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ARTICLES

VENUE CHOICE AND FORUM SHOPPING IN THE BANKRUPTCY REORGANIZATION OF LARGE, PUBLICLY HELD COMPANIES*

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An empirical study of the bankruptcy reorganization of the forty-three largest, publicly held companies to file and complete bankruptcy proceedings from 1979 to 1988 revealed extensive forum shopping. In virtually all cases examined by the authors, the law afforded a choice of venue. In a substantial number, the petitioning company engaged in "forum shopping" by choosing a venue where the company had little or no physical presence. Most often the venue was New York City. In their venue choices, petitioners usually sought to avoid venues that appeared hostile to extensions of exclusivity or that aggressively regulated attorneys' fees.

The authors argue that new venue choice policies are needed to deal with the problems of forum shopping. At present, two alternative policy responses exist: eliminate forum shopping or accommodate it. The authors recommend the latter option, which may be implemented by tightening statutory standards and narrowing judicial discretion. This approach could effectively deal with the most evident current problem, the routine extension of exclusivity, as well as with the potential problem of excessive attorneys' fees. The primary benefit of this approach would be competition among alternative fora for megabankruptcies, resulting in improved efficiency of the reorganization system.

The authors also discuss additional types of forum shopping—fragmentation and overcentralization. The Bankruptcy Code deals with business entities, while the intent behind reorganization is to address enterprises. An enterprise reorganization is vulnerable to legal strategies that fragment the process among several fora. Alternatively, a single entity may use the reorganization of one of its enterprises as a means to centralize reorganization of its other enterprises, to the detriment of creditors. The most obvious solution, the authors argue, is to shift the focus of the approach of the venue statutes from entities to enterprises.

While conducting an empirical study of the bankruptcy reorganizations of the forty-three largest, publicly held companies to file and complete their cases from 1979 to 1988,[1] we unexpectedly discovered extensive forum shopping.[2] We at first assumed that there was some

1. This project was designed to discover what is happening in the so-called "megabankruptcies." We studied all cases filed after October 1, 1979 (the effective date of the new Bankruptcy Code), in which a plan was confirmed before March 31, 1988, if the debtor reported at least $100 million in assets in its petition and had at least one issue of debt or equity security registered with the Securities and Exchange Commission. A primary area of inquiry in this research has been the process of plan negotiation and confirmation, with special attention paid to the fate of junior creditor and shareholder classes. Our findings in this regard are reported in LoPucki & Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicy Held Companies*, 139 U. PA. L. REV. 125 (1990). A second important area of inquiry has been the role of the company's management in the reorganization proceedings, with particular attention paid to their loyalites to competing interests. An article on this subject will be completed shortly.

The "cases" studied are reorganization cases in the bankruptcy courts, not merely the reported opinions in those cases. These cases were of sufficient size that each was likely to result in numerous published opinions by bankruptcy and appellate courts. For example, the Manville reorganization case resulted in nearly a hundred published opinions. References in this Article to a "case" are to the entire case; references to published opinions are accompanied by citations.

2. Although the existence of the type of forum shopping reported here is well known to most participants in these types of cases, including bankruptcy judges, there is no reference to forum shopping among bankruptcy districts in either the scholarly work on bankruptcy or the legislative history of the Bankruptcy Code. Nor have there been empirical studies prior

good reason why each of the forty-three cases proceeded in the district where it did. When we began to have doubts, we broadened our investigation to include the potential for and the extent of forum shopping in the cases studied. We found that in virtually all cases, the law afforded a choice of venue and the petitioner consciously chose the particular district in which the case proceeded. In a substantial minority of cases, the district chosen was one in which the company had little or no physical presence.

The power to choose the forum for a large bankruptcy reorganization is important because it determines where hundreds or thousands of parties will go to court and may be determinative of the outcomes of cases. Although bankruptcy cases are governed by federal law that theoretically mandates the same outcome regardless of the district in which the case happens to be brought, earlier studies of bankruptcy administration have established the existence of substantial, outcome determinative differences in the manner in which the law is applied from district to district.[3] If a forum is chosen strategically to exploit those differences, the choice can have an important effect on the distribution of the losses emanating from a bankruptcy reorganization. Moreover, partly because each of these cases generates substantial publicity for participants and millions of dollars in professional fees, much if not most of which is paid to professionals based in the forum city, it is probable that some bankruptcy courts compete for these cases. There is some reason to believe that some courts do so by adopting legal positions and practices that favor the parties who choose the forum in bankruptcy cases. Hence, the prevalence of forum shopping may be influencing the content of bankruptcy law.

Our sources of information for the empirical portion of this study include court documents from the cases studied,[4] other publicly avail-

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to this one about forum shopping in any kind of bankruptcy case. The term "forum shopping" is sometimes used to refer to the choice between bankruptcy and nonbankruptcy courts. *See, e.g.*, Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987). We do not discuss this type of forum shopping here; our concern is with the choice of district.

3. *See* Gross, *Perception and Reality: American Bankruptcy Institute Survey on Selected Provisions of the 1984 Amendments to the Bankruptcy Code*, AM. BANK. INST. (1987); T. SULLIVAN, E. WARREN & J. WESTBROOK, PERSISTENCE OF COMMUNITY: LOCAL VARIATIONS IN A NATIONAL BANKRUPTCY SYSTEM (forthcoming 1991); T. SULLIVAN, E. WARREN & J. WESTBROOK, AS WE FORGIVE OUR DEBTORS (1989); D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS AND REFORM (1969); Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L. REV. 85 (1989); LoPucki, *Encouraging Repayment Under Chapter 13 of the Bankruptcy Code*, 18 HARV. J. ON LEGIS. 347, 349 (1981) ("Depending on the district in which he filed, by the fall of 1980 the same debtor might have obtained Chapter 13 relief by offering his unsecured creditors no payments or he might have been denied relief if he offered them anything less than 70 percent of their unsecured claims").

4. For each case we obtained the confirmation order, the confirmed plan of reorganization, and the disclosure statement for that plan. The last of these typically provided much information about the debtor corporation.

able information such as SEC filings concerning the debtors, newspaper and journal articles about the cases, and more than 120 personal interviews with lawyers who played key roles in the forty-three cases studied.[5]

"Forum shopping" is commonly defined as attempting to have one's case heard in the forum where it has the greatest chance of success.[6] This definition is difficult to employ in empirical research because it looks to the subjective intent of the litigant. Because forum shopping is considered an ethically questionable activity,[7] participants are likely to conceal their motives in selecting a venue, making empirical findings problematic. We have chosen instead to report on phenomena that can be more objectively defined.[8] 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,[9] to refer to the ultimate choice of a venue where the company has little or no physical presence.[10]

Policymakers at least occasionally intend to permit venue choice or even forum shopping.[11] However, although the statute governing

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5. In each case we attempted to interview the principal lawyers for the debtor, the creditors' committee and the equity committee (if an equity committee was appointed). In all but a few instances, we were able to obtain the requested interviews. In addition, we interviewed other lawyers who played key roles in the negotiations over the reorganization plan. Venue was only one matter discussed in these interviews. Most of each interview was devoted to the role of management in the reorganization proceeding and the leverages used or sought to be used by various parties in negotiations regarding the reorganization plan.

6. *See, e.g.*, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (forum shopping is an "attempt [by a litigant] to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict" (citing BLACK'S LAW DICTIONARY 590 (5th ed. 1979)); McGarity, *Multi-Party Forum Shopping For Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 304 (1980) ("attempt to secure judicial review in the circuit in which his or her client will have the greatest chance for success").

7. *See* Note, *supra* note 6, at 1690-91 (considering the ethics of forum shopping).

8. In another empirical study of forum shopping, the researcher chose to define it as "whenever an appeal is taken to a court of appeals in a circuit other than where the unfair labor practice occurred, or where the aggrieved party has his principal place of business." Comment, *Forum Shopping in the Review of NLRB Orders*, 28 U. CHI. L. REV. 552, 552 n.3 (1961).

9. *See, e.g.*, Farah Mfg. Co. v. NLRB, 481 F.2d 1143, 1145 (8th Cir. 1983) (referring to forum shopping as "a practice to be discouraged"); S.L. Indus. Inc. v. NLRB, 673 F.2d 1 (1st Cir. 1982) ("Were this enough [to create venue] large corporations would be free to roam the entire country in search of venues which might provide them with what, in their opinion, would be a more favorable hearing"); *In re* Maruki USA Co., 97 Bankr. 166, 170 (Bankr. S.D.N.Y. 1988) (reference to "flagrant forum shopping"); *In re* Dahlquist (First National Bank in Sioux City, Iowa), 34 Bankr. 476, 487 (Bankr. D.S.D. 1983) ("This result discourages forum shopping, which is not favored in the law").

10. Because 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 to a legally permissible venue.

11. *See, e.g.*, Lewis v. Madison County Bd. of Educ., 678 F. Supp. 1550, 1551-52

venue in bankruptcy clearly permits venue choice,[12] there is nothing in the legislative history of the Bankruptcy Code or the literature dealing with the venue of bankruptcy cases to support the view that Congress intended to sanction the choice of venue for strategic reasons in bankruptcy cases.[13] Indeed, nearly all of the lawyers we interviewed were reluctant to admit they had chosen the courts in which their cases proceeded. Choosing venues in order to affect case outcomes was considered to be of questionable propriety. Though none of the attorneys participating in venue choice decisions admitted that their decisions were intended to affect case outcomes, in several cases their opponents thought otherwise.

In Part I of this Article, we describe both the legal standards governing venue choice in bankruptcy reorganizations of large, publicly held companies and the manner in which these standards were employed in the cases studied. We conclude that the rules for initial placement of cases afforded most companies a broad choice of venues. Moreover, cases remained in the districts in which debtors initially filed them, because the mechanism for transferring cases to more appropriate venues did not work. In Part II, we present data about the physical locations of the companies studied and relate it to the choice of venue in their reorganization cases. From this relationship we derive two principal conclusions: first, in a substantial minority of cases, the venue chosen was a district in which the debtor did not have a meaningful physical presence, and second, when forum shopping occurred, the forum most commonly selected was New York City. In Part III we consider both the problems and benefits generated by forum shopping and venue choice in cases of this kind. We identify two policy alternatives for preventing the strategic use of venue choice to determine case outcomes: either (1) eliminating venue choice, or (2) allowing venue choice, including forum shopping, to continue while directing reform efforts at the lack of uniformity in the application of bankruptcy

(M.D. Ala. 1988) ("An examination of the legislative history behind this venue provision [for title VII cases] has led some federal courts to conclude that the forum shopping alternatives were deemed necessary to support Congress' desire to afford citizens full and easy redress of civil rights grievances"); Ashworth v. Eastern Airlines, Inc., 9 Empl. Prac. Dec. ¶ 9964 (E.D. Va. 1974) ("This special venue statute [for title VII cases] may, indeed, encourage forum shopping, but that is apparently what Congress intended").

12. 28 U.S.C. § 1408 (1988). This statute is discussed in detail at *infra* Part I of this Article.

13. Among the articles that discuss venue in bankruptcy proceedings are Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings*, 62 AM. BANKR. L.J. 37 (1988); Zellis, *Recent Developments in Bankruptcy Law: Jurisdiction, Venue and Appellate Process*, 1 BANKR. DEV. J. 210, 219-26 (1984); Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue and Procedure*, 11 ST. MARY'S L.J. 251, 295-304 (1979); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 J. NAT'L ASS'N REF. IN BANKR. 36, 73 (1962).

law from district to district. We endorse and provide support for the latter alternative. In Part IV we discuss a different and potentially more intractable problem concerning venue choice—where the reorganization of a single enterprise is fragmented among several districts, or where the reorganizations of separate enterprises are overcentralized in a single district. We illustrate the potential uses of these kinds of venue choice strategies to strengthen the bargaining position of management and suggest measures to curb the use of these strategies.

I. The Potential for Forum Shopping in Large Bankruptcy Reorganization Cases

A. Permissible Venues

The statute governing venue in bankruptcy cases provides that a chapter 11 case may be filed in a district:

> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 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.[14]

Considering that a corporation's "residence" or "domicile" for the purpose of this statute is arguably in the jurisdiction where it is incorporated,[15] and that case precedent establishes that venue may be conferred upon a district by consent even though none of the statutory grounds for venue exist,[16] the venue of a large reorganization case in a particular district may be "proper" on any of five factual bases: (1) the debtor is incorporated in the district; (2) the debtor's principal assets in the United States are in the district; (3) the debtor's principal place of business in the United States is in the district; (4) a case concerning an affiliate of the debtor is pending in the district; or (5) objections to venue have been waived by express agreement or by conduct. We will next describe how each of these bases can be employed in the cases of

14. 28 U.S.C. § 1408 (1988).
15. *See* 1 Collier On Bankruptcy ¶ 3.02(1)(b)(ii) (15th ed. 1990).
16. Hunt v. Bankers Trust Co., 799 F.2d 1060 (5th Cir. 1986).

large, publicly held companies, using examples from our study. We will emphasize the extent to which there is an opportunity to expand the range of venue choice by manipulating the events that serve as the criteria for venue.

1. STATE OF INCORPORATION

There are cases holding that the state of incorporation is the "domicile" of a corporation for the purpose of determining proper venue for the corporation's bankruptcy proceeding.[17] In our study this basis for venue provided the majority of the companies (twenty-five of forty-three) with the option of filing in Delaware.[18] In fact, however, only one case was filed in Delaware. The debtor in that proceeding, Phoenix Steel, had both important assets and its corporate headquarters in Delaware and had no need to rely on domicile as the basis for venue in Delaware.

State of incorporation can be changed without significantly altering a company's business operations. Theoretically, a debtor wishing to expand its venue options might change its place of incorporation. But we found no evidence that any of the companies studied did so in connection with a venue strategy.[19] We consider use of reincorporation as a venue strategy unlikely, both because shareholder approval is required to change the state of incorporation and because there are easier ways to create or enhance venue choice opportunities.

2. PRINCIPAL PLACE OF BUSINESS

Venue for a bankruptcy case is proper at the debtor's "principal place of business." In the context of diversity jurisdiction, it is settled that a debtor can have only one such place at a given time.[20] There

17. *See, e.g., In re* Ocean Properties of Delaware, Inc., 95 Bankr. 304, 305 (Bankr. D. Del. 1988); *In re* Enjay Holding Co., 18 F. Supp. 445 (S.D.N.Y. 1937); 1 COLLIER ON BANKRUPTCY ¶ 3.02(1)(b)(ii) (15th ed. 1990).

18. As is discussed at *infra* Part IV of this Article, the "debtors" in these cases typically were corporate groups. In several cases, members of the group were incorporated in different jurisdictions. For the purpose of determining the state of incorporation of such a debtor, we considered the "debtor" to be the entity serving as the primary issuer of publicly held securities.

19. The Manville Corporation changed its place of incorporation from New York to Delaware about a year before filing its reorganization case. The change did not support its ultimate choice of New York as a forum in which to reorganize, and hence was obviously not part of a venue strategy.

20. *See, e.g.*, Illinois Cent. Gulf R.R. v. Pargas, Inc., 706 F.2d 633, 638 (5th Cir. 1983) ("A company can do business in many states but it only has one principal place of business").

are no clear statements of this principle in bankruptcy venue cases, but there is no reason to believe that it does not apply.[21]

When companies have their headquarters or executive offices in one district and the bulk of their operations in another, the case law generally approves venue at the location of the headquarters, as the principal place of business.[22] Headquarters commonly served as a basis for venue in the cases studied. Thirty-six of the forty-three companies (eighty-four percent) reorganized in the district in which the company had its headquarters at the time of filing. In nine of those thirty-six (twenty-one percent of the forty-three cases studied) the company had virtually no property or operations other than its headquarters in the district where it reorganized.[23]

Allowing the location of corporate headquarters, alone or in conjunction with other factors, to determine venue provides the potential for forum shopping by large, publicly held companies. Judging from the cases in our study, it appears that the corporate headquarters of many, if not most, such companies are easily moved from one city to

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21. In bankruptcy cases the courts consistently speak of "the" principal place of business, implying that there can be but one. *See, e.g., In re* Dock of the Bay, Inc., 24 Bankr. 811, 814 (Bankr. E.D.N.Y. 1982).

