

REPORT ON VENUE FAIRNESS

**REPORT OF THE VENUE COMMITTEE OF THE BANKRUPTCY SECTION OF
THE MINNESOTA STATE BAR ASSOCIATION
IN SUPPORT OF VENUE FAIRNESS**

JANUARY 21, 2016

The Venue Committee

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I. Introduction.¹

This report of the Venue Committee of the Bankruptcy Section of the Minnesota State Bar Association is submitted in conjunction with a proposed resolution supporting changes in the venue laws.

Forum shopping has reached epidemic levels. A recent study shows that 70 percent of public companies that have filed bankruptcy in the last five years have filed their chapter 11 cases in venues outside of the district where their principal place of business or principal assets are located. And 80 percent of those companies filed in the District of Delaware (“Delaware”) or the Southern District of New York (“SDNY”). This trend is not limited to large public companies. Indeed, most of the 559 companies that have filed for bankruptcy protection in Delaware over the 10 year² period ending in 2012 have been middle market or even smaller companies with no assets or operations in Delaware. The right of a creditor to move for a change of venue has not remedied the problem. The cost and burden of challenging a debtor’s venue choice are prohibitively high even where there are no appropriate grounds to support the debtor’s venue selection. This recently occurred in *Patriot Coal* where parties spent months and millions of dollars in legal fees briefing whether the SDNY was the proper venue notwithstanding that there was no appropriate basis to file in that District.

The consequences of forum shopping are grave. When troubled companies flee their home states to file for bankruptcy protection, it disenfranchises smaller and local parties in interest, erodes the credibility of the bankruptcy system and gives rise to the perception that the system is being manipulated. The mass concentration of chapter 11 cases in two districts—Delaware and SDNY—impedes the evolution of bankruptcy law, which benefits from the input of judges from multiple jurisdictions with a variety of backgrounds and views of the law and how it should be applied. The exodus of companies from local districts to far flung venues has a direct and negative impact on a local economy and unfairly provides Delaware and the SDNY with a windfall at the expense of due process, judicial efficiency and the reputation of our bankruptcy system.

There is nothing in the Congressional Record or the Bankruptcy Code and its various amendments to suggest that Congress contemplated the creation, or evolution, of a national bankruptcy court, sited in and consisting of judges from only two cities, for commercial cases. It is time to put a stop to abusive forum shopping and return to a national bankruptcy system readily accessible to all affected parties and local interests.

The amendments to 28 U.S.C. §1408 proposed in 2011 (H.R. 2533), *see infra*, would go far toward fixing the unfairness that plagues the current venue rules. As a threshold matter, the proposed amendments would expressly eliminate state of formation as a basis for venue in bankruptcy cases and thereby overturn prior expansive interpretations of the terms domicile and residency now utilized by courts. Second, it would limit the ability of a debtor to game the system by filing an insignificant and sometimes shell subsidiary in a favorable district to establish venue and then, immediately thereafter, file the rest of the affiliates in the same district.

Like the 1997 National Bankruptcy Review Commission Report, the Venue Committee of the Bankruptcy Section of the Minnesota State Bar Association recommends to the Minnesota

Congressional Delegation support for and passage by the Congress of an amendment to 28 U.S.C. §1408. The language of the proposed amendment is discussed in section VIII below.

II. National Campaign for Reform.

In the past, pockets of bankruptcy practitioners, working independently, sought changes to the bankruptcy venue statute in an effort to halt or at least slow forum shopping. Meanwhile, the Commercial Law League of America (CLLA) has actively supported venue reform for almost 10 years, including recent bills in the Senate (S. 314 in 2005) and the House (H.R. 2533 in 2011). In March 2012, beginning in Boston and quickly spreading across the country, bankruptcy practitioners and academics began to coalesce into a unified ad hoc group. In the same month, this ad hoc group joined together with the CLLA to launch a national grassroots effort to reform the bankruptcy venue laws.

Today, the ad hoc group consists of approximately 100 practitioners in 35 states and the District of Columbia. The Venue Committee of the Bankruptcy Section of the Minnesota State Bar Association is part of this group and shares the concerns raised in this written statement. We ask that the Minnesota Congressional Delegation support legislative efforts to implement reform, for the reasons expressed below.

III. Historical Perspective.

Professor Samir Parikh,³ in his article *Modern Forum Shopping in Bankruptcy*,⁴ details the unique history surrounding the bankruptcy venue rules. As Professor Parikh explains, insolvent companies have not always been allowed to rely on their state of formation as a venue basis.⁵ The notion that a business entity can have a residence or domicile is more a creature of common law and not statute. Indeed, the one time that Congress expressly considered the issue, in 1938, it rejected the idea that a corporation could file in its state of formation. This prohibition lasted 40 years until the enactment of the Bankruptcy Code in 1978 when Congress without any discussion conflated natural persons and business entities into a single venue provision. The door then opened for a creative debtor to flee the debtor's home jurisdiction and file in its state of formation.

The story of venue options for corporate debtors begins with Section 2(1) of the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, P.L. No. 95-598, 92 Stat. 2549. The section did not make a distinction between natural persons and business entities. Instead, it allowed all "persons" to file a petition in the jurisdiction that had "their principal place of business, resided or had their domicile for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction." *Id.* It was left to the courts to interpret the words "resided" and "domicile" and determine whether either could apply to a business entity. Courts ruled that the term "domicile" could apply to business entities and found that a business entity was domiciled in the state of its formation.⁶ In doing so, courts relied on federal cases interpreting the meaning of "residence" and "domicile" in the context of determining diversity jurisdiction.⁷

In 1934, Congress briefly ratified the judicial interpretation of the venue statute when it amended the Act to add a new Section 77B.⁸ That section allowed a corporate debtor to file in

the state of its incorporation. However, four years later, in 1938, Congress reversed itself when it enacted section 128 of the Chandler Act, which allowed large corporations with outstanding public debt or securities to file only in a jurisdiction where the debtor had its principal place of business or its principal assets. The House Report on the Chandler Act explained the change:

In general, the bill sets up as the only valid criterion for jurisdiction the company's principal place of business, or the place of location of its principal assets. Selection of any other jurisdiction usually means conducting the reorganization at great distances from the place or places where the corporation does its business. It means putting investors to great expenses and difficulty if they wish to appear and participate in the proceedings. It means, also, that inside groups who may be in control of a reorganization are able to search around for the jurisdiction in which they estimate it is least likely, for a number of reasons, that their conduct of the corporation will be examined; that they will be exposed to liability, and their perpetuation in office endangered. These defects have been met and corrected by the bill, in limiting the venue of reorganization proceedings to the principal place of business or the location of the corporation's principal assets⁹

This clear policy rationale to limit the ability of large corporations to forum shop was later endorsed in 1973 when the United States Supreme Court promulgated new Rules of Bankruptcy Procedure (order dated April 24, 1973, effective October 1, 1973). Rule 116 made a distinction between natural persons and business entities. It allowed corporate debtors to file only in a district where the debtor had its principal place of business or principal assets or where an affiliate of the debtor had already filed.¹⁰ The Advisory Committee Notes that accompanied the change expressly acknowledged the Committee's intent to "eliminate the notion that residence or domicile may serve as a useful basis for determining venue of a corporation or partnership."¹¹ The Committee reasoned that "[t]he place of incorporation [had] no relation to the business activity of the corporation"¹²

For forty years corporations were unable to flee to their state of incorporation to file for bankruptcy protection. However, in 1978, in connection with the enactment of the Bankruptcy Code, Congress once again placed natural persons and business entities in a single venue provision.¹³ The section provided that a bankruptcy petition could be filed in the district in which: (i) the person or entity was domiciled, resided, or had its principal place of business or principal assets; or (ii) the person's affiliate, general partner, or partnership had a pending case.¹⁴

Section 1472's legislative history provided no explanation for this consolidation of previously distinct venue provisions.¹⁵ Professor Samir Parikh stressed in his article that if it were Congress's intent to return to the venue rules of the 1898 Act, the shift was drastic and it is unlikely such a drastic change would have been made without any discussion or explanation in the legislative history.¹⁶ "More likely, the genesis for section 1472 was the desire to simplify the language of the 1978 Bankruptcy Act, with unintended consequences regarding forum shopping."¹⁷ He continued:

However, in context, this oversight may not be as glaring as it first appears. At the time section 1472 was enacted, there were few large, multimillion-dollar

bankruptcy cases, and forum shopping by such debtors was not a concern because venue provisions had not been abused. Without an understanding of the risk of forum shopping and lacking an appreciation of the unique harm that forum shopping in bankruptcy could pose, Congress, legal commentators, and scholars may have all viewed section 1472's changes as mere streamlining of an unnecessarily detailed provision.¹⁸

It took a few years, but debtors soon began to take advantage of the opening in the venue rules and started filing more often in their states of incorporation. Some point to 1988 as a turning point in the frequency of forum shopping. In that year, Delaware Bankruptcy Court Judge Helen S. Balick ratified that venue is proper in a corporate debtor's state of incorporation, and then held without any explanation that "the debtor's choice of forum is entitled to great weight."¹⁹ An unintended consequence of Judge Balick's decisions was that they made it easier for debtors to forum shop, and they did. Some critics viewed her decision with skepticism:

From a purely economic perspective, Judge Balick's interpretation was practically preordained. Indeed, 89% of the large public companies that filed for bankruptcy reorganization from 1980 to 1997 were incorporated or had a subsidiary that was incorporated in Delaware. Eisenberg & LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999). Judge Balick's ruling allowed all of these debtors to file in Delaware. A contrary ruling would have precluded 99% of these debtors from doing so. In light of the amount of revenues large bankruptcy cases infuse into local communities, such a ruling would have been clearly against the interests of the Delaware legal and business communities.²⁰

Notably, it has been the courts, not Congress, that expanded the meaning of "domicile" to apply to corporate entities and include the state of incorporation. When Congress has explicitly spoken to the issue, it has rejected this interpretation and limited the application of the terms "residency" and "domicile" to natural persons. As noted, unlike in 1934 and 1973, the enactment of the modern venue provision in 1978 was done without any debate or discussion about whether it would permit corporate debtors to file in their state of incorporation.

