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## Scandal Puts Texas' Two-Judge Mega Ch. 11 Panel Under Fire

By Hilary Russ

Law360 (November 9, 2023, 7:19 PM EST) -- Pressure is mounting on a Southern Texas bankruptcy court to unravel the two-judge panel that has made it a key venue for "mega" Chapter 11 cases, after a scandal surrounding a judge's undisclosed relationship there prompted academics to call for the panel to be abolished and major companies appear to be picking other places to go bankrupt.

On Nov. 1, a dozen academics, a former U.S. trustee and a handful of private practitioners and creditor groups signed a letter calling for the two-judge panel that hears big cases to be abolished. Instead, it should be replaced by a system that randomly assigns even the largest cases to all of the district's bankruptcy judges, they said.

"By limiting the assignment of cases to a small group of judges, the ability of a single judge to undermine the whole system by a lapse in judgment cannot be understated," said the letter, which was addressed to the court's chief judge and copied to the district court, Fifth Circuit, federal lawmakers and others.

U.S. Bankruptcy Judge David R. Jones resigned last month after his undisclosed relationship with former Jackson Walker partner Elizabeth Freeman came to light through media reports and litigation.

As chief judge at the time, Jones signed the 2018 order that created the panel to hear complex cases, with himself as one of the two judges initially assigned. Southern Texas mandates that companies with more than \$200 million in liabilities be designated as "complex" cases. In many other jurisdictions, mega cases begin at \$100 million of assets or liabilities.

Texas created its two-judge panel in part due to frustration that Houston's hometown companies — including Enron — had been going elsewhere to file for bankruptcy.

"For a long time, Texas was very unhappy with corporate shopping rules," said Samir Parikh, professor at Lewis & Clark Law School in Portland, Oregon, who signed the letter. "Texas solved the problem not through legislation, but by creating this special panel that basically guarantees, as a corporate debtor, you know who your judge is going to be."

Pressure on Texas to change its rules is also coming from companies simply choosing other forums for their bankruptcies, particularly New Jersey, where New York-based WeWork Inc. filed for Chapter 11 protection on Monday.

Technically, one of WeWork's more than 400 affiliated debtors — 30 Hudson Street Tenant LLC, in the Goldman Sachs office tower in Jersey City — filed for bankruptcy protection at 9:10 am, with WeWork filing just over 60 seconds later.

Drugstore chain Rite Aid also filed there last month. Kirkland & Ellis LLP, which represents both companies, did not reply to a request for comment Thursday for this story.

Unlike in southern Texas, however, New Jersey cases get spread to various judges, Chief Judge Michael B. Kaplan told Bloomberg in August.

While Judge Kaplan is overseeing the mega bankruptcies of BlockFi, Johnson & Johnson's LTL and Rite Aid, WeWork was assigned to U.S. Bankruptcy Judge John K. Sherwood, and Bed Bath & Beyond

and David's Bridal are before yet two other judges.

Dilworth Paxson LLP Chairman Lawrence G. McMichael said that in most courts, "cases are assigned randomly, period, end of story," and that Texas' panel is "a bad policy."

Jones could not be reached for comment Thursday. The Southern Texas bankruptcy court did not reply to a request for comment, and a spokesman for the Fifth Circuit declined to comment.

## **Judge Shopping**

Controversies surrounding other courts have led to rule changes about case assignment. Purdue Pharma was accused of judge shopping in 2019 when it filed its bankruptcy case in White Plains, New York, where only one bankruptcy judge presided.

Two years later, the Southern District of New York moved to a random assignment of "mega" cases, defined as those with debtors whose assets or liabilities exceed \$100 million. The nine megacases filed there so far this year have been spread out among six different judges, according to a Law360 review of the cases listed on its website.

The Eastern District of Virginia also moved to randomize megacase assignments effective February 2022.

Two other courts — the Southern District of Ohio and the Northern District of Georgia — are using limited panels of judges, according to Georgetown University Law Center professor Adam J. Levitin, writing in the University of Illinois Law Review in March.

Levitin, who also signed the letter, found that bankruptcy courts' local rules have facilitated the rise of judge shopping over the last few years, resulting in 55% of large public company bankruptcies being heard by only three of the nation's 375 bankruptcy judges in 2020.

One draw is speed. From 2017 to 2022, 20 Chapter 11 cases have been confirmed in under 28 days. But only three of those "drive-thru" prepackaged bankruptcies have complied with rules allowing cases to be expedited — a stark change from the previous decade, Levitin found.

The majority of the 17 remaining noncompliant drive-thru bankruptcies were handled by just three judges, he said: Jones and U.S. Bankruptcy Judge Marvin Isgur in the Southern District of Texas, and Robert Drain, who retired last year from New York's Southern District after overseeing the Purdue case.

Some critics of Texas' two-judge panel conceded that creditors and other parties in big bankruptcies generally benefit from having an experienced judge who can run cases efficiently. The critics also blame judge shopping on the rules, not the lawyers, who are doing their jobs by looking for the best possible resources for their clients.

However, those benefits are outweighed by the loss of trust that occurs when people broadly believe the judicial system is unfair, said Robert M. Lawless, a professor at the University of Illinois College of Law who also signed onto the letter.

"It doesn't look right. It looks like corporations are picking their judge," he said.

While the broader issue of forum shopping may be up for lawmakers to solve, the perception of judge shopping can be fixed locally by changing courthouse rules, Lawless said.

"If we as a bankruptcy system do not consider incremental or tailored reform, that greater reform might be handed out from above," said Robert Miller, a professor at the University of South Dakota who signed the letter. Practitioners and courts themselves should consider "whether reform from within is better than reform from without" to ensure that "the system not only is fair, but seems fair."

--Additional reporting by Vince Sullivan. Editing by Adam LoBelia.

