



AMERICAN
BANKRUPTCY
INSTITUTE

2018 Southeast Bankruptcy Workshop

Why Not Here? An Examination of Why More Chapter 11 Business Cases Aren't Filed in the Southeast

Hon. Mary Grace Diehl, Moderator

Atlanta

James D. Decker

Guggenheim Securities, LLC; Atlanta

Paul G. Jennings

Bass, Berry & Sims PLC; Nashville, Tenn.

Patrick J. Nash, Jr.

Kirkland & Ellis LLP; Chicago

23rd Annual Southeast Bankruptcy Workshop

Why Not Here? An Examination of Why More Chapter 11 Business Cases Aren't Filed in the Southeast

July 27, 2018

Paul G. Jennings, Moderator: Bass, Berry & Sims PLC

Hon. Mary Grace Diehl: Atlanta

James D. Decker: Guggenheim Securities, LLC

Patrick J. Nash, Jr.: Kirkland & Ellis LLP

1

Agenda

- Filing Venue Statistics
- Venue Reform Bill
- Why Certain Jurisdictions Over Others?
 - Legal Issues and Considerations
 - Home Court Advantages and Disadvantages
- Venue Transfer
- Venue Issues Outside the U.S.
- Appendix

2

Filing Venue Statistics

3

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Overview

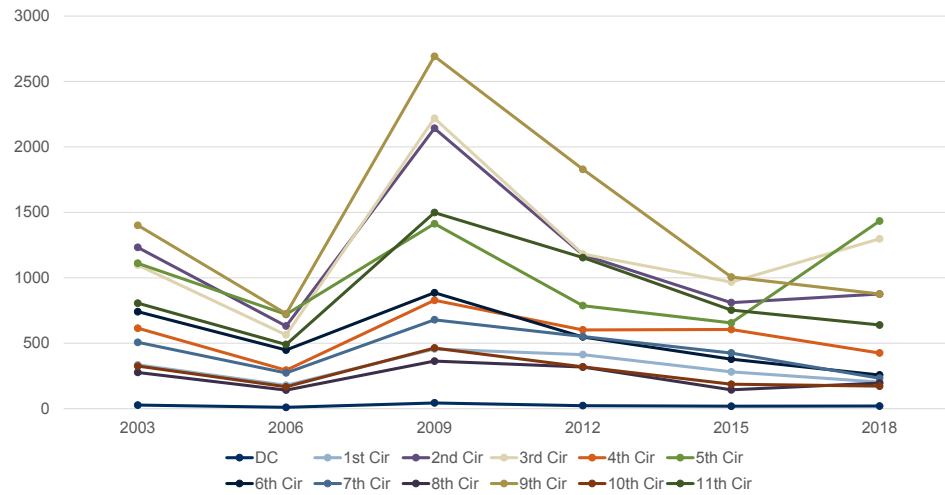
Circuit	Chapter 11 Filings
5th	1,434
3rd	1,298
2nd/9th (tie)	876
11th	639
4th	425
6th	257
7th	233
1st	203
8th	195
10th	172
DC	20

