Chapter 11 Venue Choice by Large Public Companies

Report to the Judicial Conference Committee on the Administration of the Bankruptcy System

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Executive Summary

This report responds to a request by the Judicial Conference Committee on the Administration of the Bankruptcy System that the Federal Judicial Center (FJC) provide empirical information and analysis pertaining to the question of whether or not the bankruptcy case venue statutes and procedural rule should be amended. The empirical information is relevant to a proposal that has received support from the National Bankruptcy Review Commission. The proposal is to amend 28 U.S.C. § 1408 to prohibit corporate debtors from filing for relief in a district based solely on the debtor's state of incorporation or based solely on an earlier filing by a subsidiary in the district. The FJC presented the report to the committee on January 10, 1997.

The report provides two kinds of information: (1) results from a survey sent to all bankruptcy judges in August 1996 and (2) analyses of administrative and demographic characteristics of large public companies that emerged from Chapter 11 during 1994 and 1995.

The Survey

Two hundred and twenty-one out of 339 bankruptcy judges responded to the survey (a return rate of 65%). The first two survey questions asked the judges to provide the names of cases (and related information) that the judges believed should have been transferred to another venue but were not. In response to the first question, judges supplied information about a small number of cases that they believed should have been transferred away from their own districts or divisions. In response to the second question, judges from 28 districts provided the names of 55 cases that they believed should have been transferred into their own districts. Approximately three-quarters of these cases had been filed in the district of Delaware or the Southern District of New York (S.D.N.Y.): 22 in Delaware and 20 in S.D.N.Y. The remaining 13 cases had been filed in approxi-

mately 7 districts (we could not locate filing locations for 5 of the 55 cases).

There were both local and national venue transfer problems as described by the judges. At the local level, about a third of the Delaware and S.D.N.Y. cases the judges named, and almost all of the others, had been filed in a state adjacent to the state of the judge who named the case. At the national level, judges from 18 districts distributed across the country named at least one Delaware or S.D.N.Y. case.

The survey asked judges directly whether they believed that 28 U.S.C. § 1408 should be amended and, if so, why. Eighty-two out of 221 judges (37%) answered "yes"; 76 (34%) answered "no"; 56 (25%) answered that they did not know; and the remaining 7 judges did not answer the question. Sixty judges (27%) advocated changing the domicile or residence provision for corporate debtors in 28 U.S.C. § 1408(1). A substantially smaller number directly advocated changing the affiliate filing provision of section 1408(2).

Another survey question explored the significance of the language in the bankruptcy venue transfer statute (28 U.S.C. § 1412) and the related procedural rule (Fed. R. Bankr. P. 1014). The statute and rule permit the court to transfer a case to any other district, even if the case could not have been properly filed in that district. The survey asked judges to describe the circumstances of an actual or hypothetical Chapter 11 case that should be transferred to a district in which it could not have been properly filed. Forty judges (18%) responded to the question, and their answers could be grouped under several themes. For example, one theme was that a case might be transferred to a district that was more convenient for a large number of creditors or for a single major creditor. Another theme was that the case could be transferred to a district where the bankruptcy caseload was lighter.

The final survey question offered judges the opportunity to make any other comments about venue and venue transfer in Chapter 11 cases that they believed should be part of the current discussions about statutory change and bankruptcy policy. Thirty-two judges (14%) responded to the question. The answers suggested that there is a wide variety of opinion about the importance of venue as a problem facing the courts. Comments ranged from "I think this is a very unimportant issue" to "This is one of the primary areas of manipulation and abuse in Chapter 11 cases,

particularly larger ones, and Congress should put an end to it." Several judges commented thoughtfully about the issues addressed in the proposal accepted by the National Bankruptcy Review Commission. These comments are included in the text of the report, *infra*.

Analysis of Administrative and Demographic Characteristics

We compiled some characteristics of large corporate Chapter 11 cases in which plans were confirmed during 1994 and 1995. Our purpose was to analyze the consequences of venue selection where more than one site was permissible under the current statute.

The primary source of cases was the *1996 Bankruptcy Yearbook & Almanac*. The *Almanac* lists 79 public companies emerging from Chapter 11 in 1994 or 1995, where "public" was defined as having at least one class of publicly traded security at the time of filing. These 79 cases had been filed in 28 districts: 19 cases (24%) in the district of Delaware, 18 (23%) in the Southern District of New York, and 42 (53%) in the remaining 26 districts, with no more than 5 in any one of these. Districts from all circuits except the Eighth were represented.

The secondary source of cases was an appendix to the Delaware State Bar Association Report to the National Bankruptcy Review Commission. The appendix to that report contains useful information about 18 Delaware cases. We relied on this information in our analysis of the locations of creditors relative to the district of filing and the stated corporate principal place of business.

Case Management

The Delaware bankruptcy cases from 1994 and 1995 moved through Chapter 11 much more rapidly than cases from other parts of the country. The New York cases, in contrast, moved through Chapter 11 much more slowly. The median time from filing to confirmation for the Delaware cases was 38 days (range from 16 days to 4.3 years); for the S.D.N.Y. cases, 756 days (range from 53 days to 5.9 years); and for the cases from the remaining 26 districts, 473 days (range from 33 days to 5.25 years).

Thirteen Delaware cases were confirmed in fewer than 50 days. According to the available information, all of these cases were prepackaged

or prenegotiated filings. Among our set of 79 cases, there were more prepackaged or prenegotiated filings confirmed in Delaware during this time than in the rest of the country taken together.

Magnet Courts

Delaware and the Southern District of New York appear to attract disproportionately large numbers of corporate Chapter 11 filings. Both act as legal magnets, drawing filings away from other locations even though cases move from filing to plan confirmation at very different rates in the two districts. What attractions do the two districts exert?

Corporate debtors who seek a protracted stay in Chapter 11 might be attracted to S.D.N.Y. courts based on the district's management of its large corporate cases in the early and mid-1990s. But there is more to the story than that. The focus of commercial and financial activity in S.D.N.Y. and the correlated concentration of legal and other relevant services create an attraction independent of the court's perceived case-management practices. It has been claimed by some commentators that debtors forum shop into S.D.N.Y. in order to prolong their exclusive control of the plan of reorganization. We did not search dockets for the numbers of extension motions made and granted. It also remains to be demonstrated that a prolonged period from filing to confirmation was usually or always a negative factor for the optimal commercial outcome of the cases in our population. Commentators claim further that debtors forum shop into S.D.N.Y. in order to receive higher fees than would be permitted by bankruptcy judges in other districts. Our report does not address this point.

The elimination of the affiliate filing provision of 28 U.S.C. § 1408(2) would presumably solve the kind of problem typically associated with *Eastern Airlines* and *LTV*, both S.D.N.Y. cases. Discussions of this problem almost always stop after listing those two examples. That the statutory change would also reduce judges' tendencies to grant extensions of exclusivity and award "big city" attorney fees, in S.D.N.Y. and elsewhere, is unclear.

Delaware's attraction is of a different sort. It is a very fast court for corporate filers who want to proceed with prepackaged plans. Apparently, this characteristic of the court stems from a specialization by some

members of its bar and the court's case-management characteristics. It is well known that the elimination of corporate domicile and residence from 28 U.S.C. § 1408(1) would, all else equal, markedly reduce the number of potential corporate filers who could find proper venue in Delaware. The size of the impact can be estimated by noting that only one of the 17 Delaware cases in our primary set of cases involved companies with their principal place of business in Delaware. This would consequently eliminate the opportunity for debtors to file in the district that has had the most experience managing prepackaged and prenegotiated bankruptcies.

Inconvenience to Creditors

One of the claims made against the corporate domicile and affiliate provisions of the current statute is that they permit debtors to file at locations remote from creditors, who are thereby prevented from pressing their claims in court. The claim becomes difficult to evaluate for large corporate debtors, who may bring many entities with widespread assets and creditors into a jointly administered Chapter 11 case. There has been no systematic method for assessing the distances of creditors from alternative filing sites.

We developed and applied here a systematic method, the *distance index method.* The distance index is a number that represents the distance of the average creditor from any actual or alternative filing site. We applied the distance index method to 21 Delaware cases in which the debtor's principal place of business was not in Delaware. For 19 of these cases, the average creditor was more distant from Delaware than from the state of the principal place of business. In some of these cases, however, the average creditor was far away from both locations, and the difference between the two indexes was small. In the two remaining cases, the average creditor was slightly closer to Delaware than to the state of the principal place of business.

For 15 Delaware cases, we had sufficient information to apply the distance index method to the locations of the 20 largest unsecured creditors. We found that in 9 of these cases the average large creditor was as close to Delaware as the principal place of business—filing in Delaware did not increase travel distance for these creditors.

We also applied the distance index method to five non-Delaware cases: four from the Southern District of New York and one case that had been filed improperly in Massachusetts and then transferred to Oregon. When applied to the average creditor, the cases from S.D.N.Y. all showed very small differences between distance indexes calculated for S.D.N.Y. and the principal places of business. The single largest difference was, in fact, in favor of S.D.N.Y. as opposed to Texas, the location of the principal place of business, because there was a large concentration of creditors in New York or within a 300-mile radius of it. The additional burden of distance for the 20 largest unsecured creditors was also minimal or in favor of S.D.N.Y. relative to the principal place of business. When applied to *Columbia Western* (the case transferred from Massachusetts to Oregon), the distance indexes showed that the average creditor was closer to Oregon but the average very large creditor was closer to Massachusetts.

The principle of the distance index method also allows us to estimate the airfare that the average creditor of an estate would pay to travel to and from alternative venues. We calculated round-trip airfares for approximately 20 cases. The results of the cost analyses correlate highly with the results of the distance analyses.

If greater distances mean greater inconvenience, then the distance indexes can be used to take the discussion of creditor inconvenience one step further away from anecdote, rhetoric, and speculation and one step closer to useful policy determination. How much inconvenience is too much inconvenience, however, is not a question that can be answered using this method—such an answer requires a prior normative judgment, either by judges or legislators.

There has been some discussion of creating a national panel of judges, perhaps modeled roughly after the Judicial Panel on Multidistrict Litigation, that would have the responsibility of deciding the venue of very large or complex Chapter 11 cases. The current study suggested one point that is relevant to the operation of such a panel: from the debtor's perspective, it is essential that various motions be granted quickly after filing in order for the debtor to support its commercial posture and sustain a reasonable likelihood of confirming its proposed plan of reorganization. The impact of a panel's meeting to assign venue after the petition has been filed but before "first day" motions are heard appears to work against these aspects of effective reorganization practice.

Introduction

This report responds to a request to the Federal Judicial Center from the Committee on the Administration of the Bankruptcy System, at its June 1996 meeting, to provide empirical information and analysis pertaining to the question of whether or not the bankruptcy case venue statutes and procedural rule should be amended. The committee's request followed an earlier, similar request by its subcommittee on long-range planning. Responding to the initial request, the Center prepared a preliminary report, which became part of the committee's June 1996 agenda materials and is included as an appendix, *infra*. The preliminary report reviewed the language of the current statutes and procedural rule and concluded that, in their own terms, they did not provide a coherent scheme for establishing and transferring venue.[1] This report addresses the issue of venue of corporate debtors, but not consumers, sole proprietors, or partnership debtors.

Introductory Case Examples

Four brief case descriptions should serve to introduce the issue of venue. Each of these cases exemplifies problems associated with Chapter 11 venue selection or transfer. The *Columbia Western* case clearly exemplifies filing in an improper venue. *Ernst Home Centers* and *Pic 'N Pay Stores* are recent cases from Delaware; the court granted transfer in *Ernst* and denied it in *Pic 'N Pay*. The transcripts reveal how fact-intensive and specific such decisions can become. The fourth case, *Vienna Park Properties* from the Southern District of New York, demonstrates a special problem in venue transfer litigation: the longer the original district retains the case, the more rational it becomes to retain it.

1. The texts of 28 U.S.C. §§ 1408 & 1412 and Fed. R. Bankr. P. 1014 are included as part of the Appendix, *infra*, and elsewhere in this report.

In re Columbia Western, Inc., 183 B.R. 660 (D. Mass. 1995)

"[T]he question presented [was] how the Bankruptcy Court should react when presented with a fact pattern predicted by those who decry forum-shopping."[2] The debtor operated a business from early 1980 to May 1995 with its corporate headquarters in Portland, Ore. The debtor had no presence in Massachusetts until May 15, 1995, when the debtor transferred $10.7 million from an Oregon bank to a bank in Worcester, Mass. The debtor leased month-to-month office space in Worcester, from which it did not operate. Days later, the debtor filed Chapter 11 in Massachusetts. The Massachusetts court transferred the case to Oregon, stating "[p]ermitting a court of improper venue to make a decision to retain the case improperly substitutes the judgment of one court for another and encourages forum shopping." (See Tables 7, 9, and 11, *infra*, and related text for more information about this case.)

In re Ernst Home Center, Inc., Nos. 96-1088 & 96-1089 (Bankr. D. Del. Aug. 28, 1996)

The court ruled from the bench on motions to transfer venue by certain trade creditors and a group of landlords with substantial claims against the estate, stating that "the center of gravity of this case is the west coast and the convenience of the parties and the interest of justice is best served by transferring this case to the appropriate west coast forum."[3] Most unsecured creditors were located in the west and midwest; the major unsecured creditors were concentrated in the west; 75% of the vendors/creditors were located in the west; and the 13 rejected lease locations and the 25 to be rejected were in the west or midwest. The debtor's claim that the scope of its business was "national" was not a fair characterization of its affairs, since its assets and majority of creditors were in the west. The debtor's sole connection to the east was its New Jersey Board of Directors and status as a company incorporated in Delaware. The court granted the transfer request to the Western District of Washington.

2. 183 B.R. 660, 661 (D. Mass., 1995).

3. Transcript on file with the Planning & Technology Division, Federal Judicial Center.

In re Pic 'N Pay Stores, Inc., No. 96-182 (Bankr. D. Del. Mar. 8, 1996)[4]

The major creditor, NationsBank, in Charlotte, N.C., moved to transfer venue from Delaware to the Western District of North Carolina. The court held that the facts favored the debtor and denied the motion. Being incorporated in Delaware, the debtor is entitled to file a Chapter 11 case there. The question was whether a transfer was in the interest of justice or for the convenience of the parties. There was no question that NationsBank was the largest creditor—its $41 million claim dwarfed all others. The court, however, found that the debtor had many more contacts outside of North Carolina than in North Carolina. It also had many contacts with closer proximity to Delaware than to North Carolina. Approximately half of the unsecured creditors, with claims over $11 million, were located in the northeast; 880 vendors and landlords were located in 36 states and 3 foreign countries; 60% of the inventory was imported from foreign vendors; the largest concentration of domestic vendors was in New York and New Jersey; 52% of the domestic vendors were in the northeast and 10% were in North Carolina; 86% of the landlords were located in states other than North Carolina; the debtor had approximately 800 retail stores located in 19 states; most of the debtor's assets and creditor contacts were outside North Carolina; its two senior executives lived in and had offices in New Jersey; 100% of the debtor's stock was owned by a Delaware corporation; and, although the debtor had a large distribution center and administrative offices in Charlotte, the center would likely be relocated in the Chapter 11 reorganization to Charleston, South Carolina. Moreover, the decision making concerning creditors and the reorganization was focused in New Jersey, not North Carolina. And finally, NationsBank is not a local bank, but a nationwide bank and litigates bankruptcy cases throughout the United States. (See Tables 1, 6, and 8, *infra*, and related text for more information about this case.)

