National Conference of Bankruptcy Judges

November 27, 2018

NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases

Special Committee Members:

Hon. Terrence L. Michael, (Chair)
United States Bankruptcy Court for the Northern District of Oklahoma

Hon. Nancy V. Alquist
United States Bankruptcy Court for the District of Maryland

Hon. Daniel P. Collins
United States Bankruptcy Court for the District of Arizona

Hon. Dennis R. Dow
United States Bankruptcy Court for the Western District of Missouri

Hon. Joan N. Feeney
United States Bankruptcy Court for the District of Massachusetts

Hon. Frank J. Santoro
United States Bankruptcy Court for the Eastern District of Virginia

Hon. Mary F. Walrath
United States Bankruptcy Court for the District of Delaware

NCBJ Special Committee on Venue:

Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases

Table of Contents

PART I: INTRODUCTION

The National Conference of Bankruptcy Judges ("NCBJ") is a voluntary association of United States Bankruptcy Judges, comprised of approximately 82% of the nation's active and recalled bankruptcy judges.[1] The purpose of the NCBJ is:

> To provide continuing legal education to judges, lawyers, and other involved professionals, to promote cooperation among bankruptcy judges, to secure a greater degree of quality and uniformity in the administration of the Bankruptcy system and to improve the administration of bankruptcy law in the United States.[2]

In early 2018, bipartisan legislation to revise the venue provisions for the filing of bankruptcy cases was introduced by Senators John Cornyn (R-Texas) and Elizabeth Warren (D-Mass.). Under the "Bankruptcy Venue Reform Act of 2018," S. 2282, the existing bankruptcy law pertaining to venue for filing cases would change in two principal ways.

First, the bill would require an entity to file bankruptcy in the venue in which the entity's headquarters or principal assets are located. The bill would eliminate the provisions in existing law that also permit entities to file bankruptcy where the business is incorporated, regardless of the location of its place of business or assets.

Second, in the case of a group of entities wishing to file multiple bankruptcy cases in a single venue, the bill would allow the affiliate group to file all cases in the venue proper for the parent. The bill would eliminate the current ability of a group of entities to file their bankruptcies in the place of incorporation of any affiliate.

This Committee was tasked by the NCBJ Board with producing a paper presenting the current arguments, literature, and other source material pertinent to the venue issue, that would serve as a resource to NCBJ members and other interested stakeholders. The Committee was instructed that it should not articulate recommendations with respect to the complex issues presented but should leave those conclusions or recommendations to the individual reader.

Whether one is a proponent of venue change or a proponent of the status quo, there is little debate that the existing venue law has resulted in a concentration of filing of large entity bankruptcy cases (primarily chapter 11 reorganizations) in the bankruptcy courts for the District of Delaware and the Southern District of New York (the "magnet courts"). Most of the arguments about venue change focus on whether the concentrated filings in these two magnet courts is a bad outcome or an appropriate one. One side views the legislation as

positive and much needed "reform," while the other side sees it as the unnecessary "restriction of venue choices" that should remain available to debtors and creditors. These positions are explored, respectively, in Part IV and Part V of this paper.

The Committee hopes that this paper will contribute to a greater understanding of the issues raised in the current discussion on bankruptcy venue and forum selection.

PART II: STATEMENT OF THE ISSUE

From the outset, defining the issue itself has proven to be a difficult task. While the issue of venue impacts all chapter 11 cases, the ongoing debate centers primarily around venue selection in large chapter 11 cases. No one disputes that venue selection in these large cases is consistent with existing law. The concern underlying criticisms of the current system is more subjective or normative. Critics are concerned not that the law is being disregarded, but rather that it is being exploited by certain actors in the system.

This paper highlights concerns regarding the impact of the venue selection issue on some of the primary pillars of the American legal system. Equal access to justice, the independence of the judiciary, the public perception of the integrity of the judicial system, and the efficacy of the adversary system are each implicated in a direct and palpable way in this discussion.

As this thoughtful debate continues, bankruptcy judges must remain mindful of their special status in the American system of government and their accepted limits of both power and influence on matters of policy that the Constitution plainly submits ultimately to the province of Congress. The role of federal judicial officers demands that judges tread with great care and

caution in debated policy matters which some might honestly believe transcends the legitimate interest of the judiciary in providing information to Congress as to how potential legislation may affect the administration of justice in the courts.

However, bankruptcy judges can and should engage in dialogue and action that advances the overarching debate on venue selection in view of the NCBJ's purpose of promoting cooperation among bankruptcy judges and its goal of improving the administration of bankruptcy law in the United States.

PART III: THE HISTORY OF BANKRUPTCY VENUE STATUTES AND A SUMMARY OF CASE LAW

A. History

A review of the history of venue statutes reveals little controversy on the issue. The first comprehensive law dealing with bankruptcy cases was the Bankruptcy Act of 1898 (the "Bankruptcy Act").[3] Section 2 of the Bankruptcy Act governed both the jurisdiction and the venue of bankruptcy cases.

> [T]he courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by the courts of competent jurisdiction without the United States and have property within their jurisdictions . . . .[4]

The term "domicile" was undefined in the Bankruptcy Act as enacted in 1898. At least one court facing the issue noted its belief that the state of incorporation was the domicile of that corporation.[5] In another decision, a court found that the state of incorporation was the domicile of the corporation because the laws of the state of incorporation (Missouri) required all corporations organized under Missouri law "to have and keep a general office for the transaction of business, and to have and keep that office within the state of Missouri."[6]

Between 1898 and 1933, the issue of whether a corporation's state of incorporation qualified as its domicile was not heavily litigated. In cases prior to 1933, the issue was not raised as one of venue, but rather of the court's jurisdiction to adjudicate the debtor as a bankrupt.[7] Those published decisions focused on a determination of the corporate debtor's "principal place of business."[8]

In 1934, Congress added a provision specifying proper venue for filing corporate reorganizations:

> The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal place of business or its principal assets, or in any territorial jurisdiction in the State in which it was incorporated. The court shall upon petition transfer such proceedings to the

> territorial jurisdiction where the interests of all the parties will be best subserved.[9]

Under this statute, a corporation was clearly entitled to seek bankruptcy protection in its state of incorporation.

In 1938, the Chandler Act created two alternatives for corporate bankruptcy cases: Chapter X (designed for public companies) and Chapter XI.[10] The Chandler Act restricted venue for corporations that filed under Chapter X to their principal place of business or the location of their principal assets, but left state of incorporation as a venue choice for corporations filing under Chapter XI.[11] Thereafter, some corporations eligible to file under Chapter X elected to file under Chapter XI.[12] The Supreme Court affirmed the ability of a corporation to make such an election.[13]

In 1973, the Supreme Court enacted Bankruptcy Rule 116(a)(1) and (2) which provided:

> (*a*) *Proper Venue.*
>
> *(1) Natural Person.* A petition by or against a natural person may be filed in the district where the bankrupt has had his principal place of business, residence, or domicile for the preceding 6 months or for a longer portion thereof than in any other district. A petition by or against a natural person who has had no principal place of business, residence, or domicile within the United States during the preceding 6 months may be filed in a district wherein he has property.

> *(2) Corporation or Partnership.* A petition by or against a corporation or partnership may be filed in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the bankrupt has property.[14]

This rule eliminated the domicile of a corporation as a place where proper venue existed for its bankruptcy case, regardless of the chapter. This rule remained in place until the passage of the Bankruptcy Code in 1978.

The enactment of the Bankruptcy Code in 1978 contained a new venue statute, 28 U.S.C. § 1472:

> § 1472. Venue of cases under title 11.
>
> Except as provided in section 1474 of this title, a case under title 11 may be commenced in the bankruptcy court for a 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 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, principal place of business, in the United States, or principle (sic) assets, in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.[15]

In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984,[16] which moved the venue statute from 28 U.S.C. § 1472 to 28 U.S.C. § 1408. The operative provisions remain unchanged.

B. Case Law

The venue statute applies in chapter 7, 9, 11, 12 and 13 cases, as well as involuntary cases filed under 11 U.S.C. § 303.[17]

In simple terms, 28 U.S.C. § 1408 (1) provides four possible locations where an entity or individual can file for bankruptcy protection: 1) the debtor's domicile, 2) the debtor's residence, 3) the location of the debtor's principal place of business, or 4) the location of the debtor's principal assets. Any one of the four is sufficient.[18] The relevant time period in this context is the 180 days preceding the commencement of the case, or for a longer portion of the 180-day period than in any other district.[19]

1. Corporations

a. Principal Place of Business

A corporate debtor's principal place of business for venue purposes is a question of fact to be determined upon

consideration of all relative facts and circumstances.[20] In a non-bankruptcy context, the leading authority in determining the location of a corporation's principal place of business is *Hertz Corp. v. Friend*[21] in which the Supreme Court concluded:

> 'principal place of business' is best read as referring to the place where the corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters - provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meeting (for example, attended by directors and officers who have traveled there for the occasion).[22]

As stated in *In re Standard Tank Cleaning Corp.*,[23] a corporation's principal place of business is the place where general supervision is given. This is not necessarily where the managers, or controlling shareholders or directors, happen to be located or meet.[24]

b. Principal Assets

The principal assets of a corporation are those assets principally used in the operation of the debtor's business or put another way, the debtor's significant assets.[25]

c. Domicile

A corporation's domicile is generally held to be its state of incorporation.[26] In the non-bankruptcy context of district court venue generally, a different view of what constitutes a corporation's residence is provided by 28 U.S.C. **§** 1391 which does not allow venue based on a corporation's state of incorporation:

> For all venue purposes ... an entity with the capacity to sue and be sued, ... whether or not incorporated, 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.[27]

d. Affiliates Under 28 U.S.C.**§ 1408(2)**

An alternative venue is provided for cases involving affiliates of a person or entity already subject to a case under title 11. It is permissive; there is no requirement that a case must be filed in the district in which an affiliate's case is pending. Although the term "affiliate" is not defined in title 28, the term undoubtedly has the meaning ascribed to it in 11 U.S.C. § 101(2).

e. Change of Venue

i. Statutory Considerations

Pursuant to 28 U.S.C. § 1412, "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." The considerations of this section are disjunctive and transfer is appropriate even if only one is met.[28] Section 1412 has to do double duty; that is, it applies to properly venued cases and proceedings and to improperly venued cases and proceedings.[29]

ii. Burden of Proof

The party moving for change of venue has the burden of proof. The burden of proof is usually determined to be carried by a preponderance of the evidence but at least one court has found the burden to require clear and convincing proof.[30] Further, a presumption has developed that adversary proceedings should be tried in the "home" court, *i.e.*, where the bankruptcy case is pending.[31]

iii. Timing

A motion for change of venue must be timely filed. What constitutes a timely filing is not governed by a statutory or rule definition.[32] Rather, the timeliness of a motion to change venue depends on the facts and circumstances presented in the

particular case.[33] Failure to raise the issue in a timely manner results in a waiver of any objection to venue.[34]

iv. Dismissal or Transfer of Filing in a Proper District

The dismissal and transfer of title 11 cases filed in a proper district is addressed in Federal Rule of Bankruptcy Procedure 1014(a)(1). It provides:

> If a petition is filed in a proper district, the court on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

v. Interest of Justice

Whether a case will be transferred is determined on a case-by-case basis.[35] Criteria courts have considered in determining whether a transfer is in the "interest of justice" include:

(1) Whether transfer will promote economic and efficient administration of the estate;
(2) whether interests of judicial economy will be served;
(3) whether parties will be able to receive a fair trial;
(4) whether either forum has an interest in having the controversy decided in its borders;
(5) the enforceability of any judgment; and
(6) whether the original forum should be disturbed.[36]

vi. Convenience of Parties

Under the prong "convenience of the parties," the six factors most commonly analyzed by courts are:

(1) the proximity of creditors of every kind to the court;
(2) the proximity of the debtor;
(3) the proximity of witnesses necessary to the administration of the estate;
(4) the location of the assets;
(5) the economic administration of the estate; and
(6) the necessity for ancillary administration if liquidation should result.[37]

The convenience of the debtor's counsel or other professionals is not a proper factor to take into account.[38] However, the debtor's choice of venue is sometimes taken into consideration.[39]

The formula is not always as simple as reviewing objective facts about the location of creditors or assets which lead to a conclusion. From time to time, courts look to additional factors such as the opposition to the motion, the familiarity of the judge with the local market, and the availability of technology to bridge the distance.[40]

vii. Improper Venue Selected

Bankruptcy Rule 1014 continues to be effective and authorizes a change of venue if the venue selected is improper.[41] There is a split of authority on whether a court can retain the case if it is filed in an improper venue. The majority view is that if venue is contested and found to be improper, a

bankruptcy court may not retain the case.[42] Some courts, however, have reached the opposite conclusion.[43]

PART IV: AN ANALYSIS OF THE REASONS TO CHANGE THE CURRENT VENUE LAWS

A. Synopsis of Position

Part IV discusses the numerous arguments in favor of changing the venue provisions of current bankruptcy law, which are set forth in 28 U.S.C. § 1408[44] and give entities several options in selecting venue for a chapter 11 case.

The Bankruptcy Code's venue provisions enable a debtor that is a business entity to choose the venue for its case. As has been stated, a debtor commencing a chapter 11 case may select a venue that is its state of incorporation, its principal place of business or location of its assets, or the venue where an affiliate's case is pending.[45] The debtor nearly always selects the forum for a chapter 11 case. In the majority of large cases, strategic use of venue options, based on both objective and subjective factors, is prevalent.[46] Forum shopping in bankruptcy cases has become a well-established feature of business bankruptcy practice,[47] and has been criticized as a fundamental problem in the bankruptcy system:

> At its core, forum shopping has divorced modern bankruptcy practice from traditional historical principles underlying the bankruptcy system and venue itself. Large bankruptcies now cater almost exclusively to the wishes of power players, to the detriment of smaller stakeholders who would have a better chance of getting their views heard if the

> bankruptcy proceedings happened close to home. Further, many stakeholders in these bankruptcy cases are effectively deprived of notice and an opportunity to participate, in contravention of fundamental due process and fairness principles.[48]

This section of the paper explores the following advantages of venue reform:

1) Venue reform will promote public confidence in the integrity of the bankruptcy process and the United States Courts. Current venue selection options and the concentration of large chapter 11 cases in two districts create the perception that the bankruptcy process can be manipulated to obtain strategic advantages.
2) Venue reform will further the development of uniform national bankruptcy law on significant issues arising in complex business cases. The current concentration of cases in two districts limits decisions in important commercial cases to the magnet courts and further confines appellate review to the intermediate appellate courts in those districts and Courts of Appeals in two circuits.
3) Venue reform will further the intent of Congress in establishing nationwide bankruptcy courts which

administer all types of cases in all districts. In enacting the Bankruptcy Code and designing venue selection options, Congress did not intend for just one or two districts to handle the vast majority of large business chapter 11 cases and did not intend to establish a national business bankruptcy court for large, complex chapter 11 cases.

4) Venue reform will promote access to justice for all parties in large business chapter 11 cases. Current venue selection provisions and the concentration of large chapter 11 cases in two districts disenfranchises creditors, employees, and other parties in interest from the bankruptcy process and discourages and makes it difficult for them to participate in cases affecting their interests because the proceedings may be thousands of miles away from the debtor's management and community.

5) Venue reform will lead to the more efficient allocation of judicial resources, including the utilization of experienced and qualified judges in districts other than the districts of the two magnet courts. These other courts are particularly knowledgeable on state law issues frequently arising

in the bankruptcy cases of business debtors located in their districts. Venue reform will also result in more useful and cost-effective allocation of administrative resources to clerks' offices in all judicial districts.

6) Venue reform may assist in reducing administrative expenses in chapter 11 cases, in particular professionals' fees, as the current system and concentration of large chapter 11 cases in two districts requires the necessity of employment of duplicative local counsel and other duplicative professionals, and the cost of travel to the magnet courts for the professionals who may regularly be used by the debtors and stakeholders in the cases.

7) Venue reform is in the interests of local economies and bankruptcy professionals in the communities of the principal place of business of chapter 11 debtors. Local communities and bankruptcy professionals currently incur substantial revenue and experiential opportunity losses from the concentration of large chapter 11 cases in two districts.

B. Background of the Venue Problem

1. Historical Background

Venue is about the location of a lawsuit or a case, as opposed to jurisdiction which relates to a court's ability to adjudicate a dispute.[49] An optimal venue is a forum that is " . . . closest to, most knowledgeable about, or most accessible to the litigants."[50] Outside of bankruptcy, primarily in civil actions, a plaintiff chooses the venue for an action; however, a corporate plaintiff is not permitted to commence an action based on the plaintiff's state of incorporation.[51] In a bankruptcy case, the debtor chooses the venue, subject to a court's ability to transfer venue if transfer is in the interest of justice or for the convenience of the parties.[52] The optimal venue for a large business bankruptcy case is more complicated than venue in typical civil actions or bankruptcy cases of individuals, who must file in the district in which they reside,[53] because the case involves multiple parties in interest in many different locations.

Historically, the bankruptcy law's venue provisions for business bankruptcy cases have vacillated. Many of the changes in laws have gone unexplained, leading to uncertainty about venue provisions.[54]

Under the Bankruptcy Act, a business debtor was required to file a bankruptcy petition in the place where it had its principal place of business or where it had its domicile, which led courts to rule that a corporation could file a petition in the state of incorporation.[55]

The Chandler Act significantly changed the venue provisions for large corporate debtors with public debt, and restricted a debtor to filing a chapter X reorganization case in a jurisdiction where the debtor had its principal place of business or principal assets.[56] The House Report to the bill explained that limiting the venue of those cases to the principal place of business or location of principal assets was in the interests of investors and avoided the manipulations of forum shopping:

> 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 appeal 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 a 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.[57]

The limitation of venue to principal place of business or assets was incorporated in the Rules of Bankruptcy Procedure promulgated by the Supreme Court of the United States in 1973. Rule 116 provided that corporate debtors must file a bankruptcy petition only in a district where the debtor had its principal place of business or assets or if there was no such district in any district where the bankrupt had property.[58] The Advisory Committee Note indicates that the rule was intended to reject state of incorporation as proper venue as it "[had] no relation to business activity of the Corporation. . . . "[59]

The Bankruptcy Reform Act of 1978, as amended by the Bankruptcy and Federal Judgeships Act of 1984, streamlined the venue provisions by providing a single section that applies to all types of debtors,[60] but there is no indication in the legislative history of the reasons for the conflation of the venue provisions for natural persons and businesses.[61]

In the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress enacted 28 U.S.C. § 1408, codifying the numerous venue options as set forth at the outset of this section. As a result, debtors have relied on state of incorporation and the pendency of an affiliate's case as a proper venue despite having

no other contacts with a jurisdiction. "The bankruptcy venue [law] as currently written turns . . . venue principles on their head. It focuses on the convenience of the debtor who alone chooses where to file its case, rather than on the convenience of the creditors who are forced to deal with the debtor at its chosen place of filing."[62]

2. Evolution of the Venue Problem

Current venue rules give "corporate debtors . . . the option of filing just about anywhere . . . [D]ecision-makers . . . can easily change states of incorporation, move assets and offices, or make other maneuvers to facilitate a filing in their chosen district. These are the consequences of permissive venue rules."[63] The Bankruptcy Code's permissive venue provisions have resulted in a distribution of large cases in two districts. The overwhelming majority, between 60 and 70 percent of all large chapter 11 cases, are commenced in bankruptcy courts in the District of Delaware and the Southern District of New York, the magnet courts.[64] The selection of these venues ". . . often appears to bear no meaningful relationship to the business, its operations, its financial difficulties, or its stakeholders."[65]

The issue of forum shopping and the concentration of large chapter 11 cases in the two magnet districts first came to light in the early 1990s.[66] The controversy about forum shopping has

existed for decades and the phenomenon has grown to larger proportions in recent years. It is still unclear why the majority of large chapter 11 cases file in the District of Delaware and the Southern District of New York as there is a dearth of objective data and research on the reasons that drive venue decisions.

During the late 1980s, most large chapter 11 cases were commenced in the Southern District of New York. For example, in 1989, Eastern Airlines, which was headquartered in Florida, filed its chapter 11 case in New York. It established its venue there, however, through the chapter 11 filing of one of its minor affiliates, Ionosphere Club, which had a New York office.

The so-called affiliate filing practice increased in prevalence thereafter. Forum shopping became a controversial practice in the 1990s with the rise of the District of Delaware as a magnet court for chapter 11 filings. Critics of the bankruptcy venue rules began calling for reform. The chapter 11 cases of Enron, Worldcom, General Motors, and the Los Angeles Dodgers, were all commenced and handled by the magnet courts while their headquarters and business operations were elsewhere. These cases have long been cited as examples of abuse of the bankruptcy venue process. These and more recent cases have fueled the sentiment for reform.[67]

Venue selection decisions are made by lawyers and executives, often in consultation with large creditors. Although a number of lawyers who were interviewed in a study by the U.S. Government Accountability Office expressed the view that the combination of judicial expertise and legal precedent make the process more predictable and efficient in the magnet courts,[68] critics of the current system have maintained that predictability is a doubtful reason for forum shopping because the Bankruptcy Code is uniform; rather they contend that predictability is a euphemism for the self-interest of the lawyers and lenders who dominate bankruptcy practice because it is more geographically convenient for them to represent their clients in the magnet courts.[69] Other critics ascribe more sinister motives to forum shopping. Professor Lynn M. LoPucki and others posit that companies file in Delaware and New York because those courts favor management and lender interests, and because they more readily approve the fees of bankruptcy professionals than other jurisdictions.[70] Professor LoPucki also theorizes that judges in the magnet courts are complicit in forum shopping in their decisions and procedures, which are aimed to attract high profile cases to their districts for egotistical or more sinister reasons.[71] As is made clear throughout this paper, the NCBJ rejects any notion that any

bankruptcy judges make decisions not supported by the facts and law or act with improper motives.

