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Local Ch. 11 Rules for Complex Cases and Venue Selection Emerge from the Pandemic



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Chapter 11 filings, like all bankruptcy filings, have noticeably declined since the onset of COVID-19. A number of bankruptcy courts have used the lull in filings exacerbated by COVID-19 to adopt or update local rules (LBRs), which provide procedures for the administration of “complex” and/or “mega” cases — terms referencing those larger cases that are notable for having substantial assets or debts, or are otherwise subject to national or international interest. A representative sampling of districts adopting or updating complex case rules includes the Southern District of New York (SDNY), the Northern District of Texas (NDTX), the Southern District of Ohio (SDOH), the District of Columbia (DC) and the Eastern District of Virginia (EDVA).

In their application, the complex case rules of these jurisdictions overlap with one another in addressing such common administrative issues as first-day hearings, service lists and professional compensation. A closer comparison of the complex case rules adopted, however, reveals interesting differences among these districts as to when their rules apply, and their procedures for the judicial assignment of complex cases.

The complex case rules of the SDNY are embedded within its LBRs,¹ as illustrated by LBR 1073-1, addressing the judicial assignment of bankruptcy cases. SDNY has three divisions: Manhattan, Poughkeepsie and White Plains. Historically, a case filed in any of those divisions was assigned to a judge sitting in that division. A single judge presides in the White Plains Division, which came to

be the venue chosen for a number of complex case filings, including *Purdue Pharma LLC, In re Sears Holdings Corp.*, *In re 96 Wythe Acquisitions* and *In re Gateway Development Corp.* Effective Dec. 1, 2021, SDNY LBR 1073-1 was amended to include a new subsection (f):

Mega Chapter 11 Cases. Notwithstanding subdivision (a) of this rule, the Clerk shall assign a mega chapter 11 case to a Judge in the District by random selection irrespective of the courthouse in which the case is filed. A chapter 11 case qualifies as a mega chapter 11 case if the assets or liabilities of the debtor are equal to or greater than \$100 million. A multi-debtor chapter 11 case qualifies as a mega chapter 11 case if the cumulative assets or cumulative liabilities of the filing debtors are equal to or greater than \$100 million.

The SDNY has a total of 11 bankruptcy judges, 10 of whom now share in the random assignment of defined mega chapter 11 cases regardless of either the division where the case is filed or where the judge normally presides — often called the “wheel.”² The revised LBR was accompanied by General Order 11-581,³ entered Nov. 30, 2021. Based on a determination by the SDNY’s judges, the general order espoused that the random assignment of mega chapter 11 cases among the judges, regardless of the courthouse where filed, would result in a more balanced utilization of judicial resources.

1 Local Rules, U.S. Bankruptcy Court for the Southern District of New York (last modified Dec. 1, 2021), available at nysb.uscourts.gov/sites/default/files/LocalRules2021.pdf (unless otherwise specified, all links in this article were last visited on Jan. 5, 2023).

2 The SDNY adopted LBR 1073-1, as amended by General Order M-581, entered Nov. 30, 2021. Pursuant to the order, Chief Judge **Cecelia G. Morris** also removed herself from the assignment of chapter 11 mega cases. The same order assigned all chapter 13 cases filed in the district to the judge sitting in the Poughkeepsie, N.Y., courthouse.

3 General Order 11-581, U.S. Bankruptcy Court for the Southern District of New York (entered Nov. 30, 2021), available at nysb.uscourts.gov/sites/default/files/m581.pdf.

Complex Case Rules for the NDTX date back to 2006, but these too were updated in 2021. The NDTX General Order 2006-02 defines a complex chapter 11 case as one:

filed in this district under Chapter 11 of the Bankruptcy Code that requires special scheduling and other procedures because of a combination of the following factors:

- a. The size of the case (usually total debt of more than \$10 million);
- b. The large number of parties in interest in the case (usually more than 50 parties in interest in the case);
- c. The fact that claims against the debtor and/or equity interests in the debtor are publicly traded (with some creditors possibly being represented by indenture trustees); or
- d. Any other circumstances justifying complex case treatment.

The Rules further direct a debtor believing that a case should be classified as a complex chapter 11 case to file with the petition a form notice of designation as a complex chapter 11 case. The clerk then assigns the case to a judge pursuant to the procedures and orders of the district or division, and the assigned judge then either grants or denies complex case treatment.