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

4

Filing Venue Statistics

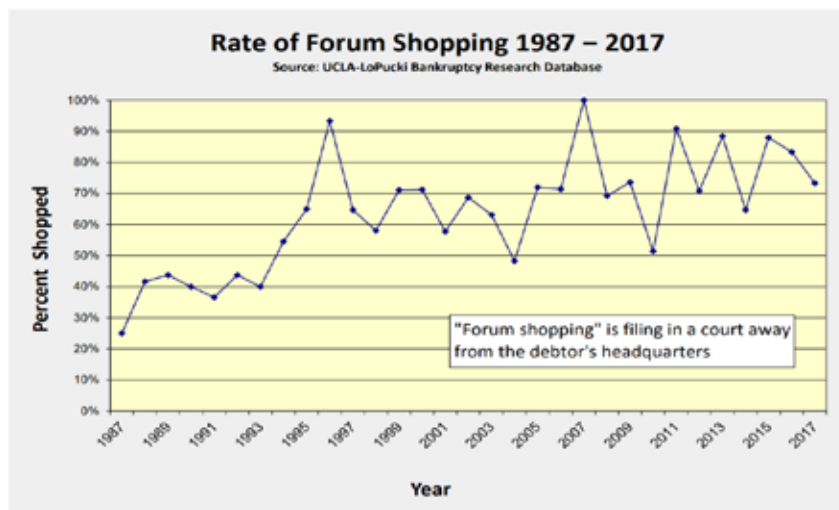
Chapter 11 Business Filings Over Time



5

Filing Venue Statistics

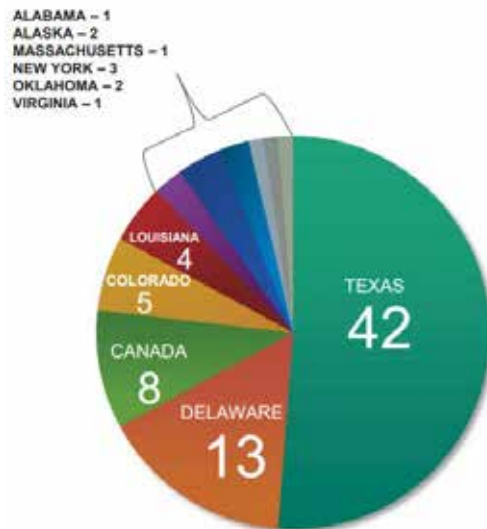
“Forum Shopping”



6

Filing Venue Statistics

Oil & Gas Filings “Flow” to Texas¹



¹2015-2016 E&P Filings by Location (Source: Haynes and Boone, LLP)

7

Venue Reform Bill

8

Venue Reform Bill

Overview

- In January 2018, Senators John Cornyn (R-TX) and Elizabeth Warren (D-MA) introduced the Bankruptcy Venue Reform Act of 2018 (the “**Venue Reform Bill**”).
 - Would amend section 1408 of the Bankruptcy Act to require debtors to file in the district “**in which the principal assets or principal place of business are located.**”
 - Would also bar debtors from “tag-along” filings in jurisdictions where their affiliates have ongoing bankruptcy proceedings unless that affiliate “**owns, controls, is the general partner, or holds 50% or more of the outstanding voting securities**” of the debtor.
- In sum, the Venue Reform Bill would **eliminate** the domicile venue option and the affiliate option that allows larger parent companies to file in the same venue as a smaller subsidiary.
 - The practical effect of this would be to significantly restrict a debtor’s ability to choose its venue, and would specifically reduce filings in Delaware, where many businesses do not operate but are domiciled in Delaware by virtue of having incorporated there.

9

Venue Reform Bill

Support For the Venue Reform Bill

- Senators Cornyn and Warren released a joint statement emphasizing that the bill is intended to **strengthen the integrity of the bankruptcy system** and build public confidence by **preventing companies from forum shopping**.
 - The Venue Reform Bill is also meant to permit employees and small business creditors to participate in a meaningful way in the bankruptcy cases.
- Support for the Venue Reform Bill largely comes from those outside of Delaware and New York, who would see a significant jump in major bankruptcies filed if the bill were to pass.
- Other supporters of the Venue Reform Bill include the Commercial Law League, Texas Bankruptcy Bar Association, Texas Hotel & Lodging Association, Boston Bar Association, AG & Business Legal Strategies, and the Iowa Bankers Association.

10

Venue Reform Bill

Opposition to the Venue Reform Bill

- Delaware's Governor and congressional delegation issued a joint statement in response to the Venue Reform Bill:

"Many American companies, large and small, choose to incorporate in Delaware because of the expertise and experience of our judges, attorneys, and business leaders. Denying American businesses the ability to file for bankruptcy in the courts of their choice would not only hurt Delaware's economy but also hurt businesses of all sizes and the national economy as a whole. This is a misguided policy, and we strongly oppose it."

- Senator Christopher Coons (D-DE) also published an additional statement that emphasized that the Venue Reform Bill "is bad for businesses everywhere, but it **would be a disaster for Delaware.**"
- Other parties opposed, including the New York City Bar Association, called the Venue Reform Bill a "**radical departure from longstanding practice**" and "**contrary to its purpose,**" by dramatically restricting a corporate debtors' forum selection.