Supporters of allowing debtors to file in their state of incorporation make the analogy to 28 U.S.C. § 1391(c), the venue statute for civil litigation. That statute defines residency as:

An entity ... shall be deemed to reside, *if a defendant*, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, *if a plaintiff*, only in the judicial district in which it maintains its principal place of business.²¹

The argument follows that removing a debtor's state of incorporation as a proper venue in bankruptcy cases would be inconsistent with the rule established under federal law in virtually all non-bankruptcy cases.²² This argument is over-simplified to the point of being misleading. Section 1391's personal jurisdiction hook explicitly provides that it applies only to a corporation that is a defendant in a civil action; this is clearly not the case in a bankruptcy proceeding. A debtor in bankruptcy is more analogous to a plaintiff in a civil action; namely, the party that

commences the proceeding and forces other parties to participate. If viewed in that light, limiting bankruptcy venue to principal place of business or principal assets would be consistent with the meaning of a plaintiff's residence under the general federal venue provisions.

As discussed below, current law, as interpreted and applied by courts, has had the unintended consequence of allowing abusive forum shopping with an overwhelming concentration of business cases being filed in Delaware and SDNY. Indeed, debtors have been able to exploit loopholes in the current statutory scheme to establish venue in favorable jurisdictions in which they have no operations, office or employees, and in some cases where there is a complete absence of minimum contacts. Under today's regime, the focus is on the convenience of the debtor who alone chooses where to file its case, in many cases without regard to the convenience or even due process considerations of stakeholders. And the law has developed to accord considerable deference to the debtor's choice. Change is needed. The time is now to bring fairness and credibility back to the system.

IV. Empirical Evidence of Venue Shopping.

It is obvious to any bankruptcy lawyer practicing outside of Delaware or New York City that nearly all middle market and larger chapter 11 cases are filed in one of those two places. This perception is supported by the numbers:

- Nationwide, excluding individual chapter 11 cases, nearly 17% of all chapter 11 cases are filed in Delaware or SDNY.²³
- 7 out of 10 "Megacases" filed between January 1, 2007 and June 30, 2012 forum shopped, a statistical increase in frequency of 14% from the early 1990's and an absolute increase of 130% in the number of Megacases that forum shopped.²⁴
- 80% of the Megacases that forum shopped between 2007 and 2012 filed in Delaware or Southern District of New York.²⁵
- 88% of the Megacases that forum shopped relied on state of incorporation or the affiliate filing hook.²⁶
- From December 1, 2003 to December 31, 2012, at least 559 business debtors filed in the District of Delaware notwithstanding that their principal places of business and principal assets were situated outside of Delaware.²⁷ In the same timeframe, 104 business debtors filed in the Southern District of New York notwithstanding that their principal places of business and principal assets were situated elsewhere.²⁸
- These 663 filings meant that at least \$860 billion of assets and \$1.8 trillion of liabilities were administered by courts having no meaningful connection with the subject debtors, affecting over 4.5 million creditors and more than 2 million employees.²⁹
- The top five states that lost hometown businesses to Delaware and SDNY over the 10-year period ending in 2012 were:

- California (85 cases, \$47.3B in assets, \$52.2B in liabilities, 617,000 creditors, 87,000 employees);
 - New Jersey (51 cases, \$19.6B in assets, \$23.1B in liabilities, 313,600 creditors, 100,200 employees);
 - Pennsylvania (47 cases, \$28.3B in assets, \$30.2B in liabilities, 140,000 creditors, 47,000 employees);
 - Illinois (38 cases, \$20.3B in assets, \$28B in liabilities, 87,000 creditors, 61,000 employees); and
 - Florida (32 cases, \$10.3B in assets, \$11B in liabilities, 285,000 creditors, 115,000 employees).³⁰
- Here in Minnesota, as the chart below will illustrate, bankruptcy forum shopping over the same 10-year time period was rampant as well. (13 cases, \$7.9B in assets, \$4.3B in liabilities, 171,000 creditors and 121,000 employees).
 - Even New York has been the victim of forum shopping, having lost at least 32 cases to Delaware consisting of \$12.1B in assets, \$12.6B liabilities, and affecting 216,000 creditors and 30,000 employees.³¹
 - Of the chapter 11 business cases filed in Delaware in 2013 (through September 30, including cases that were affiliates of other cases), all but three identified a state other than Delaware as the location of the debtor's principal place of business (a California grocery chain, which claimed that its principal place of business was CT's Wilmington office, is treated as a non-Delaware debtor for this purpose). Of the chapter 11 business cases filed in the SDNY in 2013 (through September 30), 35 identified a state other than New York as the location of the debtor's principal place of business (excluding foreign debtors).³²
 - With the Megacases and middle market debtors fleeing to Delaware and SDNY, what is left behind in the other 88 federal districts are individual and small business cases.

Because the Administrative Office does not publish statistics on the size of companies filing for chapter 11, it is necessary to access and investigate ECF filings to sample cases. As an example, we examined filings in the Northern District of Illinois. Of the first 50 business chapter 11 filings in that District in 2013, only two had assets of more than \$5 million (and neither of them had assets of more than \$15 million).

V. Anecdotal Examples of Venue Shopping.

Today, nearly all of the Megacases that forum shopped filed in Delaware or SDNY. Notably, Delaware out-paced New York by a margin of more than 2 to 1.³³ The fact that Megacases are accumulating in just two courts indicates a “market irregularity” that must be corrected.³⁴

a. The Reasons for Forum Shopping are Varied

Bankruptcy professionals and academics that have studied forum shopping identify three primary motivations for corporate debtors to seek venues outside of their principal places of business.³⁵ The primary reason given is that corporate debtors and their professionals are shopping for favorable law.³⁶ A second reason is that corporate debtors and their professionals believe or at least perceive that there exists a different level of experience, knowledge and/or personality among judges in different districts.³⁷ A third reason is that corporate debtors and their professionals perceive procedural or administrative benefits from filing in one venue over another.³⁸ Under current rules, many business debtors have a choice among multiple venues and their advisors have a duty to advise business debtors to file in what they perceive to be the most favorable venue to achieve the most successful outcome. In this context, it is understandable why forum shopping exists. Until the venue laws are changed to restrict a debtor's choices and ability to forum shop, the practice will undoubtedly continue to grow. The long term consequence will be the erosion of credibility in the system as more and more affected parties become convinced that the bankruptcy system can be manipulated.

b. Venue Shopping Has Spread to Middle Market and Smaller Cases.

Forum shopping is not limited to Megacases. Smaller business cases with less than \$15 million in assets made up almost half of the 559 out-of-state cases that filed in Delaware between 2003 and 2012.³⁹ Examples of smaller cases being filed in distant venues include:

Manistique Paper Company, a paper mill with its sole business location in the Upper Peninsula of Michigan, filed for bankruptcy protection in Delaware in 2011. It had 150 employees, less than \$20 million in assets and \$25 million in debt. It was privately held and had no public debt. Forty-six of the 108 creditors who filed claims were from Michigan or neighboring Wisconsin. Two of the most significant creditors were the Michigan Department of Environmental Quality and the United Steel Workers (on behalf of the workforce that worked and lived entirely within Michigan).⁴⁰ They were forced to protect their interests in a bankruptcy court 1,000 miles away from the debtor's principal place of business and assets.