22. *See, e.g., In re* Holiday Towers, 18 Bankr. 183 (Bankr. S.D. Ohio, 1982) (venue proper at the site of the general executive offices); *In re* Bell Tower Assoc., 86 Bankr. 795, 800 (Bankr. S.D.N.Y. 1988) (venue proper at the site where debtor made overall management decisions); *but see In re* Lakeside Utilities, 18 Bankr. 115 (Bankr. D. Neb. 1982) (location of the debtor's "executive offices" which were the "nerve center" of the company was not the debtor's principal place of business); *In re* Dock of the Bay, Inc., 24 Bankr. 811, 814-15 (Bankr. E.D.N.Y. 1982) (that president and sole shareholder directs and controls the company and provides its financing from the district is not enough to render district the company's principal place of business). Decisions under 28 U.S.C. § 1332 governing diversity jurisdiction provide an additional source of authority regarding the location of a debtor's principal place of business for purposes of 28 U.S.C. § 1408(1)(1988). In 1958, Congress amended the statute governing diversity jurisdiction in the United States district court to include the term "principal place of business," explaining that "the new standard was to be applied in accordance with the same term in the Bankruptcy Act." S. REP. NO. 1830, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3099, 3102. Because diversity issues implicate policies regarding federalism that are of limited or no relevance to bankruptcy, authority under the diversity statute need not necessarily be applied in interpreting the same phrase in the bankruptcy statute. Nonetheless, authority under the diversity statute is more plentiful, generally from higher courts, and of more recent vintage. *See, e.g.*, J.A. Olson Co. v. City of Winona, 818 F.2d 401, 409 (5th Cir. 1987) (adopting total "activity test" in the context of diversity jurisdiction); Topp v. Compair Inc., 814 F.2d 830, 834 (1st Cir. 1987) (applying "nerve center test" in the context of diversity jurisdiction, but stating that a subsidiary is considered to have its own principal place of business); Kelly v. United States Steel Corp., 284 F.2d 850, 854 (3d Cir. 1960) (adopting "place of activity" test in the context of diversity jurisdiction); *In re* Air Crash Disaster Near Chicago, 644 F.2d 594, 620 (7th Cir. 1981) (adopting "nerve center test" in the context of diversity jurisdiction); Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (adopting "nerve center test" in the context of diversity jurisdiction).

23. The companies were Anglo Energy, Combustion Equipment, Lionel, Nucorp, Penn-Dixie, Revere Copper & Brass, Salant, Saxon Industries and Seatrain Lines.

another.[24] For example, in a period of five years before AM International filed its petition, it moved its headquarters from Chicago to Cleveland to Los Angeles and back to Chicago.[25] Similarly, Evans Products moved its headquarters from Portland, Oregon to Miami, Florida about a year before filing its petition in the Miami bankruptcy court.[26] The chief executive officer and major shareholder lost control of the company during the bankruptcy proceedings. Upon confirmation of the plan in 1986, the emerging company, renamed Grossman's Inc., moved its headquarters to Braintree, Massachusetts, where the new chief executive lived.[27]

The fact that headquarters were recently moved to the district does not prevent the headquarters from serving as the basis for venue in the district, provided that they have been in the district for a longer portion of the preceding 180 days than in any other district—essentially, for more than ninety days.[28] At least five of the companies in our study moved their headquarters to the district in which they filed only shortly before filing.[29] Though we cannot establish the motive for any of these moves with certainty, it is entirely plausible that some moves were undertaken at least partly in order to establish venue in a desired location for the forthcoming bankruptcy filing.

3. PRINCIPAL ASSETS

The "principal assets" of a business debtor typically are the assets employed in the operation of the debtor's business.[30] A large, publicly

24. At least 15 of the 43 companies studied (35%) moved their headquarters at or about the time of the reorganization case. A few of these moves occurred in contemplation of the filing; the large majority were by the emerging company, which had been sold to outside investors or greatly reduced in size by the reorganization. See Appendix to this Article. A recent study found that only 62 of the Fortune 500 companies (12%) moved their headquarters during the 10 year period ending in 1985. Eisenberg and Friedland, How Big the Head Office: The Organizational and Urban Sources of Variation in the Size of Corporate Headquarters Complex, (manuscript submitted for publication); *see generally* Eisenberg and Friedland, *Corporate Headquarters Relocation*, 15 REAL ESTATE ISSUES 38 (1990).

25. *AM International Calls Moves—This Time Chicago*, Wall St. J., June 19, 1981, at 9, col. 3; Wayne, *AM International's Struggle*, N.Y. Times, June 20, 1981 at 29, col. 3.

26. *See* Chase, *Evans Products Says 3 Executives Quit, Citing Victor Posner's Role as Chairman*, Wall St. J., Feb. 13, 1984, at 7, col. 1. Evans Products filed its bankruptcy petition on March 11, 1985.

27. Grossman's Inc., SEC Form 10-K for the year ended December 31, 1986, at cover.

28. 28 U.S.C. § 1408(1) (1988). *See, e.g., In re* Baltimore Food Sys., 71 Bankr. 795 (Bankr. D.S.C. 1986); *In re* Commonwealth Oil Ref., 596 F.2d 1239 (5th Cir. 1979).

29. Baldwin-United (Cincinnati to New York), Continental Airlines (Los Angeles to Houston), Dreco Energy (Canada to Houston), Evans Products (Portland to Miami) and Wickes Companies (San Diego to Los Angeles).

30. However, the provision has also been used to find venue at the site of a passive asset. *See In re* HME Records, 62 Bankr. 611, 613 (Bankr. M.D. Tenn. 1986) (music tapes in storage).

held company is likely to have substantial assets in many districts. There is no case discussing whether a corporation can have its "principal assets" located in more than one district. We suspect, however, that most participants in the bankruptcy process presume that "principal" assets in a district means more assets in that district than in any other, with the implication that only one district can qualify as the place where a company's principal assets are located.[31]

In the cases studied, the location of the principal assets of the company did not seem to be an important determinant of the choice of venue. Many of the companies filed in the districts where their principal assets were located, but their headquarters were also located there and therefore provided an alternative basis for venue. With one possible exception,[32] none of the seven companies that reorganized in a district away from its headquarters chose a district that was even arguably the district where its principal assets were located.

The place of principal assets criterion for establishing venue nevertheless creates some potential to expand venue choice by manipulating events. If, as is commonly the case, a company intends to file bankruptcy and to sell or abandon assets, it can dispose of the assets either before or after the filing, depending on whether it wishes to enhance or diminish the site of the assets as a venue option. For example, one of the companies studied, KDT, was a Massachusetts-based retailer that had one of its two distribution centers in the Manhattan division of the Southern District of New York, where the company chose to file its reorganization petition. Apparently on the basis of the location of this distribution center, the debtor asserted that New York was an appropriate venue.[33] A short time after filing, and after it was clear that there would not be a challenge to venue, the company closed the New York distribution center. Had KDT closed the center before filing, it would have eliminated its only arguable basis for the appropriateness of the venue it had chosen.[34] The reorganization of Seatrain Lines

31. There is support for this result in the language of the venue statute itself. The statute refers to "the district in which the . . . principal assets in the United States . . . have been located . . . ." Use of the word "the" preceding "district" implies that there is only one such district. *See* 28 U.S.C. § 1408(1) (1988).

32. This possible exception was Towner Petroleum. Towner was an oil company with headquarters in Houston, Texas, and oil properties in many parts of the United States. The company filed in Oklahoma City, Oklahoma. In resisting a subsequent motion to transfer venue to Houston, Texas, the debtor maintained to the court's satisfaction that it had more assets in the western district of Oklahoma than in any other single district. However, in no sense could one maintain that Towner's operations were "centered" in Oklahoma. Before an expansion that led to the company's financial difficulties, the company's operations were based in Ohio.

33. By no stretch of the imagination could New York have been considered the principal place of the company's assets. There was no challenge to venue in New York, and hence no judicial determination whether venue properly existed there.

34. We have no direct evidence that the parties considered the possible effects on venue in deciding to file before closing the New York center.

presents an even more dramatic example of a debtor's ability to enhance or diminish the principal assets basis for venue. Although we do not assert that any of these actions in fact were taken for the purpose of altering its venue options, in the year prior to its filing Seatrain Lines disposed of its containership liner operations and closed its operations in the Brooklyn Naval Yard. At the time Seatrain filed in the Southern District of New York, its "principal assets" were either an oil refinery in Texas or six oil tankers operating in the Alaskan coastal trade. Shortly after filing, it divested the oil refinery, leaving only the tankers. Depending upon when, in relation to the asset dispositions, Seatrain chose to file, and where the tankers were located at the time of filing, Seatrain's "principal assets in the United States" at the time of filing might have been in the Eastern District of New York, Texas, or any port in which the tankers gathered.

4. BANKRUPTCY OF AN AFFILIATE PENDING

Venue for the reorganization of a particular company is proper in any district in which there is pending a bankruptcy case concerning one of the company's affiliates.[35] The Bankruptcy Code broadly defines "affiliate" in a manner that will include all members of a debtor's corporate group—parent, subsidiaries and sister companies—and may include companies not even under common control.[36]

To understand the tremendous potential of this provision to expand venue choice, one must realize that virtually all large companies are composed of more than one legal entity.[37] In fact, all forty-three "companies" included in this study actually were corporate or corporate/limited partnership groups. Pizza Time Theatre and Tacoma Boatbuilding each had only two entities in their group, but Itel had 143 and EPIC had 352.[38] The large majority of the companies studied were composed of between three and twenty-six entities.[39] In some of these

35. 28 U.S.C. § 1408(2) (1988).

36. "Affiliate" is defined at 11 U.S.C. § 101(2) (1988). An affiliate includes both an entity that owns 20% or more of the debtor's securities and any entity whose securities are 20% or more owned by the debtor.

37. *See* P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURE LAW 465-68 (1985) (1000 largest companies have an average of 48 subsidiaries).

38. Technically, the EPIC case consisted of the joint administration of 352 separate bankrupt partnerships, all of whom had the same corporate general partner. If the general partner had filed as well, which it did not, then venue in the district of the general partner's offices would have been appropriate. *See* 28 U.S.C. § 1408(2) (1988), quoted at text accompanying note 14 *supra*. In fact, all the partnership cases were filed in that district and venue was not challenged. Perhaps the venue theory was that the location of the general partner was the principal place of business of each of the partnerships.

39. Thirty-two of the forty-three companies studied (74%) were composed of between three and twenty-six entities.

companies, all of the entities were components of a single enterprise—that is, a set of activities customarily grouped together in order to produce a marketable service or activity.[40] But in most, the group was a conglomerate, operating two or more enterprises in different physical locations. Usually the different enterprises were under the ownership of legally separate entities.

Such corporate structures, when combined with the rule allowing corporations to file wherever one of their affiliates has filed, effectively give the group a choice of venue. The choice is exercised by having the affiliate which is located in the desired venue file the first petition there. This petition was referred to by some of the lawyers interviewed as the "venue hook." Once the hook is filed, venue in the desired district is proper for the remaining members of the corporate group, even if they have no other connection with the district.

Probably the most frequent use of the venue hook is to buttress arguments in favor of a venue choice that is arguably appropriate on other grounds as well. For example, Wickes Companies was a Delaware corporation with assets spread throughout the United States at the time it filed its petition in the Central District of California. Wickes was in the process of moving its headquarters from the Southern District of California to the Central District at the time; but venue based on the location of the principal executive offices during the 180 days prior to filing still would have been in the Southern District. To buttress the argument for venue in the Central District, where Wickes had substantial operations, Wickes selected a corporation unquestionably located in the Central District from among its subsidiaries. The petition for that company was the first filed in the Central District. Petitions for the other members of the corporate group, including the parent, were filed a few minutes later. With regard to each, including some with little or no connection with the Central District, venue was proper in the Central District because there was pending in that district "a bankruptcy case concerning such person's affiliate."[41]

A more recent example of use of the "venue hook" occurred in the Eastern Airlines reorganization. Eastern was headquartered in Miami, which was also the center of its airline operations, except for the New York shuttle it sold shortly after filing. When Eastern decided to file in the Southern District of New York, it first filed a petition for a small subsidiary that was indisputably based in New York City. Six minutes later it filed a petition on behalf of the parent.[42]

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40. See *infra* note 164 for an illustration of some of the difficulties in defining what is an "enterprise."

41. 28 U.S.C. § 1408(2) (1988).

42. The subsidiary, Ionosphere, had assets of less than two million dollars and was solvent at the time of filing. It ran hospitality clubs at airports served by Eastern. For a discussion of the venue choice in this case, see *Eastern's Bankruptcy Strategy: Go North*, Miami Review, March 20, 1989, at 4, col. 1.

5. VENUE WITHOUT VENUE

Even if a case is filed in an improper venue, the court may be required to retain it or may choose to do so. Bankruptcy Rule 1014(a)(2) provides that "on timely motion of a party in interest and after notice and a hearing . . . 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."[43] The advisory committee note to this rule indicates that "[u]nder this rule a motion by a party in interest is necessary. There is no provision for a court to act on its own initiative."[44] It follows that if no party requests a change of venue, the case must continue in the improper venue.[45] Even if a party in interest in a case pending in an improper venue moves for a change of venue, it is not clear that Rule 1014 requires that the court grant the motion. Prior to the 1984 amendments to title 28, bankruptcy courts had specific discretionary power to retain a bankruptcy case and deny a motion for a transfer of the case even if the venue was improper.[46] That specific statutory authorization was repealed in 1984. Since then, the courts have been divided as to whether they may retain a case filed in an improper venue despite a motion objecting to the venue.[47]

B. Transfers of Venue

Cumulatively, the five bases for venue described above give both debtors and petitioning creditors broad latitude in selecting the initial venue for the bankruptcy reorganization of a large, publicly held company. But once the case is filed, the court has similarly broad latitude to transfer it to another district "in the interests of justice or for the convenience of the parties."[48] If the courts routinely and consistently

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43. BANKR. R. 1014(a)(2), 11 U.S.C. app. Rule 1014 (1988).

44. BANKR. R. 1014 advisory committee note, 11 U.S.C. app. Rule 1014 (1988).

45. Venue may be conferred upon a district by consent. *See, e.g.*, Hunt v. Bankers Trust Co., 799 F.2d 1060 (5th Cir. 1986). See also Bankruptcy Rule 1014 advisory committee notes to 1987 amendments, 11 U.S.C. app. Rule 1014 (1988), which provide, "If a timely motion to dismiss for improper venue is not filed, the right to object to venue is waived."

46. *See* R. GINSBERG, BANKRUPTCY: TEXT, STATUTES, RULES ¶ 1.05(d), at 90 (1989).

47. *Compare* Armstrong v. Ranier Financial Services, Inc. (*In re* Greiner), 12 Collier Bankr. Cas. 2d 363 (Bankr. D.N.D. 1985); *In re* Romzek, 13 Collier Bankr. Cas. 2d 924 (Bankr. E.D. Mich. 1985) and *In re* Leonard, 13 Collier Bankr. Cas. 2d 1189 (Bankr. D.D.C. 1985) (court may no longer retain case filed in an improper venue) *with In re* Boeckman, 13 Collier Bankr. Cas. 2d 921 (Bankr. D.S.D. 1985) and *In re* Baltimore Food Systems, Inc., 71 Bankr. 795, 16 Collier Bankr. Cas. 2d 578 (Bankr. D.S.C. 1986) (court may retain case filed in an improper venue).

48. *See* 28 U.S.C. § 1412 (1988); BANKR. R. 1014(a)(1) (1988). The court may transfer a case to any district, including one where it could not have been filed originally. R. GINSBERG, *supra* note 46, ¶ 1.05(d), at 89.

made such transfers, they could nullify the efforts of petitioners to control venue.[49] Regardless of where a case was filed, it would end up in the same place—where the interests of justice or the convenience of the parties required.

To the contrary, we found that the likelihood of a change of venue in the types of cases we studied was small. As previously noted, the court is not authorized to change venue except on motion of a party in interest.[50] The dynamics of a voluntary reorganization case filed by a large, publicly held company make such a motion unlikely.

