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Senator Coons to Lead Subcommittee on Bankruptcy and the Courts: Legislative Implications

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The Senate Judiciary Committee in February approved Delaware Democratic Senator Chris Coons to head the Subcommittee on Bankruptcy and the Courts for the 113th Congress. This gives Coons oversight of the nation's bankruptcy court system, as well as court administration and management, judicial rules and procedures, the creation of new courts and judgeships, and legal reform and liability issues. In a press release announcing the appointment, Coons stated that he will be examining a "broad range of issues" while laying out two particular goals for his chairmanship, working with the Delaware bar and addressing judicial vacancies.

Prospects for Bankruptcy Venue Reform Dim

In October 2011, Arent Fox reported on the Chapter 11 Bankruptcy Venue Reform Act of 2011 (HR 2533), which had been introduced in response to a perceived trend of "forum shopping" by corporate debtors. Testimony given before the House Judiciary Committee at the time indicated that approximately 70% of the large public companies that had filed for Chapter 11 bankruptcy between 2005 and 2011 filed their petitions in either Delaware or New York. Proponents of the bill argued that requiring companies to file in jurisdictions where they have "real" ties (such as business operations or assets) would prevent companies from shopping for debtor-friendly venues, often to the detriment of their stakeholders. Although it enjoyed a rare level of bi-partisan support, the venue reform bill was not considered by the House Judiciary Committee.

Coons said at the time that he opposed the venue reform bill. And it appears that federal lawmakers concerned about venue reform will continue to face staunch opposition from Coons during his tenure as chairman. In the press release announcing his new chairmanship, Coons stated: "Delaware has a well-established and respected bankruptcy bench and bar, and I look forward to working with Delaware experts to make sure that our bankruptcy system resolves cases predictably and with the proper balance between the interests of creditors and debtors." As for other jurisdictions, Coons is quoted by Bloomberg news as stating that "(i)n jurisdictions that don't have the same capacity, in terms of experience on the bench and the strength of [the] bankruptcy bar, it can, at times, be difficult."

Ostensibly, Sen. Coons' opposition to the venue reform bill stems from his desire to protect Delaware's status as a business friendly state. Since he now chairs the subcommittee that would initially consider any changes to the venue rules, it is hard to see him giving much attention to this issue in the context of hearings or legislation. Even if other senators on the Judiciary Committee introduced a similar bill, Coons is ultimately in a position to block it due to the power afforded individual senators under the chamber's rules. Although there is a consensus among bankruptcy practitioners that there is a need to reform chapter 11, and the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 is closely evaluating the issue, it is unlikely that Congress will in the near future consider a large bankruptcy reform bill that could serve as a vehicle for a forum shopping bill.

Budget Sequestration Is Likely to Exacerbate the Judicial Vacancy Crisis

In announcing his chairmanship, Coons also indicated that: "We have a judicial vacancy crisis in many parts of this country, and I'd like to look at what can be done to address it."

Notably, in April 2012 the Senate unanimously passed the bipartisan Temporary Bankruptcy Judgeship Extension Act introduced by Senator Coons. The legislation extended the authorizations of 29 temporary bankruptcy judgeships in 14 states and Puerto Rico to ensure that the judgeships would not be lost due to the retirement, resignation, death or removal of the judge. Of note, more than one-third of the nation's largest bankruptcies are handled by Delaware's bankruptcy judges. Included among the 29 temporary judgeships extended by the act were five of Delaware's six judgeships, which would otherwise have expired.

This issue has been exacerbated recently by the affects of budget sequestration, which will reduce the federal court system's budget by 5% in 2013. Testifying recently before the House Appropriations Committee, Supreme Court Justice Anthony Kennedy noted that sequestration would slow down trials and that "bankruptcies would be delayed." This issue will almost certainly come up as Sen. Coons explores remedies to judicial vacancies.

Other Broad Ranging Issues

Sen. Coons does not have a long voting or legislative record that can be used as a reference for other actions he may take as Chairman of the subcommittee. However, he has quickly established himself as a thoughtful member of the Democratic caucus who shares many of the views of the liberal wing of the party but who tends to work across the aisle on bipartisan legislation. He cares about consumer issues and believes strongly in protecting access to the court system.

The challenge Coons faces generally as a senator from Delaware, but especially as the new Chairman of the bankruptcy subcommittee, is that of balancing the national interest against parochial interests unique to his state. Delaware has a business friendly legal system that makes it easy for companies to incorporate in the state even if their principle place of business is elsewhere.

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This also applies to its bankruptcy court system, which is a preferred venue for many distressed businesses.

Given his reputation as a thoughtful and well-liked legislator, we expect Sen. Coons to use his Chairmanship to examine substantive issues within the subcommittee's jurisdiction while very carefully balancing national priorities with parochial interests.