Carey Limousine L.A., Inc. was a company operating entirely in California. It had less than \$500,000 of assets and fewer than 20 employees. The debtor filed for bankruptcy in Delaware after the California Fair Employment Department obtained a large award against it for back pay and benefits for persons employed by the debtor as chauffeurs. The debtor objected to the Department's claim in the Delaware bankruptcy court, converting a matter of interest only to a California business, its employees, and its regulator to a proceeding before a court in Delaware.⁴¹

Similarly, Diversapack of Monroe LLC, a Monroe, Ohio, based manufacturer with less than \$15 million in debt, filed in Delaware and then promptly sold its assets under Section 363 of the Bankruptcy Code. There was no attempt to reorganize, and no involvement of East Coast lenders whose proximity to Delaware is often cited as a basis for a Delaware filing.⁴²

Supporters of the status quo may argue that no party in the Manistique Paper, Carey Limousine, or Diversapack case (or, for that matter, in the great majority of small, out-of-state

cases filed in Delaware) moved to transfer venue to the home district of the debtor. However, this argument ignores the fact that such a motion would have required a creditor to incur the very cost of litigating in a distant court that it sought to avoid. The creditors in those cases were therefore left to hope that the cost of protecting their rights (such as by defending a claim objection or a preference action) in a remote location would not exceed the amount at stake.

c. Venue Shopping Has Spread to Purely Local Real Estate Cases.

What is more local than a real estate bankruptcy case involving a single property or project? As with middle market cases, forum shopping has spread to single asset real estate cases. Cordillera Golf Club LLC operates a second home/resort community just west of the Beaver Creek, Colorado ski resort. A dispute erupted between the homeowners and the project owners over the alleged misapplication of dues. The bankruptcy case was filed in Delaware for no apparent reason other than to disadvantage the “small but vocal minority of current and former club members” who differed with the operator over the sale of club property.⁴³

Another case from Colorado, *The Banning Lewis Ranch Company, LLC vs. City of Colorado Springs, Colorado (In re The Banning Lewis Ranch Co. LLC)*, 532 B.R. 335, 341 (Bankr. D. Colo. 2010), concerned a large real estate development in Colorado Springs. The development was subject to numerous zoning and regulatory restrictions administered by The City of Colorado Springs. The City’s motion to change venue, filed promptly after the case was filed, and before any substantive relief had been granted, was denied.

The Cordillera Golf Club LLC and *In re Banning Lewis Ranch Co. LLC* cases are troublesome not only because they concerned purely local real estate developments, but both cases suggest an effort by the debtors to insulate themselves from those having the greatest stake in their attempts to reorganize.

d. Venue Shopping Infects Not Only Cases filed in Delaware and the SDNY.

Venue shopping is not limited to cases belonging elsewhere being filed in Delaware or the SDNY. Peregrine Financial Corp., a commodities broker based and incorporated in Iowa, filed under Chapter 7 in the Northern District of Illinois.⁴⁴ Of course, distance provides insulation, which the debtor might have viewed as critical in light of the criminal allegations that have surrounded the case.

R.E. Loans, LLC, was a real estate company that sold investments to investors concentrated in the Oakland, California area. The debtor filed in Texas, basing its choice of venue on the fact that the principal secured creditor’s note was stored in a vault in Dallas.⁴⁵

The Peregrine and *R.E. Loans*, cases together with the other examples cited above, highlight that venue shopping may be motivated as much by a desire to get away from a jurisdiction as by desire to *get into* a jurisdiction that is reputedly easy on debtors. The fact that the venue choice was Chicago or Dallas instead of New York or Wilmington makes the problem no less chronic.

e. Debtors Are Filing in Districts Where There is No Appropriate Basis for Venue.

The Patriot Coal case involved a debtor's effort to manufacture venue in the SDNY by creating New York incorporated affiliates in advance of the filing. As discussed below, although it took a lengthy, expensive process, eventually the court did transfer venue out of New York. Other debtors have been more fortunate by avoiding challenges to their venue choice. For example the Star Tribune, the Minneapolis newspaper that filed, seemingly for the purpose of restructuring its many and varied union contracts, filed its case in the SDNY after its parent holding company filed in that district. All of the Star Tribune's operations and employees were in Minnesota. The operating company also owned 22 parcels of real estate in Minnesota, and none outside Minnesota. In its petition, the parent company declared its "Location of Principle Assets" to be "55 South Water Street, New York, New York" an office building with many tenants. When the holding company finally filed its schedules two months after the petition date, the schedules showed that the parent company did not own the New York office building and that it had no assets in New York, except that addresses for certain insurance policies were listed with a New York address. By then it was too late, as a practical matter, to seek a change in venue.

f. Venue Shopping Has Spread to Business Chapter 7 Cases.

Surprisingly, forum shopping is not restricted to chapter 11 cases. Even chapter 7 debtors find reasons to flee their home jurisdictions. In addition to *Peregrine Financial* discussed above, earlier this year, Fenwick Automotive Products Limited, a Los Angeles based importer and manufacturer of automotive parts, filed for bankruptcy relief under Chapter 7 in Delaware claiming state of incorporation as the only basis for venue.⁴⁶ It is a simple Chapter 7 case with a trustee appointed to liquidate hard assets that are almost all located in California. There were no efficiencies to be gained by having this straight-forward liquidation administered in Delaware. No motion to change venue was brought, but as discussed below, given the cost, difficulties, and uncertainties of such a motion, any rational creditor could easily conclude not to do so.

g. The Minnesota Experience Has Been the Same as The National Experience.

The Minnesota experience is no different than the national trends. Numerous Minnesota based companies seeking bankruptcy relief have chosen to file their cases in Delaware or SDNY based on the same flimsy connections with those jurisdictions as other cases from other states. Minnesota based companies filing in Delaware or SDNY include:

Debtor	Filing Date	Assets	Liabilities	No. of Creditors	Industry	Jurisdictional Basis
Tiro Acquisition, LLC <i>In re Tiro Acquisition, LLC</i> , Case No. 04-12938 (BLS) (Bankr. D. Del.).	10/12/2004	\$0.00	\$18.5 Mil.	2	Holding Co.	State of incorporation

Debtor	Filing Date	Assets	Liabilities	No. of Creditors	Industry	Jurisdictional Basis
SMC Holdings Corp. <i>In re SMC Holdings Corp.</i> , Case No. 05-10395 (MFW) (Bankr. D. Del.)	2/10/2005	\$191 Mil.	\$100 Mil.	15	Baggage Cart Rental	State of incorporation
Northwest Airlines Corporation <i>In re Northwest Airlines Corporation</i> , Case No. 17930 (ALG) (Bankr. S.D.N.Y.).	9/14/2005	\$14.3 Mil.	\$14.3 Mil.	65,000	Airlines	Affiliate filed in jurisdiction
Musicland Corp. <i>In re Musicland Corp.</i> , Case No. 06-10064 (SMB) (Bankr. S.D.N.Y.).	1/12/2006	\$371 Mil.	\$486 Mil.	25,000	Retail Stores	Affiliate filed in jurisdiction
Buffets Holdings Inc. <i>In re Buffets Holdings, Inc.</i> , Case No. 08-10141 (MFW) (Bankr. D. Del.).	1/22/2008	\$963 Mil.	\$1.1 Bil.	500	Restaurant, Steak Buffet Chain	State of incorporation
Star Tribune Holdings <i>In re Star Tribune Holdings Co.</i> , Case No. 09-10244 (RDD) (Bankr. S.D.N.Y.) and <i>In re Star Tribune Company</i> , Case No. 09-10245 (RDD) (Bankr. S.D.N.Y.), jointly administered under Case No. 09-10244.	1/15/2009	\$493 Mil.	\$661 Mil.	10,000	Media	Insurance policy with New York address

Debtor	Filing Date	Assets	Liabilities	No. of Creditors	Industry	Jurisdictional Basis
USI Senior Holdings <i>In re USI Senior Holdings, Inc., Case No. 09-11150 (MFW) (Bankr. D. Del.).</i>	3/31/2009	\$360 Mil.	\$356 Mil.	15,000	Manufacturing/Installation	State of incorporation
WEC 96D Lynwood Investment Trust <i>In re WEC 96D Lynwood Investment Trust, Case No. 10-10434 (PJW) (Bankr. D. Del.).</i>	2/11/2010	\$1 Mil.	\$1 Mil.	1	Single Asset Real Estate	State of incorporation
Midwest Oil of Minnesota <i>In re Midwest Oil of Minnesota, Case No. 10-12771 (KJC) (Bankr. D. Del.).</i>	9/1/2010	\$7.1 Mil.	\$6.6 Mil.	40	Petroleum	State of incorporation
Meridian Behavioral Health <i>In re Meridian Behavioral Health, LLC, Case No. 11-10860 (SHL) (Bankr. S.D.N.Y.).</i>	2/28/2011	\$1.7 Mil.	\$7.4 Mil.	N/A	Health Care	Unspecified
Buffets Restaurant Holdings <i>In re Buffets Restaurant Holdings, Case No. 12-10237 (MFW) (Bankr. D. Del.).</i>	1/18/2012	\$5 Bil.	\$500 Mil.	50,000	Restaurant	State of incorporation