In re Vienna Park Properties, 128 B.R. 373 (S.D.N.Y. 1991) (Vienna Park III)

In *Vienna Park I*, the court denied a motion to transfer venue to the Eastern District of Virginia despite making the following findings: the locale

4. Transcript on file with the Planning & Technology Division, Federal Judicial Center.

of all creditors favored a transfer to Virginia (the debtor had no creditors in New York); the residence of the witnesses favored a transfer to Virginia; if liquidation occurred, Virginia would be the better-suited venue; and the case would raise issues of Virginia law that are matters of local concern. The court nevertheless denied transfer, stating that its own "imprint on this case is so pervasive that transfer to another bankruptcy judge would not be in keeping with judicial economy."

On appeal to the district court, the denial of transfer was remanded for further consideration (*Vienna Park II*).

On remand, the bankruptcy court, in *Vienna Park III*, again denied transfer, ruling that it had "gained such a familiarity with, and insight into, this case, that a transfer of venue would only thwart the efficient administration of the case and work an injustice in the case and to all parties involved." Indeed, "[a] transfer of venue would have imposed on the new court the burdensome task of moving up along the 'learning curve' and would have delayed the entire reorganization process. Ultimately, a delay in the reorganization process would not have worked in favor of the convenience of the parties or the interest of justice."

The Proposal Accepted by the National Bankruptcy Review Commission

The information presented in this report is relevant to a proposal to change corporate venue statutory language that has been acted on by the National Bankruptcy Review Commission. At its meetings on December 18, 1996, and February 21, 1997, the commission tentatively recommending to Congress two changes in 28 U.S.C. § 1408. One change would prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where the district is located.[5] The second change would prohibit corporate parent companies from filing in

5. Approved by the commission on December 18, 1996. The commission had before it a staff memorandum supporting the change drafted by Professor Lawrence P. King & Elizabeth I. Holland, November 19, 1996.

a district solely because one of the parent's affiliates has a bankruptcy case pending there.[6]

Several bankruptcy experts had expressed strongly contrasting opinions on the need for venue reform before the issue was taken up by the commission. On July 21, 1995, the American Bankruptcy Institute had sponsored a symposium, titled "The Biased Business of Venue Shopping," which in its published form comprised six chapters reviewing all of the relevant arguments in favor of and against the current law.[7] This published symposium, which reprinted as one of its chapters the LoPucki and Whitford article discussed in the next paragraph, remains the most comprehensive discussion of venue choice for corporate bankruptcy cases.

The Availability and Significance of Systematic Empirical Information

Systematic empirical information has to date been limited to a study originally published in 1991 by Professors LoPucki and Whitford,[8] who distinguished between "venue choice" and "forum shopping" as follows: "We use the term 'venue choice' to refer to situations in which petitioners have the statutory right to file in more than one district. We use the term 'forum shop,' ordinarily employed as a pejorative, to refer to the ultimate choice of a venue where the company has little or no physical presence."[9] LoPucki and Whitford noted further that "[b]ecause the law affords a broad choice of venue in reorganization cases, even a venue selected by 'forum shopping' within the meaning we have assigned to the term might be a legally permissible venue."[10]

6. Approved by the commission on February 21, 1997. The commission had before it a staff memorandum supporting the change drafted by Professor Lawrence P. King & Elizabeth I. Holland, February 10, 1997.

7. ABI Bankruptcy Reform Study Project, The Biased Business of Venue Shopping (1995).

8. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies,* 1991 Wis. L. Rev. 11 (1991). This article was reprinted in the ABI symposium on venue shopping.

9. *Id*. at 14.

10. *Id*. at n.10.

LoPucki and Whitford selected for study the 43 largest publicly held companies to file and complete their Chapter 11 cases between 1979 and 1988.[11] They then divided these cases into four groups, based on the degree of connection between the debtor and the district of filing: Group One comprised 7 cases (16%) that were characterized as having venue "away from the center of operations and principal executive offices"; Group Two comprised 9 cases (21%) characterized as having venue "at principal executive offices, away from all operations"; Group Three comprised 18 cases (42%), characterized as being "national or regional companies, [with] venue at principal executive offices"; and Group Four comprised 9 cases (21%), characterized as "locally based companies filing locally."[12] LoPucki and Whitford adduced proof of highly focused forum shopping by showing that 5 of the 7 cases in Group One, and 8 of the 9 cases in Group Two, were filed in the Southern District of New York.[13] None of the cases in Group Three or Four were filed in S.D.N.Y. Thus, 13 of the 16 examples of forum shopping, and none of the 27 counterexamples, chose venue in S.D.N.Y.

LoPucki and Whitford offered many interesting and provocative interpretations and speculations in their article, particularly in respect to the motives of some lawyers and judges in large Chapter 11 reorganization cases. The data in the article are widely cited in favor of the proposition that there are serious abuses of forum shopping by lawyers and venue retention by judges, even though LoPucki and Whitford themselves, in their article and elsewhere, qualify the conclusiveness of their information. For example, during the ABI symposium cited above, Professor Whitford engaged in the following discussion with the symposium moderator, Ms. Faye Knowles:

11. *Id*. at 12.

12. *Id*. at 59–60.

13. For the Group One cases, LoPucki and Whitford concluded that "[t]hese are cases in which there was forum shopping by any definition." *Id.* at 26. For the Group Two cases, they concluded that "'forum shopping,' in the sense that we have defined the term, occurred in these cases." *Id*. at 28.

Ms. Knowles: You speculated in your study that courts decide cases certain ways in order to attract certain desirable cases, and you allude to that concept here. Do you have any evidence of that or has history—

Mr. Whitford: No.

Ms. Knowles: —proved out in the last five years?

Mr. Whitford: I throw it open for discussion. I've raised the issues. The decisions are possibly there.[14]

The LoPucki and Whitford article is cited to support the position that improper forum shopping, as defined in the article, should be stopped. LoPucki and Whitford, however, concluded that forum shopping should be accommodated rather than eliminated:

> The primary benefit to be realized from the continuation of forum shopping is competition among districts leading to the development of more effective procedures and techniques for reorganization and liquidation of business enterprises. Such improvements are in the interest of all parties. Our view is influenced by the fact that forum shopping can occur across international borders and, to that extent, is beyond the control of any one nation.[15]

A final fact about the LoPucki and Whitford study requires emphasis here: its perspective has been largely overtaken by subsequent events, in particular the apparent rise of Delaware as a favored venue for the filing of many significant corporate reorganization cases. Only one of the 43 cases LoPucki and Whitford described had been filed in Delaware (*Phoenix Steel*, which LoPucki and Whitford classified into their Group 3, containing cases that were not characterized by forum shopping[16]). Moreover, the use of state of incorporation as the nexus for venue figured not at all in their analysis, except for a passing reference to the use of *reincorporation* as an unlikely ploy to gain a forum in a more favorable venue.[17]

14. Official Proceedings of the ABI National Symposium on the Biased Business of Venue Shopping at 48, lines 11–23 (1995).

15. LoPucki & Whitford, *supra* note 8, at 58.

16. *Id.* at 28–29, 62.

17. *Id.* at 17.

The Current Situation

Information presented later in this report confirms that the situation has changed significantly. The focus of activity and attention clearly has broadened, or shifted, from the Southern District of New York to include Delaware. The thrust of the proposal placed before the commission would have its major effect on Delaware, and in fact is called by some the "Delaware amendment."[18] If the statute were changed as proposed, all else being equal, Delaware's status as a favored state of incorporation would no longer include an automatic grant of proper bankruptcy venue. The proposed change also would prevent the filing by a very large parent company in the home district of a small affiliate, as exemplified by *Eastern Airlines* and *LTV* filing in the Southern District of New York immediately after the filings by the Ionosphere Club and Chateaugay, respectively.[19] It is emphasized here, however, that we did not design this research specifically to study Delaware or any other particular district. To the extent that our methods led us to the district of Delaware and S.D.N.Y., it was because those two districts witnessed the relevant activity during 1994 and 1995, the most recent years in which we could acquire sufficient information.

The relatively rapid shift in the location of large corporate reorganization filings should signal that such shifts may happen again. In fact, all else being equal, it is certain to happen again if the statute is changed as proposed, because Delaware is not the principal place of business or location of principal assets of many large corporations.[20] One important

18. "The Venue Proposal has been referred to by some as the 'Delaware amendment' because it appears principally intended to limit the ability of Delaware corporations to file for bankruptcy in the District of Delaware." Executive Summary of the Report of the Delaware State Bar Association to the National Bankruptcy Review Commission in Support of Maintaining Existing Venue Choices at 1 (October 3, 1996) (copy on file with the Planning & Technology Division, Federal Judicial Center).

19. The *Eastern* and *LTV* cases are the two examples almost always mentioned in this context. The only other example we know of, but much less frequently mentioned, is the filing by *Wickes* in the Central District of California instead of the Southern District of California. The circumstances in that case, however, appear to have been at least somewhat different from *Eastern* and *LTV*.

20. See Section II, *infra*, for a description of relationships between the site of incorporation and other aspects of business location.

question is, therefore, whether the proposed change would cure the alleged ills of the current practice or simply shift them to other locations.

Components of the Study

Section I reports on the results of a national survey of bankruptcy judges on the questions of Chapter 11 venue and venue transfer. The study was conducted from August 2 to September 17, 1996. Two hundred and twenty-one judges responded from 48 states, the District of Columbia, and Puerto Rico. We believe the survey's results contain a fair cross-section of bankruptcy judges' opinions on questions of corporate venue, as well as a list of cases that exemplify the venue problem as these judges see it.

Section II contains our analysis of information from approximately 90 sizable corporate Chapter 11 cases. Most of these cases were drawn from a published list of companies emerging from Chapter 11 in 1994 and 1995, and the rest from a list of cases included in the Delaware State Bar Association's report on behalf of maintaining current venue choices. Section II presents a quantitative analysis using a new method for calculating creditors' travel distances and costs to different venues nationwide.

Section III summarizes our conclusions.

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I. The 1996 Survey of Bankruptcy Judges

A. Introduction and Method

We mailed a survey on venue to all bankruptcy judges in August 1996. The text of the survey questions is presented below in the report of findings. Questions 1 and 2 requested specific information about Chapter 11 cases that, in the judge's opinion, had misplaced venue. Question 1 asked for information about cases originally filed in the judge's district that the judge believed should have been transferred but were not. Question 2 requested information about cases originally filed in any other district that should have been transferred to the judge's own district but were not. Question 3 asked for the judge's opinion whether the current venue statute, 28 U.S.C. § 1408, should be changed. Question 4 focused on specific language in the bankruptcy venue transfer statute, 28 U.S.C. § 1412, asking the judge to comment on the relationship between conditions for filing and conditions for transferring a case. Question 5 merely inquired whether we could contact the judge again. Question 6 offered the opportunity to make additional comments about venue and venue transfer.

The survey was mailed to 339 bankruptcy judges on August 2, 1996. We mailed a follow-up postcard to nonresponding judges on August 23, and closed the window for data collection on September 17.

During the data-collection period we received responses from 221 judges, for a return rate of 65%. The responding judges were distributed among 83 districts from 48 states (plus Puerto Rico and the District of Columbia). All circuits were represented. We concluded that the results were likely to present a fair cross-section of bankruptcy judges' views on venue.

B. Results: Question 1

1. *Are you aware of one or more Chapter 11 cases having been filed in your district that, for achieving the purposes of the bankruptcy system as a whole, should have been transferred to another district but were not? (Recall that we are interested in cases which fit that description whether or not the filing was appropriate under the terms of the current venue statute.)*

   [ ]1 Yes
   [ ]2 No
   [ ]3 Don't know

   If you answered yes, please provide the case name(s) and year(s) of filing, or other information that would allow us to locate the case file(s). Use the remaining space to make any additional comments that will help us to understand the venue issue in the case(s).

The responses of the 221 judges to the first part of Question 1 were distributed as follows:

Yes	No	Don't know	Blank
21	170	21	9

Thus, 9.5% of the judges affirmed awareness of one or more cases that should have been transferred out of their districts, while 77% reported having no knowledge of such cases, and 9.5% said they did not know. The second portion of the question asked for specifics. Thirty-two judges responded, of whom 19 had answered "yes" to the first question.

Two themes emerged in this set of answers: (1) that single-asset real estate cases may be filed away from the most appropriate venue but are not always transferred, and (2) that cases are sometimes not filed in the appropriate division within a district. Geographical convenience and efficient judicial administration were other explanations given for cases listed as falling into this category of questionable venue selection.

C. Results: Question 2

2. *Are you aware of any Chapter 11 cases having been filed in any other district that, for achieving the purposes of the bankruptcy system as a whole, should have been transferred to your district but were not? (Recall that we are interested in cases fitting that description whether or not the filing was appropriate under the terms of the current venue statute.)*

   [ ]1 Yes
   [ ]2 No
   [ ]3 Don't know

   If you answered yes, please provide the case name(s) and year(s) of filing, and district(s) in which filed, and other information that would allow us to locate the case file(s). Take the remaining space to make any additional comments that will help us to understand the venue issue in the case(s).

The responses of the 221 judges to the first part of Question 2 were distributed as follows:

Yes	No	Don't know	Blank
49	124	40	8

Thus, 22% of the judges affirmed awareness of one or more cases that should have been transferred into their districts, while 56% reported having no knowledge of such cases, and 18% said they did not know.

Judges' responses to the second part of the question are summarized in Table 1 below. The first column identifies the case name, the second column shows the responding judge's own district, and the third column shows the district of filing.[21]

21. We exercised some discretion in preparing this list, as follows: When different judges in a district identified different individual entities in a recognizably consolidated filing (e.g., *Chateaugay* and *LTV*), we combined those as one case. It is possible that we failed to identify all such case types.