Twenty years ago, the National Bankruptcy Review Commission found that bankruptcy venue provisions resulted in forum shopping and manipulation that gave rise to a perception of injustice and unfairness.[72] Current critics of the system are vocal, and many believe the problems arising from venue selection are growing. "[F]orum shopping is still a systemic issue in bankruptcy."[73] Indeed, from 2007 to 2012, "the forum shopping phenomenon "was actually amplified" with seven out of ten corporate debtors studied by Professor Parikh having venue shopped.[74] Venue shopping has spread to middle market and smaller cases, including real estate cases and chapter 7 business cases.[75] According to Judge Steven Rhodes, the bankruptcy judge (now retired) who presided over the City of Detroit case, "[the] current bankruptcy venue law is the single most significant source of injustice in chapter 11 cases."[76]

Empirical and anecdotal evidence of venue shopping is ample. The bankruptcy system has evolved to the point where most large and mid-size chapter 11 cases are commenced in the District of Delaware or Southern District of New York.[77] The Administrative Office of the United States Courts publishes case statistics according to type of case, but it does not publish

statistics on the size of businesses commencing chapter 11 cases, and therefore samples of large business cases must be collected in a random fashion. An ad hoc group of bankruptcy practitioners and a law professor collected such data and reported in 2013 that venue shopping to Delaware or New York was epidemic. They reported that 80 percent of "mega cases" were filed in those two jurisdictions, 88 percent relying on the state of incorporation or affiliate venue options. Seventeen percent of all chapter 11 cases filed in the nation are commenced in those districts. Moreover, in 2013, most debtors filing in Delaware identified other districts as the location of their principal place of business.[78]

Several reasons are cited by certain bankruptcy professionals and academics for maintenance of the current permissible venue provisions: 1) favorable law in a particular jurisdiction; 2) different levels of knowledge and experience among bankruptcy judges; 3) procedural or administrative benefits in a particular jurisdiction.[79] These arguments are patently appealing, but they are not documented with evidence, as there has not been a statistical study of the motivations for debtors' attorneys recommending the commencement of chapter 11 cases in the magnet jurisdictions.

Selection of a venue due to favorable legal precedent may be a legitimate reason for a business commencing its chapter 11 case outside of its principal location despite an absence of ties where resolution of a legal issue is central to the case.[80] Moreover the magnet courts have developed special expertise in the handling of large chapter 11 cases. However, these reasons are self-fulfilling prophecies that are harmful to the bankruptcy system. If the current concentration of large chapter 11 cases continues, there will be two, de facto, national bankruptcy courts, a system which Congress did not envision and which is not in the interests of the bankruptcy system as a whole.

Evidence submitted by critics of the current system to the American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter 11 suggests that debtors use the current venue rules to file in distant locations for illegitimate reasons, including the disenfranchisement of parties in the communities where a debtor's operations matter the most.[81] The Wall Street Journal has described the reason as one of convenience for lawyers and lenders: "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."[82] This theory has support in the scant

available data. "Indeed, a small pool of law firms are involved in the venue decision for the vast majority of high-profile bankruptcy cases."[83] In studying bankruptcy practice in the 1970s, and ultimately in enacting the Bankruptcy Reform Act of 1978, Congress intended to eliminate the perception that there was a "bankruptcy ring" of professionals controlling bankruptcy practice.[84] The current climate of venue shopping by a small group of professionals reinstitutes that untoward perception.

Recently, Senator Elizabeth Warren (D-Mass.), one of the sponsors of the bipartisan venue reform bill, S. 2282, and a former bankruptcy scholar at the Harvard Law School, emphasized the need for venue reform, pointing to the *Boston Herald* bankruptcy case as a premier example of venue abuse.[85] The Herald, one of Boston's two newspapers of general circulation, with over 200 employees, filed for chapter 11 in Delaware although all of the newspaper's employees, retirees, and suppliers, are located in Boston. Senator Warren theorized that companies ". . . run away from home to put as much distance as they can between themselves and their communities . . . in an effort to keep creditors and employees in the [local] community away from the proceedings."[86] Noting that Boston has a bankruptcy court with "excellent bankruptcy judges," Senator Warren dismissed the argument that the magnet courts have

"specialized expertise" in big business bankruptcies as a euphemism for "more favorable legal precedents that line up with the interests of corporate management."[87]

C. Venue Reform will Promote the Integrity of and Public Confidence in the Bankruptcy System and the Federal Judiciary.

Venue reform would ensure the integrity of the bankruptcy system and eliminate manipulation in the selection of venue in large chapter 11 cases.[88] The concentration of large chapter 11 cases in two districts undermines and threatens the integrity of the bankruptcy system and erodes public confidence in the judiciary.[89]

Twenty years ago, the National Bankruptcy Review Commission found that the Bankruptcy Code's venue provisions, which remain the same today, result in forum shopping which undermines "the fairness--real or perceived--of the bankruptcy system."[90] "The process appears to be manipulable."[91] "When companies flee their home state and seek refuge in another jurisdiction, it appears the process can be manipulated."[92]

These findings and observations remain relevant today. Indeed, bankruptcy venue shopping in large cases has amplified since first identified in the 1990s and continues to plague the system.[93] Forum shopping results in "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."[94] The appearance "that the deck is stacked in favor of debtors and the institutional players erodes public confidence and calls into question the fairness of the bankruptcy system."[95] "At the heart of the question about venue reform is a question about the integrity of the bankruptcy system. If bankruptcy is to remain an accessible system to all parties, changes to bankruptcy venue are . . . necessary."[96]

Many scholars and experts in bankruptcy law believe that venue shopping and the concentration of large chapter 11 cases in two districts is a problem.[97] Several witnesses who testified before the ABI Commission to Study the Reform of Chapter 11 in public hearings held between 2012 and 2014 expressed the view that "venue choice has a negative impact on judicial legitimacy."[98] "The Honorable Steven Rhodes of the U.S. Bankruptcy Court for the Eastern District of Michigan [Ret.] has stated that venue choice has a negative impact on the judicial legitimacy, especially when it prevents or impairs the meaningful participation of any of the parties, ultimately undermining the integrity of the adjudication process itself."[99] Another well-known expert witness similarly observed, "[t]he unspoken but implicit message in a filing across the country from home base is that nobody counts but the lenders and the

debtor's management."[100] In a written statement submitted to the ABI Commission, University of Texas Professor Lawrence J. Westbrook argued that bankruptcy cases should be heard in the business's community to increase the transparency of the proceedings and ultimately to improve the administration of justice, or at least the appearance of it. [101]

A number of lawyers have conceded that they select certain venues for large chapter 11 cases because the judges have "developed reputations for being pro-debtor and for favoring financial institutions in disputes against creditors. . . ."[102] Corporate executives and boards also have expressed the view that the bankruptcy judges in those jurisdictions are more business friendly and predictable.[103] "The perception is that the deck is stacked in favor of debtors and the institutional players."[104] According to the former president of the Commercial Law League of America, venue shopping reduces legal discourse in favor of predictability of outcome, and consequently constituents of the bankruptcy system and the general public "become more disillusioned and indifferent."[105] "Manipulation of bankruptcy venue rules contributes to a perception that in many bankruptcy cases, the outcome is predetermined, and parties are helpless to reverse the tide of decisions by the very largest players."[106]

Although it is difficult to measure the erosion in public confidence resulting from venue selection, when seven out of ten large cases are filed in the magnet courts, the conclusion seems inescapable that cynicism is increasing and public confidence in the bankruptcy system is decreasing.[107] Venue reform will increase the appearance of fairness and promote public confidence in the bankruptcy system and the federal courts.

D. The Concentration of Large Chapter 11 Cases in Two Jurisdictions Inhibits the Development of Uniform, National Bankruptcy Law on Legal Issues Arising in Complex Business Cases.

In 1997, the National Bankruptcy Review Commission made the following findings:

> There is no doubt that uniformity of legal interpretation and application are desirable. More importantly, a cornerstone of our judicial system is that the law be subject to a variety of interpretations at the trial level and made uniformly applicable by the courts of appeals and the Supreme Court. But when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down. There may be no need to make substantive law reform; there may be a need to prevent one or two judges from making national law. Deleting state of incorporation as a venue option increases the number of courts that can decide important issues, and the number of appellate courts that can eventually exercise review over those decisions. Ultimately, this approach is more likely to yield thoughtful decision making and policy applicable to big cases.[108]

The concentration of chapter 11 cases in two magnet courts has continued and has resulted in those courts controlling the creation and evolution of chapter 11 bankruptcy law in the United States. Their decisions are final if not appealed. Moreover, the decision of a magnet court is subject only to appellate review by select intermediate appellate courts, and courts of appeal in only two circuits. Consequently, these decisions may be reinforced by recurring application to cases filed in the same district and assigned to the same judges.[109]

A past President of the Commercial Law League of America has observed:

> The concentration of business filings in Delaware and SDNY has 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 . . . ." When decisions are made by a select few judges, the system breaks down. "Without discourse the review process ceases." Debtors may be selecting Delaware and the SDNY [sic] 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.

> 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. . . . By many accounts extraordinary DIP financing terms [required by lenders] became customary after 2009 when financing was readily accessible. . . . 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. . . .
>
> 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 around the nation. Venue reform would help achieve this goal by spreading chapter 11 cases more evenly around the country.[110]

The bankruptcy system, like the federal judicial system as a whole, benefits from the decisions of bankruptcy judges from different jurisdictions and from the appellate decisions from different intermediate appellate courts and different courts of appeals on bankruptcy issues.[111] The concentration of large chapter 11 cases in two jurisdictions impairs the full development of bankruptcy law in the United States. Venue reform would result in cases being filed in districts throughout

the United States and would contribute to the development of bankruptcy law throughout these courts.

E. Venue Reform Will Further the Intent of Congress in Establishing a Nationwide Bankruptcy System.

In enacting the Bankruptcy Code, Congress created a national bankruptcy court system in the 94 judicial districts.[112] Although the jurisdictional provisions of the United States Code confer original jurisdiction for bankruptcy on the United States District Courts, all of the judicial districts in the United States have entered orders referring all of their bankruptcy cases to the bankruptcy courts. The jurisdictional provisions of the United States Code and the orders of reference of the district courts do not differentiate between business and individual cases and bankruptcy judges across the nation handle both business and consumer cases.

There is nothing in the language of (or legislative history of) the Bankruptcy Code to support the conclusion that Congress intended to create, through the current venue provisions, national bankruptcy courts for business bankruptcy cases.[113] "Indeed Congress knows how to confer national jurisdiction on a court when it feels that consistency and uniformity are a sufficient basis to do so. That is the reason for a national court for patent appeals. Certainly, it cannot be argued

seriously that Congress intended by the current venue statute to create such a court for large Chapter 11 bankruptcy cases."[114]

In enacting the current venue provisions for bankruptcy cases, "Congress, without any discussion conflated natural persons and business entities into a single venue provision . . . [leaving the door open] . . . for a creative debtor to flee the debtor's home jurisdiction and file in its state of formation."[115] The legislative history to the original venue provisions of the Bankruptcy Reform Act of 1978 provided no explanation for the consolidation of previously distinct venue provisions for business entities and natural persons, and there was no debate or discussion in Congress on the genesis or purpose of the change.[116] Based on these unexplained revisions to the bankruptcy laws, bankruptcy practice was enabled to evolve into the current system in which a disproportionate number of the large chapter 11 cases are filed in magnet courts.

The argument that bankruptcy judges and courts outside of the magnet courts are less qualified to handle large chapter 11 cases is unsupported and factually inaccurate. Clearly, the bankruptcy judges in the magnet courts have developed expertise in dealing with large chapter 11 cases, and they have been responsible for many technological and case management innovations.[117] Nevertheless, the magnet courts do not have a

monopoly on competent judges and efficient case management procedures for handling large chapter 11 cases.

Since the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, bankruptcy judges have been chosen based on merit and qualifications, first by a recommendation of a merit screening panel, and then by appointment of the court of appeals for the relevant circuit.[118] Consequently, the bankruptcy courts have developed a deep bench of efficient and competent judges. Moreover, many courts have adopted case management procedures for large chapter 11 cases as a result of the Conference on Large Chapter 11 Cases, the recommendations of the Judicial Conference Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee"), and guidelines issued by the Federal Judicial Center in 2004.[119] In June of 2001, the Bankruptcy Committee recommended changing the venue provisions to prohibit corporate debtors from filing their cases in a district based solely on state of incorporation or an earlier filing by a subsidiary in the district. It later withdrew this recommendation but requested a study by the Federal Judicial Center and others to evaluate the factors that influence the selection of venue for large cases and the effect of venue choice on parties in interest and the courts and make recommendations. The study

recognized that choice of venue depended on procedures courts have in place for handling large chapter 11 cases. As a result of the Bankruptcy Committee's recommendation, as well as educational programs for judges and clerks and research projects of the Federal Judicial Center on handling complex cases, courts throughout the United States have the expertise and competence to administer large chapter 11 cases. In fact, many judges from outside the magnet courts demonstrated their competence in conducting complex chapter 11 cases when they sat over the years as visiting judges in the magnet courts.

In addition, knowledge of state and local law is crucial in large cases. Notwithstanding that the provisions of the Bankruptcy Code apply to large chapter 11 cases, state and local law are often significant in many issues arising in a case, such as property rights, claims objections, and avoidance of fraudulent transfers.[120] The knowledge and experience of local bankruptcy judges on such state and local law issues is invaluable in the administration of a large chapter 11 case.

Venue reform will promote Congress's original intent to establish the bankruptcy courts as a nationwide system with bankruptcy courts in all districts handling all types of cases in all of the chapters arising in, under, and related to the bankruptcy case.

F. Venue Reform Will Promote Access to Justice for Creditors and Interested Parties in Large Chapter 11 Cases.

The Bankruptcy Code's venue provisions enable a debtor that is a business entity to choose the venue for its case. It may select a venue that is its state of incorporation, its principal place of business or location of its assets, or the venue where an affiliate's case is pending.[121] The state of incorporation currently is a proper venue for a chapter 11 case, even if it is far away from the business's principal assets or principal place of business.

Location continues to play an important role in bankruptcy policy and practice as local rules of practice govern proceedings in each district.[122] Technological advances have not changed the hardship of distant venues for many parties. Although telephonic or video access is often available for hearings, many parties prefer that their lawyers be present in the courtroom for hearings.[123] Furthermore, parties in a chapter 11 case in a distant location may be required to be represented by local counsel at considerable extra expense.[124]

Frequently, companies strategically file chapter 11 cases far away from the primary business location in a place that usually has no relevance to the industry.[125] Such a venue choice effectively deprives employees, unions, small creditors,

landlords and local governments of a genuine opportunity to participate in the bankruptcy proceedings and attend hearings.[126] Venue selection outside of a principal place of business would necessitate the filing of a motion to change venue and litigate change of venue in order to obtain an order transferring a case to the venue more convenient to them.[127]

The concern that venue shopping is unfair to smaller creditors, employees, labor unions, retirees, and other local parties with an interest in a bankruptcy case has long been recognized by experts in the field. In 1997, the National Bankruptcy Review Commission found that forum shopping and the concentration of cases in magnet courts made it difficult for small creditors and employees to actively participate in a bankruptcy case.[128] "By choosing to file a chapter 11 case in a distant venue, the debtor is depriving local constituents of their due process."[129] If chapter 11 cases were required to be administered closer to their center of business contacts, more local creditors, such as vendors of goods and services, employees, and retirees would have a greater opportunity to participate in the case.[130]

Absent a change in venue, employees and small creditors are required to travel to appear in the bankruptcy court personally or hire local counsel to participate in the case to represent

them on issues that may negatively affect their jobs or pensions.[131] Small creditors often will settle their claims and matters affecting their interests in lieu of the high cost to hire a local attorney:

> 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. . . . 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 . . . 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.[132]

Moreover, interested parties in cases in distant locations may receive inadequate mail notice by the time an objection is due. While efficiency is desired in the judicial system, burdening small creditors, unions, or landlords with legal costs gives the impression that the bankruptcy system is rigged against them.[133] When small stakeholders that have an interest in observing chapter 11 proceedings are left out of the process with the deck stacked against them, system failure occurs.[134]

Venue shopping disenfranchises employees who are hopeful of a successful reorganization that may save their jobs and maybe even their pensions.[135] Companies like *Polaroid Corporation* or *Evergreen Solar, Inc.*, that were based in Massachusetts

commenced their chapter 11 cases in Delaware. That venue did not allow for employees to take local transportation to the Boston courthouse where a judge could explain in person why their pensions and jobs were impacted.[136] Even if small stakeholders did not attend the proceedings they would have a better opportunity to understand the proceedings and the court's decisions.[137] The ability to have this opportunity is critical to due process and the public perception of a fair judicial system.

Opponents of venue reform argue that venue choice is similar to other areas of federal civil procedure in which a party commencing an action is afforded substantial deference in choosing a forum.[138] A debtor commencing a chapter 11 case acts more like a plaintiff than a defendant.[139] It is the debtor that brings the creditor to court and not the other way around.

> Bankruptcy is essentially an *in rem* proceeding involving a multitude of parties involving creditors of all types: it is not the typical two-party civil litigation. A multitude of parties that are not necessarily adverse to each other are brought into the bankruptcy court by the debtor to determine the claims and interests in the property of the estate. Over the course of a case it is not unusual for different parties to have allied interests on some issues and adverse interests on others. The shifting sands in a bankruptcy case thus make it much different than straight two-party litigation where the parties' interests are adverse throughout the case.[140]

Smaller creditors are disenfranchised by a debtor's unilateral ability to select venue because they have no say in a predetermined venue choice that the debtor selected, often with the assent of certain financial institutions or larger creditors.[141]

Opponents of venue reform also argue that in large chapter 11 cases there is no expectation of a convenient venue because creditors usually are spread throughout the country, but this ignores true creditor expectations.[142] Although stakeholders understand that the debtor may file suit, "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."[143] Additionally, "opponents of venue reform argue that eliminating state of incorporation for venue will not actually create venue that is more convenient for creditors and other stakeholders."[144] "The National Bankruptcy Review Commission studied the extensive arguments and information provided by the Delaware State Bar and still found that 'disenfranchisement of creditors due to a bankruptcy filing in an inconvenient forum was the single most cited reason in favor of a proposal to amend the venue provisions.'"[145]

> Filing cases far from where the debtor conducts its business tilts the playing field toward the 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 financial resources to actively participate in a faraway venue.[146]

Whereas local creditors have the expectation that they can sue or be sued in the state in which they have a business relationship with a debtor, "[t]hey 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."[147]

The concept of venue is based on the idea that cases should be determined in the place most convenient to the stakeholders.[148] United States bankruptcy courts were established in each state, unlike the United States Tax Court, to provide direct access by citizens and to support principles of federalism.[149] Smaller stakeholders are deprived of their due process rights when the inconvenience and costs that chapter 11 debtors impose on them by selecting a venue far from that business organization's place of business or assets preclude them from appearing and being heard.[150]

The ability of parties who are small creditors, employees, and retirees, to seek a change of venue in a large chapter 11 case is an inadequate and costly remedy. It is the burden of the creditor to seek a change in venue, and the creditor will have to pay the attorneys' fees associated with change of venue litigation, which may be expensive and time-consuming. Moreover, a change of venue motion is often impractical and untimely, since significant final orders are frequently entered at the early stages of large chapter 11 cases.[151]

Several cases demonstrate the inadequacy of change in venue remedies due to the inconsistent results of such requests and the substantial costs a party must incur in litigating a motion to change venue, even when venue transfer is successful.

In *In re Patriot Coal Corp.*,[152] a debtor and 98 subsidiaries with headquarters in Missouri employed about 4,000 employees at the time it filed its chapter 11 case in the Southern District of New York.[153] Venue for the chapter 11 case was manufactured in the Southern District of New York. The debtor conceded that two New York incorporated subsidiaries were formed on the eve of bankruptcy so that all cases could be filed there as affiliates of the subsidiary to file first. The United Mine Workers of America, numerous other creditors, and the United States Trustee sought a change in venue to a proper district. The debtor

contested the requests for a change in venue, which after four months of litigation and a 61 page opinion by the bankruptcy judge, were granted.[154] Moreover, the debtor spent $2 million in fees contesting the change in venue, and the creditors spent an additional $1 million in fees litigating venue, illustrating the waste in time and money litigating whether or not the Southern District of New York was the appropriate venue for the chapter 11 cases.[155]

Winn-Dixie Stores, Inc., the largest supermarket chain in the southeastern United States, which was headquartered in Jacksonville, Florida, together with its affiliates, filed chapter 11 cases in the Southern District of New York.[156] Although the business had no connection with New York, the companies manufactured venue for the case in New York by incorporating a subsidiary in the state 12 days prior to the filing and invoking the so-called "affiliate rule."[157] Creditors, including one of the supermarket's largest suppliers, moved for a change in venue on the grounds that the debtor had engaged in blatant forum shopping. Litigation over the change in venue ensued. Indeed, the creditors' committee supported the case remaining in the Southern District because New York was more convenient for the estate professionals.[158] The bankruptcy court rendered a lengthy decision and transferred the cases to

the Middle District of Florida, finding that although venue was proper in the Southern District of New York, the interests of justice required the transfer.[159] Attorneys for the creditors who requested the change in venue reported that their clients expended hundreds of thousands of dollars in fees to litigate the change in venue.

The wide discretion given to bankruptcy courts in venue transfer litigation is exemplified by the *Houghton Mifflin* case.[160] Houghton Mifflin, one the nation's largest publishing companies, was based in Boston, Massachusetts. It had negotiated a prepackaged plan of reorganization converting billions of dollars of secured debt into equity. Under its plan support agreement, Houghton and its 24 subsidiaries were required to file their chapter 11 cases in the Southern District of New York, which they did. The United States Trustee moved for a change of venue. In granting the motion, the bankruptcy court found that there was no statutory basis for venue in the Southern District of New York for the Boston-based publishing company; however, the New York bankruptcy court continued to handle the case and deferred transfer of venue because the statute did not specify *when* transfer must occur. Therefore, the court did not transfer venue until after confirmation of the plan, leaving nothing but the determination of the fee

applications to the Bankruptcy Court for the District of Massachusetts.[161]

The current venue provisions of the Bankruptcy Code permitting venue selection by the debtor in its state of incorporation, or where the case of an affiliate is pending, as opposed to the place of principal assets or business location, should be changed to provide due process for all constituents, so that stakeholders have a fair chance of participating in the bankruptcy process.

G. The Concentration of Chapter 11 Cases in Two Districts Leads to an Inefficient Use of Judicial Resources.

The concentration of large chapter 11 cases in only two districts is inefficient. "The magnet court judges are overburdened while judges in other courts are underutilized. Overburdened judges must carefully allocate their time and any misallocation will negatively affect judicial performance and the accuracy of rulings."[162] Currently, there are 94 judicial districts in the United States. Delaware and the Southern District of New York are the most frequently chosen forums in large chapter 11 cases. Permanent judgeships are established among the districts based on relative population and caseloads.[163] For example, Los Angeles has twenty-one permanent judges and Chicago has ten.[164] When a district experiences

caseloads that are disproportionate to the population, Congress occasionally authorizes temporary judgeships to alleviate the imbalance.[165]

As Delaware has a small population, Congress and the Judicial Conference of the United States have allocated to the District of Delaware only one permanent bankruptcy judgeship plus seven temporary judgeships to handle the large case load of chapter 11 filings.[166] Currently two of the temporary judgeships are not filled. Thus, the judicial resources allocated to Delaware are disproportionately high under the usual formula because of its status as a magnet court. This allocation of resources results in a shift of federal funds from other districts with larger population bases.[167]

The cause of this imbalance is forum shopping by debtors that strategically choose the magnet courts.[168] Thus, the other 92 districts are underutilized.[169]

The solution to this imbalance is venue reform that prevents forum shopping.[170] If debtors are required to file large chapter 11 cases where their principal places of business and assets are located, the bankruptcy system would more efficiently balance court resources.[171] If debtors filed in their home states (principal places of business) then case

volume would reflect the general population as Congress intended for the bankruptcy courts.[172]

H. Venue Reform and the Reduction in the Concentration of Large Chapter 11 Cases in Two Districts May Reduce Administrative Expenses and Parties' Costs of Participation in the Chapter 11 Process.

The administrative expenses in a large chapter 11 case of a business entity, in particular compensation charged by a debtor's and the estate's bankruptcy professionals, including committees' attorneys and financial advisors, are often substantial, sometimes running into the hundreds of millions of dollars.[173] The amount of fees in large chapter 11 cases are the subject of concern to the courts, the United States Trustee, and creditors whose dividends are affected by professional compensation claims, which have a priority in payment ahead of unsecured creditors.

The current Chairman of the United States Senate Committee on the Judiciary, Senator Charles Grassley (R-Iowa), has suggested that the overwhelming concentration of large chapter 11 cases in the magnet courts has resulted in abusive billing practices and excessive professional fees, and he requested that the United States Government Accountability Office (GAO) conduct a study on attorneys' fees and venue selection for large chapter 11 cases [hereinafter the GAO Report].[174] In conducting its

study, the GAO interviewed bankruptcy judges, attorneys, and Assistant United States Trustees in 15 jurisdictions and reviewed case filings as well as the academic literature on professional fees and venue selection. In explaining the reasons for the study, the GAO reported, "[t]he size of these fees has raised questions about whether professionals have charged a premium for large bankruptcies and used the venue selection process to file in courts where they believed they would receive higher fees."[175]

The majority of witnesses interviewed by the GAO identified negative effects with the concentration of cases in the magnet courts.[176] The GAO referenced in its report that a number of witnesses it interviewed cited "perceived court attitudes on professional fees as a significant factor in venue selection."[177] The GAO referenced two academic studies that cite attitudes towards and scrutiny of professional fees as a factor in venue selection, and in particular, one study in which the author contends that attorneys chose to file in venues where they believed their fee requests would be approved due to more relaxed scrutiny of fees, although it noted a divergence of opinions by academics on this issue.[178]

Professor Lynn LoPucki has studied and written extensively on forum shopping and professional compensation in large chapter

11 cases, publishing many articles and compiling a database on fees charged. He theorizes that forum shopping and liberal venue provisions are responsible for excessive professional fees in large cases and that there is a pattern of forum shopping for courts in which the professional fees are the highest.[179] Professor LoPucki's criticisms of the magnet courts and his conclusions regarding the motivations for forum shopping are controversial and he has many critics.[180] The NCBJ strongly disagrees with any suggestions by Professor LoPucki that any bankruptcy judges make rulings that are not justified by the facts and law.

Another respected law professor also has conducted extensive studies of professional fees in chapter 11 cases. Professor Nancy B. Rapoport theorizes that because large law firms routinely appearing in large chapter 11 cases in the magnet courts play numerous roles in those cases, they rarely object to each other's fee applications, and that peer pressure affects the scrutiny fee applications receive.[181]

The centralization of large cases in two districts is a factor that may drive up the costs of commercial bankruptcy cases. Recognizing that the sophistication and complexity of large chapter 11 cases are factors increasing professional fees, the Minnesota State Bar Association, in its Report on Venue

Fairness, posits that "familiarity breeds complacency," and that the concentration of large cases in the magnet courts has contributed to increasing fees:

> 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.[182]

Local Rule 9010-1(c) of the United States Bankruptcy Court for the District of Delaware provides that for cases and proceedings in that district, an attorney may not be admitted *pro hac vice* unless associated with a local attorney who is admitted to the Delaware Bar.[183] The requirement of local counsel and the expenses associated with duplicative lawyers and professionals could be obviated if the majority of large chapter 11 cases were not commenced in the District of Delaware. If more cases were

filed outside of the magnet courts in local courts near their principal places of business, compensation of professionals could be based on lower, local rates and fewer local counsel would be necessary.

Venue reform may contribute to reduction of costs in large chapter 11 cases, by reducing duplication of efforts and the amount of professional compensation.

I. Venue Reform is in the Interests of Local Economies and Bankruptcy Professionals.

Significant negative financial consequences to local economies occur when large chapter 11 cases are commenced in a distant location. Local communities and businesses as well as bankruptcy professionals who practice outside of the jurisdictions of the two magnet courts lose substantial revenues. "Based upon estimates from Bloomberg Businessweek, the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly $4 billion from local economies."[184] Large chapter 11 cases produce significant revenue and income in the locality in which they are pending. Conversely, local communities lose money when bankruptcy cases choose venue in a distant jurisdiction.[185]

> [T]he filing of a significant chapter 11 bankruptcy case generates revenue for a local economy. . . The economic activity generated by [a large] bankruptcy

> filing could be substantial for a community . . . [including] revenues . . . from . . . 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.[186]

Indeed, Senator Chris Coons (D-Del.), a vocal opponent of venue reform, has opined that a change to current bankruptcy venue laws would have devastating and far-reaching consequences to Delaware's economy. He has publicly stated that the Delaware Bankruptcy Court is "one of the key pillars of our [Wilmington's] local economy and a big reason for all of the other successful businesses nearby."[187] Conversely, the District of Massachusetts has lost 37 cases to Delaware between 2004 and 2016, resulting in a loss of in excess of $180,000 in economic activity from cases that should have stayed in Massachusetts.[188]

Additional negative effects on the concentration of large chapter 11 cases in two districts are the loss of opportunities and the decrease in revenue sustained by bankruptcy professionals outside of the magnet districts. Bankruptcy is a complex specialty in the law, and chapter 11 work is an even more complicated sub-specialty in the field of bankruptcy. A small number of law firms are involved repeatedly in the venue decisions for the vast majority of large chapter 11 cases.[189] In

reforming bankruptcy law in 1978, Congress disapproved of the "unseemly and continuing relationship" among members of the bar, referring to it as the bankruptcy ring, and enacted laws that were intended to expand bankruptcy law into the mainstream of commercial practice.[190] The concentration of large chapter 11 cases in two districts has the effect of centralizing chapter 11 specialists in those jurisdictions. Consequently, bankruptcy professionals in the non-magnet districts are not hired by the interested parties. They lose revenue and do not have the opportunity to develop their skills in chapter 11 cases.

The GAO Report reported that one of the negative effects of the large case concentration in Delaware and the Southern District of New York most commonly cited by attorneys and cited by several bankruptcy judges was the difficulty local bankruptcy firms face in maintaining a bankruptcy practice outside of those jurisdictions.[191] The concentration of large cases in two districts has resulted in law firms, financial advisors, and other bankruptcy professionals in other jurisdictions losing hundreds of millions of dollars in revenue, which would change if venue reform were enacted.[192]

Another reason for venue change which will prompt more local filings is the revenue a successful reorganization will bring to a locality. A chapter 11 case that is commenced in the

location of its company's headquarters or where its principal assets are located is more likely to reorganize and continue its business operations and is less likely to liquidate or sell substantially all of its assets than in a case commenced in a remote jurisdiction.[193] Most significantly, a successful reorganization produces revenue and wealth for 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 [sic] sources for more revenues for further development, expenditures and tax receipts."[194]

J. Summation of Part IV Argument

There are numerous negative consequences associated with venue shopping and the concentration of large chapter 11 cases in two districts. Despite globalization and technological advances, the physical location of a court remains relevant in bankruptcy and affects who may come to court and participate in a hearing.[195]

Many proponents of venue reform believe that the bankruptcy law should require that chapter 11 cases be filed in the venue where they have their principal places of business or assets,

and recommend changing the current permissive provisions allowing filing in the state of incorporation and/or district where an affiliate has filed.[196] To solve the numerous problems discussed above, the Bankruptcy Code's provisions regarding venue should be amended to provide that the proper venue for a business entity for a bankruptcy case is the district in which such entity has its principal place of business or principal assets. This change will result in a more efficient and appropriate distribution of chapter 11 cases in the United States.

PART V: AN ANALYSIS OF THE REASONS TO MAINTAIN THE CURRENT VENUE LAWS

A. Synopsis of Position

Part V discusses the arguments against revision of the current bankruptcy law. The proponents of maintaining the status quo view proposed revisions as an unwarranted restriction of the venue choices that Congress has long provided for corporate debtors contemplating a bankruptcy filing.

The present venue regime provides a corporate debtor with several choices of where to file its bankruptcy case. The debtor can file a bankruptcy petition in any district where (1) the debtor is domiciled, (2) the debtor's principal place of business is located, (3) the debtor's principal assets are located, or (4) an affiliate has filed for bankruptcy. 28 U.S.C. § 1408. For all except five years since 1898, corporate debtors have had the option to file for bankruptcy relief where they are incorporated and since 1973 have been allowed to file in the same district as an affiliate's bankruptcy case.[197]

Allowing a corporation to file a bankruptcy case in the district of the state of its incorporation is consistent with the venue provisions for federal cases generally.[198] The Supreme Court has long held that the state of incorporation is meaningful for venue selection and has rejected arguments that

the principal place of business is a superior contact.[199] State of incorporation is specifically mentioned as a venue choice in numerous other federal statutes, as well.[200]

Venue based on an affiliate's bankruptcy filing has been recognized since the start of modern bankruptcy practice involving large corporate debtor groups, first in 1973 and then in the 1978 Bankruptcy Code.[201] The rationale for this choice is clear: modern corporations often conduct business and borrow money in groups of affiliates. To force related entities to file in different venues would be remarkably inefficient and could lead to potentially conflicting results within the corporate group. For example, because corporate debtors typically have loans on which all their affiliates are borrowers or guarantors, obtaining permission for debtor-in-possession financing or use of cash collateral could be logistically difficult if affiliates are required to file in different locations. If the different courts impose different substantive, or even procedural, requirements on the various debtors, it may be impossible to borrow or to reorganize.

Nonetheless, some argue that the state of incorporation and affiliate filing should not be included as options for venue of a corporate debtor's bankruptcy case, notwithstanding that such a restriction would be contrary to (i) the general federal venue

statute, (ii) the example of other federal statutes, and (iii) the history of the bankruptcy statutes themselves.

Restricting long-available venue options is not wise. First, the purported problems caused by existing venue choices are not supported by the facts. Statistics of chapter 11 filings do not support the assertions that extraordinary numbers of small, medium, large and even "mega" chapter 11 cases are being skewed to a limited number of courts.[202] In addition, statistics show that bankruptcy courts readily transfer venue where warranted.[203]

Second, it is submitted that restricting venue options is contrary to a primary purpose of the Bankruptcy Code, which is to allow the debtor sufficient flexibility to reorganize efficiently, thereby maximizing value for stakeholders. At least one scholar has concluded that the "proposal to eliminate place of incorporation as an appropriate venue is harmful in the case of firms seeking to file a prepackaged bankruptcy, and would provide little if any benefit in the case of a traditional Chapter 11 proceeding."[204] Facts and common sense support maintaining flexibility in choosing venue for chapter 11 cases, which has been a factor contributing to the United States corporate bankruptcy law becoming a worldwide model for preserving businesses. Companies entering chapter 11 are

fragile. They and their various constituents – lenders, vendors, employees, retirees, and other creditors and parties in interest – value the predictability, consistency and efficiency of courts which have been proven over time to administer such cases successfully. Options to file chapter 11 cases with such courts (which do not remain static but, rather, change as the courts' composition and guiding law change) therefore should be maintained, not restricted.

Third, narrowing venue choices to a debtor's headquarters or the location of its main assets would add unnecessary uncertainty and delay to chapter 11 cases. Today's large businesses often have more than one headquarters or location of major assets (indeed, they seldom consist of just one debtor but usually comprise a number of affiliated companies) with far-flung assets some of which – intellectual property, accounts receivable, and litigation claims - do not even have a physical location. In the early stages of large chapter 11 cases, too much of primary importance needs to occur without the addition of complex, fact-based venue litigation. In addition, creditors of large debtors are usually equally widespread, such that *no* venue choice will be near most creditors who wish to participate in the case.

Fourth, today's bankruptcy system recognizes that creditors are far-flung, and the courts have developed practices and utilized technology to permit participation by all creditors, wherever located. Moreover, Congress has already taken steps to restrict venue in certain proceedings so as not to disadvantage small entities.

In sum, restricting venue choice provides no demonstrable benefit to the bankruptcy system and could well reduce its efficiency and predictability, thus jeopardizing business reorganizations and reducing recoveries for the collective parties in interest.

B. Use of Venue Options

Proponents of venue change assert that allowing the state of incorporation as a venue option results in too many big and medium-sized corporate chapter 11 cases being filed in "remote" venues, far from the debtor's headquarters and many of its stakeholders. This argument is not supported by the evidence.

Commentators observe that "the venue debate is mostly about where mega-sized bankruptcy cases should be prosecuted. The debate pays little attention to small or medium-sized business enterprises, which account for more than 90% of all business bankruptcy cases filed each year."[205] If one considers all chapter 11 business bankruptcy cases filed in 2017, for example:

10.7% filed in Delaware, 8.7% filed in the Southern District of New York, and 8.4% filed in the Southern District of Texas; almost 73% filed elsewhere.[206] Thus, the alleged "problem" with the bankruptcy venue statute is not even an issue for most chapter 11 business debtors.

Even if one considers only filings by large entities (with assets or liabilities over $50 million), 2,527 bankruptcy cases were filed between January 1, 2005, and May 8, 2018, under chapter 11 or 15.[207] More than half of those cases (1,536) were not filed in Delaware or New York.[208] Of the 1,369 companies eligible to file in Delaware because they were incorporated there, less than half (639) did.[209] Notably, venue choice for the largest corporate debtors is even more diverse. A recent report by a law firm active in large corporate bankruptcy cases notes that the ten largest chapter 11 cases filed in 2017 were venued as follows: 3 in the Southern District of New York, 3 in the Southern District of Texas, 2 in the District of Delaware, 1 in the Eastern District of Virginia, and 1 in the Eastern District of Louisiana.[210] A similar spectrum of venue choices applied for the ten largest chapter 11 cases filed in 2016.[211]

In reality, then, the alleged "problem" is hard to see: even among the largest corporate debtors, only a minority avail themselves of the option to file where they are incorporated.

C. Venue Choice Is Based on Laudable Goals

Since many statutes provide for venue options, venue selection in and of itself is not improper.[212] "[F]orum shopping is a legitimate, expressly authorized action when more than one forum satisfies the requisite legal criteria," and "the hostility toward forum shopping is based on numerous flawed underlying assumptions."[213] In non-bankruptcy litigation, "[n]ot only do venue options provided by procedural rules allow forum shopping, but the structure of the judicial system provides incentives to shop for a forum."[214] Federal and state legislatures have given litigants choices of fora and courts have recognized the legitimacy of litigants seeking the most favorable venue for their clients.[215] "In light of the potential venue choices provided to litigants under the American judicial system and the governing laws, we should not be surprised or dismayed at the fact that forum shopping has thrived."[216] Furthermore, the "ethical rules require attorneys to use rules and procedures to the fullest benefit of their clients. . . . Expecting attorneys to ignore their clients' best interests by failing to select a favorable venue when it is available is asking attorneys to commit malpractice."[217] In the non-bankruptcy context, attorneys select venue for their clients' cases by considering, for example, the statute of limitations, the

party's capacity to sue, recoverable damages, and other favorable law in the forum of choice.[218]

In large bankruptcy cases, corporate debtors and their stakeholders are under enormous pressure to maintain the business as a going concern for the benefit of all; they need every possible resource to further that goal. The availability of efficient and favorable venue choice is one such resource.

Even proponents of restricting venue choice in the bankruptcy context concede that "the Supreme Court has repeatedly recognized the value of some types of forum shopping"[219] and acknowledge that "in certain cases, forum shopping's benefits may outweigh its bad effects."[220] In bankruptcy cases, the ultimate goal of a debtor in determining where to file is to "select the forum that best enables a debtor to successfully reorganize its business, thereby preserving jobs and value for the benefit of the debtor's employees, its creditors, and all parties in interest."[221] This goal is a central purpose of the Bankruptcy Code.[222]

Empirical evidence shows that this is the goal (and effect) of venue selection as it presently exists.

1. Predictability

The GAO Report found that the predominant driver of venue choice for chapter 11 debtors is "overall predictability in a case."[223]

This includes the ability to predict how a particular set of judges may be inclined to rule on particular issues. "Predictability in law, especially in the corporate area, is generally thought to be a good thing" and "arguably benefits all of a firm's claimants."[224] Often it is not even necessary that case law be favorable - only that it be known so that parties need not litigate the issue or at least can reduce it to a more manageable dispute. "Practitioners strive for predictability because it enables the accelerated determination of issues and reduces the costs and expenses associated with judicial proceedings."[225]

Where courts have overseen many large cases, decisional law on many recurrent issues is well-developed. As a result, parties can assess what will happen with greater precision, thus saving time and money (to the benefit of all stakeholders in the case) by avoiding the roll of the dice in litigation. The magnet courts have developed consistent and far-reaching precedents, which may account for the penchant of some parties to file large corporate cases there.[226] This is what makes venues

attractive to those filing large business bankruptcy cases.[227] In contrast, judges in other districts may be less predictable - either because they have not had the opportunity to handle as many large complex cases or because they may not see the value in predictability.[228]

The debtor's ability to obtain financing may also depend on where it files.[229] Continued financing is the lifeblood of a large chapter 11 case. "Several [empirical] studies have shown that debtors with DIP financing are more likely to reorganize than those without, and one study finds an increase in the value of a debtor's stock and public debt when DIP financing is approved."[230] Many "lenders who provide financing to a company in distress may incorporate clauses in their financing agreements requiring the company to file in a certain jurisdiction. . . . because they prefer the predictability offered by certain courts."[231] Though this may reflect the lender's self-interest, it is not bad for the company and may "even [be] laudable, given a creditor's interest in a speedy, efficient and resource-conserving reorganization process."[232] Notwithstanding the fact that the magnet courts have well-developed restrictions on onerous terms that lenders seek in granting debtor-in-possession loans,[233] corporate cases continue to file in those districts with the lenders' consent because they appreciate knowing what terms

they can and cannot obtain and that the court will analyze and decide the motion shortly after the petition is filed.[234]

2. Developed Case law

A majority of attorneys and judges surveyed in the GAO Report considered prior rulings and judges' experience as significant factors in choosing venue because of the predictability of outcomes.[235] Predictability improves if there are written opinions on issues that the debtor may face in its case. Just as in other areas of federal practice, the Supreme Court has not clarified all bankruptcy issues that could be critical to a debtor's ability to reorganize and maximize the value of its estate. Case law differs among the circuits on many bankruptcy issues.[236] A debtor that is domiciled or has operations and assets in different circuits is accorded the right to decide where to file based on the law in those circuits, just as in other areas of the law where filing a case in a venue that has favorable case law or procedures is not disdained but, indeed, is expected.[237]

Counsel in bankruptcy cases "are acutely aware of variance in substantive law between circuits and even courts within the same circuit. Not surprisingly, some of these differences can alter the disposition of a bankruptcy case."[238] For example, circuits differ on whether a debtor can assume and assign, or

even just assume, a license of intellectual property without the licensor's consent.[239] There is conflicting decisional law regarding the standards for rejection of union contracts.[240] Similarly, there is conflicting case law on when rent must be paid.[241]

Where the law is not favorable on an important issue in a case, it would be detrimental to the collective stakeholders to mandate that the debtor file in that district. "Failure to select the most available and favorable venue may violate an attorney's responsibilities to the client."[242] At best, it could result in higher costs occasioned by the need to litigate an issue where there is no precedent; at worst, it could result in the debtor being required to file in a district where case law is against the estate's interest on an issue critical to the success of the reorganization.[243] In either instance, it is the stakeholders who suffer as administrative (and possibly other) costs increase.

One particularly critical issue for a corporate debtor (and its stakeholders) is whether the court will consider and grant "first day relief," including authority to pay prepetition claims of certain critical creditors.[244]

> [I]t is vital for a debtor commencing a Chapter 11 case to be in a bankruptcy court that recognizes the

> need to approve "first-day motions," which, among other things, provide the hope for a seamless transition into formal reorganization on as much of a "business as usual" basis as possible and relieve the immediate concerns of employees and vendors.[245]

The magnet courts understand this and readily schedule emergency hearings and grant authority to pay critical creditors their prepetition claims if supported by the record presented. To do so, those courts rely on the doctrine of necessity, which is a well-developed concept rooted in the Bankruptcy Act[246] and incorporated into section 363(b) and other sections of the Bankruptcy Code and the Bankruptcy Rules.[247] In contrast, some courts were reluctant to grant such relief and pay any prepetition claims before a plan of reorganization was confirmed.[248] Only recently has the Supreme Court resolved this split and sanctioned the practice of bankruptcy courts granting first day relief.[249]

While the current magnet courts have well-defined procedures assuring that first day motions will be heard and decided promptly,[250] other courts do not - instead addressing the need for emergency relief on an ad hoc basis.

> A bankruptcy court that is not familiar with the problems inherent in large, complex Chapter 11 cases might delay or otherwise defer the resolution of initial proceedings without realizing the negative impact of this delay on the ability to stabilize the

> debtor. . . . A court's lack of experience in dealing with the disposition of a debtor's initial needs may irrevocably impair the debtor's ability to reorganize.[251]

Understandably, "risk aversion would lead [debtor's counsel] to shy away from untested courts."[252]

A similar point may be made about a court's experience and consistency in conducting sales of substantially all of a business debtor's assets. Venues where large bankruptcy cases often file typically have well-developed procedures for such sales.[253]

3. Judges' Experience

While there is no doubt that the bankruptcy bench is quite capable nationwide, another factor driving venue selection in bankruptcy cases is the experience of the judges in the district.[254] This is not a surprise because there is substantial empirical evidence (even from proponents of venue change) to demonstrate that large bankruptcy cases overseen by experienced judges have higher success rates.[255]

Because Delaware is a favorite target of the proponents of venue change, many of the empirical studies concentrate on it. "Overall, these findings suggest that companies may have filed for bankruptcy in Delaware in order to benefit from the Delaware

judges' experience, the speed of the Delaware process, or both."[256]

4. Speed

Speed is also cited as one of the most significant factors in determining where to file a case.[257] There is empirical evidence that cases assigned to more experienced judges spend less time in bankruptcy, are more likely to be reorganized rather than liquidated, and are less likely to refile for bankruptcy after emergence[258] - i.e., they are more often successful.

Particularly with prepackaged cases, where all parties have already voted in favor of the plan prepetition (or their rights are not affected), the advantage to all parties in interest of a speedy bankruptcy process is readily apparent: "prepackaged bankruptcies are efficiency-enhancing when compared to creditors' other options. . . . [and] [t]here are efficiencies to be gained from handling many of these cases in one jurisdiction."[259]

In addition, because prepackaged plans have already been approved by all impaired creditor classes, "small creditors rarely need to appear in bankruptcy court over contested matters" in those cases.[260] Thus, there is little justification for restricting venue choices in prepackaged cases which "would

disable Delaware (or any other court) from specializing in prepackaged bankruptcies, and thereby make prepackaged bankruptcies a more uncertain proposition. . . . increas[ing] the risks associated with filing these cases and decreas[ing] social welfare."[261]

5. Cost

The longer a case is in bankruptcy, the more costly it typically is (thereby reducing the recovery for creditors and jeopardizing its "success").[262] Generally courts that process cases faster have more successful outcomes.[263] Empirical studies confirm that large business bankruptcy cases which file in the current recurring venues for large cases appear to cost less.[264] One academic who is critical of venue choice predicted that the *General Motors* case would cost $1 billion in professional fees, when, in fact, it cost $110 million.[265] It is axiomatic that savings on administrative claims translate into higher recoveries for other stakeholders.

Speed has beneficial effects other than just increased recoveries for stakeholders. Creditors get paid faster, and there is less uncertainty faced by employees, vendors, and other parties impacted by the bankruptcy case, including, of course, the debtor itself.

D. Eliminating Venue Choices Will Not Benefit Creditors

Eliminating venue choices will not promote the goals of the Bankruptcy Code (to maximize value for all constituents while allowing the debtor to reorganize) and may well frustrate those goals.

1. Eliminates Efficiencies

Proposed changes to the venue statute will often eliminate the choice of courts which have achieved substantial efficiencies in handling large cases. As noted above, those courts process large cases faster, cheaper, and more efficiently. That results in savings to the estate and a greater recovery for all stakeholders.

Given the quality of the bankruptcy judges today, there is no question that other bankruptcy judges and courts are eminently qualified to handle large corporate bankruptcy cases. However, research suggests that judges need experience - as a judge - in complex corporate reorganization cases in order to be most effective. "Our results suggest that judges - the most important 'manager[s]' of the restructuring process - develop specific expertise through time on the job which affects their bankruptcy rulings and that this on-the-bench experience is incremental to judges' general skills."[266] An empirical study shows that judges need to handle at least six large business

cases a year for two to four consecutive years to achieve the needed experience and efficiency.[267] It is unlikely that all districts will ever have a sufficient number of large business cases to allow their bankruptcy judges to achieve that level of expertise: taking 2017 as an example, a total of 1,237 chapter 11 business bankruptcy cases were filed in either Delaware or the Southern District of New York.[268] If these cases had been evenly spread across all 350 bankruptcy judges in the nation, each judge would have presided over fewer than four such cases, which is insufficient for judges to have garnered the necessary experience. Of course, none of the proposals to change the venue statutes suggest that large chapter 11 cases be evenly distributed. Thus, there will always be some judges who will get more cases, and more experience, than others. Even if other judges could achieve the necessary number of cases and level of expertise, however, the four years' delay that the research suggests is needed to achieve the requisite expertise would certainly affect stakeholders adversely.

Further, clerks' offices in the magnet courts have developed expertise in handling those cases: they have experienced personnel and established procedures to assist stakeholders seeking information.[269] Clerks' offices in other districts throughout the country would have to expend

substantial funds to implement similar procedures and create technology infrastructures to permit smaller stakeholders to have access to the proceedings to the same extent as exist in the magnet courts.[270] In these times of shrinking judicial budgets, that may not be possible.[271]

In addition, given the uncertainty of where, and when, large cases would file mandates that either (i) all clerks' offices throughout the country expend considerable funds planning for a filing that never comes or (ii) the clerks' offices wait until a filing before "upgrading" their systems to handle it. Either alternative is wasteful, disruptive, and detrimental to stakeholders in large bankruptcy cases.

Similar increased costs would be visited upon the United States Trustee's offices throughout the country. Currently, the United States Trustee's Offices for the magnet courts have personnel who, because they have handled numerous large cases in the past decades, are familiar with the legal issues and the logistics of dealing with the many stakeholders in those cases. If large cases are dispersed, the other regional offices will need to add to and train their personnel (trial attorneys, analysts, and paralegals) and establish similar procedures for handling the unique issues in such cases, such as first day hearings. In an era of shrinking executive branch budgets, this

also could be difficult. Again, the uncertainty of where and when large cases may file will require either that all regional offices be prepared for a filing that never comes or that they wait until a filing before getting additional staff and training. The result in either event will be delays and harm to stakeholders in those cases.

2. No Demonstrated Benefit to Small Stakeholders

Although the proponents of venue change contend that filing where the debtor's headquarters is located is a matter of fairness and good public policy, they provide no proof of this. Notably, no empirical evidence supports the proposition that filing where the debtor's headquarters or principal assets are located results in a better outcome for small creditors, employees, retirees, or other parties in interest who ostensibly would benefit from being nearer to the presiding court. To the contrary, as noted above, the empirical evidence is that the venues where large cases are filed now, often based on state of incorporation, produce the most successful outcomes for large multi-location debtors.[272]

In addition, for large debtors, which have operations and employees all over the country, it is not evident that most smaller stakeholders are located near the debtors' headquarters or principal assets, even if that location could be identified.

For example, an airline's employees are not located only at its headquarters but everywhere it flies; a retailer's employees are similarly located everywhere it has stores.

a. Small Stakeholders' Interests Are Protected

To the extent that the proponents of venue change suggest that smaller stakeholders are not adequately represented under the current statute, that is not the case. All general unsecured creditors are represented by the official unsecured creditors' committee which is invariably appointed in every large case.[273] The committee is charged with representing the interests of all general unsecured creditors, big and small.[274] The committee's fees are paid by the estate and, thus, "the small, unsecured creditors to a large extent are able to free ride on the efforts of the larger unsecured creditors" who serve on the committee.[275]

In matters that affect them in areas which may conflict with the interests of other creditors, employees and retirees are typically represented by national counsel for the unions and the Pension Benefit Guaranty Corporation. Small trade creditors are often represented by trade associations and their lawyers.[276] Similarly, commercial landlords (particularly mall owners) are typically represented by national counsel who regularly appear in large cases. Therefore, it is rare that an individual

creditor appears in a case - even when that case is in the creditor's "home" district.[277]

Further, the interests of creditors that the proponents of venue change assert they are most interested in protecting (employees and retirees) are often better protected in courts where large business cases are filed than in their "home" courts. As noted above, courts that currently handle large corporate cases enter orders early in the case allowing the payment of employees' prepetition claims (for wages, vacation, and severance)[278] and the payment of critical vendors.[279]

Other rights that employees and retirees possess are protected by sections 1113 and 1114 of the Bankruptcy Code and cannot be terminated or modified without the debtor meeting high standards.[280] To the extent the rights of those parties require additional protection, advocates should ask Congress to amend those sections directly. Modifying the venue statute to preclude the filing of the bankruptcy case itself in the best available forum would be detrimental to all constituents.

Finally, the ultimate protection for employees and retirees is provided by a successful reorganization or sale of the business as a going concern, which as noted above is more likely to happen in the magnet courts.[281] The interests of the entire organization and all its creditors - not the availability of a

"neighborhood" court for small, "local" creditors who likely will not appear in court anyway - should be the ultimate consideration.

b. Stakeholders Can Participate

In addition, all stakeholders, large and small, can actively participate even in large cases in the magnet courts through the technology that those courts have established at significant cost. Although bankruptcy courts have led the judiciary in adopting the latest technologies, not all bankruptcy courts have the same capabilities.[282]

Technology has virtually eliminated the disadvantage that smaller creditors may have in participating in bankruptcy cases venued at a distance.

> It is now easier than ever for parties to access and participate in bankruptcy proceedings, regardless of where they take place. Advances in communication technology have also made it easier for debtors to disseminate information about the existence and progress of their bankruptcy cases. Parties now can communicate with each other and the court through the existence of dedicated web pages and email addresses and parties who are not physically close to where a case is taking place can participate directly in court proceedings using telephone or video chat. Thus, as debtors and assets become more dispersed, technology provides mechanisms to bring parties together in the courtroom.[283]

This technology comes in many forms. The bankruptcy courts all have nationwide electronic filing, through which parties in interest can access all public dockets and pleadings (including proofs of claim, hearing transcripts, and trial exhibits) in all venues.[284] In the magnet courts, there are additional technological advances.[285] For example, in large cases debtors are generally required to hire claims agents to handle noticing, claims docketing, and other administrative responsibilities.[286] Often the debtor, its claims agent, and the official unsecured creditors' committee maintain websites, call centers, or other resources which make information available to stakeholders in the case.[287] "The use of a call center [in particular] substantially reduces the burden on company personnel, establishes a centralized source of information, provides consistent answers to questions and ensures that the company can focus on ongoing operations and the restructuring itself."[288]

In addition, the magnet courts permit parties (even pro se parties) to listen and participate by phone in many hearings.[289] Parties may even appear by telephone and present their arguments quite effectively.[290] This is in contrast to many other bankruptcy courts which prohibit pro se parties, or even parties generally, from appearing or even listening to a proceeding by phone.[291]

In addition, the magnet courts have videoconferencing capabilities which allow parties to present argument from their own location.[292] Such investments in technology have also allowed those courts to conduct joint hearings with foreign tribunals in cross-border cases.[293]

c. Adversary Proceedings Are Different

The proponents of venue change legislation are correct, however, that smaller stakeholders are not represented by the creditors' committee (or by trade organization counsel) in adversary proceedings that seek to recover a preference. They argue that this mandates that a large case be filed in the putative defendants' home court.[294] This ignores several realities, however.

First, the estate and all other stakeholders are benefitted if all preference litigation can be prosecuted in the forum where the bankruptcy case has been filed. This allows one counsel (and judge) to handle both the liquidation of estate property and the distribution to creditors, resulting in efficiencies in scheduling, discovery, and resolution. It also prevents inconsistent rulings on procedural and substantive matters. This saves time and costs for the estate - resulting in faster and higher recoveries for stakeholders.

Second, it is rarely known on the first day of the case who the preference defendants will be. As a result, it would be impossible to determine a proper venue at the early stages of the case based on whom the debtor may ultimately sue. Further, it is not altogether clear at the beginning of a bankruptcy case that claims to avoid preferential transfers will be pursued. If the enterprise is sold as a going concern, the buyer will often buy those actions or insist that those actions be waived so that its suppliers are not "harassed" or become hostile.[295] Even if the business is reorganized and preference claims are pursued, however, they are usually not commenced until after the plan is confirmed.[296]

Third, even if the identities of potential preference defendants are known on the first day of the case, they are typically located all over the country - because large debtors have national presences. It is unlikely that one venue would be "convenient" for all defendants. Thus, mandating that a debtor file its bankruptcy case based on potential preference defendants' locations is simply not realistic.

Finally, Congress has already heard and answered the complaints of small stakeholders who are sued for preferences. In 2005, Congress amended the Bankruptcy Code to provide that venue for the smallest preferences will lie only in the district

where the defendant resides.[297] "Requiring creditors to incur the substantial costs for small avoidance actions is unreasonable and contrary to Congressional intent, as it pressures creditors to settle in order to save on costs regardless of the merits of any potential defense." [298]

In amending venue of adversary proceedings, Congress properly balanced the interests of the estate (and all other stakeholders) against the interests of small creditors sued for preferences. If the proponents of venue change believe that small defendants in preference actions need further protection, they should advocate for a change of the venue of those actions, not a change of the venue of the main bankruptcy case. Congress should not change the requirements of venue for the main case just to protect these few small stakeholders in the unlikely event that preferences are pursued.

3. Added Costs

Not only will changing the venue statute fail to provide a demonstrable benefit to stakeholders, it will have detrimental effects on all by increasing the costs of a reorganization case.

a. Litigation over Choice of Venue

Limiting venue to a debtor's headquarters or the location of its principal assets will inevitably lead to litigation over which is the proper venue. In the largest cases, even a single

debtor typically has headquarters, assets, operations, creditors, employees, and retirees in many districts. Thus, the "proper" venue for that case would not be readily apparent. A debtor could have many "hubs" of assets and operations. In the retail industry, in particular, a debtor may have stores (assets and operations) in all 50 states with distribution and regional centers throughout the country.[299] In those cases, there are often creditors in all 50 states and overseas. While some creditors (landlords and utilities) may be located near the retail operations, major creditors such as trade suppliers, tort claimants, and the institutional lenders often are not. The trade creditors may be overseas, and the lenders are typically on the East or West Coast.[300] Determining which forum is most convenient is not evident. Scholars ask "should we: weigh all creditors' interests equally?; distinguish among creditors based on the dollar amount of their claims?; or differentiate among creditors based on the likelihood of payments?"[301] Any option would result in some creditors being located far from the venue of the bankruptcy case.

Where there are affiliated debtors, the effects are worse. Many large businesses operate through numerous affiliates which themselves have headquarters and "hubs" of assets. Where there are multiple affiliated debtors, the fight over choice of venue

would be even more costly and protracted if venue is limited to one debtor's headquarters or the location of its main assets.

The proponents of venue change do not articulate the standard that should be applied to determine which venue is proper in such situations. They simplistically contend that cases should be filed where the debtor has its headquarters or principal assets without answering how to identify that location. Even one of the proponents of venue change recognizes the difficulties. "Current proposals calling for a debtor's choice of venue to be cabined to the principal place of business may make little sense in light of how technology and globalization have enabled the creation of debtor companies with no clear or primary physical location."[302] Some technology debtors have no physical assets or presence anywhere and some global companies do not have a clear principal place of business or assets.[303]

A fight over proper venue at the beginning of a case will cause unwarranted delay, uncertainty, and costs at the most critical juncture and may even imperil the debtor's ability to reorganize.[304] These kinds of determinations are required in chapter 15 cross-border bankruptcy cases, in which a court must determine the "center of main interests" of the debtor's business.[305] As anyone who has been involved in such a

determination under chapter 15 can attest, a similar trial under chapter 11 to determine the proper venue based on the location of the debtor's principal assets would be fact-intensive and cause considerable delay and uncertainty - all to the debtor's and its stakeholders' detriment.[306]

Further, filing in a venue far from the lenders' "home" would increase costs thereby reducing other creditors' recoveries because loan agreements typically require that the debtor pay the lenders' counsel fees. In addition, it is evident that the filing of a large corporate bankruptcy case *anywhere* (even if there is only one headquarters) would be inconvenient for many parties in interest.[307] Large debtors have numerous employees, utilities, suppliers, and landlords in many states and overseas; they are not all near the debtor's headquarters or "principal assets." Consequently, costs for creditors who are not near the debtor's headquarters will increase as well.

b. Inability to Jointly Administer Cases

Most large corporate bankruptcy cases include affiliated entities whose businesses and operations are intricately intertwined. They often share administrative services (including human resources, legal departments, and payroll), have an integrated cash management system, and have cross-

guaranteed each other's loans. Where affiliates have their "principal places of business or assets" in different districts, elimination of the affiliate-filing venue rule may mandate that affiliates file in different districts. This would lead to duplication of costs of the estate (each debtor, lender, and creditors' committee would need their own professionals), additional costs and possible delay caused by the necessity to coordinate each bankruptcy case, and duplication of judicial resources (with the possibility of inconsistent rulings in each district). This would be a serious detriment to stakeholders and their recoveries.

Even one of the proponents of change acknowledges that "[t]he value in adjudicating all these cases before the same court is clear and uncontroversial."[308] The harm in not doing so may be catastrophic:

> Without this basis for venue [filing where an affiliate has filed], various companies within the same corporate family could be forced to file for bankruptcy in different districts. A wholesale adjudication of the corporate family's bankruptcy cases would be virtually impossible. There would be considerable waste of judicial resources, not to mention the financial and logistical burden on the debtor's officers and legal counsel. The net result would be a significant reduction in any chance of a meaningful reorganization.[309]

The alternatives suggested to deal with this dilemma by those who wish to restrict venue choice still add costs and delay to the cases. Some suggest that a party could file a motion to transfer venue to one district but would allow transfer only if the debtor to be transferred has a "meaningful connection" to the receiving district.[310] If it does not, joint administration of the cases is impossible. Even if it does, motions to transfer venue would have to be filed in all related cases[311] thereby increasing uncertainty, multiplying costs, delaying the resolution of the cases, and risking inconsistent rulings.

Another alternative is to seek substantive consolidation of the debtors, but the threshold to be met in such a case is high.[312] This would entail a substantial evidentiary hearing in the early stage of the cases, multiplying costs and resulting in detrimental delay and uncertainty at that critical time. Substantive consolidation also could be detrimental to some creditors by arbitrarily depriving them of their prepetition bargain.[313]

If the motions are not granted, the reorganization of the related debtors will be more costly, longer, and riskier for creditors. If the motions are granted, it will result in nothing more than the current system allows - but with the

additional costs, delays, and risks inherent in the suggested alternatives. Finally, even picking a "lead" case for venue purposes for its affiliates would be a fact-driven exercise with inherent risk, delay, and cost.

4. There Is Already a Remedy

A change to the venue statute is unnecessary, moreover, because parties (including employees and small creditors) already have the option of moving to transfer venue of the bankruptcy case (or an adversary proceeding or contested matter) to another forum. A court, "on timely motion of a party in interest or on its own motion,"[314] may transfer any bankruptcy case or adversary proceeding if it is "in the interest of justice or for the convenience of the parties."[315] This applies to cases filed in the proper venue as well as to cases filed in an improper venue.[316]

Bankruptcy courts ordinarily apply four factors when determining the convenience of the parties and the interest of justice: (a) the proximity of the bankruptcy court to the interested parties; (b) the location of the debtor's assets; (c) the respective bankruptcy courts' abilities to administer the estate more economically; and (d) the relative economic harm to the debtor and the other interested parties by the transfer.[317]

Proponents of venue change typically resort to nonevidence-based arguments in an effort to marginalize the perceived effectiveness of motions to transfer venue. For example, one advocate for upending the current bankruptcy venue system asserts that for most creditors, seeking to transfer venue of a bankruptcy case "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."[318] Such sweeping statements wither under close scrutiny.

First, there is no empirical study of motions to transfer venue of bankruptcy cases which supports those conclusions. In fact, motions to transfer venue are granted more often than not.[319] For example, the Delaware bankruptcy court granted over two-thirds of the venue transfer motions it has heard in chapter 11 bankruptcy cases since 2001. During that period, forty-three motions to transfer venue were adjudicated.[320] Twenty-nine, or 67.4%, of those motions were granted.[321] In addition, on at least four occasions during that period, Delaware bankruptcy judges raised the issue of transferring venue *sua sponte* and in all cases transferred the case.[322] It is similar in other courts that regularly handle large corporate cases: between 2000 and 2017, the Bankruptcy Court for the Southern District of New York granted 85% of the non-duplicative motions to transfer venue

that were adjudicated.[323] Thus, even though the burden of proving that venue should be transferred lies with the moving party and a debtor's proper choice of forum is entitled to "great weight,"[324] the bankruptcy courts have not hesitated to transfer a case when required for the convenience of the parties or in the interests of justice.[325]

Of course, there are many cases where it is not appropriate to grant a motion to transfer venue under those same standards.[326] For example, in large cases where the debtor has locations, employees, and creditors all over the country, there may be no one venue that is convenient for all parties in interest.[327]

The proponents of venue change also suggest that venue motions are not granted because courts do not consider them timely.[328] Once again, this assertion is contrary to the empirical evidence. Bankruptcy judges are well aware of the need to move with alacrity in deciding venue transfer motions.[329] Indeed, on average, when cases were transferred, Delaware bankruptcy courts granted such relief promptly: in 12 of the cases, the court transferred venue within 10 days after the issue was raised and in five more the transfer was within 15 days.[330]

It is also argued (without any evidence) that parties in interest choose not to file motions to transfer venue because

they will not be granted.[331] Given the actual percentage of motions that are granted, this makes little sense. In addition, there are legitimate reasons why a creditor may choose not to file a motion to transfer venue, including the belief that the debtor's choice of venue was appropriate.[332]

5. Venue Restriction Denies Other Parties Choices

Current venue provisions maximize choices for creditors as well as the debtor. The debtor currently has many choices of venue (state of incorporation, place of principal assets, principal place of business, or where an affiliate has filed).[333] One or more of those choices may be more convenient to other parties than the one the debtor has chosen. The rules currently permit parties in interest who are dissatisfied with the debtor's venue choice to file a motion to transfer the case to another available venue.[334] Restricting venue choice and requiring the debtor to file at its principal place of business (even if that can be determined) might be convenient for the debtor's officers and management but will not necessarily be convenient for all the debtor's lenders, employees, retirees, vendors, and other creditors. Restricting venue choices for the debtor would also deprive those other parties of the opportunity to seek a change of venue to a location more convenient to them.

E. Venue Debate May Largely Be Driven by Attorneys

At least one scholar has noted that not all critics of the current venue regime are motivated by concerns for the virtue of the law.

> Rather, an examination of the complaints offered, and the identity of those who offered them, reveals that many complaints are generated by a baser motive: greed.[335]

Many vocal proponents for restricting venue choice are attorneys who covet the fees generated by cases that are not filed in their districts.[336]

The Commercial Law League of America has led the effort to revise the venue laws "partner[ing] with a group of practitioners from around the country to join forces in a national effort to change the bankruptcy venue statute."[337] According to its former president, the reason to do so is the concern expressed by professionals "that their business has been severely impacted by the fact that Chapter 11 filings are significantly down in their district" as cases file in the magnet courts instead.[338] One proponent of venue change candidly admits that it "could mean a shift in hundreds of millions of dollars in revenues from national and New York City-based law firms to local and regional bankruptcy practices in Atlanta, Boston, Dallas and San Diego."[339] Similarly, although the

National Bankruptcy Review Commission in 1997 cited the interests of small creditors as a reason to change venue, "the history of the Commission and its venue discussions make it abundantly clear that it was the (non-Delaware) lawyers, and not small creditors, who were behind these recommendations."[340]

Modifying venue choices which have been proven to result in faster, less costly, and more efficient reorganizations of large corporate debtors to potentially benefit some attorneys is not good policy.

F. Response to Arguments in Part IV

Part IV of this paper presents seven specific arguments in favor of venue restriction which do not, on closer examination, justify any change. Part IV also alludes to, but rejects, an additional argument which some have made that is a direct attack on the integrity of all bankruptcy judges. That argument has been roundly criticized by academics and practitioners as not supported by the data on which it is premised (or on any other facts). The NCBJ strongly believes that there is no evidence that any judges make rulings that are not justified by the facts and law to attract future cases to their district, just as it disagrees with any suggestion that any bankruptcy judge is not competent to handle a corporate bankruptcy case.

1. Comments on Specific Arguments in Part IV

First, Part IV contends that venue change will "promote public confidence in the integrity of the bankruptcy process."[341] In support, it cites (i) the National Bankruptcy Review Commission report; (ii) testimony presented at the ABI Commission to Study the Reform of Chapter 11; and (iii) articles prepared by a local bar association, individual attorneys, and academics.[342] However, the National Bankruptcy Review Commission report is dated; it is more than twenty years old.[343] The ABI Commission had conflicting testimony on whether venue choice should be restricted and, as a result, chose to make no recommendation for change.[344] Finally, local attorneys are not free from bias on this issue and indeed seem to be motivated by their own self-interest rather than what is best for the bankruptcy system.[345] In contrast, there are many academic studies that conclude that the current venue provisions result in the efficient resolution of large complex business cases that is a principal goal of the Bankruptcy Code.[346]

Venue change proponents also argue that public confidence will be enhanced if employees and local creditors can better keep abreast of developments by attending bankruptcy hearings, which they contend can only be assured if companies are required to file in the district of their headquarters.[347] However,

employees and small creditors rarely attend bankruptcy hearings, even if held at their local courthouse. Further, proximity is no guarantee that their rights will be preserved. Public confidence in the bankruptcy system usually depends on the success or failure of the case, which is determined by a host of factors including the nature and quality of the business itself, the state of the industry and economy, the experience of the professionals involved, and the timing in the case. Therefore, prohibiting filings in venues with a good record of successful reorganizations is likely to erode, not build, public confidence.

Second, Part IV asserts that a concentration of cases in two districts "inhibits the development of uniform, national bankruptcy law on legal issues arising in complex, business cases."[348] On the contrary, the concentration of large complex business cases in two circuits has resulted in well-developed case law on important issues in those circuits, which benefits companies seeking to reorganize because of its predictability.[349] That, however, has not inhibited the development of significant bankruptcy law by the other circuit courts.[350] Attorneys have stated that a venue lacking well-established law at times may be preferable to a venue (even a "magnet" one) which has unfavorable case law on a key issue.[351] Thus, limiting venue

choice hurts businesses by curtailing their options to pick the best available forum for the particular case.

Third, Part IV asserts that venue change will further the intent of Congress that there be a national bankruptcy system.[352] However, the current availability of venue choices does nothing to restrict the national bankruptcy system. There are still 94 judicial districts and bankruptcy courts exist in all of them. Debtors, therefore, are free to file in any of district where they have their principal assets, principal place of business, or are incorporated. Statistics show that large complex businesses do file bankruptcy in many different districts.[353] By allowing parties choices, the existing venue statute has given large complex business organizations important flexibility to reorganize in an efficient, speedy, and less costly, manner.[354]

Fourth, Part IV asserts that venue change is necessary to afford small creditors "access to justice."[355] As noted above, however, it is clear that no district will be convenient for all creditors in a large complex business case.[356] Further, technology reforms have made the bankruptcy courts (and especially the magnet courts) readily accessible to all stakeholders by allowing electronic access to information and easy participation by phone in hearings, and Congress has provided specific protections to small out-of-state litigation

targets.[357] Allowing businesses the option to file in districts that assure they will have an efficient, speedy, and less costly means of reorganizing is the best protection for all stakeholders.

Fifth, Part IV asserts that the concentration of chapter 11 cases in two districts leads to an inefficient use of judicial resources.[358] This argument, however, is based in part on a flawed premise: that the number of bankruptcy judgeships is based on the population in each district. In fact, the number of bankruptcy judgeships is based on the workload of the judges in that district, not on its population.[359] If more cases are filed in a district, more resources are given to the district (in number of judges and clerks). In that way, judicial resources are appropriately channeled where they are needed. In contrast, providing resources to courts in preparation for large chapter 11 cases which may never file in that district is a waste of judicial resources.

Sixth, Part IV asserts that "venue reform . . . may reduce administrative expenses and parties' costs of participation in the chapter 11 process."[360] In support of this argument, however, it relies on anecdotal testimony by witnesses interviewed by the GAO, without acknowledging the contrary testimony also obtained by the GAO in favor of current venue choices.[361] It also relies

on dated academic research that has been refuted by more current academic studies establishing that in venues that regularly handle large complex business cases costs are less because cases are processed quicker and more efficiently.[362]

Seven, Part IV argues that venue should be restricted because it is in the interest of local bankruptcy professionals and communities.[363] This argument has largely been addressed in Part V.E. above. The parochial interests of businesses and professionals in any location should not be the basis of bankruptcy policy. Further, the proponents of venue change acknowledge that ultimately the successful reorganization of a business will benefit the local community where its business operations are located for many years after the case is closed. Therefore, allowing companies to file in districts which have been proven to result in faster, less costly, and more efficient reorganizations of large corporate debtors will have a far more beneficial effect on the local communities than the revenues generated by the bankruptcy case filing in that district (which will largely benefit only the local professionals). Eliminating successful venue choices simply to benefit some attorneys is not good policy.

2. Unfounded *Ad Hominem* Attacks on Judges

Part IV alludes to an argument articulated by one critic of the current venue statute. That argument, propounded by Professor Lynn LoPucki, contends that "forum shopping is driven by judicial 'corruption,' with judges agreeing to make improper decisions in order to lure the largest cases to their courts."[364] As emphatically stated in Part IV, the NCBJ strongly rejects any suggestions by Professor LoPucki that any bankruptcy judges make rulings for reasons other than that which is supported by fact and law. The inflammatory insinuations of the corruption theorist have no basis in fact and have been soundly refuted by numerous academics and practitioners.[365]

Scholars conclude that the author of the corruption theory "makes assertions that either are not or cannot be empirically supported."[366] Even Professor LoPucki admits that "I can identify no particular decision as corrupt."[367] Many scholars take the corruption theorist to task for ignoring or downplaying actions that courts took "if those actions were inconsistent with the competitive theory"[368] and convincingly dispute his assertion that corruption is evidenced indirectly from "trends."[369]

For example, "the data do not prove that" judges who fail to appoint a trustee, rather than an examiner, in specific cases "acted improperly or were biased" nor "prove what would have

happened if a trustee had been appointed."[370] Similarly, the "routine approval of fee applications simply because the lawyers requested their national, customary billing rates" does not prove corruption.[371] Nor have scholars found any support in the data for LoPucki's "finding" of corruption[372] in bankruptcy courts' approval of 363 sales or approval of reorganization plans without conducting their own independent valuation.[373] The Supreme Court has expressly instructed bankruptcy courts to refrain from substituting their judgment of what a company is worth for what the marketplace determines it is worth.[374] Finally, while the approval of first day motions allowing payments to critical vendors is cited as a blatant sign of corruption,[375] courts approving those payments have relied on long-standing precedent (the doctrine of necessity).[376] Recently the approval of first-day motions was expressly sanctioned by the Supreme Court.[377]

It is not just the judges in the magnet courts who are vilified by Professor LoPucki; all judges are subject to being labeled "corrupt" by him. He contends, for example, that the willingness of other courts to adopt procedures similar to the magnet courts is evidence of their own corruption.[378] Scholars reject this unfounded assertion, as well: "That a bankruptcy court (or district) adopts new, streamlined procedures (like the

ones originally used only in the Delaware courts) in response to criticisms that its existing procedures are inefficient or otherwise discourage attorneys from filing large cases in the court/district does not mean that any individual judge is corrupt or cannot still apply the law to the facts."[379] Adoption of procedures designed to improve the efficient administration of justice is laudable[380] not corrupt.

The corruption theory, which is based on speculative insinuations and unsupported theses of a non-judicial actor rather than on the facts, would never be given credence in a court of law. The public and Congress should give it no credence either. "The greatest flaw in [the corruption theory] is LoPucki's inability to present a plausible motivation to justify his frequent use of the word 'corrupt' to describe the bankruptcy bench. On the contrary, . . . the members of the bankruptcy bench are sincere, well-meaning, and conscientious, and . . . have given up the opportunity to earn multiples of a bankruptcy judge's salary in order to 'do the right thing.'"[381]

G. Summation of Part V Argument

The current venue provisions for chapter 11 cases provide a proper balance between (i) a debtor's ability to select the forum which will afford the business the best chance to successfully reorganize for the benefit of all of its

stakeholders and (ii) the ability of creditors and other parties in interest to challenge a debtor's choice of forum. Those who advocate for venue change present no evidence that the current venue transfer laws do not work.

Eliminating venue choices for chapter 11 debtors is a drastic remedy for a problem for which little or no evidence exists. It would, moreover, add uncertainty, delay, and expense to a process - the rehabilitation of companies in financial distress - that can ill afford it. It would deprive creditors, employees, retirees, and other parties of the opportunity to transfer venue of the case in the interests of justice or for the convenience of the parties. Congress has long provided venue choice to permit parties to manage business problems fairly and efficiently. The empirical evidence shows that the venue scheme works efficiently, expeditiously, and cheaply to reorganize businesses.[382] It should not be changed.

PART VI: CONCLUSION

The Committee recognizes that compelling arguments exist on both sides of the debate addressed in this paper.[383] It takes no position on the merits of either side, but leaves that decision to the individual reader, with hopes that the reader's views have been informed.

[1] According to statistics maintained by the Administrative Office of the United States Courts, there were 351 active and recalled bankruptcy judges as of September 30, 2018. The NCBJ reports that 297 active and recalled bankruptcy judges are members.
[2] *See* NCBJ Mission Statement, https://www.ncbj.org./page/MissionStatement (last visited Nov. 13, 2018).
[3] Ch. 541, 30 Stat. 544 (1898), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.
[4] *Id.* § 2 (codified at 11 U.S.C. § 11).
[5] *See, e.g., In re R.C. Stanley Shoe Co.*, 8 F. Supp. 681 (D.N.H. 1934) (dicta).
[6] *In re Tenn. Constr. Co.*, 207 F. 203, 205 (S.D.N.Y. 1913).
[7] *In re Am. & British Mfg. Corp.*, 300 F. 839 (D. Conn. 1924).
[8] *See, e.g.*, *Chicago Bank of Commerce v. Carter*, 61 F.2d 986 (8th Cir. 1932); *Home Powder Co. v. Geis (In re Lincoln Min. & Mill. Co.)*, 204 F. 568 (8th Cir. 1913); *Burdick v. Dillon (In re Matthews Consol. Slate Co.)*, 144 F. 737 (1st Cir. 1906).
[9] Act of June 7, 1934, Ch. 424, 48 Stat. 911, 912.
[10] Chandler Act of 1938, ch. 575, 52 Stat. 840, 886, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. *See* Eugene V. Rostow & Lloyd N. Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 YALE L.J. 1334 (1939).
[11] Chandler Act, 52 Stat. at 886. Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 165-172 (2013) [hereinafter, Parikh, *Modern Forum Shopping in Bankruptcy*]. Although Professor Parikh suggests that venue was restricted for all corporations under the Chandler Act, in fact because of the venue restriction (and appointment of a trustee) in Chapter X, most corporations elected to file under Chapter XI instead, where state of incorporation venue was still available. *See* David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue*, 1 DEL. L. REV. 1, 13-14 (1998) [hereinafter Skeel, *Bankruptcy Judges*].
[12] Skeel, *Bankruptcy Judges*, *supra* note 11, at 13-15 (reasons included not only the venue option but the fact that Chapter XI left management in place, rather than replacing them with a trustee).
[13] *Gen. Stores Corp. v. Shlensky*, 350 U.S. 462 (1956). To be clear, nothing in this case suggests that the decision to file under Chapter XI was based upon the fact that venue in the state of incorporation was allowed under Chapter XI.

[14] Bankruptcy Rules and Official Bankruptcy Forms, 415 U.S. 1003 (1973) (superseded by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549).
[15] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, title II, § 241(a), 92 Stat. 2669 (codified at 28 U.S.C. § 1472) (renumbered as § 1408 by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333).
[16] Pub. L. No. 98-353, § 102(a), 98 Stat. 333.
[17] 1 COLLIER ON BANKRUPTCY ¶ 14.02 (Richard Levin & Henry Sommer, eds., 16th ed. 2018).
[18] *In* re *Broady,* 247 B.R. 470, 472 (B.A.P. 8th Cir. 2000); *In re Miller,* 433 B.R. 205, 211 (Bankr. W.D. Mich. 2010).
[19] *Id. See also In re Frame,* 120 B.R. 718 (Bankr. S.D.N.Y. 1990).
[20] 6 NORTON BANKRUPTCY LAW AND PRACTICE § 6:1 (William L. Norton, III, ed., 3d ed. 2015).
[21] 130 S. Ct. 1181 (2010).
[22] *Id.* at 1192. *See also In re Eagle Pointe Ltd. Dividend Housing Ass'n Ltd. P'ship,* 350 B.R. 84 (Bankr. N.D. Ind. 2006).
[23] 133 B.R. 562, 564 (Bankr. E.D.N.Y. 1991).
[24] *Id. See also In re Newport Creamery, Inc.,* 265 B.R. 614, 617 (Bankr. M.D. Fla. 2001).
[25] *See In re EquiMed, Inc.,* 253 B.R. 391 (D. Md. 2000); *In re Handel*, 242 B.R. 789 (Bankr. D. Mass. 1999).
[26] *In re Dunmore Homes, Inc.*, 380 B.R. 663, 670 (Bankr. S.D.N.Y. 2008); *In re Segno Commc'ns, Inc.*, 264 B.R. 501 (Bankr. N.D. Ill. 2001).
[27] 28 U.S.C. § 1391(c)(2).
[28] *Dwight v. Titlemax of Tennessee, Inc.*, 2010 U.S. Dist. LEXIS 4767, at *5 (E.D. Tenn. Jan. 21, 2010).
[29] 1 COLLIER ON BANKRUPTCY ¶ 4.05 (Richard Levin & Henry Sommer, eds., 16th ed. 2018).
[30] *In re Peachtree Lane Assocs., Ltd.*, 150 F. 3d 788 (7th Cir. 1998). *But see In re Northwest Airlines Corp.*, 384 B.R. 51, 70 (S.D.N.Y. 2008) (stating that the party seeking transfer bears the significant burden of proof under a clear and convincing standard).
[31] *In re Terry Mfg. Co.*, 323 B.R. 507, 509 (Bankr. M.D. Ala. 2005); *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123 (Bankr. D. Mass. 1984); *Colarusso v. Burger King Corp.*, 35 B.R. 365, 368 (Bankr. E.D. Pa. 1984).
[32] *In re McCall*, 194 B.R. 590, 592 (Bankr. W.D. Tenn. 1996).
[33] *In re Moss*, 249 B.R. 200, 203 (Bankr. W.D. Mo. 2000).
[34] *Id.* at 202. *See also In re Land*, 215 B.R. 398, 403 (B.A.P. 8th Cir. 1997).

[35] *In re Enron Corp.*, 284 B.R. 376, 386 (Bankr. S.D.N.Y. 2002); *In re Bruno's, Inc.*, 227 B.R. 311, 324 (Bankr. N.D. Ala. 1998).
[36] *In re Commonwealth Oil Ref. Co.*, 596 F. 2d 1239, 1247 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *In re West Coast Interventional Pain Medicine, Inc.*, 435 B.R. 569, 579 (Bankr. N.D. Ind. 2010); *In re B.L. McCandless, L.P.*, 417 B.R. 80, 82 (Bankr. N.D. Ill. 2009); *In re Dunmore Homes*, 380 B.R. 663, 672 (Bankr. S.D.N.Y. 2008); *Irwin v. Beloit Corp. (In re Harnischfeger Indus., Inc.)*, 246 B.R. 421, 435-37 (Bankr. N. D. Ala. 2000).
[37] *Id.*
[38] *In re Trico Steel Co., LLC*, 261 B.R. 915, 917 (Bankr. N. D. Ohio 2001).
[39] *In re Caesar's Entm't Operating Co.*, 2015 Bankr. LEXIS 314 (Bankr. D. Del. Feb. 2, 2015).
[40] *In re Abacus Broad. Corp.*, 154 B.R. 682, 684-86 (Bankr. W.D. Tex. 1993) (court had "no earthly idea" what the Salt Lake City market was like); *In re B.L. McCandless LP*, 417 B.R. 80 (Bankr. N.D. Ill. 2009) (court considered familiarity of courts with the idiosyncrasies of Pennsylvania real property law).
[41] 6 NORTON BANKRUPTCY LAW AND PRACTICE § 6:3 (William L. Norton, III, ed., 3d ed. 2015).
[42] *See, e.g., Thompson v. Greenwood*, 507 F.3d 416 (6th Cir. 2007); *In re Great Lakes Hotel Assoc.*, 154 B.R. 667 (E.D. Va. 1992); *In re Petrie*, 142 B.R. 404 (Bankr. D. Nev. 1992).
[43] *See, e.g., In re Leonard*, 55 B.R. 106 (Bankr. D.D.C. 1985); *In re Boeckman*, 54 B.R. 110 (Bankr. D.S.D. 1985).
[44] The provisions of title 11 and title 28 of the United States Code relating to bankruptcy cases and proceedings will be referred to hereinafter as the "Bankruptcy Code."
[45] 28 U.S.C. § 1408.
[46] *See, e.g., In re Malden Mills Indus., Inc.*, 361 B.R. 1, 6 (Bankr. D. Mass. 2007) (referring to debtor's counsel's argument that refiling in Delaware where prior case was in Massachusetts was to avoid burdens of legacies of prior Massachusetts cases, and finding that debtor's venue selection was designed to make the venue inconvenient and expensive for some parties).
[47] Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119 (2018) [hereinafter Ellias, *What Drives Bankruptcy*].
[48] Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 386-87 (2015) [hereinafter Coordes, *Geography of Bankruptcy*].

[49] *See* Richard F. Broude, *Jurisdiction and Venue under the Bankruptcy Act of 1973*, 48 AM. BANKR. L.J. 231, 243 (1974).
[50] *See Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1691 (1990).
[51] 28 U.S.C. § 1391 (defining a plaintiff's residence as the location of its principal assets and a defendant's residence is deemed to be any judicial district where there is personal jurisdiction in the action).
[52] 28 U.S.C. § 1412. As will be discussed *infra* at Part IV.F, a contested request to transfer a case due to improper venue involves costly and time-consuming litigation.
[53] 28 U.S.C. § 1408.
[54] Parikh, *Modern Forum Shopping in Bankruptcy, supra* note 11, at 166.
[55] Section 2(1) of Ch. 541, 30 Stat. 544, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.
[56] Act of June 7, 1934, ch. 424, § 77B (1934).
[57] H.R. REP. NO. 75-1409, at 40 (1937).
[58] Rules of Bankruptcy Procedure, Rule 116(a)(2) (1973).
[59] Comm. on Rules of Practice and Procedure, Jud. Conference of the U.S., Preliminary Draft of Proposed Rules and Official Forms under Chapters I to VII of the Bankruptcy Act, at 35 (1971).
[60] 28 U.S.C. § 1472 (renumbered as § 1408 by The Bankruptcy and Federal Judgeship Act of 1984).
[61] *See* Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 169.
[62] *The Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary* , 112th. Cong. 12 (2011) (Testimony of Hon. Frank J. Bailey, Chief Judge, United States Bankruptcy Court for the District of Massachusetts), https://judiciary.house.gov/wp-content/uploads/2011/09/Bailey-09082011.pdf [hereinafter Testimony of Hon. Frank J. Bailey].
[63] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 192.
[64] *The Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong 1 (2011) (Statement of Melissa Jacoby, Professor of Law, University of North Carolina at Chapel Hill), https://judiciary.house.gov/wp-content/uploads/2011/09/Jacoby-09082011.pdf [hereinafter Statement of Melissa Jacoby]. *See also* Coordes, *Geography of Bankruptcy*, supra note 48.

[65] *American Bankruptcy Institute Commission to Study the Reform of Chapter 11, Final Report and Recommendations*, at 311 (citation omitted) [hereinafter *ABI Chapter 11 Commission Report*].
[66] *See* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 12 (1991) (authors gathered and evaluated data of chapter 11 cases for large publicly held companies between 1979 and 1998 and concluded that a substantial number had forum shopped) [hereinafter LoPucki & Whitford, *Venue Choice*].
[67] Robert J. Gayda, *The Bankruptcy Venue Debate: A Never Ending Story*, LAW360 (July 14, 2015), https://www.law360.com/articles/676417/the-bankruptcy-venue-debate-a-never-ending-story.
[68] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-839, CORPORATE BANKRUPTCY: STAKEHOLDERS HAVE MIXED VIEWS ON ATTORNEYS' FEE GUIDELINES AND VENUE SELECTION FOR LARGE CHAPTER 11 CASES (2015), http://www.gao.gov/assets/680/6672696.pdf [hereinafter GAO Report].
[69] *See, e.g.*, *In re Crosby Nat'l Golf Club, LLC*, 534 B.R. 888 (N.D. Tex. 2015) (finding that attempts to legitimize forum shopping were unconvincing).
[70] Alex Wolf, *Bankruptcy Venue Reform Critics Question Need for New Bill*, LAW360 (Jan. 10, 2018, 8:29 PM EST), https://www.law360.com/articles/1000307/bankruptcy-venue-reform-critics-question-need-for-new-bill ("[Venue shopping is] feeding a corrupt culture in the bankruptcy courts. . . . That culture is the idea that only the big players — the debtor, the DIP lender, the creditors' committee — are the only ones that count. Everybody else is a meddler.") (quoting Lynn M. LoPucki). *See also* LoPucki & Whitford, *Venue Choice*, *supra* note 66.
[71] LYNN M. LOPUCKI, COURTING FAILURE (Univ. of Michigan Press 2005) [hereinafter LOPUCKI, COURTING FAILURE].
[72] *National Bankruptcy Review Commission Final Report, Bankruptcy: The Next Twenty Years*, at 779 & n.1914 (October 20, 1997), http://govinfo.library.unt.edu/nbrc/report/01title.html [hereinafter *NBRC Report*].
[73] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 162.
[74] *Id.*
[75] Venue Fairness, Written Statement on behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness,

submitted in support of Testimony of Douglas B. Rosner before the American Bankruptcy Institute Commission to Study the Reform of Chapter 11, (Nov. 22, 2013), http://commission.abi.org/sites/default/files/statements/22nov2013/Venue-Statement-ABI-Commission.pdf [hereinafter *Venue Fairness*]. *See also Report on Venue Fairness*: Report of the Venue Committee of the Bankruptcy Section of the Minnesota State Bar Association in Support of Venue Fairness, at 8 (Jan., 2016), https://www.mnbar.org/docs/default-source/sections/report-on-venue-fairness---january-2016.pdf?sfvrsn=0 [hereinafter *Minnesota Bar Association Report*].

[76] Peter Califano, *Bankruptcy Reform – Everything You Need to Know is in This Article*, 29 COM. L. WORLD, Oct.-Nov. 2015, at 9 (2015) (quoting Hon. Steven Rhodes), https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/colaworl29&id=106&men_tab=srchresults [hereinafter, Califano, *Everything You Need to Know*].

[77] *Venue Fairness*, *supra* note 75.

[78] *Id.* at 7.

[79] *Id.* at 8.

[80] The American College of Bankruptcy has published a book entitled "Circuit Review," a discussion of important decisions from the various federal circuits relating to key issues for practitioners. American College of Bankruptcy, Circuit Review (2017).

[81] *ABI Chapter 11 Commission Report*, *supra* note 65, at 311-12.

[82] Peg Brickley, *UMWA Turns Out the Grassroots Troops in Patriot's Chapter 11*, WALL ST. J.: BANKR. BEAT (Sept. 27, 2012, 4:44 PM ET), http://blogs.wsj.com/bankruptcy/2012/09.

[83] Parikh, *Modern Forum Shopping in Bankruptcy, supra* note 11.

[84] H.R. REP. NO. 95-595 at 50 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6011.

[85] Becky Yeark, *Yeark's Take: Elizabeth Warren: Boston Herald Bankruptcy Highlights Need for Venue Reform*, WALL ST. J. (Aug. 6, 2018, 3:28 PM ET)https://www.wsj.com/articles/yeraks-take-elizabeth-warren-boston-herald-bankruptcy-highlights-need-for-venue-reform-1533583737?shareToken=st1790190b9811437bb37373fb343ff7cb.

[86] *Id.*

[87] *Id.*

[88] Laura N. Coordes, *New Rules for a New World: How Technology and Globalization Shape Bankruptcy Venue Decisions*, 27 ASPER REV. INT'L BUS. & TRADE L. 85, 87 (2017) ("[this] article argues that bankruptcy venue reform must occur in order to ensure the

integrity of the bankruptcy system . . .") [hereinafter Coordes, *New Rules*].

[89] Parikh, *Modern Forum Shopping in Bankruptcy, supra* note 11, at 197 ("The perception is that there are courts willing to give corporate debtors and other key decision makers the outcomes they seek. And, due to a lack of rules governing the venue choice, a debtor can simply choose the court that is most flexible. This impression erodes public confidence in the bankruptcy courts and affects creditors, employees, unions and other constituents excluded from the perceived backroom dealings. An attendant problem is that the fairness of the bankruptcy system is also called into question. The court system strives to ensure that similarly situated parties receive similar treatment. Forum shopping leads to disparate treatment.").

[90] *NBRC Report*, *supra* note 72, at 779 & n.1914.

[91] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 197.

[92] *Id.*

[93] *Id.* at 177-81 (author reviewed data on public company bankruptcy filings in 159 cases from 2007 to 2012 and concluded that 69 percent of the cases had forum shopped and 63 percent filed in either Delaware or the Southern District of New York).

[94] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 13.

[95] *Id.*

[96] Coordes, *New Rules*, *supra* note 88, at 110.

[97] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 197; Coordes, *New Rules*, *supra* note 88, at 104; John Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INTL L. 785, 787 (2007).

[98] *See ABI Chapter 11 Commission Report*, *supra* note 65.

[99] *Id.* at 313 & n.1106.

[100] *Id.* at 314.

[101] *Id.*

[102] Mark Curriden, *Playing on Home Court: New York and Delaware May Lose Their Grip on Bankruptcy Cases*, A.B.A.J., Mar. 2012, at 16 [hereinafter Curriden, *Playing on Home Court*].

[103] *Id.*

[104] Califano, *Everything You Need to* Know, *supra* note 76, at 8.

[105] *Id.* at 14.

[106] Coordes, *New Rules*, *supra* note 88, at 102.

[107] Califano, *Everything You Need to Know*, *supra* note 76, at 14.

[108] *NBRC Report*, *supra* note 72, at 782.

[109] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 198 ("Without discourse across bankruptcy courts, [the] inaccuracies [of the magnet courts] remain unchallenged and are actually strengthened by repeated application to a long string of cases.").
[110] Califano, *Everything You Need to Know*, *supra* note 76, at 13-14.
[111] Ivan Reich, *Making the Case for Bankruptcy Venue Reform*, FLA. B. ST.-TO-ST. NEWSL., Spring 2013, at 12, http://www.flabaroutofstaters.org/pdf/OOS-2013-spring.pdf [hereinafter Reich, *Making the Case*].
[112] 28 U.S.C. §§ 157, 1334. Coordes, *Geography of Bankruptcy*, *supra* note 48, at 399 ("When Congress created bankruptcy laws, it also created a national system of bankruptcy courts scattered throughout the country, with each court addressing bankruptcy problems in a designated region.").
[113] Testimony of Hon. Frank J. Bailey, *supra* note 62, at 20.
[114] *Id.*
[115] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, *at 13.*
[116] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 169.
[117] Testimony of Hon. Frank J. Bailey, *supra* note 62.
[118] 28 U.S.C. § 152.
[119] Conference on Large Chapter 11 Cases, Fed. Jud. Ctr. (Jan. 1, 2004), https://fjc.gov/content/conference-large-chapter 11-cases-0.
[120] Coordes, *New Rules*, *supra* note 88, at 95. *See also Butner v. United States*, 440 U.S. 48 (1979).
[121] 28 U.S.C. § 1408.
[122] Coordes, *New Rules*, *supra* note 88, at 102.
[123] *Id.* at 102-03.
[124] *See, e.g.*, Del. Bankr. L.R. 9010-1(d) ("Association with Delaware Counsel Required. Unless otherwise ordered, an attorney not admitted to practice by the District Court and the Supreme Court of the State of Delaware may not be admitted pro hac vice unless associated with an attorney who is a member of the Bar of the District Court and who maintains an office in the District of Delaware for the regular transaction of business ('Delaware counsel'). Consistent with CM/ECF Procedures, Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court.").

[125] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 13.
[126] *Id.*
[127] *NBRC Report*, *supra* note 72, *at* 776-78.
[128] *Id.*
[129] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 13.
[130] *Id.*
[131] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 14.
[132] *Id.*
[133] *Id.* at 15.
[134] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, *at 13.*
[135] *Id.* at 14.
[136] *Id.*
[137] Testimony of Hon. Frank J. Bailey, *supra* note 62.
[138] *See, e.g.*, *In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002) ("[A]debtor's choice of forum is entitled to great weight if venue is proper.")
[139] Testimony of Hon. Frank J. Bailey, *supra* note 62.
[140] *NBRC Report, supra* note 72, at 783.
[141] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 14.
[142] *Id.* at 8.
[143] *Id.* at 15.
[144] Califano, *Everything You Need to Know*, *supra* note 76.
[145] *Id.*
[146] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 14.
[147] *Id.* at 14-15.
[148] Testimony of Hon. Frank J. Bailey, *supra* note 62.
[149] *Id.*
[150] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 13.
[151] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 21.
[152] 482 B.R. 718 (Bankr. S.D.N.Y. 2012).
[153] *Id.* at 734.
[154] *Venue Fairness*, *supra* note 75.
[155] *Id. See also Minnesota Bar Association Report*, *supra* note 75, at 21.
[156] *In re Winn-Dixie Stores Inc.*, No. 05-11063 (RDD) (Bankr. S.D.N.Y. 2005).

[157] Craig A. Bruens & M. Natasha Labovits, *You Can Still Shop after Winn-Dixie the Right to Choose Venue Survives the Transfer to Fla.*, AM. BANKR. INST. J., July-Aug. 2005, at 16 [hereinafter Bruens & Labovits, *You Can Still Shop after Winn-Dixie*].
[158] *Id.*
[159] *In re Winn-Dixie Stores Inc.*, No. 05-11063 (RDD), D.I. 739 (Bankr. S.D.N.Y. 2005) (order granting transfer of venue).
[160] *In re Houghton Mifflin Harcourt Publishing Co.*, 474 B.R. 122 (Bankr. S.D.N.Y. 2012).
[161] *Venue Fairness*, *supra* note 75.
[162] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 198.
[163] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, *at 19.*
[164] *Id.*
[165] *Id.*
[166] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, *at 19.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] GAO Report, *supra* note 68.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 24.
[178] *Id.* at 26.
[179] Lynn LoPucki, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423, 425-26 (2009).
[180] *See* A. Mechele Dickerson, *Words that Wound: Defining Discussing, and Defeating Bankruptcy "Corruption,"* 54 BUFF. L. REV. 365 (2006) [hereinafter Dickerson, *Words that Wound*]; Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467 (2006) [hereinafter Tabb, *Courting Controversy*]; Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF. L. REV. 343 (2006); Melissa Jacoby, *Fast, Cheap, and Creditor Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401 (2006) [hereinafter Jacoby, *Fast*].
[181] Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Bankruptcy*, 5 J. BUS. & TECH. L. 263, 274 (2010) [hereinafter Rapoport, *Rethinking Professional Fees*].

[182] *Venue Fairness*, *supra* note 75. *See also Minnesota Bar Association Report*, *supra* note 75, at 21.
[183] There is an exception to Del. Bankr. L.R. 9010-1(c) which exempts all federal and local government attorneys from the requirement of local counsel, and they are not required to appear with local counsel. *See* Del. Bankr. L.R. 9010-1(e)(i), http://www.deb.uscourts.gov/content/rule-9010-1-bar-admission.
[184] Peter C. Califano, *Bankruptcy Venue Reform*, at 3 (Feb. 26-28, 2017) https://cdn.ymaws.com/clla.org/resource/resmgr/docs/Position_Papers/Venue_2017.pdf.
[185] *Venue Fairness*, *supra* note 75.
[186] *Id.* *See also Minnesota Bar Association Report*, *supra* note 75, at 20.
[187] Sen. Chris Coons, *Bankruptcy Legislation Could Devastate Delaware*, DE ONLINE, https://www.delawareonline.com/story/opinion/contributors/2018/01/25/sen-chris-coons-bankruptcy-legislation-could-devastate-delaware/1065030001/.
[188] Douglas B. Rosner, Mass. Lawyers Weekly, Feb. 15, 2018.
[189] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 196; Coordes, *Geography of Bankruptcy*, *supra* note 48, at 395.
[190] *See* H. R. REP. NO. 95-595, at 50 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 5963, 6011. *See also* Coordes, *Geography of Bankruptcy*, *supra* note 48, at 395.
[191] GAO Report, *supra* note 68, at 27-28.
[192] Curriden, *Playing on Home Court, supra* note 102.
[193] LOPUCKI, COURTING FAILURE, *supra* note 71, at 110-122.
[194] *Venue Fairness*, *supra* note 75.
[195] Coordes, *New Rules*, *supra* note 88.
[196] *See, e.g.*, Califano, *Everything You Need to Know*, *supra* note 76 (author reviewed the history of the venue debate, the consequences of forum shopping, and advocated for amendment of the bankruptcy venue statute to require commencement of a chapter 11 case where the entity has its principal place of business or principal assets in the United States).
[197] Skeel, *Bankruptcy Judges, supra* note 11. *See also* Fed. R. Bankr. P. 116(a)(2) (repealed by the Bankruptcy Reform Act of 1978).
[198] Since the Judiciary Act of 1789, federal law has treated place of incorporation as an appropriate venue for lawsuits in the federal courts. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1518 (2017) (citing Act of Sept.

24, 1789, § 11, 1 Stat. 79). *See also* 28 U.S.C. § 1391(c) (1948).

[199] *See, e.g.*, *Delaware v. New York*, 507 U.S. 490 (1993) (rejecting argument that principal place of business rather than state of incorporation should govern escheat rights).

[200] *See, e.g.*, 28 U.S.C. § 1400(b) (patent cases); 42 U.S.C. § 9613(b) (CERCLA); 15 U.S.C. § 22 (antitrust cases); 15 U.S.C. § 77v (Securities Act of 1933); 15 U.S.C. § 78aa (Securities Exchange Act of 1934); 15 U.S.C. § 80b-14 (Investment Advisors Act); 15 U.S.C. § 1222 (action to terminate car dealer franchise agreement); 15 U.S.C. § 2606 (Toxic Substances Control Act); 18 U.S.C. § 1965 (civil RICO); 28 U.S.C. § 2343 (review of orders of federal agencies); 42 U.S.C. § 2223 (certain actions against Atomic Control Agency); 7 U.S.C. § 1642(e) (Stabilization of Wheat Market Act); 28 U.S.C. § 1398 (action to enforce orders of Surface Transportation Board); 45 U.S.C. § 56 (certain actions by railroad employees).

[201] In 1973, the Judicial Conference of the United States Courts enacted Bankruptcy Rules, including a rule which provided that a corporate debtor could file in the district where an affiliate had filed. Fed. R. Bankr. P. 116(a)(2) (repealed by the Bankruptcy Reform Act of 1978). The Bankruptcy Code retained the affiliate venue provision. 28 U.S.C. § 1408. *See generally* Skeel, *Bankruptcy Judges*, *supra* note 11.

[202] *See infra* Part V.B.

[203] *See infra* Part V.D.4.

[204] Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1396 (2000) [hereinafter Rasmussen & Thomas, *Timing Matters*].

[205] Jack Butler, *Commentary: The Examiners: For Large Companies, Venue Choice Isn't a Bad Thing*, WALL ST. J., Mar. 4, 2015, https://blogs.wsj.com/bankruptcy/2015/03/04/the-examiners-for-large-companies-venue-choice-isnt-a-bad-thing [hereinafter Butler, *For Large Companies*].

[206] *Bankruptcy Filings: U.S. Bankruptcy Courts - Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code (Table F-2)*, U.S. Courts (Dec. 31, 2017), http://www.uscourts.gov/sites/default/files/data_tables/bf_f2.3_1231.2017.pdf [hereinafter *Bankruptcy Filings*].

[207] 2005-13 data collected from UCLA-LoPucki Bankruptcy Research Database, http://lopucki.law.ucla.edu and The Deal, LLC, http://pipeline.thedeal.com. 2014-18 data collected from https://reorg-research.com/home.

[208] *Id.*
[209] *Id.*
[210] Charles Oellermann & Mark G. Douglas, *The Year in Bankruptcy 2017*, JONES DAY (Feb. 2, 2018), www.jonesday.com/the-year-in-bankruptcy-2017-02-02-2018.
[211] Charles Oellermann & Mark G. Douglas, *Top Ten Bankruptcies of 2016*, JONES DAY (Jan. 26, 2017), www.jonesday.com/top-10-bankruptcies-of-2016-01-26-2017.
[212] *See* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting Venue*, 78 NEB. L. REV. 79, 110-11 (1999) (arguing that based on the structure of the federal and state court systems, selecting the forum constitutes a legitimate use of available law and is in keeping with ethical rules requiring attorneys to use rules and procedures to the fullest benefit of their clients) [hereinafter Algero, *In Defense of Forum Shopping*]. *See also* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1989 (2002) (noting that venue selection occurs in "almost every legal context" and often is one of the most important strategic determinations that an attorney will make) [hereinafter, Miller, *Chapter 11 Reorganization*]; Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 196-97 (concluding that "[f]orum shopping is a fixture of court-adjudicated dispute resolution and defended by scholars") (*citing* Richard Maloy, *Forum Shopping? What's Wrong With That*?, 24 QUINNIPIAC L. REV. 25, 50 (2005); Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1359).
[213] Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 335, 343 (2006) [hereinafter Bassett, *The Forum Game*].
[214] Algero, *In Defense of Forum Shopping*, *supra* note 212, at 82.
[215] *Id.* at 83.
[216] *Id.*
[217] *Id.* at 111-12. *See also* Coordes, *Geography of Bankruptcy*, *supra* note 48, at 420 ("Lawyers have a duty to represent their clients to their best ability, and finding the most favorable forum available is part of that duty."); Bassett, *The Forum Game*, *supra* note 213, at 344 ("The ethical rules require lawyers to represent clients to the best of their ability, and selecting the forum most favorable to the client's claim is an integral part of vigorous and effective representation. Indeed, the failure to forum shop would, in most instances, constitute malpractice.").
[218] *See* Algero, *In Defense of Forum Shopping*, *supra* note 212, at 88.

[219] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 193 (noting that "not all manner of forum shopping is negative").
[220] Coordes, *Geography of Bankruptcy*, *supra* note 48, at 420.
[221] Bruens & Labovits, *You Can Still Shop after Winn-Dixie*, *supra* note 157, at 16-61.
[222] Coordes, *Geography of Bankruptcy*, *supra* note 48, at 421 (acknowledging that "forum shopping may also be consistent with bankruptcy's policy of helping the debtor. . . [and] improv[ing] its chances of a successful reorganization").
[223] GAO Report, *supra* note 68, at 21. *See also* Marcus Cole, *Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1860 (2002) [hereinafter Cole, *Delaware Is Not a State*].
[224] Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 290 (2001) [hereinafter Rasmussen & Thomas, *Whither the Race?*].
[225] Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1990. *See also* GAO Report, *supra* note 68, at 23 (noting that two attorneys opined that filing in a court without considering prior rulings - such as the Ninth Circuit's opinion on the non-assignability of intellectual property - could harm a company's ability to successfully emerge from bankruptcy and could be considered malpractice); Perry Mandarino, *Commentary, The Examiners: The Myth of Forum Shopping*, WALL ST. J.: BANKR. BEAT (Mar. 4, 2015, 12:29 PM ET), https://blogs.wsj.com/bankruptcy/2015/03/04/the-examiners-the-myth-of-forum-shopping (noting that "it's certainly understandable that many legal advisors will favor those districts that offer the most expedient and experienced courts in addressing the complex nature of large claim pools").
[226] *See* Ellias, *What Drives Bankruptcy*, *supra* note 47 (concluding that markets are better able to predict the outcome of a bankruptcy case filed in Delaware or the Southern District of New York than in other jurisdictions because their combination of judicial expertise and developed legal precedent make the bankruptcy process more predictable and efficient).
[227] *See* Curriden, *Playing on Home Court, supra* note 102 (quoting one attorney in Houston who says that "Many companies file in Delaware or New York . . . because corporate executives and boards view the judges in those jurisdictions as more predictable and thus being 'the safe choice.'").

[228] *Id.* *See also* Reich, *Making the Case*, *supra* note 111 (arguing that the predictability of Delaware and New York is not a good thing and positing that "uncertainty" is preferable to predictability because it leads to settlements).
[229] *See* Curriden, *Playing on Home Court*, *supra* note 102 (quoting a prominent Dallas attorney as saying, "If you want financing, you must file in Delaware or New York.").
[230] Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 463 (2006) [hereinafter Ayotte & Skeel, *An Efficiency-Based Explanation*] (citing Sandeep Dahiya et al., *Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence*, 69 J. FIN. ECON. 259, 270-76 (2003)). *See also* Cole, *Delaware Is Not a State*, *supra* note 223, at 1868; Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1391 n. 173.
[231] GAO Report, *supra* note 68, at 24. *See also* Kenneth Ayotte & David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy*, (U. PENN. INST. FOR LAW & ECON., Research Paper No. 30-29, Oct. 18, 2004), SSRN: https://ssrn.com/abstract=463001 or http://dx.doi.org/10.2139/ssrn.463001 (concluding that secured lenders exhibited a strong preference for filing in Delaware) [hereinafter Ayotte & Skeel, *Distressed Companies*]; Cole, *Delaware Is Not a State*, *supra* note 223, at 1868.
[232] Cole, *Delaware Is Not a State*, *supra* note 223, at 1868.
[233] *See* Del. Bankr. L.R. 4001-2; S.D.N.Y. Bankr. L.R. 4001-2.
[234] *See* Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1992-93.
[235] *See* GAO Report, *supra* note 68, at 21-23.
[236] *See* Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 193 (citations omitted).
[237] *See* Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1990 (noting the practice among patent attorneys to file where there is the most developed patent law). *See supra* Part V.C.
[238] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 193.
[239] *Compare Perlman v. Catapult Entertainment, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999) (holding that debtor could not assume or assign) *and In re West Elecs., Inc.*, 852 F.2d 79, 82 (3d Cir. 1988) (same), *with Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997), *cert. denied*, 521 U.S. 1120 (1997) (holding that debtor may assume if it does not intend to assign it to a third-party). *See* GAO Report, *supra* note 68, at 23

(noting that two attorneys opined that filing in a court without considering prior rulings - such as the Ninth Circuit's opinion on the non-assignability of intellectual property - could harm a company's ability to successfully emerge from bankruptcy and could be considered malpractice).

[240] *Compare Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1094 (3d Cir. 2006) (holding that debtor cannot reject a collective bargaining agreement without evidence that the rejection is necessary to prevent debtor's liquidation), *with Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 88-90 (2d Cir. 1987) (holding that debtor may reject a collective bargaining agreement if it is necessary to "complete the reorganization process successfully").

[241] *Compare In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210-11 (3d Cir. 2001) (holding that rent must be paid immediately only if it first comes due after the bankruptcy case is filed), *with In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 67-70 (Bankr. S.D.N.Y. 2004) (holding that debtor is obligated to immediately pay rent for the portion of the month after the petition date).

[242] Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1989.

[243] *See* Cole, *Delaware Is Not a State*, *supra* note 223, at 1862 (attorneys stated that the absence of negative case law is better than being required to file in an unfavorable venue).

[244] First day motions typically seek authority to pay prepetition wage and benefit claims of employees to the extent they have priority under section 507(a)(4) and (5), prepetition tax claims that may be entitled to secured status, prepetition premiums necessary to maintain insurance on the debtor's property and operations, adequate protection for utilities under section 366, prepetition claims of critical vendors (e.g., those who are the sole source of goods the debtor needs), and similar claims.

[245] Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1992-93 (noting that without first day relief employees might refuse to work and vendors might stop supplying the debtor).

[246] *See, e.g.*, *Gregg v. Metropolitan Trust Co.*, 25 S. Ct. 415, 519 (1905); *Miltenberger v. Logansport, C. & S. W. R. Co.*, 1 S. Ct. 140 (1882); *In re B&W Enters., Inc.*, 713 F.2d 534, 535-38 (9th Cir. 1983); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972).

[247] *See, e.g.*, 11 U.S.C. § 503(b)(9) (elevating to administrative claim status the prepetition claims of suppliers for goods

delivered within 20 days of the petition date); Fed. R. Bankr. P. 6003 (allowing payments on less than 21 days' notice "to the extent that relief is necessary to avoid immediate and irreparable harm"). Administrative claims may be paid during the administration of the estate before a plan of reorganization is confirmed. *See In re Mid-State Plumbing, Inc.*, 2017 WL 4179819, at *4 (Bankr. W.D. La. Sept. 20, 2017).

[248] *See, e.g.*, *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (holding that absent additional evidence, debtors could not pay prepetition claims of critical vendors prior to plan confirmation); *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (in granting objection of priority tax claimant to settlement of unsecured claim, the court noted that the absolute priority rule arises "as soon as a debtor files a petition for relief" and not just when a plan is filed or is being considered for confirmation); *Crowe & Assocs. Inc. v. Bricklayers & Masons Union Local No. 2 (In re Crowe & Assocs. Inc.)*, 713 F.2d 211 (6th Cir. 1983) (holding that debtor could not pay employees' prepetition claims before confirmation even if necessary to avoid a labor dispute that would impair debtor's operations).

[249] *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985-86 (2017) (citing with approval bankruptcy courts' granting of "'first-day' wage orders that allow payment of employees' prepetition wages, 'critical vendor' orders that allow payment of essential suppliers' prepetition invoices, and 'roll-ups' that allow lenders who continue financing the debtor to be paid first on their prepetition claims" because those orders preserve the debtor as a going concern, promote the possibility of a confirmable plan, and benefit even the creditors who are not being paid).

[250] Del. Bankr. L.R. 9013-1(m); S.D.N.Y. Bankr. L.R. 1002-1.

[251] Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1992-93.

[252] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1389.

[253] Del. Bankr. L.R. 6004-1; S.D.N.Y. Bankr. L.R. 6004-1.

[254] *See* GAO Report, *supra* note 68, at 24; Cole, *Delaware Is Not a State*, *supra* note 223, at 1863-65; Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1375 (noting that "attorneys know that Delaware has experience in processing [prepackaged] case[s]; no other venue has handled nearly as many").

[255] *See* Benjamin Charles Iverson, Joshua Madsen, Wei Wang & Qiping Xu, *Practice Makes Perfect: Judge Experience and Bankruptcy Outcomes* (July 16, 2018), SSRN: https://ssrn.com/abstract=3084318 or

http://dx.doi.org/10.2139/ssrn.3084318 (finding that cases assigned to more experienced judges spend less time in bankruptcy, are more likely to be reorganized rather than liquidated, and are less likely to refile for bankruptcy after emergence, thereby saving significant costs for the estate) [hereinafter Iverson et al., *Practice Makes Perfect*]. *See also* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 990, 1014 (2015) (concluding that the judge's experience is "strongly correlated" with the survival of the debtor and that "bankruptcy system participants can increase the likelihood of the debtor company's survival simply by shifting cases to more experienced judges"); Stephen J. Lubben, *Delaware's Irrelevance*, 16 AM. BANKR. INST. L. REV. 267, 279 (2008) (refuting Professor LoPucki's earlier claim that Delaware cases failed - as evidenced by refiling rates - more than in other venues and concluding that there is no "statistically significant difference in refiling rates" for cases in or outside Delaware based on data of public companies with more than $100 million in assets who filed bankruptcy cases between 1992 and 2002); Ayotte & Skeel, *Distressed Companies*, *supra* note 231 (concluding that the choice of Delaware is inversely related to the home court judges' experience with business cases).

[256] Ayotte & Skeel, *An Efficiency-Based Explanation*, *supra* note 230, at 462.

[257] *See* Cole, *Delaware Is Not a State*, *supra* note 223, at 1860 ("Nearly all of the lawyers interviewed mentioned speed as an important benefit they associated with Delaware bankruptcy venue.").

[258] *See* Iverson et al., *Practice Makes Perfect*, *supra* note 255, at 28. *See also* Ayotte & Skeel, *An Efficiency-Based Explanation*, *supra* note 230, at 462 ("Overall, these findings suggest that companies may have filed for bankruptcy in Delaware in order to benefit from the Delaware judges' experience, the speed of the Delaware process, or both."); Ayotte & Skeel, *Distressed Companies*, *supra* note 231 (concluding that a Delaware reorganization case is between 140-190 days faster than an equivalent case in another court); Barry E. Adler & Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L. J. 1309, 1317 (2003) (concluding that "all agree, that Delaware reorganizes firms faster than do other jurisdictions"); Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1389-90 (finding that "Delaware processes its cases a bit quicker than do other venues"). *See also* Cole, *Delaware Is Not a State*, *supra* note 223, at 1860 (citing Fed. Jud. Ctr., *Chapter 11 Venue*

Choice by Large Public Companies: Report to the Judicial Conference Committee on the Administration of the Bankruptcy System, at 37 (1997), http://www.fjc.gov).

Professor LoPucki originally contended that Delaware did not process cases faster than other courts. Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 989-92 (1999). His recent research, however, confirms that Delaware is faster. Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1984 (2002) ("Our data show that the Delaware process is quicker."). While the academics have focused on Delaware (because it has been the target of the advocates for restricting venue choice), it is suspected that the other venues of choice for large chapter 11 business cases are similar in processing those cases efficiently - or they would not continue to get those cases.

[259] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1388. *See also* Rasmussen & Thomas, *Whither the Race?*, *supra* note 224, at 289 (citations omitted) ("Given the overriding necessity of having all affected classes of creditors agree to the proposed new capital structure, we have argued that prepackaged bankruptcies tend to promote the joint welfare of the firm's owners. We have also asserted that having a single jurisdiction specialize in prepackaged bankruptcy makes a good deal of sense.").

[260] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1391.

[261] *Id.*

[262] *See* Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Cases*, J. OF EMPIRICAL LEGAL STUD., no. 1, 2004, at 114 & 137-39 (finding that there is a direct correlation between the length of time spent in bankruptcy and the cost, namely the amount of fees awarded in bankruptcy) [hereinafter LoPucki & Doherty, *Determinants*].

[263] *See* Cole, *Delaware Is Not a State*, *supra* note 223, at 1860-61 (noting that having experienced judges who could handle the case expeditiously "results in a cost savings to the estate"); Rasmussen & Thomas, *Whither the Race?*, *supra* note 224, at 296 ("It logically follows that quicker bankruptcy proceedings will, on average, be cheaper affairs."); Ayotte & Skeel, *Distressed Companies*, *supra* note 231, at 15 (concluding that Delaware is chosen as a venue because it is significantly quicker than other courts to confirm a reorganization case which other research has shown is a predictor of the success of a bankruptcy case).

[264] *See* Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. CORP. & FIN. L. 141, 146 (2012) (finding that "cases filed in New York or Delaware do not cost more – in fact, these jurisdictions seem to actually reduce chapter 11 costs") [hereinafter Lubben, *What We "Know"*]; LoPucki & Doherty, *Determinants*, *supra* note 262, at 131 (admitting that, controlling for the size of the debtor, Delaware fees were not greater to a statistically significant degree than other jurisdictions).

[265] *See* Eric Morath, *GM Bankruptcy 'Unusually Inexpensive,'* WALL ST. J.: BANKR. BEAT (July 26, 2011, 4:08 PM ET).

[266] Iverson et al., *Practice Makes Perfect*, *supra* note 255, at 6.

[267] *Id.* at 28 (finding that "judges' learning concentrates in the first two years of tenure, but that it can take up to four years for a judge to manage large Chapter 11 filings in a manner similar to more experienced judges.").

[268] *See Bankruptcy Filings*, *supra* note 206.

[269] *See, e.g.*, United States Bankruptcy Court for the District of Delaware, *How to File an Electronic Claim*, http://deb.uscourts.gov/sites/default/files/ELM/Electronic_Claims.swf (last accessed June 20, 2018); *Noticing Information*, http://deb.uscourts.gov/noticing-information (last accessed June 20, 2018); *Claims Agency List*, http://deb.uscourts.gov/sites/default/files/moveit/ClaimsAgentCases.html (last accessed June 20, 2018).

[270] *See* Fed. Jud. Ctr., *Remote Participation in Bankruptcy Court Proceedings*, at 25 & 29 (2017) [hereinafter Fed. Jud. Ctr., *Remote Participation*] (noting that "equipping the courtrooms with the necessary audio and visual systems still poses significant costs" and "the cost of installing and using videoconferencing comes out of the court's local budget"). Delaware has already expended in excess of $1.5 million to add videoconferencing and teleconferencing capabilities in all its courtrooms.

[271] *See* Congressional Budget Office, *The Budget and Economic Outlook: 2018 to 2028*, www.cbo.gov/publication53651 (last visited June 19, 2018). Currently the Administrative Office will provide supplementary staffing assistance to courts where large cases are filed (other than the magnet courts) but those courts must pay the salary and benefits associated with those temporary staffers. If venue is changed, it is unlikely the Administrative Office will continue to provide such assistance.

[272] *See supra* Part V.C.

[273] *See, e.g.*, Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1394. A notable exception to this is prepackaged cases, where either the general unsecured creditors have already voted in favor of the plan or their claims are not impaired (i.e., are left unaffected by the chapter 11 plan). In those cases, the general unsecured creditors have no need for representation as their rights are not being affected. *Id.* *See supra* Part V.C.4.
[274] 11 U.S.C. §§ 1102 & 1103.
[275] *See* Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1395.
[276] *See id.* at 1380 (noting that "several effective organizations represent the interests of small creditors, especially the National Association of Credit Management").
[277] *See* Skeel, *Bankruptcy Judges*, *supra* note 11, at 36-37 (noting that many of the smaller creditors are "unlikely to participate in any event" and that they "will be represented in important respects by the creditors committee").
[278] This is typically capped at the priority wage amount and, therefore, does not provide excessive payments to insiders or managers. *See* 11 U.S.C. § 507(a)(4) & (5) (currently placing a cap of $12,850 on priority wage and benefit claims).
[279] Congress, in part, ratified this practice when it amended the Code in 2005 by providing administrative priority to prepetition claims of vendors who delivered goods within 20 days of the bankruptcy filing. 11 U.S.C. § 503(b)(9).
[280] In the Third Circuit, the standard for rejection of a collective bargaining agreement is stricter than in other circuits. *See, e.g.*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1094 (3d Cir. 2006) (holding that debtor cannot reject a collective bargaining agreement without evidence that the rejection is necessary to prevent a debtor's liquidation). *Cf. Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 88-90 (2d Cir. 1987) (holding that debtor may reject a collective bargaining agreement if it is necessary to "complete the reorganization process successfully").
[281] *See supra* Part V.C.
[282] *See* Fed. Jud. Ctr., *Remote Participation*, *supra* note 270, at 1-2 (noting that remote participation technology in particular is not yet universally adopted by the bankruptcy courts and suggesting a remote access guide might "promote access to the courts, make the best use of existing judicial resources, and contain costs while maintaining the quality of court proceedings").

[283] Coordes, *New Rules*, *supra* note 88, at 97-98.
[284] *See Electronic Filing (CM/ECF)*, U.S. COURTS, http://www.uscourts.gov/courtrecords/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf (last visited Nov. 14, 2018).
[285] In at least one of the magnet courts, audio recordings of hearings are docketed within twenty-four hours of the hearing, allowing anyone to listen to the proceeding after the fact. *See, e.g.*, *Digital Audio Files Available Over the Internet*, Bankr. D. Del., http://www.deb.uscourts.gov/sites/default/files/forms/DEB_CourtSpeak_Notification_2-12-2018.pdf (last visited June 19, 2018).
[286] *See, e.g.*, Del. Bankr. L.R. 2002(f). The costs are borne by the estate. 11 U.S.C. § 156(c) (stating that "any court may utilize facilities or services . . . which pertain to the provision of notices, dockets . . . and other administrative information to parties in cases . . . where the costs of such facilities or services are paid for out of the assets of the estate").
[287] Claims agents are required, for example, to provide public access to information on their websites regarding claims. *See, e.g.*, Del. Bankr. L.R. 2002-1(f)(viii).
[288] Jennifer Meyerowitz & Jennifer E. Mercer, *Effective Use of a Call Center in Chapter 11 Cases*, AM. BANKR. INST. J., 28 (Sept. 28, 2013).
[289] *See, e.g.*, *Instructions for Telephonic Appearances*, Bankr. D. Del., https://www.deb.uscourts.gov/sites/default/files/Chambers%20Information/Telephonic_Procedures%5B1%5D.pdf (last accessed June 19, 2018) (providing that "[a]ny party not submitting a pleading, but interested in monitoring the court's proceedings, may participate by telephonic appearance in 'listen-only' mode"). *See also* Del. Bankr. L.R. 3007-1(g) (providing that "[a]ny claimant may participate *pro se* (and telephonically) at a hearing on an Objection to his or her claim by following the telephonic appearance procedures located on the Court's website").
[290] For example, at the first hearing held in *The Weinstein Cos.* case, counsel appearing by phone for a party was permitted to cross-examine the debtor's witness regarding the exact terms of the proposed DIP financing. *In re The Weinstein Cos.*, No. 18-10601, D.I. 77 at 75 (Bankr. D. Del. Mar. 19, 2018). In a subsequent hearing, counsel for the Unsecured Creditors'

Committee appeared telephonically and more than adequately presented the Committee's position. *Id.*, D.I. 273 at 25.
[291] *See* Fed. Jud. Ctr., *Remote Participation*, *supra* note 270, at 19 (noting that "some [courts] indicate that telephonic appearances by pro se parties are rarely permitted").
[292] *See* Fed. Jud. Ctr., *Remote Participation*, *supra* note 270, at 23.
[293] *Id.* *See, e.g.*, *In re Nortel Networks, Inc.*, No. 09-10138, 2010 WL 1169766 (Bankr. D. Del. Feb. 26, 2010).
[294] Testimony of Hon. Frank J. Bailey, *supra* note 62.
[295] *See, e.g.*, *In re Videology, Inc.*, No. 18-11120, D.I. 348 (Bankr. D. Del. July 17, 2018) (preference claims included in assets to be sold at auction); *In re Bon-Ton Stores, Inc.*, No. 18-10248, D.I. 632 (Bankr. D. Del. Apr. 25, 2018) (same); *In re Oldapco, Inc.*, No. 17-12082, D.I. 425 (Bankr. D. Del. Feb. 8, 2018) (same).
[296] *See, e.g.*, *In re Abeinsa Holdings, Inc.*, No. 16-10790, D.I. 1775-89 (Bankr. D. Del. March 23, 2018) (preference claims filed 15 months after plan confirmed); *In re Hancock Fabrics, Inc.*, No. 16-10296, D.I. 1999-2065 (Bankr. D. Del. June 20, 2017) (preference claims filed seven months after plan confirmation); *In re AmCad Holdings, LLC*, No. 14-12168, D.I. 646-54 (Bankr. D. Del. Aug. 11, 2015) (preference complaints filed 13 months after plan confirmation).
[297] *See* 28 U.S.C. § 1409(b) (providing that "a trustee . . . may commence a proceeding . . . to recover a money judgment of or property worth less than $1,300 . . . only in the district . . . in which the defendant resides").
[298] *Dynamerica Mfg. LLC v. Johnson Oil Co., LLC (In re Dynamerica Mfg. LLC)*, 2010 WL 1930269, at *3 (Bankr. D. Del. May 10, 2010).
[299] For example, the *Toys "R" Us* case which filed in the Eastern District of Virginia had its headquarters in New Jersey. However, New Jersey was the location of only about 30 of the debtor's 800 stores in the United States and less than 5% of its employees. *In re Toys "R" Us, Inc.*, No. 17-34665, 2018 Bankr. LEXIS 1604 (Bankr. E.D. Va. May 31, 2018). The *Bon-Ton* case had ten affiliated debtors and headquarters in Pennsylvania and Wisconsin and had over 250 stores, 9 furniture galleries, and 4 clearance centers throughout the Northeast, Midwest and upper Great Plains area. *In re The Bon-Ton Stores, Inc.*, No. 18-10248, D.I. 2 (Bankr. D. Del. Feb. 2, 2018).
[300] *See* Miller, *Chapter 11 Reorganization*, *supra* note 212, at 1995.
[301] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1394.

[302] Coordes, *New Rules*, *supra* note 88, at 109.
[303] *Id.* *See also Montana v. Blixseth (In re Blixseth)*, 484 B.R. 360, 365-67 (B.A.P. 9th Cir. 2012) (concluding that the principal place of intangible assets does not have a "one-size-fits-all" solution).
[304] Knowing this, some parties may even object to the debtor's choice of venue as a tactical ploy to force concessions in their favor.
[305] 11 U.S.C. §§ 1502(4) & 1520. In determining the center of main interests in a chapter 15 case, the courts consider the same factors that a court would in determining the location of a debtor's principal place of business or principal assets: the location of the debtor's headquarters, its managers, its principal assets, the majority of the creditors, and the administrative functions. *See, e.g.*, *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013). *See also* Mark Lightner, *Determining the Center of Main Interests under Chapter 15*, 18 NORTON J. OF BANKR. L. & PRACTICE 519, 521 (2009).
[306] *See, e.g.*, Allan L. Gropper, *The Model Law after Five Years: the U.S. Experience with COMI*, 2011 NORTON ANN. REV. OF INT'L INSOLVENCY 13, n.20 (2011) (commenting that the "requirement that there be a COMI determination has, in too many cases, complicated and confused the process of recognition" of a foreign proceeding); Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 410 (2010) ("determining a debtor's COMI is the most hotly contested issue in international insolvency").
[307] *See* Bruens & Labovits, *You Can Still Shop after Winn-Dixie*, *supra* note 157 (noting that in large chapter 11 cases "[t]here is often no one forum that is convenient for *every* party"); Skeel, *Bankruptcy Judges*, *supra* note 11, at 36 (1998) (noting that large public companies "often do business in numerous states [making] any filing location . . . likely to inconvenience a significant number of creditors").
[308] Parikh, *Modern Forum Shopping in Bankruptcy*, *supra* note 11, at 176.
[309] *Id.* at 191.
[310] *Id.* at 200 (suggesting that "The requirement that the corporate debtor have a 'meaningful connection' to the district should curtail the most blatant forms of forum shopping. The use of the word 'meaningful' would compel the debtor to show by a preponderance of the evidence that its business and/or operations establish some material relationship to the chosen

district; at the same time, 'meaningful' would demand a far less rigorous showing than words such as 'substantial' or 'predominant.'").

[311] Large cases typically involve numerous related entities. In the *Loewen* case, for example, there were almost a thousand related debtors. *See In re Loewen Group Int'l, Inc.*, No. 99-01244 (Bankr. D. Del. 1999).

[312] *See, e.g.*, *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515 (2d Cir. 1988).

[313] If companies are substantively consolidated, creditors who did business only with an affiliate that had a strong balance sheet or free assets would see those assets combined with the estates of less solvent entities, thereby depleting their recovery. This is clearly not what they contemplated when they lent to the stronger company.

[314] Fed. R. Bankr. P. 1014.

[315] *Id.* *See also* 28 U.S.C. § 1412.

[316] *Id.* *Cf.* 28 U.S.C. §§ 1404(a) & 1406(a) (regarding change of venue of civil actions in the district court).

[317] *See, e.g.*, *Gulf State Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990); *Puerto Rico v. Commonwealth Oil Ref. Co. (In re Oil Ref Co.)*, 596 F.2d 1239, 1247 (5th Cir. 1979); *In re Donald*, 328 B.R. 192, 204 (B.A.P. 9th Cir. 2005); *In re Dunmore Homes, Inc.*, 380 B.R. 663, 672 (Bankr. S.D. Ky. 2008); *In re Innovative Commc'n Co., LLC*, 358 B.R. 120, 126-28 (Bankr. D. Del. 2006); *In re Delaware and Hudson Ry. Co.*, 96 B.R. 467, 486 (Bankr. D. Del. 1988); *In re Ocean Props. of Del., Inc.*, 95 B.R. 304, 305 (Bankr. D. Del. 1988); *In re MacDonald*, 73 B.R. 254 (Bankr. N.D. Ohio 1987); *In re Baltimore Food Sys. Inc.*, 71 B.R. 795 (Bankr. D.S.C. 1986); *In re Walter*, 47 B.R. 240 (Bankr. M.D. Fla. 1985); *In re Almeida*, 37 B.R. 186 (Bankr. E.D. Pa. 1984).

[318] *Venue Fairness*, *supra* note 75. *See also* Parikh, *Modern Forum Shopping in Bankruptcy*, supra note 11, at 201.