In thirty-seven of the forty-three cases studied, the debtor initially selected the venue by filing a voluntary petition. Venue change could then occur only if creditors, shareholders or other parties in interest moved for a change. In two of the cases studied large lenders attempted to protect their interests by making such motions. They were the only parties even to attempt to change the venue of any of the thirty-seven cases initiated by a voluntary petition. Both were unsuccessful.

Among the participants who never requested a change of venue in the cases studied were the creditors' committees. These committees have a built-in conservatism on the issue of venue. However outlandish the venue selected by the debtor, that location is where the creditors' committee appointed by the United States Trustee will organize and retain counsel. Creditors inconvenienced by the venue are unlikely to serve on the committee. The job of representing these committees in large cases is lucrative and much sought after. To the lawyer selected, a change of venue probably means the loss of a coveted client; at the very least it means personal inconvenience. It is therefore not surprising that none of the creditors' committees in the cases studied sought a change of venue.

Many of the additional committees representing equity holders, subordinated debenture holders, secured creditors and other groups were not appointed until months after filing in the cases studied. In the interim, the debtor and creditors' committees had made arrangements, such as hiring counsel and employing experts, on the assumption that the case would proceed at the venue initially selected. The court held hearings on various matters, devoted time to becoming familiar with the case and perhaps made special arrangements to accommodate the hearing of such a large case in the district. By the time these other committees were appointed, there probably was considerable momentum for the case to remain in the district. Regardless of what the situation might have been at the filing of the case, to change venue months into a large case would inconvenience just about everybody.

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49. *See* Note, *supra* note 6, at 1690 (arguing that the right to such transfer mitigates concern that forum shopping will lead to litigation far from the "natural" forum).

50. *See supra* text accompanying note 44.

Smaller creditors, landlords, labor unions and other interested parties may want to participate in a case other than through a committee. For example, a small secured creditor may want to seek relief from the automatic stay, a landlord may wish to terminate a lease, and a labor union may wish to oppose sale of a plant. If so, they have a real interest in securing a venue for the case that is convenient for them and the lawyers who usually handle their affairs. It is not an easy or inexpensive matter for such an entity to obtain a lawyer in a distant city. Nonetheless, for such entities a venue fight in a large case is not likely to be cost effective. First, the venue fight itself will necessitate hiring a lawyer in the city where the case was filed. Moreover, in the context of the large, publicly held company, the range of inquiry on a motion to transfer venue is very broad. Though there may be thousands of parties and hundreds of contested matters, case authority indicates that a court should consider: (1) the proximity to the bankruptcy court of assets, creditors, the debtor, the debtor's principals, evidence and witnesses; (2) the willingness of parties to participate in the case or in adversary proceedings if proceedings were in one venue or another; (3) the economical administration of the estate; (4) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining their attendance; (5) the applicability of state law to the case; (6) the intertwined relationships of debtors; (7) the necessity of ancillary administration; and (8) the local interest in having localized controversies decided at home.[51] To argue such a motion effectively requires a thorough understanding of the debtors' business, the bankruptcy case, the related proceedings and the hundreds or thousands of issues potentially to be litigated. This is more than a single small party can be expected to address in any litigation.

Even when a party mounts a serious challenge to venue in a large reorganization case, it is unlikely to be successful. As was mentioned previously, in the cases we studied there were two challenges to venue by a party other than the debtor and both failed.[52] We were told in our interviews with the lawyers that part of the reason it is so difficult to obtain a change of venue in large reorganization cases is that, because these cases have high visibility, many bankruptcy judges consider them to be career opportunities and are therefore reluctant to transfer them to other districts. Two of the cases in our study were transferred to

51. *See, e.g., In re* Toxic Control Technologies, Inc., 84 Bankr. 140, 143 (Bankr. N.D. Ind. 1988).

52. In the reorganization of Tacoma Boatbuilding, the lead banks moved to transfer venue from New York to the State of Washington; the New York court denied the motion. In the Towner Petroleum reorganization, the lead banks moved to transfer venue from Oklahoma City to Houston; the Oklahoma City court denied the motion.

other districts.[53] Both were involuntary cases initiated by creditors and transferred on motion of the debtor before the order for relief was entered. We speculate that involuntary cases are more likely to be transferred[54] because they do not quickly "grow roots" in the districts in which they were filed. Until an order for relief is entered, official committees are not appointed and probably individual creditors do not make arrangements to participate in the forum city. In the two cases that were transferred, the debtor was seeking a move to a city that was both its headquarters and center of operations.

II. Forum Shopping In The Cases Studied

A. The Pattern of Forum Shopping

To determine how the parties to the cases studied actually made use of the venue choice opportunities described in Part I, we sought to compare each company's locus of operations, including employees, manufacturing plants, distribution centers and other work locations, with both the locus of the company's principal executive offices and the venue of its reorganization case. As we have pointed out, in these cases there was virtually always at least some venue choice legally available to the filing party. We were particularly interested, however, in cases in which the venue actually chosen differed from the location of the company's operations. These are cases in which there is forum shopping as we have defined it.

Based on our findings, we divided the companies studied into four categories, as shown in more detail in the Appendix. The cases in category one are those that proceeded in a district that was neither the headquarters of the company nor the company's center of operations. In each of these cases, the debtor made a deliberate decision to proceed in a district other than the district in which the company was based. These are cases in which there was forum shopping by any definition. Seven of the forty-three cases (sixteen percent) were in this category. Five of the seven cases, *HRT*,[55] *KDT*, *Man-*

53. In the reorganization of Marion, the Houston court transferred the case to Mobile. In proceedings involving FSC Corp., the New York court transferred the case to Pittsburgh.

54. Only six cases in our study were involuntary. Two of the six resulted in transfers of venue. See *supra* note 53.

55. HRT's headquarters were in Los Angeles and most of its stores were in the southwest at the time of the filing of the petition in New York City. One reason for the selection of New York as the venue for the case was that the company's attorneys, who had represented HRT in a previous bankruptcy reorganization, were in New York. That earlier reorganization, concluded in the mid-1970s, also proceeded in New York.

ville,[56] *Tacoma Boatbuilding* and *Towle Manufacturing*,[57] were filed in New York City. In only one of the five, *KDT*, did the company have any substantial presence in the geographical area covered by the New York division of the bankruptcy court.[58] In only one of the five, did any party object to venue. In that case, *Tacoma Boatbuilding*, the motion for change of venue was denied.[59]

Each of the cases in category two proceeded at the venue of the company's headquarters, but those headquarters were located in a district where the company had little or no physical assets or operations, other than the headquarters itself. Nine of the forty-three cases (twenty-one percent) were in this category. Eight of the nine cases, *Anglo Energy*, *Combustion Equipment*, *Lionel*, *Penn-Dixie*, *Revere Copper & Brass*, *Salant*, *Saxon* and *Seatrain Lines*, proceeded in New York City. In

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56. With assets of more than $2 billion and 27,000 employees, the Manville Corporation was arguably the largest company to have completed a reorganization in the bankruptcy courts during the period covered by this study. (Baldwin-United had assets of over ten billion, but fewer than 11,000 employees; Wickes Companies had over 43,000 employees at the time of filing, but assets of only about $1.5 billion.) At the time it filed its bankruptcy in the Southern District of New York, the headquarters of the Manville Corporation were on the Ken-Caryl Ranch near Denver, Colorado. *See* Manville, SEC Form 10-K for the fiscal year ended December 31, 1981, at 13. While Manville owned manufacturing plants, mines and timber resources throughout the United States and the world, New York appears to have been one of the few states in which Manville had no substantial assets or operations. *Id.* at 13-24. Manville apparently chose to file in New York because many of the key participants in the case were in New York and because it preferred the New York Bankruptcy Court. No party objected to venue and the case proceeded in New York.

57. Towle Manufacturing was incorporated in Massachusetts, its principal executive offices were in Massachusetts, and 80% of the square feet of office, manufacturing and warehouse space it occupied was in Massachusetts. *See* Towle Manufacturing, SEC Form 10-K for the fiscal year ended December 31, 1986, at cover, 11. As of the time Towle filed its petition in the Southern District of New York, its only contact with the state was 60,000 square feet of leased showroom space which it promptly sought to sell. *Id.* at 12. The company's major secured creditor agreed to New York venue prior to filing because it liked the New York practice with regard to cash collateral; the creditors' committee did not object to New York venue because it was convenient.

58. KDT had one of its two distribution centers in the Bronx, which is included with Manhattan in the New York division of the Southern District of New York. That distribution center was closed during the chapter 11 case. *See supra* text accompanying notes 33-34. KDT also may have had stores in Manhattan or the Bronx.

59. In *Tacoma Boatbuilding*, the company successfully argued that its "nerve center" was in New York City, despite the fact that throughout the bankruptcy case it continued to list its "principal executive offices" on its SEC filings as being in Tacoma, Washington. All of the company's operations were in the state of Washington. Tacoma Boat Building Co., SEC Form 10k for the fiscal year ending December 31, 1985.

In two other cases, *Baldwin-United* and *FSC Corp.*, petitions were filed in New York, but the cases were transferred to, and then proceeded in, other bankruptcy courts. In *Baldwin-United*, there was a "race to the courthouse" in an attempt to control venue, won by unsecured creditors who desired venue in Cincinnati. The circumstances are described more fully at *infra* note 60. In *FSC Corp.*, creditors filed against the Pittsburgh-based company in New York City, but the court transferred the case to Pittsburgh.

part, the concentration of these cases in New York reflects a general pattern of companies with operations elsewhere having their headquarters in New York, perhaps because that city is a financial center. While we were not able to determine that any of these companies moved their headquarters to New York to obtain venue there,[60] within a short time after their cases were concluded, five of the eight moved their headquarters to other districts,[61] leaving virtually no presence in New York. Probably most of these companies filed in New York because it was a desirable venue and they happened to have headquarters there at the time of filing. But few had substantial or permanent links to New York. We, therefore conclude that "forum shopping," in the limited sense that we have defined the term,[62] occurred in these cases.

The cases in category three are those of national or regional companies that had no clear center of operations and filed in a district which was both the district of the company's headquarters and the site of some of its business operations. Eighteen of the forty-three cases studied (forty-two percent) were in this category. The argument that these cases proceeded in the most appropriate venues must be grounded ultimately in the locations of the headquarters, because in each of these cases there was at least one other district that would have been a more appropriate venue had the headquarters been located there. It is significant that the argument for venue is grounded in the location of the headquarters because, as previously noted, the headquarters of many such companies can be and sometimes are easily moved from one district to another.[63] Nonetheless, by our definition, forum shopping

60. Two companies in other categories apparently did move their headquarters for purposes of establishing the basis for venue in New York City. One of the cases was *Tacoma Boatbuilding*, discussed as a category one case. The company established some kind of office in New York, even while the "principal executive offices" listed on its SEC filing remained in Tacoma, Washington, where the operations were based.

The other company was Cincinnati-based Baldwin-United. Six months before Baldwin-United was forced into bankruptcy by creditors, the CEO was ousted and replaced by Victor Palmieri, a prominent distressed-property liquidator who had previously liquidated the properties of the Penn Central Railroad. Palmieri was located in New York. When hired by Baldwin-United he moved into New York offices already in use by the company for other purposes saying that "[New York] was a good location for negotiating with the various Baldwin creditors." *Baldwin Moving Some Offices*, The Cincinnati Post, Oct. 8, 1984, at 26, col. 3. When pressed by creditors, the company filed its bankruptcy petition in New York, but, unknown to the company, creditors had filed an involuntary bankruptcy case in Cincinnati only minutes before. *See* Darlin & Solomon, *Baldwin-United is Forced to File For Chapter 11*, Wall St. J., Sept. 27, 1983, at 3, col. 1. The order of filings was critical, because the court in which the first petition was filed had the right to determine the appropriate venue, and, as previously noted, bankruptcy judges tend to retain high visibility cases. *See supra* text following note 52. With little chance of winning the venue fight and facing the possibility that an unsuccessful attempt would alienate the Cincinnati judge, the company quickly agreed to allow the case to proceed in Cincinnati.

61. For details, see the listings for these cases in the Appendix.

62. *See supra* text accompanying notes 9-10.

63. *See supra* notes 24-27 and accompanying text. One of these companies, Con-

did not occur in this category of cases, because each of these companies had a substantial physical presence in the district where it reorganized.

Each of the cases in category four unquestionably proceeded in an appropriate venue. That is, the company had a clear center of operations, its headquarters were located at that center, and the reorganization proceeded in the district in which that center was located. Nine of the forty-three cases (twenty-one percent) were in this category.[64]

The companies in category four are essentially "local," that is, located in a particular city or district. A few of the cases in the first two categories, most notably *Tacoma Boatbuilding* and *Towle Manufacturing*, share this characteristic. But the large majority of companies in the study had operations in many places and could not be meaningfully described as located in any particular district. Each could be described as being "based" in a particular city only because it has its headquarters there.

B. Why New York City was the Venue of Choice

When forum shopping occurred, the destination of choice was usually New York City. Even though none of the companies studied had substantial operations in New York City, thirteen of the forty-three cases studied (thirty percent) proceeded in New York City. In two additional cases[65] (five percent), parties filed petitions in New York City in unsuccessful attempts to proceed there.

Through our interviews we discovered numerous reasons for the preference for New York City. The foremost reason cited was convenience. For the top executives of companies headquartered in New York, the federal courthouse in Foley Square was undoubtedly the most convenient place to appear in bankruptcy court. A disproportionate number of the most highly regarded bankruptcy lawyers are in New York; they are more available and representation by them is less expensive

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tinental Air Lines, moved its headquarters from the site of its principal operations, Los Angeles, to the site where it filed bankruptcy, Houston, only months before filing. *See* Continental Air Lines, Inc., SEC Form 10-k for the fiscal year ended December 31, 1982. In two of these cases, *Amarex* and *Evans Products*, shortly after confirmation the emerging company moved its headquarters out of the district where the case proceeded and closer to the center of its operations. *See* TGX Corp., SEC Form 10k for the fiscal year ending Dec. 31, 1987 (TGX acquired Amarex in the reorganization proceedings); Grossman's, Inc., SEC Form 10K for the fiscal year ending on Dec. 31, 1986 (new name for Evans Products). In another case, Dreco moved both its headquarters and center of operations back to Canada. *See* Dreco Energy Services Ltd. SEC Form 10K for the fiscal year ending August 31, 1987.

64. Even so, in two of the nine cases, *FSC Corp.* and *Marion*, the cases were initially filed in other districts and then transferred back to the district of the company's physical location. In other category four cases, the lawyers for the debtors told us in interviews that they considered other venues before selecting the venue of the company's physical location.

65. Baldwin-United filed a voluntary petition in New York City; creditors filed an involuntary petition there in *FSC Corp.*

if the case is filed in New York. Several of the "money center" banks have large workout departments in New York, making it convenient for them to participate in cases there. The investment bankers and accountants who specialize in bankruptcy cases are also disproportionately located in New York. These people are located in New York because the city has long been the financial center of the United States. In some sense it could be said that they have attracted the large reorganization cases to New York. But if New York City had not become the bankruptcy reorganization center for the United States, perhaps some of these people would have been located elsewhere.

Another reason cited by interviewees for the continuing flow of bankruptcy cases to New York is the New York courts' considerable experience in handling the reorganizations of large, publicly held companies. Judges and court staff are well-versed in the types of problems that arise and have proven capable of handling the large volumes of paperwork and cumbersome meetings and hearings they generate. An added benefit is the substantial body of precedent in the Southern District of New York, both reported and unreported, from which lawyers can predict how particular matters will be handled.