Table 1
Cases that Judges Claimed Should Have Been Transferred but Were Not
(Question 2)

Case Name Provided	District(s) of Responding Judge	District Filed in
AMI	N.D. Ill.	D. Del.
Box Bros. Energy	N.D. Tex.	D. Del.
Braun's Fashions	D. Minn.	D. Del.
Camelot Music	N.D. Ohio	D. Del.
Edison Bros.	E.D. Mo.	D. Del.
Elsinor Corp.	D. Nev.	D. Del.
Ernst[22]	W.D. Wash.	D. Del.
Grand Union	D.N.J.	D. Del.
Homeland	W.D. Okla.	D. Del.
Kuppenheimer	D.N.J.	D. Del.
MEI Diversified	D. Minn.	D. Del.
Morrison-Knudsen	D. Idaho, N.D. Ohio	D. Del.
Ormond Shops	D.N.J.	D. Del.
Peter J. Schmidt	W.D.N.Y.	D. Del.
Pic 'N Pay	W.D. N.C., D.N.J.	D. Del.
PSF Finance LP	E.D. Mo.	D. Del.
Rickel Home Centers	D.N.J.	D. Del.
Spectradyne	N.D. Tex.	D. Del.
Today's Man	D.N.J.	D. Del.
Todjaman	E.D. Pa.	D. Del.
TWA	E.D. Mo.	D. Del.
Weiners	S.D. Tex.	D. Del.
Embassy Properties No.	W.D. Mo.	D. Kan.
Sonny Hill Dealerships	W.D. Mo.	D. Kan.
Mt. Pleasant Ltd. Ptns.	E.D. Mich.	W.D. Mich.
Accessory Place	D.N.J.	S.D.N.Y.
Allis Chalmers	E.D. Wisc.	S.D.N.Y.
Caldor	D.N.J.	S.D.N.Y.
Canadian's Corp.	D.N.J.	S.D.N.Y.
Eastern Air. (Ionosphere)	S.D. Fla.	S.D.N.Y.
Falmouth Assoc.	D. Minn.	S.D.N.Y.
Frost Brothers	W.D. Tex.	S.D.N.Y.
Harvard Indus.	D.N.J.	S.D.N.Y.
Jamesway Corp.	D.N.J.	S.D.N.Y.

22. On August 29, 1996, pursuant to creditors' motions, the Delaware court transferred this case to the Western District of Washington. The date of transfer followed the date on which judges in W.D. Wash. returned their surveys.

Case Name Provided	District(s) of Responding Judge	District Filed in
Laventhal & Horvath	E.D. Pa.	S.D.N.Y.
Lomas Nettleton	N.D. Tex.	S.D.N.Y.
LTV (Chateaugay)	N.D. Ohio, N.D. Tex.	S.D.N.Y.
Lure Cis	N.D.N.Y.	S.D.N.Y.
Minnesota Street Assoc.	D. Minn.	S.D.N.Y.
Orion Pictures	C.D. Cal.	S.D.N.Y.
Pentagon Park	D. Minn.	S.D.N.Y.
Reserve Mining	D. Minn.	S.D.N.Y.
Revco	N.D. Ohio	S.D.N.Y.
St. Johnsbury	D. Vt.	S.D.N.Y.
Tacoma Boat	W.D. Wash.	S.D.N.Y.
Phar-Mor	W.D. Pa.	N.D. Ohio
Coutrouix	N.D. Ala.	M.D. Tenn.
Express One	N.D. Tex.	E.D. Tex.
American Eagle	E.D. N.C.	W.D. Va.
Colo. Fuel & Iron	D. Colo.	D. Vt.
Children's Palace	W.D. Pa.	Not specified
Kash N' Karry	M.D. Fla.	Not specified
Park Towers Apts.	W.D. Ky.	Not specified
Pleasant Points Apts.	W.D. Ky.	Not specified
Rangeland Manor	W.D. Ky.	Not specified

Judges from 28 districts, in every circuit except D.C., provided the names of 50 cases that had been filed in 9 identifiable districts and the names of 5 cases for which we could not locate filing information in time for this report. As shown in the table's right-hand column, Delaware and S.D.N.Y. accounted for 76% (42 of 55) of the cases the judges identified. Twenty districts, in every circuit except the First and D.C., claimed at least one case from either the district of Delaware or the S.D.N.Y.

Three of the cases—*LTV (Chateaugay)*, *Morrison-Knudsen*, and *Pic 'N Pay*—were claimed for more appropriate venue by two districts each.

Table 1 also shows that the 55 claimed cases were unevenly distributed among the 28 claiming districts. Six districts claimed cases from both Delaware and S.D.N.Y. New Jersey and the E.D. Pa., both of which are very close to Delaware and S.D.N.Y., made all of their 13 claims for cases filed in those districts; D.N.J. and E.D. Pa. accounted for 22% (13 of 58) of the total of the claims made, and 29% (13 of 45) of all the claims made for cases filed in the district of Delaware or S.D.N.Y.

1. Discussion: Questions 1 and 2

Few bankruptcy judges asserted that Chapter 11 cases have been inappropriately filed in their own districts (fewer than 10% of the responding judges responded "yes" to Question 1; 77% responded "no"). Such cases frequently involved single-asset real estate debtors and/or were filings in the judge's own division rather than a more appropriate division in the district. Substantially more judges asserted that some Chapter 11 cases were filed elsewhere that should have been filed in, or transferred to, their own districts (22% responded "yes" to Question 2; 56% responded "no"). A large proportion of such cases were filed in Delaware or S.D.N.Y. (76% of the identifiable cases cited in responses to Question 2). Districts claiming these cases for more appropriate venue were located across the country, but two districts adjoining Delaware and S.D.N.Y.—D.N.J. and E.D. Pa.—claimed 31% of the cases (13 of 42). Finally, three cases were claimed by two districts each, showing that, for certain cases, judges will find that there is more than one location of more appropriate venue.

D. Results: Question 3

3. Irrespective of your answers to Questions 1 or 2, do you believe that the current venue statute, 28 U.S.C. § 1408, should be amended?

[ ]1 Yes
[ ]2 No
[ ]3 Don't know

If you answered yes, how should it be amended, and why?

The responses of the 221 judges to the first part of the question were distributed as follows:

Yes	No	Don't know	Blank
82	76	56	7

Thus, 37% of the judges believed that the statute should be changed, 34% did not believe it should be changed, and 25% did not know whether it should be changed.

Seventy-four judges who answered "yes" to the question provided additional information in text. Sixty of these judges explicitly advocated changing the domicile or residence provision for corporate debtors as it is expressed in 28 U.S.C. § 1408(1).[23] Examples of direct advocacy included the following statements:

- "Eliminate state of incorporation as a basis for jurisdiction."
- "Limit corporate venue to principal place of business or place where the majority of assets are located."
- "Corporate venue should be limited to principal place of assets or principal place of business. Domicile or place of incorporation should not be a proper basis for venue."

Others in this group of 60 appear to have contemplated the domicile or residence question, but may also have been concerned with 28 U.S.C. § 1408(2)'s provision for affiliate filings, the so-called "venue hook." For example:

- "Choice of venue is too liberal, and easily allows for forum shopping."
- "The latitude given debtors appears quite broad and ripe for mischief."
- "Prevent runaway debtors from leaving their creditor body thousands of miles away with no reasonable opportunity to participate."
- "Reduce debtor's ability to forum shop by restricting venue."
- "Would make more sense to require filing in the major headquarters of a corporate entity (either operational or financial perhaps) unless the majority of the 20 largest unsecured creditors (Rule 1007) reside elsewhere. It would be filed originally in major head-

23. 28 U.S.C. § 1408 reads as follows:

> 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.

quarters but have mandatory quick hearing to decide about transfer."

There were eight explicit references to the provisions of 28 U.S.C. § 1408(2), including the following:

- "The current statute allows massive forum shopping and allows them to set up an affiliate, file that first and then bring in all other entities. Removing or modifying 1408(2) may solve that problem."
- "The affiliate section 1408(2) should not be permitted to way the day [sic]."
- "Tag-along things should be eliminated. Venue should be the principal place of the most significant debtors. Repeal 1408(2)."
- "An amendment that prevented a subsidiary from conferring venue on a parent and its subsidiaries. If parent is a holding company, not operational, then an operating subsidiary should confer venue."

A few other comments implied reference to the questions of domicile or residence and affiliates, for example:

- "As proposed by the Bankruptcy Review Commission."
- "I agree with Winston and Strawn."[24]

Finally, nine comments or fragments within longer comments were directed to questions other than, or larger than, those of domicile or residence and affiliates:

- "It's up to creditors [and] the U.S. Trustee to bring improperly venued cases to the court's attention so that appropriate action may be taken after notice and hearing."
- "Bankruptcy system would be well served by a multidistrict process whereby mega chapter 11 cases could be filed in more than one district and directed by a panel to districts to achieve a wider distribution."
- "It should allow a case to be filed in an adjacent district if that district's court facilities are more convenient."
- "180 days is too short, encourages 'moves' solely for venue purposes."

24. A November 22, 1995, letter from Gerald F. Munitz, Esq., to the commission in support of the proposed change was transmitted on Winston & Strawn stationery.

- "[Section] 1412 should be amended to clarify that a bankruptcy court may order a change of venue."
- "Unclear whether a district may retain a case that has been filed in the wrong venue. Rule should be clear that the court has discretion to retain case in the interest of justice and for the convenience of the parties."
- "It should be clear that court is empowered to *sua sponte* raise venue when debtor has filed in an improper district."
- "To prohibit filing in a division of the district when there is no connection to it."
- "Make available expedited appeal of denial of change of venue."
- "Some clarification of proper venue is appropriate, especially to reflect that the location of books and records of a company may not be reflective of the principal place of business."

1. Discussion: Question 3

Sixty-two percent of the judges responding to the questionnaire either did not believe 28 U.S.C. § 1408 should be changed or indicated that they did not know whether it should be changed. Sixty judges (27%) specifically recommended changing the domicile or residence provision to prevent corporations from filing in the state of incorporation if that is the corporation's only connection to the forum. No other single recommendation received more than about a dozen unambiguous mentions.

E. Results: Question 4

4. The current bankruptcy venue transfer statute and rule permit a case to be transferred to "any district," apparently whether or not the case could have been properly filed in that district originally. Can you describe the circumstances of a case in Chapter 11, whether actual or hypothetical, that should be transferred to a district in which it could not have been properly filed originally? If you describe an actual case, please provide the case name, filing district, and year of filing.

Forty judges (18%) responded to this question. The answers did not allow for easy organization into a small number of well-defined catego-

ries, but a few ideas and themes did emerge with enough frequency or were otherwise interesting enough to mention here.

According to the responding judges, a case should at least sometimes be transferred:

- to a location where the debtor has moved its principal place of business and principal assets and where there are sufficient creditors within a 90-day period before the debtor files in the location from which the debtor has moved;
- to the location of a very large number of creditors even if that district is not the principal place of business or location of principal assets;
- to the location of a major creditor;
- to a location where there is substantial related litigation, either as cases or adversary proceedings in the bankruptcy court or litigation in the district court;
- to a location that is just as convenient to the debtor in possession (DIP) and other parties in interest and where the caseload is lighter;
- to a location more conveniently located with respect to airports and other conveniences even if the DIP has no other connection there; and
- away from a division or district in which the judges have a conflict, to any district equally convenient to the DIP or other parties.

1. Discussion: Question 4

The reasons for transfer listed in the answers to Question 4 fall under the general headings specified by the bankruptcy transfer statute, 28 U.S.C. § 1412, and its implementing rule, Fed. R. Bankr. P. 1014. The statute and rule refer to "the interest of justice or the convenience of the parties," particularly insofar as convenience is to be measured in terms of physical distance between the party or witness and the forum of the case. The responses that mentioned a conflicted or an overburdened local bench fell into the "interest of justice" category. In general, there appear to be reasons, highly dependent on the facts of individual cases, that justify transferring cases into districts into which they could not have been filed originally.

The leading case interpreting these phrases, *Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co.*[25] set out a six-factor test. The six factors were listed as follows: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of witnesses necessary for estate administration; (4) the location of assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if liquidation ensues.

F. Question 5

Question 5 merely inquired if we could contact the judges further.

G. Results: Question 6

> 6. *Please use the remainder of this space, and additional pages if necessary, to make any other comments about venue and venue transfer in Chapter 11 cases that you believe should be part of the current discussions about statutory change and bankruptcy policy. Thank you.*

Thirty-two judges (14%) responded to Question 6. Several made general comments on the extent of the venue selection issue, ranging from "Venue problems are rare and easily resolved" and "I think this is a very unimportant issue" to "Venue shopping is rampant to get the right judge" and "This is one of the primary areas of manipulation and abuse in [Chapter] 11 cases, particularly larger ones, and Congress should put an end to it." Seven judges referred explicitly or implicitly to the proposal to eliminate state of incorporation as a venue predicate.[26] Nineteen

25. 596 F.2d 1239, 1247 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

26. An example of an implicit reference is "Venue should be where a corporation has its principal place of business."

Another judge wrote "The real problem with venue is the public perception. People do not understand how a corporation that has never done a dollar's worth of business in a state can take bankruptcy there and cost them many dollars in a far away place to assert their rights."

One judge defended the current practices as follows: "Large Chapter 11 cases. There are allegations that many large Chapter 11 cases have been venued in [S.D.N.Y.] or Del. that should have been filed elsewhere. Few parties in interest are requesting changes of venue. In large cases, no one district is ever exactly right for everyone. Unless there is a

judges contributed other suggestions across a spectrum of venue-related matters, including the following:

- change Fed. R. Bankr. P. 1014 to permit, explicitly, retention of cases filed improperly, perhaps following the logic of *In re Lazaro*;[27]

strong policy bias . . . in favor of some type of community interest by having the cases filed somewhere someone defines as local, these cases are overwhelmingly well handled and well placed where filed. Bankruptcy judges who don't see these cases often would like to see more of them but attorneys in large Chapter 11 cases prefer to have judges who have handled them before and don't make them their life's work."

