

Judicial Vacancies, Bankruptcy Legislation Top Concerns for Coons' Subcommittee

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Delaware's bankruptcy attorneys have responded with overwhelming enthusiasm to U.S. Senator Christopher A. Coons' appointment as chair of the newly-created Senate Judiciary Subcommittee on Bankruptcy and the Courts. The attorneys say the move will not only be good for Delaware, but will also benefit the bankruptcy bar and bench throughout the country.

Coons, who was elected in 2010, was appointed as the subcommittee's chairman January 31. He is an attorney who is viewed by many as a liberal Democrat with pro-business leanings. Prior to being elected to New Castle County Council in 2004, he spent eight years as in-house counsel for W.L. Gore & Associates Inc. Many believe his unique liberal, but pro-business, views will enable him to be fair to both creditors and debtors.

"I think he will be fair and impartial to both creditors and debtors," said Brett D. Fallon, a partner at Morris James. "He has a very good grasp of the issues and will treat both parties fairly and impartially. Obviously, I am pleased with Senator Coons' appointment."

"I think he brings a very good balance to the subcommittee," said Juliet M. Moringiello, a bankruptcy professor at Widener University School of Law's Harrisburg, Pa., campus. "I think this is a very good thing for Delaware because Senator Coons is a capable guy and a smart lawyer. He will make sure that the bankruptcy system works well for both creditors and debtors."

Tobey M. Daluz, a partner at Ballard Spahr's Wilmington office, agreed that Coons' background is ideal for his new position.

"As a bankruptcy practitioner in Delaware, I am thrilled about Senator Coons' appointment and the subcommittee's creation," Daluz said. "He has the necessary type of experience for this position in terms of both his business and law backgrounds and he possesses a strong understanding of the needs of the judiciary across the country, not just in Delaware. I think he will be terrific in this position."

In addition to overseeing the nation's bankruptcy system, the subcommittee will also manage the federal courts, including administration, management, judicial rules and the creation and appointment of new judgeships.

The creation and appointment of new judgeships will be part of the new subcommittee's most important challenges.

There are currently 89 federal judicial vacancies, according to the Administrative Office of the U.S. Courts. Of those 89, only 34 appointments are pending.

In fact, in a released statement announcing his appointment, Coons acknowledged that the problem of judicial vacancies will be among his top priorities.

"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," he said. "Our federal courts have traditionally been the last bastion for many Americans to assert their civil rights, but recent federal court decisions have made it harder to not only enforce federal civil rights, but also rights that people may have as a consumer or as an employee under state law. That has to change."

Daluz said she agrees that the judicial vacancy crisis, particularly in the bankruptcy courts, is of paramount importance.

"I think the most important issue for the subcommittee is to ensure that every jurisdiction has the requisite number of bankruptcy judges to handle their caseload," she said. "Some of the jurisdictions are overwhelmed."

There are currently several issues facing the bankruptcy bar that could be addressed by the subcommittee, such as limiting the use of the business judgment rule as a defense in bankruptcy litigation, balancing the rights of creditors and shareholders, and billing rates. However, neither Daluz nor Moringiello believe any significant changes to the U.S. Bankruptcy Code will result from the subcommittee.

"I think it will be very hard to get any bankruptcy legislation passed to address some of the bar's concerns," Moringiello said. "The last big changes to the Bankruptcy Code happened after eight years of debate. I think the big bankruptcy questions are going to be decided by the courts."

"I do not see a wholesale revision of the Bankruptcy Code on the immediate horizon," Daluz said. "Perhaps within this decade we will see some changes, but with the Republicans in the majority in the House and the Democrats in the Senate, we won't see any major revisions because they can't reach an agreement."

"I think we all forget that the Bankruptcy Code is relatively young," Daluz continued. "It was passed in 1978 and I think from 1979 forward we have seen a lot of refinement and development from the judiciary that will continue."

Fallon was also doubtful that any meaningful reform would come in the immediate future.

"It's anybody's guess, but I would be surprised if we saw any major reform coming anytime soon with this Congress," he said. "I don't think there is enough of a groundswell that you will see major reform on bankruptcy issues in the immediate future."

However, Fallon did say that it would be interesting to see the subcommittee examine the increasing number of quick sales of a company's assets under Section 363 of the Bankruptcy Code. Section 363 allows the bankruptcy courts to sell off a company's assets free and clear of claims from creditors.

"One thing that we are seeing is that many of the Chapter 11 reorganization cases that are filed seem to end up as quick sales under Section 363 of the Bankruptcy Code," he said. "Rather than doing a traditional reorganization, companies are

selling their assets within the first several months of the case. I don't know what the answer is, but it would be interesting to look at that and see if the Bankruptcy Code is still fulfilling its intended purpose."

Coons' appointment will likely ensure that attempts to revive the Chapter 11 Bankruptcy Venue Reform Act of 2011 will not succeed. The proposed legislation would require companies to file for bankruptcy in the same state as their principal place of business or where most of their assets are located. If passed, the bill would be a tremendous blow to Delaware bankruptcy litigation because currently corporations can file for bankruptcy in the state where they are incorporated and most companies are incorporated in Delaware. U.S. Representatives Lamar Smith, R-Texas, and John Conyers Jr., D-Mich., sponsored the bill, which was introduced in late 2011 but failed to make it out of the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law.

Coons and his fellow Delaware senator, Thomas R. Carper, were among the most outspoken opponents of the bill.

"I don't see the venue bill going anywhere," Moringiello said.

Daluz said it is unlikely the legislation would be reintroduced, noting that Delaware attorneys are not the only members of the bankruptcy bar who would be affected by it.

"I have not heard anything about resurrecting the bankruptcy venue bill," she said. "It's an issue that remains of concern to bankruptcy attorneys and officials, not just in Delaware, but in Pennsylvania as well. There are many Philadelphia firms with bankruptcy attorneys who practice in Delaware quite regularly. They are equally concerned."

Although a large portion of the Delaware bar focuses on Chapter 11 reorganizations, Daluz said she believes the subcommittee needs to examine certain aspects of consumer bankruptcy as well. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the most recent consumer bankruptcy legislative reform, has made it more difficult for individuals to be discharged from bankruptcy. Under the legislation, student loans cannot be discharged and homestead deductions are limited.

"From an overall policy perspective, right now I am not sure my concerns would arise on the Chapter 11 side," Daluz said.

"My personal concern is on the consumer side and the amendments to the code in 2005 that made it more difficult for consumers to discharge their debts in bankruptcy. I don't do that kind of work, I'm squarely a corporate bankruptcy attorney, but I still have significant concerns about that bill."

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