[319] *See* Butler, *For Large Companies*, *supra* note 205 ("when transfer motions are pursued, they are granted more often than not"); Cole, *Delaware Is Not a State*, *supra* note 223, at 1876 (quoting a visiting judge in Delaware as saying Delaware judges are "receptive to motions to transfer venue" and noting that in an 18-month period Delaware judges granted 17 of 19 such motions).

[320] Although 161 transfer motions were filed since 2001, many of those motions were duplicative of others filed in the same case. In addition, in many instances the parties consensually resolved the motion, or the debtor voluntarily dismissed the case. Thus, the final adjudicated number of motions (43) is substantially less than the number filed (161). *See* United States Bankruptcy Court for the District of Delaware, *Report of Motions to Transfer Venue filed between 2001 and 2018* [hereinafter *Delaware Report*].

[321] *Id.*

[322] *See, e.g.*, *In re First River Energy, LLC*, No. 18-10080, D.I. 40 & 41 (Bankr. D. Del. Jan. 18, 2018); *In re RC Sooner Holdings, LLC*, No. 10-10528, D.I. 204 & 211 (Bankr. D. Del. Feb. 22, 2010); *In re Three S Delaware, Inc.*, No. 08-13068, D.I. 20 & 24 (Bankr. D. Del. Dec. 10, 2008); *In re Dr. Barnes Eye Center, Inc.*, No. 04-10784, D.I. 9 & 15 (Bankr. D. Del. Mar. 10, 2004).

[323] United States Bankruptcy Court for the Southern District of New York, *Report of Motions to Transfer Venue filed between 2000 and 2017*. Although there were 686 motions filed in that period, many were duplicative (particularly in the *Lehman* case). Of the non-duplicative motions, the Court granted 261 and denied 46. *Id.*

[324] *In re Delaware & Hudson Ry. Co.*, 96 B.R. 467, 467-68 (Bankr. D. Del. 1988).

[325] *See, e.g.*, *In re Omtron USA, LLC*, No. 12-13076, D.I. 84, 86 (Bankr. D. Del. Dec. 21, 2012) (transferring case at the request of the Unsecured Creditor's Committee because 97% of the debtor's real estate, 94% of the creditors, and pending litigation were located in North Carolina); *In re Patriot Coal Corp.*, 482 B.R. 718, 745-46 (Bankr. S.D.N.Y. 2012) (granting motion to transfer venue because of last-minute creation of a subsidiary solely to file case in the district); *In re Qualteq, Inc.*, No. 11-12572, 2012 WL 527669, at * 6 (Bankr. D. Del. Feb. 16, 2012) (transferring venue because "the great weight for administration of these related chapter 11 cases lies in Chicago, Illinois, not only in the management and economic administration of the estate, but in the related adversary proceeding. . . ."); *In re Dunmore Homes, Inc.*, 380 B.R. 663, 668-69 & 676-77 (Bankr. S.D.N.Y. 2008) (granting motion to transfer case of real estate development company with over $250 million in liabilities because (1) a majority of the debtor's significant assets consisted of real property in California, (2) all but one of the debtor's top 30 creditors were located in California, and (3) the majority of employees, shareholders, and professionals were located in California).

[326] *See, e.g.*, *In re Trump Entm't Resorts, Inc.*, No. 14-12103, D.I. 2056 (Bankr. D. Del. Aug. 15, 2016) (denying motion to transfer venue filed by a pro se party two years after the petition date); *In re Newbury Common Assoc., LLC*, No. 15-12507, D.I. 504 (Bankr. D. Del. Apr. 4, 2016) (denying transfer to Connecticut because the motion was filed more than two months after the commencement of the case, 61.5% of unsecured claims and 59% of equity holders were outside of Connecticut, the main witnesses in the case were willing to come to Delaware, and the bankruptcy court in Connecticut did not have a sitting bankruptcy judge); *In re Restaurants Acq. I, LLC*, No. 15-12406, 2016 WL 855089, at *3 & *6 (Bankr. D. Del. Mar. 4, 2016) (denying transfer of venue to Texas because the creditors were geographically dispersed and a significant number of them would need to travel regardless of where the case was, noting that (1) the largest trade creditor was not in Texas, (2) 65% of all other creditors were not in Texas, and (3) the debtor had restaurants located in five different states).

[327] *See* Bruens & Labovits, *You Can Still Shop after Winn-Dixie*, *supra* note 157 (opining that motions to transfer venue in large chapter 11 cases are often not granted because "[t]here is often no one forum that is convenient for *every* party").

[328] *See* LoPucki, Courting Failure, *supra* note 71, at 39 ("If some party makes a request to transfer the case to another city, the court will likely hear the request a month or two after the party files it. . . . By the time that the transfer occurred, the effect would be to inconvenience just about everyone involved.").

[329] *See, e.g.*, *In re Goldking Holdings, LLC*, No. 13-12820, D.I. 96 (Bankr. D. Del. Nov. 20, 2013) (in granting motion to transfer venue 13 days after the motion was filed, the Court noted that "as I said, this is a sale case with a solicitation process that is in its early stages and the circumstances of this case both warrant and more importantly permit transfer of venue without the risk of material disruption to the interest of creditors"); *In re USM Corp.*, No. 05-10272, D.I. 32 at 26:25-5-26:1 (Bankr. D. Del. Feb. 3, 2005) ("And I think it is appropriate to do it earlier rather than later. And for those reasons, I will grant the motion."); *In re Racing Servs., Inc.*, No. 04-10349, D.I. 29 at 55:12-16 (Bankr. D. Del. Feb 11, 2004) ("I think it's more important to transfer it now rather than wait, because of the necessity to address the serious issue raised with respect to Section 543 on whether the receiver can

be excused from turning over the assets of the debtor to the debtor's estate.").

[330] *See First River Energy, LLC*, No. 18-10080, D.I. 40 (Bankr. D. Del. Jan. 17, 2018) (same day); *In re Louisiana Med. Center and Heart Hosp., Inc., LLC*, No. 17-10202, D.I. 9 (Bankr. D. Del. Feb. 14, 2017) (12 days); *In re Jay Wolfe Used Cars of Blue Springs, LLC*, No. 15-11667, D.I. 50 (Bankr. D. Del. Sept. 9, 2015) (13 days); *In re Goldking Holdings, LLC*, No. 13-12820, D.I. 88 (Bankr. D. Del. Nov. 20, 2013) (13 days); *In re DesignLine Corp.*, No. 13-12089, D.I. 59 (Bankr. D. Del. Sept. 4, 2013) (7 days); *In re Cordillera Golf Club, LLC*, No. 12-11893, D.I. 190 (Bankr. D. Del. July 16, 2012) (13 days); *In re Blue Springs Ford Sales, Inc.*, No. 12-10982, D.I. 39 (Bankr. D. Del. Mar. 29, 2012) (same day); *In re FTB, Inc.*, No. 11-12823, D.I. 26 (Bankr. D. Del. Oct. 14, 2011) (15 days); *In re RC Sooner Holdings, LLC*, No. 10-10528, D.I. 204 (Bankr. D. Del. June 14, 2010) (4 days); *In re Three S Delaware, Inc.*, No. 08-12027, D.I. 108 (Bankr. D. Del. Sept. 24, 2008) (14 days); *In re USM Corp.*, No. 05-10272, D.I. 30 (Bankr. D. Del. Feb. 10, 2005) (1 day); *In re El Comandante Mgmt. Co.*, No. 04-12972, D.I. 40 (Bankr. D. Del. Oct. 22, 2004) (2 days); *In re Liberate Techs.*, No. 04-11299, D.I. 61 (Bankr. D. Del. May 12, 2004) (9 days); *In re Dr. Barnes' Eyecenter, Inc.*, No. 04-10784, D.I. 15 (Bankr. D. Del. Mar. 12, 2004) (2 days); *In re Racing Servs., Inc.*, No. 04-10349, D.I. 19 (Bankr. D. Del. Feb. 12, 2004) (2 days); *In re RFS Ecusta, Inc.*, No. 02-13110, D.I. 439 (Bankr. D. Del. Mar. 28, 2003) (same day); *In re Delaney House, LLC*, No. 03-11256, D.I. 10 (Bankr. D. Del. Mar. 23, 2003) (2 days). *See also Delaware Report*, *supra* note 320.

[331] LoPucki, Courting Failure, *supra* note 71, at 38-39.

[332] *See Butler, For Large Companies*, *supra* note 205 (noting that parties "seek to transfer venue in a fraction of the cases filed . . . [leading to an] inference that these parties are mostly satisfied with debtors' venue choices").

[333] 28 U.S.C. § 1408.

[334] Fed. R. Bankr. P. 1014; 28 U.S.C. § 1412.

[335] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1361 ("In the legal market today, widespread competition exists for clients and the attorneys' fees they generate."). *Cf.* Bassett, *The Forum Game*, *supra* note 213, at 341 & 390 (concluding that efforts to "reform" venue selection in other areas of the law are driven by attorneys for defendants who are motivated to get a forum that is more favorable to their clients).

[336] *See, e.g.*, Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1376 ("[T]he debate about venue selection is one driven by the interests of bankruptcy lawyers."); William B. Sullivan, *Shaking the Jurisdictional System; Will Revocation of Automatic Reference Become the Norm?*, 14 BANKR. STRATEGIST 1, 6 (Mar. 1997) ("most lawyers, accountants and other bankruptcy professionals located in other states look upon Delaware's loss as their gain"); *Delaware's Withdrawal of the Reference: What it Means*, 30 No. 4 BANKR. CT. DEC. NEWS 1 (Feb. 11, 1997) ("You will recall that, for at least the past five years, much of the bankruptcy bench and bar (outside of Delaware and possibly New York) has been complaining about the fact that many large corporations file Chapter 11 in the District of Delaware. . . ."). *See also* Rosner, *supra* note 188, at 20. Interestingly, Mr. Rosner, as counsel for the debtor, elected to file the *Magic Brands* case in Delaware, rather than in its headquarters' location. *In re Magic Brands, LLC*, No. 10-11310, D.I. 257 (Bankr. D. Del. May 17, 2010).

[337] Reich, *Making the Case*, *supra* note 111, at 9.

[338] *Id.* at 8-11.

[339] *See* Curriden, *Playing on Home Court*, *supra* note 102, at 16.

[340] Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1380 (citing *NBRC Report*, *supra* note 72, *at* 776-79).

[341] *See supra* Part IV.

[342] *Id.*

[343] *See NBRC Report*, *supra* note 72.

[344] *See ABI Chapter 11 Commission Report*, *supra* note 65, at 310-24.

[345] *See supra* Part V.E.

[346] *See supra* Part V.C.1-5.

[347] *See supra* Part IV.

[348] *See supra* Part IV.

[349] *See supra* Part V.C.1-2.

[350] Indeed, seminal Supreme Court precedent applied to large chapter 11 cases has tended to originate from other circuits, even from consumer cases. *See, e.g.*, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999); *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *Nw. Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

[351] Cole, *Delaware Is Not a State*, *supra* note 223, at 1862.

[352] *See supra* Part IV.

[353] *See supra* Part V.B. Part IV relies in part on dated material. For example, it asserts that between 60-70% of all large chapter 11 cases are filed in New York and Delaware, relying on statistics from 2005-2011. *See, e.g.*, *Geography of Bankruptcy*, *supra* note 48, at 389; Statement of Melissa Jacoby, *supra* note 64. More recent statistics, however, show that less than 50% of large cases filed in those jurisdictions between 2005-18. *See* 2005-13 data collected from UCLA-LoPucki Bankruptcy Research Database, http://lopucki.law.ucla.edu; The Deal, LLC, http://pipeline.thedeal.com and 2014-18 data collected from https://reorg-research.com/home.

[354] *See supra* Part V.C.1-5.

[355] *See supra* Part IV.

[356] *See supra* Part V.D.3.a.

[357] *See supra* Part V.D.2.b & c.

[358] *See supra* Part IV.

[359] *See* Fed. Jud. Ctr., *Judges Administrative Manual, ch. 6: Authorization of Judgeships*, http://jnet.ao.dcn/sites/default/files/pdf/201508_JAM_Ch06_-_Authorization_of_Judgeships_0.pdf.

[360] *See supra* Part IV.

[361] See GAO Report, *supra* note 68, at 21. The GAO Report did not reach any conclusion on the effect of venue on fees in bankruptcy cases.

[362] *See* Lubben, *What We "Know"*, *supra* note 264, at 146 (finding that "cases filed in New York or Delaware do not cost more – in fact, these jurisdictions seem to actually reduce chapter 11 costs"); Cole, *Delaware Is Not a State*, *supra* note 223, at 1860-61 (noting that having experienced judges who could handle the case expeditiously "results in a cost savings to the estate"); Rasmussen & Thomas, *Whither the Race?*, *supra* note 224 ("It logically follows that quicker bankruptcy proceedings will, on average, be cheaper affairs.").

[363] *See supra* Part IV.

[364] *See* Michael St. James, *Why Bad Things Happen in Large Chapter 11 Cases: Some Thoughts about Courting Failure*, 7 TRANSACTIONS: TENN. BUS. L. 169, 170 (*citing* LOPUCKI, COURTING FAILURE, *supra* note 71) [hereinafter St. James, *Why Bad Things Happen*]. Although Professor LoPucki does not expressly state that the ordinary definition of corruption (the acceptance of money in exchange for an official action) applies, the cover of his book certainly suggests it, and some have called it libel per se. *Id.* at 176 n.30 (noting that "the graphic on the cover of LoPucki's book . . . tilted scales of justice, a wad of money in the heavy scale

and a basket of prominent bankruptcy cases . . . in the lighter side, visually suggests that the bankruptcy judges presiding over the identified cases had been bought.").

[365] *See, e.g.*, Jacoby, *Fast*, *supra* note 180, at 403 (noting that LoPucki's data and examples of competitive practices "do not match up temporally or substantively" and noting that "the broader literature casts doubt that competition or the lack thereof is the dominant shaper of judicial practices in the way that LoPucki suggests"); Tabb, *Courting Controversy*, *supra* note 180, at 475 & 485 (2006) (accusing LoPucki of character assassination and not only questioning whether the data supports his conclusions but noting that in some ways it "runs counter to his overall argument"); *Critics Punch Holes in Foundation of Court Corruption Theories*, BCD NEWS & COMMENT (Mar. 22, 2005), at 1 (quoting a practitioner as saying that "without the benefit or filter of experience, [Professor LoPucki] makes rash and irresponsible conclusions about sitting and retired bankruptcy judges, based on faulty data and speculation disguised as academic research."). *See also* James J. White, *Bankruptcy Noir*, 106 MICH. L. REV. 691, 698 & 706 (Feb. 2008) [hereinafter, White, *Bankruptcy Noir*] (concluding that LoPucki's conclusions were dubious because (i) values were overstated because he used an improper method of calculation and (ii) there was a selection error in the sample used).

One scholar noted: "It is unfortunate that the discourse over bankruptcy venue for large corporations has been so personal because it creates an atmosphere that makes it virtually impossible to rationally discuss the topic." Dickerson, *Words that Wound*, *supra* note 180, at 365. If the issue were rationally discussed, it would be found that the corruption theory is nothing more than "an unsupported hypothesis masquerading as well-researched fact." Thomas Salerno, *Book Review of Courting Failure*, AM. BANKR. INST. J., (Feb. 2005) (concluding that "he crosses the line from good-faith comment to unfounded character assassination"). *See also* Hon. Robert D. Martin, *Comments*, 54 BUFF. L. REV. 503, 504 (2006) (noting that "[a]ssigning venal motives to the judges . . . is to do so without any evidence" and characterizing LoPucki's assertions that bankruptcy judges are corrupt as a "vicious attack on people whose service is undertaken with dedication and sacrifice, and not for personal aggrandizement.").

[366] Dickerson, *Words that Wound*, *supra* note 180, at 368. *See also* Jacoby, *Fast*, *supra* note 180, at 403 (casting doubt on LoPucki's conclusions); White, *Bankruptcy Noir*, *supra* note 365,

at 698 & 706 (concluding that LoPucki's data and conclusions were inaccurate).

[367] *LoPucki Presents Corrupt Court Theory*, 43 No. 19 BANKR. CT. DEC. NEWS 1 (Nov. 2, 2004).

[368] Dickerson, *Words that Wound*, *supra* note 180, at 373. For example, LoPucki admits that "[a] judge whose sole consideration was the size and number of cases she could attract would not have written the opinion" in the *Fleming Companies* case criticizing and cutting the fees of a national bankruptcy law firm. LoPucki, *Where Do You Get Off*?, 54 BUFF. L. REV. 511, 527 (2006). *See, e.g.*, *In re Fleming Cos.*, 304 B.R. 85, 89 (Bankr. D. Del. 2003).

[369] Jacoby, *Fast*, *supra* note 180, at 438 (concluding that the corruption "theories and assumptions go considerably farther than the data or the available literature can support."). One scholar, in particular, cautions that "[b]ecause correlation does not imply causation, ascribing a nefarious motive to the courts in which more big-time Chapter 11 cases get filed is a risky proposition." Rapoport, *Rethinking Professional Fees*, *supra* note 181, at 274. *See also* White, *Bankruptcy Noir*, *supra* note 365.

[370] Dickerson, *Words that Wound*, *supra* note 180, at 369. Rather, "those courts rationally could have decided to focus on reorganizing or restructuring those companies rather than overseeing a trustee's attempts to sue the directors or officers" who were already "being investigated by numerous state and federal agencies, and had [already] been sued." *Id.*

That is exactly what happened in the *Enron*, *Global Crossing*, *Worldcom*, and *Adelphia* cases identified by LoPucki as examples of a pattern of corruption: the court in each case replaced management and appointed an examiner (instead of a trustee) who conducted an extensive investigation. *See In re Enron Corp.*, No. 01-16034, D.I. 2838 (Bankr. S.D.N.Y. Apr. 9, 2002); *In re Global Crossing Ltd.*, No. 02-40188, D.I. 1834 (Bankr. S.D.N.Y. Sep. 26, 2002); *In re Worldcom, Inc.*, No. 02-13533, D.I. 25, 53 & 83 (Bankr. S.D.N.Y. July 23, 2002); *In re Adelphia Commc'ns, Corp.*, No. 02-41729, D.I. 5678 (Bankr. S.D.N.Y. Aug. 6, 2004).

[371] Dickerson, *Words that Wound*, *supra* note 180, at 375-76. "[M]ost courts, United States Trustee's offices, and a growing number of academic commentators have concluded that national law firms should be compensated at their customary billing (i.e., the national) rates rather than the rates charged in the area where the case is filed." *Id.* at 376. *See also Guidelines for*

Reviewing Applications for Compensation and Reimbursement of Expenses Filed under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248, 36250-51 (June 17, 2013) (to be codified at 28 C.F.R. pt. 58, Appx. A) ("The United States Trustee will not object to 'non-forum' rates of professionals when the 'non-forum' rates are based on the reasonable rates where the professionals maintain their primary office, even if the locally prevailing rates where the case is pending are lower (i.e., a professional may bill the same reasonable rate in any forum).").

In fact, the Bankruptcy Code sought to encourage the use of standard (national) rates in bankruptcy cases. *See* H.R. REP. NO. 95-595, at 330 (1977), *reprinted in* 19785963, 6286 U.S.C.C.A.N. (noting that section 330 was meant to overrule case law "which set an arbitrary limit on fees payable, based on the amount of a district court's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.").

[372] LOPUCKI, COURTING FAILURE, *supra* note 71, at 72, 103-07, 167-80.

[373] Dickerson, *Words that Wound*, *supra* note 180, at 376 (noting that "[i]t would be odd to require judges, *sua sponte*, to reject uncontroverted evidence in large cases."). *See also* Jacoby, *Fast*, *supra* note 180, at 421-22; Rasmussen & Thomas, *Timing Matters*, *supra* note 204, at 1389.

The suggestion of LoPucki that the bankruptcy courts are "corrupt" because they approve sales of debtors under section 363 at inadequate prices is notably unsupported by any facts. *See, e.g.*, White, *Bankruptcy Noir*, *supra* note 365, at 692 (challenging LoPucki's analysis and questioning his conclusion that a reorganization realizes 91% of the value of the company while a 363 sale realizes only 35%). In addition, it does not support his corruption thesis: if courts were competing, it is

hard to fathom how approving sales at inadequate prices would attract new cases. *Id.* (noting that if debtors really realized three times their value in a reorganization as opposed to a sale, as LoPucki contends, "why would anyone, a creditor, a judge, or even the debtor or the debtor's lawyer, choose a 363 sale over reorganization?").

[374] *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999) (stating that it was "one of the Code's innovations to narrow the occasions for courts to make valuation judgments" and concluding that "it is up to the creditors - and not the courts - to accept or reject a reorganization plan").

[375] LoPucki, Courting Failure, *supra* note 71.

[376] St. James, *Why Bad Things Happen*, *supra* note 364, at 177. *See, e.g.*, *Gregg v. Metropolitan Trust Co.*, 25 S. Ct. 415, 519 (1905); *Miltenberger v. Logansport, C. & S. W. R. Co.*, 1 S. Ct. 140 (1882); *In re B&W Enters., Inc.*, 713 F.2d 534, 535-38 (9th Cir. 1983); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972).

[377] *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985-86 (2017) (citing with approval bankruptcy courts' granting of "'first-day' wage orders that allow payment of employees' prepetition wages, 'critical vendor' orders that allow payment of essential suppliers' prepetition invoices, and 'roll-ups' that allow lenders who continue financing the debtor to be paid first on their prepetition claims" because those orders preserve the debtor as a going concern, promote the possibility of a confirmable plan, and benefit even the creditors who are not being paid).

[378] LoPucki, Courting Failure, supra note 71, at 123-28.

[379] Dickerson, *Words that Wound*, *supra* note 180, at 366-67.

[380] For example, many district courts have adopted procedures similar to those that the Eastern District of Virginia uses for its "rocket docket" allowing streamlined discovery - without being accused of corruption. Dickerson, *Words that Wound*, *supra* note 180, at 371.

[381] St. James, *Why Bad Things Happen*, *supra* note 364, at 176.

[382] Indeed, the American bankruptcy system as currently practiced has reached a standard that nations around the world seek to emulate. *See, e.g.*, *Committee to Strengthen Singapore as an International Centre for Debt Restructuring*, https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Report%20of%20the%20Committee.pdf (last accessed June 18, 2018)

(implementing chapter 11 principles in Singapore's financial restructuring laws).

[383] Although Section F of Part V contains a response to Part IV, the Committee believes that no additional response to Part V is necessary at this time as the pertinent arguments have been presented in Part IV.