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The Silent Reduction in Force

The Downsizing of the Bankruptcy Bench Is Accelerating in the Aftermath of COVID-19

Insolvency professionals have seen it before: An enterprise faced with decreasing demand for services is forced to reduce its workforce as a cost-containment measure in an effort to effectively manage resources. Only this time, the downsizing is happening on the bankruptcy bench. Absent any fanfare, the ranks of the nation's bankruptcy judges are steadily declining through attrition. With bankruptcy cases at their lowest levels in more than three decades and aggregate filings in 2022 equivalent to just 30 percent of the cases filed in 2012,¹ courts increasingly find they cannot justify the replacement of a departing bankruptcy judge, choosing instead to keep the position vacant until bankruptcy filings significantly rebound.

As bankruptcy filings receded following the Great Recession, so did the number of sitting bankruptcy judges. From 2010-19, the system lost seven statutory judgeships² and an additional 19 judicial offices were intentionally left vacant due to the reduced number of case filings.³ In the fallout from COVID-19, bankruptcy cases dropped to unprecedented levels correspondingly, the number of open judgeships has doubled over the past three years.⁴

As of March 1, 2023, 38 of the nation's 345 judicial offices remain vacant with no immediate apparent plans to fill the seat, representing 11 percent of the bankruptcy judgeships authorized by statute.

The number of vacant judgeships is only projected to grow as additional departures loom on the horizon. Forty-five sitting judges are currently eligible for retirement, having reached the age of 65 and completed at least 14 years of judicial service. While future retirements are difficult to predict, it is a good bet that at least 15 judges could decide to hang up their robes over the next 12 months. Unless filings appreciably change, any new vacancies in the coming year are likely to go unfilled.

Although this is the first time that the judiciary has broadly implemented a downsizing of the bankruptcy bench, the concept has been baked into judicial policy for decades. Every two years, the Judicial Conference of the United States (JCUS) is statutorily required to conduct a "comprehensive review of all judicial districts to assess the continuing need for [authorized bankruptcy judgeships]."⁵ It must report its findings to Congress, together with recommendations for the elimination of any authorized position when a vacancy exists.⁶ Recognizing a duty to conserve resources in an era of tightening budgets, the policy recommends replacing a departed bankruptcy judge only when there is a demonstrated "continuing need."

To facilitate the report, the JCUS tasked its Committee on the Administration of the Bankruptcy System to make a "continuing need assessment" based on the judicial workload in each district. The workload is measured by first examining the statistical case filing data, then applying a "weighted caseload" formula to estimate the burden on each judge in the court.⁷ If a court's weighted filings per



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1 See Judicial Conf. of the U.S., Report on the Continuing Need for Authorized Bankruptcy Judgeships, Appendix B (Dec. 20, 2022) [hereinafter, the "JCUS Report"].

2 The seven judgeships represent a net loss to the judiciary. Four temporary judgeships were created during this 10-year period, while another 11 temporary judgeships lapsed. The new judgeships were established in the District of Delaware (x2), Middle District of Florida and Eastern District of Michigan, while the lapsed judgeships occurred in the Northern District of Alabama, Eastern District of California, Central District of California (x3), District of New Hampshire, Southern District of Mississippi, Southern District of New York, Eastern District of Pennsylvania, Middle District of Pennsylvania and Western District of Tennessee. Since 1992, Congress has exclusively utilized temporary judgeships to address judicial needs in the bankruptcy courts in lieu of adding permanent positions. A temporary bankruptcy judgeship exists for a limited duration defined by a statute (typically five years) and is extinguished upon the first judicial vacancy to occur within a district after the expiration date due to a death, resignation, retirement or removal. See JCUS Report at p. 2, n.1; e.g., H.R. 2266, 115th Cong., § 1003 (2017). A judgeship is "temporary" only as to the district holding it, and not to the specific judge occupying the seat. A judge appointed under a "temporary judgeship" can serve his/her entire 14-year term or beyond, irrespective of when the judgeship is set to lapse. Moreover, during the term of the temporary judgeship, the court can fill any vacancy that occurs on its bench, yet once the temporary judgeship expires, it is "reclaimed" by preventing the court from filling the next vacancy to occur after the expiration date. Currently, 29 bankruptcy judgeships are temporary, while the remaining 316 are permanent. See JCUS Report at p. 2.

3 The judicial vacancies existing as of Dec. 31, 2019, include the District of Alaska, Eastern District of California, Northern District of California (x2), Central District of Illinois (x2), Eastern District of Louisiana, Northern District of New York, Western District of New York, Northern District of Ohio, Southern District of Ohio, Western District of Oklahoma, District of Oregon, Southern District of Texas, Western District of Virginia and Western District of Wisconsin, together with three additional slots that have never been filled (the Southern District of Illinois, Eastern District of New York and Western District of Texas).