Another judge provided explicit revisions of §§ 1408 and 1412:

> Section 1408(1) and (2) [new language is in italics]: (1)*(a) if the entity that is the subject of such case is an individual,* in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of ~~the person or~~ *such* 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~~ *entity* were located in any other district;
>
> *(b) if the entity that is the subject of such case is not an individual, in which the principal place of business in the United States or principal assets in the United States of such entity 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 principal place of business in the United States or principal assets in the United States of such entity were located in any other district;*
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.
>
> Section 1412: *(1)* 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.
>
> *(2) A district court shall transfer a case or proceeding under title 11 which is filed in an improper district to the district court for the proper district.*
>
> *(3) If the venue of a case is proper only under 28 U.S.C. § 1408(2), a district court shall transfer the case and the cases of all affiliates filed in that district to the district court for the district in which the principal place of business in the United States or principal assets in the United States of all such entities considered together are located.*

27. In re Lazaro, 128 B.R. 168 (Bankr. W.D. Tex. 1991). On the question of retention, one judge wrote "The interplay between 28 U.S.C. § 1412 and [Rule] 1014 needs to be clarified or appropriate amendment made (compare 28 U.S.C. § 2075). For example, can a bankruptcy court retain an improperly venued case? The rule and its 1987 Advisory Committee note seem to say no, but the statute itself does not say no. If it is in the interest of justice or the convenience of the parties, why shouldn't a bankruptcy court be allowed to permissibly retain jurisdiction of an otherwise improperly venued case. Flexibility permeates the provisions of . . . the Bankruptcy Code. Why shouldn't such flexibility perme-

- eliminate a local rule requiring the district court to rule on venue transfer motions after receiving a report and recommendation from the bankruptcy judge;
- eliminate "incredible waste of time and money" expended on venue transfer hearings, particularly if the bankruptcy court's decision is appealed to the district court;[28]
- require mandatory hearing on venue very early in [perhaps only in major] cases, before the court has "done a lot of things [and created] a natural reluctance to interrupt" by the parties; and
- create a process wherein "a few sophisticated U.S. Trustees or assistants" could be consulted on venue transfer rules.

H. Summary

The responses to Question 6 illustrate several conclusions that may be drawn from the survey results generally. First, there is wide variety of opinion among bankruptcy judges about the extent and importance of venue choices in Chapter 11. Second, while only a minority of responding judges recommend changing the venue statute (28 U.S.C. § 1408), most of that minority supports a change that would eliminate the domicile and residence provisions for corporations in section 1408(1) and perhaps also tighten or eliminate the affiliate filing provisions of section 1408(2). These changes are urged in order to prevent forum shopping for attorney fee leniency and various forms of "debtor friendliness."

A third conclusion drawn from the answers to Question 6 appears at first to cut against the preceding recommendation. Some bankruptcy judges urge an explicit loosening of transfer requirements, in 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014, to allow courts, when appropriate, to retain cases that have been filed improperly. This recommendation appears to contradict the earlier one because the effect of tightening the provisions of section 1408 could be undone by expanding the scope of judicial discretion in section 1412 and Rule 1014.

ate the Bankruptcy Code's accompanying Title 28 venue provisions? (Venue problems can be waived.) Although 11 U.S.C. § 105(a) addresses the court's *sua sponte* powers and notwithstanding the court's inherent powers, perhaps 28 U.S.C. § 1412 might be amended to expressly reflect that the court may act *sua sponte*."

28. *See, e.g., In re Palace Casinos Inc.*, 94B-20658 (D. Utah 1994).

This apparent contradiction can perhaps be explained by observing a difference between the problems judges are trying to solve with the two reforms. The advocates of tightening the requirements for filing in section 1408 want to even out the national distribution of large corporate filings by reducing their concentration in the Southern District of New York and Delaware. The advocates for amending section 1412 and Fed. R. Bankr. P. 1014 want to ease the travel and related burdens of debtors and other parties in interest who would find a bankruptcy court of improper venue more conveniently located than the nearest court of proper venue.

Nevertheless, if both reforms were instituted lawyers could still argue that the convenience of their clients or the interest of justice is served by locating their large corporate filings in the national center of corporate finance or the location of the state law that governs many of their corporate and contractual affairs.

II. Administrative and Demographic Characteristics of Large Cases

In this section we report on some characteristics of large corporate Chapter 11 cases that confirmed plans during 1994 and 1995. Our purpose was to analyze the consequences of venue selection where more than one site was permissible under the current statute. We have some characteristics of the estates that are referred to in arguments for and against changing the corporate and affiliate venue provisions of 28 U.S.C. § 1408. We collected no information on the commercial and legal activities of these entities after the dates of confirmation.

A. Sources of Cases

The primary sources of cases were two tables published in *The 1996 Bankruptcy Yearbook & Almanac*.[29] The *Almanac* tables list 79 public companies emerging from Chapter 11 in 1994 or 1995, where "public" was defined as "having at least one class of publicly traded security at the time of filing."[30] The tables do not include the district of filing; we located that information by accessing the Federal Judicial Center's integrated database.

The secondary source of cases was a set of 18 Delaware cases described by the Delaware State Bar Association as part of their report in support of maintaining existing venue choices.[31] The Delaware report was subse-

29. New Generation Research, Inc., The 1996 Bankruptcy Yearbook & Almanac (1996).

30. *Id.* at 56.

31. Report of the Delaware State Bar Association to the National Bankruptcy Review Commission in Support of Maintaining Existing Venue Choices (October 3, 1996) (copy on file with the Planning & Technology Division, Federal Judicial Center).

quently reviewed in a memorandum prepared for the National Bankruptcy Review Commission.[32] The 18 Delaware case names are provided in Table 3.

Table 2
The Primary Set of Cases

Case Name	Filing Date	Confirmation Date	District of Filing
Martech USA	12-19-93	05-16-94	D. Alaska
America West Air	06-27-91	08-10-94	D. Ariz.
Angeles Corp.	05-03-93	03-31-95	C.D. Cal.
Centennial	12-13-91	02-23-94	C.D. Cal.
Fin. Corp. of SB	09-17-90	03-31-95	C.D. Cal.
Mortgage & Realty	08-18-95	09-22-95	C.D. Cal.
Nu-Med	01-06-93	05-04-94	C.D. Cal.
Everex Systems	01-04-93	06-16-94	N.D. Cal.
Hexcel	12-06-93	01-11-95	N.D. Cal.
Media Vision	07-25-94	12-19-94	N.D. Cal.
Integra—a Hotel	07-14-92	02-11-94	D. Colo.
Washington Banc.	08-01-90	04-20-94	D.D.C.
Acme Holdings	07-13-95	08-24-95	D. Del.
CCX	03-24-94	04-28-94	D. Del.
Cherokee	11-07-94	12-14-94	D. Del.
Columbia Gas	07-31-91	11-15-95	D. Del.
Equitable Bag	10-14-94	12-01-94	D. Del.
Grand Union	01-25-95	05-31-95	D. Del.
Harvest Foods	12-13-94	12-29-94	D. Del.
MEI Diversified*	02-23-93	09-28-94	D. Del.
Memorex Telex	02-11-94	03-14-94	D. Del.
NH Holdings	09-02-93	12-07-94	D. Del.
Pullman	11-23-94	12-19-94	D. Del.
Resorts Int.	03-21-94	04-22-94	D. Del.
Restaurant Ent.	11-23-93	01-07-94	D. Del.
S. Houston Race Pk.*	04-17-95	09-22-95	D. Del.
TDII	12-02-93	01-18-94	D. Del.
TWA	06-30-95	08-04-95	D. Del.
UDC Homes	05-17-95	10-03-95	D. Del.
Vista Mortgage	08-17-95	09-19-95	D. Del.
Westmoreland	11-08-94	12-16-94	D. Del.

32. Memorandum from Prof. Lawrence P. King & Elizabeth I. Holland to the National Bankruptcy Review Commission, November 19, 1996 (copy on file with the Planning & Technology Division, Federal Judicial Center).

Case Name	Filing Date	Confirmation Date	District of Filing
American Ship	11-04-93	10-11-94	M.D. Fla.
Hillsborough	12-27-89	03-01-95	M.D. Fla.
Kash N' Karry**	11-09-94	12-12-94	M.D. Fla.
Sunshine Jr.	12-18-92	04-26-94	M.D. Fla.
Cenvill Properties	08-12-92	01-28-94	S.D. Fla.
Sportstown	02-07-95	11-30-95	N.D. Ga.
HAL	09-21-93	08-30-94	D. Haw.
Gulf USA	10-18-93	06-29-95	D. Idaho
Mallard Coach	05-15-92	12-14-94	N.D. Ill.
Fair Lanes	06-22-94	09-21-94	D. Md.
Gantos	11-12-93	03-07-95	W.D. Mich.
Rose's Stores	09-05-93	12-15-94	E.D.N.C.
Boonton	09-08-93	11-17-94	D.N.J.
Emerson Radio	09-29-93	03-11-94	D.N.J.
New Valley	03-31-93	11-01-94	D.N.J.
Best Products	01-04-91	05-31-94	S.D.N.Y.
Cellular Info.	09-08-92	03-15-94	S.D.N.Y.
Continental Info.	01-13-89	11-30-94	S.D.N.Y.
Crystal Brands	01-21-94	07-25-95	S.D.N.Y.
Eastern Air Lines	03-09-89	11-30-94	S.D.N.Y.
Gitano Group	03-01-94	08-30-94	S.D.N.Y.
Integrated Resourc.	02-13-90	08-08-94	S.D.N.Y.
Jamesway	07-19-93	12-12-94	S.D.N.Y.
JWP	12-21-93	10-03-94	S.D.N.Y.
Liberté Investors	10-25-93	01-24-94	S.D.N.Y.
Lionel	06-14-91	12-12-94	S.D.N.Y.
Lone Star	12-10-90	02-17-94	S.D.N.Y.
Maryland Cable	03-10-94	05-02-94	S.D.N.Y.
McCrory Parent	02-28-92	05-10-94	S.D.N.Y.
RH Macy & Co.	01-27-92	12-08-94	S.D.N.Y.
Sterling Optical	12-31-91	12-16-94	S.D.N.Y.
Telemundo	06-08-93	07-20-94	S.D.N.Y.
Woodward/Lothrop	01-17-94	12-28-95	S.D.N.Y.
Action Auto	01-28-93	06-28-94	N.D. Ohio
CSC Industries	11-22-93	09-28-95	N.D. Ohio
F&C International	04-19-93	03-31-94	S.D. Ohio
Americold Corp.	05-09-95	06-20-95	D. Or.
Columbia Western***	05-17-95	12-11-95	D. Or.
Almac's	08-06-93	11-08-94	D. R.I.
First City Banc.	10-31-92	05-12-95	N.D. Tex.
Sunrise Energy	11-15-94	07-13-95	N.D. Tex.
Intelogic Trace	08-05-94	11-22-94	S.D. Tex.
MCorp	03-31-89	06-30-94	S.D. Tex.

Table 2 (continued)

Case Name	Filing Date	Confirmation Date	District of Filing
Solo Serve	07-21-94	07-06-95	W.D. Tex.
Rocky Mt. Helicopters	10-13-93	12-30-94	D. Utah
Jay Jacobs	05-13-94	11-17-95	W.D. Wash.
B-E Holdings	02-18-94	12-02-94	E.D. Wisc.
Value Merchants	12-13-93	06-15-95	E.D. Wisc.

*Not included in subsequent analysis. **Actual filing district uncertain. ***Transferred from D. Mass.

Table 3
The Secondary Set of Cases (Delaware Filings Only)

Case Names	
Anacomp	Morrison-Knudsen
Bill's Dollar Stores	Pic 'N Pay
Braun's Fashions	Rickel Home Centers
Burlington Motor	Silo Holding
DEP	SLM International
Grand Union Co.	Smedley Industries
Homeland Stores	Smith Corona
Industrial General	Spectravision
Lomas Financial	Today's Man

B. Information Obtained for the Primary and Secondary Sets of Cases

Cases of the kinds listed in Tables 2 and 3 develop very large case files, sometimes running to more than 100 linear feet of papers. Such cases are often composites of multiple filings by related entities, listed as successive docket numbers in the court's databases but administered jointly for purposes of hearing and judicial action.[33] The various entities represented in a single jointly administered case can vary greatly in size and organizational structure, from a holding company listing very few employees and little physical property or significant debt, to an operating company with thousands of employees and creditors and numerous locations world-wide.

33. Fed. R. Bankr. P. 1015.

The organizational complexity of such enterprises or conglomerates[34] creates a large portion of the problem of appropriate venue. It also creates a difficult research problem: What information is required for an analysis of the problem, and can it be located in the voluminous files?

After reviewing case files in the Southern District of New York and Delaware, we sought to collect the following information on as many cases as possible:

- the petition coversheet;
- Exhibit A to the petition ("SEC form," listing, *inter alia*, numbers of secured and unsecured creditors, stockholders, etc.);
- a list of the 20 largest unsecured creditors;
- a machine-readable creditor matrix;
- Schedule A (list of real property);
- the corporate resolution (affidavit in support of petition);
- enough of the early docket to understand the nature of "first-day" motions and orders; and
- a summary of professional fees paid.

Table 3 lists the 18 Delaware cases reported in the *Delaware State Bar Association Report to the National Bankruptcy Review Commission*. We relied on this information in our analyses of the locations of creditors relative to the district of filing and the stated corporate principal place of business.

Included in the remainder of this section are some of the more salient facts that can inform a policy debate about changing the venue statute. We begin with some general descriptions of the primary cases and then move to a more detailed analysis of both primary and secondary cases.

34. LoPucki & Whitford noted that each of their 43 cases comprised more than one business entity, ranging in number from 2 *(Pizza Time Theater* and *Tacoma Boatbuilding)* to 352 *(EPIC)*. The authors distinguished between an enterprise (entities organized as "a set of activities customarily grouped together in order to produce a marketable service or activity") and a conglomerate ("two or more enterprises in different physical locations . . . [where] the different enterprises were under the ownership of legally separate entities"). LoPucki & Whitford, *supra* note 8, at 22.

C. The Primary Cases: Locations and Dates of Filing, and Durations from Filing to Confirmation

Table 2 shows that the 79 primary cases were filed in 28 districts: 19 (24%) in Delaware, 18 (23%) in S.D.N.Y., and 42 (53%) in the remaining 26 districts, with no more than 5 in any one of these. Two Delaware filings, *MEI Diversified* and *Sam Houston Race Park*, were transferred from Delaware shortly after filing. We were unable to gather additional information about them in time to prepare this report, and do not report further on them. This reduces the Delaware count to 17 cases and the total to 77.

In brief, almost half of the corporate debtors emerging from Chapter 11 in 1994 and 1995 filed in either Delaware or S.D.N.Y.; those two districts shared the cases about equally. Tables 4 and 5 divide the 77 cases into three groups: Delaware, S.D.N.Y., and the remaining 42 cases.

1. Delaware Cases Were Generally Newer than Cases Filed Elsewhere

The Delaware cases were generally newer than the cases in the other two groups, as summarized in Table 4.

Table 4
Filing Dates of the Primary Cases

District	No. Cases	Oldest	Newest	Median Case
D. Del.	17	7-31-91	8-17-95	11-17-94
S.D.N.Y.	18	1-13-89	3-10-94	6-3-92*
Remainder (23 dists.)	42	3-31-89	8-18-95	9-25-93*
All cases	77	1-13-89	8-18-95	10-25-93

*The date midway between the two middle cases.

The case in the middle of the Delaware distribution, *Cherokee*, was filed 22 months after the mid-case in the non-Delaware and non-S.D.N.Y. cases, and 29 months after the mid-case in the distribution of S.D.N.Y. cases.

