

VIA ELECTRONIC SUBMISSION

January 19, 2024

H. Thomas Byron, III, Esq.
Secretary, Committee on Rules of Practice and Procedure
Office of General Counsel
Thurgood Marshall Federal Building
One Columbus Cir., N.E.
Washington, D.C. 20544

Submission of a Proposal to Adopt a Rule to
Require Random Case Assignment for Mega Bankruptcy Cases

Dear Secretary Bryon:

Please find enclosed a Proposal requesting that the Committee on Rules of Practice and Procedure adopt a Federal Rule of Bankruptcy Procedure pursuant to 28 U.S.C. § 2075 requiring random assignment of all mega bankruptcy cases to all bankruptcy judges within a particular district.¹

Local judicial assignment rules that concentrate mega bankruptcy cases within a district to small subsets of bankruptcy judges undermine public confidence in the Chapter 11 system. While leading bankruptcy courts have recently adopted new local rules abolishing judge-shopping for mega bankruptcy cases in response to widespread and public criticism of these practices, some districts have rejected such calls and continue to limit the assignment of larger cases to only one or two judges in the entire district.

On November 1, 2023, a variety of academics, industry associations and former government officials submitted a Letter to the Bankruptcy Court for the Southern District of Texas urging it to abolish the current system of assigning complex chapter 11 cases to just two bankruptcy judges pursuant to General Order 2018-1 and, instead, adopt a system of random assignment among all bankruptcy court judges for mega bankruptcy cases within the district.² It

¹ The undersigned are aware that the Advisory Committee on Court Administration and Case Management for Civil Cases is considering a Federal Rule of Civil Procedure to address case assignment procedures in divisions with only one or two district judges at its April meeting. We believe the Committee should address similar concerns raised by case assignment procedures for larger bankruptcy cases.

² See Letter from various stakeholders to the Chief Judge of the United States Bankruptcy Court for the Southern District of Texas dated November 1, 2023, available at <https://acrobat.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3Ad1d1eb22-b639-3292-8fa4-e4f59f856600>. The Creditor Rights Coalition submitted similar letters to the Chief Judge of the United States Bankruptcy Court for the Southern District of Texas on March 4, 2022 and to the Director of the Administrative Office of the United States Courts on March 24, 2022. See Letter from the Creditor Rights Coalition to the United States Bankruptcy Court for the Southern District of Texas dated March 4, 2022, available at https://www.prnewswire.com/news-releases/the-creditor-rights-coalition-encourages-the-bankruptcy-court-for-the-southern-district-of-texas-to-use-rule-making-authority-to-curb-judge-shopping-301496739.html?tc=eml_cleartime; Letter from the Creditor Rights Coalition to the Honorable Roslynn R. Maukopf, Director, Administrative Office of the United States Courts dated March 24, 2022, available at <https://acrobat.adobe.com/id/urn:aaid:sc:US:a8c22913-9911-4014-a7d2-d3181718a271>.

is critical for a national and uniform rule to be adopted by the Committee in light of recent comments by the Chief Judge of the District Court for the Southern District of Texas rejecting calls for change.

A Federal Rule is necessary to provide uniformity across all bankruptcy courts to provide a level playing field and to avoid debtors creating the perception of a two-tiered justice system. Judge shopping has already damaged public confidence in the fairness of the judicial system, particularly given the ethics scandal unfolding in the Southern District of Texas, and it is time for that to be restored. Adopting such a change through rulemaking would promote public confidence in judicial impartiality.

The Proponents of the Proposal are listed below. We respectfully request that the Proponents be notified when the Committee considers this matter in open session. For the convenience of the Committee, all communications can be directed to Adam Levitin at ajlevitin@georgetown.edu and the Creditor Rights Coalition at info@creditorcoalition.org.

Respectfully submitted,

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cc.