11

Venue Reform Bill

Why Did It Fail?

- Proponents of maintaining the current system argue that experienced courts and judges are better equipped to handle complicated issues in a large bankruptcy proceeding.
 - This leads to **greater predictability**, thus reducing the cost, risk, and delay often associated with bankruptcy filings.
 - In turn, this helps **save businesses, preserve jobs, and reduce creditor losses.**
- Importantly, despite the idea of promoting certainty and predictability being viewed as a good thing for debtors, it is not necessarily a bad thing for individual creditors.
- Additionally, while technology has made it increasingly easier for creditors to participate in a bankruptcy case from any jurisdiction, it has also become increasingly difficult to isolate a particular district as the unequivocal home of a large debtor's business when trade creditors and employees may be scattered across the globe.

12

Why Certain Jurisdictions Over Others?

13

Why Certain Jurisdictions Over Others?

Legal Issues and Considerations

- ***Sophistication of Courts:***

- **Responsiveness:** Debtors are wary of courts that do not have reasonably good and responsive “first-day” procedures. A delay in holding a “first-day” hearing and entering “first-day” orders can negatively impact a debtor’s overall restructuring efforts, as it delays access to cash, paying employees, and other essential relief.
 - A delay in first-day proceedings may also indicate a broader lack of responsiveness, which could create an obstacle for companies that may often need to schedule emergency or expedited hearings.
 - A smaller court with a limited number of judges may also lead to delay.
- **Consistency:** Consistency in courts is crucial, not just on the law, but among judges as well. In a district with multiple judges, if the efficiency and outcome of your case can depend on the judge you draw, such a jurisdiction is less likely to be a popular one.

14

Why Certain Jurisdictions Over Others?

Legal Issues and Considerations (cont'd)

- **U.S. Trustee:**

- **Experience:** Experience and sophistication of U.S. Trustees is also important. A U.S. Trustee office with less large Chapter 11 experience may be less “user friendly.”
- **Professionals and Fees:** A U.S. Trustee’s stance on hiring advisors and professional fees may also be a consideration.
- **Procedure and Timing:** Appointment of the unsecured creditors committee (the “**UCC**”) is important. A quick selection and organization of the UCC is generally preferred.

15

Why Certain Jurisdictions Over Others?

Legal Issues and Considerations (cont'd)

- **Caselaw Among Circuits:**

- Binding precedent (or lack thereof) is also a consideration.
- Major legal considerations include: collective bargaining agreements and related jurisprudence; certain obligations such as Coal Act liabilities; IP assumption/assignment; third-party releases; ease of section 363 sales; and critical vendor issues.
 - For example, the Fourth Circuit is a good place to be for selling assets pursuant to section 363 “free and clear” of Coal Act liabilities and collective bargaining agreements.
 - The Fifth Circuit generally has a very restrictive view of third-party releases, requiring debtors to provide an “opt out” mechanism.

16

Why Certain Jurisdictions Over Others?

Legal Issues and Considerations (cont'd)

- **Local Rules and Procedures:**

- The local rules and local procedures of a specific jurisdiction, including whether complex case and/or omnibus procedures are in place, should also be considered.

- **Efficiency and Expense:**

- Expense and ease of access may be a consideration.
 - Travel costs, accessibility of the forum by regular airline routes, rules requiring retention of local counsel, and a court's willingness to accept proffers of evidence over live testimony or to conduct telephonic hearings for certain matters may be considerations.

- **DIP Financing:**

- The DIP lender's preference for venue may factor into the debtor's ultimate decision, as well as a court's likelihood to permit certain DIP financing structures, such as roll-ups.

17

Why Certain Jurisdictions Over Others?