We suspect that some cases were filed in New York in anticipation of rulings that would have been reached by the bankruptcy court in the city of the company's physical location if the case had been filed there.[66] Interviewees asserted that two issues were important enough

66. The forum shopping petitioner ordinarily will not be selecting the judge who will hear the case, but only the panel from which that judge will be drawn. If a case is filed in a particular district, it almost certainly will be heard by a judge from one of the panels of bankruptcy judges designated for that district. District judges have the power to withdraw cases from the bankruptcy court and hear them themselves, but a district judge did so in only one of the cases in our study, *In re Manville Corp.* In that case the withdrawal did not occur until several years after confirmation. *In re Manville Corp.*, 63 Bankr. 600 (S.D.N.Y. 1986). A panel is a group of bankruptcy judges that has been designated to hear cases at a particular physical location. In many districts there are several physical locations at which cases are heard, and hence several panels. If the case is filed in a major metropolitan area, there will be at least three or four judges on the panel; the largest panel, in the Central District of California, consists of 19 judges. *See* 28 U.S.C. § 152(a)(2)(1988). Among the judges on the panel, the assignment of chapter 13 cases and cases originating from particular divisions of the district are commonly made to a particular judge or subpanel. *See e.g.* LoPUCKI, LAW & BUSINESS DIRECTORY OF BANKRUPTCY ATTORNEYS 1054 (1990) (Chief Judge Cosetti assigned all chapter 12 and 13 cases from Pittsburgh-area counties). Chapter 11 cases are almost invariably assigned by random draw.

In many parts of the United States, however, including areas adjacent to major metropolitan areas, panels consist of as few as one or two judges. Thus, in the Texaco bankruptcy (which was *not* one of the cases we studied) debtors filed in White Plains, New York, knowing that there was only one judge assigned to the panel for that location. Moreover, we have heard accounts of cases not in our study indicating that even in districts where panels are larger, lawyers have devised methods for obtaining, or increasing the odds of obtaining, a particular judge. In one district, judges are assigned in rotation; one need only have the correct position in line. In another, an unpopular judge occasionally went out of the rotation; savvy lawyers sometimes waited until that occurred before filing their key cases. In yet

to warrant forum shopping in favor of New York and away from the "natural" venues: first, the courts' policies toward extensions of exclusivity (debtors' lawyers wanted to know that exclusivity would be extended), and second, the courts' policies on the award of attorneys' fees.

Our data indicate that the New York bankruptcy court's practice with regard to extensions of exclusivity has been more liberal than that of other courts. Exclusivity was less frequently lifted or allowed to expire in the New York cases,[67] even though the New York cases remained pending for longer periods of time.[68] The difference cannot be

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another, the petitioner can file the petition with a particular judge on the weekend, obtain an emergency hearing on portions of the case, and the judge may then retain the case. Such manipulations are not confined to the bankruptcy courts or even to the United States. For an entertaining discussion of strategies for manipulating the assignment of cases among German judges, see W. WEYRAUCH, THE PERSONALITY OF LAWYERS, 223-25 (1964).

Finally, if a small affiliate used as a venue hook draws an unacceptable judge, it may be possible to file a petition for a larger member of the corporate group in another district and then consolidate the two cases in the second district. In the last situation, the motion to transfer venue should be filed in the district in which the first petition was filed. *See* BANKR. R. 1014(b), 11 U.S.C. app. Rule 101A (1988).

One bankruptcy judge, Burton R. Lifland, Chief Judge of the Southern District of New York, presided over seven of the cases studied. These seven, *Anglo Energy*, *HRT*, *Lionel*, *Manville*, *Penn-Dixie*, *Tacoma Boatbuilding*, and *Seatrain Lines*, were 54% of the New York cases, and 16% of all of the cases in our study. While we did not investigate the reasons for this concentration of cases, suspicions persist that the random draw system has not been effective. *See* Dockser, *Chief Judge, Veteran of Big Cases, Gets Airline's Chapter 11 Petition*, Wall St. J., March 10, 1989, at A10, col. 3.

67. Exclusivity was lifted or expired in only one (*Anglo Energy*) of 13 cases in New York (8%), as compared with 8 of 30 cases in all other districts (23%).

68. The New York cases remained pending about 31% longer than cases in other districts. In their landmark study of the bankruptcy system, Stanley and Girth found that chapter 11 cases generally took longer from filing to confirmation in the Southern District of New York than elsewhere. D. STANLEY & M. GIRTH, *supra* note 3, at 143 (tables 7-8) (1971). The following table shows the same pattern among the cases we studied.

Table 1

Time in chapter 11. This table shows the number of years elapsed from filing to confirmation of the chapter 11 plan, with cases arranged by the city where court met.

Case Name	Court City	Years From Filing To Confirmation
EPIC	Alexandria	0.6
AM International	Chicago	2.4
Baldwin-United	Cincinnati	2.5
Cook United	Cleveland	2.0
White Motor	Cleveland	3.2
Storage Technology	Denver	2.6
Energetics	Denver	0.6
Louth	Detroit	3.0
Braniff	Ft. Worth	1.3
Dreco	Houston	3.0
Oxoco	Houston	0.3
Continental Air	Houston	2.8
Charter	Jacksonville	2.7
Sambo's Restr.	Los Angeles	3.7

accounted for by the size of the companies involved; the average size of the companies proceeding in New York was no greater than the average for companies proceeding elsewhere.[69]

Although we did not systematically collect data about attorney fees in our study, it is generally believed that the hourly rates charged by

Smith Internat'l	Los Angeles	1.7
Wickes Companies	Los Angeles	2.4
Evans Products	Miami	1.3
Air Florida	Miami	2.1
MGF	Midland	3.0
Marion	Mobile	2.9
Towner	Oklahoma City	1.2
Wilson Foods	Oklahoma City	0.9
Amarex	Oklahoma City	2.8
FSC	Pittsburgh	3.6
NuCorp	San Diego	3.4
Itel	San Francisco	2.2
Technical Equities	San Francisco	1.4
Pizza Time Theater	San Jose	1.1
Crystal Oil	Shreveport	0.2
Phoenix Steel	Wilmington	2.0
Average for non-New York cases		2.1
Anglo Energy	New York	2.7
Combustion Equip't	New York	3.2
HRT	New York	1.2
KDT	New York	1.6
Lionel	New York	3.6
Manville	New York	4.3
Penn-Dixie	New York	1.9
Revere	New York	2.8
Salant	New York	2.2
Saxon	New York	2.9
Seatrain Lines	New York	6.1
Tacoma Boat	New York	1.9
Towle	New York	1.5
Average for New York cases		2.8

New York cases on the average remained pending for approximately eight months (31%) longer than cases in other districts. If we eliminate Seatrain Lines as an exceptional case (6.1 years to confirmation), New York cases still averaged nearly five months longer than cases in other districts.

69. Measured by mean size of employees, sales and assets, the New York cases in our study were considerably smaller than the cases in other districts that we studied:

	Employees	Sales in Millions	Assets in Millions
New York cases	5,981	$576	$440
Other districts	7,515	$921	$851

The median size of New York cases was approximately the same as the median size of cases in other districts:

	Employees	Sales in Millions	Assets in Millions
New York cases	5,000	$376	$230
Other districts	4,282	$313	$322

and awarded to bankruptcy lawyers in New York City are higher than the rates in most other cities.[70] When New York lawyers appear in cases in cities where the local lawyers are paid less, both their rates and their travel expenses may come under attack.[71] This provides an additional incentive for the New York lawyers to file their cases in New York. On the other hand, when lawyers from low rate cities appear in cases in New York, they can generally recover their travel expenses and are not held to the rates awarded in their home cities.

There was one case in our study in which a conflict among federal circuits provided a substantial incentive for choice of the New York forum. In *Tacoma Boatbuilding*, a group of banks held undersecured claims totaling about five million dollars. Had the case proceeded in Tacoma, Washington, the debtors' physical location, the banks would have been awarded pendency interest on the secured portions of their claims pursuant to the Ninth Circuit's holding in *In re American Mariner Industries*.[72] Instead, the debtor filed in New York, where pendency interest was denied under the view expressed by the Fifth Circuit in *In re Timbers of Inwood Forest Assoc.*[73] The banks' motion for a change of venue to Washington was denied and the banks were unable to recover interest.

III. Venue Choice and Forum Shopping: The Problem or the Solution?

In Part I of this Article, we demonstrated that in the context of the reorganization of large, publicly held companies, the rules regulating venue give virtually every debtor some choice of venue. In Part II we presented data showing that in a substantial number of the cases studied, parties took advantage of this choice to arrange venue at other than what would seem natural places,[74] that is, to forum shop. In this

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70. See cases cited at *infra* note 90.

71. *See, e.g., In re* Evans Products, 69 Bankr. 68, 69 (Bankr. S.D. Fla. 1986) (Miami bankruptcy court reduces fees applied for by New York law firm from $212 an hour to $134 an hour, stating as one reason for doing so that another firm's services were "markedly superior").

72. 734 F.2d 426 (9th Cir. 1984). Our conclusion that the change of venue would have led to a change of outcome accorded with the views expressed by the participants we interviewed. The interest claim was based on federal law, which in all probability would leave the transferee court free to ignore precedent in the transferor circuit and apply its own instead. *See* Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677 (1984) (arguing that the transferee court must be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit).

73. 808 F.2d 363 (5th Cir. 1987). The conflict between the circuits was resolved by the Supreme Court in United Savings Association of Texas v. Timbers of Inwood Forest Assoc., 484 U.S. 365 (1988), but not in time to affect the outcome in *Tacoma Boatbuilding*.

74. The term "natural venue" has been used to describe the court "closest to, most knowledgeable about, or most accessible to the litigants." Note, *supra* note 6, at 1691.

Part we begin by examining the problems and benefits generated by a system that allows such choices.

A. The Problems

The problems arising out of forum shopping fall into two[75] general categories. First, any venue choice raises the possibility that the party making the choice may be able to manipulate the outcome of the case by selecting a forum that will render a favorable decision. In the context of large reorganization cases, this may cause subsidiary problems by creating an incentive for courts to alter the decisions they reach so as to attract other large cases to the district. A second category of problems is that forum shopping in the narrow sense in which we have defined it[76] ensures that cases will be heard in locations inconvenient to many parties, making it more expensive for them to participate and perhaps increasing the cost to the point where their participation is no longer cost-effective.

1. MANIPULATING OUTCOMES

Theoretically, the Bankruptcy Code and Rules, which are federal law, apply uniformly in all districts. While bankruptcy law frequently refers to the law of the various states,[77] choice of law rules ordinarily direct the various bankruptcy courts to the same local law,[78] regardless of the venue in which the case is heard. According to the ideal of the rule of law, because the judges will be applying the same law, the same result should be reached in any given case regardless of choice of venue.

In practice, however, bankruptcy judges have broad discretion over critical matters. For example, sales of property by debtors that are not in the ordinary course of business require the court's prior approval, but the applicable legal standard is merely that the sales must be made

75. McGarrity identifies additional categories of problems that result from forum shopping in the context of appellate review of administrative action; they are not discussed here because they do not appear to result from forum shopping in the context discussed here. McGarrity, *supra* note 6, at 312-18.

76. *See supra* notes 9-10 and accompanying text.

77. For example, an individual debtor's exemptions are usually determined by state law. 11 U.S.C. § 522(b) (1988).

78. The possibility that venue choice might be used to control what state's law was applied in a large reorganization case creates interesting theoretical issues. For example, a debtor might file in state A because its conflicts of law rule will direct it to the law of state B, rather than file in state B, whose conflicts of law rule would direct it to the law of state C. *See* Rowe & Silbey, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 37-41 (1986); Marcus, *supra* note 72. But such considerations did not appear to affect the choice of venue in any of the cases studied. In fact, we find it difficult to imagine the circumstances in which such considerations might have significance for a large reorganization case.

for "good business reasons."[79] If a litigant can predict how this discretion will be exercised differently in particular districts, the litigant's choice of a forum effectively can represent a conscious choice of case outcome.

This potential for manipulation is enhanced by the likelihood that any particular bankruptcy court will have taken a position on any particular matter. The bankruptcy courts process high volumes of similar kinds of cases and must exercise discretion on particular matters repeatedly; in so doing they inevitably generate "rules of thumb" or "local practices" with regard to those matters. Some of these practices are the subject of informal understandings among the panel of judges for the district; others may even be memorialized in administrative orders or local rules.[80] Therefore, to a far greater degree than in courts of general jurisdiction, it is possible for knowledgeable observers to predict how a particular bankruptcy judge or panel will exercise its discretion in particular circumstances.

As was noted above in connection with forum shopping to New York,[81] among the issues over which bankruptcy courts have discretion, two in particular influence venue choice in large chapter 11 cases: continuation of exclusivity and regulation of attorney fees. The Bankruptcy Code gives chapter 11 debtors the exclusive right to file a reorganization plan during the first 120 days of the case, and this period of exclusivity may be extended by the court "for cause."[82] Maintenance of exclusivity often gives debtors considerable leverage in bargaining with creditors over the contents of a reorganization plan. So long as exclusivity is continued, no plan can be considered by the court unless it is proposed by the debtor. The case goes forward on terms acceptable to the debtor or not at all.[83] The amount of leverage thus generated differs from case to case depending on how delay might affect the various parties,[84] but

79. 11 U.S.C. § 363(b)(1) (1988).

80. In some instances, of course, there is variance in how matters are handled among the different judges of a multi-judge district. In such instances those making a venue choice cannot manipulate outcomes unless they can manipulate also the assignment of a judge from a multi-judge panel, generally not an easy thing to do. *See supra* note 66.

81. *See* text following *supra* note 66.

82. 11 U.S.C. § 1121(b), (d) (1988). The bankruptcy court may also reduce the 120 day period for cause, but this probably has never occurred in a large chapter 11 case. 11 U.S.C. § 1121(d) (1988).

83. Refusal of creditors to negotiate with the debtor may itself be grounds for continuation of exclusivity. *See In re* Gibson & Cushman Dredging Corp., 101 Bankr. 405, 404 (Bankr. E.D.N.Y. 1989) (citing legislative history for the proposition that "recalcitrance among creditors" is cause for altering the period of exclusivity). In some courts creditor recalcitrance may be equated with refusal to make concessions.

84. Often delay improves the debtor's cash flow because the payments it is obligated to make during the case are less than the payments it will be obligated to make upon confirmation. Delay may also be beneficial because some interest accrual is suspended during the case, but interest accrual will resume as soon as a plan is confirmed. *See generally* L.

it is nearly always substantial. Commonly, the debtor is able to trade movement of the case toward confirmation for concessions from creditors.

A few courts are reluctant to grant extensions of exclusivity beyond the 120 day period provided by the statute.[85] In other districts, most notably the Southern District of New York, extensions are routinely granted for the duration of the chapter 11 case. In fact, in the cases in our study, exclusivity was more than three times as likely to be continued for the duration of the case in the Southern District of New York as in all other districts.[86] The liberal policy of the New York court in granting extensions of exclusivity was probably a factor leading to the choice of New York as a forum for some of the cases studied.[87] It may also be one reason that New York cases, on average, remain pending longer.[88]

Court practices in the award of attorneys fees may also have weighed heavily in the parties' choice of venue. Most of the legal work in chapter 11 cases, including work on behalf of the unsecured creditors' committee, is compensated through the award of attorneys fees by the court and payment of the fees awarded by the debtor. According to the Bankruptcy Code, fee awards must be "reasonable" in amount, and may be provided only for work that is "necessary."[89]

LoPucki, Strategies for Creditors in Bankruptcy Proceedings (2d ed. 1991) (forthcoming). Delay can hurt the debtor, however, by increasing the legal and other professional fees payable by the debtor that are caused by continuation of the case. Moreover, the period the case remains pending under chapter 11 is commonly a burdensome one for the debtor's management. Management must make court appearances, sometimes frequently, and court orders may interfere with its ability to manage an already troubled enterprise.

85. For example, the practice in the Southern District of Florida was to allow exclusivity to expire without granting any extension, except in highly unusual circumstances. Denial by that court of the first application for an extension of exclusivity dramatically affected the outcome in the reorganization of Evans Products. Although there were no immediate consequences of expiration, when negotiations later faltered, creditors proposed and obtained confirmation of their own plan which canceled the interests of shareholders without compensation. The plan was confirmed over the objections of both the debtor and the equity committee. *In re* Evans Products, Co., 65 Bankr. 31 (Bankr. S.D. Fla. 1986), *aff'd*, 65 Bankr. 870 (S.D. Fla. 1986) For further discussion of the *Evans Products* case, see LoPucki & Whitford, *supra* note 1, at 144-45.

86. Of the 43 cases in our study, 13 were filed in New York City. In only one of those cases was exclusivity not extended to the end of the case. The judge who refused to extend exclusivity in that case has since retired. By contrast, exclusivity was terminated in eight of the 30 cases (27%) that proceeded in other districts.

87. It may also be the reason that the Eastern Airlines case was filed in New York. *See supra* note 42 and accompanying text. The Southern District of Florida, probably the most appropriate venue for the Eastern Airlines case, is one of those districts where exclusivity customarily is not extended. *See supra* note 85.

88. *See supra* note 68 and accompanying text. The difference in case length between New York and elsewhere cannot be accounted for by size of case. *See supra* note 69 and accompanying text.

89. *See* 11 U.S.C. § 330(a)(1) (1988).

There are substantial differences in market rates and billing practices for legal services in different localities. Normally, a bankruptcy court will look to prevailing market rates in their own locality in setting fees. In large chapter 11 cases, where many of the attorneys may come from different localities, the question frequently arises whether the court should approve fees according to the rates and billing practices of the locality in which the court sits or that in which the attorney ordinarily works.[90] Some lawyers prefer to avoid the issue by filing cases in districts accustomed to higher fees.

When the conscious choice of venue becomes common, as it has in large reorganization cases, it can put pressure on judges to decide cases differently. Unless the judges exercise their discretion in ways that favor management and their lawyers, debtors will not bring their cases to the district. This practice is of direct concern to many bankruptcy judges because they would like to have the experience of presiding over at least one high visibility, megabankruptcy case. Such a case is likely to add to the judge's total workload. But the added work is outweighed by the opportunities for publicity, career advancement, and playing a central role in what may prove to be a matter of historic importance.[91]

Even a judge who does not personally desire large reorganization cases, or is indifferent to the possibility, may be reluctant to exercise discretion in a manner that would drive them away. When a large reorganization case comes to a district, it typically means added work, of a highly desirable nature, for many local lawyers. When such a case is of local origin, but is filed in another district because of the manner in which local bankruptcy judges exercise their discretion, the local bar is likely to be disappointed.[92] Judges tend to be sympathetic to the interests of the local bankruptcy bar. Often the judge will be a former member of this group. In any event, the local bankruptcy bar is likely

90. *See, e.g., In re* Washington Manufacturing, 101 Bankr. 944 (Bankr. M.D. Tenn. 1989) (New York firm will be allowed to charge at its customary rates and will not be limited to Nashville, Tennessee rates); *In re* Frontier Airlines, Inc., 74 Bankr. 973 (Bankr. D. Colo. 1987) (New York lawyers allowed "New York rates" for work in Colorado bankruptcy case); *In re* Wilson Foods Corp., 36 Bankr. 317 (Bankr. W.D. Okla. 1984) ("Accordingly, we find that outside counsel may charge rates normally charged clients in their respective regional areas for counsel time expended in these proceedings").

91. A similar point was made earlier in the context of challenges to venue, a decision similarly influenced by the attractiveness of large bankruptcy cases. *See* text following *supra* note 52.

92. The local legal newspaper in Miami noted the loss of fees to local counsel when Eastern Airlines filed in New York. The headline of one story was: "Miami lawyers lost millions to N.Y. colleagues: Fees flew north when Eastern filed in Manhattan." One Miami bankruptcy attorney was quoted as saying, "Much of the economic disaster that befalls the community on the filing of Eastern would have been decreased by the increase of the economy of . . . downtown Miami [if Eastern had filed in Miami]." Miami Rev., March 20, 1989, at 5, 8.

to constitute the principal audience for the judge's work.[93] In addition, it may be in the interests of the bankruptcy judges to attract high quality lawyers to practice before the court in order to aid in the constant struggle to achieve higher levels of productivity.[94]

Moreover, bankruptcy judges have more reason than district judges to be concerned about the welfare and opinions of the lawyers who practice before them. Bankruptcy judges are not Article III judges; they are formally appointed by the courts of appeals and serve fourteen-year terms. The lawyers may have occasion to evaluate them in connection with their reappointment for an additional term, newspaper or television stories about the quality of the judiciary, professional honors and awards, or employment after they leave the bench. Many judges will not be indifferent about these things.

To the extent that bankruptcy judges seek to attract major reorganization cases, they would tend to exercise their discretion in favor of the positions of the managements of debtors because those managements have primary control over the initial placement of cases. As discussed above, extensions of exclusivity are an important issue for debtors and these judges would therefore be more inclined to grant extensions.[95] Judges seeking large cases would particularly wish to avoid gaining a reputation for displacing managements through the appointment of trustees. Because debtors' lawyers are influential in deciding where cases are filed, the judges would also want to avoid reputations for unduly limiting lawyers' fees.[96] In particular circumstances, the lawyers' interests in higher fees may be offset by the debtor's interest in minimizing the cost of reorganization, but this conflict may be more apparent than real. The debtor's management may want to proceed in a district that will allow counsel to be paid full market rates, so that the best attorneys will be willing to work on the case.

2. INCONVENIENCING SMALLER PARTIES

When cases were filed away from the company's main center of operations, the lawyers who participated in the forum shopping decision nearly always defended the decision on the ground that the chosen forum was the most convenient for the participants in the case. Indeed,

93. *See, e.g.*, Smith, *The Drive for Judicial Supremacy: Reversing an Ancient Dependence*, 50 FLA. B.J. 608 (1976) (arguing that lawyers are a judge's proper constituency and that judges should be made more rather than less accountable to the lawyers who practice before them).

94. Because high-quality lawyers are better at their work, they are less likely to waste the court's time on unnecessary issues; because their work is more likely to be accurate, the court can spend less time checking citations and other representations made.

95. *See supra* notes 82-88 and accompanying text.

96. *See generally* S. STEIN, A FEAST FOR LAWYERS (1989).

if the top executives of the company, the creditors' committees, the workout departments of its major banks, the financial analysts who will testify for both sides and all of their lawyers are in New York, it is at first glance difficult to see why anyone would think that venue should be many miles away at the site of the company's operations.

But these major players are only the tip of the iceberg. In nearly all of the cases studied there were thousands of parties in interest. For the purpose of providing them with representation regarding particular matters, such as the negotiation of a plan, their interests were aggregated through committees, indenture trustees, labor unions or in other ways. With regard to these matters, they probably were not unduly prejudiced[97] when the case proceeded in a distant forum. But with regard to other issues, such as lifting the automatic stay, obtaining adequate protection, determining the amounts of claims, reclaiming possession of property, or resolving a myriad of other kinds of contested matters, the parties had to arrange for individual representation. When the case proceeded in a distant forum, the effect probably was to reduce participation on these issues.[98]

To fix the venue of the chapter 11 case is also to fix at least the initial venue of many kinds of "tag along" litigation.[99] In the *Evans Products* case, for example, venue was at the site of the company's headquarters in Miami, Florida. Both an Oregon supplier who dealt with company headquarters when it was in Portland, Oregon, only a year before, and a Massachusetts supplier who dealt with the company's primary subsidiary in Boston, had to file their claims in the Miami bankruptcy court. If the debtor objected to those claims, the creditors would have had to appear in the Miami bankruptcy court to present their evidence or seek a change of venue. Similarly, when the chapter 11 case was filed, secured creditor and landlord litigation throughout the country came to an abrupt halt, while the attorneys considered whether to petition the Miami bankruptcy court to lift the stay.

If any of the parties in the *Evans Products* case thought that venue for the main case in Miami was inappropriate, they could have moved for a change. None did. But that does not warrant the conclusion that none wanted a change of venue. The burden of preparation for argument on a motion for a change of venue would have been great.[100] The

97. The relationship among individual creditors, shareholders, and other interested parties and the intermediaries which represent them in these cases is discussed in LoPucki & Whitford, *supra* note 1, at 154-58.

98. We did not collect data on participation by minor parties. However, some interviewees asserted that one of the advantages of a forum inconvenient to small creditors and shareholders was that it prevented them from "interfering" in the reorganization process.

99. *See* 28 U.S.C. § 1409(a) (1988). "Tag along" jurisdiction is discussed extensively in Gibson, *supra* note 13.

100. *See supra* text accompanying note 51.

motion would have been heard in Miami. With the debtor, most of the major creditors, and the committees allied against the motion, success would have been unlikely. If parties to these large cases seek a change of venue at all, with few exceptions they will seek to change only the venue of the particular contested matters in which they are involved.

B. The Benefits

The competition among bankruptcy courts for large reorganization cases discussed above[101] may produce benefits. Arguably, some of these benefits have already been achieved through the concentration of cases in New York City. The judges and other court personnel there have gained experience in handling such cases, there is now a substantial body of both formal and informal precedent which makes it easier to predict the course of future reorganization cases, and large departments of specialized lawyers and other support services have developed. For New York City, the processing of large bankruptcy reorganization cases is an important industry.

To the extent that venue choice and forum shopping are sanctioned by law, it becomes easier for other districts to compete for this industry. There has been only limited discussion in the legal literature of the idea of competition among courts as a method for improving the quality of justice.[102] In the context of bankruptcy, there are possible benefits from such competition. In terms of resource allocation, the judiciary may be used more efficiently when companies seeking quicker reorganization or more attention from the court opt to reorganize in judicial districts less busy than others.[103] Reorganizing companies might also

101. *See supra* text accompanying notes 91-95.

102. Probably the greatest amount of discussion has concerned the development of alternative dispute settlement institutions and other methods of private resolution of disputes. *See* Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. B. FOUND. RES. J. 79; Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981); Wiehl, *Private Justice For a Fee: Profits and Problems*, N.Y. Times, Feb. 17, 1989, at B5, col. 3. The desirability of competition among courts has also been cited as a reason not to be unduly concerned about conflicts in decisions reached by different federal courts of appeal. *See, e.g.*, R. POSNER, THE FEDERAL COURTS 156 (1985) ("[J]udicial monopoly reduces diversity of ideas and approaches—what in other contexts is called 'yardstick competition'. . . [The federal courts of appeals] compete indirectly by providing varied responses to common problems"); McGarity, *supra* note 6, at 318-19 (citing "feedback" and "percolating" effects of conflicts among circuits as "advantages" that can be produced by forum shopping); Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1008 (1987).

103. While some debtors unquestionably seek delay in reorganization cases, a substantial number want their cases to move as quickly as possible. Examples among the cases we studied include *Crystal Oil* and *Oxoco*, who were racing against a tax deadline, and that of the Wickes Companies, whose CEO wanted the company to emerge from bankruptcy as

exercise their choice of venue to avoid judges who lack judicial temperament or an understanding of the reorganization process. It is also possible that issues that currently divide reorganization experts might be resolved in the marketplace, as companies opt for the forum in which they believe they can best reorganize. Among such issues are the degree of involvement bankruptcy judges should have in reorganization cases,[104] and whether judges better facilitate negotiation by pressuring parties indirectly, by putting the case on a firm schedule for adjudication, or by some combination of the two. Judges or panels of judges might develop levels of expertise with respect to such matters that can make the difference between success and failure of the reorganization process. This may already have occurred in the New York bankruptcy court.[105]

C. Can Forum Shopping Be Prevented?

Nothing in the legislative history of the Bankruptcy Code suggests an intention to permit forum shopping as we have defined that term—i.e., pursuing venue in a place where the debtor has little physical

quickly as possible for career reasons. When Campeau, a large, publicly held Canadian company not included in our study, chose to reorganize in Cincinnati, some knowledgeable observers speculated that the reasons may have included relatively clear bankruptcy court dockets in that city and the successful handling of the Baldwin-United case by that court.

104. *Compare* Abrams, *A View from the Bench—The Judge's Role in Chapter 11 Cases*, ABI Newsletter, Nov./Dec. 1989 (New York bankruptcy judge arguing that judges should initiate action in chapter 11 cases and not merely respond to matters raised by parties) *with* Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 BUS. LAW. 1309, 1316 (1979) ("Until an appropriate pleading is filed the court's only function with respect to the operation of the business should be to change the composition of the creditors' committee if it is not representative. The bankruptcy judge should not worry about 'how's the business doing' ").

105. A recent study by the Administrative Office of the United States Courts indicates that chapter 11 cases filed in the Southern District of New York are much more likely to result in confirmation of a plan than cases filed elsewhere. Of the cases in that study, 43% of those filed in the Southern District resulted in confirmation of a plan, whereas the comparable statistic for all cases studied was 17%. Flynn, Statistical Analysis of Chapter 11, at 12 (Oct. 1989) (unpublished manuscript) (prepared for the Administrative Office of the United States Courts). An alternative explanation for the success of the New York bankruptcy court is that the cases filed there are, on the average, larger than the cases filed elsewhere. *See id.* at 32-33. That the cases of larger companies are more likely to result in confirmation of a plan was suggested by earlier studies. *See, e.g.*, LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code*, 57 AM. BANKR. L.J. 99, 109 (1983) (empirical study finding statistically significant relationship between size of debtor as measured by dollar value of assets at filing and confirmation of a plan and remaining in business). That proposition is strongly supported by the data in this study. Of the 74 megabankruptcy cases filed from October 1, 1979, to March 31, 1988, 66 resulted in confirmed plans as of the time of this writing, one was dismissed, two were converted to chapter 7, and three remain pending. We do not know the status of two others. This implies a confirmation rate of between 89% and 96%, depending on what happens (or has happened) to the pending and status-unknown cases.

presence. Although the Code permits several alternative bases for initially placing venue, it also provides for free transfer of cases "in the interest of justice or for the convenience of the parties."[106] The most reasonable interpretation of the statutory scheme is that if the petitioner chooses to commence the case in a district in which the debtor has little or no presence, the court should transfer it to a more appropriate district.

As previously discussed, however, corrective transfers have failed to materialize; in practice, cases remain in the districts in which debtors initially file them.[107] Certainly, a primary reason for this pattern is a substantial collective action problem. Although the benefits of venue transfer may well exceed the costs for all claimants as a group, the benefits to any one claimant are likely to be far less than the costs of a successful challenge to the initial venue choice. These costs are high, in part because much of the information needed to assess what venues are possible, such as information about the financial condition of nonfiling members of the debtor's corporation group, tends to be under the exclusive control of the debtor during the crucial period from the filing of the case until momentum renders the case unmovable. The mechanism incorporated into the bankruptcy system to alleviate collective action problems like this—representation by committees—is uniquely incapable of addressing the venue problem. Once a company has filed a petition in a particular district and the committees have organized and retained counsel there, the district will be convenient for the committee. It is unrealistic to expect that they will lead the fight to transfer venue to another district.[108]

Moreover, if we are correct about the reluctance of bankruptcy judges to transfer large cases, attempts are unlikely to succeed. It is possible that parties sense this and that this in part is why there have been so few motions to transfer venue in the cases we studied. For these reasons, any serious effort to prevent forum shopping cannot rely on creditors, shareholders or their committees to initiate a venue correction, or on the bankruptcy judge to order the transfer.

To prevent forum shopping would require statutory reform. The most important step would be to clarify legislative intent with respect to venue. Congress could mandate that each case proceed in the most appropriate venue, specifying the criteria for determining what district is most appropriate. Alternatively, Congress could mandate only that the case proceed in some district in which the debtor has a substantial presence,[109] that is, prohibit forum shopping as we have defined it. This

106. 28 U.S.C. § 1412 (1988).

107. *See supra* notes 48-54 and accompanying text.

108. *See supra* text following note 50.

109. For now, we ignore the problem of defining the debtor, the extent of whose presence is to be measured. The definitional problem is the subject of Part IV of this Article.

latter option would not eliminate all venue choice, and consequently would not eliminate all competition between districts for large reorganization cases, but it would lessen the number of potential venues available to a filing party and thereby perhaps alleviate the problems produced by forum shopping.

To achieve its purpose, the legislation would have to improve the procedure for correcting an improper choice of venue. The appropriateness of the venue initially chosen would have to be subjected to independent review and correction, before the parties to the case invested substantial time and money preparing to participate where the case was filed. Practically speaking, this mechanism would have to correct venue within a few days of filing.

The agency most likely to be able to respond so quickly would be the United States Trustee.[110] That agency already monitors several aspects of reorganization cases and seeks corrective action even though there has been no objection from any party. If the United States Trustee's statutory duties were expanded to include assuring that cases proceeded in appropriate venues, that agency could develop systems and expertise for assessing and correcting venues in large reorganization cases. For example, the United States Trustee could require that the debtor in a large reorganization case file, along with the schedules and statements of affairs, an explanation of its basis for believing that the venue selected is the most appropriate.[111] Because United States Trustee regions are much larger than bankruptcy court districts—there are only twenty-one regions in the entire country[112]—these officials might be less concerned than bankruptcy judges with attracting cases to their regions. On the other hand, it is possible that the local bankruptcy bar could influence the Trustee not to seek transfer of venue of an inappropriately filed large case.

Probably a better alternative would be to assign motions for transfer of venue in chapter 11 cases for determination by a single national panel, operating much as the panel that now designates the most appropriate venue for multi-district litigation.[113] If this alternative were

110. *See generally* 28 U.S.C. § 581-89a (1988) (chapter 39). There are 21 United States Trustees each with authority over his or her region. *Id.* at § 581(a). Each has a professional staff that performs the duties specified in *id.* at § 586.

111. To facilitate employment of the "enterprise" theory in assessing the appropriateness of venue (see *infra* Part IV), that information should include information about all affiliates of the debtor, showing which have joined in the filing and which have not. With respect to the debtor and its property, the venue statement typically would include the type of information currently set forth in the "properties" section of the SEC's Form 10-K: the address of the company's headquarters, the number of persons employed there, and how long the headquarters has been located there. Of course, the Trustee should have the right to require that other information be furnished.

112. 28 U.S.C. § 581(a) (1988).

113. 28 U.S.C. § 1407 (1988). *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL

chosen, parties located far from the panel should be permitted to participate in the venue determination through written submissions. Another alternative would be to require that motions for change of venue in chapter 11 cases be determined by a United States district judge, who as an Article III judge with life tenure will hopefully be somewhat more removed from the influence of the local bankruptcy bar than are bankruptcy judges.

Such a system could work to limit forum shopping among districts within the United States. But if the standard of appropriate venue were based on convenience to the parties, it probably would be necessary that both the debtor and the decision maker compile and analyze substantial amounts of data in each large reorganization case, including information about non-filing members of the corporate group who might be impacted by the reorganization. The added convenience to the parties in such a system might be considerable; the added expense might be also. It is necessary to consider whether there are alternative methods to avoid the deleterious consequences of forum shopping.

D. Can Forum Shopping Be Accommodated?

As discussed above,[114] when petitioners in large reorganization cases are able to choose their venue, it tends to put bankruptcy courts in competition with one another and to pressure them to exercise their discretion in favor of those (primarily the debtor's management and their lawyers) who control the choice. This tendency is less worrisome with respect to bankruptcy cases than it would be with respect to most other kinds of litigation. Unlike many other kinds of litigation, bankruptcy is not a zero-sum game. Maximization of the estate to be distributed through effective techniques of reorganization or liquidation is a matter that rivals distributional issues in importance, not only from a public policy perspective but also to the parties themselves. For this reason, many of the issues important enough to influence venue choice are issues of court quality rather than court bias. Venue choice decisions motivated by the desire for an effective reorganization or liquidation should be encouraged.[115] It is only when distributional matters are important enough to influence venue choice decisions that there is cause for concern.

PRACTICE AND PROCEDURE, §§ 3861-68 (1986); Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211 (1976). The assignment of cases to the most appropriate court by the Judicial Panel on Multi-District Ligitation has been proposed as a solution to forum shopping in other contexts. Ross & Goldman, *Racing to the Court: An Unseemly Way to Challenge Agency Orders*, Nat'l L.J., Mar. 3, 1980, at 27, col. 1.

114. *See supra* notes 91-96 and accompanying text.

115. *See supra* notes 101-105 and accompanying text.

Among the cases we studied, the primary distributional matters that seemed to reach this level of importance were extensions of exclusivity and awards of attorneys' fees. A system that permits venue choice will generate some pressure for bankruptcy judges to adopt particular positions on these matters. But there are ways to deal with these pressures without eliminating venue choice.

Any system that gives parties a broad choice of venue is likely to prevent bankruptcy judges from effectively restricting fee awards to amounts less than the attorneys can command in the marketplace. If, for example, the bankruptcy judges in a particular city limit fees to $200.00 per hour, a debtor's lawyer who can command $300.00 per hour in the marketplace may be able to insist that the case be filed elsewhere. However, this limitation on the power of the bankruptcy courts should not be of concern. The legislative history of the Bankruptcy Code expresses a clear intention that the lawyers who work in reorganization cases should be paid full market rates; it rejects the notion that economy of administration is a justification for reducing the compensation of attorneys.[116]

Of greater concern is the possibility that bankruptcy judges who want to attract large reorganization cases to their district will be under pressure to award attorney fees in excess of existing market rates. Analysis requires that we distinguish fee awards for the debtor's attorney from awards for attorneys for creditors or other parties. We will address the problem with respect to the debtor's attorney first.

In most markets for legal services, a sophisticated client can avoid paying more than the market rate for attorney services by negotiating a binding fee agreement at the inception of the relationship. If the lawyer will not agree to limit fees to market rates, the client can take its business elsewhere. In bankruptcy, however, there is considerable doubt whether even the most sophisticated debtor can effectively limit by contract the amount of fees its own lawyer can obtain. Although it is customary for a fee agreement to be entered into early in the representation and for the lawyer to disclose hourly billing rates at that time, it is also customary for the fee agreements to provide that the lawyer may seek "additional compensation pursuant to provisions of the Bankruptcy Code."[117] At the conclusion of a large case, reorganization lawyers often seek, and bankruptcy judges often award, "bo-

116. *See* 124 CONG. REC. 32,394 (1978) ("[T]he policy of [Bankruptcy Code section 330(a)] is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11"). The legislative history is reviewed in *In re* Jensen-Farley Pictures, Inc., 47 Bankr. 557, 576-79 (Bankr. D. Utah 1985).

117. *See, e.g.*, 1 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 7.52 (1990).

nuses" or "premiums" in excess of the lawyers' hourly rates.[118] Moreover, even if the client sought and obtained the agreement of the lawyer not to apply for fees in excess of agreed upon hourly rates without first obtaining the client's permission to seek additional fees, that agreement would not necessarily be binding on the court.[119] This lack of certainty about the enforcement of fee limitation contracts tends to diminish the incentives for clients to seek them, further insuring continuation of the custom, even in the largest reorganization cases, of relying on the bankruptcy court to control fee awards to the debtor's attorneys.

If the Bankruptcy Code were amended to make clear that contractual limitations on fee awards to the attorneys of chapter 11 debtors would be enforcable, the debtor itself could provide an additional check on fee awards in excess of market rates. At the time it sought counsel, the debtor could bargain for binding hourly rates or other limitations on the fees of its own attorneys. If the debtor wanted to insure that no bonuses would be paid without its permission, it could insist that the fee agreement so provide.[120] Moreover, the debtor's management normally will have substantial incentives to resist excessive attorney fees. The money saved may remain with the debtor, facilitating its operations after confirmation. If such money goes to creditors, it may well be in substitution for debt instruments, thereby limiting the debtor's need for cash in future years.[121] In these circumstances, if debtors sup-

118. Bonuses were common in the cases in our study. *See, e.g., In re* Penn-Dixie Industries, Inc., 18 Bankr. 834 (Bankr. S.D.N.Y. 1981); *In re* White Motor Credit Co., 50 Bankr. 885 (Bankr. N.D. Ohio 1985). Bonuses were also awarded without written opinion in *KDT Industries, Inc.* and in *Johns-Manville Corp.*

119. 11 U.S.C. § 328(a) (1988) provides:

> The trustee . . . may employ . . . a professional person . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

Some debtors who have attempted to control the fees of their own lawyers by contract have encountered difficulty enforcing the contract. *See, e.g., In re* Warrior Drilling & Engineering Co. (Howell Petroleum Corp. v. Berkowitz, Lefkovits & Patrick), 18 Bankr. 684 (Bankr. N.D. Ala. 1981).

120. A debtor might prefer that its attorney be able to seek a bonus for outstanding work, in order to provide an incentive to do the same. In a fee agreement, this result could be achieved by providing that the attorney may apply to the court or to an arbitrator for extra fees. But we would not expect such agreements to authorize such applications in districts where the court has a reputation of seeking to attract large chapter 11 cases by awarding fees in excess of market rates.

121. There is a potential corporate governance problem here. The interests of management are not always the same as the interests of the corporation. Management might sometimes agree to pay a bankruptcy attorney above market rates without adequate justification, simply because management is not sufficiently motivated to preserve the corporation's assets or because the attorney is in a position to offer some side benefit to management.

port the payment of New York rates for New York lawyers, it suggests that the debtors believe the New York lawyers are worth the premium.

The fees of lawyers retained by creditor or shareholder interests present a different set of problems. In retaining an attorney, creditor or shareholder groups may have little incentive to drive a hard bargain. The fees of the lawyers retained by official committees initially are paid by the estate. That payment is likely to reduce the amounts otherwise available for distribution to creditors and shareholders in the aggregate. However, the reductions may not be to the same classes who hire the attorneys; they may be to classes with higher or lower priorities and the committee may anticipate such a distribution when it retains counsel. Hence, merely rendering fee agreements enforceable does not adequately address the problem of excessive fees to creditor and shareholder representatives.

The debtor's management has the same incentive to object to excessive fees whether they are paid to their own attorneys or to others. But management's concerns will not necessarily result in effective action. The debtor's lawyers may be reluctant to press objections to fees for creditor or shareholder attorneys out of concern that the lawyers on the other side will retaliate in other cases.[122] We have observed elsewhere[123] that attorneys in large reorganization cases tend to be "repeat players" who are likely to encounter each other in future reorganization cases.

Fortunately, the bankruptcy system does not rely solely on parties to the case to initiate court review of attorneys' fee applications. The United States Trustee monitors applications for compensation and files comments on them.[124] Moreover, some courts employ auditors to review fee applications.[125]

Once objections to the fees of lawyers representing creditor and shareholder interests have been raised, even the most cynical judge who sought to attract cases to the district would have reason to be responsive. It is debtors, not creditors or shareholders, who determine where cases are filed, and debtors are generally well served by limiting fees for creditors and shareholders.

However, there is no reason to believe that such waste of corporate assets will be more prevalent with respect to the hiring of bankruptcy counsel than with respect to any of the other decisions that corporate management makes.

122. *See, e.g., In re* Evans Products Company, 69 Bankr. 68, 69 (Bankr. S.D. Fla. 1986) ("It is uncommon for any attorney to question in any particular [detail] the fee application of any other attorney in a case in which both attorneys must seek approval of their compensation").

123. LoPucki & Whitford, *supra* note 1, at 156-57.

124. 28 U.S.C. § 586 (a)(3)(A) (1988).

125. *See, e.g., In re* Heck's, 112 Bankr. 775 (Bankr. S.D.W.Va. 1990) (employing fee auditor).

Extensions of exclusivity pose another vexing problem. Because failure to extend the period of exclusivity greatly reduces the bargaining leverage of those in control of the debtor, in choosing venue managements will look for districts in which extensions are likely to be granted. Yet extensions of exclusivity do not always promote effective reorganization.[126]

It is not necessary to restrict venue choice to prevent bankruptcy judges from using liberal extension policies to attract cases. The problem can be addressed directly by reducing the discretion of bankruptcy judges to grant extensions of exclusivity. The reduction might be accomplished by promulgating reviewable standards for granting extensions,[127] limiting extensions to fixed periods of time, perhaps one year,[128] requiring that applications for extensions be heard by a district judge, or some combination of these proposals.

Another deleterious effect of forum shopping is inconvenience to parties distant from the selected forum. The problem potentially affects all parties. The debtor can protect itself when choosing venue, and larger creditors often have the opportunity to negotiate with the debtor about venue before the petition is filed.[129] But the inconvenience of a particular venue for small creditors or shareholders is unlikely to be considered at all in determining the venue of the case.

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126. An analogous problem concerns the appointment of a trustee to replace incumbent management. Debtors are likely to favor a district that almost never appoints a trustee. However, the appointment of a trustee is so rare in reorganization cases that policies regarding the appointment of trustees currently are not likely to be an important consideration in the choice of venue.

127. For example, the statute might prohibit granting an extension over the objection of an official committee representing holders of claims or interests who have a substantial stake in the success of the reorganization case. Alternatively it might provide for granting an extension only in cases in which business uncertainties, pending litigation or other circumstances made it impossible for the debtor to move forward with a plan that could be confirmed by cram down.

128. The rule of exclusivity plays a key part in the dynamics of the state remedies/bankruptcy system by assuring management substantial leverage in the plan process. But that part could be served adequately by a rule that did not allow extensions beyond one year.

The legal mechanisms for creditors to petition substantial numbers of debtors into involuntary bankruptcy do not exist. *See* LoPucki, *A General Theory of the State Remedies/Bankruptcy System*, 1982 WIS. L. REV. 311 (1982). Instead, the system relies upon voluntary filings. To induce debtors to file vountarily, Congress offers reasonable assurance that filers will remain in control of their business and the plan process. *See* LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code*, 57 AM. BANKR. L.J. 247, 265 (1983). A primary function of the rule of exclusivity is to provide that inducement and control. That the right of exclusivity cannot extend beyond one year is unlikely to dissuade any significant number of debtors from filing for reorganization, however. Most debtors have pressing short-term financial reasons to seek bankruptcy protection when they file. The prospect of one more year of certain control for management should be a sufficient incentive to file, given the costs of not doing so.

129. The *Tacoma Boatbuilding* and *Towner Petroleum* cases, however, indicate that even a company's major bank lenders can be dragged kicking and screaming into an inconvenient venue. *See supra* note 52.

Assigning each case to the district most convenient for parties in the aggregate could reduce inconvenience to parties in the aggregate. But it cannot solve the fundamental problem that the creditors and shareholders of large, publicly held companies are spread throughout the United States and, increasingly, in foreign countries. What is convenient for some will be inconvenient for others, and this problem would remain even if forum shopping were eliminated entirely. Consequently, we think it makes more sense to address the problem of inconvenience by making it easier for parties to participate in cases without traveling to the physical site of the forum. Distant parties could be given the option to have matters submitted to the court without oral argument. Hearings could be held by telephone or, using state-of-the-art equipment, by television conference. Meetings of creditors or shareholders could be videotaped or even broadcast live. Courts could facilitate the efforts of private parties to make court files in large reorganization cases accessible "on-line."[130] Through a combination of these methods, the bankruptcy courts might be able to reduce the inconvenience of parties distant from the forum to such an extent that the physical site of the forum would be relatively unimportant.[131]

We have no illusions that implementation of our proposals for controlling extensions of exclusivity and the award of excessive attorneys fees will bring an end to the pressures on bankruptcy courts to favor management or their attorneys. In a system that permits venue choice and forum shopping, competition among courts will not confine itself to issues of court quality. Maintenance of healthy competition will require an ongoing effort. Forum shoppers will discover and encourage other court policies and practices that favor management or their attorneys without maximizing the value of the company. When such differences in particular policies and practices among the various bankruptcy courts reach such a level of visibility that they actually affect the flow of cases,[132] some response will be necessary. Unless that

130. Both Lexis and Westlaw have experimented with making case files in major bankruptcy cases available "on-line." For example, Lexis now includes all opinions and important documents filed in the *Federated Department Stores* case (LEXIS, Bkrtcy. library, FDS file).

131. Gibson advocates the assigning of particular issues within a case to a district that is convenient for the parties to that particular dispute. *See supra* note 13. Thus, in a large chapter 11 case, the court with primary jurisdiction might authorize a distant court to hear a particular disputed claim because the distant court is more convenient for the witnesses or others. While we think there is merit to this suggestion, it is still necessary for the "home" court in the first instance to decide whether the distant court should hear the case. Hence, the types of innovations we suggest to facilitate participation by distant parties remain necessary.

132. Such differences can affect the flow only if they are known to those lawyers and managements who control the flow. Our experience in interviewing the lawyers and judges in this study suggests to us that at that point they are also discoverable by outsiders.

response is forthcoming, the policies and practices of the competing courts in large reorganization cases will continue to shift in favor of the interests of management and their attorneys.[133]

Even though elimination of forum shopping is a practical alternative,[134] we favor the approach of retaining the present system for selecting venue and addressing in other ways the deleterious consequences that flow from extensive venue choice and forum shopping. The primary benefit we anticipate from maintaining venue choice and forum shopping is continued competition among districts in improving their methods and techniques for maximizing the aggregate value of the enterprise undergoing reorganization. The development of such methods and techniques is in the interest of all parties.

One's view on these matters might be influenced by the fact that forum shopping can occur across international borders.[135] To the extent that venue can be based on mobile assets or corporate headquarters, it cannot be controlled by any one nation. Insulation of the bankruptcy courts from competition within the United States will lessen their incentives to develop and nurture effective reorganization techniques, perhaps putting those courts at a disadvantage in responding to an international competition for large reorganization cases. Assuming it is desirable for United States bankruptcy courts to continue to play a major role in the reorganizations of multi-national companies, a failure to keep up with developments internationally would be an unfortunate

133. In the context of large, publicly held companies, United States law probably affords the debtor's management more bargaining leverage than the law of any other nation. It is possible that this favored status results in significant part from the combination of rampant forum shopping and court competition for high visibility cases.

134. We discussed the technique by which this could be accomplished at *supra* note 109 and accompanying text.

135. Two of the cases in our study had this international aspect. Dreco Industries was originally based in Edmonton, Alberta. In the early 1980s, it greatly expanded its operations in the United States, and when it filed, it chose Houston as the venue in which to reorganize. By that time, a majority of its assets were in the United States. In accord with Canadian law, the Canadian courts immediately imposed a receivership over Dreco's Canadian assets, substantially inhibiting debtor control of those assets. We have no direct evidence that Dreco expanded into the United States in order to establish venue. But the procedures for reorganization under U.S. law are generally more favorable to debtors, and the future manipulation of venue internationally for such purposes is a distinct possibility. *See generally*, STUDY COMMITTEE ON BANKRUPTCY AND INSOLVENCY LEGISLATION, BANKRUPTCY AND LEGISLATION (Canada, 1970).

The other case involved Anglo Energy. The parent company was incorporated in the Bahamas. Its only subsidiary, a United States corporation, owned all the assets and owed all the debts dealt with in the reorganization. The subsidiary filed the bankruptcy (in the Southern District of New York) and as part of the confirmed plan the parent was merged into its subsidiary. In interviews we were told that it may have been an important concern of the debtor that the proceeding be filed in the United States because of a fear that the debtor's management could not have maintained as much control if the case had been filed under Bahamian bankruptcy law.

byproduct of rigid venue rules designed to curb domestic forum shopping.

IV. Fragmentation of Enterprise and Overcentralization in Choice of Venue

In Parts I through III of this Article, no distinction was made between the business in financial distress, which we will refer to as the "enterprise," and the legal entity or entities, usually corporations, that own the enterprise. By enterprise we mean a set of integrated business activities that are managed as a unit by the company. For example, most airlines today include a ticketing system, an aircraft maintenance department, and a baggage-checking system in a single coordinated "enterprise," in order to offer the kind of product the market requires.[136] When this distinction is made, it becomes apparent that the ownership of a single enterprise may be fragmented among several entities,[137] that a single entity may own more than one enterprise,[138] and that the boundaries of enterprises and entity ownership of them are often incongruent.[139]

Under nonbankruptcy law it is entities, not enterprises, that become liable for debts. Under chapter 11, it is entities, not enterprises, that are eligible to file for reorganization.[140] Under the venue provisions relating to bankruptcy, characteristics of the entity, not the enterprise, determine where cases may appropriately be filed.[141]

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136. Our concept of enterprise is drawn from P. Blumberg, The Law Of Corporate Groups, Procedural Law §§ 22.03, 22.05 (1985). As Blumberg points out, the degree to which the management of the different business activities of a company are coordinated (or "integrated," to use his term) varies greatly. There is no single litmus test for determining when a company is a single enterprise or contains different enterprises. Despite this vagueness, we believe the concept of enterprise is a meaningful one.

137. For example, Continental Airlines was a single, integrated business composed of eight corporate entities. One was a holding company, and another owned five aircraft and six spare engines, which it leased to a third. The principal activity of two other corporations in the group was to "borrow money outside the United States and lend it to" another member of the group. Continental Airlines Corporation, Third Amended Disclosure Statement, Feb. 12, 1986, at 14-15.

138. That is, it may own two or more separate businesses that operate essentially independently of each other.

139. For example, entity A may own some of the assets employed in enterprise 1, while the remaining assets are owned by entity B, which also owns enterprise 2. To render the example more concrete, assume that entity A is a corporation that owns most of the assets of enterprise 1, which is a manufacturing company. Entity B is John Smith, who owns all of the stock of the corporation and other assets used in and essential to the manufacturing operations. Smith also owns a retail store which has no other relationship with the manufacturing company.

140. *See* 11 U.S.C. § 109(a), (d) (1988) (limiting eligibility to be a debtor in reorganization proceedings to "persons") and 11 U.S.C. § 101 (1988) (defining "person" to include individuals, partnerships and corporations).

141. 28 U.S.C. § 1408 (1988).

However, in crucial respects it is the enterprise, not the entity, which is the subject of bankruptcy reorganization. An important goal of bankruptcy reorganization policy is to make it possible for a viable business to continue in operation so that the "going-concern value" of the assets can be realized.[142] To achieve that goal, the bankruptcy court is given broad power over the debtor's business.[143] Even in liquidation cases, the bankruptcy courts seek to coordinate the disposition of related assets of the business in order to obtain a better price than could be had from a piecemeal disposition.[144] In each instance, the power of the court makes sense only if it relates to an enterprise rather than merely to an entity that owns some of the assets of the enterprise.

To give effect to these policies, it is generally recognized that a single bankruptcy court must be able to control, or at least coordinate, all aspects of the reorganization of the business:

> [T]he need to centralize bankruptcy-related proceedings and prevent a chaotic scramble for the debtor's assets is an interest of paramount importance in the bankruptcy laws. The automatic stay . . . is designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another.[145]

That the law governing the filing and venue of bankruptcy cases is couched in terms of legal entities does not necessarily prevent the bankruptcy courts from assembling the entities constituting a single enterprise in a single venue. Mechanisms exist to transfer the cases of all entities owning an interest in the enterprise to the same court. If all of the entities are in bankruptcy, but in different districts, on motion to transfer venue, the court in which the first petition was filed has control over venue for all members of the group.[146] That court is invited

142. *See, e.g.*, COLLIER ON BANKRUPTCY ¶ 1108.03 (1990) ("The chief purpose of corporate reorganization is to preserve, if possible, the going-concern value of the debtor in contrast to forced sales and depressed values in liquidation. To accomplish this purpose the debtor's business must be maintained in operation").

143. *See, e.g.*, 11 U.S.C. §§ 1104, 1108 (1988) (giving the bankruptcy court authority to appoint a trustee to "operate the debtor's business"); 11 U.S.C. § 1103 (1988) (authorizing creditors' committees to investigate "the operation of the debtor's business and the desirability of the continuance of such business").

144. *See, e.g.*, *In re* 26 Trumbull St., 77 Bankr. 374 (Bankr. D. Conn. 1987) (bankruptcy sale of bank's collateral yielded higher price than bank's "customary means of disposition" because collateral was sold along with lease to business premises which had been preserved through bankruptcy proceeding).

145. Gibson, *supra* note 13, at 41.

146. *See* BANKR. R. 1014(b), 11 U.S.C. app. Rule 1014 (1988).

to consider the "intertwined relationships of debtors"[147] in deciding "for the convenience of the parties and witnesses, in the interest of justice the court or courts in which the case should proceed."[148] With regard to entities that are not in bankruptcy, there will be no case pending and hence no case that can be transferred. Creditors can address this problem in different ways. Creditors of the non-filing entity can force the entity into bankruptcy, directly or indirectly,[149] and then seek a transfer to the district where the other cases are pending. Creditors of entities in or out of bankruptcy can seek substantive consolidation of the non-filing entities with the entities already in bankruptcy.[150] But, as with transfers of venue generally, these mechanisms are likely to operate only if there is a knowledgeable, sophisticated party in interest willing to spend money to press the matter. Previously we discussed some of the disincentives to filing such a motion.[151]

The inadequacies of the process for assembling enterprises from entities through transfers of venue and substantive consolidation creates the potential for additional strategies in choice of venue. First, an enterprise might proceed through reorganization with some entities "in" bankruptcy while others remain "out." Second, the entities that own the enterprise might all file, but in different districts. Third, the entities might all file in the same district, but at such different times that the court cannot administer them together. Finally, these strategies might be used in virtually any combination. Adopting the terminology of Blumberg, we will refer to these strategies as "fragmentation."[152]

As previously discussed, all of the companies studied here were corporate groups comprised of two or more entities. The large majority of these companies proceeded through reorganization with some entities remaining out of bankruptcy. In some cases, the reason may simply have been that the affiliate was solvent and not in need of reorganization.[153] But in many, financially distressed members of the corporate group remained outside bankruptcy after initial filing. Some of these entities never filed;[154] others later joined the case established

147. *See, e.g., In re* Toxic Control Technologies, Inc., 84 Bankr. 140 (Bankr. N.D. Ind. 1988).

148. BANKR. R. 1014(b), 11 U.S.C. app. Rule 1014 (1988).

149. *See* L. LOPUCKI, *supra* note 77 (directly by creditor's petition under Bankruptcy Code § 303, or indirectly by attack employing the creditor's state remedies).

150. *See* Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941); *In re* Tureaud, 45 Bankr. 658 (Bankr. N.D. Okla. 1985), *aff'd*, 59 Bankr. 973 (N.D. Okla. 1986) (non-debtor affiliates consolidated with debtor in bankruptcy).

151. *See supra* notes 48-52 and accompanying text.

152. *See* P. BLUMBERG *supra* note 136.

153. One example is Texas Air, which held a majority of the stock in Continental Airlines.

154. In *Anglo Energy*, for example, only the first level subsidiary filed, even though many of the lower level operating subsidiaries were in financial difficulty. The effect, probably

by the initial filing; yet others filed separate cases in the same district or in other districts.[155]

Because of the manner in which we collected our data, we learned very little about the non-filing entities, the "satellite" cases that proceeded in other districts or at different times, or the strategies, if any, served by these fragmentations. It is clear, however, that one effect of fragmentation can be to make it more difficult for parties other than the debtor to get information about all aspects of the enterprise. The extensive requirements for financial disclosure by chapter 11 debtors do not apply to non-filing entities. Although the requirements do apply to an affiliate that files in a venue distant from the courts in which the remainder of the enterprise is reorganizing, the information about that affiliate's affairs will circulate less widely than it would if the affiliate's case had been joined with the related cases.[156] Some information will be available only at the location of the court.[157] The information that

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intentional in that case, was to complicate the bankruptcy court's ability to control the affairs of the subsidiaries during the pendency of the bankruptcy. While some control was possible, the subsidiaries did not need to obtain court approval of transactions out of the ordinary course of business. *See* 11 U.S.C. § 363(b) (1988).

155. FSC was essentially a holding company investing in unrelated businesses. When it filed in Pittsburgh, some subsidiaries filed in other districts, and plans for those subsidiaries were also filed in those other districts. One of the cases in our study, *Evans Products*, was a non-wholly owned subsidiary of Sharon Steel. Both companies were under the direct control of corporate raider Victor Posner. After the *Evans Products* case was concluded in the Southern District of Florida, Sharon Steel filed for reorganization in another district. *Energetics* was another case in which an affiliate's bankruptcy proceeded in another district.

In a larger number of cases, a subsidiary reorganized in the same court as its parent, but had a separate plan confirmed months or years before or after a plan for the parent was approved. Examples of this pattern include the Johns-Manville, White Motor and Wickes bankruptcies. *See Manville Says Unit Won Final Approval for Reorganization*, Wall Street J., March 27, 1984, P.10, col. 3 (Manville Forest Products); *In re* White Motor Corp., 50 Bankr. 885 (Bankr. N.D. Ohio 1985) (reference to seperate confirmation for White Motor Credit); *Wickes Says Court Approved Debt Plans of Credit, Alden Units*, Wall Street J., Nov. 17, 1983, p.21, col. 2 (Wickes Credit Corp, Alden). In some of these cases the committees in the principal case were well informed about the proceedings concerning the subsidiary and were able to participate as fully as the law allowed.

In several of the cases we studied—for example, *AM International* and *Dreco Energy*—a subsidiary reorganized in a foreign country. In those cases, the United States court with jurisdiction over the parent's bankruptcy had especially little control over the subsidiary's reorganization. A similar phenomenon occurred in *Baldwin-United*, where state insurance commissions took control of three of the parent company's principal subsidiaries, pursuant to state laws permitting receiverships to be cstablished over insolvent insurers for the benefit of policyholders with claims. *See Plans for Redemption of Annuities Sold by Baldwin Units Are Filed By Two States*, Wall Street J., Oct. 19, 1983, p. 18, col. 1.

156. As a matter of course, information about the affiliate will be furnished only to creditors and equity holders in the affiliate. *See generally* BANKR. R. 2002, 11 U.S.C. app. Rule 2002 (1988). Upon application, the court may require that the information be furnished to others, including committees appointed in the cases of affiliate. *See* BANKR. R. 2002(l), 11 U.S.C. app. Rule 2002 (1988). Thus, the creditors' committee in the FSC case received reports from the cases of affiliates reorganizing in other districts.

157. *See, e.g.*, 11 U.S.C. § 343 (1988) (requiring debtor to appear at the location of

is disclosed may not be in formats that can be easily related to the information furnished in related cases.[158] Most importantly, the schedule for disclosure of information in a particular case is based on the parties' need for information in that case;[159] it may come too late to be of use in related cases in other districts.

Although we were not able to document that fragmentation was used for strategic purposes in any of the cases we studied, we suspect that was only because our investigation was limited. When creditors, shareholders and other parties lack information, the position of management tends to be strengthened; management is likely to have the information no matter what the configuration of bankruptcy filings. Once an enterprise has been fragmented, it tends to be harder, for example, for a creditor to object to the sale of an asset not owned by the entity to which it is a creditor or to formulate its own plan of reorganization to compete with a plan proposed by management. Fragmentation might also be used by management to impede the flow of information that might result in substantive consolidation.[160] Management's motive might be to favor the creditors of one of its entities over the creditors of another.

Consolidating in a single venue the organization cases of affiliates that operate independent enterprises can also inflict substantial, unnecessary inconvenience. For example, assume that affiliates in New York and Los Angeles each operate economically independent, largely local enterprises. If their cases are administered together by a New York bankruptcy court, the parties to the Los Angeles company's case may be severely inconvenienced. The problem is compounded by the existence of "tag along" litigation, mainly adversary proceedings, the venue of which will follow the main case to New York.[161] In a particular

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the forum for examination at the meeting of creditors); BANKR. R. 1007, 11 U.S.C. app. Rule 1007 (1988) (requiring the filing of extensive schedules and statements of affairs, but not requiring that they be sent to creditors or shareholders). For all but a few parties, access to those documents is available only by examination of the court file.

158. Each district fixes the formats for reports of business operations. *See* 11 U.S.C. § 704(8) (1988); BANKR. R. 9029, X-1007, 11 U.S.C. app. Rules 9029 & X-1007 (1988).

159. For example, the disclosure statement is distributed only when a particular plan is submitted to creditors and equity holders for acceptance. *See* BANKR. R. 3017(d), 11 U.S.C. app. Rule 3017 (1988).

160. Substantive consolidation is an equitable doctrine under which a bankruptcy court can deal with the assets and liabilities of two or more entities as though they were held or incurred by a single entity. The grounds for substantive consolidation are typically that creditors did not rely on the separate identities of the entities in granting credit, fraudulent transfers were made among the entities or their affairs are otherwise so entangled that it would be too costly or time-consuming to deal with them separately. *See* 5 COLLIER ON BANKRUPTCY ¶ 1100.06(1) (15th ed. 1990). If the entities that might be consolidated are in reorganization proceedings pending in different districts, it may be more difficult for participants in the cases to recognize the grounds for consolidation.

161. The principle of centralizing control over the affairs of a reorganizing debtor is

circumstance, a debtor might choose such "overcentralization" as a venue strategy precisely to inconvenience antagonistic creditors and in that way perhaps discourage opposition. This strategy of overcentralization would be implemented by first filing a reorganization case in New York for the New York enterprise and then using that case as the "venue hook" that justifies a New York filing by the Los Angeles enterprise.

Overcentralization can also occur when several enterprises with linked corporate structures are brought into one case, even though one of the enterprises is solvent and probably should not be in bankruptcy at all. This situation apparently existed in one of the *Manville* cases, which were included in our study. Manville Forest Products, a major subsidiary which was operated separately and was not in financial difficulty, filed for reorganization and based venue on the reorganization case of its parent. The district court referred to the joinder of Forest Products as apparently nothing more than an attempt by Manville and its creditors to "do [the Forest Products creditors] out of their preferred position with respect to the Forest Products assets."[162]

Choices of venue that fragment a single enterprise among two or more districts or that overcentralize the cases of separate enterprises cannot be easily accommodated in a rational scheme of bankruptcy venue. A first step in addressing this type of forum shopping would be to redraft the provisions of the Bankruptcy Code regarding jurisdiction and venue to replace the entity approach with an approach that takes account of enterprise.[163] Such an approach might require the United States Trustee and the bankruptcy court to examine any corporate filing to determine whether other entities need to be included in the proceeding for the court to exercise effective control over the entire enterprise. The court should then be empowered to include these entities. To facilitate such an examination, petitions would have to include

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implemented through 28 U.S.C. § 1334(d) (1988), which grants jurisdiction over all of the property of the debtor "wherever located" to the district in which the bankruptcy case is pending, and 28 U.S.C. § 1409 (1988), which compels any person who would file a proceeding against the debtor "arising out of or related to a case under title 11," except claims arising after commencement of the bankruptcy case, see 28 U.S.C. 1409(e) (1988), to commence their proceeding in the district in which the main case is pending. *See generally* Gibson, *supra* note 13, at 41. Once the proceeding is filed, the court in which the main case is pending may transfer it to a more convenient forum. 28 U.S.C. § 1412 (1988). But the court in which the main case is pending also has the option to retain it "in the interests of justice". *Id.*

162. *In re* Manville Forest Products, 31 Bankr. 991 (Bankr. S.D.N.Y. 1983).

163. In his masterful multi-volume work, *The Law of Corporate Groups, Bankruptcy*, Blumberg traces the "increasing unacceptability of the concept of entity" and the "emergence of enterprise law as the standard for application to corporate groups and their constituent corporations." *See generally* P. BLUMBERG, THE LAW OF CORPORATE GROUPS, BANKRUPTCY xxxiii, xxxv (1985).

information sufficient to permit the United States Trustee and the court to determine the extent of the filing enterprise.[164]

V. Conclusion

The statutes and rules governing the venue of bankruptcy reorganization cases have fostered considerable forum shopping by large, publicly held companies. Much of that shopping has been for the convenience of the major participants in the cases, but in some cases it has been used for strategic purposes, including avoidance of districts that are hostile to extensions of exclusivity, or that aggressively regulate attorneys' fees. Forum shopping has the potential to slow the reorganization process and augment the bargaining power of debtors by channeling cases to districts where exclusivity is routinely extended. It can also put pressure on bankruptcy judges who wish to attract large reorganization cases to make their districts more attractive to debtors and their lawyers (*e.g.*, by overcompensating the lawyers for their work in the case), and make participation less convenient for small parties.

It is unrealistic to expect the parties in these cases to control forum shopping through motions to transfer venue. Individual parties do not have access to the information needed, usually no single party has sufficient incentive to represent the interests of creditors or other interested parties as a group, and the mechanisms for consolidating representation through committees are poorly designed to deal with the issue of venue.

In attempting to deal with these problems, policymakers can choose between two basic alternatives. First, they can attempt to eliminate forum shopping by establishing a mechanism for assuring that cases proceed in the most appropriate venue. To be effective fully, it would be necessary that the filing party have little discretion in determining what is the most appropriate venue, and to achieve this it would be necessary that the filing party's initial venue selection be reviewed by a neutral party, such as the Multi-District Litigation Panel. Second,

164. Once it is established that it is the administration of an enterprise rather than an entity that is to be centralized in a single district, the appropriateness of a particular district as a venue may depend on the definition of the enterprise. For example, Sharon Steel was a Pennsylvania-based company which owned and controlled Evans Products. Evans Products was headquartered in Florida, but had nationwide operations which were conducted through numerous subsidiaries. One of those subsidiaries was Grossman's, whose operations and headquarters were in Massachusetts. If Grossman's had been regarded as the debtor, the most appropriate venue would have been in Massachusetts. Because Evans Products was regarded as the debtor, Grossman's affairs were sorted out in the Florida bankruptcy case of *Evans Products*. If Sharon Steel had been regarded as the debtor, Grossman's affairs probably should have been sorted out in the Pennsylvania bankruptcy case of *Sharon Steel*. Under an enterprise approach, a court would have to make an empirical decision about what combinations of assets should be considered an enterprise.

they can attempt to accommodate forum shopping by addressing in other ways the deleterious consequences of such shopping, including excessive attorney fees, excessive extensions of exclusivity and inconvenience to minor participants.

While elimination of forum shopping is a practical alternative, we favor accommodation. We believe that with vigilance, the negative consequences of forum shopping can be identified and addressed. Congress, judges and other members of the bankruptcy community should reconcile the conflicting practices in different districts by clarifying vague standards and narrowing judicial discretion on distributional matters. In effect, this is what we have advocated with respect to the most evident of current problems—excessive fees to attorneys and extensions of exclusivity.[165]

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.

Lastly, we have identified two additional types of forum shopping, which we have denominated fragmentation and overcentralization. These types of forum shopping are made possible by the fact that business enterprises are not necessarily congruent with the entities that own them. While the purpose of reorganization is in large part to deal with enterprises, the provisions of the Bankruptcy Code dealing with venue and eligibility to file speak in terms of entities. As a result, it is possible for the reorganization of a single enterprise (consisting of several entities) to be fragmented among several districts or for the reorganization of several enterprises from different locations to be overcentralized in a single district. We have suggested ways in which parties might exploit these and other combinations for strategic advantage, and concluded that if they are in fact significant problems the probable solution is a redrawing of the venue statutes to replace the current entity approach with an enterprise approach.

165. *See supra* notes 116-128 and accompanying text.

APPENDIX

Basis for Venue

The cases are divided into four categories, depending on the geographical relationship between the debtor's executive offices, the center of its operations and the bankruptcy court in which the debtor reorganized. Our information about location of executive offices and business operations comes from a variety of sources, including the disclosure statements accompanying the reorganization plans, 10-K filings to the SEC, interviews and newspaper articles. Only the nine cases in group four had a single "natural" venue and proceeded in that location.

GROUP ONE: *Venue away from center of operations and principal executive offices* (seven of forty-three cases, sixteen percent).

1. *HRT*—case in New York although principal executive offices and center of operations were in California.
2. *KDT*—case in New York although principal executive offices and center of operations were in Massachusetts.
3. *Manville*—case in New York even though principal executive offices and center of operations were in Colorado.
4. *Tacoma Boatbuilding*—case in New York even though principal executive offices and substantially all operations were in State of Washington; banks moved for change of venue to Tacoma, Washington, but the motion was denied.
5. *Technical Equities*—case in San Francisco even though principal executive offices and center of operations were in San Jose division (San Jose division has a separate panel of judges).
6. *Towle Manufacturing*—case in New York even though principal executive offices and substantially all operations were in Massachusetts.
7. *Towner Petroleum*—case in Oklahoma City, Oklahoma, even though principal executive offices were in Houston, Texas, and properties were spread throughout more than eight states; banks moved for change of venue to Houston, but motion was denied.

GROUP TWO: *Venue at principal executive offices, away from all operations* (nine of forty-three cases, twenty-one percent). Case proceeded in district where principal executive offices were located, even though all or substantially all operations were in other districts.

1. *Anglo Energy*—case in New York City based on principal executive offices, operations centered on the North Slope in Alaska.
2. *Combustion Equipment*—case in New York City based solely on principal executive offices; operations centered in Connecticut, Illinois,

Minnesota and Pennsylvania; emerging company moved principal executive offices to Minnesota.

3. *Lionel*—case in New York City based on principal executive offices and small portion of stores; operations centered in Philadelphia, Pennsylvania warehouses.
4. *Nucorp*—case in San Diego based solely on principal executive offices; operations in Texas, Ohio and several other states.
5. *Penn-Dixie*—case in New York City based on principal executive offices and possibly very minor operations; emerging steel company moved principal executive offices to center of steel operations in Kokomo, Indiana.
6. *Revere*—case in New York City based solely on principal executive offices; operations in several states and other districts in New York state; emerging company moved principal executive offices to Stamford, Connecticut.
7. *Salant*—case in New York City based solely on principal executive offices; manufacturing operations in several states and countries.
8. *Saxon*—case in New York City based on principal executive offices and possibly minor operations; operations in several states; emerging company moved offices to Valley Forge, Pennsylvania.
9. *Seatrain Lines*—case in New York City (*i.e.*, Southern District of New York) based solely on principal executive offices; company had presence in Brooklyn Naval Yard in the Eastern District of New York, but was closing its operations there; other operations in Alaskan coastal trade and Texas; emerging company moved headquarters to Englewood, Colorado.

GROUP THREE: *National or regional companies, venue at principal executive offices* (eighteen of forty-three cases, forty-two percent). Companies had no clear centers of operations. Had the principal executive offices been in another district, that district would have been at least as appropriate a venue for the case.

1. *Amarex*—case in Oklahoma City, Oklahoma, based on principal executive offices and substantial properties, but Amarex owned more than twice as many developed acres in Texas; emerging company moved its principal executive offices to Houston.
2. *Baldwin United*—case in Cincinnati, Ohio, where company's headquarters were located, but debtor was a conglomerate owning numerous subsidiaries throughout the U.S. Key holdings were the Empire Savings group of Colorado banks, single premium deferred annuity companies operating out of Arkansas and Indiana, and a $1.7 billion mortgage insurer (MGIC) that was domiciled in Wisconsin. Six months before filing, debtor hired New York based turnaround expert and established "nerve center" in New York

while principal executive offices "technically" remained in Cincinnati. Creditors filed in Cincinnati minutes before debtor filed in New York and debtor consented to case proceeding in Cincinnati. The emerging company, Philcorp, moved its principal executive offices to Philadelphia, Pennsylvania.

3. *Charter*—case in Jacksonville, Florida, based on principal executive offices and some retail outlets; largest properties were apparently oil refineries in the Bahamas and Houston, Texas.
5. *Continental Airlines*—case in Houston, Texas, based on principal executive offices recently moved to that city and one of several operational hubs; principal operational facilities remained in Los Angeles, California, and company also had operational hubs in Denver, Colorado and Honolulu, Hawaii.
6. *Dreco*—case in Houston based on move of principal executive offices and center of operations from Canada; properties were located in several states and Canada; emerging company moved its principal executive offices and center of operations back to Canada.
7. *Energetics*—case in Denver, Colorado, based on principal executive offices and some properties; greatest concentration of properties was in Wyoming.
8. *EPIC*—case in Virginia based on principal executive offices including company's crucial financing operations, but properties located primarily in Texas and other southwestern states (the limited partnerships that owned the properties were reorganized as part of the proceeding).
9. *Evans Products*—case in Miami, Florida, based on principal executive offices moved to that city about one year before filing; company was a conglomerate with operations in many different districts; emerging company moved its principal executive offices to Braintree, Massachusetts.
10. *FSC*—case in Pittsburgh, Pennsylvania, where reorganizing entities were based, but company operated a variety of businesses, including the Adobe Oil refinery in Louisiana (through subsidiaries) and had thirty-seven offices used for sales activities in twenty-seven cities, storage facilities in six cities in U.S. and offices in England and West Germany. Creditors filed involuntary petition in New York but court transferred case to Pittsburgh. Subsidiaries reorganized separately in at least four other chapter 11 cases in other districts.
11. *Itel*—case in San Francisco, California, based on headquarters of 200,000 square feet there; principal assets were dispersed. Shipping containers were throughout the world, rail cars throughout the U.S. Itel maintained offices and depots in eleven cities around the world and in about a dozen U.S. cities. It owned short line railroads in Wisconsin principally and also in northern California and Alabama. The emerging company moved to Chicago, Illinois.

12. *MGF*—case in Midland, Texas, based on principal executive offices and substantial operations, but substantial operations also in east Texas and Wyoming, and property in Colorado.
13. *Oxoco*—case in Houston, Texas, where company was headquartered. Oil and gas properties were located in eleven states, Africa and Indonesia. Nearly half the properties were in Texas; we do not know what proportion were in the Southern District, which includes Houston.
14. *Phoenix Steel*—case in Delaware, where headquarters were located. Company owned two steel mills, one in Delaware where company filed, and one in Pennsylvania. During the proceeding, the Pennsylvania mill was closed.
15. *Pizza Time Theatre*—case in San Jose, California, where company had its headquarters and manufacturing operation at time of filing, but principal assets were 120 company-owned restaurants and 100 franchisee-owned restaurants in thirty-five states and three foreign countries. During the case, under an interim operating agreement anticipating a sale of the company's assets to a competitor, the headquarters were moved to Texas.
16. *Sambo's Restaurants*—case in Los Angeles, California, where headquarters were located. At the time of filing, company operated about six hundred restaurants in forty-six states. Its two distribution centers were in Carpenteria, California (near Los Angeles), and in Florence, Kentucky.
17. *White Motor*—case in Cleveland, Ohio, where headquarters were located. Company, a manufacturer, had plants in eight states, Canada and Australia. At least one major segment of the business, White Farm Equipment, had all its plants outside Ohio. Emerging company kept one plant located in Cleveland, but moved its headquarters to Stamford, Connecticut.
18. *Wickes*—case in Los Angeles, California, based on move of principal executive offices to Los Angeles at time of filing and filing by a subsidiary immediately prior to filing by the parent; company was a conglomerate with operations of reorganizing subsidiaries centered in many different districts.
19. *Wilson Foods*—case in Oklahoma City, Oklahoma, based on principal executive offices and substantial operations, but operations were in eight states and largest operations were in Iowa.

GROUP FOUR: *Locally based companies filing locally* (nine of forty-three cases, twenty-one percent). Venue at location of principal executive offices and center of operations.

1. *Air Florida*—case in Miami, Florida, where company was based.

2. *AM International*—case in Chicago, Illinois, where two of three divisions had their largest operations.
3. *Braniff*—case in Fort Worth, Texas. Headquarters and center of operations were at the Dallas-Fort Worth Airport. Because they were located on the Ft. Worth side of the field, the Ft. Worth division in which the company filed was the appropriate division.
4. *Cook United*—case in Cleveland, Ohio. Operations centered in northern district of Ohio, including twenty-three of forty-two retail stores and 80,000 square foot headquarters building.
5. *Crystal Oil*—case in Shreveport, Louisiana. The large bulk of Crystal's operations were in north Louisiana. The company had already disposed of its refinery in Arkansas and made a decision to dispose of the other two.
6. *Marion*—case in Mobile, Alabama, where the company had the greatest concentration of operations and property. Creditors filed an involuntary petition in Houston, Texas, but court transferred case to Mobile. Owned an oil refinery in Mobile, oil and gas properties in a five-state area with concentrations in Mississippi (acreage) and Alabama (producing wells), real estate in Alabama and Florida, and cable television systems in a several state area.
7. *McLouth Steel*—case proceeded in Detroit, Michigan, where mills and headquarters were located.
8. *Smith International*—case proceeded in Los Angeles, California, where company was based.
9. *Storage Technology*—case proceeded in Denver, Colorado. Company occupied over two million square feet of floor space in twenty-seven buildings in the area of Denver, Colorado, making it clearly a Denver company. However, it had smaller, but still substantial, bases of operation in central Florida and Puerto Rico.