4 From January 2020 through Feb. 28, 2023, 25 additional vacancies occurred in the Central District of California (x4), Northern District of California, Southern District of California, District of Delaware, Middle District of Florida, Southern District of Florida, Northern District of Iowa, District of Kansas, District of Massachusetts (x2), District of Maryland (x2), Eastern District of Michigan, District of Nevada, Middle District of North Carolina, Northern District of Ohio, Southern District of Ohio, Northern District of Oklahoma, Eastern District of Pennsylvania (x2), Western District of Pennsylvania and District of Utah. It is estimated that only six of these vacancies are likely to be filled in the near future.

5 28 U.S.C. § 152(b)(3).

6 *Id.*

7 The case-weighting formula was first adopted by the JCUS in 1991 to assess the average amount of judicial time expended on various types of bankruptcy cases. In broad strokes, the formula assigns a weight for each case depending on the chapter and asset size, and whether the debtor is represented (among other factors). The formula aggregates all of the case weights together with certain enhancements (i.e., additional weight for larger chapter 11 cases) to gauge the workload of each court. The court's workload is then divided by the number of authorized judgeships to arrive at the "weighted filings per judgeship." In instances where judgeships are held vacant, the workload number is divided by the number of active judges to estimate the burden on the remaining judges. This metric assigns a value for cases only in the year they are filed. The formula is also singularly focused on case-related activities and does not account for additional time spent by judges performing other work, including general case-related research, court management and administration, continuing legal education, outreach activities, official travel and bar-related events. See JCUS Report at p. 4, n.7.

authorized judgeship exceeds 1,500, the JCUS may recommend that Congress create another judgeship to serve the affected district. Conversely, if a judicial vacancy occurs and the weighted caseload for the remaining judges (authorized judgeships minus one) is at 1,000 or below, the presumption is that no “continuing need” exists, and the JCUS is likely to recommend to the affected circuit that the seat remain unfilled.⁸

In its December 2022 report to Congress, the JCUS recommended that all currently authorized bankruptcy judgeships be retained. In other words, it did not advocate for the statutory elimination of any existing judicial positions. However, the JCUS acknowledged that the decrease in case filings means less work in many bankruptcy courts. In an effort to “frugally manage their limited, existing resources,” the JCUS recommended that the circuit judicial councils refrain from filling vacancies in a majority of districts “until there is a demonstrable need to do so.”⁹ The report marks a seismic shift in the judiciary’s approach to judicial vacancies. Previously, the statistical data supported the replenishment of most bankruptcy judgeships,¹⁰ but now, the bulk of the open positions will likely remain that way for some time.

The JCUS advisory impacts 66 of the nation’s 90 bankruptcy courts.¹¹ Excluding those 14 single-judge districts where a seat must conceptually be filled, this means that departing judges in 87 percent of the remaining districts (including at least one in each circuit excluding the District of Columbia) are unlikely to be replaced in the coming year. If the public is unaware that a downsizing is occurring, it will become increasingly obvious as additional vacancies arise.

Ultimately, the decision of whether to replace a bankruptcy judge rests with the court of appeals for each

affected district.¹² The circuit must consider the JCUS recommendation, but it need not accept it. While the weighted caseload can be a strong indicator of the demand for judicial resources, it is not the only factor. Geographic, economic and demographic considerations may also play a role. If a district has a significantly large footprint, the circuit may still opt to appoint a judge in a distant duty station to reduce the time, expense and inconvenience for traveling litigants, although the growing use of video proceedings may lessen the importance of this factor. The circuit may also be persuaded by compelling evidence of a substantial and sustained uptick in filings. Because the next continuing-need assessment will not occur for another 18 months, the circuit could conclude that the findings are dated and new developments warrant the appointment of a new judge. Yet despite these alternatives, most circuits still follow the JCUS’s recommendations.

The contraction of the bankruptcy bench has many implications. In the short term, fewer judges means fewer opportunities to work in the judiciary. Lawyers aspiring to become jurists may have their dreams deferred, and recent judiciary initiatives to promote a more diverse and inclusive bench will be stymied by the dearth of new openings. Competition for chambers staff positions will also increase as the number of available bankruptcy clerkships and judicial assistant positions diminishes. In addition, the lack of turnover on the bench can be self-perpetuating. Judges approaching retirement age may decide to delay their separation for fear of the impact that their departure may have on the colleagues and district they leave behind.

The work of the bankruptcy courts is dynamic and constantly evolving, and the JCUS readily acknowledges that bankruptcy filings “tend to fluctuate at a substantially greater rate than other types of cases.”¹³ Thus, it invites the following question: If the pendulum swings swiftly in the other direction and bankruptcy filings skyrocket, will the courts be ready to react?

The good news is that by preserving the authorized (though vacant) judgeships, the judiciary possesses the means to respond in most jurisdictions by appointing a new judge without an act of Congress. Still, the changes will not be immediate. Considering that it takes eight to 12 months to fill a vacancy and possibly another two years for the judge to realistically acclimate to the job, circuits must vigilantly monitor their bankruptcy filings and skillfully project a court’s future needs before they become unmanageable. Another unknown is whether circuits have formally established filing benchmarks, which, if triggered, can start the process of filling a vacant position. My suspicion is that no such formalities exist, and it will likely fall on the individual districts to press the circuit for action if the workloads substantially increase.