Home Court Advantages and Disadvantages

- As alluded to, forcing a debtor to file in its "home" jurisdiction allows certain creditors, such as employees and retirees, to more fully participate in the case.
 - In certain instances, this could derail a debtor's restructuring.
 - For example, if the debtor plans to conduct mass layoffs or terminate an existing collective bargaining agreement, employees will be more able to interject themselves into the proceedings and possibly prevent the debtor from implementing these practices.
- Filing in a "home" jurisdiction will also mean that any adversary proceeding initiated is also in said "home" court.
 - If the debtor filed elsewhere, it would force adverse parties to litigate in the foreign jurisdiction, possibly undermining predictability for the debtor's trade vendors and business partners who may have reasonably believed that any dispute would be resolved in the "home" court.

18

Venue Transfer

19

Venue Transfer

Overview

- Venue of bankruptcy cases is governed by section 1408, which provides that venue may lie in the district where:
 - the debtor has a domicile;
 - the debtor has a residence;
 - the debtor has a principal place of business;
 - the debtor has principal assets; or
 - there is a pending bankruptcy case concerning the debtor’s affiliate, general partner, or partnership.
- Often, debtors seeking to file their cases in a certain jurisdiction, despite no meaningful contacts with these states, would form a subsidiary in the jurisdiction and then rely upon section 1408(5) to “tag-along” their case to the pending case of the newly-formed affiliate.
- The debtor’s choice of venue may nevertheless be challenged under section 1412, which provides that a court may transfer a case or proceeding for the “convenience of the parties” or in the “interest of justice.”

20

Venue Transfer

In re Winn-Dixie Stores, Inc.

- On February 21, 2005, Winn-Dixie and its affiliates filed voluntary petitions for relief under Chapter 11 in the Southern District of New York, despite being headquartered in Florida and the bulk of their operations being located throughout the southeast.
 - Winn-Dixie’s basis for venue in the Southern District of New York had been created through the incorporation of a subsidiary 12 days prior to its filing.
 - A creditor subsequently moved to transfer the venue to Florida, which several other southern-based creditors joined, claiming it would be prohibitively expensive to participate in New York.
- Despite ultimately transferring venue to Florida, the court noted that Winn-Dixie had not acted in bad faith or engaged in improper forum shopping by filing the cases in New York.
 - Indeed, the bankruptcy court seemed to accept the practice of opportunistic forum selection generally, noting ***“I do not believe it is otherwise improper to file within a district that Congress has expressly created for one. In fact, it may well be a duty to do so based on one’s analysis of all the facts at hand.”***

21

Venue Transfer

In re Patriot Coal Corporation

- In June 2012, Patriot Coal Company formed two New York subsidiaries.
 - Roughly six weeks later, Patriot Coal Company and 98 of its subsidiaries filed Chapter 11 in the Southern District of New York.
 - The debtors stipulated that the creation of the two new subsidiaries was solely for the purpose of establishing venue.
- Shortly after the petition date, the United Mine Workers of America filed a motion to transfer the case to the Southern District of West Virginia.
 - Similar motions were subsequently filed by certain of the debtors’ insurance companies., the West Virginia Attorney General, and the U.S. Trustee.
- Ultimately, Judge Chapman of the Southern District of New York transferred the case to the Eastern District of Missouri, where, among other things, the debtors’ headquarters, executive offices, and management team were located. Notably, Judge Chapman did not consider the debtors’ “eve of filing” strategy to be in bad faith.

22

Venue Transfer

In re Caesars Entertainment Operating Co. Inc.

- Prepetition, the debtors executed a restructuring support agreement that required them to file a voluntary petition for relief under Chapter 11 between January 15, 2015 and January 20, 2015.
 - On January 12, 2015, certain creditors preempted the voluntary filing and filed an involuntary petition for relief under Chapter 11 in the District of Delaware.
 - On January 15, 2015, the debtors filed voluntary petitions for relief under Chapter 11 in the Northern District of Illinois.
- Bankruptcy Rule 1014(b) permits the court in which the first-filed petition is pending to determine which district is appropriate.
- Accordingly, Judge Gross of the District of Delaware was faced with the issue of whether to allow the case to proceed in Delaware or Illinois.
 - Judge Gross ultimately found that Delaware was not significantly more or less convenient or accessible for the various parties in interest and their professionals, and transferred the case to Chicago.

23

Venue Issues Outside the U.S.