By General Order 2022-2 signed June 8, 2022,⁴ the NDTX adopted a new procedure for the assignment of cases among its judges. The general order first defines a mega case as one filed with assets or liabilities of more than \$50 million. A party filing a mega case is directed to elect between the Dallas or Fort Worth divisional dockets. Mega cases will then be assigned in rotating order to each judge in the division where filed. The Dallas Division has three judges, and the Fort Worth Division has two judges. All other cases will be assigned proportionally and by random draw among the judges of each division. Only one judge presides in each of two additional divisions making up the district.

The SDOH adopted its procedures for complex chapter 11 cases as Appendix A to General Order 30-4,⁵ entered Feb. 24, 2021. On first reading, the SDOH appears to provide a lower bar than most jurisdictions for what constitutes a complex case to which its local rules will apply. A complex case is defined as one “not filed by an individual debtor, as a single-asset real estate case, or as a small business case.” Furthermore, “the debt of the debtor or the aggregate debt of all affiliated debtors is at least \$10 million, or it involves a debtor with publicly traded debts or equity.” However, the SDOH then goes on to impose a residency requirement for filing

a complex case, which tracks the bankruptcy venue provisions of 28 U.S.C. § 1408:

Debtor Domiciled in Ohio. Any debtor with its domicile in the State of Ohio for the last one hundred eighty (180) days immediately preceding commencement of the case, or for a longer portion of such one hundred eighty (180) day period than its domicile was located in any other state, may file a complex case in either division of this district.

Debtor Domiciled Elsewhere. Any debtor domiciled outside the State of Ohio with its principal place of business or principal assets located in this district for the last one hundred eighty (180) days immediately preceding commencement of the case, or for a longer portion of such one hundred eighty (180) day period than its principal place of business or principal assets were located in any other district, may file a complex case in the division of this district where the principal place of business or principal assets are located.

The SDOH is also unique among the districts sampled with respect to the judicial assignment of complex cases. Here, complex cases are randomly assigned between two designated judges, who are chosen through a majority vote of the district’s judges and who are to serve three-year terms. Initially, one judge will serve a four-year term. One of the designated judges will also sit in each of the district’s eastern and western divisions. When a designated judge is assigned to a complex case, that judge retains the case independent of his/her term length.

The District of Columbia’s procedures for complex cases became effective Aug. 2, 2022, and are found in Appendix B to the District’s LBRs.⁶ Like the procedures adopted by the SDOH, a case filed in D.C. can be deemed complex if not filed by an individual debtor, or as a single-asset real estate or small business case. The following conditions also apply:

(1) *Mandatory Designation.* Unless the Court orders otherwise for cause, (1) a debtor or all affiliated debtors whose total liabilities are more than \$50 million, the total number of creditors of the debtor or all affiliated debtors is more than 249, and/or (2) a portion of the debtor or equity of the debtor or any affiliated debtor is publicly traded shall file with the petition as notice of election as a Complex Case.

(2) *Optional Designation.* A debtor or all affiliated debtors whose total liabilities are more than \$10 million and/or the total number of creditors of the debtor or all affiliated debtors is more than 50 but no more than 249 may elect, but is not required [to] file, a notice of election as a Complex Case with the petition.

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⁴ General Order 2022-2, U.S. Bankruptcy Court for the Northern District of Texas (entered June 8, 2022), available at txnb.uscourts.gov/sites/txnb/files/general-orders/2022-02%20Signed.pdf.

⁵ General Order 30-4, U.S. Bankruptcy Court for the Southern District of Ohio (entered Feb. 24, 2021), available at ohsb.uscourts.gov/general-orders.

⁶ Local Rules, U.S. Bankruptcy Court for the District of Columbia (last modified Aug. 2, 2022), available at dcb.uscourts.gov/sites/dcb/files/2022-11-03%20LBR.pdf.

(3) *Motion for Treatment as a Complex Case.* A debtor or all affiliated debtors who otherwise do not meet the requirements of (1) or (2) herein may file a motion for treatment as a Complex Case within seven (7) days after the petition date. Such motion shall be set for hearing no more than fourteen (14) days after filing of the motion. A debtor who has filed a motion for treatment as a Complex Case shall be deemed to be a Complex Case unless and until otherwise ordered.