Until then, circuits possess many options to counter an unexpected wave of new filings. Retired judges can volunteer to return to the bench on recall, serving in either a full- or

8 The formula is overdue for review. Although typically evaluated every 10 years, the current formula has not changed since 2010, with the exception of adjustments to account for the increased commitments required in chapter 11 mega cases and the introduction of subchapter V cases. The judiciary was prepared to conduct a nationwide judicial survey in March 2020 as a precursor to the next round of revisions, but the survey was shelved due to the COVID-19 pandemic. *See id.*

9 *See* JCUS Report at p. 5 (“[T]here was no current need to fill all authorized bankruptcy judgeships in these districts and, upon recommendation of the Bankruptcy Committee, the [JCUS] agreed to advise circuits to consider not filling current or future vacancies in these districts until there is a demonstrated need to do so.”).

10 *Compare* Report of the Proceedings of the JCUS September 2020, p. 17 (identifying 26 districts that fell below continuing-need threshold), *with* Report of the Proceedings of the JCUS September 2022 (listing 66 districts); *see also* Report of the Proceedings of the JCUS September 2018, p. 13 (21 districts); Report of the Proceedings of the JCUS September 2016, p. 7 (22 districts); Report of the Proceedings of the JCUS September 2014, p. 7 (four districts); Report of the Proceedings of the JCUS September 2012, p. 8 (three districts); Report of the Proceedings of the JCUS September 2010, p. 8 (three districts).

11 *See* JCUS Report, Appendix E. The 66 affected districts include the Northern District of Alabama, District of Alaska, District of Arizona, Eastern District of Arkansas; Western District of Arkansas, Central District of California, Eastern District of California, Northern District of California, Southern District of California, District of Colorado, District of Connecticut, Middle District of Florida, Southern District of Florida, Middle District of Georgia, Northern District of Georgia, Southern District of Georgia, District of Idaho, Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Northern District of Indiana, Southern District of Indiana, Northern District of Iowa, Southern District of Iowa, District of Kansas, Western District of Kentucky, Eastern District of Louisiana, Western District of Louisiana, District of Maine, District of Maryland, District of Massachusetts, Eastern District of Michigan, Western District of Michigan, District of Minnesota, Eastern District of Missouri, Western District of Missouri, District of Nebraska, District of Nevada, District of New Jersey, Eastern District of New York, Northern District of New York, Southern District of New York, Western District of New York, Eastern District of North Carolina, Middle District of North Carolina, Western District of North Carolina, Northern District of Ohio, Southern District of Ohio, Northern District of Oklahoma, Western District of Oklahoma, District of Oregon, Eastern District of Pennsylvania, Middle District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, District of South Carolina, District of South Dakota, Eastern District of Tennessee, Western District of Tennessee, Northern District of Texas, Western District of Texas, District of Utah, Eastern District of Virginia, Western District of Virginia, Western District of Washington, Eastern District of Wisconsin and Western District of Wisconsin. The 10 multi-judge districts that are not subject to the advisory are the Middle District of Alabama, Southern District of Alabama, District of Delaware, Eastern District of Kentucky, Southern District of Mississippi, District of New Mexico, Middle District of Tennessee, Eastern District of Texas, Southern District of Texas and Eastern District of Washington. The Eastern and Western Districts of Arkansas are counted as one district in the tally because they share three jointly authorized bankruptcy judgeships. JCUS Report at p. 5, n.10.

12 28 U.S.C. § 152(a).

13 *See* JCUS Report at p. 6.

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part-time capacity. Because their salaries are funded from a retirement annuity rather than the judiciary budget, recalled judges can be a prompt and cost-effective option, since the incremental cost of their support personnel is modest and, in many instances, they agree to serve without staff.

Courts can also look to other districts for support. Multi-district designations, along with intercircuit and intracircuit assignments, may be used to import the skills of an experienced bankruptcy jurist into a court that sorely needs assistance. Failing that, temporary law clerks can be assigned to assist districts perceived to have the greatest need. Although none of these solutions is a substitute for a full-time judge, they can provide interim relief to an overburdened court until reinforcements arrive.

These are unprecedented times. During the crush of filings wrought by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, who would have ever thought that a majority of the bankruptcy courts might one day lack the workload to replace a departing judge? In addition, where is the “tsunami” of new cases that many expected in the wake of the COVID-19 pandemic? As these examples show, accurate forecasts of future bankruptcy trends have proven elusive. Given the level of unpredictability, the judiciary should be able to contract and expand as filings dictate. While downsizing may be the order of the day, the bankruptcy system has shrewdly retained its capacity to fill those judgeships should the need arise. It’s now just a matter of when. **abi**

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