24

Venue Issues Outside the U.S.

Forum Shopping in Europe

- Forum shopping is not a phenomenon individual to the U.S. In recent years, it has become very prevalent in Europe as well.
 - In the 2000s, multiple German companies moved their “center of main interests” (“**COMI**”) (the equivalent of the U.S.’s principal place of business) to the UK shortly before filing to take advantage of English insolvency law, viewed to be more favorable.
- Like the Venue Reform Bill, the European Insolvency Regulation (“**EIR**”) has attempted to limit such efforts.
 - In 2015, the EIR introduced a three-month “suspension period” for forum shopping activities, like those of *Winn-Dixie* or *Patriot Coal*, carried out immediately before a debtor files for insolvency.
 - The “suspension period” is triggered where a debtor’s registered office (effectively, its headquarters) has been moved across borders within the three months before filing.
 - In such cases, a court may not presume that the new registered office is the COMI. Instead, the court must establish, based on the facts before it, in what jurisdiction the COMI exists.

25

Appendix

26

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: First Circuit

<i>1st Circuit</i>	
Maine	13
Massachusetts	76
New Hampshire	15
Rhode Island	9
Puerto Rico	90
Total	203

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

27

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Second Circuit

<i>2nd Circuit</i>	
Connecticut	42
N. New York	27
E. New York	344
S. New York	425
W. New York	38
Vermont	0
Total	876

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

28

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Third Circuit

<i>3rd Circuit</i>	
Delaware	817
New Jersey	276
E. Pennsylvania	84
M. Pennsylvania	33
W. Pennsylvania	85
Virgin Islands	3
Total	1,298

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

29

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Fourth Circuit

<i>4th Circuit</i>			
Maryland	116	E. Virginia	103
E. North Carolina	74	W. Virginia	16
M. North Carolina	18	N. West Virginia	13
W. North Carolina	39	S. West Virginia	29
South Carolina	17		
Total			425

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

30

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Fifth Circuit

<i>5th Circuit</i>			
E. Louisiana	34	N. Texas	474
M. Louisiana	7	E. Texas	73
W. Louisiana	79	S. Texas	613
N. Mississippi	31	W. Texas	104
S. Mississippi	19		
Total			1,434

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

31

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Sixth Circuit

<i>6th Circuit</i>			
E. Kentucky	9	S. Ohio	17
W. Kentucky	13	E. Tennessee	31
E. Michigan	70	M. Tennessee	45
W. Michigan	4	W. Tennessee	24
N. Ohio	44		
Total			257

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

32

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Seventh Circuit

<i>7th Circuit</i>			
N. Illinois	117	S. Indiana	27
C. Illinois	19	E. Wisconsin	11
S. Illinois	21	W. Wisconsin	16
N. Indiana	22		
Total	233		

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

33

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Eighth Circuit

<i>8th Circuit</i>			
E. Arkansas	14	E. Missouri	54
W. Arkansas	13	W. Missouri	30
N. Iowa	9	Nebraska	10
S. Iowa	10	North Dakota	4
Minnesota	45	South Dakota	6
Total	195		

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

34

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Ninth Circuit

<i>9th Circuit</i>			
Alaska	6	Idaho	19
Arizona	140	Montana	10
N. California	104	Nevada	90
E. California	74	Oregon	22
C. California	316	E. Washington	6
S. California	26	W. Washington	52
Hawaii	11	Guam	0
Total	876		

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

35

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Tenth Circuit

<i>10th Circuit</i>			
Colorado	74	E. Oklahoma	1
Kansas	29	W. Oklahoma	13
New Mexico	25	Utah	15
N. Oklahoma	4	Wyoming	11
Total	172		

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)

36

Filing Venue Statistics

Chapter 11 Business Cases By Circuit¹: Eleventh Circuit

<i>11th Circuit</i>			
N. Alabama	34	S. Florida	170
M. Alabama	10	N. Georgia	102
S. Alabama	17	M. Georgia	37
N. Florida	22	S. Georgia	12
M. Florida	235		
Total		639	

¹For the 12-month period ending March 31, 2018 (Source: www.uscourts.gov)