A debtor whose case qualifies for mandatory or optional designation must file a notice of election concurrent with the order for relief. If one or more affiliated debtors files a complex case, all affiliated cases will be treated as complex cases. Judicial assignment in D.C. is straightforward, as the district has one sitting bankruptcy judge.

The EDVA adopted its procedures for complex chapter 11 cases effective Feb. 15, 2022. These procedures are set forth in Exhibit 15 as incorporated within LBR 1075-1.⁷ Complex cases are defined in the EDVA as:

- a) any case, other than a single asset real estate case, in which the noncontingent, liquidated debt owed by the debtor exceeds \$15 million;
- b) any case, other than a single-asset real estate case, with noncontingent, liquidated debt in excess of \$7.5 million and not more than \$15 million in which the debtor elects treatment as a complex case by filing a notice of such election with the Petition or within seven days after the order for relief; and
- c) any case, upon motion of the debtor or the (U.S. Trustee), which may be heard as a first day motion, the Court designates as complex.

For the purpose of determining whether the procedures apply, “debtor” includes either a single debtor or a group of affiliated debtors whose cases are jointly administered or substantially consolidated.⁸ While the procedures set forth in Exhibit 15 apply for all chapter 11 cases designated as complex, the EDVA also adopted Exhibit 16 to recognize a further category of “mega cases” for purposes of judicial assignment.⁹

Incorporated within LBR 1075-2, and also referenced in LBR 5005-1(B)(3), Exhibit 16 to the EDVA LBRs defines “mega cases” as those having total noncontingent, liquidated and non-insider liabilities or assets of the collective debtors exceeding \$100 million. While also effective Feb. 15, 2022, Exhibit 16 notes that it originated from a standing order entered on Nov. 30, 2021. Its stated purpose is to more evenly utilize the judicial and administrative resources of the district by establishing a district-wide wheel for the random assignment of mega cases.¹⁰

Similar to the SDNY, the EDVA encompasses three divisions: Norfolk, Richmond and Alexandria. Two judges preside in each of the three divisions. Chapter 11 cases that are not mega cases will continue to be assigned randomly

between the judges of the division where the case is filed, but mega cases will henceforth be assigned district-wide among five judges. As was done in the SDNY, the chief judge excluded himself from the wheel. If the judge assigned presides in a division different than where the case is filed, subsequent filings and hearings will normally shift to the division of the assigned judge. However, when the basis for divisional venue is the principal place of business or principal assets of the mega debtor, or if the division of filing is the debtor’s headquarters or principal place of business, the assigned judge can transfer the case back to the filing division and conduct hearings there, if not held remotely. Any EDVA judge may conduct first-day hearings if the assigned judge is unavailable. Unless ordered otherwise, the first-day hearings will be conducted remotely.

In most instances, the adoption of complex case rules serves to indicate that a district is ready and waiting to address the issues of a complex case, should such a debtor determine to file in the jurisdiction.

Why are the various districts adopting complex case rules? One article had the following quote from **Ian T. Peck** of Haynes and Boone, LLP:

Every jurisdiction wants to provide participants in the bankruptcy process with accessibility, predictability and, perhaps most importantly for large complex cases, a sophisticated judiciary capable of handling thorny and unique issues.¹¹

The article goes on to explain that updates to the NDTX LBRs resulted from work by a committee of more than 20 restructuring lawyers appointed by the district’s bankruptcy judges. The stated goal of the committee’s work was to attract big cases and to encourage distressed local businesses to file in their hometown, where judges were said to be familiar with their businesses and travel costs could be minimized. Dallas lies within the NDTX. It so happens that the committee’s appointment followed chapter 11 filings by Dallas-based Neiman Marcus and Plano-based JCPenney in Houston, which lies within the competing Southern District of Texas.

