



CLLA HILL DAY

February 26 – 28, 2017

EXAMPLES OF REMOTE BANKRUPTCY FILING PROBLEMS AND PARTIAL LIST OF SUPPORTING ORGANIZATIONS

For decades it has been recognized that giving local parties the opportunity to participate and be heard in a chapter 11 case strengthens the integrity of the judicial system and permits the judge to gain a personal understanding of what is at stake. Here are some examples underscoring these important attributes of local bankruptcies.

1) **In re VeraSun Energy Corporation**. United States Bankruptcy Court, District of Delaware, Case No. 08-12606. Corn farmers are forced individually to argue ethanol contract assumption and rejection issues in a remote Delaware court (approximately 1000 miles away) during a critical phase of their production season. [See, video clip].

2) **In re Solyndra LLC**. United States Bankruptcy Court, District of Delaware, Case No. 11-12799. This involved the bankruptcy of a high profile solar-panel maker that received \$527 million in federal financing and a \$25.1 million tax break from the State of California. Upon filing, the California-based company suspended its manufacturing operations and laid off approximately 1100 employees triggering both Federal and California Worker Adjustment and Retraining Notification Act ("WARN") issues. The employees affected by the mass layoffs resided in California. By fleeing to Delaware, Solyndra made it more expensive and burdensome for these employees to pursue their claims. The result for the employees was an out-of-court settlement of only \$3.5 million (less 33% for their attorneys' contingent fee) on their claim of \$15 million.

3) **In re Perkins & Marie Callender's Inc.** United States Bankruptcy Court, District of Delaware, Case No. 11-11795. The Tennessee-based Debtor filed a motion to reject nunc pro tunc various nonresidential real property leases back to the petition date and in effect, eliminate any basis for landlords to claim post-petition administrative rent. One of the landlords involved was a 74-year old retiree who owned property in Colorado and leased restaurant space to the Debtor. The motion also allowed the Debtor to abandon all personal property and surrender with no further conditions, leaving the landlord with the task to clean up the premises. If the bankruptcy case had been filed in Tennessee where its headquarters were located, the out-of-state landlords would have had an opportunity to join local landlords and negotiate better surrender terms. But due to the distance of the remote court and the time and expense involved in pursuing the matter, the landlord had no choice but to accept the terms imposed by the bankruptcy court.



4) **In re StarTribune**. United States Bankruptcy Court, Southern District of New York, Case No. 09-10244. The Star Tribune, the largest newspaper in the upper Midwest, followed its parent into chapter 11, filing in the Southern District of New York. Both companies were headquartered in Minnesota. Ultimately, the parent's schedules revealed for the first time that it had no contacts with New York and its assets consisted solely of cash in a bank account in Minneapolis and a number of insurance contracts. By then it was too late, as a practical matter to seek a change in venue.

The local unions representing editorial staff and employees, virtually all of whom were in Minnesota, believed that a Minnesota local bankruptcy judge would have had a much better understanding of the role of the newspaper in the community. They feared that the company fled to New York for a reason. Their fears became reality when the debtors promptly moved to reject some of the collective bargaining agreements while continuing to negotiate as to others. Eventually, all of the unions agreed to concessions under the belief that the company would prevail in the bankruptcy court in New York, far removed from the effected employees

5) **In re Patriot Coal Corp.** United States Bankruptcy Court, Southern District of New York, Case No. 12-12900. Debtors owned and operated nine active coal mines in West Virginia and three in Kentucky. The Debtors' corporate headquarters and their executive offices were based in St. Louis, Missouri. To establish venue in New York, Patriot, just one month before the Chapter 11 filings, formed two New York subsidiaries. Notwithstanding the dubious grounds for establishing venue in the SDNY, it took over four months, millions in attorney's fees before the court finally transferred venue to Eastern District of Missouri (the district where its headquarters is located). Reported at **In re Patriot Coal Corp.**, 482 B.R. 718 (Bkrcty. S.D.N.Y. 2012). The Debtors' attempts to file in a jurisdiction far from their employees and retirees sparked angry street demonstrations. *"No one has ever mined an ounce of coal in New York City,"* UMWA International President Cecil Roberts decried in a news release at the time. *"This is a case about coal and coal miners. The people who will be affected by this live in the coalfields. Setting up dummy corporations to cherry-pick a legal venue, like Patriot did, is morally wrong. This case belongs in Charleston, not Manhattan."*

6) **City Sports, Inc.** United States Bankruptcy Court, District of Delaware, Case No. 15-12054. This Massachusetts-based sporting goods retailer filed for bankruptcy protection in Delaware where it was incorporated. The majority of the store locations were in Massachusetts. A consequence of fleeing to Delaware to liquidate its stores was that it gave certain Massachusetts landlords the impression that the outcome of the case was preordained. That perception impacted their willingness to participate in the case in any meaningful way.

7) **La Poloma Generating Company, LLC.** United States Bankruptcy Court, District of Delaware, Case No. 16-12700. This case involved the La Poloma Generating Plant which



is a power plant capable of generating 1022 megawatts on a 400 acre site located in McKittrick, CA (near Los Angeles). Immediately, the problems of a remote court (located 2,765 miles away) surfaced for creditors of the Debtor (20 of the 30 largest unsecured creditors were located in California).

First, was the creditors' committee formation. With a mere 10 days' notice and the uncertainty over which creditors would be invited to sit on the committee, most of the California-based creditors were not able to attend the formation meetings in Delaware. No committee was formed in the case because of a lack of interest.

More importantly, the Debtor had many regulatory issues involving California law that had caused its financial problems. This required specialized knowledge of the law and assistance from local/state officials. This was made more difficult when the bankruptcy case was filed in Delaware, likely at the request of the Debtor's lenders.

8) **In re Integrated Telecom Express, Inc.** 384 F.3d 108 (3d Cir. 2004). The California-based Debtor elected to go out of business, even though it was highly solvent, solely to use the Bankruptcy Code (11 U.S.C. Section 502 (b)(6)) to reduce the landlord's rent claim by about \$20 million, resulting in a surplus distribution to shareholders (\$100 million instead of approximately \$80 million). The Debtor had no contacts with Delaware except that was the state of incorporation. The Debtor chose to file in Delaware to take advantage of favorable legal precedent. Nevertheless, the Debtor's California landlord had the financial ability to challenge the filing. The bankruptcy court in Delaware declined to dismiss the Debtor's case as a bad faith filing, but the Third Circuit eventually reversed. Had the Landlord lacked the resources to persevere in the remote court, the Debtor's attempt to forum shop for a more favorable result would have succeeded.

PARTIAL LIST OF SUPPORTING ORGANIZATIONS

State Bar of California
State Bar of Florida
State Bar of Minnesota
City of Berkeley
National Association of Credit Managers
Boston Bar Association

For further information please contact:

Joseph A. Peiffer, Esq.

Email: joe@peifferlaw.com

Peter C. Califano, Esq.

Email: pcalifano@cwclaw.com

Douglas B. Rosner, Esq.

Email: DRosner@GOULSTONSTORRS.com

Christine E. Baur, Esq.

Email: christine@baurbklaw.com