Debtor	Filing Date	Assets	Liabilities	No. of Creditors	Industry	Jurisdictional Basis
The Dolan Co. <i>In re Dolan Co.</i> , Case No. 14-10614 (BLS) (Bankr. D. Del.).	3/23/2014	\$100 Mil.	\$153 Mil.	5,000	Legal and Professional Publishing	State of incorporation
Universal Cooperatives, Inc. <i>In re Universal Coop. Inc.</i> , Case No. 14-11187 (MFW) (Bankr. D. Del.).	5/11/2014	\$365.6 Mil.	\$904 Mil.	1,000	Farm Supply Cooperative	State of incorporation

VI. Negative Consequences of Forum Shopping.

The growing frequency of forum shopping “undermines the perception and integrity of the bankruptcy system.”⁴⁷ When companies flee their home state to seek refuge in another jurisdiction, it appears the process can be manipulated.⁴⁸ There is an unseemly appearance of backroom dealings and a system that allows debtors to choose whatever jurisdiction they please in order to achieve a particular outcome. The erosion of public confidence together with the difficulty of smaller creditors, employees or labor unions to participate leads to disenfranchisement of large swaths of constituents. In addition, the abnormally high level of forum shopping leads to a disproportionate allocation of cases and resources. A related harm is “when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down.”⁴⁹

Chapter 11 debtors forum shop at a staggering rate — “a level at which the negative effects of forum shopping are concentrated, and debate must shift from a discussion of the harm to an exploration of possible solutions.”⁵⁰

a. The Appearance of Venue Manipulation Undermines Public Confidence in the Bankruptcy System.

The threat of forum shopping to the integrity of the bankruptcy system is and should be of paramount concern. “Rampant forum shopping undermines the perception and integrity of the bankruptcy system.”⁵¹ When 7 out of 10 Megacases flee to other jurisdictions or when a disproportionately high number of large and middle market companies run to Delaware or SDNY to seek refuge from their creditors, employees and local communities, one cannot deny that forum shopping has become rampant. Under current law, the burden is on creditors to request a change of venue and courts have been reluctant to challenge a debtor’s choice. Debtors can simply choose any jurisdiction that they perceive will provide them with a desired outcome

at the expense of constituents. “The process appears to be manipulable.”⁵² This perception erodes public confidence and calls into question the fairness of the bankruptcy system.

The perception is that the deck is stacked in favor of debtors and the institutional players. Judges in more favored venues certainly strive to hear the voices of all interested parties who want to speak, but the suspicion that a debtor chose a particular venue for a reason is nonetheless present and it is not irrational. Why else, a creditor located far from where the case was filed must ask itself, did my customer file for bankruptcy in a district where it does not do business or have any meaningful connection if not to obtain an advantage over the other parties in its bankruptcy case? Recently, the Wall Street Journal described the frequency of forum shopping in an article about the *Patriot Coal* case: “Lenders and lawyers who get the big cases like taking their troubles to courts in New York and Delaware, which are convenient to their homes and offices and attuned to their concerns.”⁵³ This cynical view will only grow as forum shopping continues to run rampant.

Admittedly it is difficult to measure the erosion in public confidence caused by forum shopping. However, when 7 out of 10 Megacases forum shop, and 80% of those cases are filed in two districts, a reasonable person can conclude that cynicism is rising while confidence in our bankruptcy system is eroding.

b. Venue Shopping Disenfranchises Creditors, Employees and Other Parties.

Whether it is the geographic distance or the perception that the debtor is manipulating the system, the mass concentration of chapter 11 cases in two districts disenfranchises smaller creditors, employees, labor unions, retirees and other “local” parties with an interest in a bankruptcy case. This concern has long been recognized by proponents of venue reform and independent commissions studying bankruptcy reform. In 1998, the Bankruptcy Review Commission recognized that forum shopping and the concentration of cases in Delaware made it more difficult for small creditors and employees to actively participate in a bankruptcy case.⁵⁴ Others have understood that the channeling of commercial cases to Delaware and the SDNY, to the inconvenience and detriment of parties located more central to the nexus of the debtor’s activities, implicates the norm of equal access to justice.⁵⁵

By choosing to file a chapter 11 case in a distant venue, the debtor is depriving local constituents of their due process. This situation is perhaps best exemplified by the case of *Delphi*, in which retirees in Michigan were disadvantaged by the distance they had to travel to have input in the case, which was filed in New York.⁵⁶ In particular, at *Delphi*’s confirmation hearing in New York, only one retiree located in Michigan participated in the hearing, and his participation was by telephone. There is no record of any employees participating in person at the confirmation hearing. Had the bankruptcy case been administered closer to *Delphi*’s center of business contacts, the retirees or employees would have likely had a greater opportunity to participate in the case.⁵⁷

Another example was the *Polaroid Corporation* case, a company that since its inception in 1937 was headquartered in Cambridge, Massachusetts.⁵⁸ When financial difficulties arose in 2001, it fled to Delaware far away from its thousands of Baystate employees and retirees. Similarly, a more recent start-up company, *Evergreen Solar, Inc.*, filed for bankruptcy protection

in Delaware in 2011, after having received \$58 million in aid from the Commonwealth of Massachusetts.⁵⁹ These examples highlight that companies that are closely identified with the citizens and government of Massachusetts have chosen to file for bankruptcy relief far from their home states.

These companies filed far from the employees that hoped for a successful outcome in the bankruptcy case and to save their jobs and perhaps their pensions. These companies filed far from where most vendors of goods and services to those companies had come to expect that they would deal with the companies. These companies filed far from where the local governments — state and municipal — had provided support and, in the case of Evergreen, very large incentives.⁶⁰

As Chief Judge Bailey of the Bankruptcy Court for the District of Massachusetts recognized in his testimony before Congress, if these cases had stayed home in Massachusetts, stakeholders, large and small, would have had an opportunity to participate in the proceedings. “At a minimum, stakeholders would have received notices that told them that they could participate in the proceeding at a courthouse near where they live and work before a judge that lives in the same community as they do. This is to say there would have been the perception that their opportunity was real and accessible. And perception is often paramount.”⁶¹ “The ability of smaller stakeholders to attend proceedings, or at least to feel they could if they so desired, is central to their belief that they are being dealt with fairly.”⁶² This sentiment was shared by employees and retirees in *Patriot Coal*:

Shirley Inman of Madison, W.V., is also anxiously awaiting word from Chapman. That’s because Ms. Inman, who used to drive a truck at a coal mine, believes Patriot intends to strip her of the retiree benefits that pay for the heart medication that keeps her alive. She wants the company’s lawyers to look her in the eye when they do it.

“If someone is going to take my health care away from me, I think I ought to be able to watch them do it with my own eyes. And I think they ought to have to see me sitting there while they do it,” Ms. Inman wrote in a letter this week.⁶³

Filing cases far from where the debtor conducts its business tilts the playing field toward financially sophisticated and represented parties who regularly appear in large bankruptcy cases, and away from smaller creditors. Creditors and parties in interest who are drawn into a bankruptcy and who do not regularly ply in the bankruptcy process lack the time and the financial resources to actively participate in a faraway venue.⁶⁴ Joe Chiavone is just one example of creditors around the country growing more and more frustrated and disillusioned with the bankruptcy system and the tendency of business debtors to file cases in faraway jurisdictions. The argument that in larger cases, creditors are spread out throughout the country and therefore no venue is convenient for everyone ignores creditor expectations. Vendors, employees, retirees, landlords and other parties doing business with a company understand and expect that they can be sued or may need to file suit in the state in which their customer, employer or business relationship is headquartered. They do not have a reasonable expectation

that their substantive rights will be adjudicated in a district with no connection to the debtor's principal place of business or assets.

Unlike regular lawsuits, bankruptcy cases are proceedings that affect a myriad number of parties who must either participate or have their legal rights materially affected, and perhaps even lost. To operate effectively, a creditor or party in interest must have legal representation to navigate the bankruptcy issues. It is a burden to do so when the venue for a case is not near the locus of a creditor's relationship with the debtor. Many creditors find it very expensive to hire counsel in Delaware or the SDNY—especially in Delaware with its requirement that Delaware lawyers must appear in court. While electronic filing has in some respects reduced the burden of participating in a case, it has not eliminated the need to appear at hearings and present evidence. Forcing a creditor to protect its interests or defend a preference in a distant venue adds considerable cost and time to meaningfully participate in the case, and can often result in the creditor too readily compromising its rights to avoid the costs.⁶⁵ Although compromise is a worthy goal, inducing early compromises by burdening a party with excessive costs breeds suspicion that the system is rigged in favor of debtors and those parties aligned with debtors.⁶⁶

Federal bankruptcy courts were established in each state to provide direct access by citizens and to support principles of federalism. These principles should be respected, not overridden, by lax venue rules that permit excessive forum shopping by debtors.

c. The Centralization of Cases in Two Districts Impairs the Evolution of Bankruptcy Law.

The concentration of business filings in Delaware and SDNY have enabled them to become a duopoly on chapter 11 jurisprudence. By capturing a large swath of large and middle market cases, these two districts have become magnet courts controlling the creation and evolution of chapter 11 bankruptcy law. This is a problem. “A cornerstone of our judicial system is that the law be subject to a variety of interpretations at the trial level”⁶⁷ When decisions are made by a select few judges, the system breaks down. “Without discourse, the review process ceases.”⁶⁸ Debtors may be selecting Delaware and the SDNY as their preferred choice of venue to voice approval of those courts' interpretation of bankruptcy issues. However, there is no assurance that these interpretations of the law are the only correct ones. Absent the benefit of contrary views from other courts, these decisions may be left unchallenged “and are actually strengthened by repeated application to a long string of cases” filed in the same district.⁶⁹

The Bankruptcy Code provides for a national bankruptcy court system. “Like the federal judicial system as a whole, the evolution of the law benefits from the input of judges from multiple jurisdictions, which over time reach consensus.”⁷⁰ Absent widespread input, legal discourse begins to decline and constituents (including the general public) become more disillusioned and indifferent.

Debtor in possession financing is an example of the impact on the development of jurisprudence when cases are concentrated in one or two districts leading to the same courts being asked repeatedly to enter substantially similar financing orders. In the first year of the financial crisis, private capital markets virtually froze. The few lenders providing debtor in possession financing began requiring increasingly excessive and burdensome terms. Bankruptcy

courts felt compelled to approve more expensive debtor in possession financing and enter orders containing extraordinary terms (e.g., roll ups, quick sales, excessive fees and interest rates, liens on avoidance recoveries, etc.).⁷¹ Thereafter, with the concentration of chapter 11 cases in two districts, the same judges in subsequent cases began seeing again and again their own prior orders or those of their colleagues containing the extraordinary terms that had once been relatively rare.⁷² By many accounts, extraordinary DIP financing terms became customary after 2009 even when financing was readily accessible.⁷³ The Loan Syndication and Trading Association acknowledged that “to be sure, the terms of DIP loans are customized to the bankruptcy process.”⁷⁴ Had chapter 11 cases been more widely disseminated over the last few years, proposed DIP financing orders would have been scrutinized by a wider and more varied group of bankruptcy judges who would not have been bound to adhere to principles of predictability and consistency within a single judicial district. One could reasonably conclude that under those circumstances, the extraordinarily burdensome DIP financing provisions would not have become the norm after credit markets improved.

Many critics of venue reform advocate the need for one or two national courts to hear larger sophisticated cases and view the concentration of cases in Delaware and SDNY as filling this need. The flaw with this argument is that these “national courts” are not comprised of judges from around the country. Instead, they draw their judges from within the boundaries of their two respective cities where the judges are chambered (New York City and Wilmington). Such uniformity likely impedes the evolution of bankruptcy jurisprudence, which benefits from diverse viewpoints and discourse. There is much to be said for the development of innovative case management techniques and legal interpretations from judges from around the nation. Venue reform would help achieve this goal by spreading chapter 11 cases more evenly around the country.

Lastly, there is no basis for the argument that judges and professionals in Delaware and SDNY are more experienced than their counterparts in the 88 other federal districts in administering large, complex chapter 11 cases. Bankruptcy judges and professionals in other districts are more than capable of administering complex chapter 11 cases. Indeed, the competency of the national bankruptcy bench was on display from 2000-2006 when 21 visiting judges from 15 states ably presided over approximately 50% of the chapter 11 cases filed in Delaware.

d. Local Concerns Often Dominate Bankruptcy Cases.

While the Bankruptcy Code is federal law, the phrase, “or other applicable non-bankruptcy law” appears numerous times throughout the Code. Under most circumstances, that applicable non-bankruptcy law is the law of the state of the debtor’s principal place of business. This predicament places the bankruptcy judges in Delaware and New York City in the position of interpreting and applying state law for all 50 states. It is certainly arguable that bankruptcy judges sitting in the appropriate states would have more experience interpreting and applying their own state’s laws.

The consequences of a corporate bankruptcy are often most profound in the region and community in which the debtor’s principal place of business or principal assets are located. **Simply stated, bankruptcy is local.** Not only are there jobs involved, but the local economy

might depend to a large extent on business from that debtor. Many critical issues of local importance arise. The debtor may be, for example, one of the community's larger employers or it may sustain many small businesses that provide various goods and services. The consequences could extend even further, affecting for example the number of hospital beds that are available, the quality of elder care, or even waste removal. These are just a few of the countless local issues that might be encountered, and of course will require local subject matter expertise for example in real property, local taxes, environmental or health and safety issues, along with the treatment of real and personal security interests.

Aside from the application of statutes and common law, bankruptcies filed in remote jurisdictions draw cases away from the parties with the most familiarity with the debtor's operations and who have an important stake in the case's outcome. For example, employees, local vendors and retirees will be unable to attend hearings without incurring insurmountable time and travel expenses. There will also be little or no local media coverage on the progress of the debtor's efforts to reorganize and the interest of local constituents will wane. Absent active participation, public confidence in the process will likely erode leading to cynicism and skepticism among smaller creditors, employees and other local constituencies.

At the very heart of the concept of venue is the idea that those affected by a court proceeding should have access to the proceeding. Whether access means an actual ability to attend the hearings, the ability of the local press to follow the proceedings first hand and then to pass on developments to the local population, or the perception that the events in the case are occurring in the court with the most ties to all constituencies, the important goal of judicial transparency is served by the proposed amendments.⁷⁵

In summary, requiring that a corporate bankruptcy take place locally ensures that the distinct needs of the community are not overlooked or, worse, ignored by other groups residing hundreds, if not thousands, of miles away. This would allow for the participation, input and information that local parties can provide to the debtor, other creditors and the courts, and enhances the overall bankruptcy process.

The Pacific Gas and Electric Company ("PG&E"), filed in the Northern District of California, shows how local participants can become involved in a bankruptcy case.⁷⁶ The PG&E case was one of the largest utility bankruptcy cases ever to be filed (\$35 billion in assets and approximately 20,000 employees). Immediately upon filing, a small group of homebuilders began meeting and formed an informal committee ("MLX Committee") to address the treatment of claims, deposits and the assumption/rejection of main line extension contracts ("MLX Contracts") needed for the building of new subdivisions. The MLX Contracts were subject to a complicated set of state tariffs on file with the California Public Utilities Commission. The MLX Committee exchanged information, negotiated with the debtor and participated in motion practice that resulted in the assumption of all MLX Contracts (50,000 contracts worth approximately \$90 million). Without the local connections between the homebuilders, local lawyers and the debtor, assumption and payment on the MLX Contracts would have been substantially delayed and possibly jeopardized. This mega case ended with a confirmed plan and a successful reorganized debtor.

Similarly, in the *In re Franklin Park Development I, Inc.* case in the District of Massachusetts,⁷⁷ involving a large housing project, primarily for lower income renters, the judge, along with the trustee, visited the property and the case received significant local press coverage. This court involvement with a highly charged, very local, situation defused tensions in a way that would not have been possible had the case been filed elsewhere.

e. The Centralization of Cases in two Districts Drives Up the Costs of Commercial Bankruptcy Cases.

The professional fees and costs associated with large corporate chapter 11 cases have increasingly been the subject of concern to courts, the Office of the United States Trustee, and creditors. As chapter 11 cases become more concentrated in Delaware and the SDNY, the choice of legal and financial advisors has similarly become concentrated. And it is not only the cost of the debtor's professionals that the estate must bear. The appointed committees' professionals' fees and costs as well as the attorneys and other fees of lenders and bondholders whose contracts include the payment of their legal costs are also paid from the estate.

Senator Charles Grassley suggested in a letter to the Comptroller General of the United States, dated September 9, 2013, that excessive professional fees in chapter 11 cases may be the result of the overwhelming concentration of cases in select venues.⁷⁸ In the letter, Senator Grassley asks that the Government Accountability Office to prepare a report to the Senate Judiciary Committee on, among other questions:

Given recent legislative proposals to tighten venue restrictions for corporate bankruptcy cases[], I ask that the Government Accountability Officer survey a broad range of bankruptcy courts as well as the Department of Justice and other stakeholders to determine whether venue changes could assist in reducing abusive billing practices by professional firms.⁷⁹

Professor Lynn LoPucki⁸⁰ has been studying professional fees and complex business bankruptcy cases for some time. He has published numerous articles and compiled databases on the fees charged and awarded in numerous cases. In *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*,⁸¹ Professor LoPucki posits that lax venue rules are in part responsible for higher professional fees.⁸² As LoPucki put it:

In the 1970s, lawmakers inadvertently conferred on large public companies the right to choose their bankruptcy courts.[] Forum shopping became rampant [] ultimately leading to competition among bankruptcy courts to attract large cases. The professional who influence their clients' choices of courts sought to avoid courts that would limit their fees. This resulted in a pattern of forum shopping to the court in which professional fees are highest.⁸³

While certain of LoPucki's assertions and conclusions on forum shopping have been criticized, it cannot be denied that the overwhelming concentration of chapter 11 cases in two districts may breed complacency among participants with respect to professional fees. Professor Rapoport⁸⁴ in her article *Rethinking Professional Fees in Chapter 11 Cases*⁸⁵ explores the idea that peer pressure among like situated law firms may limit the scrutiny that fee applications

receive and the relative scarcity of fee application objections.⁸⁶ When the same large law firms are in the same two forums playing numerous roles (counsel to debtor, creditor, lender, bondholders) depending on the case, the principal of “what goes around, comes around” limits the amount of scrutiny of fees.⁸⁷

This is not to say that the concentration of large and complex business cases in Delaware and New York are the only reason for increasing fees in chapter 11 cases — certainly the complexity of the case is a driver and the sophistication and complexity of the financing both prepetition and postpetition that is involved in large businesses these days increases the costs. However, it is reasonable to assume that familiarity breeds complacency.