2. Delaware Cases Were Confirmed Faster than Cases Filed Elsewhere

Given that the population of cases was selected based on the cases' dates of confirmation in Chapter 11 (1994 or 1995), and that the Delaware cases are newer, we expected to see the Delaware cases move from filing to confirmation faster than the cases in the other two groups. Our expectations were confirmed, as shown in Table 5.

Table 5
Primary Cases: Median Days from Filing to Confirmation

District	No. Cases	Days Filing to Confirmation
D. Del.	17	38
S.D.N.Y.	18	756
Remainder (26 dists.)	42	473
All cases	77	443

The striking fact demonstrated in Table 5 is that the Delaware cases moved from filing to confirmation in a median duration of 38 days. The quickest transit through the process was *Harvest*, a well-known prepackaged bankruptcy case that confirmed a plan in 16 days. Only two Delaware cases required more than six months to confirm a plan: one of these, *Columbia Gas*, was in the process for 4.25 years, while the other, *NH Holdings*, required 1.25 years.

Thirteen of the 17 cases were confirmed in less than 50 days. All of these cases were prepackaged or prenegotiated filings. According to the available information, there were more prepackaged or prenegotiated filings confirming in Delaware during this time than in all of the country taken together.

The median duration from filing to confirmation of the 17 S.D.N.Y. cases was 756 days—slightly more than two years. The range ran from 53 days for *Maryland Cable* to 5.9 years for *Continental Information Systems.* The well-known *Eastern Airlines* case confirmed a plan after 5.7 years.

The time from filing to confirmation for the group of 42 cases from the remaining 26 districts, which were located in all of the circuits except the Eighth, generally fell between times for Delaware and S.D.N.Y. cases. The fastest case was *Kash N' Karry*, at 33 days. The slowest case was *MCorp*, which ran for 5.25 years.

D. A Matter of Interpretation: The Magnet Courts

For the time period in question, Delaware exhibited remarkable speed in taking cases from filing to confirmation. Conversely, S.D.N.Y. proceeded slowly relative to the general run of corporate confirmations across the country. Yet both districts appear to attract disproportionately large numbers of corporate Chapter 11 filings. In that sense, these districts appear to act as legal magnets drawing filings away from other locations. But how do they do that, and what attraction do they exert?

1. The Southern District of New York as a Magnet

Beginning with the publication in 1991 of the article by LoPucki and Whitford, commentators have alleged two strong attractions in the Southern District of New York: (1) the willingness of some bankruptcy judges in the district to grant repeated extensions of exclusivity, and (2) their willingness to award professional fees from the estate that are much higher than fees allowed by judges in other districts. These tendencies qualify, in the language used by critics, as debtor-friendly or debtor's counsel-friendly.

We do not discuss professional fees in this report.

It is clear that the S.D.N.Y. cases are considerably longer in the interval from filing to confirmation than cases in other districts. But it remains to be demonstrated that a prolonged period from filing to confirmation is always a negative factor for the optimal commercial outcome of the bankruptcy case. There may be circumstances in which the goal of expeditious judicial case management is in partial conflict with the goal of effective bankruptcy estate management.[35]

Corporate debtors who seek a protracted stay in Chapter 11 might be attracted to S.D.N.Y., based on the district's management of its large

35. "Exclusivity extensions are frequently needed in large cases, however, to enable the debtor to have a meaningful opportunity to build consensus, to motivate the parties to negotiate, and to avoid potentially expensive and disruptive competing plans" (footnote omitted). Bert Lance, *Choice of Venue: Scapegoat for Every Ill in Chapter 11, in* The Biased Business of Venue Shopping 68–69 (1995). Cecelia Morris, the clerk of the bankruptcy court in the S.D.N.Y., informed us that special circumstances in two of the longest S.D.N.Y. cases, *Eastern Airlines* and *Continental Information Systems,* made a speedy course to confirmation an unnecessary or even a counterproductive goal for achieving the commercial purposes of the appointed trustees of these estates.

cases in the early and mid-1990s. But there is, of course, more to the story than that. The focus of commercial financial activity in S.D.N.Y., and the correlated concentration of legal and other relevant services, create an attraction independent of the characteristics of the court's perceived case-management practices. The passage of cases as complex as these through a court will always be a process controlled by both the bench and the bar. Moreover, S.D.N.Y. is a district that at the time of this writing has 11 judges, 8 of whom sit in Manhattan. We are unaware of any published information that would substantiate a claim that the bench as a group tends to extend exclusivity periods to a degree that is unusual for cases of this sort.[36] Given a random draw among the judges for cases, an entity filing in Manhattan cannot predict with any certainty which judge will be assigned to its case.

2. Delaware as a Magnet: The Question of Prepackaged and Prenegotiated Filings

Delaware's magnetism is of a different sort. While S.D.N.Y. cases took longer to confirm than the national average, Delaware's cases were confirmed much more rapidly. As noted above, the speed is closely connected to the fact that the Delaware cases were predominantly prepackaged or prenegotiated filings. It is plausible, and certainly consistent with the findings, that one of Delaware's attractions is the availability of smooth prepackaged filing and case-management processes—characteristics of which include rapid transit through Chapter 11.

There are many intricacies and policy implications of prepackaged bankruptcies that we do not claim to understand. We have consulted the academic literature[37] and practical commentary.[38] The academics seem to have arrived at a soft consensus that prepackaged bankruptcies are in-

36. A detailed review of dockets of our primary set of cases should reveal whatever such differences between districts there have been. We were unable to do work at this level of detail for the current report.

37. Recent contributions to this literature were summarized in *Prepak Versus Chapter 11: How to Choose*, 29 Bankr. Ct. Decisions A1 (November 19, 1996). *See also* Brian L. Betker, *An Empirical Examination of Prepackaged Bankruptcy*, 24 Fin. Mgmt. 3 (Spring 1995), and sources cited therein; and John McConnell & Henri Servaes, *The Economics of Pre-Packaged Bankruptcy*, *in* Corporate Bankruptcy: Economic and Legal Perspectives 322 (Jagdeep S. Bhandari & Lawrence A. Weiss eds., 1996).

38. *E.g.*, David G. Epstein *et al.*, 3 Bankruptcy §§ 11-21 through 11-24 (1992).

termediate in cost (to the debtor) between out-of-court workouts and ordinary Chapter 11 processes. The commentary advises lawyers to compare the pros and cons associated with a prepackaged plan with those associated with an out-of-court workout and an ordinary Chapter 11, and counsels that the greatest advantage for a debtor of the prepackaged option—speed through the bankruptcy process—can also be its greatest disadvantage. We have presented evidence that prepackaged claims are confirmed more quickly, but cannot comment on any negative outcomes that may have accrued to these debtors, their creditors, or other parties-in-interest.

If the conclusion of the academics is correct, then, all else equal, judicial policy makers could justify judicial support for prepackaging as a means of efficient and effective case management and court administration. The question of whether all else is in fact equal is not, however, an easy one. Perhaps not enough experience with the prepackaged device has accumulated to arrive at a secure conclusion. A potential hazard is that some creditors will be forced to accept terms that they could have improved on during a more prolonged Chapter 11 process. It is unclear how to assess the risk associated with that hazard in general, rather than on a case-by-case basis.[39]

The rapid transit of large bankruptcies through the confirmation process is facilitated by case-management practices that get the case off to a fast start. Some aspects of the Delaware practice are described below.

a. The Delaware Practice

Some Chapter 11 cases are filed in Delaware according to the following practice. Before filing, debtor's local counsel telephones Judge Balick, in her role as chief judge, to inform her of an impending filing and indicate the day, or range of days, during which the debtor wishes to file. Judge Balick assesses the current Chapter 11 caseloads of Judge Walsh and herself, including which judge was assigned the last large case. On that basis,

39. Whether any such creditors are unfairly disadvantaged, or rather are holdouts acting against the best interests of the creditor body as a whole, is a difficult question. One commentary states the following: "A prepackaged bankruptcy cannot be forced on a significant number of reluctant creditors. Nevertheless, given the possibility of a prenegotiated bankruptcy reorganization, a greater fraction of them may be willing to agree to the plan precisely because holdouts can be forced to participate by filing Chapter 11." McConnell & Servaes, *supra* note 37, at 326.

with a goal of keeping Chapter 11 workloads more or less even, Judge Balick decides whether she or Judge Walsh will take the case. She informs the lawyer by telephone of her decision. If she is to take the case, then she tells local debtor's counsel of the date on which she will have enough time to hear and decide first-day motions. If she decides that Judge Walsh is to take the case, she tells debtor's counsel to contact Judge Walsh to confirm a filing date on which he will have enough hearing time. The judges will adjust their schedules to meet debtors' needs. Debtor's local counsel may prepare a document on law firm stationery addressed to the assigned judge. If the debtor does not file on the day originally scheduled, the originally assigned judge will take that case whenever it is filed. The letter specifies the first-day motions debtor intends to make. This list of first-day motions is dated and hand-delivered by debtor's local counsel to the assigned judge the day before the case is filed. (District court rule 83.5 requires out-of-district counsel to associate with local counsel. Thus, it is always local counsel who contact Judges Balick and Walsh.)[40]

There appears to be considerable specialization within the Delaware bankruptcy bar. One local firm was lead local counsel for the debtor in 15 of the 17 Delaware cases in our primary source. The same firm was also primary counsel in four of those cases.

3. The Relationship Between the Proposed Statutory Change and the Attractions of the Southern District of New York and Delaware

It is well known that the elimination of corporate domicile and residence from 28 U.S.C. § 1408(1) would, all else equal, markedly reduce the number of potential corporate filers who could find proper venue in Delaware. The size of the impact can be estimated, for example, by noting that only one of the 17 Delaware cases in our set of cases involved a company with its principal place of business in Delaware. In contrast, 13 out of 18 cases in S.D.N.Y. involved companies with their primary place of business in that district, and 35 out of 42 cases in the remaining 26 districts involved companies filing in the district of their primary place of business. One consequence of the proposed change to § 1408(1) would be a

40. We thank Chief Judge Balick for reviewing this description of the assignment practice for its thoroughness and accuracy. The availability of this procedure for substantial Chapter 11 cases is well understood by members of the court's administrative staff.

reduced opportunity to file in the district that has had the most experience managing prepackaged and prenegotiated bankruptcies.

The elimination of the affiliate filing provision of § 1408(2) would presumably solve the kind of problem typically associated with *Eastern Airlines* and *LTV*, both S.D.N.Y. cases in which a small subsidiary files in a district in order to allow its large parent, which has little if any direct connection to the district, to file there shortly thereafter. That it would also reduce judges' granting of extensions of exclusivity and awarding "big city" attorney fees in S.D.N.Y. and elsewhere, is unclear.

E. Physical Distance from Creditors as an Attraction for Choosing Venue

One of the criticisms made against the corporate domicile and affiliate provisions of the current statute is that they permit debtors to file at locations remote from creditors, who are thereby prevented from pressing their claims in court.[41] The criticism becomes difficult to evaluate for large corporate debtors, which, as enterprises or conglomerates, may bring many entities with widespread assets and creditors into a jointly administered Chapter 11 case. The report of the Delaware State Bar Association emphasized that many large Delaware filings exhibit creditor bodies with wide distributions around the United States and internationally. In reply, the memo prepared for the National Bankruptcy Review Commission argued that a finer analysis revealed a flaw in the bar association's position.[42]

41. "Forum selection becomes a strategic tool, available for clever parties to manipulate outcomes to the disadvantage of smaller creditors who are cut out of the bankruptcy process." Memorandum from Lawrence P. King & Elizabeth I. Holland, *supra* note 32, at 7. (The same claim appears verbatim, at 3, in the commission's staff memorandum of May 1996.) "[U]nder the current venue rules, some debtors can choose venues far from their creditors. If the chosen venue is too inconvenient for smaller parties, most will not participate and the outcome of the case may be much different than if a broad range of parties had been heard." Faye Knowles, *Choice of Venue: Planting the Abominable Seedling?*, *in* The Biased Business of Venue Shopping 27 (1995). The examples of *Ernst Home Center* and *Pic 'N Pay*, Delaware filings in which transfer motions were based on the claim of an unfair distance between creditors and location of filing, have been briefly described in Section I, *supra*.

42. ". . .[M]ore creditors were located in the state of the principal place of the debtor's business than in the state of Delaware, in all of the samples except for one. In fact, out of

The arguments in the Delaware State Bar Report and the Commission's memorandum were useful explorations of the problem of unfairness to creditors created by the geography of venue choice; they should be extended in two ways.

First, they should account for the fact that the physical distances between federal judicial districts on the east coast, particularly from the mid-Atlantic states northeast to New England, are much smaller than they are in the rest of the country. The distance between Boston, Mass., and Washington, D.C., is 439 miles.[43] Within that distance, on a fairly straight line, are federal courthouses in D.C., Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts. This area is in many ways an unbroken residential, commercial, and industrial corridor well served by highways, trains, buses, and airplanes. Within the area, state borderlines are not always of practical importance. For example, Wilmington, Del., is well served by the Philadelphia airport. By contrast, Los Angeles and San Francisco, principal sites of the adjacent Central and Northern Districts of California, are separated by 382 miles. The southernmost division of N.D. Cal., San Jose, is 275 miles from the northernmost division of C.D. Cal., Santa Barbara. And at an extreme, there are 615 miles between El Paso and Waco, both in the Western District of Texas. When distances are considered in the context of inconvenience to creditors, such facts need somehow to be taken into account. For example, is it more inconvenient for a Philadelphia lawyer to represent a client in Wilmington, Del. (30 mi.), than it is for an El Paso lawyer to represent a client in Waco (615 mi.), Austin (582 mi.), San Antonio (556 mi.), or Midland-Odessa (300 mi.), the other di-

the thirteen debtors studied, nine had more creditors in the state where their principal place of business was located than in any other state. In other words, if each of these debtors had filed for Chapter 11 relief in the district where their principal place of business was located, no other state-wide venue would have encompassed a greater number of creditors." Memorandum from King & Holland, *supra* note 32, at 14.

43. The distances listed in this paragraph are road distances found in the Rand McNally Standard Highway Mileage Guide Vol. 1 (1990). In the more detailed analyses provided below, we used a commercial computer program, *MacInfo Desktop* (1992–1996), which provides shortest (straight-line) distances between locations. The numbers between locations provided by these two sources often do not agree. For current purposes, it is important only that we used the same method for calculating distances whenever comparing distances between many pairs of locations.

visions of W.D. Tex.? Section 1, below, presents a distance analysis that can account for such factors.

Second, analyses of distance as an index of creditor inconvenience should be supplemented by estimated travel costs to actual and potential venues. This analysis appears in Section 2, below.

