Why Bankruptcy Venue Reform Now?

By Laura N. Coordes and Joan N. Feeney***

Introduction

"Justice must not only be done, but should be seen to be done."[1] This venerable maxim, expressed nearly one hundred years ago by British Lord Chief Justice Hewart, champions the importance of the public's perception of integrity in the courts. Its standard of the appearance of propriety, fairness, and impartiality has become a well-settled principle of American law and process.[2] The primary interaction of this nation's citizens with the United States courts is in the bankruptcy courts "where they see justice done or not done. And it is important that they have the opportunity to see it."[3]

Bankruptcy forum shopping or "venue shopping" as it has come to be known, is a debtor's choice of the venue for its case in a district, court, or division, or even before a particular bankruptcy judge, using the several options contained in the Judicial Code's venue statute.[4] Venue shopping to a particular court has been a problem in the bankruptcy system for years. According to Judge Steven Rhodes, the now-retired bankruptcy judge who presided over

*Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law.
** Joan Feeney is a neutral with JAMS, the co-author of the Bankruptcy Law Manual (Thomson/Reuters/West), and was a United States Bankruptcy Judge for the District of Massachusetts for 27 years.

[1] *R v. Sussex Justices ex parte McCarthy*, 1 KB 256 (1923).

[2] *See, e.g.*, Code of Conduct for United States Judges, Canon 2, *available at* https://www.uscourts.gov/judges (Mar. 12, 2019) (requiring federal judges to avoid the appearance of impropriety in all activities).

[3] *In re Crosby National Golf Club, LLC*, 534 B.R 888, 895 (Bankr. N.D. Tex. 2015) ("There is value in witnessing the messiness and frequent tedium of court proceedings. There is value in hearing someone argue why you are right and why you are wrong. There is value in watching a judge wrestle with uncomfortable issues that affect your livelihood. There is value in knowing that even though our judicial system is not perfect, those who serve it work hard to achieve what is fair, just, and right under the law.").

[4] 28 U.S.C. §§ 1408 (venue of cases under title 11) & 1412 (change of venue). The criteria set forth in § 1408 are in the alternative; a debtor can select any of them if the debtor meets the requirements of one of the permitted options, and if more than one venue is appropriate, the debtor may choose the best one from its perspective. *See Arrol v. Broach (In re Arrol)*, 170 F.3d 934 (9th Cir. 1999) (venue of case of debtor who on petition date resided in Michigan was proper in California where debtor had resided for better part of 180 days prior to commencement of case).

the City of Detroit Chapter 9 case, the debtor's ability to choose virtually any venue for its case under the current bankruptcy venue law "is the single most significant source of injustice in Chapter 11 cases."[5] Recent developments have caused constituents of all types of business bankruptcy cases—creditors, employees, retirees, legal and financial professionals, attorneys general of forty-two states, academics, bankruptcy judges, and members of the public—to question the fairness and legitimacy of the current bankruptcy system and to support venue reform.[6]

Yet, calls for reform of the bankruptcy venue statute are nothing new. Twenty-five years ago the independent National Bankruptcy Review Commission, established by Congress in 1995 to investigate and recommend changes to bankruptcy law and procedure, proposed changes to bankruptcy venue laws to prohibit debtors from seeking relief based on state of incorporation, and to modify the ability of a business to file for bankruptcy where a corporate subsidiary or affiliate already filed.[7] Eight years ago the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 held hearings on the problems caused by bankruptcy venue shopping under the current law, and heard substantial evidence from numerous witnesses that forum shopping results in the location of a case having no meaningful relationship to the business, its operations, its financial difficulties, or its stakeholders, which in turn often results in a negative perception of the credibility, fairness, and legitimacy of bankruptcy relief.[8] In 2018, the National

[5] Peter Califano, *Bankruptcy Reform - Everything You Need to Know is in This Article*, 29 COM. L. WORLD 8, 9 (2015) (quoting Hon. Steven Rhodes).
[6] *See* Press Release and Letter of the National Association of Attorneys General executed by 42 United States Attorneys General dated November 9, 2021, supporting passage of H.R. 4193 and S. 2821(Nov. 9, 2021), *available at* https://wwww.naag.org/policy-letter/naag-endorses-bankruptcy-venue-reform-act-of 2021 (hereinafter, "NAAG Letter").
[7] National Bankruptcy Review Commission Final Report, Bankruptcy: The Next Twenty Years 779 (Oct. 20, 1997), *available at* http//gov.info. library.unt.eud/NBRC/report01title.html (hereinafter, "NBRC Report").
[8] Final Report and Recommendations of the ABI Commission to Study the Reform of Chapter 11, at 311, *available at* http://commission.abi.org/report. The ABI Commission did not propose changes to current venue law, explaining that its members were unable to reach a consensus.

Conference of Bankruptcy Judges established a committee to report on the arguments, literature, and other material relevant to then pending venue reform legislation.[9] Bankruptcy venue reform bills have been introduced in Congress six times since 2011. Noting the momentum for venue reform in the 116th Congress, Professor Robert Lawless observed: ". . . this time feels different . . . ."[10] Given the venue shopping described below, venue reform in the 117th Congress has momentum and has become even more urgent.

Proponents of venue reform, most recently the members of Congress who have sponsored pending bipartisan bills and professionals representing parties in bankruptcy cases, have asserted many reasons for change to the statutory scheme, and we will not repeat them all here.[11] We advocate for bankruptcy venue reform in this article for several reasons that bankruptcy scholarship should continue to explore in light of recent developments.[12] First, we examine a negative consequence of venue shopping: the diminution of public confidence in and resulting discredit to the bankruptcy system. Venue shopping in bankruptcy is contrary to notions of

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[9] *See* Terrence L. Michael, Nancy V. Alquist, Daniel P. Collins, Dennis R. Dow, Joan N. Feeney, Frank J. Santor, Mary F. Walrath, National Conference of Bankruptcy Judges, Report of the Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases, *available at* www.ncbj.org and 93 AM. BANKR. L. J. 741 (2019) (hereinafter, "NCBJ Report"). The NCBJ Special Committee on Venue was directed to refrain from taking a position for or against venue reform legislation.

[10] Creditslips.org/creditslips/pending_and_new_legislation (May 5, 2020 5:22 PM).

[11] Rep. Zoe Lofgren, Press Release, "Logren, Buck Introduce Bipartisan Legislation to End Corporate Bankruptcy Forum Shopping" (June 28, 2021), *available at* https://lofgren.house.gov; Sen. Elizabeth Warren, Press Release, "Warren, Cornyn Introduce Bill to Prevent Large Corporations from 'Forum Shopping' in Bankruptcy Cases" (Sept. 23, 2021), *available at* https://warren.senate.gov; Eric A. Rosen, *The Reason Bankruptcy Venue Is Needed Now*, 35 COM. L. WORLD 12 (2021); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381 (2015).

[12] There is an extensive and growing academic literature on the harms of venue shopping and judge picking. *See, e.g.*, Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991) (finding extensive venue shopping among the bankruptcies of large, publicly-held companies); Lynn M. LoPucki, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) (arguing that venue shopping leads to "shoddy reorganizations"); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013) (finding that venue shopping has continued to proliferate for decades); Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381 (arguing that venue shopping contravenes due process); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. ___ (forthcoming June 2022) (using Belk's one-day Chapter 11 case to illustrate bankruptcy courts "ignoring" the Bankruptcy Code and Rules); Adam J. Levitin, *Judge Shopping and the Corruption of Chapter 11* (Sept. 1, 2021), *available at* https://ssrn.com/abstract=3900758 (highlighting the harms of judge shopping).

fairness and neutrality and creates an appearance of bias and impropriety that risks endangering bankruptcy's significant and valuable role and reputation as the American economy's safety net.[13] We thereafter discuss the negative impact venue shopping already has had on the development of bankruptcy law. Next, we discuss why transfer of venue is an inadequate remedy. Finally, in the interests of a transparent evaluation of the best options for fixing the venue statute, we recommend hearings on the pending bipartisan bills in the 117th Congress: H.R. 4193 sponsored by Rep. Zoe Lofgren (D-Cal.) and Rep. Ken Buck (R-Col.) and S. 2827, sponsored by Sen. Elizabeth Warren (D-Mass.) and Sen. John Cornyn (R-Tex.).

The venue reform debate has become highly polarized, stagnating any forward movement. At the same time, the status quo in bankruptcy has become untenable, for the reasons this article will discuss. Although evaluation of all options for change is beyond this article's scope, we nevertheless encourage full dialogue and discussion of ideas for venue reform in order to move past the status quo of gridlock and polarization.

I. How Venue Rules Lead to Venue Shopping

The bankruptcy venue rules, found in Title 28 of the U.S. Code, provide a great deal of flexibility to corporate debtors. Broadly speaking, the bankruptcy venue statute provides that a debtor may file a case in the district in which it is incorporated; in the district where its principal place of business or principal assets are located; or in the district where a case involving its affiliate, general partner, or partnership is pending.[14] Under the bankruptcy venue statute, the more complex a corporate debtor is, the higher the likelihood that it will have numerous options for venue under the statute. For example, a debtor with multiple affiliates may commence its

[13] Robert M. Lawless & Elizabeth Warren, *Shrinking the Safety Net: The 2005 Changes in U.S. Bankruptcy Law*, University of Illinois College of Law, Illinois Law and Economics Working Paper Series Research Paper No. LE06-031, *available at* http://papers.ssrn.com/pape.tar?abstract_id=949629 (2006).
[14] 28 U.S.C. § 1408.

bankruptcy case in any location in which an affiliate is headquartered or incorporated, even if that affiliate is inactive or holds virtually no assets.[15]

The bankruptcy venue statute's options have enabled various sorts of venue shopping over the years. Because many corporations are incorporated in Delaware, debtors often choose to file in Delaware even if their only connection to the state is that they are incorporated there.[16] Many debtors have used the bankruptcy venue statute's affiliate provisions to file for bankruptcy in a district in which a small or even a shell subsidiary has filed.[17]

Importantly, a debtor's choice of venue may not be final. The venue transfer statute provides that a court may transfer a bankruptcy case to a different district "in the interest of justice or for the convenience of the parties."[18] However, as detailed below, it is often quite difficult, if not impossible, for parties to a case to file a venue transfer motion when it is worthwhile to do so, and in practice, transfer of venue is quite rare.[19]

In addition to the venue rules laid out by statute, every judicial district has its own local rules, which may also impact a debtor's choice of venue and, in some cases, even allow the debtor to choose the judge that will hear its case.[20] For example, the Southern District of Texas has local rules for the assignment of complex Chapter 11 cases, which provide that all such cases will be assigned to one of two judges.[21] And until recently, the Southern District of New York had rules that provided that all bankruptcy filings with the debtor's address in Rockland or

[15] M. Natasha Labovitz & Craig A. Bruens, *You Can Still Shop After Winn-Dixie*, 24 AM. BANKR. INST. J. 16 (2015).
[16] 1 Collier on Bankruptcy 4.02 (16th 2021) ("[M]any cases that have no other connection with the state have been filed in Delaware.").
[17] *See, e.g.*, *In re Patriot Coal Corp.*, 482 B.R. 718, 742-43 (Bankr. S.D.N.Y 2012).
[18] 28 U.S.C. § 1412.
[19] Labovitz & Bruens, *You Can Still Shop After Winn-Dixie*, 24 AM. BANKR. INST. J. 16.
[20] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. ___ (forthcoming 2022).
[21] Order Regarding Complex Case Assignment, Bankr. S.D. Tex. (Jan. 29, 2018).

Westchester Counties went to a single judge.[22] Perhaps in recognition that it is problematic for a debtor to singlehandedly select the judge that will hear its bankruptcy case, the Southern District of New York recently changed its local rules to make its case assignments more random.[23] At least in the Southern District of New York, debtors will no longer be guaranteed a particular judge simply by ensuring that they can locate themselves or an affiliate in a particular county.

The desire to hand-select a bankruptcy judge reveals some common perceptions—and misperceptions—about the role of a judge in a bankruptcy case. There is a perception that some judges are more knowledgeable than others when it comes to handling complex cases.[24] Indeed, districts that have adopted complex case assignment rules seem to explicitly acknowledge such perception when they restrict complex case assignments to specific judges, to the exclusion of other judges within the district. There is no empirical evidence that some bankruptcy judges are equipped to handle "big" cases while others are not. This perception is belied by the fact that all bankruptcy judges endure a comprehensive merit selection process.[25] The circuit courts of appeals consult with the local bar to meticulously select and scrutinize candidates for a bankruptcy judgeship.[26] A circuit court's selection of a bankruptcy judge thus indicates its confidence that the judge will be able to handle any bankruptcy case, from the simplest to the

[22] Levitin, *Judge Shopping and the Corruption of Chapter 11*, *available at* https://ssrn.com/abstract=3900758 ("[T]he SDNY bankruptcy court has long had a local rule that assigns all cases where the debtor's address on the bankruptcy petition is in Rockland or Westchester Counties to the one-judge White Plains Division in the New York City suburbs.").
[23] James Nani, *Purdue Bankruptcy Spurs Forum Shopping Pushback in NY, Congress*, BLOOMBERG LAW (Dec. 6, 2021) ("Under the New York rule, 'mega' Chapter 11 cases worth at least $100 million will be randomly assigned to one of the district's judges regardless of the courthouse where the initial filing occurs.").
[24] Written Testimony of Adam J. Levitin, Professor of Law, Georgetown University Law Center before the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, United States 11 System, July 28, 2021, *available at* https://docs.house.gov/meetings/JU/JU05/20210728/113996/HHRG-117-JU05-Wstate-LevitinA-20210728.pdf (hereinafter, "Levitin Testimony").
[25] Levitin, *Judge Shopping and the Corruption of Chapter 11*, *available at* https://ssrn.com/abstract=3900758.
[26] Levitin, *Judge Shopping and the Corruption of Chapter 11*, *available at* https://ssrn.com/abstract=3900758.

most complex, that comes before them. Put simply, all bankruptcy judges are immensely qualified to hear all types of bankruptcy cases.

Notably, recent venue—and judge—shopping patterns have undercut the argument that only the most experienced judges can hear complex cases; as Professor Adam Levitin has pointed out, many debtors have steered their cases toward less experienced judges.[27]

Purdue Pharma's bankruptcy is a recent, salient example of blatant judge-shopping. Seeking to place its case before Judge Robert Drain in the Southern District of New York, Purdue changed the service of process address for its non-equity general partner to an address in Westchester County prior to its bankruptcy filing, presumably so that it could take advantage of the Southern District's previously discussed local rule, which at the time assigned all cases in that county to Judge Drain.[28] This was essentially Purdue's only connection to Westchester County: its headquarters are in Connecticut, and its primary manufacturing operations are in Rhode Island and North Carolina.[29] Yet, using the flexibility provided by the bankruptcy venue statute and the Southern District's local rules, Purdue was able to ensure its case was placed before Judge Drain. Judge Drain might have been a particularly attractive choice for Purdue because he had previously approved non-consensual third-party releases in bankruptcy cases, and such releases were critical to the success of Purdue's bankruptcy plan.[30] More about that below.

In conclusion, the bankruptcy venue statutes and local bankruptcy court rules have historically allowed debtors significant leeway in choosing both the court in which to file their case and the judge in front of whom they will appear. As discussed in more detail below, the

[27] Levitin Testimony, *supra* note 24 at 12 ("[I]f one looks at the patterns of judge-shopping, it has not been to more experienced judges, but actually away from them.").
[28] Levitin Testimony, *supra* note 24 at 9.
[29] Levitin Testimony, *supra* note 24 at 9.
[30] Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV at 69-70 (forthcoming 2022).

discretion to choose a location granted by these statutes and rules has been abused by debtors and their counsel to obtain the outcome they want from a bankruptcy case, regardless of any connection between the court and those affected by the bankruptcy case. Congress did not intend this result. Although it is true that debtors who forum shop are often in compliance with the *letter* of the law, their actions nonetheless can indicate bad faith. A bankruptcy system that permits such actions to go unchecked is a system that needs correction.

II. Recent Venue Shopping Examples

Over the past twenty-five years many large, medium, and small businesses have used the Judicial Code's bankruptcy venue provisions to locate the administration of their bankruptcy cases away from their headquarters.[31] The Boy Scouts of America, the Boston Herald, the Los Angeles Dodgers, and Tropicana Las Vegas Casino are just a few examples of debtors which did not file their Chapter 11 cases in the district of their principal place of business and used allowed venue options to file in the District of Delaware. Enron, Houghton Mifflin, General Motors, the Minneapolis Star, and Eastern Airlines all commenced their cases in the Southern District of New York despite having no meaningful connection there. For years, big business has used the venue statute's lenient choices to seek relief in so-called "magnet courts"—first, the Southern District of New York, then the District of Delaware, and more recently the Southern District of Texas and the Eastern District of Virginia. Strategic use of venue choices has become more prevalent and even disturbing in recent years, with venue shopping evolving from the choice of a particular district to particular courts and even individual judges.[32] Although academics have

[31] NCBJ Report, 93 AM. BANKR. L. J. at 759.

[32] *See* Levitin, *Judge Shopping and the Corruption of Chapter 11* (Sept. 1, 2021), *available at* https://ssrn.com/abstract=3900758. While 11 U.S.C. § 1408 instructs that a case must be commenced in the appropriate district, the statute does not indicate in which division of a district a bankruptcy petition should be filed in the event a district has several divisions. Most bankruptcy courts having more than one court location have adopted local rules providing instruction on which division is considered proper for a case to be administered. *See, e.g.*, BANKR. D. MINN. R. 1002-1; BANKR. D. MASS. R. Appendix 5.

written about venue shopping for years, data and statistics are scant on why debtor's lawyers counsel their clients to commence cases away from their nerve centers and in other districts.[33] Whatever benefits a debtor might gain from venue shopping within its case are outweighed by the system-wide harms that venue shopping is perpetuating.

Several recent cases have attracted national attention, underscoring the need for revisions to bankruptcy venue law. Both the Johnson & Johnson subsidiary LTL and Purdue Pharma are emblematic of business entities' ability to use venue options to choose their bankruptcy court, choices that individual debtors do not have.[34]

Johnson & Johnson created LTL Management LLC under Texas law two days prior to its bankruptcy filing in North Carolina to deal with hundreds of millions of dollars in claims asserted in mass tort litigation against the parent due to its sale of carcinogenic talc product.[35] At this time, approximately 35,000 tort actions were pending against Johnson & Johnson in federal multi-district litigation in New Jersey.[36] Texas law allows a business to transfer liabilities to a separate entity through a controversial mechanism known as a "divisive merger" (more colloquially known as "the Texas two-step") in which liabilities of a business, not assets, are transferred to a separate entity.[37]

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[33] *See* NCBJ Report, 93 AM. BANKR. L. J. at 758, 760, 810. The NCBJ Report criticized Professor LoPucki's view that judges are responsible for forum shopping as having no factual support and referred to his theory as an ad hominem attack.

[34] *See Donald v. Curry (In re Donald)*, 328 B.R. 192, 202 (B.A.P. 9th Cir. 2005) (individual debtor's domicile is not simply any residence, as a debtor can have several, but is a place where one intends to permanently remain or return to).

[35] Order of Hon. J. Craig Whitley to Appear and Show Cause Why Venue Should Not Be Transferred to Another District, *In re LTL Mgmt. