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CHAPTER 11 BANKRUPTCY VENUE REFORM ACT OF 2011

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 2533

SEPTEMBER 8, 2011

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CHAPTER 11 BANKRUPTCY VENUE REFORM ACT OF 2011

THURSDAY, SEPTEMBER 8, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:09 a.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Smith, Gowdy, Cohen, and Conyers.

Also present: Representative Carney.

Staff present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Travis Norton, Counsel; Johnny Mautz, Counsel; Allison Rose, Professional Staff Member; Ashley Lewis, Clerk; Joanne Moy, Intern; and (Minority) James Park, Subcommittee Chief Counsel.

Mr. COBLE. Ladies and gentlemen, the Subcommittee will come to order. We are awaiting Mr. Cohen's presence. He is on his way, so we will get started.

Good to have you all with us today.

Over the past 3 decades, the bankruptcy system has witnessed the concentration of large Chapter 11 reorganization cases in the two so-called magnet districts, Delaware and the Southern District of New York. Many debtors have filed there, including those with little or no tangible connection to those respective districts.

For example, in the last 10 years nine large North Carolina-based companies filed for bankruptcy protection in either Manhattan or Wilmington, Delaware. R.H. Donnelly Corporation, based in Cary, had 3,800 employees and over $12 billion in claimed assets at the time it filed. In 2001, Greensboro-based Burlington Industries, which had almost 14,000 employees on the petition date, also filed in Delaware. The same was true of Pillowtex which was based in Kannapolis, North Carolina.

This concentration of cases in two districts is made possible by section 1408 of title 28 of the United States Code. That section permits the debtor to file a Chapter 11 case where it is incorporated, where it has its principal assets, or where it has its headquarters.

In addition, a corporation can also file where there is a pending Chapter 11 case concerning its affiliate. This means that no matter how large the parent company's headquarters are or where it is lo-

cated, the parent can bootstrap the entire corporate family into the venue of a very small affiliate.

These rules allow a large Chapter 11 debtor to forum shop for a district it perceives as most friendly to its ultimate goal. This leads to some strange results, as you all know. Recently the Los Angeles Dodgers, an entity with "Los Angeles" in its very name, filed for bankruptcy in Delaware, approximately 3,000 miles from the closest California bankruptcy court.

When a large Chapter 11 case is filed far from the debtor's principal place of business, many stockholders in the company lose a meaningful opportunity to make their views known to the bankruptcy court. Small creditors must defend preference claims filed in a remote jurisdiction. Employees, not unlike those at Burlington Industries, must travel long distances to present evidence of any claims they may have. New York and Wilmington may be convenient for the big financial folks, but small business creditors oftentimes are left in the dust when a reorganization takes place in a faraway district.

H.R. 2533 addresses these inequities by eliminating the place of incorporation as a district in which a debtor can file its Chapter 11 case and doing away with the pending affiliate rule by which many companies bootstrap their way into a New York or Delaware courtroom.

Under the bill, the efficiencies of the Chapter 11 bankruptcy filing are not disturbed. An affiliate can still join its parent company's case, but a parent company can no longer game the system by bootstrapping its way into a more favorable district on the heels of its much smaller affiliate.

I look forward to hearing from our distinguished panel of witnesses today about how the bill would affect corporations, courts, creditors, employees, and bankruptcy practice as a whole.

We are pleased as well to welcome the Chairman of the full Committee, but before I do that, Chairman Smith, we are pleased to have Congressman Carney, a Representative from Delaware, who will sit in on the hearing. Mr. Carney, however, is not a Member of the Subcommittee, so he will not be recognized for questioning. Mr. Carney, good to have you with us.

Mr. CARNEY. Thank you very much.

[The bill, H.R. 2533, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 2533

To amend title 28 of the United States Code with respect to proper venue for cases filed by corporations under chapter 11 of title 11 of such Code.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 2011

Mr. SMITH of Texas (for himself, Mr. CONYERS, Mr. COBLE, and Mr. COHEN) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28 of the United States Code with respect to proper venue for cases filed by corporations under chapter 11 of title 11 of such Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Chapter 11 Bankruptcy Venue Reform Act of 2011".

SEC. 2. AMENDMENTS.

Section 1408 of title 28 of the United States Code is amended—

(1) by inserting "(a)" before "Except",

(2) by inserting "and subsection (b) of this section" after "this title", and

(3) by adding at the end the following:

"(b) A case under chapter 11 of title 11 in which the person that is the subject of the case is a corporation may be commenced only in the district court for the district—

"(1) in which the principal place of business in the United States, or principal assets in the United States, of such corporation have been located for 1 year immediately preceding such commencement, or for a longer portion of such 1-year period than the principal place of business in the United States, or principal assets in the United States, of such corporation were located in any other district; or

"(2) in which there is pending a case under chapter 11 of title 11 concerning an affiliate of such corporation, if the affiliate in such pending case directly or indirectly owns, controls, or holds with power to vote more than 50 percent of the outstanding voting securities of such corporation.".

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this

1 Act shall take effect on the date of the enactment of this
2 Act.

3 (b) APPLICATION OF AMENDMENTS.—The amend-
4 ments made by this Act shall apply only with respect to
5 cases commenced under title 11 of the United States Code
6 on or after the date of the enactment of this Act.

○

Mr. COBLE. I am now pleased to recognize the distinguished gentleman from Texas, Lamar Smith, who chairs the House Judiciary Committee, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman.

Before its demise, Enron was a Texas-based company with 7,500 employees at its Houston headquarters and over $60 billion in claimed assets. But in December 2001, Enron filed for Chapter 11 bankruptcy protection in a Manhattan courthouse, 1,500 miles away from Texas. How was this possible?

Unlike venue rules for other types of cases, Chapter 11 bankruptcy venue rules give many corporations several choices of where to reorganize. A corporation can file in the State where it is incorporated, where it has its principal assets, or where it is headquartered. For many companies, this rule alone provides three different venue choices.

But many corporations have even more choices of venue. A corporation can also file a Chapter 11 case in a venue where its corporate affiliate's case is already pending.

Using this rule, Enron's bankruptcy lawyers first filed the bankruptcy of a small New York subsidiary with only 57 employees in the Southern District of New York. Moments later, because this affiliate's case was now pending, the Houston-based parent company bootstrapped its massive bankruptcy case into a Manhattan bankruptcy court.

The current Chapter 11 venue rules allow many corporations to forum shop for a venue with favorable judicial precedent for the business. For example, a nationwide retailer may prefer to file in Delaware because of the Third Circuit's well-known rulings on the treatment of unpaid rent in bankruptcy. At the same time, a business with many unionized employees can avoid filing in Delaware to avoid Third Circuit precedent on collective bargaining rights in bankruptcy.

The Constitution instructs Congress to enact uniform bankruptcy laws. While courts of appeal are permitted to interpret Bankruptcy Code provisions differently, Chapter 11 debtors should not be able to leave their home districts and shop for a forum whose judicial precedent on bankruptcy law they happen to prefer.

In recent years, a majority of large companies have chosen to file their Chapter 11 cases in the Southern District of New York and in Delaware.

Like umpires in baseball, bankruptcy judges should be neutral referees in Chapter 11 cases. The practice of forum shopping is predicated upon an assumption that some judges are fairer than others. Regardless of where a company reorganizes, a judge should call balls and strikes the same way.

I believe our national bankruptcy system suffers when Chapter 11 bankruptcy cases are concentrated in just two judicial districts on the East Coast. When a large Chapter 11 case travels across the country to be heard in a faraway bankruptcy court, many of the business' stakeholders lose out. Employees, creditors, and the community in which the business operates feel out of touch with the reorganization process. Interested parties frequently have to travel long distances to present evidence to support their claims.

In July, I introduced H.R. 2533, the Chapter 11 Bankruptcy Venue Reform Act of 2011, to reform the Chapter 11 venue rules so that corporate debtors must reorganize in their home court. I am pleased to be joined in that effort by Ranking Member Conyers and the Chairman and Ranking Member of this Subcommittee.

The bill requires corporate debtors to file for Chapter 11 where they have their principal place of business or principal assets. It also prohibits large parent companies like Enron from leaving their headquarters and following tiny, well-placed subsidiaries into a preferred venue. The bill still allows subsidiaries to follow a parent firm into a venue, thus preserving the efficiencies that flow from joint administration of related debtors' cases.

This bill improves the fairness of the bankruptcy system for all stakeholders in a Chapter 11 case.

I thank the witnesses for coming today and look forward to hearing from them. And, Mr. Chairman, let me thank you for having this hearing as well.

I yield back.

Mr. COBLE. I thank you, Chairman Smith.

And we have been joined by the distinguished gentleman from South Carolina. Mr. Gowdy, good to have you with us today.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. COBLE. Folks, what I think I am going to do is go ahead and recognize the witnesses, and then we will delay your statements pending the arrival of Mr. Cohen. Let me introduce our distinguished guests and witnesses today.

Mr. Peter Califano is a bankruptcy attorney at Cooper White & Cooper in San Francisco where he chairs the bankruptcy and creditors' rights groups. He has represented numerous creditor interests in a variety of bankruptcy venues during his career. Today he is testifying on behalf of the Commercial Law League of America, an organization of attorneys and other experts engaged in the field of commercial law.

Mr. Califano received his law degree from Santa Clara University School of Law and his undergraduate degree from the State University of New York at Buffalo, where it gets cold in the wintertime I have been told, Mr. Califano.

Mr. David Skeel is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania School of Law. He is widely regarded as an expert in bankruptcy law and has authored numerous books and articles, including publications on the Dodd-Frank Wall Street Reform Act and the automobile bankruptcies. He frequently appears in major media outlets to discuss bankruptcy and corporate law.

Professor Skeel earned his law degree at the University of Virginia and his undergraduate degree, I am pleased to say, from the University of North Carolina. Of course, I am subjectively involved with that State.

Judge Frank Bailey is the Chief Judge of the Bankruptcy Court for the District of Massachusetts. After a long and distinguished career as a litigation and bankruptcy attorney in Boston, he was appointed Bankruptcy Judge in January 2009 and Chief Judge of the district in December 2010. Judge Bailey is active in public interest law organizations and the National Conference of Bank-

ruptcy Judges. He also teaches courses in bankruptcy law at the New England School of Law.

Judge Bailey earned his law degree at Suffolk University in Boston and his undergraduate degree from Georgetown.

Finally, our fourth witness is Professor Melissa Jacoby. She is the Graham Kenan Professor of Law at the University of North Carolina School of Law in Chapel Hill where her teaching and research take multi-disciplinary approaches to exploring bankruptcy, debtor, creditor, and commercial law issues. She is a conferee to the National Bankruptcy Conference and has provided helpful advice to Committee staff during the drafting of the bill we are considering today. I wish to thank her for her assistance today and extend to her a special welcome as well to being affiliated with my alma mater. Although you are a transplanted Tar Heel, Professor, we will accept you nonetheless.

But it is good to have all four of you with us, and I think in the interest of courtesy to Mr. Cohen, I know he would want to be here before we commence your statements. So if you all would just stand easy for the moment and we will proceed imminently. Thank you. [Pause.]

Mr. Gowdy, do you have any comment to make since we are dead in the water here?

Mr. GOWDY. Just how delighted I am to be back, Mr. Chairman, and how much I am looking forward to hearing from our distinguished panel witnesses.

Mr. COBLE. I thank the gentleman from South Carolina. [Pause.]

Mr. SMITH. Mr. Chairman?

Mr. COBLE. Yes, Chairman?

Mr. SMITH. While we are here and have the time, I might take the opportunity to point out something of perhaps historical interest to those in the room. And that is, if you look over on the wall to our left, to your right, you will see a crack extending horizontally across almost the entire length of the room. That is a result of the earthquake that occurred in D.C. a week or so ago.

Let me say that while the Judiciary Committee's wall has cracked, our resolve to pass good legislation has not. [Laughter.]

This is the first time I have seen it under lights, and it is frankly more severe than it appeared to be when I saw it in a dark room. But that earthquake did have consequences, and the Committee room on the other side of this wall, Government Reform, has I think even more extensive cracks as well. And there may be one other Committee room that suffered some damage as well.

But as long as we had the time, Chairman, I thought I would pass that out, and I will yield back.

Mr. COBLE. I thank you for that. I am pleased to know that it was not caused by one of the irate Members of the Subcommittee. That is interesting to know. Only kidding, of course. [Pause.]

We will come back to order, folks. I think Mr. Cohen is on his way.

Why don't we start with you, Mr. Califano, and then when Mr. Cohen gets here, he will make his opening statement.

Folks, if you will confine your statement to 5 minutes. There is an amber light that will appear after the green light vanishes.

That warns you that you have a minute to play with. So if you could wrap up on or about 5 minutes, we would appreciate that.

So, Mr. Califano, why don't you start us off? You are recognized for 5 minutes.

TESTIMONY OF PETER C. CALIFANO, PARTNER, COOPER WHITE & COOPER, SAN FRANCISCO, CA, ON BEHALF OF THE COMMERCIAL LAW LEAGUE OF AMERICA

Mr. CALIFANO. Good morning and thank you for inviting me to testify as a witness before the Subcommittee. My name is Peter Califano. I am an attorney and a partner at the law firm of Cooper White & Cooper in San Francisco, California and chair of the Bankruptcy Section of the Commercial Law League of America.

The CLLA is the Nation's oldest organization of attorneys and other experts in the field of commercial law, bankruptcy, and reorganization. The Bankruptcy Section of the CLLA consists of over 500 professionals, including bankruptcy lawyers, trustees, law professors, and bankruptcy judges. The CLLA members tend to be involved in smaller and mid-sized bankruptcy cases. We tend to represent main street interests as opposed to the mega-cases of Wall Street.

The CLLA supports the proposed Chapter 11 Bankruptcy Venue Reform Act of 2011, introduced by Representatives Smith and Conyers. H.R. 2533 attempts to rebalance the interests of all parties in bankruptcy by making sure that the bankruptcy process remains within the communities that have the most significant vested interest in the outcome. This is accomplished by determining where a bankruptcy case may be filed. The CLLA strongly believes that when these businesses fail and need rehabilitation in bankruptcy, the local bankruptcy courts are the best positioned to oversee the process. Let me explain why.

First, the consequences of corporate bankruptcy are most profound in the communities where the debtor's principal place of business or assets are located. Not only are jobs involved, but they may affect other matters such as hospitals, the closing of plants, and waste removal.

Second, if bankruptcies are filed in remote districts, the parties with the most familiarity with the debtor's operations and who have an important stake in the case's outcome might be cut off or minimized in the process. Employees, small creditors, and retirees will suffer. Let me illustrate by discussing three cases.

The first case is called Integrated Telecom Express. This bankruptcy involves a highly solvent California equipment manufacturer and was filed primarily to reduce the landlord's claim by $20 million as permitted by the Bankruptcy Code. The case was filed in Delaware because the State permits this type of bankruptcy filing. The landlord resisted and finally prevailed on appeal to the Third Circuit. Had the landlord lacked the resources to persevere in Delaware, the dispute would have ended earlier in the debtor's favor.

Now, let us compare this with another landlord situation. In the Perkins & Marie Callender's case, this is a company that is headquartered in Memphis, which is in Mr. Cohen's district. The bankruptcy was filed in Delaware. The commencement of the

case—the debtor filed a motion to reject various real property leases back to the petition date and, in effect, eliminate any basis to claim administrative rent. The debtor was also allowed to leave its personal property at the premises. One of the landlords was a retiree who did not have the resources to resist the motion. The outcome of the motion probably cost the individual landlord retiree about $4,000 or $5,000.

Now, let me give you an example of a local case that is successful or was successful, the Pacific Gas and Electric Company case. This bankruptcy was the largest utility bankruptcy case ever to be filed. It had $35 billion in assets and approximately 20,000 employees. The case was commenced in the Northern District of California. Immediately local builders and lawyers formed an informal group to negotiate and litigate with the debtor over the assumption of highly regulated and specialized agreements for extending power into new subdivisions. The group was successful in achieving an early resolution for the home builders.

There are many examples of this kind of thing in this case.

Please note that this case was with the Honorable Dennis Montali resulting in a confirmed plan and a successfully reorganized debtor. This confirms that there are other courts around the country who have the skill and ability to handle a mega bankruptcy case. The point of these examples are that creditors can get left behind when bankruptcy cases are filed in remote courts, and these cases lose important local input.

In conclusion, H.R. 2533 remedies the overly permissive venue provisions for corporate bankruptcies resulting in bringing back bankruptcy cases to communities most affected by the outcome.

[The prepared statement of Mr. Califano follows:]

PETER C. CALIFANO

Chair, Bankruptcy Section
Commercial Law League of America

September 8, 2011

H.R. 2533
CHAPTER 11 BANKRUPTCY VENUE REFORM ACT

Written Statement

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STATEMENT OF THE COMMERCIAL LAW LEAGUE OF AMERICA AND ITS BANKRUPTCY SECTION SUBMITTED AT THE HEARING ON THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES

"Chapter 11 Bankruptcy Venue Reform Act of 2011"

September 8, 2011

I. INTRODUCTION

The Commercial Law League of America (the "CLLA"), has been in favor of venue reform for over 10 years. The CLLA, founded in 1895, is the nation's oldest organization of attorneys and other experts engaged in the field of commercial law, bankruptcy and reorganization. The CLLA's bankruptcy membership, which numbers over 500 professionals, includes attorneys from mid-size and small firms and bankruptcy judges representing virtually every state, and consists of representatives of divergent interests in bankruptcy cases. Although the CLLA has been traditionally associated with the representation of creditor interests, many of its attorneys represent debtors, trustees, and other parties in the bankruptcy process. Most importantly, its primary goal, when opining of legislative and related matters, is the fair, equitable and efficient administration of bankruptcy cases.

II. SUMMARY OF THE CLLA'S POSITION

The CLLA supports the "Chapter 11 Bankruptcy Venue Reform Act of 2011", recently introduced by Representatives Lamar Smith and John Conyers, Jr. (HR 2533) because it constructively attempts to rebalance the interests of all parties in bankruptcy by making sure that the bankruptcy reorganization process remains within the regions and communities that have the most significant vested interest in the outcome. This is achieved by proposing that a corporate debtor file only in districts where its principal place of business or principal assets has been located for at least one year prior to the commencement of the case, as well as placing other restrictions on "pending affiliate case" filings. The CLLA believes that if enacted, HR 2533 will significantly assist in the administration of bankruptcy cases throughout the country.

III. ANALYSIS

A. Statutory background.

28 U.S.C. §1408 provides:

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

It is generally accepted that the domicile for a corporation is its state of incorporation. *In re B.L. of Miami, Inc.*, 294 B.R. 325 (Bankr. D. Nev. 2003); *In re FRG, Inc.*, 107 B.R. 461, 471 (Bankr. S.D.N.Y. 1989), *citing Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226 (1957); *In re Segno Communications, Inc.*, 264 B.R. 501, 506 (Bankr. N.D. Ill. 2001) ("To determine the domicile of a corporation we look to the state of its incorporation.").

The initial choice of venue can be changed pursuant to 28 U.S.C. Section 1412 provides that: "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." Unfortunately, this remedy is rarely used, and, even if attempted, it is not usually successful. The burden of proof for the change of venue is on the party seeking transfer and the "remote" jurisdiction has almost total discretion to decide whether or not to deny the motion. In the context of a large bankruptcy filing where the court is quickly deciding many important threshold issues at the commencement of a case and other actions that must be taken promptly (for example, cash collateral orders and the appointment of committees) it is extremely difficult to change venue. Accordingly, it has been reported that:

> The power to transfer a case or proceeding should be exercised cautiously." *Toxic Control Tech.*, 84 B.R. at 143; see Enron, 274 B.R. at 342 ("Transferring venue of

> a bankruptcy case is not to be taken lightly.") (*citing*, in turn, *Commonwealth of Puerto Rico v. Commonwealth Oil Ref. Co. (In re Commonwealth Oil Ref. Co.)*, 596 F.2d 1239, 1241 (5th Cir. 1979) ("CORCO ") ("the court should exercise its power to transfer cautiously"); In re Pavilion Place Assocs., 88 B.R. 32 (Bankr. S.D.N.Y. 1988) ("Transfer is a cumbersome disruption of the Chapter 11 process.")). Whether or not to grant a section 1412 motion to transfer venue of a case or proceeding under title 11 lies within the sound discretion of a bankruptcy court based on an "individualized, case-by-case analysis of convenience and fairness" factors. *Gulf States Exploration Co. v. Manville Forest Prod. Corp. (In re Manville Forest Prod. Corp.)*, 896 F.2d 1384, 1391 (2d Cir.1990) (*quoting Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (quoting, in turn, *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). "A bankruptcy court's decision denying or transferring venue will only be reversed if the court's decision constitutes an abuse of discretion. *Enron*, 274 B.R. at 343.

(footnote omitted). *In re Enron*, 317 B.R. 629, 638 (Bankr. S.D.N.Y. 2004).

B. HR 2533 and local interests

The consequences of a corporate bankruptcy are most profound in the region and community in which the debtor's principal place of business or principal assets are located. ***Simply stated, bankruptcy is local.*** Not only are there jobs involved, but also the local economy might depend to a large extent on business from that debtor. Many critical issues of local importance arise. The debtor may be, for example, one of the community's larger employers or it may sustain many small businesses that provide various goods and services. The consequences could extend even further, affecting the number of hospital beds that are available, the quality of elder care, or even waste removal. These are just a few of the countless local issues that might be engaged, and of course will require local subject matter expertise for example in real property, local taxes, environmental or health and safety issues, along with the treatment of real and personal security interests.

It has been our members' experience that bankruptcies filed in remote jurisdictions draw cases away from the parties with the most familiarity with the debtor's operations and who have an important stake in the case's outcome. For example, employees, local vendors and retirees will be unable to attend hearings without incurring insurmountable tome and travel expenses. There will also be little or no local media coverage on the progress of the debtor's efforts to reorganize and the development and interest in local groups and unofficial/official committees

will wane. Practitioners know that quite often, these interested parties will go down to the local bankruptcy court and meet other similarly-situated parties, share information and develop alliances and informal groups to protect their interests. Ultimately, these efforts might impact official or unofficial committees in the case, whether claims are successfully bought by third parties, or even have a direct impact on the provisions of the plan of reorganization. However, if the bankruptcy is pending in a remote location, these parties would not be able to take advantage of this type of informal networking and their contribution will be lost or minimized.

In summary, requiring that a corporate bankruptcy take place locally ensures that the distinct needs of the community are not overlooked or, worse, ignored by other groups residing hundreds, if not thousands, of miles away. HR 2533 insures the participation, input and information that local parties can provide to the debtor, other creditors and the courts, and enhances the overall bankruptcy process.

C. Examples of how bankruptcy venue impacts local iuterests.

(1) In re Pacific Gas and Electric Company, United States Bankruptcy Court, Northern District of California, Case No. 01-30923 – This bankruptcy, one of the largest utility bankruptcy cases ever to be filed ($35 billion in assets and approximately 20,000 employees), commenced in April 2001. Immediately, a small group of homebuilders began meeting and formed an informal committee ("MLX Committee") to address the treatment of claims, deposits and the assumption/rejection of main line extension contracts ("MLX Contracts") needed for the building of new subdivisions. The MLX Contracts were subject to a complicated set of state tariffs on file with the California Public Utilities Commission. The MLX Committee exchanged information, negotiated with the Debtor and cooperated in law and motion practice that resulted in the assumption of all MLX Contracts (50,000 contracts worth approximately $90 million) by December 2001. Without the local connections between the homebuilders, local lawyers and the Debtor, assumption and payment on the MLX Contracts would have been substantially delayed and possibly jeopardized. Please also note that this case, with the Honorable Dennis Montali presiding, resulted in a confirmed plan and a successful reorganized debtor after efficiently administered proceedings. This indicates that there are courts around the country who have jurists and staffs with the understanding, ability and skill to handle "mega-bankruptcy" cases.

(2) In re Astropower, Inc., United States Bankruptcy Court, District of Delaware, Case No. 04-10322. Plaintiff filed a preference action against one of its freight shippers for approximately $463,000. The Shipper had worked extensively with the Debtor for several years and continued working with them during the preference period (90 days preceding the filing) providing services during this time. In addition, by continuing to provide services to the Shipper, the Shipper had accrued substantial "new value" offsets against amounts claimed as preferential payments. At the time (and to some extent, this still is the case) Delaware law was more restrictive than most jurisdictions in how new value was calculated and therefore reduced the effect of the new value provided by the Shipper. The Shipper ultimately decided to settle the matter for $116,000 and avoid having to litigate the matter in Delaware. This situation is very common and an often repeated scenario for creditors, wherever a remote jurisdiction is involved.

(3) In re Integrated Telecom Express, Inc., 384 F.3d 108 (3d Cir. 2004). The Debtor elected to go out of business, even though it was highly solvent, solely to use the Bankruptcy Code (11 U.S.C. Section 502 (b)(6)) to reduce the landlord's rent claim by about $20 million, which would result in a surplus distribution to shareholders ($100 million instead of approximately $80 million). The Debtor had no contacts with Delaware except that was the state of incorporation. The Debtor developed equipment and software for broadband communications and was headquartered in San Jose, California. Most of its shareholders resided in Taiwan. The Debtor chose to file in Delaware because of favorable legal precedent sustaining debtors' filing in the face of a motion to dismiss for bad faith filing holding that a filing meets the good faith filing standard if the debtor files to take advantage of a particular provision of the Bankruptcy Code notwithstanding other circumstances. See, In re PPI Enteprises, Inc., 228 B.R. 339 (Bankr. D. Del. 1998, aff'd by, In re PPI Enteprises, Inc., 324 F.3d 197 (3rd Cir. 2003). The bankruptcy court in Delaware declined to dismiss the Debtor's case as a bad faith filing and refused to transfer venue to the Northern District of California. The District Court upheld the Court's decision but the Third Circuit reversed. The Third Circuit found that the case was not filed in good faith in that the Debtor was not in financial distress and did not preserve any special value for the creditors with the filing of the petition. Given the circumstances, taking advantage of the cap on the landlord's rent claim was not justification enough to establish "good faith" for the

bankruptcy, so the case was order dismissed. Had the landlord lacked the resources to persevere in the remote district, the dispute would have ended earlier in the Debtor's favor.

(4) In re Franklin Park Development I, Inc., United States Bankruptcy Court, District of Massachusetts, Case No. 86-10721. Bankruptcy Judge Lavien, presided over a housing project, primarily for lower income renters, comprising hundreds of units and perhaps over a thousand residents. The judge, along with the trustee, visited the property, and received significant local press coverage. His personal attention helped defuse a seriously emotionally charged situation. The delicate consideration of a local judge provided invaluable comfort to those affected and led Bankruptcy Judge Lavien to observe:

> So far, I've said nothing explicit about the conditions that I saw on the View of August 5th, because I still have trouble believing that as a nation, in 1986, we are concerned with an assortment of sophisticated national and international issues and, yet, still allow our fellow human beings to live in filth and substandard housing. Had the conditions of the Franklin Park Development been viewed in a third world country, they would have raised sympathetic outcries. *In re Franklin Park Development I, Inc.*, 64 B.R. 253, 255-256 (Bankr. D. Mass 1986).

(5) In re Solyndra LLC, United States Bankruptcy Court, District of Delaware, Case No. 11-12799. Recently filed bankruptcy case of a high profile solar-panel maker. Upon filing the California-based company suspended its manufacturing operations and laid off 1100 employees triggering both Federal and California Worker Adjustment and Retraining Notification Act ("WARN") issues. In addition, California Labor Code places significant duties on employers when its employees are laid off, especially with respect to salary and accrued benefits. Penalties for violations of these obligations may provide a basis for nondischargeability according to case law in the 9th Circuit. It is currently unclear how the Debtor's employees will fair in the remote jurisdiction on these issues.

(6) In re Perkins & Marie Callender's Inc., United States Bankruptcy Court, District of Delaware, Case No. 11-11795. At the commencement of the case the Debtor filed a motion to reject *nunc pro tunc* various nonresidential real property leases back to the petition date and in effect, eliminate any basis to claim administrative rent. One of the landlords involved in this group leases is a retiree who owns property in Colorado and leases restaurant space to the Debtor (the "Landlord"). The motion also allowed the Debtor to abandon all personal property and

surrender with no further conditions, leaving the landlord with the task to clean up the premises. If the bankruptcy case had been filed in a local bankruptcy court, the Landlord might have worked together with other landlords and negotiated better surrender terms with the Debtor. But due to the distance of the remote court and the time and expense involved in pursuing the matter, the Landlord had no choice but to accept the Debtor's terms.

D. Response to possible objections to HR 2533.

Opponents may advance various arguments for the status quo for bankruptcy venue. We have already addressed above the difficulties in presenting and prevailing on a motion for venue transfer under 28 U.S.C. Section 1412 and courts' ability to properly handle mega-cases.

In addition, others claim that special provisions contained in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), first day orders, telephonic hearings and arrangements for *pro hac vice* counsel all together provide adequate protection for trade creditors' and employees' interests. To the contrary, these protections fall considerably short when addressing the bigger overall issue of bankruptcies filed in a remote venue located far away from local concerns. One example showing how these protections fall short is in the area of preference litigation. Contrary to the majority view found in decisions from other jurisdictions throughout the country, the new value exception provided for in 11 U.S.C. Section 547 (c)(4) must remain unpaid to qualify as a defense in some jurisdictions. This immediately puts preference defendants in these districts at a distinct disadvantage. Additionally, while employees are certainly interested in being paid on their priority wage claims, their input in negotiations concerning the long term survival of the debtor is even more important. Our point is that none of these technical protections adequately replace the benefits in having a local bankruptcy court reorganize a local company.

IV. CONCLUSION

Bankruptcy venue with its forum-shopping and judge-shopping implications has been the subject of much legal scholarship and debate. Reasonable minds can differ greatly on the subject. However, HR 2533 remedies the overly permissive venue provisions of 28 U.S.C.

Section 1408 and brings bankruptcy cases back to the communities most affected by the outcome, enhancing success, and providing effective administration.

Respectfully submitted,

James W. Hays
President
Commercial Law League of America

Peter C. Califano
Chair, Bankruptcy Section
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David Reid Gamache
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Mr. COBLE. Thank you, Mr. Califano.

Professor Skeel, before we recognize you, I want to recognize the distinguished gentleman from Tennessee, Mr. Cohen, who is the Ranking Member of the Subcommittee, for his opening statement.

Mr. COHEN. Thank you, Mr. Coble. I appreciate your courtesy, and I apologize for being late. I appreciate each of the witnesses' being here and contributing on this important subject.

This bill, which is bipartisan—it has got the sponsorship of the Chairs and Ranking Members of both the full Committee and the Subcommittee—the Chapter 11 Bankruptcy Venue Reform Act of 2011, offers what we think are common sense changes to the bankruptcy venue statute. And that is the main reason why I am an original cosponsor.

There are other issues with venue that concern me. In Memphis, we are a border community and have cases in Mississippi and Arkansas that we feel should be filed in the Memphis courts as well. But this is a different issue.

And under 2533, a corporate debtor would be permitted to file its case only in the district that encompasses its principal place of business or where its principal assets are located for the year preceding commencement of the bankruptcy case or for the longer portion of such year. Such debtor may also file in a district where the bankruptcy case of a parent company or other controlling affiliate is pending. Under our current law, a corporate debtor may file a bankruptcy case in one of a number of venues. In addition to its principal place of business or the place where its principal assets are located, a debtor may file its case in the district encompassing its place of incorporation, oftentimes the Blue Hen State of Delaware, or a district where an affiliate case is pending. Unfortunately, the availability of the latter two options has led to a vast majority of large Chapter 11 cases being filed in one of only two bankruptcy courts—one of those, of course, is the Blue Hen court—even when these venues are not convenient or fair for most of the stakeholders involved in these cases. Even though all of us want to go see where DuPont is headquartered, it is not necessarily the best site for most people.

Such a result threatens to undermine the purpose of having venue rules in the first place, which is to ensure that legal right rules and rights be adjudicated in the places most convenient and fair for all the parties in a case. I think a convenient forum is one of the first things you learn about in law school and the need for that. In a Chapter 11 bankruptcy context, filing a case in a venue where a debtor has no substantial ties harms small creditors, employees, and other affected stakeholders who lack the resources of larger creditors and corporate debtors to assert or protect their interest in these distant forums.

Our witnesses will go into greater detail as to why venue matters a great deal in Chapter 11 cases—Mr. Califano has done so, mentioned Perkins—and why the changes that H.R. 2533 proposes are necessary. We will also hear from our learned witness from the Keystone State and why he opposes the bill.

I applaud Chairman Smith and Ranking Member Conyers for their leadership on this issue. I also thank Chairman Coble for holding this hearing. It is a delight to work with Chairman Coble and am fortunate to be able to do so.

And I would like to recognize Mr. Carney of Delaware, who is on the dais, who is a Blue Hen and wants everybody to go to Delaware as often as possible, even when it is inconvenient. I hope that we can have a fruitful discussion and continue the prosperity of the State of Delaware but not at the inconvenience of thousands and

thousands and thousands of people that aren't in Mr. Carney's district.

With that, I yield back the remainder of my time.

Mr. COBLE. Thank you, Mr. Cohen.

Professor Skeel, I am not trying to impose pressure upon you, but I will remind you that Mr. Califano complied with the 5-minute rule.

TESTIMONY OF DAVID A. SKEEL, JR., PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Mr. SKEEL. I was very impressed.

Mr. COBLE. But you will not be keel-hauled if you fail to do that.

Mr. SKEEL. It is a tough standard to live up to.

Mr. COBLE. Goods to have you with us, sir. You are recognized, Professor.

Mr. SKEEL. Thank you for the opportunity to testify. It is a great honor to appear before y'all today. That "y'all" is just to show there is still some Tar Heel in me, in fact, still a lot of Tarheel in me.

The objective of the proposed reform is to make it harder for companies to file for bankruptcy in Delaware or New York. In my view, as you all know, the reform would be an enormous mistake, well-intentioned but a mistake.

In my remarks, I will focus very briefly on three issues: the historical context; the remarkable effectiveness of Delaware and New York; and finally, the question of convenience for small creditors.

First, the history. The history is a little bit complicated but the bottom line of the history is there is a longstanding tradition that a company should be permitted to file for bankruptcy or to reorganize in its State of incorporation. This rule is closely linked to the longstanding belief that corporations should generally be regulated by the States, not by Congress. The traditional right for a corporation to file for bankruptcy in its State of incorporation needs to be seen in this context, the context of how the rest of corporate law works. Removing this right would flip the traditional understanding of corporate regulation on its head.

The second issue is the claim that the current venue rule has led to a so-called "race to the bottom." The leading academic advocate for reform, Lynn LoPucki of UCLA, has argued that Delaware and New York attract cases by, among other things, paying high fees to bankruptcy lawyers, permitting the debtor's managers to keep their jobs, and simply rubber-stamping the company's proposed reorganization plan or asset sale. Professor LoPucki accuses the bankruptcy judges in Delaware and New York and other judges that have adopted similar practices of being corrupt. I believe that the allegations of corruption are unfounded and deeply unfair.

In my own work, I have tried to investigate some of Professor LoPucki's claims. What a co-author and I found is that Delaware cases turn out to be much quicker than cases in other districts and that the best predictor of whether a company will file for bankruptcy in Delaware, as opposed to its local court, is how experienced the local court is. If the local court is inexperienced, the company is much more likely to file in Delaware; if the local court is

more experienced, the company is much less likely to file for bankruptcy in Delaware.

New York has developed the administrative capacity and expertise to handle the very largest cases, the cases that are seen as too big for Delaware or other districts. The idea that it makes sense to have courts with special expertise dealing with particularly complex cases is widespread in American law. The new Dodd-Frank Act resolution rules, to give just one example of this, is based on precisely this principle, that we ought to put in a specialized court cases that are very large and very complicated.

The final issue is convenience for small creditors. Critics of Delaware and New York argue that it is much harder to attend a hearing in Delaware or New York than it would be to attend hearings in the company's principal place of business. In reality, the vast majority of Chapter 11 cases—and this is about 90 percent. My math isn't great but I don't think this is too far off—are filed in the district where the company has its principal place of business. And even with the largest cases, only half of them, end up in Delaware or New York. And these cases, whatever you think of convenience, you are going to get that convenience. The headquarters, principal place of business, and State of incorporation are all going to be in one State—in one district.

Many of the debtors that do file for bankruptcy in Delaware or New York are far-flung companies for which there is no single location that would be convenient for most of the creditors.

It is also important, it seems to me, to be realistic about the extent to which small creditors really want to participate in these big bankruptcy cases. Most small creditors don't want to be actively involved. It takes time and often money. And those who do are often very frustrated that there isn't more they can do, even if they can appear in court, to affect the outcome as an individual creditor.

I do think that convenience is very important, but I think there are much better ways to deal with the convenience concern. Video and telephone hearings have become much more common than they were in the past, and they are going to continue to become more common.

I also think there are some creative things we could do to facilitate participation. Elizabeth Warren, when she was head of the TARP Committee, held a series of hearings in the locations where a lot of affected workers live, in their hometowns, in their home areas. I think you could do something like that in Chapter 11. You could require that a debtor in a case that is far-flung have periodic forums in the local State where local creditors have a chance to be informed and to raise their issues.

What I don't think we ought to be doing is changing the venue rules. What that would do, in my view and from the work that I have done, is undermine a system that works remarkably well. There are some problems with the bankruptcy system, it seems to me, and I think we should be dealing with them. There are problems like the fact that derivatives aren't regulated in bankruptcy. Venue reform doesn't seem to me to be one of those problems.

[The prepared statement of Mr. Skeel follows:]

Written Testimony of David A. Skeel, Jr.

Before the Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives
September 8, 2011

Thank you for the opportunity to testify about H.R. 2533, the proposed "Chapter 11 Bankruptcy Venue Reform Act of 2011." My name is David Skeel, and I am the S. Samuel Arsht Professor at the University of Pennsylvania Law School. It is a great honor to appear before you today.

Under the current venue rules, a debtor is permitted to file for bankruptcy in the district in which it has: 1) its domicile (which, for a corporation is its state of incorporation), 2) its residence, 3) its principal place of business in the United States, 4) its principal assets, or 5) an affiliate that has already filed for bankruptcy.[1] The proposed Chapter 11 Bankruptcy Venue Reform Act of 2011 would eliminate two of the existing venue options, domicile and the place where an affiliate has already filed for bankruptcy.

The objective of the reform is to make it harder for companies to file for bankruptcy in Delaware or New York. Nearly all of the large companies that file for bankruptcy in Delaware are incorporated in Delaware; removing domicile as a venue option would make it impossible for most to file for bankruptcy in Delaware. Removing the affiliate option would make it harder for companies to file for bankruptcy in New York, because many of the big cases that are brought to New York begin with an affiliate filing in New York.

In my view, removing the domicile and affiliate options would be an enormous mistake. It would overturn a long history of bankruptcy practice; it would undermine the effectiveness of our corporate bankruptcy system; it would increase the administrative costs of the system; and it would not help the very parties the proposal is ostensibly designed to help.

[1] The first four options are in 11 U.S.C. § 1408(a); the affiliate option is § 1408(b).

In the remarks that follow, I'll develop these points in a little more detail by focusing on three issues in particular: first, the historical context; second, the remarkable effectiveness and distinctive expertise of Delaware and New York; and finally, reform proponents' concerns about the convenience of cases in Delaware and New York.

The Historical Context

With the exception of a short period in the 1970s, a company has always been permitted to file for bankruptcy in its state of incorporation.[2] Prior to the 1930s, large corporations usually did not file for bankruptcy if they fell into financial distress. Instead, they used a judicial process known as equity receivership to reorganize. For this process, too, the company's state of incorporation was considered an appropriate venue location.

The assumption that companies should be permitted to file for bankruptcy in their state of incorporation is closely linked to the longstanding belief that corporations should generally be regulated by the states, not by Congress. Corporations are creatures of the states. They are created by the states, and the states are the ones who regulate their internal affairs. Corporations are also subject to federal laws, of course, including the antitrust and securities laws, the environmental laws, and bankruptcy itself. But the starting point is always state law.

The longstanding rule that corporations can file for bankruptcy in their state of incorporation needs to be seen in this context. It is a direct reflection of the historical commitment to state oversight of corporations. Removing a corporation's right to file for bankruptcy in a district in its state of incorporation would flip the traditional understanding of corporate regulation on its head.

[2] I focus in this section on domicile as a proper filing location. The affiliate provision has a different justification: facilitating efficient administration of cases involving multiple entities.

This tradition should only be overturned if the case for repudiation is undeniable and overwhelming. In my view, it isn't. To the contrary, eliminating domicile as a venue option would seriously undermine the current bankruptcy process.

The Virtues of the Current System

There have been two major complaints about the current venue framework. The first is that it has led to forum shopping that has created a "race to the bottom" in Chapter 11 practice. The second is that cases in Delaware and New York are inconvenient for some constituencies, especially employees and other relatively small creditors. I will consider the first complaint in this section and the second in the following section.

The leading academic advocate for reform, Lynn LoPucki, has argued that Delaware and New York have attracted cases by, among other things, paying high fees to the debtor's bankruptcy lawyers, permitting the debtor's managers to keep their jobs, giving the company much more flexibility with its "first day orders," and simply rubberstamping the company's proposed bankruptcy plans and sales of its assets.[3] Professor LoPucki argues that other courts, starting with courts in Texas and Chicago, have copied Delaware's and New York's practices. According to Professor LoPucki, this has had terrible consequences for the bankruptcy process. He has pointed out, for instance, the many companies that reorganized in Delaware in the 1990s later filed for bankruptcy again. Professor LoPucki accuses the bankruptcy judges in Delaware and New York, and the judges that seem to have adopted similar practices, as well as the system as a whole, of being corrupt.

I should perhaps start by saying that I believe that the allegations that bankruptcy judges around the country are corrupt are unfounded and unfair. The bankruptcy judges I know are extraordinarily impressive; I have never met one who was corrupt. I will therefore focus on the substantive criticisms that have been leveled by Professor LoPucki and others.

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[3] Professor LoPucki makes these arguments most fully in his book, *Courting Failure*. Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting Bankruptcy Courts* (2005).

It does seem to me quite clear that bankruptcy courts around the country have adopted practices that were pioneered in Delaware and New York. In the 1990s, Delaware judges acted much more quickly than other courts on "first day orders"—which include the debtor's request to hire a bankruptcy lawyer, its request to continue paying its employees, and requests to pay some "critical vendors." Now, courts around the country deal with these requests much more expeditiously than in the past. Courts also are more willing to pay New York rates to lawyers from New York. While there have been occasional missteps, I believe the emergence of Delaware and New York as the venues of choice in some of the large cases has been extremely beneficial for the bankruptcy process overall.

I have outlined the benefits of the current framework, and responded to criticisms, in great detail in my scholarly work. Rather than repeat those arguments here, I will simply refer to several of these articles in footnotes, and note that the criticisms are flawed in numerous respects. They are based on very small numbers of cases, for instance, and the conclusions often disappear if the time frame of analysis is adjusted even slightly.[4] In the discussion that follows I'll focus on the "big picture" problem with the attack on Delaware and New York, which is that these courts have been extremely effective.

Since its emergence as a prominent bankruptcy venue starting in roughly 1990, Delaware's bankruptcy judges have established a reputation for speed and efficiency in handling the Chapter 11 cases filed in Delaware. In a study of Delaware cases in the 1990s, a co-author and I found that Delaware cases were indeed appreciably faster than cases in other districts.[5] We also found that companies appeared to be attracted to Delaware by the expertise of the Delaware

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[4] Professor Douglas Baird and Dean Robert Rasmussen give a vivid illustration of the precariousness of the empirical data. Using Professor LoPucki's data, they show that the statistical significance of his finding that companies that reorganized in Delaware in the 1990s were more likely to file for bankruptcy a second time disappeared if he used a time period other than five years. If he considered companies that refilled within one, two, three, four, or six years of the first reorganization. Delaware would not have looked statistically different than other venues. Douglas G. Baird & Robert K. Rasmussen, Beyond Recidivism, 54 *Buffalo Law Review* 343, 352 (2006).

[5] The study is described and the results reported in Kenneth Ayotte & David A. Skeel, Jr., An Efficiency-Based Explanation for Current Reorganization Practice, 73 *University of Chicago Law Review* 425, 461 (2006).

bankruptcy judges.[6] The single best predictor of whether a company would file for bankruptcy in Delaware rather than in the state of its headquarters was the relative expertise of the two bankruptcy courts. If the local judges were experienced in handling Chapter 11 cases, the company was much more likely to file the case in the state of its headquarters.

In the past decade, many of the very largest cases—the so-called mega mega cases—have filed for bankruptcy in the Southern District of New York. Here, too, they appear to have been attracted by the expertise of the New York bankruptcy judges. The New York judges are expert in dealing with the administrative and other complexities of the very largest cases. The court has developed the infrastructure to handle these cases.

If Congress were to remove domicile and affiliate filing as venue options, it would destroy the expertise that has been developed in these courts. Although it is difficult to know for sure, I suspect that the amendments would increase the administrative cost of the bankruptcy system. The administrative efficiency that the Delaware and New York bankruptcy courts have developed would be lost. Other courts would not handle enough cases to replicate this efficiency, which would increase the overall administrative costs of the bankruptcy system. It also seems very likely that the overall effectiveness of the bankruptcy system would decline.

I do not mean to suggest that the current bankruptcy system is perfect. I do think that courts have not scrutinized proposed sales of assets under section 363 as carefully as they should, particularly when the buyer is a current lender or insider.[7] But changing the venue rule is not the solution, and it would seriously undermine the effectiveness of the current framework.

Convenience

The other major objection to the current system is that Delaware and New York filings are inconvenient to employees, other local creditors and the local community. It is much harder

[6] *Id.*

[7] This issue is discussed in *id.* at 464-67 and David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and its (Unintended) Consequences* 170-173 (2011).

to attend a hearing in Delaware or New York, the reasoning goes, than it would be to attend hearings in the company's principal place of business.[8]

It is important to keep in mind that the vast majority of Chapter 11 cases, and the majority even of large cases, are filed in the district where the company has its headquarters and principal place of business. For all of these cases, convenience is thus not an issue. Moreover, the cases that tend to be filed locally are the cases in which local creditors are most likely to wish to participate.

Of the large companies that do file for bankruptcy in Delaware or New York, many are companies for which no single location will be convenient for most of its local creditors. When a retailer like Kmart (although Kmart itself filed for bankruptcy in Chicago) files for bankruptcy, for instance, there will be local creditors nearly everywhere in the country. There is no single, ideal filing location. Moreover, for these companies, Delaware and New York are more convenient than many locations. Both are serviced by major airports and by train lines.

There obviously may be exceptions to these patterns, and convenience for as many parties as possible is an important concern. But gutting the venue statute is not the best solution to this concern. Two better approaches already exist. First, if a case truly does not belong in Delaware or New York, the district court has the power to transfer the case "in the interest of justice or for the convenience of the parties."[9] A number of cases have been transferred under this provision, and courts could be encouraged to use it still more frequently.

The other solution is to make it as convenient as possible for creditors and other interested parties to participate in cases even when they cannot realistically appear in person. The use of telephonic and video appearances already is increasing and should be encouraged. Small creditors also are represented by the creditors committee— and in some cases by special committees—and are entitled to access information gathered by the creditors committee.

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[8] For further discussion of the issues in this section, see, e.g., David A. Skeel, Jr., What's So Bad About About Delaware?, 54 *Vanderbilt Law Review* 309, 310 (2001).
[9] 28 U.S.C. § 1412.

Conclusion

Although Chapter 11 is not perfect, it works remarkably well. Indeed, I believe it is the most effective corporate bankruptcy framework in the world. The solution to its flaws is to address the flaws directly, not to change the venue rules. In my view, changing the venue rules would undermine Chapter 11, and would be a serious mistake.

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Mr. COBLE. Thank you, Professor.
Judge Bailey?

TESTIMONY OF THE HONORABLE FRANK J. BAILEY, CHIEF JUDGE, BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, MA

Judge BAILEY. All right, Mr. Coble, I guess the time pressure is off now. [Laughter.]

I am used to setting time limits these days, and I am not very good at keeping at them but I am going to do my best.

Mr. Chairman, Members of the Subcommittee, thank you very much for the opportunity to be here today and to talk with you about H.R. 2533. I first want to make the point clear that I am here on my own behalf. I am not here for the Judicial Conference of the United States or the Administrative Office of the United States Courts.

I would like to make three points, and they line up very nicely with what I think Professor Skeel has just previously stated in his statement. And I would like to start actually with a quote from Professor Skeel's article in 1998, 1 Del. L. Rev. It starts on page 1 where he said: There was and there continue to be a populist and progressive disdain for charter competition since it appears to benefit out-of-state interests at the expense of employees and the communities in which those businesses operate. I think that he has really put his finger on the point that I want to start with, and that is the current venue statute undermines confidence in the bankruptcy system.

Communities identify strongly with their corporate citizens. Many people, of course, work in the community for those corporate citizens. Often we are talking about the "nerve center" of those corporate citizens that sit in your districts. I have used the examples of Coca-Cola in Atlanta, FedEx in Memphis, Gillette in Boston. Even the Tampa Bay Bucs in Tampa-St. Pete now becomes relevant because the Los Angeles Dodgers have filed in a so-called magnet court. I could use the examples of Enron in Houston, GM in Detroit, and indeed, I could use the example of Lehman Brothers in New York City.

For iconic companies such as these to file a bankruptcy petition in a magnet court rather than in the place where they are fully identified as corporate citizens and where they did business for many years in many instances undermines confidence in the process.

In my statement that I filed with the Committee, I use the example of Polaroid and Evergreen Solar, both Massachusetts companies that filed at a magnet court rather than in the District of Massachusetts. In fact, the numbers are somewhat astounding, and we will put a slide up to demonstrate this.

In fact, since 2000, over 30 public companies, large, medium, small cap companies, have filed far from Massachusetts even though those companies were all headquartered in the Commonwealth of Massachusetts. They collectively represented over 30,000 jobs and had assets of nearly $10 billion. That is all since the year 2000.

Let us consider Evergreen Solar, take a closer look at that entity, and we will have a slide on that as well. That company was developing alternative energy technologies. I apologize, Mr. Coble, for that business. But that company received the highest financial in-

centives from the Commonwealth of Massachusetts that any company had ever received. Its nerve center was in Marlboro, Massachusetts. Last month, that company filed its Chapter 11 petition in a magnet district, the place of its incorporation, but a place with which it had, to my knowledge, no business ties whatsoever.

Those opposed to the amendments ask why does all of this matter. Sort of so what. The bankruptcy system is working well, Professor Skeel tells us. Well, as a judge that sits on consumer cases as well as business cases, both large and small, I can tell you that it matters a great deal. In both consumer cases and in business cases, I regularly have employees, small vendor creditors, retirees, former employees who attend hearings in my courtroom. They can generally take public transportation to my courtroom, and I give them the chance to say their piece. And I frequently have to deliver bad news to them, sometimes life-changing bad news to them. And I have found that they can accept that bad news. They are not happy about it, but they can accept that bad news if they understand from whence it is being delivered by a local judge in a Federal system that has placed that local judge in the Boston courthouse where I sit. They may not be happy, but ultimately I believe they are satisfied with the system that Congress has created for them when they have that opportunity.

My second point is that the transfer of venue statute is simply not effective. It is enormously expensive for a party to mount a challenge to venue. The debtor has chosen that location and will always fight back hard.

My third point and last point is there are talented and sophisticated judges in other districts. We should be using them. In Massachusetts and all over the country, we have accomplished and sophisticated judges capable of handling their fair share of large, complex business cases. We put a slide up. The slide will speak for itself. These judges are no slackers. In fact, they include the incoming President of the National Conference of Bankruptcy Judges, my colleague, Judge Joan Feeney. The past presidents of that august organization in just the last few years have come from Texas, Nevada, Ohio, and Oregon. The way our judicial system is supposed to work is to rely on the creativity and innovation of judges from around the country in handling these large company cases. Right now, the concentration of cases in the magnet districts, I am afraid, restricts that innovation.

Thank you very much.

[The prepared statement of Judge Bailey follows:]

UNITED STATES HOUSE OF REPRESENTATIVES

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, COMMERCIAL
AND ADMINSTRATIVE LAW

HEARING ON CHAPTER 11 BANKRUPTCY
VENUE REFORM ACT OF 2011
H.R. 2533

SEPTEMBER 8, 2011

TESTIMONY OF THE HON. FRANK J. BAILEY
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Mr. Chairman and Members of the Subcommittee on Courts, Commercial and Administrative Law:

My name is Frank J. Bailey, I am the Chief Bankruptcy Judge for the United States Bankruptcy Court for the District of Massachusetts. Thank you for the opportunity to discuss with you the Chapter 11 Bankruptcy Venue Reform Act of 2011, H.R. 2533.

I am one of the five bankruptcy judges in the District of Massachusetts and I primarily handle cases in Boston. In addition to Boston, we have courts in Worcester and Springfield, Massachusetts. I have been on the bench for a little under three years. Before that I was a partner in a Boston law firm for many years where I practiced both litigation and bankruptcy. I graduated from the Georgetown University School of Foreign Service here in Washington in 1977 and from the Suffolk University Law School in 1980. I then served as law clerk to the Honorable Herbert P. Wilkins, Associate Justice of the Supreme Judicial Court of Massachusetts. Following that I joined the law firm of Sullivan & Worcester LLP where I worked primarily in the bankruptcy department. Later I joined Sherin and Lodgen LLP where I chaired the Litigation Department and was a member of the Management Committee for many years.

I was appointed to the bench by the First Circuit Court of Appeals in late 2008 after nomination by the 1st Circuit Merit Selection Panel and became the chief judge in late 2010. I co-chair the Local Rules Committee and am active in lecturing for continuing legal education programs and at bar and academic functions, as do all of my Massachusetts colleagues. I also teach Creditors Rights and Bankruptcy Law at New England Law Boston, a Boston area law school. I am active in the National Conference of Bankruptcy Judges and serve on the Endowment Committee. I am also a member of the Board of Directors of the Immigrant Learning Center in Malden, Massachusetts, which provides free English language classes to new Americans.

I am testifying today on my own behalf, and my views do not reflect the views of the Judicial Conference of the United States, the National Conference of Bankruptcy Judges, or any committee on which I serve. Also, I am attending at my own expense today, without reimbursement from the judiciary or any of the organizations in which I am active. That is because I believe strongly in this bill and wish to indicate my support for it.

SUMMARY OF TESTIMONY

When Congress enacted the current bankruptcy venue statute, 28 U.S.C. sect. 1408, the intent was to offer large public companies broad latitude in deciding where to file a reorganization case. Logically and sensibly, the choices included the location of the corporate headquarters and the place where most of the corporate assets are located. This was also consistent with the history of bankruptcy venue for large public company cases. Congress expanded the choices to include the place of incorporation and the place that a corporate affiliate, no matter how small or recently formed, had previously filed. This was applicable even if the corporation transacted little or no business in those places. Congress no doubt was comfortable with offering such broad venue choices because the statute gives courts the power, on request, to overrule the venue choice of the filer if it is inconvenient or unfair to other parties. 28 U.S.C. sect. 1412.

It has simply not worked out the way Congress intended. This broad grant of venue choices has had an unexpected impact on the distribution of large bankruptcy cases. While the convenience of counsel and others close to the center of the process has proven a key to case placement, the rights

of small creditors, vendors, employees and pensioners has been allowed to suffer.

Through creative lawyering, or perhaps what could be described less generously as “clever” lawyering, cases are now often filed in certain select "magnet" courts in districts far from where the corporation actually operated its business. And efforts to ask that a court overrule the filer's choice have proven to be much too expensive for all but the most well-heeled creditors. And even when such a bid to change venue has been tried, the strong legal presumption that the debtor chose the appropriate place has proven to be a very difficult legal hurdle to overcome.

It has evolved that the driving force in venue decisions in bankruptcy filings has become what is best for the lawyers and other turnaround and workout professionals that advise corporate management. And in a world of prepackaged plans, lock up agreements and claims trading, often all of the largest financial stakeholders have agreed to a particular venue choice long before filing. This means the banks, bondholders, and hedge funds can, together with the debtor, select a venue that is convenient for them, and the employees, local governments, landlords and smaller vendors will be stuck with that choice.

The proposed amendments will go far toward fixing this unfairness.

CASE STUDIES: POLAROID CORPORATION and EVERGREEN SOLAR, INC.

In the structure of American business people engage in enterprises through the legal fiction of corporations. Corporations are merely combinations of people that have as their goal the organization, development and operation of that enterprise for a profit. As such, corporations become citizens of the community in which they operate. Like symphonies, museums, colleges and universities and professional sports teams, business corporations are woven into the fabric of the community. Perhaps more than the afore-mentioned cultural institutions, the businesses at which people work and into which they invest their futures often become iconic representatives of the communities themselves. Coca Cola in Atlanta, Gillette in Boston, FedEx in Memphis, the Tampa Bay Bucs in Tampa/St. Pete and Microsoft in Seattle: communities such as these are impressed with the corporate seal of the companies that are founded and nourished through the ingenuity and sweat of local citizens that work for them, as well as those that provide goods and services to them.

I would like to focus on two companies that were very much part of the soul of the Boston-area communities in which they were founded and grown.

Polaroid Corporation. Polaroid is a famous company. It was founded in 1937 by Edwin Land after his breakthrough scientific research of polarization techniques. This of course led to the development of polarized lenses and eventually to the instant film developing techniques for which the company became famous. Polaroid was, since its inception, headquartered in Cambridge, Massachusetts. It had management, research and development, and manufacturing capabilities around the globe, but it always maintained a large commitment to Massachusetts – including a large Massachusetts-based work force. In fact, Polaroid employed thousands of people in the District of Massachusetts and kept many other thousands of people working to provide it goods and services. Then, after a long period of decline mostly caused by a failure to appreciate newly emerging digital photography, Polaroid filed a Chapter 11 bankruptcy proceeding on October 11, 2001. But that bankruptcy case was filed in the District of Delaware, not in the District of Massachusetts or in any other district where Polaroid had significant investment or assets. Thus, any

interested party had to either travel to Wilmington, Delaware or hire a lawyer to appear in the Delaware court in order to make known its views as the Chapter 11 case of Polaroid progressed through the courts.

Evergreen Solar, Inc. Let me now focus on a much more recent example. The Commonwealth of Massachusetts has worked hard to identify the segments of the global economy in which it could most successfully compete. Leveraging the presence of its world class colleges and universities and the human capital that inevitably is attracted to such institutions, the state government identified, among others, businesses in the alternative energy arena as a focus. One of those businesses is Evergreen Solar, Inc. Please refer to **Exhibit 1**. Evergreen, which was incorporated in Delaware, develops materials for the production of solar power. As a targeted company in a targeted industry, the state offered Evergreen $58 million in incentives to locate a plant in Massachusetts. This was the largest corporate incentive offering in state history. In addition, Massachusetts provided a $500 tax rebate to in-state customers of Evergreen.

But the story does not end well for Massachusetts. On August 15, 2011 Evergreen filed a Chapter 11 petition in the District of Delaware, citing

an inability to compete with similar companies, mostly in China. At or just before its filing, Evergreen maintained its corporate headquarters in Marlborough, Massachusetts (30 miles West of Boston) and employed well over a thousand workers in the state.

The reason I focus on these two companies is to highlight that companies that are closely identified with the citizens and government of Massachusetts have chosen to file for bankruptcy relief far from the District of Massachusetts. These companies filed far from the employees that hoped for a successful outcome in the bankruptcy case and to save their jobs and perhaps their pensions. These companies filed far from where most vendors of goods and services to those companies had come to expect that they would deal with the companies. These companies filed far from where the local governments – state and municipal – had provided support and, in the case of Evergreen, very large incentives.

These are merely two examples of Massachusetts companies that have elected to file in locations outside the District of Massachusetts in recent years. Since 2000, at least thirty large and mid-cap companies that are rooted in Massachusetts have filed in districts outside of the District of Massachusetts. Please refer to **Exhibit 2**. Some notable examples include

Carematrix, General Cinemas, KB Toys, Polaroid, Filene's Basement II, Barzel Industries, Bradlees Department Stores, and Genuity, Inc. According to data compiled by the staff to the Committee, eight of these companies alone had nearly 30,000 employees and assets worth more than $9.6 billion.

WHY DOES IT MATTER THAT CASES FILE LOCALLY?

Each of the companies identified in the preceding section surely could have filed in the District of Massachusetts. They would have had proper venue under the existing statute, 11 U.S.C. sect. 1408. All of those companies had their corporate headquarters in Massachusetts at the time of filing. Most all of them had their principal assets in the state at the time of filing. But many of them were incorporated in, or had an affiliate in, another jurisdiction at the time they filed, thus their management and bankruptcy professionals had a choice. For a host of reasons that I will leave to the academic community, which has studied the issue closely for many years, those that select the place of filing, as well as those that counsel them, have chosen to file public company cases in jurisdictions other than the District of Massachusetts.

Let me be clear, the judges that have handled those cases are outstanding judges. They are experienced and dedicated to meeting the goals of the Bankruptcy Code in an open, fair and expeditious manner, and they have achieved those goals time and again. But, as I will discuss next, I believe the stakeholders in these cases would have achieved the same results in the District of Massachusetts. The difference is that if the cases had been filed in Massachusetts, the stakeholders, large and small, would have had an opportunity to participate in the proceeding. At a minimum, stakeholders would have received notices that told them that they *could* participate in the proceeding at a courthouse near where they live and work before a judge that lives in the same community as they do. This is to say there would have been the perception that their opportunity was real and accessible. And perception is often paramount.

The concept of "venue" informs courts regarding the placement of legal proceedings. Inherent in the judicial notion of venue is the concept that cases should be filed and determined in the place that is most convenient to the stakeholders, i.e., those that have an interest in that case. In most legal cases this means the convenience of two parties, a plaintiff and a defendant. In complex cases, venue considerations may

require the convenience of several parties. In those cases, the venue rules ensure that the case is brought in a place that takes into account the convenience of, and fairness to, the defendants that had no chance to select the forum. Significantly, in bankruptcy, because the entity that files forces all creditors, wherever they are located in the United States, to come to the forum the filer has chosen, the court may need to consider the convenience of hundreds or thousands of creditors. Venue focuses on the convenience of the parties because life-changing decisions occur in judicial proceedings, and those most affected by those decisions must have the right and capability, if they choose, to participate in those proceedings.

The bankruptcy venue rule as currently written, section 1408, turns these 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. In non-bankruptcy cases the law has developed that considerable deference is accorded to the plaintiff's choice of venue. Following the lead of such decisions, judges afford this same deference to the venue choice of bankruptcy debtors. See, e.g., In re: Enron Corp., 274 B.R. 327, 342 (S.D.N.Y. Bankr. 2002) ("[A] debtor's choice of forum is

entitled to great weight if venue is proper.") But that deference is wholly misplaced in bankruptcy because it is the debtor that drags the creditors to its chosen forum, not the other way around.

The ability of smaller stakeholders to attend proceedings, or at least to feel they could if they so desired, is central to their belief that they are being dealt with fairly. In consumer cases, I always allow pro se creditors to have their say in court. I always attempt to explain to them what is happening and why. In business cases I have the same policy, and often those with smaller claims and employees will ask their regular, trusted counsel to attend hearings to make known the views of their clients. Frequently, Bankruptcy Judges have to deliver rulings that are seen as bad news to these stakeholders. Jobs are lost and benefit promises, including those of pensions and healthcare, are broken. It is my experience that those who suffer these losses, while disappointed or worse, can accept it so long as they can see that the court made the decision after hearing all sides and that the decision was fair and compelled by existing law. Even if they decide not to attend the hearings, stakeholders know where the decisions are being made and by whom. If the case is filed in my session, they know

that all they need to do is to take an "Orange Line" train to State Street in Boston to get to the courthouse.

In short, although the Bankruptcy Code offers as one of its core values an "opportunity to be heard", there is no true "opportunity " if the case is pending in a courthouse that is hundreds or thousands of miles away.

THE QUALITY AND SOPHISTICATION OF THE MASSACHUSETTS BENCH

It has been suggested that the judges in the so-called "magnet" courts have developed a high level of expertise in dealing with large, public company Chapter 11 cases. Indeed, there is no doubt that much innovation in the processing and determination of large Chapter 11 cases has developed in those courts through the efforts of talented and dedicated judges. That is not to say, however, that the judges on the District of Massachusetts Bankruptcy bench are not also talented and dedicated. And, most importantly, the Massachusetts bench is typical of the bankruptcy bench nationwide.

The judges in Massachusetts have a combined sixty years of experience on the bench. Please refer to **Exhibit 3**. They include leaders in national bankruptcy organizations, such as the American Bankruptcy

Institute, the National Conference of Bankruptcy Judges, the American Law Institute and others. Indeed, the in-coming president of the National Conference of Bankruptcy Judges is a Massachusetts bankruptcy judge who sits in Boston. In recent years that most prominent leadership position has been occupied by judges from Nevada, Texas, Ohio and Oregon.

The Massachusetts bankruptcy judges have contributed to the development of bankruptcy law by writing hundreds of scholarly opinions as both bankruptcy court trial judges and as Bankruptcy Appellate Panel judges. They also have demonstrated a high level of scholarship and have produced some of the leading legal resources in bankruptcy practice and on the law of secured transactions. They teach at local law schools and are invited to lecture at programs both nationally and internationally. Before joining the bench, the Massachusetts judges were specialists in bankruptcy law, were leaders in their law firms both large and small, and in local bar associations. The judges also exhibited a high degree of business experience and acumen. Indeed, I served as a director of several public companies. To suggest that these judges could not provide the proper expertise to manage large Chapter 11 cases is, frankly, absurd.

The United States Bankruptcy Court for the District of Massachusetts has developed the tools needed to ensure the timely, efficient and effective disposition of large Chapter 11 cases. For many years, the court has had Local Rules of Bankruptcy Procedure to address the joint administration of related corporations. MLBR 1015-1. The Court adopted Case Management Procedures that offer the use of such procedures as omnibus hearing dates, notices of agenda, the payment of interim fees and expenses, and other matters typical in large Chapter 11 cases. MLBR 9009-2. Indeed, the Court has developed and adopted sample case management procedures. MLBR App. 6. In short, the Court has anticipated meeting the needs of large and complex cases.

Those that oppose the amendments to the venue statute have also stated that the "magnet" courts can ensure expedited determination of large Chapter 11 cases because they have the sophistication and experience to do so. The United States Courts collect data concerning the time from case opening to case closing of all Chapter 11 filings. The average time nationwide for opening and closing such cases is 13.9 months for the period from July 1, 2010 to June 30, 2011. In the District of Massachusetts the time from opening to closing Chapter 11 cases was 14

months during the same period. Although many cases involving large local companies are not filed in the District of Massachusetts, as is demonstrated above, Massachusetts is fifteenth in the United States for the number of Chapter 11 filings, so there is a sizeable population of Chapter 11 cases to study in the District of Massachusetts. These cases run the gamut from individual Chapter 11 cases to small operating companies and larger, mid-cap companies. Thus, the Massachusetts judges, with the support of an experienced Court Clerk and Clerk's Office staff, is able to process Chapter 11 cases at least at the national average for such cases. Finally, it emphasized that the size (in assets, claims or liabilities) of a Chapter 11 case does not necessarily reflect the complexity of the issues and challenges that the cases present. Thus, the data concerning the speed with which cases are resolved is, I believe, applicable to cases large and small.

Finally on this point, allow me to draw the Subcommittee's attention to a case to which I was assigned in the past year. On December 9, 2010, a publicly traded company called Molecular Insight Pharmaceuticals, Inc. filed a Chapter 11 petition in the District of Massachusetts. Please refer to **Exhibit 4**. Molecular was a Cambridge, Massachusetts based company that was developing a series of drugs for the treatment of cancer. The debtor

stated that it required expedited determination of its case because it had limited cash reserves and would need to shut down if it could not get through the Chapter 11 process in a few months. After presenting a series of "first day" motions that were decided almost immediately, the debtor began the process of negotiating a consensual plan with its principal lender. In the early phases of the case I was asked to decide a series of contested matters that helped the debtor achieve an agreement for emergence from bankruptcy. These steps were achieved through coordinated planning between the Clerk's Office and the interested parties to ensure timely adjudication of all necessary issues. In the end, the debtor achieved a confirmed Chapter 11 plan on May 5, 2011, less than six months after the case was filed. The point is that this local company that is developing important cancer fighting drugs achieved a timely and satisfactory result in its Chapter 11 case after filing in the District of Massachusetts.

THE PROPOSED AMENDMENTS SHOULD BE ADOPTED

Those who oppose the amendments to the current bankruptcy venue rule have argued that there is no need for the amendments because of section 1412, which provides for the transfer of venue when to do so would accommodate the convenience of the parties and the interests of justice

and fairness. But section 1412 is often ineffective. First and foremost, it is very expensive to litigate a motion for a change of venue. Only the most well-heeled parties in interest are able to support such a motion, and they are the least likely to seek a change in venue. It is the small vendor, the former employee, or the pensioner that may desire a change in venue, but they cannot afford the litigation for the same reasons they cannot afford to participate in the proceeding at a remote "magnet" district. Second, as noted above, because there is a strong presumption in favor of the forum chosen by the debtor it is very difficult to carry the burden of persuading the Court to change venue. Finally, many parties that may wish to seek a change in venue will be reluctant to do so because the same court that decides that motion will handle the case in the likely event that the motion is denied.

The current venue statute is an historical anomaly. The large cases of an earlier time were principally railroad reorganization cases. Those cases were governed by a railroad receivership provision in the original 1898 Bankruptcy Act and railroads were limited to filing in the state of the railroad's principal place of business or principal assets. Skeel, 1 Del. L. Rev. 1, 8-9 (1998). Later, when the Act was rewritten in 1934, Chapter X, which

governed bankruptcy cases for publicly held companies, also limited filings to the place where the public company had its principal place of business or assets. Thus, the current proposed amendments merely return the venue requirements for public companies to those that had been established for many years.

Those in opposition to the amendments seem to think that Congress intended to create, through the current venue statute, certain national bankruptcy courts for the disposition of large public company cases. There is nothing in the language of the statute or, to my knowledge, the legislative history, to support such a reading. 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. To the contrary, there is much to be said for the development of innovative case management techniques and legal interpretations from bankruptcy judges around the nation, a goal that will be served by the proposed amendments.

CONCLUSION

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

Thank you very much for the opportunity to provide to the Subcommittee my views on this important legislation.

ATTACHMENT

EVERGREEN Solar, Inc.

Manufacturer of Solar Panels

1994	Founded, Headquarters: Marlborough, MA State of Incorporation: Delaware
2007	Received $58M in incentives from MA (most in state history) to build plant
2007	$500 MA tax rebate to in state Evergreen customers
2008	$4B market capitalization - 900 employees
March 2011	Evergreen shutdown in MA, 800 employees layed off
August 2011	Evergreen files Chapter 11 in DE
>5000	Estimated number of creditors
$100M-$500M	Estimated liabilities

EXHIBIT 1 - Evergreen

Massachusetts Companies

Out of state Chapter 11 Venue

2000	DE	Carematrix
	DE	Lernout & Hauspie Speech Products
	DE	Stone & Webster
	DE	General Cinema
	DE	GC Companies, Inc.
	SDNY	Bradlees
	SDNY	Joan & David
2001	DE	Waste Systems International, Inc.
	SDNY	Polaroid
	SDNY	Casual Male Corp.
2002	DE	CTC Communications Group, Inc.
	DE	SLI, Inc.
	SDNY	Ranor
	SDNY	Genuity
2003	DE	Woodworker's Warehouse
	DE	Bob's Stores
2004	DE	KB Toys
	DE	Network Plus Corp.
2007	DE	Tweeter I
	DE	Quaker Fabric
	DE	Joan Fabrics
2008	DE	Domain Homes
2009	DE	Filene's Basement II
	DE	KB Toys
	DE	Samsonite Company Stores, LLC
	DE	Barzel Industries Inc
	DE	GSI Group, Inc.
2010	SDNY	Pizzeria Uno's
2011	DE	Orchard Brands
	DE	Evergreen Solar

EXHIBIT 2 – Other MA Cases

MA Bankruptcy Judges*

Combined 60 years of experience on the bench

Publications Include	*Bankruptcy Law Manual*, *Chapter 11 Theory and Practice*, *Documenting Secured Transactions*, and *Bankruptcy Deskbook*
Leadership Positions	Multiple Fellows of the American College of Bankruptcy President-elect of the National Conference of Bankruptcy Judges Bankruptcy Advisory Group to the Administrative Office of the U.S. Courts Judicial chair of ABI's Northeast Bankruptcy Conference International Judicial Relations Committee of the JCUS, member American Bankruptcy Institute, Director and Lecturers Boston Bar Association, Bankruptcy section, Chair Commercial Law League of America, District Chair
Legal And Judicial Work	Special Assistant U.S. Attorney in large chapter 11 case Represented Boston's largest property owner in a multi-court, debt restructuring Member of Boards of Trustees of two NYSE listed REIT's Adjunct faculty members at several Massachusetts law schools Former law clerk to justice of the Massachusetts Supreme Judicial Court Several former Bankruptcy Court law clerks Lecturers on insolvency and bankruptcy issues nationally and internationally First Circuit Bankruptcy Appellate Panel, Chief Judge Designated by the First Circuit Chief Judge to serve as judge in municipal Chapter 9 case

EXHIBIT 3 – Judges

* Includes recently retired judges

Mr. COBLE. Thank you, Your Honor.

Professor Jacoby?

TESTIMONY OF MELISSA B. JACOBY, PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, CHAPEL HILL, NC

Ms. JACOBY. Thank you for including me today in this hearing.

I would also like to clarify I am speaking entirely for myself today as a teacher and scholar of bankruptcy and commercial law and not on behalf of any group as well.

So I would like to make three brief points, and I am going to frame the issue a little bit differently.

First, I think we need to look at the current laws in the context of Federal venue principles overall, and in that context, they are not justified.

Second, the justifications for the current system really aren't empirically supported, at least at the current time.

And third, there is a perception of procedural unfairness that really is unfitting for a public court system, and that is an independent reason to consider this bill.

So point one: the current laws aren't principled. I think we have to evaluate bankruptcy venue laws by reference to other Federal venue laws. Bankruptcy has the anomaly: the focus on the preferences and convenience of the filer of the action rather than the many, many stakeholders who were affected by that case. It is really the inverse of most other Federal venue principles and rules. And it is one thing to base venue on the residence or domicile of someone being dragged into a case. It is quite another when that is the party bringing the case.

There really is no analog that I can find to affiliate venue rules in the other Federal venue principles. That is really something quite unique to bankruptcy. And because bankruptcy filers are absolved of establishing personal jurisdiction, venue is it. Venue is the only protection against inconvenience that the basic rules of the structure of the system are providing. So I do think that it is an anomaly—the current law—and that is a justification for considering this change.

The second point is that the justifications often heard are just not persuasive. Some justify the departure by saying bankruptcy is exceptional. It is different. It involves more parties. It is more complicated. But there are other Federal actions that raise exactly those same concerns. So there is the Judicial Panel on Multi-District Litigation that assigns consolidated cases to certain districts. They don't consider place of incorporation of the corporate defendant. They might consider the headquarters. They consider a variety of other factors, including expertise. But place of incorporation is not among them.

Some justify the current rules based on place of incorporation having a strong tie to bankruptcy and the relationship between corporate law and bankruptcy law. And I agree that bankruptcy courts need to respect State law, including State corporate law, but I am not sure that ties Delaware any more to these cases than the employment law, the tax law, the environmental laws of other jurisdictions. And outside of bankruptcy, when corporations get sued in Delaware, it is not unheard of for them to complain that it is inconvenient, that all of their resources are somewhere else, that their management is across the country. So I think that the relationship is attenuated.

Some justify the current system by results. They say we are better off with the status quo. We have an excellent system. I do think that the courts in New York and Delaware are doing a great job.

We do not have evidence that we are better off with the system that we have as opposed to a system where the cases went elsewhere.

Some do argue that senior lenders help select the forum. It is not just management. And I completely agree with that. But the senior lenders need not and do not have their interests aligned with the other creditors and stakeholders. Bankruptcy is very much about creditor versus creditor. It is not just a debtor versus creditor problem. So I understand that Members of Congress can't assure their constituents to just trust the system far away.

Some justify the system based on the possibility of requesting transfer and technology. We have already heard some responses to that. Absent support from the most powerful creditors in a case, transfer is not happening in the large cases, and we have known that really for at least 20 years. Technology is helpful but not seamless, and I am open to thinking about better ways to use it. It doesn't balance the playing field.

And finally, some justify with fears that judges will handle the cases less well than judges in magnet courts. And I do think that that is unfounded. Even if it were true, I think there are ways that we could structure the system to overcome that concern.

So my last point is that the current laws really do risk being perceived as procedurally unfair. There are decades of social science research that examine how parties evaluate the fairness of courts. Process matters and it shapes the view of the outcome. Someone may have a view that the outcome was better or worse for them based on whether they could see a court's effort to be fair. And when people see cases moving to magnet districts, they don't have a way to really verify that. And group representation, as we know from class actions and other contexts, is not the sole answer to protecting individual rights. We really need to think about whether people's rights individually are protected and if they perceive that fairness to be there. And it also puts more pressure on Congress to adopt more special interest exceptions to rules when they don't know what is going on.

So I see two options, to wrap this up. There is this kind of legislation, which I think is reasonable and moderate and very much able to be supported. We could quibble about the affiliate venue rule, and I am sure we will have time to talk about that.

Or we could rethink the assignment of large bankruptcy cases more structurally. There are many ways that Article III judges could assign the biggest cases to certain bankruptcy judges. We have lots of models we could choose from in the existing system. But I have confidence that the professionals and the judges in the existing system are well able to adapt to this kind of change. It has been that way before and it can be that way again.

Thank you very much for this opportunity.

[The prepared statement of Ms. Jacoby follows:]

Statement of

Melissa B. Jacoby
Graham Kenan Professor of Law
University of North Carolina at Chapel Hill

H.R. 2533, "The Chapter 11 Bankruptcy Venue Reform Act of 2011"

September 8, 2011

House Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives

Chairman Coble, Ranking Member Cohen, Chairman Smith, and Ranking Member Conyers, thank you for the opportunity to testify today. I am a law professor at the University of North Carolina at Chapel Hill. I am not engaged in the practice of law and have no financial stake in the fate of H.R. 2533. Earlier in my career, I was a staff attorney with the National Bankruptcy Review Commission, which endorsed a proposal to alter the venue laws for corporate bankruptcy cases, similar to H.R. 2533. I also am an elected member of the National Bankruptcy Conference and the American Law Institute. In this testimony, however, I speak entirely for myself as a teacher and scholar of bankruptcy and commercial law, and not on behalf of any individual or group.

Current venue laws give corporate bankruptcy filers exceptional latitude in selecting a forum. Of the more than two hundred large public companies that have filed for chapter 11 bankruptcy since 2005, nearly 70% have selected Wilmington, Delaware or New York City.[1] Some were actually headquartered in New York. But most were headquartered in cities like Charlotte, Detroit, Raleigh, Cleveland, Memphis, Nashville, Dallas, Houston, Phoenix, Riverside, Miami, Atlanta, Oklahoma City, Portland, and Seattle. Overall, the cases filed in Wilmington and New York City from 2005 to today were headquartered in more than thirty other states and the District of Columbia.

H.R. 2533 would increase the likelihood that companies headquartered around the country would file bankruptcy petitions at their headquarters. First, H.R. 2533 functionally eliminates a debtor's place of incorporation as a basis for venue. Second, H.R. 2533 addresses the affiliate venue rule. The current affiliate venue rule enables a company to follow an already-filed parent, subsidiary, or affiliated company into that first filer's venue even if that filer is miniscule relative to others in the corporate family. The proposed revision would permit subsidiaries to follow parents as a matter of right. It would require extra steps if multiple sister companies headquartered in different districts needed a coordinated restructuring.

This set of proposals was one of the few that received nearly unanimous support by the National Bankruptcy Review Commission, which was authorized by Congress in 1994 to examine the bankruptcy laws. In the past, such proposals have received the endorsement of lawmakers with a wide range of political and ideological views and state attorneys general.

Revising the options for corporate bankruptcy venue is fair, reasonable, and in line with principles of federal venue and aggregate litigation. Even if H.R. 2533 would not produce the perfect venue statute, it would enhance the appearance and reality of accessibility and fairness.

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Current bankruptcy venue laws are more permissive than other federal venue laws. Federal venue laws generally focus on the location of the persons involuntarily brought before the court. Thus, outside of bankruptcy, filers of civil actions are not permitted to choose a venue based solely on *their own* places of incorporation. 28 U.S.C. §§ 1391,1397. Bankruptcy venue rules, by contrast, focus on the entity commencing the case. 28 U.S.C. § 1408(1). A company can file a bankruptcy case in its own place of incorporation, however inconvenient that venue may be for the many creditors, equity holders, and communities affected by the bankruptcy.

In bankruptcy, a major corporation also can follow a small subsidiary into a district in which the rest of the company has no relationship. 28 U.S.C. § 1408(2). Enron took this path. This practice has no intentional analogue in other federal venue rules. Indeed, to the extent that a plaintiff claims that a parent "resides" in a district merely because its subsidiary is deemed to reside there for purposes of personal jurisdiction, the parent is likely to raise objections.

As an additional point of comparison, the case transfer rules diverge (although actual transfers in large cases are rare). Outside of bankruptcy, a civil action can be transferred for the convenience of parties and witnesses, in the interests of justice, only to a district or division "where it might have been brought," e.g., where there is proper venue. 28 U.S.C. § 1404(a). By contrast, on similar substantive showings, bankruptcy cases can be transferred to districts even if venue is not otherwise proper. 28 U.S.C. § 1412.

This flexibility for the filer, and potential inconvenience for other parties, is compounded by the fact that a corporate bankruptcy filer is relieved of establishing personal jurisdiction, in contrast with plaintiffs in civil actions. The rules establishing proper venue for a bankruptcy case are thus the main protection against strategic or inconvenient locations for creditors and other parties affected by the significant events that occur in a bankruptcy case. One could reasonably conclude that this justifies more restrictive venue rules for bankruptcy, not less.

Bankruptcy venue laws have enabled the concentration of a large proportion of cases in just two close-together East Coast districts. Supporters of the existing system ask us to take on

faith that everyone affected by corporate bankruptcies are better off with this configuration. I am not aware of any systematic empirical evidence that supports this claim.

Furthermore, a considerable body of social science research suggests that outcomes should not be the exclusive metric for a public court system; parties have independent interests in participation and witnessing of the process that are not satisfied by virtual or large-group representation.[2] Perceptions of procedural fairness are critical.[3]

The stakeholders whose faith in the system might be shaken when bankruptcies are handled far from corporate headquarters are not the largest lenders, who exercise tremendous leverage over the bankruptcy through which they pursue their own interests.[4] Instead, one must also consider the stakeholders who, by their own standards, have much to lose and yet face many hurdles associated with an ongoing process in a far-away court: employees who have worked long hours for a salary and medical and retirement benefits that bankruptcy often dismantles; small suppliers of goods and services who may be greatly affected by whether the firm reorganizes or dissolves; government units that act as creditors, regulators, and protectors of the public interest; citizens deeply anxious over whether the debtor – perhaps the only nearby hospital – will keep its doors open; and the local press that will pursue the gritty details of the case's progress that national news outlets will likely ignore. As a majority of the United States Supreme Court observed long ago in a dispute over the doctrine of forum non conveniens, "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their venue and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in local controversies decided at home." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). Although the bankruptcies of national or international corporations put pressure on this ideal, they do not render it irrelevant.

Although courts employ some technological innovations, technology can do only so much to address the perception or reality of inaccessibility. Video conferences can be costly and complicated, and, given the variety of equipment used, telephonic appearances can be awkward, with parties speaking over each other and straining to be heard. Moreover, even if a judge is willing to take evidence telephonically, it is difficult for that judge to meaningfully assess a witness's credibility over the telephone, as compared to the witnesses present in the courtroom. Likewise, giving telephone access to the press and other news media may reduce the quality of the reporting of the events in public courts, assuming the court is willing to allow non-parties to

"listen in" to the proceedings by telephone. All of this implicitly tilts the playing field in favor of the debtor, the major lenders, and other parties and professionals who are easily able to be physically present.

Supporters of the existing system sometimes contend that the non-incorporation tests for venue (principal place of business and principal assets) are no more convenient for stakeholders than a venue that results from some combination of place of incorporation and affiliate location (e.g., New York or Delaware). The Delaware State Bar Association raised a similar critique of principal place of business in 1996 when the National Bankruptcy Review Commission considered a similar proposal. The Commission studied the dataset that the Delaware State Bar Association offered. As the Commission's final report explains, in nearly all cases smaller creditors would have had better access in the principal place of business than in the place of incorporation.[5] And based on a database of public submissions to the Commission (that continues to be available on the American Bankruptcy Institute website),[6] the final report notes that "[d]isenfranchisement 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."[7]

This being said, no one can promise that use of a principal place of business or assets standard will enable every stakeholder to take public transit to the courthouse when large companies file for bankruptcy. But critiquing principal place of business or assets hardly helps to justify place of incorporation or a boundless affiliate venue rule, neither of which considers stakeholder access at all. Instead, such critiques suggest that an entirely different case-placing system should be considered to replace the status quo.

It is helpful to recall the observations of the late Lawrence P. King. Professor King was the Charles Seligson Professor of Law at New York University, of counsel at a prominent New York law firm, and editor-in-chief of the leading bankruptcy treatise. At an early public meeting of the National Bankruptcy Review Commission, Professor King opined on his own behalf that state of incorporation offered no meaningful connection to a district for bankruptcy purposes.[8] Indeed, in the context of civil actions outside of bankruptcy, it is not unheard of for corporate defendants to complain of the inconvenience of litigating in their place of incorporation, and their lack of connections to the forum, as compared to their corporate headquarters.[9] When the Judicial Panel on Multidistrict Litigation sends a consolidated set of civil actions to a particular

district and judge for pretrial purposes, place of incorporation does not seem to be a substantive factor weighing into the decision.[10]

Perhaps the best one can say about place of incorporation is that it is an objective fact. But we could say the same about a system that permitted debtors to choose from all districts or from a random sample of districts, or that permitted debtors to pre-commit to bankruptcy venue well before the onset of financial distress.

Defenders of the current system ask us to leave the system as it is, and keep the burden on far-away stakeholders to request a transfer of cases. Everyone can point to some examples of actual transfers. But they rarely occur in the largest voluntary cases. The reasons were laid out quite clearly two decades ago by Professors William C. Whitford and Lynn M. LoPucki in the Wisconsin Law Review, and reemphasized by Professors Theodore Eisenberg and LoPucki about a decade ago in the Cornell Law Review. Smaller creditors lack the necessary information to effectively challenge venue until the case is firmly entrenched in the initial district. Unless major financial institutions or the creditors' committee join the motion to transfer venue (both of which are unlikely), the price and burden of proof is high and the chance of success is low. Again, we can learn from Professor King, who opined at a public meeting on his own behalf that the theoretical possibility of transfer was not getting big cases where they should be, and a statutory fix to narrow the venue options was necessary.[11]

Elimination of place of incorporation for corporate bankruptcy venue is reasonable and will increase the perception as well as the reality of accessibility and fairness in many instances. H.R. 2533 makes this change in a way that leaves existing 28 U.S.C. § 1408 intact for all debtors other than those subject to the new venue rule. As indicated by the word "only" in the preamble to section 1408(b), the more restrictive venue test is mandatory for corporations (and limited liability corporations and limited liability partnerships) in chapter 11 and the time period for measuring the other venue metrics has been enlarged to one year. Other debtors will still be able to file where they reside or are domiciled.

As for the affiliate venue rule, the reformed version in H.R. 2533 permits integrated corporate families to follow a parent into a district. If the parent does not file, then related chapter 11 debtors could prepare a motion with their proposed first-day orders to request judicial consideration of the best district for the cases to be jointly administered. This process is already authorized by the Federal Rules of Bankruptcy Procedure. FED. R. CIV. P. 1014(b); 28 U.S.C. §

1412. And given that judicial economy is valued in venue choices, courts are unlikely to refuse. A debtor's own motion does not face the same burdens as a far-away stakeholder's motion. The difference between a debtor asking for a venue change to join an affiliate, and a far-away stakeholder asking to move the case against the debtor's will, are like day and night.

This being said, the transfer process is hardly cost-free, especially if filings must first be made across multiple districts, and if the debtor must prepare for the possibility of a consolidated filing in one of several districts. Again, the early work of Professors Whitford and LoPucki is instructive in their observation that bankruptcy formally deals with entities, but restructurings need to account for enterprises. The disconnect meant that a restrictive affiliate venue rule could block some corporate groups from filing together when they should do so, while other affiliates could file together even if they lacked a common enterprise and this choice inconvenienced creditors. Professor King similarly noted the utility of restructuring enterprises in one district.[12]

H.R. 2533's affiliate venue test is also vulnerable to the critique that it permits operating subsidiaries to follow a holding company into the latter's venue that could be inconvenient for other parties. This too is a legitimate concern, and H.R. 2533's longer look-back period to determine principal place of business or assets goes only part of the way to address this problem. In the 1990s, members of the ABA Business Law Section's Business Bankruptcy Committee recommended that coordinated affiliate filings be permitted on the basis of a dominant operating affiliate's principal place of business or assets rather than on the basis of a holding company parent's filing.[13] That objective remains a good one assuming that language can be found to achieve that goal without creating other problems.

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Proponents of the current system suggest that judges in other districts are ill-equipped to handle the largest cases. This assumption should not go unquestioned. Bankruptcy judges go through a rigorous process of merit selection by the United States Court of Appeals for each circuit. As a result, the process is less politicized than Article III judicial appointment. If opponents of venue reform believe that something different and better is happening in the selection process in the Second and Third Circuits – or, more precisely, for the courts only in

New York City and Wilmington, Delaware – they should say so explicitly so that other circuits can evaluate those practices.

Lawyers who defend the current system often note that they want judges with a lot of experience to handle the biggest bankruptcies. This type of argument is used in many contexts and can become a self-fulfilling prophecy. Of course, the District of Delaware became popular precisely because lawyers liked how a judge handled her very first large cases.[14] Had the first big case not been filed there, lawyers would never have known her capabilities. Although the Judicial Panel on Multidistrict Litigation also values experience, it spreads MDLs across the country; currently, over two hundred judges preside over one or more.[15] Overall, though, it is hard to sustain the claim that a judge needs to have previously overseen a case in order to be assigned a case. By definition, no one joins the bankruptcy bench having already presided over a large and complex bankruptcy case, or any bankruptcy case. The same can be said for all kinds of federal actions that go to the U.S. District Court, including matters literally of life and death.

Also, while a high proportion of big cases has gone to two magnet cities, judges elsewhere have effectively handled other extremely large and complicated cases, as well as the vast majority of business bankruptcy cases filed in this country. The biggest cases may require more speed and different procedures, but the underlying principles and doctrines are the same regardless of the size.

Supporters of the current system also appreciate the protocols, norms, and local rules of New York City and Wilmington that aid accessibility and quick action in the largest cases. Nothing prevents other districts from adopting those tools.[16] The Southern District of Texas, the Northern District of Texas, the District of Massachusetts, the District of New Jersey, the Western District of Pennsylvania and others already have developed complex case designations and associated procedures. Judges also may be willing to consider special procedures that parties propose for larger cases. Of course, there may be more the court system as a whole could do to sensitize judges to special needs of larger cases, but none of this justifies preserving the current system.

Commentary on bankruptcy judging also produces an inconsistent picture of the role judges play. Lawyers have argued emphatically that judges are not responsible when companies need to file a second chapter 11 case. If courts are to be held blameless when restructurings fail, it hardly stands to reason that good outcomes (assuming there's evidence) automatically justify

the status quo. Lawyers also have at times pointed to case burdens in the magnet courts to explain judges' limited opportunity to scrutinize all the details of chapter 11 plans. H.R. 2533 would ease case load burdens for those courts and contribute to more robust development of substantive bankruptcy law and innovation in large case management.

Finally, even if the judiciary itself were to conclude that only a subset of judges should handle major restructurings, such a conclusion would not justify the current venue system. For a more structural response, Congress could implement a provision like that used in chapter 9 municipality cases, under which the chief judge of the applicable court of appeals appoints the bankruptcy judge to oversee the case. 11 U.S.C. § 921(b). Or, following the model of the Judicial Panel on Multidistrict Litigation, Congress could establish a panel of Article III judges that decides where and to whom to assign the largest bankruptcy cases. 28 U.S.C. § 1407. Given that Congress has declined to take these actions so far, the strong assumption in the current structure of our bankruptcy system is that those appointed to the bench are equipped to handle the full array of commercial and consumer bankruptcy cases. I close by mentioning these other ideas to illustrate that some supporters of the status quo give us a false choice between well-overseen cases and a fairer bankruptcy system.

Thank you again for the opportunity to participate in this hearing.

End Notes

[1] The characterization of a case as a "large public company" and the associated data come from the UCLA-LoPucki Bankruptcy Research Database. The term applies to filings of companies with over $100 million in assets in 1980 dollars. My searches are further limited to voluntary chapter 11 filings.

[2] *See, e.g.*, Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306, 361, 364, 372 (1996).

[3] *See, e.g.*, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

[4] *See* Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795 (2004) (explaining why secured lenders' interests diverge from other creditors); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 513 (2009) (documenting considerable control over bankruptcy process by senior secured lenders, and finding over-secured creditors prefer immediate resolutions, such as quick sales, that will satisfy their own claims even if reorganization is possible").

[5] NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 785-86, 791 (1997).

[6] http://www.abiworld.org/AM/Template.cfm?Section=Submission_Abstract&Template=/CM/ContentDisplay.cfm&ContentID=36677

[7] NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT 886 (1997). *See also* GORDON BERMANT ET AL., CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES, REPORT TO THE JUDICIAL CONFERENCE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM 5 (FED. JUD. CENTER 1997).

[8] Minutes of the National Bankruptcy Review Commission, February 23, 1996, Washington, D.C.

[9] For some recent examples, see, e.g., Everglades Interactive, LLC v. Playdom, Inc., Civ. No. 10-902-SLR, 2011 WL 2294075 (D Del. June 8, 2011) (motion denied); Marvell Int'l v. Link_A_Media Devices Corp., 10-869-SLR, 2011 WL 2293999 (D. Del. June 8, 2011) (motion denied); Giclata v. Heckmann, 10-378-LPS-MPT, 2010 WL 3940815 (D. Del. Oct. 6, 2010) (motion denied); Illumina, Inc. v. Complete Genomics, Inc., 10-649, 2010 WL 4818083 (D. Del. Nov. 9, 2010) (motion granted); Human Genome Sciences, Inc. v. Genentech, Inc., 11-082-LPS, 2011 WL 2911797 (D. Del. July 18, 2011) (motion granted); Synthes USA, LLC v. Spinal Kinetics, Inc. 08-838-SLR, 2009 WL 463977 (D. Del. Feb. 24, 2009) (motion granted).

[10] *See, e.g.*, John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008) (written by the Chair of the JPML); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2009) (sample of transfer orders); DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL Ch. 6 (2011).

[11] Minutes of the National Bankruptcy Review Commission, February 23, 1996, Washington, D.C.

[12] Minutes of the National Bankruptcy Review Commission, February 23, 1996, Washington, D.C.

[13] G. Eric Brunstad, Jr., Mike Sigal, & William J. Schorling, *Review of the Proposals of the National Bankruptcy Review Commission: Part I*, 53 BUS. LAW. 1381, 1435 (1998) (reporting on initiative of Business Bankruptcy Committee).

[14] Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1990 & fn. 8, 1991 (2002).

[15] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS, JULY 14, 2011.

[16] Subcommittee on Venue-Related Matters of the Judicial Conference Committee on the Administration of the Bankruptcy System & the Federal Judicial Center, Conference on Large Chapter 11 Cases, Jan. 30-Feb. 1, 2003, at 39-40.

Mr. COBLE. Thank you, Professor Jacoby. Good to have you with us.

We have been joined by the distinguished gentleman from Michigan, Mr. Conyers. Good to have you with us, John.

Folks, we try to apply the 5-minute rule to ourselves as well. So if you all could keep your responses terse, we would appreciate that.

I recognize myself for 5 minutes.

Professor Jacoby, I think you have already answered it, but I want it for the record. How do you respond to Professor Skeel's argument that Delaware and New York bankruptcy courts are more expert at handling large cases?

Ms. JACOBY. Well, I think we would want to unpack that argument, and this is something that I have been trying to think a lot about. Certainly there are some judges empirically who have had more experience with big cases than judges in other districts. There are also relatively new judges in New York and Delaware who, again, may be doing a great job but they do not all come from the same level of experience.

When we take apart the pieces of what is desired in a judge, we want fairness and competence and accessibility and speed. I think those are things that both the judiciary is well equipped to handle and that also can be adapted and come up with new innovations.

I can understand why parties want to hire very experienced lawyers, but I think that expertise—we have to be careful with how we make that argument. We have no evidence that things are going better in these two districts than other places.

Mr. COBLE. Thank you, Professor.

Mr. Califano, do you believe that bankruptcy case law in Delaware and New York is shaped by the fact that they are so-called magnet districts for large Chapter 11 cases? And if so, how?

Mr. CALIFANO. Well, the Commercial Law League doesn't really have a position on this, but I can respond personally. The Delaware courts are obviously very, very busy, and they have constructed rules and procedures to handle large cases. I believe that probably case law does follow this development, and I believe that, therefore, the large cases do instruct the case law in Delaware. So my answer would be yes.

Mr. COBLE. I thank you, sir.

Professor Skeel, H.R. 2533 removes the place of incorporation as a venue option and also does away with the pending affiliate rule currently found in section 1408, paragraph 2. Some of your academic work suggests you believe that the pending affiliate rule leads to more pernicious forum shopping than the place of incorporation rule. Is this accurate?

Mr. SKEEL. First of all, I am very flattered that you have read some of my other work and others have as well.

I do think that the affiliate rule is more debatable than the place of incorporation rule. From my perspective, eliminating place of incorporation as a venue location would be just a huge, huge mistake.

I am troubled by some of the filings in New York where there is no real nexus at all. So I would be comfortable with a much more carefully crafted venue rule that said something along the lines of there needs to be some real presence in a venue before you can file there. But I generally think that the New York courts have done a good job.

One thing we have not talked about yet. We have talked about expertise of the particular judges. They also have administrative capacity and administrative expertise that, at least at this point, other courts don't have.

So the short answer is I think there is more room for improvement on the affiliate side. I wouldn't just get rid of the affiliate rule, but I would be comfortable with something that said there needs be some presence of the company in the district before you go there.

Mr. COBLE. I thank you, sir.

Judge Bailey, I think you also answered this, but I want to put this question to you. Opponents of the bill before us, 2533, assert that the bankruptcy judges in Delaware and New York have more expertise than judges in other districts and are, therefore, better equipped to administer particularly large Chapter 11 cases. What say you to that?

Judge BAILEY. Mr. Chairman, when I gave my opening remarks, I put up a slide that showed the experience of Massachusetts. There are five judges in the Commonwealth of Massachusetts in the District of Massachusetts, and two of us, by the way, have been on the bench for 3 or fewer years. But the other—when you include all five, there are 60 years of experience on the bench in the District of Massachusetts. So I would entrust any bankruptcy case that is filed in America with any of the judges that sit on our court. And I have the highest regard for my colleagues in Delaware and in the Southern District of New York, but not at the expense of having cases filed there that cause a lack of confidence in that forum selection. I don't believe Congress intended to create a national bankruptcy court through this venue statute for big cases, but that seems to be what has happened.

Mr. COBLE. I see my red light has just illuminated. So I will recognize the distinguished gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Coble.

Mr. Skeel, I haven't read—is it Ms. LoPucki from UCLA?

Mr. SKEEL. Yes.

Mr. COHEN. I haven't read her remarks. Did she actually say that the judges are corrupt?

Mr. SKEEL. She is a he.

Mr. COHEN. He.

Mr. SKEEL. And he does, and he said it over and over again. A number of us have—Professor Jacoby and I have been at conferences where we have said, Lynn, you don't really mean corrupt, do you? And he says, yes, I do. I believe the system is corrupt and the judges are corrupt. He says it in his book.

Mr. COHEN. He didn't say it was a Ponzi scheme or anything like that, did he? [Laughter.]

Mr. SKEEL. If you googled his name and put "Ponzi scheme" there, I wouldn't be surprised if he called it a Ponzi scheme too. He has called it a lot very negative things, but most consistently "corrupt." He uses the word "corrupt" over and over.

Mr. COHEN. Let me ask each of the panelists to edify me a little bit. A lot of these cases are brought in the State of Delaware because apparently a lot of corporations decide to incorporate in Delaware. When they incorporate in Delaware—and I will start with Mr. Califano and work our way to the right—what does a corporation have to have and normally have in Delaware once they incorporate? Do they have to have like 80 employees there or their

president and their vice president and their board meetings, or can they just kind of incorporate there and go back to wherever they want to be like FedEx and do that stuff in Memphis and just whatever?

Mr. CALIFANO. Mr. Cohen, I think all you have to do is pay an annual fee and you are good to go.

Mr. COHEN. That is it. They don't have to have a post office box? Do they have to have that?

Mr. CALIFANO. Maybe to start to get the incorporation started but very little else.

Mr. COHEN. That is it.

Judge Bailey, you next, I guess. I am going to come back to you, sir. Is that accurate? I mean, that is all you have to have?

Judge BAILEY. I think it is. Really the sum and substance of it, to my understanding, is that by incorporating in Delaware, that the corporation will have adopted the Delaware law certainly for corporate governance purposes, but there is no requirement that it have any actually business in Delaware.

Mr. COHEN. And Judge Bailey, is there anything special about corporate law that makes it attractive to the corporation?

Judge BAILEY. In Delaware?

Mr. COHEN. Yes.

Judge BAILEY. I am sure some of the academics can expound on this. I did serve on a couple of public company boards. They were actually incorporated in Maryland. And I know that the gifted corporate lawyers that set up these organizations certainly had in mind the rules that apply in those States. And Delaware has been an attractive location for incorporation. The rules are well-honed and certainly are predictable. It is not to say that other jurisdictions do not have similarly predictable laws.

Mr. COHEN. Professor Jacoby, are you in agreement on the fact that you really have to have limited connections to Delaware after you incorporate there or even when you do?

Ms. JACOBY. Yes.

Mr. COHEN. And what is the beauty of Delaware for all these corporations? Why do they all want to come there and be in Mr. Carney's district?

Ms. JACOBY. Well, I have actually been informed on those issues a lot by Professor Skeel's work who really does study a lot of Delaware corporate law. Many of the similar arguments have been made about the genius of corporate law and the benefits that it provides in terms of predictability. But again, we have to think about it only being a slice of really the law that governs what companies do. It is really about management and shareholders and the law that governs then. It really doesn't relate to any of the other issues that come up in a bankruptcy case.

Mr. COHEN. And in bankruptcy cases, you have got not just the corporation, but you have also got consumers, and Delaware has nothing unique for them. Does it?

Ms. JACOBY. No.

Mr. COHEN. No.

Professor Skeel, do you have any thoughts about Delaware? I mean, what is special about the reason that they should be filing these cases in Delaware? Just because they have got a post office

box and incorporate there because of the beauty of the corporate law, it was not bankruptcy law. So why should that continue to be the forum that people are allowed to choose?

Mr. SKEEL. Well, as Professor Jacoby said, a lot of the arguments about Delaware and corporate law translate into the bankruptcy context. ?n corporate law, there is a debate very much like the one we are having about whether it is a good thing that all these companies incorporate in Delaware or not, and there are two sides of it. The "populists," to use the term that Judge Bailey quoted from me, worry about it. Folks who are more market-oriented tend to think Delaware does a good job.

The one thing everybody agrees on is the quality of the Delaware judges and the Delaware courts and their precedent base and the court system. Both sides of the debate agree that the expertise of the judges and the way they handle cases is a good reason to incorporate in Delaware.

Mr. COHEN. My red light has come up as well. I think it is working on some kind of speed, but that is neither here nor there. [Laughter.]

Mr. COBLE. And I thank the gentleman.

The Chair recognizes the distinguished gentleman from South Carolina for 5 minutes. Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman.

Professor Skeel, do former partners in IP firms make better magistrate judges?

Mr. SKEEL. This sounds like a trick—I know where there is an IP expert who is on the Delaware Chancery Court. I assumed you were alluding to that.

Mr. GOWDY. No. You assume motives that don't exist. [Laughter.]

I am just asking whether or not people who have a background in IP make better magistrate judges given the fact that they preside over patent cases.

Mr. SKEEL. Yes. If they are presiding over patent cases, absolutely.

Mr. GOWDY. So you would necessarily agree that prosecutors make better judges in criminal cases.

Mr. SKEEL. I wouldn't want to make a blanket statement like that, but I would certainly say that prosecutors have relevant expertise and that would be helpful in their——

Mr. GOWDY. Are you advocating that sophisticated title 21 drug conspiracies only be handled or presided over by Article III judges who have prosecutorial backgrounds?

Mr. SKEEL. Absolutely not, and that is why I said having a prosecutorial background would be very helpful in handling those cases. When I was clerking for a judge, we got a couple of those cases. They were extraordinarily complicated. I don't think you have to have that background to handle the cases, but it certainly helps. If I were the judge, I would rather have it than not have it.

Mr. GOWDY. Can academics ever make good judges?

Mr. SKEEL. A few of them make good judges and a few of them even make good Supreme Court Justices.

Mr. GOWDY. Can you name for me judges who are currently doing bankruptcy work that you think are too inexperienced or have no business doing it?

Mr. SKEEL. As I have said in my written remarks, I think the bankruptcy judiciary is terrific, and that is one of the reasons that I——

Mr. GOWDY. I thought part of your argument was that there was certain acumen in Delaware and New York that shouldn't be wasted and that there are other judges who are inexperienced and unknowledgeable in the ways of bankruptcy. Did I misunderstand that?

Mr. SKEEL. I didn't say any of that. I said that in the big cases, the best predictor of whether people take their case to Delaware as opposed to a different district is relative number of—relative expertise based on number of Chapter 11 cases handled, which is not saying anything about experience, number of years of practice or any of those things.

Mr. GOWDY. So you have never said that Delaware bankruptcy judges have more experience and expertise.

Mr. SKEEL. I have said they are experienced and the courts have a lot of expertise, yes.

Mr. GOWDY. Your Honor, can you give us the benefit of your vetting process so we may know how bankruptcy judges are selected?

Judge BAILEY. Yes. Bankruptcy judges are Article I judges and are selected by—first, there is generally a merit selection panel. In our circuit, that panel is organized by the First Circuit and includes representatives of the consumer bankruptcy bar, the business bankruptcy bar, and also lawyers who have no involvement and non-lawyers who have no involvement in the bankruptcy process because what they are trying to identify at the merit selection panel stage, I believe, are individuals who have the judgment, the demeanor, and certainly the intelligence to sit on these complicated cases. And then after that process, the merit selection panel makes a recommendation to the circuit, in our case the First Circuit, who then selects the judge for appointment.

Mr. GOWDY. So if there are issues with experience or expertise, all that can be vetted in the screening process. In fact, it is vetted in the screening process. Right?

Judge BAILEY. And it most certainly is.

Mr. GOWDY. Professor Jacoby, can you cite us an example in the remaining amount of time I have? I was going to yield some time to Mr. Cohen since he is very knowledgeable on this. But in the remaining time I have, can you cite an example where maybe the current venue rules are being gamed?

Ms. JACOBY. Gamed as—well, the way I see the system is that it currently permits a very wide latitude, and this would alter what those options are. We have also seen situations that have been identified where debtors seem to have no proper venue, but because it is waivable and no one raises it in a case, that a case may be in New York without anyone being able to point to why.

Mr. GOWDY. Well, maybe bankruptcy attorneys are different, but usually you pick a venue not based on the experience and expertise of the judge, but whether or not you think you will get a more favorable outcome. It might be that bankruptcy attorneys are just different and they are more interested in fairness than winning, but they would be unique among attorneys if that is what they were motivated by.

I would yield back to the Chairman.

Mr. COBLE. I thank the gentleman from South Carolina.

I want to thank the witnesses for your testimony today. You all have contributed very favorably to this issue.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Again, we thank the witnesses for your attendance today, and this hearing stands adjourned.

[Whereupon, at 11:13 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary

Before its demise, Enron was a Texas-based company with 7,500 employees at its Houston headquarters and over $60 billion in claimed assets. But in December 2001, Enron filed for chapter 11 bankruptcy protection in a Manhattan courthouse 1,500 miles from Texas. How was this possible?

Unlike venue rules for other types of cases, chapter 11 bankruptcy venue rules give many corporations several choices of where to reorganize. A corporation can file in the state where it is incorporated, where it has its principal assets, or where it is headquartered. For many companies, this rule alone provides three different venue choices.

But many corporations have even more choices of venue. A corporation can also file a chapter 11 case in a venue where its corporate affiliate's case is already pending.

Using this rule, Enron's bankruptcy lawyers first filed the bankruptcy of a small New York subsidiary with 57 employees in the Southern District of New York. Moments later, because this affiliate's case was now pending, the Houston-based parent company bootstrapped its massive bankruptcy case into a Manhattan bankruptcy court.

The current chapter 11 venue rules allow many corporations to forum shop for a venue with favorable judicial precedent for the business. For example, a nationwide retailer may prefer to file in Delaware because of the Third Circuit's well-known rulings on the treatment of unpaid rent in bankruptcy. At the same time, a business with many unionized employees can avoid filing in Delaware to avoid Third Circuit precedent on collective bargaining rights in bankruptcy.

The Constitution instructs Congress to enact *uniform* bankruptcy laws. While courts of appeal are permitted to interpret Bankruptcy Code provisions differently, chapter 11 debtors should not be able to leave their home districts and shop for a forum whose judicial precedent on bankruptcy law they happen to prefer.

In recent years, a majority of large companies have chosen to file their chapter 11 cases in the Southern District of New York and in Delaware.

Like umpires in baseball, bankruptcy judges should be neutral referees in chapter 11 cases. The practice of forum shopping is predicated upon an assumption that some judges are "fairer" than others. Regardless of where a company reorganizes, a judge should call balls and strikes the same way.

I believe our national bankruptcy system suffers when chapter 11 bankruptcy cases are concentrated in just two judicial districts on the east coast. When a large chapter 11 case travels across the country to be heard in a far-away bankruptcy

court, many of the business's stakeholders lose out. Employees, creditors, and the community in which the business operates feel out of touch with the reorganization process. Interested parties frequently have to travel long distances to present evidence to support their claims.

In July, I introduced H.R. 2533, the Chapter 11 Bankruptcy Venue Reform Act of 2011, to reform the chapter 11 venue rules so that corporate debtors must reorganize in their home court. I am pleased to be joined in that effort by Ranking Member Conyers and the Chairman and Ranking Member of this Subcommittee.

The bill requires corporate debtors to file for chapter 11 where they have their principal place of business or principal assets. It also prohibits large parent corporations like Enron from leaving their headquarters and following tiny, well-placed subsidiaries into a preferred venue. The bill still allows subsidiaries to follow a parent firm into a venue, thus preserving the efficiencies that flow from joint administration of related debtors' cases.

This bill improves the fairness of the bankruptcy system for all stakeholders in a chapter 11 case.

I thank the witnesses for coming today and look forward to hearing from them.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Today's hearing focuses on H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011," which I support for several reasons.

To begin with, this bill will help level the playing field between creditors and business debtors that seek bankruptcy relief under Chapter 11.

Under current law, a business can file for Chapter 11 bankruptcy relief in the district where the debtor's incorporated, or where its principal place of business or principal assets are located.

In addition, a business may file its Chapter 11 case in a district where an affiliate of the business is already pending.

This explains how corporations headquartered in Michigan—like General Motors and Chrysler, from my hometown of Detroit, could file their Chapter 11 cases in New York in 2009.

By choosing to file for Chapter 11 in a distant venue such as New York, a business—with its principal assets and most of its creditors and employees located in Michigan or California for example—makes it much more difficult for these creditors, particularly smaller creditors and workers, to participate in the case and defend their claims.

These creditors are forced to retain counsel in the distant venue and, if they want to physically appear, incur travel costs. In effect, they have to pay more to collect on their claims.

As a result, the ability of these small creditors and workers to influence the bankruptcy proceedings is greatly diminished. And, by choosing a distant forum, a company can reduce local press coverage of the case.

Another concern is the potential under existing law for forum-shopping and manipulation which can undermine the fundamental purpose of having venue rules.

These rules are intended to ensure that cases are filed where the locus of rights can be most fairly adjudicated.

As I previously noted, a business can file a Chapter 11 case in a district where an affiliate of the business has a bankruptcy case already pending.

Thus, this would allow, for example, a lumber company in Maine—that employs hundreds of local unionized workers and owes money to numerous local suppliers—

to file its bankruptcy case in any district where an affiliate of that company has already filed a bankruptcy case.

This effectively permits management of a company—which is most likely to blame for the company's financial distress—to pick and choose the venue with the case law most friendly to management through this affiliate venue filing option.

Particularly in cases where collective bargaining agreements may need to be rejected under the Bankruptcy Code, a jurisdiction espousing a pro-management, anti-union perspective would likely be very attractive to a company's management.

A final concern I have about the current law is that it creates the potential to undermine the fairness—whether real or perceived—of the bankruptcy system and those charged with the administration of these cases.

In an effort to attract larger cases, a bankruptcy court may be less aggressive in pursuing conflicts of interest or in second-guessing fee applications by practitioners.

In addition, some have expressed concern that Chapter 11 cases in these districts may have a higher failure rate because of less demanding requirements for confirmation.

While the bankruptcy courts in New York and Delaware are without doubt highly respected, their counterparts in the rest of Nation are equally capable of handling large cases competently.

In light of these concerns, various academics as well as the National Bankruptcy Review Commission have expressed support for narrowing venue choices for large business debtors.

Accordingly, I look forward to hearing from our witnesses about the current law with respect to where Chapter 11 cases may be filed and whether H.R. 2533 is an adequate response.

Statement of the Honorable Steve Cohen
For the Hearing on H.R. 2533, the
"Chapter 11 Bankruptcy Venue Reform Act of 2011"
Before the Subcommittee on Courts, Commercial and Administrative Law

Thursday, September 7, 2011 at 10:00 a.m.

2141 Rayburn House Office Building

H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011," offers commonsense changes to the bankruptcy venue statute, 28 U.S.C. 1408. That is why I am an original cosponsor of this bill.

Under H.R. 2533, a corporate debtor would be permitted to file its case only in the district that encompasses its principal place of business or where its principal assets were located for the year preceding commencement of the bankruptcy case or for the longer portion of such year.

Such a debtor may also file in a district where the bankruptcy case of a parent company or other controlling affiliate is pending.

Under current law, a corporate debtor may file a bankruptcy case in one of a number of venues. In addition to its principal place of business or the place where its principal assets are located, a debtor may file its case in the district encompassing its place of incorporation or a district where an affiliate's case is pending.

Unfortunately, the availability of the latter two options has led to the vast majority of large chapter 11 cases being filed in one of only two bankruptcy courts, even when these venues are not convenient or fair for most of the stakeholders involved in these cases.

Such a result threatens to undermine the purpose of having venue rules in the first place, which is to ensure that legal rights be adjudicated in the place that is most convenient and fair to all the parties in a case.

In the chapter 11 bankruptcy context, filing a case in a venue where the debtor has no substantial ties harms small creditors, employees, and other affected stakeholders who lack the resources of larger creditors and corporate debtors to assert or protect their interests in distant forums.

Our witnesses will go into greater detail as to why venue matters a great deal in chapter 11 cases and why the changes that H.R. 2533 proposes are necessary. We will also hear the opposing viewpoint, which questions the need for this bill.

I applaud Chairman Lamar Smith and Ranking Member John Conyers for their leadership on this issue. I also thank Subcommittee Chairman Howard Coble for holding this hearing. Finally, I'd like to recognize the presence of Representative John Carney of Delaware on the dais.

I hope that we can have a fruitful discussion.

Bringing Chapter 11 Cases Back Home and Reforming the Dodd-Frank OLA

Editor's Note: *This month's Legislative Update features testimony from Prof. Stephen J. Lubben (Seton Hall School of Law; Newark, N.J.) before the U.S. House Financial Services Subcommittee on Financial Institutions and Consumer Credit regarding Orderly Liquidation Authority and Too Big to Fail on June 14, 2011. The full testimony is available at http://financialservices.house.gov/UploadedFiles/061411lubben.pdf. The first part of this Update features an op-ed by Reps.* ***Lamar Smith*** *(R-Texas) and* ***John Conyers, Jr.*** *(D-Mich.) on reform of the venue rules in chapter 11. Rep. Smith is chairman and Rep. Conyers is ranking member of the House Judiciary Committee.*

Bringing Chapter 11 Cases Back Home

By Reps. Lamar Smith and John Conyers, Jr.
House Judiciary Committee

In December 2001, Enron Corporation—a Houston-based company with 7,500 employees at its headquarters, $65 billion in claimed assets and a history of committing fraud on creditors, employees and many others—filed for chapter 11 bankruptcy protection 1,500 miles from Houston in the Southern District of New York. In June 2009, General Motors Corporation also filed a chapter 11 bankruptcy petition in New York, hundreds of miles from its Michigan-based operations, employees and creditors. More recently, on June 27, 2011, the Los Angeles Dodgers filed a chapter 11 case in the District of Delaware, apparently preferring to play a road game instead of taking the home field.

Rep. Lamar Smith

When a large chapter 11 case travels across the country to be heard in a remote venue, many of the business's stakeholders lose out. Local trade creditors that have shipped goods to the debtor frequently cannot afford to pay expensive New York or Delaware legal fees to pursue § 503(b)(9) claims or litigate preference liability and so are forced into long-distance settlements for cents on the dollar. Employees who work at the headquarters and whose retirement accounts hold stock in the debtor that is likely to be declared worthless lose a meaningful opportunity to make their views known to the bankruptcy court. Meanwhile, the very same management that drove the firm into bankruptcy is often permitted to retain control over the company by filing in venues the bankruptcy community generally regards as management-friendly.

When they are able, many large firms choose to file their chapter 11 cases in the Southern District of New York or the District of Delaware. They are frequently able to do so because of the "pending affiliate case" rule in 28 U.S.C. § 1408(2). That section states that a person may file a chapter 11 case in a venue where the bankruptcy case of the person's affiliate is pending. But the Enron case shows how clever bankruptcy attorneys use this rule. Rather than filing in Houston, Enron's attorneys first filed the chapter 11 case of a small New York-based Enron subsidiary—one with only 57 employees—in the Southern District of New York. Then, just a few moments later, they filed the bankruptcy case of the Houston-based headquarters, bootstrapping it into the same venue where the case of the small New York affiliate was now pending. General Motors employed a similar tactic. It left Michigan behind when it first filed the chapter 11 case of a small GM-owned Harlem car dealership in the Southern District of New York and, minutes later, filed the Detroit-based headquarters in the same venue because the car dealership's case was pending there.

Many chapter 11 cases result in confirmed plans of reorganization that are heavily negotiated by many stakeholders. We believe that chapter 11 cases should be administered in locations that give as many stakeholders as possible a meaningful chance to participate in the bankruptcy case and plan negotiations. For

Rep. John Conyers, Jr.

this reason, earlier this month, we introduced the Chapter 11 Bankruptcy Venue Reform Act of 2011 [H.R. 2533]. The bill requires a corporation to file its chapter 11 case in the venue either where it has its principal place of business (*i.e.*, its "nerve center") or where its principal assets are located. Under the bill, an affiliate corporation may follow its parent (defined as a corporation holding a majority of the voting securities of the second-filer) into the same bankruptcy court, but a parent will no longer be able to follow a small, well-placed subsidiary into a debtor-friendly jurisdiction.

One purpose of our bill is to prevent a large operating company from choosing a court based merely on its state of incorporation. Many such companies are incorporated in states where they have no employees, operations or offices. We acknowledge that the bill does not address every possible scheme that a debtor may employ in order to forum-shop. We also recognize that § 1408 as amended may require two affiliate firms, neither of which is the other's parent, to file in separate venues. But in cases where clever prebankruptcy planning is evident or case administration in two or more venues would be cumbersome, we rely on the prudence of bankruptcy judges to use their discretion under 28 U.S.C. § 1412 to transfer venue for the convenience of parties. The new rules would also make a more efficient use of the bankruptcy system by spreading the workload of large chapter 11 cases to judges, bankruptcy lawyers and turnaround specialists to venues around the country.

The House Judiciary Committee intends to hold a hearing on the subject of bankruptcy venue and on the bipartisan Chapter 11 Bankruptcy Venue Reform Act of 2011, in the near future.

continued on page 60

Legislative Update

July 29, 2011

The Honorable Lamar Smith
Chairman, House Committee on the Judiciary
2409 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member, House Committee on the Judiciary
2426 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Smith and Mr. Conyers:

The National Association of Credit Management (NACM) has represented the interest of the nation's business trade creditors for more than a century. Since its formation in the late 19th century, advocating for the legislative needs of these businesses, who supply the lifeblood of the American economy in the form of commercial credit, has been a cornerstone of NACM's mission. Most recently, our efforts have focused on restoring the balance between debtors and creditors in our nation's Bankruptcy Code. On this point, we write you today to offer our support to H.R. 2533, the Chapter 11 Bankruptcy Venue Reform Act of 2011, that you recently introduced.

NACM's membership is specifically comprised of unsecured trade creditors, many of whom are smaller businesses with limited budgets for travel. It is these smaller firms that stand to benefit greatly from the Chapter 11 Bankruptcy Venue Reform Act, as the Code's current statutes severely limit their ability to participate in their debtors' Chapter 11 cases.

By allowing debtor companies to "venue shop," as the Code currently does, small businesses are forced to choose between stretching their already-strained budgets to travel to the bankruptcy court where the debtor has chosen to file, to participate in a process that offers them no guarantee of return, or accept their position as unsecured and write off their losses. Requiring debtors to file in the jurisdiction where they have their principal place of business, or principal assets, rather than in a far away district like New York or Delaware, would eliminate this issue and enhance unsecured trade creditors' chances of having their voices heard and their needs met.

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In order to avoid confusion, however, and to enhance the overall effect of H.R.2533, NACM recommends amending the bill slightly, in order to ensure that its provisions apply to both corporations and limited liability companies. Specifically, the words "or limited liability company" should be inserted after the word "corporation" as it appears in subsection (b), subsection (b) paragraph (1), and twice in subsection (b) paragraph(2) of the bill. This minor change would more completely address the issue of forum shopping and eliminate any uncertainty surrounding which debtors must comply with these provisions.

