

NATIONAL BANKRUPTCY CONFERENCE

A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration

OFFICERS

Chair

DONALD S. BERNSTEIN

Vice Chair

RICHARD LEVIN

Secretary

K. JOHN SHAFFER

Treasurer

R. PATRICK VANCE

November 14, 2006

The Honorable F. James Sensenbrenner
Chairman, House Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

The Honorable John D. Conyers
Ranking Member, House Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Re: H.R. 5532

Dear Chairman Sensenbrenner and Representative Conyers:

The National Bankruptcy Conference has reviewed H.R. 5532 and recommends against its passage (at least insofar as it applies to bankruptcy courts). Attached for your convenience is a copy of H.R. 5532. The bill at § 464(a)(1) provides that "if all parties on one side of a civil . . . case . . . to be tried in a federal . . . bankruptcy court file an application requesting the reassignment of the case, the case shall be reassigned to another appropriate judicial officer." Because "case" is the term used for the overall bankruptcy filing (as opposed to discrete litigation that arises in the course of a bankruptcy), application of the proposed provision in this context would be fraught with difficulties.

Bankruptcy is a multi-party collective proceeding, and each of the multiple parties may have rights and objectives different from all others. It is thus virtually impossible to determine who is on the "same side." Furthermore, because a chapter 11 debtor in possession is given the powers and responsibilities of a trustee, it may act as a fiduciary for creditors on certain issues in the case. If the debtor in possession were able to make a preemptory challenge to any assigned judge, it might find constituents to whom it owes a fiduciary duty on both sides of the case. Similarly, an individual debtor might be deemed a party and a "side" and thus be permitted to challenge a judge assigned even as against the trustee in the case. And since each creditor could be seen to be in opposition to all of the others, every creditor might be deemed a party and have a right to exercise a preemptory strike.

Because § 464(a)(1) refers to a "case to be tried in a federal . . . bankruptcy court," it might be interpreted only to apply to trials on whether an order for relief should be entered in an involuntary case. All other disputes in a bankruptcy case, as the term case is used in 28 U.S.C. § 1334(a), would be

CONFEREES

PAUL H. ASOFSKY
PROF. DOUGLAS G. BAIRD
R. NEAL BATSON
H. BRUCE BERNSTEIN
RICHARD F. BROUDE
HON. LEIF M. CLARK
MICHAEL J. CRAMES
PROF. DAVID G. EPSTEIN
CHAIM J. FORTGANG
PROF. S. ELIZABETH GIBSON
DANIEL M. GLOSBAUM
MARCIA L. GOLDSTEIN
ROBERT A. GREENFIELD
HON. ALLAN L. GROPPER
NELL HENNESSY
HON. BARBARA J. HOUSER
MARSHALL S. HUEBNER
PROF. MELISSA B. JACOBY
CARL M. JENKS
PROF. KENNETH N. KLEE
DAVID A. LANDER
JONATHAN M. LANDERS
HON. JOE LEE
E. BRUCE LEONARD
MARC A. LEVINSON
HON. KEITH LUNDIN
HON. RALPH R. MABEY
MORRIS W. MACEY
PROF. RONALD J. MANN
HON. BRUCE A. MARKELL
HON. ROBERT D. MARTIN
HARVEY R. MILLER
HERBERT P. MINKEL, JR.
PROF. JEFFREY W. MORRIS
GERALD F. MUNITZ
PATRICK A. MURPHY
SALLY SCHULTZ NEELY
HAROLD S. NOVIKOFF
ISAAC M. PACHULSKI
PROF. RANDAL C. PICKER
PROF. ALAN N. RESNICK
HON. MARY DAVIES SCOTT
RAYMOND L. SHAPIRO
MYRON M. SHEINFELD
HON. A. THOMAS SMALL
EDWIN E. SMITH
GERALD K. SMITH
HENRY J. SOMMER
RICHARD S. TODER
GEORGE M. TREISTER
J. RONALD TROST
JANE L. VRIS
PROF. ELIZABETH WARREN
HON. EUGENE R. WEDOFF
PROF. JAY L. WESTBROOK
ROBERT J. WHITE
BRADY C. WILLIAMSON

EMERITUS

HERBERT H. ANDERSON
JOHN A. BARRETT
HON. GEORGE BRODY
STEPHEN H. CASE
HON. DAVID COAR
RONALD DEKOVEN
MURRAY DRABKIN
DEAN M. GANDY
HON. ROBERT E. GINSBERG
GEORGE A. HAHN
JOHN J. JEROME
HON. HERBERT KATZ
PROF. FRANK R. KENNEDY
LEONARD M. ROSEN
BERNARD SHAPIRO
LAWRENCE K. SNIDER
JOEL B. ZWEIBEL

ADMINISTRATIVE OFFICE
SUZANNE ARMSTRONG BINGHAM
ARMSTRONG & ASSOCIATES

separate "proceedings." On the other hand, if the force of the bill were to allow the reassignment of each separate proceeding within a case to a separate

bankruptcy judge, it would defeat a central intention of the Bankruptcy Code which is to provide a single forum for hearing the various disputes within a "case."

In addition to the problems identifying which matters ("cases") are covered and which parties are on a "side," the requirement that the request be made within 20 days would seem to be unworkable when most parties have neither received pleadings nor pleaded within 20 days of a bankruptcy case being filed. After the initial filing of a case, evidentiary motions and responses are filed or called for on a considerable array of times for notice.

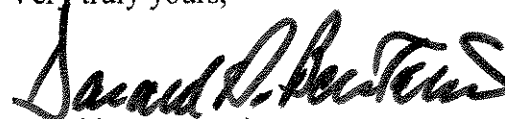
For the reasons stated, the National Bankruptcy Conference recommends that bankruptcy courts and bankruptcy cases and proceedings be eliminated from the coverage of H.R. 5532.

The Drafting Committee of the National Bankruptcy Conference recommends the following changes to the language of the bill:

1. At the beginning of § 464(a)(1), insert "Unless the court's jurisdiction is based on § 1334 of title 28,"
2. In § 464(a)(1), change "Federal district court, the United States Court of Claims, or a bankruptcy court" to "Federal district court or the United States Court of Claims," and
3. Delete § 464(c)(3) and add "and" to the end of § 464(c)(2).

Recommendation number 1 above is necessary because it will avoid possible confusion as to whether the peremptory challenge law would apply when a district court withdraws the reference in a bankruptcy case or in a proceeding within 1334's "arising in," "arising under" or "related to" jurisdiction. The law should not apply in bankruptcy cases and proceedings, regardless of whether they are in the bankruptcy or the district court. Also, recommendation number 1 will avoid the possibility that a court would interpret "Federal district court" to include a bankruptcy court, because the bankruptcy court is a unit of the district court.

Very truly yours,



Donald S. Bernstein
Chair, National Bankruptcy Conference

Enclosure

cc: The Honorable Chris Cannon
cc's continued:

The Honorable Steve Chabot
The Honorable Howard Coble
The Honorable William Delahunt
The Honorable Randy Forbes
The Honorable Trent Franks
The Honorable Louie Gohmert
The Honorable Mark Green
The Honorable Jerrold Nadler
The Honorable Chris Van Hollen
The Honorable Debbie Wasserman Schultz
The Honorable Melvin L. Watt