The EDVA’s new LBRs, and specifically the mega-case procedures set forth in Exhibit 16, espouse an intent to provide for the “efficient, expedient, orderly, consistent and uniform treatment and administration of chapter 11 reorganizations across all divisions within the District, and to provide transparency for the bankruptcy process.”¹² Implementation of Exhibit 16’s wheel for the district-wide assignment of mega cases followed a district court’s expression of concern over forum-shopping in an opinion issued in connection with the appeal of a chapter 11 confirmation order.¹³ Before

⁷ Local Rules, U.S. Bankruptcy Court for the Eastern District of Virginia (last modified Dec. 1, 2022), available at vaeb.uscourts.gov/sites/vaeb/files/LBR%20changes%20effective%2012-1-2022v1.pdf.

⁸ Exhibit 15 is incorporated within LBR 1075-1 as applicable to complex cases, and is attached to the EDVA LBRs. Footnote 1 to Exhibit 15 expands the definition of “debtor” to include affiliates.

⁹ As stated in its text, Exhibit 16 is incorporated within LBR 1075-2. It is also attached to the EDVA LBRs.

¹⁰ The opening sentence of Exhibit 16 reads, “On November 30, 2021, the Chief Judge entered a Standing Order relating to ‘mega cases’ in order to utilize more evenly the judicial and administrative resources of the district.”

¹¹ Maria Halkias, “Dallas Federal Bankruptcy Court Wants to Be More Hospitable to Bigger Complex Cases,” *Dallas Morning News* (Sept. 27, 2021), available at dallasnews.com/business/local-companies/2021/09/27/dallas-federal-bankruptcy-court-wants-to-be-more-hospitable-to-bigger-complex-cases (subscription required to view article).

¹² See the opening paragraph of Exhibit 16 to the EDVA’s LBRs.

¹³ See *Patterson v. Mahwah Bergen Retail Grp.* (In re Retail Grp.), 636 B.R. 641 (E.D. Va. 2022).

remanding the case to the bankruptcy court for its further consideration of confirmation, the district court severed third-party releases from the plan and retained jurisdiction over the final approval of professional compensation.¹⁴

The *Retail Group* opinion seems to have had a chilling effect on the filing of further complex or mega cases in the EDVA. Following its change to the judicial assignment of mega cases, the EDVA established an advisory committee to formulate the LBR changes that are now reflected in Exhibits 15 and 16. Based on interviews with members of the advisory committee, one of the purposes of the Exhibit 15 amendments was to make the practices and procedures already utilized in many of the complex cases filed in Richmond uniform throughout the district.

Reference has already been made to 28 U.S.C. § 1408, which governs venue for the filing of bankruptcy cases. It is commonly recognized that large companies generally have a number of venue options. The adoption of local rules specific to the needs of complex cases will be another factor for debtors to consider when choosing their filing venue. ABI Consultant **Ed Flynn** has maintained a list of notable chapter 11 cases filed nationwide since the onset of the COVID-19 pandemic. His valuable work reveals that 287 such cases were filed between March 2020 and October 2022. Calculations made by this article's authors reveal that of those 287 cases, 104 were filed in Delaware; 73 were filed in the Southern District of Texas, including a significant representation of oil and gas-related filings; 46 were filed in the Southern District of New York; nine were filed in the Northern District of Texas, and eight were filed in the Eastern District of Virginia, among which were several large retail bankruptcies.¹⁵ Next highest were New Jersey with six cases, and the Southern District of Florida with five cases. Of our remaining sampled jurisdictions, the Southern District of Ohio had one notable case filed, and the District of Columbia has thus far had none.

Compared against the number of filings in Delaware, the Southern District of Texas, the Southern District of New York and the Northern District of Texas, the eight notable cases filed in the Eastern District of Virginia (all in its Richmond Division) would appear to reflect the presence of sophisticated judges with a track record of ably handling such cases.¹⁶ The same experience underlying a sophisticated bench likewise serves to prepare a clerk's office and to train a local bar. As for the concerns expressed in *Retail Group* about confirming a plan inclusive of third-party releases and exculpation provisions,¹⁷ or the award of compensation based on national rates,¹⁸ the numbers previously shared regarding where complex cases have been filed — especially

in Delaware, Houston and the SDNY — appear to confirm that the EDVA's Richmond Division received its eight cases due to a quality bench and court, and not because the division has uniquely confirmed plans containing provisions unobtainable elsewhere.