1. The Distance Index: Calculating Creditor Distances from Actual and Alternative Venues

Here we describe a general method of summarizing the distances of creditors from the filing venue and apply it to a number of cases in our primary and secondary sets of cases. The usefulness of the method is to compress a great deal of information into one or two numbers that can be used to compare the consequences of filing a case in any of several potential venues.

There are two ideas behind this method. The first idea is that creditors' distances from the filing venue can be described in terms of their locations in concentric bands around that venue. Depending on how fine an analysis one wants to do, the number of bands can be made larger (finer gradations of measured distance) or smaller (coarser gradations of measured distance). The outermost band can be extended to sweep in everything beyond its inner border. For most locations, this will include Alaskan, Hawaiian, and most foreign creditors. Furthermore, one might want to make the innermost band ("the bull's-eye") special, say to include the district or state of filing rather than an area of mileage *per se*.

The other idea behind the method is a little more difficult: we want to calculate a number that is a valid index of the distance of the *average creditor* from the filing site. This index can be calculated in four steps, as follows:

Step 1: Assign each concentric band a consecutive number, beginning with zero.

Step 2: Calculate the proportion of all the creditors found in each band. For example, if there are 10 bands and the creditors are equally distributed across all of them, then the proportion in each band would be 0.1. For another example, if 80% of the creditors are in the innermost band but 20% are 3,000 miles away, then the proportion in the innermost band would be 0.8 and the proportion in the outermost band would be 0.2, and the proportions in all of the other bands would be 0.0.

Step 3: Multiply the proportion of creditors in a band by the number of that band. In the first example, where there are 0.1 of the creditors in each of 10 bands numbered 0 through 9, the products of the proportions and the band numbers will be 0.0, 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, and 0.9. In the second example, the products will be 0.0, 0.0, 0.0, 0.0, 0.0, 0.0, 0.0, 0.0, 0.0, and 1.8.

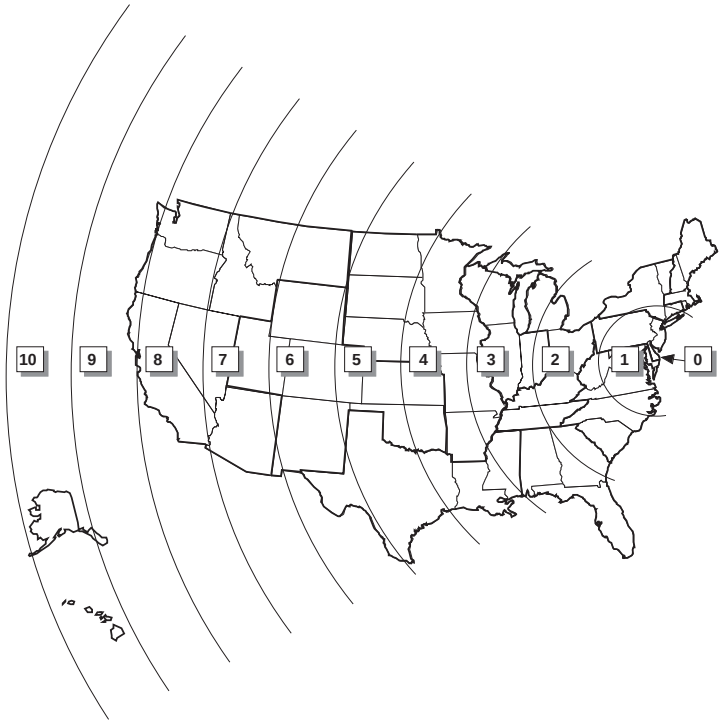
Step 4: Add the products that were calculated in Step 3. In the first example, the sum of the products is 4.5. In the second example, the sum of the products is 1.8.

We can call each sum calculated in Step 4 the *distance index* for the particular distribution of creditors. In these examples, the index has a range of 0 through 9. Figure 1 provides a graphic representation of the distance index method when Delaware is chosen as the location of filing. As a practical matter, how can the distance index be used to determine a degree of creditor inconvenience?

The distance index is most useful when it is applied to two or more filing sites, so that the consequences of filing in different locations can be compared. We will do that for some of the cases in our primary and secondary sets of cases, by calculating the indexes for the site of filing and the location of the debtor's principal place of business as listed on the petition cover sheet. We subtract the index for the principal place of business from the index for the filing site. This creates a *difference score*.

A positive difference score means that the average creditor is farther away from the filing site than from the principal place of business. The larger the positive number, the greater the distance. A negative difference score means that the average creditor is closer to the filing site than to the principal place of business. A difference score of zero means that the average creditor is equally distant from the filing site and the principal place of business.

Figure 1
The Distance Index Applied to the District of Delaware



Notice that the difference score provides no information about the absolute distance of the average creditor from either of the two locations. For example, a difference score of 0 would result when a Delaware corporation files in Delaware though its headquarters are in New York and all its creditors reside on the west coast (8 - 8 = 0). A difference score of 0 would also result for that same company if all of its creditors resided in New Jersey (1 - 1 = 0). Yet there is greater inconvenience to creditors in the first case than in the second. The difference score must be interpreted in the context of the two distance indexes from which it is derived.

For the calculations shown below, we organized the index as follows: there were 11 concentric bands ranging in number from 0–10. The innermost band (the bull's-eye) represented *either* the state of filing *or* the

principal place of business, and carried a score of 0.[44] Bands 1–10 represented successive 300-mile distances from *either* the state of filing *or* the principal place of business. Straight-line distances are measured from the geographic center of that state to the geographic center of every other state from which creditors were reported.[45]

Table 6 presents distance indexes for 22 Delaware cases for which we had a sufficiently fine-grained list of creditor addresses and a reliable indication of the debtor's principal place of business. Five of the cases were taken from our primary data source (the *1996 Bankruptcy Yearbook & Almanac*) and the other 17 from the secondary source (the Delaware State Bar Association Report).

The numbers in the right-hand column of the table are the differences between the distance index calculated for Delaware and the distance index calculated for the state designated by the debtor as its principal place of business. This number represents the amount of additional mileage that the average creditor[46] had to travel to pursue its claim, because the debtor filed in Delaware instead of the state of its principal place of business.

44. Notice that this had the effect of zeroing out the effect of relatively distant in-state creditors from large states. For example, Spectravision is headquartered in Richardson, Tex., a suburb of Dallas. It listed approximately 7,700 creditors, of whom 1,634 had Texas addresses. For the distance index calculation, these creditors were in the innermost band and hence contributed zero to the distance index, even though these creditors could have come from all over the state. The distance from Dallas to Midland, Tex., is 329 miles and to El Paso is 619 miles. Given 300-mile bands for out-of-state distances, creditors at these distances would have been valued as 2 or 3, respectively.

45. The outermost band, which lay at a minimum of 2,701 miles from the center, included all distances above that number (*e.g.*, Hawaii and Alaska were in band 10 for many of the cases). This approximation doubtlessly overestimated the distances of some creditors and underestimated others. A detailed zip-code analysis would improve precision, but it is unclear that it would change the strength of our conclusions.

46. "Average" in this context refers only to the question of physical distance, not to the size of the claim or any other relevant feature of creditors.

Table 6

Twenty-Two Delaware Cases—Filing and Principal Place of Business (P.P.B.) Distance Indexes and the Differences Between Them

Company	P.P.B.	Delaware Distance Index	P.P.B. Distance Index	Diff. Score
Homeland	Okla.	4.80	0.68	4.12
DEP	Cal.	5.72	2.91	2.81
Cherokee*	Cal.	5.60	2.96	2.64
Bill's Dollar	Miss.	3.78	1.60	2.18
Harvest*	Ariz.	3.70	1.74	1.96
Braun's	Minn.	3.52	1.92	1.60
Industrial Gen.	Ohio	2.42	1.27	1.15
Lomas	Tex.	4.06	2.94	1.12
Pic 'N Pay	N.C.	2.52	1.86	0.66
Rickel	N.J.	1.13	0.62	0.51
Smedley	N.Y.	2.02	1.55	0.47
Anacomp	Ind.	3.32	2.87	0.44
Spectravision	Tex.	3.94	3.54	0.41
SLM	N.Y.	2.50	2.19	0.31
Burlington	Ind.	2.67	2.39	0.28
Today's Man	N.J.	1.37	1.15	0.22
Silo	Mich.	3.42	3.24	0.18
Morrison-Knudsen	Idaho	4.75	4.57	0.18
Grand Union**	N.J.	1.69	1.56	0.13
Columbia Gas*	Del.	2.42	2.42	0.00
Smith Corona	Conn.	2.29	2.44	-0.15
Equitable Bag*	N.Y.	2.75	2.91	-0.16
	Means***	**3.23**	**2.23**	**1.00**
	Medians***	**3.32**	**2.19**	**0.47**

*Cases from the primary dataset. **Case in both datasets. ***The averages and medians exclude *Columbia Gas,* a Delaware corporation with Delaware as its P.P.B.

The difference scores ranged from 4.12 for *Homeland* to slightly negative scores for *Smith Corona* and *Equitable Bag.* We included *Columbia Gas* in the list as an example showing that when the state of filing is the same as the state of the principal place of business, the two distance indexes are equal. We did not include the scores from this case in calculating means or medians.

For the entire set of cases, the average (mean) difference score was one band. The median difference score (which is not affected by the magnitude of the extreme scores) was about half as large.

A closer examination of the table reveals different patterns of creditor location relative to the two focal points chosen for the analysis of each case. In the most extreme case, *Homeland,* approximately 13,000 of the total of 14,000 listed creditors were in Band 5 relative to Delaware (over 10,000 creditors were in Oklahoma). All of those Oklahoma creditors were, of course, in Band 0 relative to *Homeland*'s principal place of business.

Morrison-Knudsen provides a strong contrast to *Homeland,* in that the average creditor was not close to either Delaware or Idaho (the primary place of business), even though there were substantial numbers of creditors in Idaho and in the states close to Delaware (especially New York). The company also had almost 2,500 of its more than 48,000 creditors listed with Hawaii addresses. Hawaii was in Band 10 for both locations.

The difference scores for companies with principal places of business in the mid-Atlantic and northeast regions (*Equitable Bag, Smith Corona, Grand Union, Today's Man, SLM, Smedley,* and *Rickel*) showed difference scores of about 0.5 or less, with two cases scoring slightly negative. No particular significance should be attached to the negative scores, as they were the result of a single state shifting band number in the distance indexes for New York and Connecticut relative to Delaware. It is appropriate to conclude that there was essentially no difference in travel distance for the average creditor in these cases.

The two cases with Texas as principal place of business, *Spectravision* and *Lomas,* displayed substantially different difference scores: 0.41 and 1.12, respectively. In *Spectravision,* a large number of Texas creditors (Band 0 for Texas, Band 5 for Delaware) was largely offset by a large number of creditors in New York and other mid-Atlantic and northeast states (Bands 0 or 1 for Delaware, Bands 5 or 6 for Texas). In *Lomas,* almost a third of the creditors were in Texas but the number in the mid-Atlantic and northeast regions was relatively small.

We turn finally to *Pic 'N Pay,* with its difference score of 0.66. The case is of particular interest because the issue of venue was litigated, and the court denied the motion to transfer to North Carolina. (A thumbnail sketch of the case was presented in the introduction of this report.) The difference score for the case was less than the average for the set of 22 cases. Expressed in terms of approximate mileage, average out-of-state

creditors had to travel roughly 200 miles further to appear in Delaware than they would have had to travel in order to appear in North Carolina.

Table 7
Five Additional Cases—Filing and Principal Place of Business (P.P.B.) Distance Indexes and the Differences Between Them

Company (Filing State)	P.P.B.	Filing State Distance Index	P.P.B. Distance Index	Diff. Score
Columbia Western (MA)	Ore.*	6.99	2.75	4.24
Woodward & Lothrop (NY)	Va.	1.78	1.62	0.16
Jamesway (NY)	N.J.	1.17	1.07	0.10
Eastern Airlines (NY)	Fla.	2.78	2.69	0.09
Liberté (NY)	Tex.	3.74	4.00	-0.26

*P.P.B. as determined by the Massachussetts court before transferring the case to Oregon.

Table 7 compares the distance indexes of five cases not filed in Delaware. Four were filed in New York and the fifth, *Columbia Western,* was filed in Massachusetts but transferred to Oregon when the Massachusetts court held that it had been filed improperly. The case showed the largest difference score of any we calculated.

The difference scores for the four New York cases are all small, positive or negative. The negative score for *Liberté* reflects the concentration of New York and northeast region creditors in the case: 675 of the approximately 2,300 creditors were in Bands 0 or 1 relative to New York, while only 420 creditors were in Bands 0 or 1 relative to Texas. We include the *Eastern Airlines* numbers, in reference to Florida, because of the frequent use of this case as an example of why the affiliate provision of 28 U.S.C. § 1408(2) should be eliminated or modified to prevent parents from filing where their subsidiaries have filed. From the perspective of inconvenience to the average creditors, it did not matter very much. The same may be said for the other S.D.N.Y. cases.

If greater distances mean greater inconvenience, then the distance indexes and their difference scores should take the discussion of creditor inconvenience one step further away from anecdote, rhetoric, and speculation, and one step closer to useful policy determination. How much inconvenience is too much inconvenience, however, is not a question that can be answered by this method—such an answer requires a prior normative judgment, either judicial or legislative.

2. The Cost Index: Using Full-Coach Airfares to Estimate Costs of Travel for Actual and Alternative Venues

In addition to using physical distances, we can also describe the burden on the average creditor by estimating the costs associated with travel to and from any venue. For many of the cases already described, we used a *cost index* based on full-coach airfares and the same general method as the distance index. We calculated how much the average creditor would spend on full-coach, round-trip airfare between the creditor's location and the state of filing, as well as between creditor's location and the debtor's principal place of business.

Our information on full-coach airfares was provided by staff at the National Travel Service (NTS), the federal courts' contract travel agent. The fares, covering round-trip fares between all pairs of 38 cities,[47] were those reported by NTS on November 15, 1996; they reflected no discounts, promotions, or other special features. They were, therefore, equally likely to overestimate the costs of coach travel between the locations listed.

As in the distance index calculations, we needed to use creditor location information aggregated at the state level. When we had fares for more than one metropolitan airport for a state, we averaged them to create a single fare for the state (California, Florida, Missouri, North Carolina, New York, Pennsylvania, Texas).

In this cost index, the bands used in the distance index are replaced by locations of airports; the proportion of creditors who would have traveled from that location is multiplied by the round-trip airfare between there and the site of filing or the principal place of business. The difference score between the actual venue and the principal place of business represents the cost difference for the average creditor of traveling to one location versus the other. Figure 2 provides a graphic representation of the cost index method when Delaware is chosen as the location of filing—the Philadelphia airport was chosen as the airport serving Wilmington.

