



CLLA HILL DAY

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BANKRUPTCY VENUE REFORM

1) PROPOSAL

Eliminate the state of incorporation, restrict affiliate filings and establish the debtor's principal place of business as the proper venue for commencing a chapter 11 business bankruptcy case.

Retired Bankruptcy Judge Steven Rhodes (Bankr. E. D. Michigan) recently commented in the *Wall Street Journal* that the current venue law is “the single most significant source of injustice in chapter 11 bankruptcy cases.” The National Association of Credit Managers recently asserted that venue shopping in bankruptcy cases “creates significant obstacles for trade creditors....and increases the cost of participation.” The proposed amendment to 28 USC §1408 attempts to put an end to the rampant forum shopping permitted under the current statutory regime. Although substantively the same as the bipartisan Chapter 11 Bankruptcy Venue Reform Act of 2011 (H.R. 2533) introduced by Representative Lamar Smith (R-TX) and co-sponsored by Representatives John Conyers (D-MI), Howard Coble (R-NC) and Steve Cohen (R-TN), the proposed amendment simplifies the language by using terms defined in the Bankruptcy Code and eliminates critical loopholes. Our proposed changes to the bankruptcy venue statute are attached as **Exhibit A**.

2) BACKGROUND

Forum shopping in bankruptcy has reached epidemic levels. A 2015 GAO Report on *Corporate Bankruptcy – Stakeholders Have Mixed Views on Attorneys; Fee Guidelines and Venue Selection for Large Chapter 11 Cases* (GAO-15-839) confirmed that since 2009 nearly 2/3 of large companies (assets and liabilities of \$50 million or more) filed their chapter 11 cases in venues outside of the district where their principal place of business or principal assets are located. And approximately 90 percent of those companies filed in the District of Delaware or the Southern District of New York. (*Id.*, p.3). Our research tracked these same trends for the years from 2004 through 2016, where 735 chapter 11 bankruptcy cases were filed in the District of Delaware and another 125 chapter 11 bankruptcy cases were filed in the Southern District of New York, each involving a business debtor headquartered in a different state. These cases involved approximately \$1 trillion in assets, over \$2 trillion in debt, 6.3 million creditors and more than 2 million employees, all having their rights administered by courts having no



meaningful connection with the subject debtors. This trend is not limited to large public companies. Almost half of the Delaware cases involved smaller businesses with less than \$15 million in assets at the time of filing. The full report of the research and findings, along with other articles on venue reform can be found at:

http://www.clla.org/resources/venue_reform.cfm

3) WHY VENUE REFORM IS NECESSARY

When troubled companies flee their home states and seek bankruptcy protection in remote jurisdictions, trade creditors, employees, retirees and other parties are disenfranchised, public confidence in the bankruptcy system erodes and local interests are ignored.

- The 1997 National 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. The mass concentration of chapter 11 cases far from a debtor's home state deprives local constituents of their due process and tilts the playing field toward financially sophisticated parties who regularly appear in large bankruptcy cases. The situation has continued to deteriorate over time, leading to a growing level of indifference among creditor, employee and retiree constituents unable to participate actively in a process that directly affects their interests.
- When a disproportionately high number of large and middle market companies flee to Delaware or New York to seek refuge from their creditors, the process appears to be subject to manipulation by large moneyed interests. In the *Patriot Coal* case it was noted by the press that "[I]nders 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". Forum shopping to achieve desired outcomes directly threatens the integrity of the bankruptcy system by eroding public confidence and calling into question the fairness of a bankruptcy system that can be so easily manipulated.
- The consequences of a business bankruptcy are often most profound in the region and community in which the debtor's principal place of business or principal assets are located. The location of the bankruptcy case can have a tremendous impact on the local economy since the reorganization of a distressed company will impact on local jobs and wages for years to come. Trade creditors, employees and retirees' ability to participate in the bankruptcy is limited when the venue of the case is located thousands of miles away in a remote courtroom. In contrast, when a company stays home to reorganize, all parties can participate and the local economy can retain the more immediate economic benefits of remaining



in the debtor's headquarter city. Based on estimates from *Bloomberg Businessweek* (February 12, 2012), the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly \$4 billion from local economies.

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EXHIBIT A

PROPOSED CHANGES TO VENUE STATUTE

§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,~~ in which the domicile or residence in the United States of an individual who is the subject of such case has 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 or residence of the individual was located in any other district;
 - (2) ~~in which the principal assets or principal place of business in the United States, or principal assets in the United States, of the~~ of a person or entity, other than an individual, 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; ~~or principal assets in the United States;~~ of such person or entity were located in any other district; or
 - (23) ~~in which there is already pending a case under title 11 concerning such person's affiliate, general partner, or partnership.~~ an affiliate that directly or indirectly owns, controls, is the general partner, or holds 50 percent or more of the outstanding voting securities, of the person or entity that is the subject of such later filed case; provided, however, that such pending case was properly filed in that district under this section 1408.
- (b) For the purpose of this section 1408 –
- (1) the principal assets of a person or entity, other than an individual, shall not include cash and cash equivalents;
 - (2) in the case of a person or entity subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, as amended, and the regulations thereunder, the principal place of business shall be deemed to be the address of its principal executive offices as stated in the last annual report filed under that Act prior to the commencement of a case under title 11 by such person or entity, unless the contrary is shown to be true by a preponderance of the evidence presented; and
 - (3) the burden of establishing that venue is proper in the district in which a case under title 11 is commenced shall be on the person or entity that is the subject of such case.