The Honorable Priscilla Richman, Chief Judge, United States Court of Appeals for the Fifth Circuit

The Honorable Randy Crane, Chief Judge, United States District Court for the Southern District of Texas

The Honorable Eduardo V. Rodriguez, Chief Judge, United States Bankruptcy Court for the Southern District of Texas

Senator Dick Durbin, Chair of the Committee on the Judiciary

Senator Lindsey Graham, Ranking Member of the Committee on the Judiciary

Senator Sheldon Whitehouse, Chair of the Subcommittee on the Federal Courts, Oversight, Agency Action, and Federal Rights

Senator John Kennedy, Ranking Member of the Subcommittee on the Federal Courts, Oversight, Agency Action, and Federal Rights

Congressman Jim Jordan, Chair of the Judiciary Committee

Congressman Jerrold Nadler, Ranking Member of the Judiciary Committee

Congressman Darrell Issa, Chair of the Subcommittee on the Courts, Intellectual Property, and the Internet

Congressman Hank Johnson, Ranking Member of the Subcommittee on the Courts, Intellectual

**BEFORE THE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE
PROPOSAL TO REQUIRE RANDOM JUDICIAL ASSIGNMENT FOR MEGA
BANKRUPTCY CASES**

The undersigned (the Proponents) respectfully request that the Committee on Rules of Practice and Procedure consider and then adopt a Rule under which mega bankruptcy cases³ would be randomly assigned to any bankruptcy judge of the district in which the case is filed.

Introduction & Rationale for the Proposal

Currently, bankruptcy courts have wide latitude to establish case assignment systems pursuant to local rules and orders of the court and can establish case assignment processes by general order. See 28 U.S.C. § 137(a) (“[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.”). See also 28 U.S.C. § 151 (stating “bankruptcy judges shall constitute a unit of the district court...”). To date, most district courts give latitude to bankruptcy courts to implement local bankruptcy rules under 28 U.S.C. § 154.

In the last few years, we have seen some bankruptcy courts adopt local judicial assignment rules to create small subsets of bankruptcy judges within a district to hear large corporate bankruptcies.⁴ This, together with the existence of some divisions within districts with one or two bankruptcy judges⁵, have led debtors to exploit case assignment procedures to effectively pick and choose the judge of their choice. Unsurprisingly, this has led to a concentration of mega bankruptcy cases in just a handful of bankruptcy judges.⁶

³ The United States Bankruptcy Court for the Southern District of New York defines a Mega Chapter 11 Case as a debtor having greater than \$100 million of assets or liabilities. See Bankr. S.D.N.Y. 1073-1. We support this threshold for Mega Cases in the Proposal for appropriately weighing truly local interests with the need for a national rule.

⁴ Some have argued in favor of specialized courts for mega cases so that these cases can be heard by the best and most expert judges. However, bankruptcy judges have an extraordinarily high level of expertise; they are appointed by the courts of appeals in consultation with the local bar. See Levitin, Adam J., *Judge Shopping in Chapter 11 Bankruptcy* (March 23, 2022) at 10. University of Illinois Law Review, Vol. 2022 (“[j]udge shopping is not driven by debtors’ desire to have a good judge, but to have a judge who is good for them.”), available at <https://ssrn.com/abstract=3900758>.

⁵ Most notably, the filing of the Purdue Pharma bankruptcy case in the White Plains division of the Southern District of New York caused widespread condemnation because it was filed in a division with only one sitting judge. See, e.g., Levitin, Adam J., *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances* (March 23, 2022). Texas Law Review, Vol. 100, 2022, available at <https://ssrn.com/abstract=3851339> or <http://dx.doi.org/10.2139/ssrn.3851339>.

⁶ Professor Levitin found that 55% of all large company bankruptcy cases filed in 2020 came before a handful of judges with 50% of those coming before Chief Judge Jones and Judge Isgur. See Levitin, *supra* note 4, at 10.

This has led to controversy and criticism for undermining public confidence in the chapter 11 system.⁷ Chief Justice Roberts in his 2021 Year-End Report on the Federal Judiciary⁸, the Administrative Office of the United States Courts⁹, Senators from both parties¹⁰ as well as academics¹¹ and other stakeholders¹² have raised concerns about case assignment procedures that enable a party to select a particular judge to hear a case. The Southern District of New York, one of the leading venues for bankruptcy cases, amended its local rules in 2021 in response to these concerns followed by the Eastern District of Virginia, to provide for the random assignment of mega chapter 11 cases among all bankruptcy judges within the district.¹³

Some districts, however, have rejected these calls for change.¹⁴ A Federal Rule is necessary to provide uniformity across all bankruptcy courts to provide a level playing field and to avoid debtors creating the perception of a two-tiered justice system.

We ask that the Rules Committee follow the example set by the Southern District of New York and the Eastern District of Virginia providing for random assignment of mega bankruptcy cases and apply it uniformly to all Bankruptcy Courts.