Greater dissemination of chapter 11 cases should inherently reduce the professional fees in cases not only for estate professionals but for all constituents. New York rates, in particular, are the highest in the country. Attorneys outside of large cities generally charge lower rates for their legal services, thereby reducing the overall costs of administering a case in chapter 11 and enabling certain debtors for whom a bankruptcy filing in New York or Delaware is cost-prohibitive to have an opportunity to reorganize instead of liquidate. Moreover, where creditors and others are represented by their regular counsel from elsewhere in the country, Delaware local rules requiring attendance and participation by local counsel at all times create unnecessary duplication and impose unnecessary costs.⁸⁸

f. The Centralization of Cases in Two Districts Results in an Inefficient Use of Judicial Resources.

The United States is divided into 90 federal judicial districts. Permanent judgeships are allocated among districts based largely on population. Because Delaware has relatively few people, it has only one permanent bankruptcy judge (and currently five temporary judges). The Central District of California (Los Angeles) has 21 permanent judges and the Northern District of Illinois (Chicago) has 10 permanent judges. The District of Minnesota has four permanent judges.

Congress has from time-to-time authorized temporary bankruptcy judges for appointments to districts experiencing caseloads disproportionate to their populations. Not surprisingly, five of the 30 current temporary judges have been allocated to Delaware, more than any other state (the SDNY has one temporary judgeship). Through the temporary appointments, federal funds are effectively being shifted away from other more populous districts to support multiple judges in Delaware and the SDNY. The dockets of these courts are bloated not because their citizenry is in any greater need of the bankruptcy system, but rather because of venue shopping by debtors seeking some insulation from employees, vendors, pensioners, and their home communities located far away. Meanwhile, the other 88 districts are underutilized.

The solution is not to take away funding from the 48 states to appoint more judges in Delaware and SDNY. That would merely encourage continued and perhaps an increase in abusive forum shopping. The solution is to enact venue reform, which would require companies to file for bankruptcy protection in their home states. Venue reform would result in a more efficient bankruptcy system. Case volume would more accurately reflect the size and population of a judicial district and lead to a more balanced allocation of chapter 11 cases and resources.

g. Impact on Local Economy.

There is another important consequence that arises out of where a bankruptcy case is filed that cannot be ignored — the financial impact on a local economy when a mid-sized or large company decides to file their chapter 11 bankruptcy case in a different and remote court. The repercussions can be significant.

First, the filing of a significant chapter 11 bankruptcy case generates revenue for a local economy. The case, held over two to three years (and maybe more), will involve large numbers and teams of professionals, creditors and other parties in interest who participate in numerous hearings, adversary proceedings, discovery and fact-finding, related state and federal court litigation and consulting activities all designed to assist the debtor to reorganize or creditors to preserve their rights. The economic activity generated by each bankruptcy filing could be substantial for a community. A recent Bloomberg Businessweek article estimated that the Delaware and the New York City economies would lose a combined total of approximately \$300 million, if the bankruptcy venue statute was amended to eliminate the state of incorporation as an appropriate place to commence a chapter 11 bankruptcy filing.⁸⁹ According to typical convention and visitor bureau benchmarks, these revenues are derived from estimates for expenditures such as overnight hotel rooms, food and beverage purchases, ground transportation, taxes, entertainment, office support services and the renting of conference rooms for business meetings or lodging for extended stays. Our ad hoc group of practitioners is conducting further research to clarify and develop data regarding the economic impact on communities when their companies flee to another jurisdiction to file for bankruptcy protection.

Second and more importantly, is the revenue and wealth that is produced when a company successfully reorganizes, continues and possibly expands its operations with the participation and support of its local constituents. This means that employees remain employed, vendors and other creditors continue to be engaged to assist in the production of goods and/or services by the reorganized company and tax revenues are paid to the appropriate governmental entities. Property values grow and in turn provides sources for more revenues for further development, expenditures and tax receipts. Therefore, a chapter 11 bankruptcy case that is designed to actually reorganize and continue business operations (as opposed to a liquidation or asset sale of substantially all assets) would be significantly more important and vital to a local population and well-being of the local economy. And bankruptcies that are filed where the debtor company is headquartered or where its principal assets are located are more likely to be successfully reorganized as opposed to a bankruptcy case filed in a remote jurisdiction.⁹⁰

VII. Right to Request Change in Venue not the Answer.

Advocates of the status quo frequently point to the availability of the right of a party to seek a change of venue as the solution to forum shopping. As is apparent from the fact that so few cases are transferred, the existing mechanism to move a case filed in an improper or inconvenient forum is inadequate.

a. The High Cost and Heavy Burden of Seeking a Change in Venue.

There is a substantial cost that any creditor would incur to move to change venue in a particular case. While a venue change contest might seem easily handled in a summary manner, some have turned into extended proceedings with evidentiary trials and extensive briefing costing hundreds of thousands of dollars. One example is the *Patriot Coal* case filed in the SDNY.⁹¹ It took the court over four months and 61 pages of ruling to decide a venue challenge involving facts that were largely beyond contest. Based on a review of the interim fee applications filed in the *Patriot Coal* case, it can be estimated that the debtor spent around \$2 million and the creditors an additional \$1 million to litigate the venue challenge.⁹² The court's opinion "demonstrates the near impossibility of having venue transferred away from New York."⁹³

As recognized by earlier commissions that have evaluated this venue abuse problem, few creditors will bother with this fight. It is just too much trouble and too expensive, and the creditor is forced to bear the burden of this cost without recompense, much less prospects for ultimate success.⁹⁴

Further discouraging parties from bringing motions to change venue is the perception that such motions are not likely to be granted, regardless of the strength of the case in favor of moving the case to another court.⁹⁵ As discussed above, the burden is on the creditors to prove that the debtor's choice of venue was inappropriate or not convenient. It is a heavy burden in light of the deference given by courts to the debtor's choice.

The timing of a motion to change venue is also critical and in many instances it is not realistic or practical for average creditors to prosecute a venue challenge in the first days or weeks of a case. First day orders can grant sweeping relief. By the time a motion to change venue would even be considered most of the important first day or "second day" motions relating to DIP financing, sale procedures, break-up fees and the like would have already been entered and have become final. The case would have progressed forward so far and taken such a direction that it bears the indelible imprint of the first court. Such was the case with *Jitney Jungle*.⁹⁶ By the time this case was transferred to New Orleans there was little that the New Orleans bankruptcy judge said that he could do because of the actions taken or orders previously entered in Delaware, where the case was initially filed. Similarly, in *Winn-Dixie*, by the time the Florida judge received the case, so much of substance had already been ordered in the case that there was little the Florida judge could do but administer the orders of the Delaware judge.

Several reported cases have declined to transfer venue, or have delayed the transfer of venue, because too much had already occurred in the case by the time the court ruled on the venue motion. In the *Houghton Mifflin* case, the SDNY found no statutory basis for venue in that court. Nonetheless the court deferred the transfer of venue until after confirmation of the plan.⁹⁷ Notably, although the court found no basis for venue in the SDNY, it chided the United States Trustee for bringing the motion and for not exercising the "prosecutorial discretion" it had to disregard the venue fault in light of the fast pace of the case.

In *In re Enron Corp.*, 274 B.R. 327, 350 (Bankr. S.D.N.Y. 2002), the court stressed the importance of case administration, and the "learning curve" the court acquired in the first month

of the case in denying a motion to change venue filed shortly after the filing of the case. Of course judicial economy and orderly case administration are important goals of the court system, but in the context of a motion to change venue they make the outcome of every change of venue motion a foregone conclusion. In nearly every case the court will have become familiar with the debtor before the time it takes a creditor to file, litigate, and try a motion to change venue.

b. Reliance on Creditors' Committees Is not the Answer.