Going forward, the net effect of the EDVA's adoption of complex and mega case local rules will be the random assignment of mega cases among five experienced judges rather than two, which does serve Exhibit 16's stated purpose of more evenly utilizing the judicial and administrative resources of the district. More judges can handle more cases. The use of a wheel for judicial assignment also helps to alleviate any public concern that corporate debtors are "forum-shopping" or "judge-shopping" for these types of cases in a small number of districts. The SDNY followed the same course for the same stated reasons, except that complex cases will be assigned there among 10 judges. It should be noted in closing that the same clerk manages the entire EDVA, and that the same local counsel appear in all three of its divisions.

Conclusion

The sampled local rules for complex and mega cases, albeit different in some respects, reflect efforts within a growing number of districts to prepare for the unique challenges posed by such cases. In the event that a complex case is filed, the districts seek to enhance accessibility and predictability for all parties-in-interest, including debtors, creditors and the court.

While continuing to value the knowledge and sophistication gained by certain judges through their exemplary efforts in prior cases, the rules adopted within the sampled districts also indicate a trend toward balancing the benefits of judicial sophistication with transparency in case assignments, and the balanced use of a district's judicial and administrative resources. In most instances, the adoption of complex case rules serves to indicate that a district is ready and waiting to address the issues of a complex case, should such a debtor determine to file in the jurisdiction. **abi**

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14 In what ABI Editor-at-Large **Bill Rochelle** described as a "scorching opinion," the district court vacated confirmation of a chapter 11 plan containing third-party releases deemed overly broad and beyond the bankruptcy court's jurisdiction, citing *Stern v. Marshall*. Before remanding the case to the bankruptcy court for further consideration of confirmation, the district court severed the offending third-party releases from the plan. The district court's opinion also suggested that the prospective approval of third-party releases could have led Retail Group to have filed its chapter 11 cases in the EDVA's Richmond Division. See "The War Between National and Local Rates Continues in Eastern Virginia," *Rochelle's Daily Wire* (Oct. 12, 2022), available at abi.org/newsroom/daily-wire.

15 According to the statistics compiled by Mr. Flynn, the debtors in 107 out of 199 chapter 11 filings in the EDVA during the 12 months ending March 31, 2021, listed an address on their respective petitions lying within the district. The difference of 92 cases showing an address outside the district is misleading, since it includes affiliates of the lead debtor. For example, the *Nordic Aviation* group of cases filed on Dec. 15, 2021, included 117 separate filings.

16 The same compliment was paid to the bankruptcy judges of the NDTX by Mr. Peck. See Halkias, *supra* n.11.

17 Fourth Circuit precedent, which is binding in the EDVA, allows for the confirmation of chapter 11 plans containing third-party releases when those releases qualify under a seven-factor test derived from the Sixth Circuit's decision in *In re Dow Corning Corp.* See *Nat'l Heritage Found v. Highbourn Found.*, 760 F.3d 344 (4th Cir. 2014). The bankruptcy court in *Nat'l Heritage* approved an exculpation provision. See also Hon. Brian F. Kenney & Alexander R. Steiger, "Third-Party Releases and the Importance of Marshalling in the Fourth Circuit," *Bankruptcy Law News*, Vol. XXIV, No. 37 (Fall 2022), published by the Bankruptcy Law Section of the Virginia State Bar.

18 In a comprehensive memorandum opinion entered Oct. 18, 2022, in *In re Nordic Aviation Capital Designated Activity Co.*, et al., Case No. 21-33693, slip op. at 34-37 (Doc. 1135), Hon. **Kevin R. Huennekens** reviewed the provisions and history of § 330, as well as Fourth Circuit precedent adopting the 12 *Johnson* factors, which together support awarding professional compensation in bankruptcy on the basis of market rates as determined within the relevant market. The memorandum opinion went on to make detailed factual findings upon which the court approved numerous fee applications of both national and local counsel at their customary rates, subject to any adjustments agreed by each firm with the U.S. Trustee. See also *Barber v. Krimbrells Inc.*, 577 F.2d 216 226 (4th Cir. 1978) (holding that "the 12 factors must be considered by district courts in [the Fourth Circuit] in arriving at a determination of reasonable attorneys' fees"); *Harold & Williams Dev. Co. v. U.S. Trustee (In re Harold & Williams Dev. Co.)*, 977 F2d 906 (4th Cir. 1992) (describing bankruptcy court's "broad discretion" to approve such requests).