47. Albany, Atlanta, Birmingham, Boise, Boston, Buffalo, Burlington, Charlotte, Chicago, Cleveland, Dallas, Denver, Detroit, Houston, Kansas City, Los Angeles, Louisville, Miami, Milwaukee, Minneapolis, New Orleans, New York, Newark, Oklahoma City, Omaha, Orlando, Philadelphia, Pittsburgh, Portland, Raleigh, Reno, Salt Lake City, San Diego, San Francisco, San Antonio, Seattle, St. Louis, and Washington, D.C.

Figure 2
The Cost Index Applied to Delaware Showing the Direct Air Routes Used in the Cost Index Calculations

Table 8 presents distance indexes for 17[48] Delaware cases for which we had a sufficiently fine-grained list of creditor addresses and an appropriate airfare.

The average difference score for the 17 Delaware cases was $290, with a range from $1,047 for *Homeland* to -$84 for *Silo.* As expected, the *Columbia Gas* difference score was $0; as before, we include it here as a check on the method, but do not include it in calculating means or medians.

48. We were unable to complete the calculations for the additional five cases included in the distance index analyses shown in Table 6, because the airfares for the cities involved were collected at a later date and were not directly comparable to those collected earlier.

Table 8
Seventeen Delaware Cases—Filing and Principal Place of Business (P.P.B.) Cost Indexes and the Differences Between Them

Company	P.P.B.	Delaware Cost Index	P.P.B. Cost Index	Diff. Score
Homeland	Okla.	$1191	$145	$1047
DEP	Cal.	1221	521	700
Cherokee*	Cal.	1233	581	652
Industrial Gen.	Ohio	526	158	367
Lomas	Tex.	981	634	347
Smedley	N.Y.	629	356	273
Braun's	Minn.	699	429	270
Rickel	N.J.	433	196	237
Pic 'N Pay	N.C.	678	490	188
Spectravision	Tex.	929	757	172
Grand Union**	N.J.	566	406	161
Today's Man	N.J.	542	419	122
Equitable Bag*	N.Y.	821	756	66
SLM	N.Y.	569	506	63
Morrison-Knudsen	Idaho	923	866	57
Columbia Gas*	Del.	665	665	0
Silo	Mich.	765	849	-84
	Means***	**$794**	**$504**	**$290**
	Medians***	**$732**	**$498**	**$213**

*Cases from the primary dataset. **Case in both datasets. ***The averages and medians exclude *Columbia Gas*, a Delaware corporation with Delaware as its P.P.B.

Some of the assumptions that we had to make in order to complete the calculations doubtless led to some overestimations and some underestimations. Despite these shortcomings, the cost analysis appears to provide a useful tool to sort out cases on the basis of the airfare costs associated with the Delaware venue as opposed to the venue in the state of the principal place of business, for the average creditor.

Table 9 shows cost indexes and difference scores for the five non-Delaware cases with principal places of business apart from the filing venue. As was true for the distance indexes, *Columbia Western* is radically different from the four S.D.N.Y. cases. The additional costs of air travel to New York were negligible for the cases that filed there.

Table 9
Five Additional Cases—Filing and Principal Place of Business (P.P.B.) Cost Indexes and the Differences Between Them

Company (Filing State)	P.P.B.	Filing State Cost Index	P.P.B. Cost Index	Diff. Score
Columbia Western (MA)	Ore.*	$812	$390	$422
Eastern Airlines (NY)	Fla.	695	633	63
Jamesway (NY)	N.J.	414	378	36
Woodward & Lothrop (NY)	Va.	547	573	-26
Liberté (NY)	Tex.	768	835	-66
	Means	**$647**	**$562**	**$86 (< $5**)**
	Medians	**$695**	**$573**	**$36 (< $5**)**

*P.P.B. as determined by the Massachusetts court before transferring the case to Oregon. **N.Y. cases only.

Associated with the airfare costs in all cases will be additional fixed and variable costs. The fixed costs (lodging, meals, etc.) will be approximately the same irrespective of the airfares. Variable costs will vary with airfares when, for example, the fares vary directly with time in the air for which counsel are billing creditors. As a practical matter, the time-based fees of counsel may swamp the transportation costs themselves.

The distance and cost indexes for average creditors are highly correlated.[49] For current purposes, this means that the conclusions drawn from the one set of data are generally supported by the findings in the other set.

A final comment about calculations involving average creditors: One might argue that some Delaware corporations that filed in the location of the principal place of business (other than Delaware) would have caused less inconvenience to the average creditor had they filed in Delaware. We found five cases in our primary set of cases that allowed us to test that possibility: *Almac's* (filing in Rhode Island), *Centennial* (filing in C.D. Cal.), *Cenvill* (filing in S.D. Fla.), *Hexcel* (filing in N.D. Cal.), and *Solo Serve* (filing in W.D. Tex.). For all the cases except *Solo Serve*, the distance-index difference score was in favor of filing at the principal place of business as opposed to the state of incorporation, Delaware (scores ranged from -0.37 to -1.08). *Solo Serve*, on the other hand, many of whose

49. The Spearman rank-order correlation coefficient relating the two measures for the Delaware cases is 0.90 ($t = 8.21$, $df = 15$, $p < .001$).

creditors were in New York, favored a Delaware filing, with a score of 1.15.[50]

3. Inconvenience to the Largest Unsecured Creditors

One might argue that estimations of inconvenience based on the locations of all the creditors in large corporate cases are unrealistic. We have not tried to estimate the probability that the average creditor is interested in traveling anywhere, or paying a lawyer to travel, to pursue the creditor's modest claim in person. The largest creditors, on the other hand, have so much at stake that they are likely to travel to the case venue wherever it is. Putting aside the possibility that counsel for very large creditors may be located in cities different from the listed address of the creditor itself, we can proceed with a distance analysis for the 20 largest unsecured creditors in our primary set of cases, using the list of such creditors that Fed. R. Bankr. P. 1007(d) requires to be filed with the Chapter 11 petition.

As shown in Table 10, the relatively small number of creditors per case created greater variability in the distance indexes, so that the range of difference scores ran from very large positive in Restaurant Enterprises, in which virtually all of the creditors were in California, to large negative, as in Memorex, a company listing its principal place of business in Texas and many of whose largest creditors were in New York. Interpretation of this table benefits in particular from a comparison of the mean and the median difference scores. Note that on the median, the placement of these cases in Delaware created virtually no inconvenience for the largest creditors.

50. The difference scores were the filing site/principal place of business distance index minus the Delaware index.

Table 10
Sixteen Delaware Cases (Primary Source), Twenty Largest Unsecured Creditors[51]—Filing and Principal Place of Business (P.P.B.) Distance Indexes and the Differences Between Them

Company	P.P.B.	Delaware Distance	P.P.B. Distance Index	Diff. Score Index
Restaurant Enterprises	Cal.	7.40	0.90	6.50
Vista Mortgage	Tex.	5.00	0.00	5.00
UDC Homes	Ariz.	5.90	2.00	3.90
Harvest	Ariz.	4.89	3.51	1.38
Acme Holdings	Ariz.	4.95	3.90	1.05
Cherokee	Cal.	4.89	4.42	0.47
Westmoreland Coal	Pa.	1.37	1.26	0.11
TWA	N.Y.	2.69	2.63	0.06
Resorts	N.J.	2.05	2.00	0.05
CCX	N.C.	2.00	2.00	0.00
Pullman	N.J.	2.15	2.15	0.00
Columbia Gas	Del.	1.25	1.25	0.00
NH Holdings	N.Y.	3.79	3.84	-0.05
Grand Union	N.J.	4.89	5.18	-0.29
TDII	Mo.	1.90	3.90	-2.00
Memorex	Tex.	1.83	5.22	-3.39
	Averages***	**3.71**	**2.86**	**0.85**
	Medians***	**3.79**	**2.63**	**0.06**

***The averages and medians exclude *Columbia Gas*, a Delaware corporation with Delaware as its P.P.B.

Table 11 completes the analysis of distance by displaying difference scores for five non-Delaware cases in which the principal place of business was different from the venue of filing. There are two points of interest in the table. First, there was a striking reversal of difference score in the *Columbia Western* case (see Tables 7 and 9): The large unsecured creditors were headquartered in the east, so that travel to Oregon was for them far less convenient than if the case had remained in Massachusetts; the average unsecured creditor of the company, on the other hand, was much closer to Oregon than to Massachusetts.

51. The number of creditors listed on the official form is sometimes more and sometimes less than 20. The *Equitable Bag* debtor claimed not to have any creditors who fit the category required for inclusion on this form.

Table 11
Five Additional Cases, Twenty Largest Unsecured Creditors—Filing and Principal Place of Business (P.P.B.) Distance Indexes and the Differences Between Them

Company (Filing State)	P.P.B.	Filing State Distance Index	P.P.B. Distance Index	Diff. Score
Gulf USA (ID)	D.C.	6.33	2.13	4.2
Jamesway (NYS)	N.J.	1.9	2.05	-0.15
Eastern (NYS)	Fla.	2.41	4	-1.59
Columbia Western (MA)	Ore.	2.44	7.11	-4.67
Liberté (NYS)	Tex.	0.38	5.9	-5.52
	Averages	**2.69**	**4.24**	**-1.55**
	Medians	**2.41**	4	**-1.59**

Second, the S.D.N.Y. cases all showed negative difference scores, reflecting concentrations of the largest unsecured creditors in the northeast, New York in particular. As shown also in Table 7, locating these cases in S.D.N.Y. did not appear to work an additional cost on the unsecured creditors. We did no analysis of secured creditors.

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III. Conclusions

The information we have presented addresses several questions about corporate venue.

A. Do Bankruptcy Judges Favor the Amendment of 28 U.S.C. § 1408?

Thirty-seven percent of the 221 responding bankruptcy judges stated that they were in favor of amending section 1408. Twenty-seven percent explicitly favored eliminating a debtor's incorporation in a state as a sufficient basis for establishing proper Chapter 11 venue (§ 1408(1)). There was less direct support for eliminating the affiliate filings provision of section 1408(2).

B. According to the Judges, How Frequent and Widespread Is the Occurrence of Inappropriate Venue Choice?

Judges from 28 districts named 55 cases that they believed should have been filed or transferred to their districts but were not. Approximately three-quarters of these cases had been filed in the district of Delaware or the Southern District of New York. Venue transfer concerns have both a local and a national aspect. About a third of the D. Del. and S.D.N.Y. cases, and almost all of the others, had been filed in a state adjacent to the state of the judge who named the case. On the national level, judges from 18 districts distributed across the country and not adjacent to D. Del. or S.D.N.Y. named at least one D. Del. or S.D.N.Y. case.

C. Is it Accurate to Conclude that a Substantial Minority of Bankruptcy Judges Favor Tightening the Requirements for Establishing Corporate Venue?

Yes, but with a qualification. While a substantial minority favored amending 28 U.S.C. § 1408, some judges also commented on the need to retain or expand judicial discretion to retain any case, or transfer any case to any district, in the interest of justice or for the convenience of the parties. Discretion exercised under 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014 could lead to cases remaining in or being transferred to districts of improper venue under an amended 28 U.S.C. § 1408. It is difficult to assess how often this happens now, or how often it would happen if the statute were amended as proposed.

D. Over the Past Decade, What Trends in the Locations of Corporate Chapter 11 Filings Can Be Discerned?

The relationship between S.D.N.Y. and D. Del. filings has changed during the past decade. In 1991, when LoPucki & Whitford published their review of venue selection, 13 of the 43 cases they studied were venued in S.D.N.Y. and one was venued in Delaware; in the past few years, S.D.N.Y. has maintained a large proportion of corporate filings, but the Delaware proportion has grown to approximately equal size. The predominance of Delaware and S.D.N.Y. is demonstrated by the list of 79 public companies emerging from bankruptcy in 1994 and 1995: D. Del. and S.D.N.Y. accounted for just under half of the cases (though D. Del. transferred two of these to other districts), while the remainder were distributed among 26 districts across the country; every circuit except the Eighth was represented by these cases. The Southern District of New York and the district of Delaware may fairly be described as magnet courts for corporate filings.

E. What Accounts for the Status of the Southern District of New York and the District of Delaware as Magnets for Corporate Filings?

Putting aside its obvious significance for financial markets generally, yet specifically in respect to corporate filers, some commentators claim that

the S.D.N.Y. bankruptcy court is attractive for two reasons. The first is a tendency to grant repeated extensions of the debtor's period of exclusive control over the plan of reorganization. The second is a willingness to award higher professional fees than are available in other districts. Information reported here supports the conclusion that S.D.N.Y. cases move much more slowly from filing to confirmation than corporate cases generally do elsewhere. We are unaware of evidence, in our work or published elsewhere, that the slow pace of the cases through S.D.N.Y. systematically disadvantaged classes of creditors or other parties in interest. We do not present an analysis of professional fees.

Delaware is attractive for different reasons. The median time from filing to confirmation for our primary set of Delaware cases was 38 days. This striking result arises from a heavy concentration of prepackaged cases in Delaware. The concentration of prepackaged cases in Delaware appears to have developed from a specialization within the local bar and case-management practices by the court that get the cases off to a fast start.

If prepackaged confirmations do not produce more post-confirmation judicial workload than traditional Chapter 11 confirmations do, then prepackaged cases are a great benefit from the perspective of judicial administration. There is also reason to believe that they are less expensive for the debtor than traditional Chapter 11 cases.

Proponents of removing the domicile/residence provision for corporations from 28 U.S.C. § 1408(1) do not allude to prepackaged bankruptcies in their rationales; they refer instead to a concept of debtor friendliness that has not been well defined or described by specific case examples.

There is general agreement, however, that the first few days of a large public filing are often critically important to the debtor and other parties in interest. Debtor friendliness might be found in the extent to which a court quickly grants debtor's motions for orders pertaining to various aspects of the company's continued operations. Research could compare the numbers and kinds of first-day motions made by debtors in large public filings and how different courts tend to rule on them. This research would give a more objective foundation to the notion of debtor friendliness than we have been able to find so far in published commentaries.

F. How Much Are Creditors Inconvenienced When the Debtor Files Away from its Principal Place of Business?

The creditors of large publicly held companies may be widespread nationally and even internationally. Proponents of changing 28 U.S.C. § 1408 argue that corporate debtors will file in some locations in order to increase the costs creditors must bear by traveling to the filing venue. They argue further that debtors should always file where they have some physical presence—for example, the principal place of business. Under these conditions, the argument continues, creditors will on average be less inconvenienced than if the debtor files where it has no physical presence—in particular, if it files in Delaware, when the only nexus is Delaware incorporation.