The process for adopting new Federal Rules provided in the Rules Enabling Act, 28 U.S.C. § 2075, and elaborated through the Judicial Conference, is a preferable method for dealing with this issue for several reasons. This process would allow both a systematic approach to and public comment on the case assignment procedures. As the Supreme Court has recognized, rulemaking “draws on the collective experience of bench and bar, and it facilitates

⁷ While lax venue rules have attracted widespread criticism for concentrating bankruptcy cases within a small number of districts, judge-shopping is a relatively new phenomenon. Judge-shopping creates an even greater perception of conflicts of interest by allowing debtors the ability to choose the judge that they believe will be favorably disposed toward them. Levitin, *Id.* at 23, 27 (“SDTX is “selling” its venue, and part of its unique selling proposition is a guaranty of case assignment to one of two judges who want to attract megacases and understand the need to “sell” the venue to debtors... There is no reason to create a complex case panel except to guaranty to debtors that they will be able to get a particular judge.”); See also LoPucki, Lynn M., *Chapter 11's Descent into Lawlessness* (June 2022) at 4. Forthcoming 96 *American Bankruptcy Law Journal* (June 2022), UCLA School of Law, Law-Econ Research Paper No. 21-12, available at <https://ssrn.com/abstract=3946577>.

⁸ John G. Roberts, Jr., C.J., U.S. Sup. Ct., 2021 Year-End Report on the Federal Judiciary at 5, available <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> (“2021 Year-End Report”).

⁹ Letter dated December 15, 2021 from the Honorable Roslynn R. Mauskopf to Senators Leahy and Tillis, available at <https://acrobat.adobe.com/id/urn:aaid:sc:US:047cd171-d1c3-43dd-99d4-daf9b61f15ed>.

¹⁰ Letter dated November 2, 2021 from Senators Leahy and Tillis to Chief Justice Roberts, available at <https://acrobat.adobe.com/id/urn:aaid:sc:US:9aefa119-339f-4562-8b57-bbc7232b6be7>.

¹¹ See, e.g., Levitin.

¹² The Brennan Center for Justice noted in its letter dated September 1, 2023 to the Committee on Rules of Practice and Procedure that “[r]andom case assignment protects the impartiality and public legitimacy of the judiciary.” See Letter from Brennan Center for Justice dated September 1, 2023 available at <https://www.uscourts.gov/file/75014/download>.

¹³ See Bankr. S.D.N.Y. 1073-1 and Bankr. E.D.Va. 21-21.

¹⁴ Notably, the Southern District of Texas has publicly rejected calls for change, despite an ethics scandal and at a time when the judiciary is already under intense scrutiny. See, James Nani, “Texas Bankruptcy Panel to Survive Ethics Scandal of Its Creator, November 17, 2023 (Chief District Court Judge Randy Crane stated to Reuters “Our Chief Bankruptcy judge has considered all of the media input, academic input as well as the logistics of our court and is making appropriate work orders. He has the complete confidence of our court.”).

the adoption of measured, practical solutions.”¹⁵ For this reason, this Committee can more comprehensively study and weigh the issues raised by judge shopping and case assignment processes.

Proposal

The Judicial Conference is empowered under 28 U.S.C. § 2075 “to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.”¹⁶ Pursuant to this authority, the Conference should adopt a rule that requires the random assignment of mega chapter 11 cases among all bankruptcy judges within a district.

This Proposal accords with the Conference’s longstanding support for random case assignment, recently reaffirmed by Chief Justice Roberts, who observed that “the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues.”¹⁷ The proposal also responds to widespread and bipartisan concerns about judge-shopping.¹⁸

A uniform rule is necessary to reinforce the importance of fairness and impartiality of the federal judiciary. This Proposal would take a critical step in that direction by preventing gamesmanship by bankruptcy courts to attract the largest and most high-profile bankruptcy cases.

Thank you for your consideration,

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¹⁵ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

¹⁶ The Department of Justice set forth the authority for adoption of a Federal Rule in this context in its Letter to Advisory Committee on Civil Rules, dated December 21, 2023, available at <https://aboutblaw.com/bca3>, in support of a proposal to adopt a rule of civil procedure to require random assignment of certain civil cases. Those same arguments apply equally here.

¹⁷ 2021 Year-End Report, *supra* note 8 at 5.

¹⁸ *Id.*; *supra* notes 8 through 12.

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