While we agree that your legislation will provide greater protection to trade creditors, we want to again draw your attention to the most pernicious part of the Code, Section 547, which pertains to preferences. As the Chapter 11 Bankruptcy Reform Act aims to restore a level of fairness to the bankruptcy process, any legislation that shifts the burden of proof in a preference claim from the creditor to the debtor or debtor's trustee would do the same. As testimony before the National Bankruptcy Review Commission demonstrated, the majority of preference recoveries do nothing but provide funds to the legal team securing the recovery. The Commission was told that less than 10% of these funds are returned to the creditor constituency that made the alleged preference payments, which ultimately violates the intent of this section of the Code.

Nonetheless, NACM supports H.R. 2533 as a solid bill that would correct a significant error in our nation's Bankruptcy Code, and encourages lawmakers to expand the legislation to ensure its application to limited liability companies in addition to corporations.

NACM looks forward to working with lawmakers on ensuring that the Bankruptcy Code is constructed in the fairest, most economically-beneficial way, and applauds the House Committee on the Judiciary for taking the initiative on this matter. Thank you again for your time and your consideration.

Sincerely,

Robin Schauseil, CAE
NACM President

and

Kathy Tomlin, CCE
NACM Chairman
and
Manager of Credit and Collection
Central Concrete Supply Company

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August 3, 2011

Re: **Chapter 11 Bankruptcy Venue Reform Act of 2011**
HR 2533

Dear Member of Judiciary Committee :

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and reorganization. Its membership consists of nearly 2,500 individuals. The Bankruptcy Section of the CLLA is made up of approximately 500 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and mid-size practices, who represent divergent interests in bankruptcy cases.

The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of state-law collection and bankruptcy cases for all parties-in-interest. Members of the CLLA have testified on numerous occasions before Congress as experts in bankruptcy, collections and reorganization fields.

The CLLA submits this comment in support of the proposed amendment to 28 U.S.C. Section 1408, as set forth in HR 2533[1]. It has been our members' experience that forum-shopping in the bankruptcy process draws cases away from the parties with the most familiarity with the debtor's operations and who have an important stake in the outcome of the bankruptcy case. This forum-shopping has been the subject of much legal scholarship and commentary. Over the years, an increasing number of significant commercial bankruptcy cases have been filed in either Delaware or the Southern District of New York due, in part, to the permissive venue provisions of Section 1408, even when those venues are remote from the parties and interests most implicated by the bankruptcy. There are many examples of "odd" venue locations for bankruptcy cases, the most recent being the Los Angeles Dodgers case having been filed in Delaware (Case No. 11-12010-KG) instead of its home city of Los Angeles, CA.

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[1] Special thanks to Adam A. Lewis, Esq. of Morrison & Foerster, who contributed to the drafting of this Comment.

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HR 2533 constructively attempts to address this issue by requiring a corporate debtor that files based on its principal place of business or principal assets to have been present in the filing district for at least one year before commencement of the case, instead of the current 180-day period. In addition, if the filing is based on the pending case of an affiliate, the affiliate must now control more than 50% of the outstanding voting shares of the filing entity. However, the proposed amendment to Section 1408 (2) is still subject to possible abuse. For example, a company (or family of companies) planning for an eventual bankruptcy could incorporate a parent in Delaware as a holding company, and then simply follow that holding company into bankruptcy in the preferred venue. This would be especially easy for a privately held company that would not need public shareholder approval for such a change in ownership. Indeed, some companies might create that arrangement even before they have serious financial problems, just to be prepared for a future bankruptcy. Therefore, we suggest that Section 1408 (2) also include a provision that would require that the parent company have some actual substantial business operations in addition to merely holding the stock of a subsidiary.

An alternative approach to addressing the venue issue, legislation might instead be developed to amend the statute controlling the procedure for venue transfers. *See*, 28 U.S.C. Section 1412. For example, entity debtors could be required to file where its principal place of business or principal assets are located, unless the entity debtor makes an affirmative showing that a different venue is more suitable. This would provide the courts with an enhanced ability to review and analyze venue selection via a motion to transfer a bankruptcy case brought by an interested party. Such an approach would allow flexibility to address the particular facts and circumstances of the situation, but shift the burden of proof to the party that would want to vary the venue decision. The amended statute might look like this:

28 U.S.C. Section 1412 (suggested amendment)

(a) A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interests of justice or for the convenience of the parties.

(b) In deciding a motion to transfer venue under subparagraph (a) in the case of an entity in which venue is based on (i) the domicile of the entity under section 1408(1) or (ii) the venue of another case under section 1408(2), the court shall grant the motion and shall transfer the case to a district in which the entity's principal place of business in the United States or principal assets in the United States are located, unless the court finds that: (1) the entity has substantial assets (without regard to stock or other equity interests in another entity) or substantial operations in the district in which the case under title 11 was filed; or (2) the district in which the case was filed under title 11 is more convenient for a substantial number of the entity's creditors without regard to the amount of the

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claims held by such creditors. For purposes of this paragraph (b), "operations" shall not include functioning entirely or principally as a holding company.

In any event, if the alternative approach is not selected, in addition to the changes proposed in HR 2533, changes should also be made to Section 1412 in order to insure the intended legislative results.

In conclusion, the CLLA supports the proposed amendment to Section 1408 provided for in HR 2533. HR 2533 would help to eliminate the "gaming" of bankruptcy venue and would promote better results for all parties in the bankruptcy process. The CLLA appreciates this opportunity to comment on the proposed amendment to Section 1408, and if needed, would be happy to discuss this comment further with you.

Respectfully submitted,

James W. Hays
President
Commercial Law League of America

Peter C. Califano
Chair, Bankruptcy Section;
Commercial Law League of America

David Reid Gamache
Co-Chair, Governmental Affairs Committee
Commercial Law League of America

Louis S. Robin
Co-Chair, Legislative Committee
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GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Professor of Law

September 5, 2011

Hon. Lamar Smith
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Re: H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011"

Dear Mr. Smith:

I am a Professor of Law at the Georgetown University Law Center, where I teach courses in bankruptcy and commercial law. I have also previously served as the Scholar in Residence at the American Bankruptcy Institute. I write in support of H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011." I urge the House Judiciary Committee to support this bill which reforms Chapter 11 bankruptcy venue so as to prevent forum shopping by debtors.

I. The Los Angeles Dodgers of Delaware and Other Bankruptcy Venue Oddities

The current bankruptcy venue statute permits business entity debtors to file in the district in which they are headquartered, in the district in which their principal assets are located, in any district in the state in which they are incorporated, or in any district in which one of their affiliates has filed.[1] This system gives debtors tremendous leeway in choosing where to file their bankruptcies. The result has been the proliferation of bankruptcy filings in venues with at best a nominal connection to the debtor. For example, the Los Angeles Dodgers filed for bankruptcy in the District of Delaware, where they have an incorporated entity, but no assets or operations or even substantial creditors.

Moreover, with minimal planning, a debtor can easily game the venue system. The

[1] 28 U.S.C. § 4801 (providing for venue for cases filed under Title 11 "in the district court for the district in which the domicile, residence, principal place of business in the United States, or principal assets in

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most common method for doing this is "bootstrapping." This is done by having the debtor-to-be create a subsidiary in the desired filing district and then having the subsidiary file for bankruptcy in that district. This allows the rest of the corporate family to be "bootstraped" into that district under the venue statute's provision permitting venue in a district where an affiliate of the debtor has filed for bankruptcy. The result is that the debtor can file in a district in which it has neither substantial assets nor operations nor incorporation and maybe not even creditors.

The bootstrapping phenomenon has been on display in major bankruptcy cases since at least the early 1980s, when Eastern Airlines, a Texas-based airline, bootstrapped its bankruptcy filing into the Southern District of New York by having its affiliate Ionosphere Club file first in the Southern District of New York. This practice has been repeated in many major bankruptcies. Thus, Enron, which filed in the Southern District of New York despite having only minimal assets and operations in that state, and General Motors used a wholly-owned dealership, Chevrolet-Saturn of Harlem, that was based in New York, to bootstrap in the rest of its corporate family into the Southern District of New York bankruptcy court.

Bootstrapping enables forum shopping, but whatever one thinks of bootstrapping, it is permitted by the terms of the venue statute. The abuse of venue has become so routine that Borders bookstores dispensed with all pretenses of compliance with the venue statute in its bankruptcy filing in the Southern District of New York. Borders involved a filing by eight corporate entities, none of which were New York entities. The filing group included Colorado, Delaware, Michigan, and Virginia entities, making venue proper in districts in any of those states. Borders' sole connection with the Southern District of New York was that a few of its 632 stores were located in Manhattan.[2] This flimsy connection to the Southern District of New York was patently insufficient to comply with the bankruptcy venue statute. Indeed, the violation was so blatant, that it was spotted by one of my law students, an LLM student from India. Neither the court[3] nor the U.S. Trustee, however, made any objection to the venue.[4]

As far as I can tell, the same situation occurred in Chrysler's bankruptcy filing in the Southern District of New York. The initial filing entity was Chrysler Realty Co., LLC, a Delaware limited liability company headquartered in Michigan. The Chrysler bankruptcy petition indicated that venue was proper based on the debtor having been domiciled or having "had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District."[5] The petition itself contained no further clarification of the basis for

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[2] Adam J. Levitin, *Borders Improper Bankruptcy Venue,* Creditslips.org, Feb. 28, 2011, *at* http://www.creditslips.org/creditslips/2011/02/borders-improper-bankruptcy-venue.html.

[3] Bankruptcy Rule 1014 provides that "If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion...may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties."

[4] The lack of objection from the US Trustee is particularly troublesome given that the U.S. Trustee will readily object to improper venue in consumer bankruptcies even when the courthouse in the district in which the debtor has filed is much more convenient for the debtor than the courthouse in the proper district. Knowingly or negligently signing off on a materially false declaration of proper venue raises serious ethics issues for bankruptcy attorneys.

[5] Petition, *In re Chrysler Realty Co., LLC*, 09-50000-ajg, Bankr. S.D.N.Y., Apr. 30, 2009.

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venue. Given that Chrysler Realty Co., LLC is a Delaware entity headquartered in Michigan, the only possible basis for venue would be the location of the company's principal assets. The petition, however, contained no averment whatsoever about the location of those assets.[6] I have been unable to ascertain the location of Chrysler Realty Co., LLC's assets, not least because this entity never filed a schedule of its assets with the court, but it would appear, then, that Chrysler's bankruptcy should not have been conducted in the Southern District of New York.[7]

II. The Harms of Bankruptcy Forum Shopping

The central problem with the venue statute as it stands is that it enables forum shopping. Forum shopping enables debtors to pick what law they want—to the detriment or benefit of particular creditor constituencies. For example, a debtor that is hoping to reject a collective bargaining agreement will avoid filing in the Third Circuit because of the *Wheeling-Pittsburgh Steel* precedent that limits the rejection of collective bargaining agreements to "necessary modifications" for ensuring the debtor's short-term survival and avoidance of liquidation. Debtors seeking to assume intellectual property licenses will avoid the Ninth Circuit because of the *Catapault* precedent in that Circuit that favor licensors. Debtors seeking to use cross-collateralization to obtain debtor-in-possession financing will avoid the Eleventh Circuit's *Saybrook* precedent. The ability to forum shop enables debtors (sometimes in coordination with particular creditors, especially their debtor-in-possession lenders) to pick the most favorable venues in terms of law. There is a danger that this could produce a "race to the bottom" in bankruptcy law, if districts compete for filings through increasingly debtor-friendly rulings.

Forum shopping can also affect outcomes in more subtle ways. For example, appointment of a trustee is largely a discretionary matter with the bankruptcy court as it is under a "for cause" standard.[8] Forum shopping also enables debtors to select filing districts in which judges are unlikely to appoint trustees and to allow the debtor's management to remain in place as debtor in possession; this was reportedly a critical factor in Enron's decision to file in the Southern District of New York. (Doing so also preserved the firm's attorney-client privilege, which might have affected federal and state investigations of Enron officers and directors).

Forum shopping may also be done on the basis of courts' willingness to approve the fees of attorneys and financial advisors. Bankruptcy courts must approve the fees of the attorneys and other professionals for the debtor and official committees. Courts' willingness to approve fees varies in part based on the going local market rate; a bankruptcy court in the Southern District of New York does not blink at an attorney billing $900, but a court in the District of Montana might. There are relatively few law firms with sufficient personnel to

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[6] It is worth remembering that Chrysler has never owned the Chrysler building; it was originally owned by William Chrysler himself and has since changed hands many times, but even when it served as Chrysler's headquarters, it was not company property.

[7] If so, then it would also appear that Chrysler's bankruptcy petition contained a materially false statement to the court.

[8] 11 U.S.C. §1104.

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handle large bankruptcy cases, and most are based in New York. The result is that debtors' attorneys (of whom I was once one) are a constituency with an interest in steering filings to districts where judges will not question their billing rates.[9] Hiring billing rates mean that more of the bankruptcy estate's assets are diverted to pay attorneys and other professionals, with less left for unsecured creditors and equityholders. Thus, forum shopping can directly hurt creditors' bottom line by increasing the transaction costs of bankruptcies.

Forum shopping also harms local creditors, such as employees and small businesses, as it frequently results in filings in inconvenient, distant districts. These smaller local creditors cannot afford to monitor distant cases, much less make appearances, and are thus unable to exercise their rights as creditors through participation in the bankruptcy. Similarly, having a bankruptcy taking place far from a firm's base of operations means that employees—whose livelihoods and retirement benefits may be on the line—are unable to exercise their right to make their presence felt through demonstrations near the courthouse.

III. Problems with the Expertise Argument

The major argument made in favor of the current venue statute is that it allows debtors to file in districts that have developed expertise in handling large business bankruptcies, particularly the Southern District of New York and the District of Delaware. While it is true that these districts have developed an expertise and have many outstanding bankruptcy judges, the expertise argument cannot support the current venue system both because expertise is neither limited to nor guaranteed in SDNY and Delaware and because expertise is an argument for a *single* specialized court, not a menu of courts.

It is frankly hard to accept assertions that the SDNY and Delaware bankruptcy judges have unusual expertise or skill that is lacking in other districts. We have seen major cases successfully handled by many other districts, including the Northern District of Illinois, the Eastern District of Michigan, the Western District of Missouri, and the Northern District of Texas. These courts have all shown themselves more than capable of handling large, complex bankruptcies.

Similarly, expertise and skill varies among judges in the SDNY and Delaware, just as it does among judges in other districts. There is no guarantee that a new bankruptcy judge in any district will handle a case as well as in other districts. Indeed, it is worth recalling that SDNY and Delaware didn't always have their current level of expertise.

There is also no evidence that SDNY or Delaware venue produces superior results. A major study by Professor Lynn LoPucki at the UCLA Law School argues that in fact there are higher failure rates of Delaware and SDNY reorganizations.[10]

Even assuming that there was demonstrably greater expertise in SDNY and Delaware

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[9] Similarly, attorneys based in SDNY and Delaware may simply wish to avoid the inconvenience of having to handle cases in other districts where they will have to do more travelling. As courts are increasingly comfortable with telephonic and video hearings, travel is less necessary and there is less expense for bankruptcy estates.

[10] *See* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2006).

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than elsewhere in the country, the expertise argument does not support the current venue system. Instead, expertise is an argument for funneling all filings to a single district. It does not support permitting debtors to pick their own venue even as between the Southern District of New York and the District of Delaware. If one is to take the expertise argument seriously, it points to requiring a single venue for all large business bankruptcy cases.[11]

IV. Lack of Objection Does Not Mean Consent to Venue

It is important to address a spurious argument made by defenders of the current venue system, namely that if venue were being abused, creditors would readily object to it. First, the creditors may simply be unaware with there being a venue problem. They are entitled to rely upon the assertions made—under penalty of law—in bankruptcy filings, and to assume that the U.S. Trustee's office will police venue. They may also assume that if there is a problem some other creditor would have objected. But even if a creditor identifies a venue problem, it hardly means that there will be an objection filed, even if the creditor is unhappy about the venue. Indeed, it is very easy to imagine a scenario in which many creditors are unhappy about the venue chosen by the debtor but do not object because the costs of the objection outweigh the benefits.

Consider a scenario in which a venue challenge would cost $50,000. No creditor will bring such a challenge unless it knows it will get at least $50,001 worth of benefit. This means there could be many creditors who would get $49,000 worth of benefit, but none would bring the motion. Added up, this could be a lot of money—with a thousand such creditors, there is $49 million in harm, and yet no objection would be forthcoming to the venue.

If these creditors are not adequately represented by the Unsecured Creditors' Committee (which is quite possible and is an issue itself affected by choice of forum), the motion will not be made.[12] Even if a venue motion had positive expected net present value, a creditor might not want to pay for a venue objection because the benefits would be shared with all the other creditors. Why not let someone else pay the freight?

Creditors' value calculation about whether to object about venue is further complicated because the benefit (and even location) of a different venue is uncertain. Even if a particular venue is improper, the creditor does not know what venue the debtor would then select, and the law in that jurisdiction might be unsettled, making the benefit of transferred venue uncertain. What this means is that lack of venue objection cannot be interpreted as consent. It just means that creditors do not think the benefits of an objection outweigh the costs.

V. Conclusion

[11] The sensible location for such a single venue would be Washington, D.C.

[12] The creditors could proceed as an unofficial *ad hoc* committee, but that poses coordination problems and Rule 2019 disclosure requirements that creditors may wish to avoid.

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Bankruptcy venue is ultimately a substantive issue, as the ability to forum shop affects both the applicable law and the amount of the professional fee claims in a case. I urge the Committee to reform the bankruptcy venue system to eliminate forum shopping, either by centralizing all large filings in one district or by requiring filing in the district in which a firm's nerve center is based.

Sincerely,

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