Delaware provided the largest number of examples of debtors filing away from their stated principal places of business, approximately 20. The Southern District of New York provided four. We concluded that the average creditor (defined by the indexes we developed for this purpose) was usually inconvenienced by a Delaware filing in relation to a (hypothetical) filing at the principal place of business. The inconvenience associated with filing in S.D.N.Y. as opposed to the principal place of business, was smaller. For both districts, inconvenience to the 20 largest unsecured creditors was often minimal or zero.

The indexes compress large amounts of information about the locations of creditors into a single number; each case needs to be evaluated in more detail to gain a clear picture about why the average creditor will be inconvenienced by a filing in D. Del. or S.D.N.Y. instead of the location of the debtor's principal place of business. The cost index included only airfare. Variable costs associated with time-based attorney fees may be a much larger component of the cost associated with traveling away from the creditor's home district.

G. Could a National Panel of Judges Assign Venue to Very Large or Complex Chapter 11 Cases?

There has been some discussion of creating a national panel of judges, perhaps modeled roughly after the Judicial Panel on Multidistrict Litigation, that would have the responsibility of deciding the venue of very large or complex Chapter 11 cases. The current study suggested one point

that is relevant to the operation of such a panel: from the debtor's perspective, it is essential that various motions be granted quickly after filing, in order for the debtor to support its commercial posture and sustain a reasonable likelihood of confirming its proposed plan of reorganization. The impact of a panel's meeting to assign venue, after the petition has been filed but before "first day" motions are heard, appears to work against these characteristics of effective reorganization practice.

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Appendix

(Memorandum from Gordon Bermant and Gregory A. Mahin to the Long-Range Planning Subcommittee of the Committee on the Administration of the Bankruptcy System, May 23, 1996.)

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SUBJECT: Venue Choice and Forum Shopping in Chapter 11 Cases: Preliminary Report

BACKGROUND

Some judges and commentators have expressed concern about the current authority for, and practice of, setting venue in bankruptcy cases and proceedings. Thus the National Bankruptcy Review Commission has made venue a topic on its agenda. The American Bankruptcy Institute has published a symposium under the (conclusory) title of "The Biased Business of Venue Shopping." And well-known bankruptcy scholars are speaking and writing on apparent problems and solutions.

Your Subcommittee asked the Federal Judicial Center to prepare a report that lays out the issues and arguments, pro and con, with respect to changing the bankruptcy venue statutes. We will review available empirical information, the pertinent statutory and regulatory language and history, and the major cases, emphasizing cases in Chapter 11 and related proceedings. We will also address a question of special interest to the Committee, which is how venue choices in very large Chapter 11 cases affect the Committee's efforts to rationalize national judicial workloads

and judgeship allocations among the districts. We will consider in detail Subcommittee recommendation III(A)(2)(c) of its 1993 Final Report, which called for amending Title 28 to create a "multi-district" panel to assign venue in "mega" Chapter 11 cases.

This memorandum introduces the issues and describes how we intend to proceed to the drafting of a final report, which we will submit to the Committee at its next meeting.

THE ISSUES AND ARGUMENTS IN A NUTSHELL

Common Ground: All sides in the debate agree that the determination of proper venue has two major dimensions: fair case administration and convenience of the parties.[1] There is general agreement that the sources of discontent about venue choice in consumer cases, especially in Chapter 13, are different from those in Chapter 11. Within the Chapter 11 arena, problems arise only when the economics of the case may warrant the debtor's filing a petition in an alleged "odd" or "unnatural" location. Many of the examples around which argument swirls are so-called "mega" cases, in which the debtor's scope of operations offers it several arguably appropriate venue sites. Finally, there are few if any allegations that the current practices of lawyers and judges violate statutes or rule. The issues surround lawyers' use of existing statutory authority to file in locations especially favorable to their clients, and bankruptcy judges' rulings, within their discretion, that encourage filing and ensure retention of large, high-profile cases in their districts.

Claims and Responses: The table below lists the main set of claims against lawyers and judges in respect to their gaining and maintaining, respectively, venue in Chapter 11 cases. For each claim there is a response that denies either the validity or the force of the claim.

1. The leading case in establishing the factors to consider on a motion to *transfer* venue is *Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.)*, 596 F.2d 1239, 1247 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). The factors are proximity of creditors of every kind to the court, the location of the debtor's assets, the proximity of the debtor to the court, the proximity of witnesses necessary to the administration of the estate, and the economic administration of the estate.

Claim: Venue provisions should be changed because:	Response
Lawyers use the affiliate provision of section 1408 as a "venue hook" to bring an entire entity into a "pro-debtor" venue.	Section 1408(2) permits aggregation of administration of cases of related entities, enhancing efficiency and expeditious handling of the case.
Lawyers use the domicile or residence provision of section 1408 to file in the state of incorporation even though the entity has no other connection to that venue.	Intentionally manipulating the state of incorporation merely in order to file bankruptcy there is highly unlikely for several reasons. In any case, filing in the state of incorporation has precedent in general civil venue statutes. Filing in state of incorporation follows the sound practice of seeking commercial predictability.
Lawyers use various venue provisions to file in a location that will seriously inconvenience their creditors.	Evidence of this abuse arose in connection with single-asset real estate bankruptcies and led to development of bad-faith filing case law to control abuse; if abuse is sufficiently serious, a remedy already exists.
Lawyers use various venue provisions to file in a location where one or more judges allow them to charge "big city" fees against the estate.	Lawyers will not select venue for this reason alone; it is the quality of their performance that determines their fees; the statute explicitly contemplates that fees for bankruptcy should not be less than those for other areas of practice. 11 U.S.C. § 330(a)(3)(E).
Judges in some districts routinely grant multiple extensions of the exclusivity period.	Extensions have been granted in order to create a "meaningful opportunity to build consensus, to motivate the parties to negotiate, and to avoid potentially expensive and disruptive competing plans." (ABI Symposium at 69.) Furthermore, as of the Reform Act of 1994, orders granting exclusivity extension are immediately appealable. 28 U.S.C. § 158(a)(2).
Judges in some districts permit debtors working with a few creditors to file prepackaged bankruptcies, thus thwarting efforts to transfer venue and favoring some creditors at the expense of others.	Such prepackaged bankruptcies facilitate confirmation and rapid rehabilitation of the debtor, thus saving time and costs.

Claim: Venue provisions should be changed because:	Response
Judges in some districts issue various orders (e.g., cash collateral, relief from stay, sale of assets) that are unfairly "pro-debtor."	This criticism may reflect a "pro-creditor" bias or a complaint by lawyers whose local judges' practices are unfairly "pro-creditor," or "anti-lawyer" in regard to fees.
Judges issue "pro-debtor" rulings merely in order to attract and keep interesting Chapter 11 cases and/or to generate business for the local bar.	There is no evidence that this is true. To the extent that it is, changing venue statutes seems to be a clumsy way to solve the problem.

Factual Inadequacy and Complexity: The organized factual basis supporting assertions about abuse of the venue provisions is unsatisfactory. It consists largely of unattributed reports about lawyers' admissions of strategic intent in venue selection, and a list of 43 very large cases, of which a proportion were filed in districts where the debtor had little if any physical presence.[2] The article presenting this information is more equivocal about the strengths of its findings than it is about its policy recommendations that depend on the findings' validity. The data in the article are widely cited in favor of the proposition that there are serious abuses of forum shopping and case retention, even though the article's authors qualify the conclusiveness of their information and recommend "accommodation" to forum shopping rather than elimination of it.[3]

It is unsurprising that the factual basis for supporting a claim of abuse is very difficult to develop, for three reasons. The first reason is that the decisions of judges and lawyers that are in question are readily susceptible to more than one interpretation depending on different assumptions

2. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 Wisc. L. Rev. 11 (1991).

3. *Id*. at 44–50. During an ABI symposium on the subject, Professor Whitford engaged in the following discussion with the symposium moderator, Ms. Knowles:
"Ms. Knowles: You speculated in your study that courts decide cases certain ways in order to attract certain desirable cases, and you allude to that concept here. Do you have any evidence of that or has history— Mr. Whitford: No. Ms. Knowles: —proved out in the last five years? Mr. Whitford: I throw it open for discussion. I've raised the issues. The decisions are possibly there. Judge Cole denies it." *Official Proceedings of the ABI National Symposium on the Biased Business of Venue Shopping* (1995). At transcript page 48, lines 11–23.

about their intent that cannot reasonably be distinguished. For example, does a debtor's lawyer select a venue in order to "manipulate" the case outcome or in order to "predict" it? Does a judge grant an extension of the exclusivity period in order to seek intellectual challenge and garner credit for managing large cases or in order to facilitate confirmation of a plan that will optimally benefit all the parties? What facts could be collected to distinguish between these alternatives?

The second reason is that many very large Chapter 11 entities are national or international in the scope of their business operations, so that deciding natural or most appropriate venue in regard to minimizing the inconvenience to unsecured creditors becomes an impractical, if not impossible, task. Yet it is such inconvenience that is one of the prongs of venue analysis that courts are to undertake upon motion for transfer.

The third reason is that the argument over venue appears at bottom to be an argument about the purposes of the Bankruptcy Code and the appropriate balance to be struck between the interests of debtors, creditors, the debtor's employees, and others whose interests may be vitally affected by the rehabilitation or liquidation of the debtor in Chapter 11. Proponents for substantial restrictions on venue choice argue that debtors' lawyers use current provisions to enter the courtrooms of judges who are substantially "pro-debtor" or to avoid "pro-creditor" judges. As noted above, two examples frequently used are extensions of the exclusivity period and allowance of "big city" fees. But judges will most likely continue their current practices on these matters no matter what the venue statues provide. Statutory reform, if it be necessary, might more effectively be aimed directly at the control of these practices rather than indirectly at them through control of access to the forum considered by some to be controversial.

Despite these problems, there are several approaches to collecting information that we believe can contribute at least modestly to clarifying the issues and supporting policy decisions. The first approach is to summarize all the existing case law, to determine how the published cases treat questions of venue transfer and related matters. We have begun that task and intend to report fully on it in time for the Committee's next meeting. The second approach is to access the electronic dockets of a selected number of courts in an attempt to discern the amount of activity regarding venue motions and orders that occurs but does not rise to visi-

bility through publication. There are a number of technical difficulties associated with this kind of inquiry, but we are going to pursue it as far as we can. The third approach is to coordinate our empirical efforts with others outside of the judiciary with similar interests. We have learned that Professor LoPucki, who co-authored the most complete study to date, has extended this work in collaboration with Professor Eisenberg of Cornell Law School. They have agreed to share information with us for the purpose of our report to the Committee. The fourth approach is to make an independent analysis of the relationships among venue choice and other characteristics of large corporations that have filed for Chapter 11 protection since Professors LoPucki and Whitford published their earlier study. We have begun this inquiry and will pursue it so long as it seems to be generating information useful enough to warrant the labor involved.

Statute and Rule Ambiguity: The three primary authorities under which bankruptcy venue questions should be resolved are 28 U.S.C. §§ 1408 and 1412, and Federal Rule of Bankruptcy Procedure 1014. A strong argument can be made that these authorities are seriously incomplete and imprecise, and that they should be amended irrespective of any other argument or conclusion about venue choice and forum shopping in Chapter 11 cases. Here we present a brief form of that argument.

Section 1408 of title 28 is the general bankruptcy case venue statute. The section provides five alternative grounds for laying proper venue: domicile, residence, principal place of business in the United States, principal location of assets in the United States, and the district where a case concerning the debtor's affiliate, general partner, or partnership is pending.

Section 1412 of title 28, entitled Change of Venue, reads in full as follows:

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

We note that section 1412 is silent on two key points and apparently permissive on a third:

- it makes no distinction between cases of proper and improper venue;

- it provides no explicit guidance regarding dismissal or retention of cases filed with improper venue; and
- it does not require that a case may be transferred only to a district where the case could have been brought originally.

The silence and permissiveness of section 1412 on these key points creates uncertainty that is not created by the language of the comparable general civil venue and venue transfer statutes, as described in the following paragraph.

The predicates for proper venue in various civil case types are established in a series of sections running from 28 U.S.C. § 1391 to § 1403. Transfer of a properly venued case is covered by section 1404; of particular relevance is section 1404(a): "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Transfer of an improperly venued case is covered by section 1406; of particular relevance in section 1406(a): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

These civil statutes thus provide explicit guidance and limits to judicial action in response to motions for change of venue. For bankruptcy cases, on the other hand, the combination of section 1408 and section 1412 provide less certain and incomplete direction.

The gap is filled, and perhaps over-filled, by Bankruptcy Rule 1014 and the associated 1987 advisory committee note. Rule 1014(a) and the note are presented in the footnote.[4] The rule provides that a case filed in an

4 . Fed. R. Bankr. P. 1014(1)(2) and the 1987 committee note read in part as follows:

> DISMISSAL AND CHANGE OF VENUE
>
> (a) Dismissal and Transfer of Cases.
>
> (1) *Cases Filed in Proper District.* If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice . . . , the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.
>
> (2) *Cases Filed in Improper District.* If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice . . . , the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.
>
> Advisory Committee Note (1987)

improper district may either be transferred to any court (not necessarily where venue would have been proper in the first instance) or dismissed (despite the lack of this alternative in section 1412). The note states that the authority to dismiss is based on 28 U.S.C. § 1406, although there is no evidence of congressional intent that this section is (or is not) applicable to bankruptcy cases and proceedings. Finally, reading the statutes and rule together allows the conclusion that a properly venued case may be transferred to a district in which it would have been improperly venued to begin with; also, a district must accept a case on transfer that it could not have retained in the face of a motion to transfer. This does not appear to be a coherent scheme for laying and transferring venue.

It is not surprising that there is marked disagreement among courts over the meaning of section 1412, and whether Rule 1014 impermissibly exceeds the statutory language. Our review of the cases, which we will present to the Committee at its next meeting, will review these disagreements fully. Irrespective of one's own interpretation of the statute and rule taken together, it is clear that amendatory language could help to resolve conflict in this area of litigation. As we hope to have made clear, this is a problem with a solution that is largely independent of the problems, discussed earlier, of venue choice and forum shopping, which find their statutory home in the language of 28 U.S.C. § 1408.

> Both paragraphs 1 and 2 of subdivision (a) are amended to conform to the standard for transfer in 28 U.S.C. § 1412. Formerly, 28 U.S.C. § 1477 authorized a court either to transfer or retain a case which had been commenced in a district where venue was improper. However, 28 U.S.C. § 1412, which supersedes 28 U.S.C. § 1477, authorizes only the transfer of a case. The rule is amended to delete the reference to retention of a case commenced in the improper district. Dismissal of a case commenced in the improper district as authorized by 28 U.S.C. § 1406 has been added to the rule. If a timely motion to dismiss for improper venue is not filed, the right to object to venue is waived.

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