A recent ABI Review Commission is not the first to review the practice of forum shopping. In response to the National Review Commission in the mid 1990's, the Delaware State Bar Association noted that because Delaware cases usually had creditors' committees represented by experienced committee counsel to protect the interest of individual creditors, remote creditors were protected.⁹⁸

The problem with the Delaware Bar Association's point is that the direct contact most creditors have with a bankruptcy case concern matters for which a committee will provide no help. Claim objections, Section 503(b)(9) claims, preference actions, the assumption or rejection of contracts, stay relief motions, and objections to sales (to protect a particular interest in the item sold, not a general objection) make up most of matters that involve individual creditors. A creditor is on its own in dealing with these issues.

VIII. The Solution.

Venue reform has been the subject of debate for decades. Most recently, the House Judiciary Committee considered passage of the Chapter 11 Bankruptcy Reform Act of 2011 ("H.R. 2533") which was introduced on July 14, 2011 in the United States House of Representatives by Representative Lamar Smith (R-TX) and cosponsored with Representatives Howard Coble (R-NC), Steve Cohen (D-TN), and John Conyers, Jr. (D-MI). The bill tracked the recommendations made by the National Bankruptcy Review Commission in 1998. In summary, H.R. 2533 would have eliminated a debtor's place of incorporation as a basis for venue. In addition, it would have limited the ability of debtors to game the system using the affiliate hook by restricting affiliate filings only to a venue in which a case of a direct or indirect parent (e.g., greater than 50% equity holder) was pending.

The Venue Committee recommends that the Bankruptcy Section of the Minnesota State Bar Association endorse passage of an amendment to 28 U.S.C. §1408 substantially similar to that proposed in H.R. 2533 as follows (underlined text indicates proposed changes):

28 U.S.C. §1408. Venue of cases under title 11

- (a) Except as provided in section 1410 of this title, a case under title 11 may be commenced only in the district court for the district—
 - (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in

the United States, or principal assets in the United States, of such person or entity were located in any other district; or

- (2) in which there is already pending a case under title 11 concerning such person's an affiliate that directly or indirectly owns, controls, is the general partner, or partnership holds 50 percent or more of the outstanding voting securities, of the person or entity that is the subject of such later filed case.
- (b) For the purpose of this Section 1408, the domicile or residence of a person or entity other than an individual shall be the district in which such person or entity has its principal place of business or principal assets in the United States.

IX. Conclusion.

Abusive forum shopping feeds into the perception that the system can be manipulated; that companies seeking chapter 11 relief file in other districts to obtain an advantage over creditors and other parties. This growing perception undermines public confidence in the federal bankruptcy system. Parties who doubt the fairness of the bankruptcy process are less likely to engage in the process and the system will eventually break down.

The issue is not whether a district is more fair or competent than another district. The issue is the perception of unfairness, of a system capable of being manipulated, that has taken root in the minds of bankruptcy practitioners, creditors, employees and the public at large. The integrity of the bankruptcy system is paramount. Amending the venue statute will preserve and strengthen that integrity.

Respectfully Submitted,

Kurt Anderson
James Baillie (co-chair)
Phillip Bohl
James Brand
Mychal Bruggeman
Gregory Burrell
Clint Cutler
Karl Johnson
Steve Kinsella
Lorie A. Klein
Mike McGrath
Ralph Mitchell
Charlie Nelson
Sarah Olson
Michael Rosow (co-chair)
James Rubenstein
David. E Runck
Jacob Sellers
Mary Sieling

¹ Most of this report is drawn from a statement submitted by Douglas B. Rosner, Esq, on behalf of a national ad hoc group of practitioners. We are grateful to Mr. Rosner for his consent in using his statement and to the Commercial Law League of America for its support. Mr. Rosner's report can be found here:

<http://commission.abi.org/sites/default/files/statements/22nov2013/Written-Venue%20Statement-for-ABI-Commission.pdf>. The report was submitted to a commission formed by the American Bankruptcy Institute. That commission made many recommendations for changes in chapter 11. It discussed venue but was unable to take a position for or against venue reform. This is not surprising given that a substantial number of its members practice in Delaware or the Southern District of New York.

² Most of the statistical information is drawn from a study of cases over a ten year period ending in 2012.

³ Associate Professor of Law at Lewis & Clark Law School.

⁴ 46 Conn. L. Review 159 (November 2013).

⁵ *Id.* at 169 (Prof. Parikh's article contains a well-researched explanation of the history of bankruptcy venue laws).

⁶ See, e.g., *In re Hudson River Nov. Corp.*, 59 F.2d 971, 973 (2d Cir. 1932) (finding that corporation had its "residence and domicile" in Delaware, its state of incorporation); *In re R.C. Stanley Shoe Co.*, 8 F. Supp. 681, 683 (D.N.H. 1934) ("[A] corporation may be organized under the laws of one state and have its principal place of business in another state and there be jurisdiction in both states to adjudge the corporation a bankrupt.").

⁷ See *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 166 (1948) ("[T]he 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated.'" (quoting *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449 (1892))).

⁸ Act of June 7, 1934, Ch. 424, § 77B, 48 Stat. 911, 912, *repealed by* Chandler Act, Ch. 575, 52 Stat. 840 (1938).

⁹ H.R. REP. NO. 75-1409, at 40 (1937).

¹⁰ Rule 116(a)(2) stated that:

A petition by or against a corporation or partnership may be filed only in the district where the bankrupt has had its principal place of business or principal assets for the preceding six months or for a longer portion thereof than in any other district, or, if there is no such district, in any district where the bankrupt has property.

¹¹ Comm. on the Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Bankruptcy Rules and Official Forms under Chapters I to VII of the Bankruptcy Act 35 (Comm. Print 1971).

¹² COLLIER ON BANKRUPTCY ¶ 116.03[2] (James W. Moore & Lawrence P. King eds., 14th ed. 1979).

¹³ See 28 U.S.C. § 1472 (later redesignated as 28 U.S.C. § 1408).

¹⁴ *Id.*

¹⁵ See Parikh, *supra*, p. 169.

¹⁶ See *id.* But see *in re Landmark Capital Co.*, 19 B.R. 342, 346 (Bankr. S.D.N.Y.), *aff'd*, 20 B.R. 200 (Bankr. S.D.N.Y. 1982) (bound by the plain language of the 1978 venue statute, court

found that “though it is true that Rule 116(a) of the Bankruptcy Rules eliminated domicile and residence as useful bases for determining venue of a corporation or partnership, Congress did not see fit to carry this scheme forward in new 28 U.S.C. § 1472.”)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *In re Ocean Properties of Delaware, Inc.*, 95 B.R. 304, 305 (Bankr. D. Del. 1988); *In re Del. & Hudson Ry. Co.*, 96 B.R. 467, 467 (Bankr. D. Del. 1988).

²⁰ Parikh, *supra*, p. 188, n. 142.

²¹ 28 U.S.C. § 1391(c)(emphasis added). Compare its predecessor statute: “[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.” 28 U.S.C. § 1391(c) (1948).

²² See REPORT OF THE DELAWARE STATE BAR ASSOCIATION TO THE NATIONAL BANKRUPTCY REVIEW COMMISSION IN SUPPORT OF MAINTAINING EXISTING VENUE CHOICES, pp. 18-19 (1996).

²³ See Exhibit A of Rosner report at

<http://commission.abi.org/sites/default/files/statements/22nov2013/Written-Venue%20Statement-for-ABI-Commission.pdf>

²⁴ Parikh, *supra* at pp. 159, 177-181. In his study, “Megacases” is defined as a public company with \$1.2 billion or more in assets; a debtor was considered to have forum shopped if it did not file in the district where its principal place of business or principal assets were located or if it filed where an affiliate had filed and such affiliate’s assets were miniscule in comparison to the primary debtor’s. *Id.* at pp. 176-177.

²⁵ *Id.* at p. 179.

²⁶ *Id.*

²⁷ See Spreadsheet of Delaware Chapter 11 Cases, Exhibit B to Rosner report, for a list of identified cases. Figures are based on an examination of petitions, schedules and/or first day pleadings. Note that the actual number of cases filed is much larger, but where multiple affiliated companies filed petitions this spreadsheet lists and counts only the lead case among groups of cases that were administratively consolidated in contrast with statistics issued by the Administrative Office of the United States Courts which counts each affiliate as a separate case.

²⁸ See Spreadsheet of SDNY Chapter 11 Cases, Exhibit C to Rosner report, for a list of identified cases. Figures are based on an examination of petitions, schedules and/or first day pleadings. Note that the actual number of cases filed is much larger, but where multiple affiliated companies filed petitions this spreadsheet lists and counts only the lead case among groups of cases that were administratively consolidated in contrast with statistics issued by the Administrative Office of the United States Courts which counts each affiliate as a separate case.

²⁹ See Rosner report, *infra*.

³⁰ See *id.*

³¹ See Rosner report, *infra*.

³² Based on a review of pleadings in 2013 Delaware and SDNY chapter 11 cases.

³³ Parikh, *supra* at p. 180 (Delaware ranked the top venue for forum shoppers).

³⁴ *Id.* at p. 181.

³⁵ See, e.g., Parikh at pp. 193-196 (citing Debra Lyn Bassett, *the Forum Game*, 84 C.A.L. Rev. 333 (2006); Douglas B. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 Yale L.J. 648

(2010); Richard M. Cieri, *Forum Shopping, First Day Orders and Case Management Issues in Bankruptcy*, 1 DePaul Business & Com. L.J. 515 (2003)).

³⁶ *Id.* at p. 193.

³⁷ *Id.* at pp. 194-195.

³⁸ *Id.* at pp. 195-196.

³⁹ See Exhibit B of Rosner report (262 of the 559 out-of-state companies that filed in Delaware between 2003 and 2012 listed assets under \$15 million).

⁴⁰ *In re Manistique Papers, Inc.*, 11-12562 (KJC), D. Del.

⁴¹ *Carey Limousine L.A. Inc.*, 12-12664 (BLS), D. Del.

⁴² *Diversapack of Monroe LLC*, 12-10981 (KG), D. Del.

⁴³ *Cordillera Golf Club LLC*, 12-11893 (CSS), D. Del.

⁴⁴ *Peregrine Financial Corp., Inc.*, 12-27488, N.D. Ill.

⁴⁵ *R.E. Loans, LLC*, 11-35865, N.D. Tex.

⁴⁶ *In re Introcac Inc.*, Case No. 13-11499 (Bankr. D. Del.).

⁴⁷ Parikh, *supra* at p. 197.

⁴⁸ *Id.*

⁴⁹ National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years*, 782 (October 20, 1997).

⁵⁰ Parikh at p. 198.

⁵¹ *Id.* at p. 197.

⁵² *Id.* at p. 197.

⁵³ Peg Brickley, *Patriot's Chapter 11*, WSJ (9/28/12).

⁵⁴ See Bankruptcy Review Commission at pp. 776-778.

⁵⁵ Patricia B. Tomasco and Emilio Nicolas, "Let My People Go...to Delaware": Paupers, Vagabonds and Fugitives from Justice Excepted, XXXII ABI Journal 2, 16-17, 51, March 2013.

⁵⁶ *In re DPI Holding Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.).

⁵⁷ See Ivan Reich, *Making the Case for Bankruptcy Venue Reform*, Florida Bar State - to - State Newsletter (flabaroutofstaters.org), p. 12 (Spring 2013).

⁵⁸ *In re Polaroid Corp.*, Case No. 01-10864 (PJW) (Bankr. D. Del.).

⁵⁹ *In re Evergreen Solar, Inc.*, Case No. 11-12590 (Bankr. D. Del.).

⁶⁰ Testimony of the Hon. Frank J. Bailey, Chief Judge, United States Bankruptcy Court for the District of Massachusetts, Hearing on Chapter 11 Bankruptcy Reform Act of 2011, H.R. 2533, p. 9 (September 8, 2011).

⁶¹ *Id.* at p. 11.

⁶² *Id.* at p. 13.

⁶³ Brickley, *supra*, (WSJ 9/28/12).

⁶⁴ See Testimony of Joe Chiavone, Chief Financial Officer, CPA, Wisenbaker Builder Services, Inc., attached as Exhibit D, at p. 6 (complains that faraway venues "frustrates my ability to participate in the process.").

⁶⁵ See Testimony of Joe Chiavone at p. 4 (expresses frustration that "venue distance is used against us in order to wear down our resolve to dispute claims that we believe lack merit"). See also Testimony of Kathleen Tomlin, CCE, Regional Credit Manager, Central Concrete Supply Co., Inc. at p. 4 (ABI Commission, May 2013) ("it is also distressing that we can be sued in locations like New York and Delaware which are generally far ... from the business location of

the customer.... As a result, some companies agree to pay all or a portion of a preference demand simply to avoid the high costs of defending against a preference claim....”).

⁶⁶ See *id.* at p. 5 (“We sometimes ... agree to pay all or a portion of a preference demand simply to avoid the high costs of defending” in a faraway bankruptcy).

⁶⁷ National Bankruptcy Review Commission, at p. 782.

⁶⁸ Parikh at p. 198.

⁶⁹ *Id.*

⁷⁰ Reich at p. 13.

⁷¹ See Steven B. Levine, et al., *The New Rules of the Game for DIP Financing*, *The Secured Lender*, p. 34 (May 2013).

⁷² See *Id.* at p. 36 (the authors did not mention the concentration of chapter 11 cases as a possible cause, but it is difficult to ignore it as a likely reason).

⁷³ *Id.*

⁷⁴ Elliot Ganz and Allison Hester-Haddad, *DIP Loans: A Common-sense Assessment of “Extraordinary Provisions,”* *The Secured Lender*, p. 34 (October 2013).

⁷⁵ Judge Bailey Testimony, *supra*, at p. 21.

⁷⁶ *In re Pacific Gas and Electric Co.*, Case No. 01-30923 (DM) (Bankr. N.D. Calif.).

⁷⁷ *In re Franklin Park Development I, Inc.*, 86-10721, D. Mass.

⁷⁸ See <https://www.documentcloud.org/documents/784938-bankruptcy-09-09-13-letter-to-gao-fees-in.html>.

⁷⁹ The GAO issued a response in September 2015 that did not precisely answer this question but instead surveyed attorneys, judges and academic literature on the effects of the concentration of large cases in Delaware and SDNY. See Government Accountability Office, Corporate Bankruptcy: Stakeholders Have Mixed Views on Attorney’s Fee Guidelines and Venue Selection for Large Chapter 11 Cases, Report to the Chairman, Committee on the Judiciary, United States Senate, September 23, 2015 available at <http://www.gao.gov/assets/680/672696.pdf>. The questions surveyed relating to venue were of the factors considered in deciding on the appropriate venue for filing. The report also discusses the effects if any of the relatively new fee guidelines for large cases promulgated by the Executive Office of the United States Trustee. The GAO report noted that its survey revealed there were positive and negative reasons for selecting Delaware and SDNY as the venue for large cases as cited in this Report. The positive effects noted in the survey of judges and attorneys included the case experience of judges in Delaware and the SDNY compared to elsewhere and a more developed body of court rulings to provide certainty in how cases will be handled. Negative effects noted included the difficulty in firms outside of these jurisdictions in maintaining their bankruptcy practices and the lack of opportunity for judges elsewhere in the country to develop the law. The GAO report is, unfortunately, of limited utility due to the nature of the survey undertaken. For example, the GAO listed 14 law firms that participated in the survey, based on its ability to identify the firms as having handled large cases that fit within the US Trustee fee guidelines for large cases. Significantly, most of the listed law firms surveyed maintain offices in Delaware or the SDNY or elsewhere in the Northeast corridor, which calls into question the usefulness of the report.

⁸⁰ Security Pacific Bank Professor of Law at the UCLA Law School.

⁸¹ 83 Am. Bankr. L.J. 423 (2009).

⁸² *Id.* at 425.

⁸³ *Id.* at 425-426.

⁸⁴ Nancy B. Rapoport is the Gordon Silver Professor of Law at William S. Boyd School of Law, University of Las Vegas, Nevada.

⁸⁵ J. Business & Technology Law Vol.5, Issue 2, 263 (2010).

⁸⁶ *Id.* at 279.

⁸⁷ *Id.*

⁸⁸ See Testimony of Joe Chiavone at p. 3. See also Tomesco and Nicolas, *supra* at n. 57 (authors question constitutionality of Delaware local counsel requirements).

⁸⁹ McCarty and Milford, "Delaware Bankruptcy Capital Status May End With Proposed Law", BloombergBusinessweek.com (Feb. 10, 2012).

⁹⁰ LoPucki, *Courting Failure*, (Univ. of Michigan 2005), pp. 110-122.

⁹¹ *In re Patriot Coal Corporation*, Case No. 12-12900 (SCC) (Bankr. S.D.N.Y.).

⁹² Although the debtor's counsel's fee statements did not isolate fees incurred just in the venue fight, in a broader fee category labeled "Automatic stay/litigation" the debtor was charged more than \$4.1 million for the months that covered the venue litigation. Assuming generously that just half of that related to venue, and that the movants spent one-half of what the debtor spent on the issue, it still cost the non-debtor movant an estimated million dollars in legal fees to move the case.

⁹³ Bill Rochelle, *Patriot Shows Futility of Moving Cases from NY*, Bloomberg (11/29/12).

⁹⁴ See Testimony of Joe Chiavone at p. 5 (complains that it is too expensive for a vendor to fight "abusive" forum shopping).

⁹⁵ See, e.g. *In re Banning Lewis Ranch Co. LLC*, 10-13445 (Bkrcty. Del. 2010).

⁹⁶ *In re Jitney Jungle*, Case No. 99-3602 (Bankr. D. Del.).

⁹⁷ *In re Houghton Mifflin Harcourt Publishing Co.*, Case No. 12-12171 (RFG), Decision on U.S. Trustee Motion to Transfer Venue of these Cases, (Bankr. S.D.N.Y. June 22, 2012).

⁹⁸ Report of the Delaware State Bar Association, *supra*, at p. 13.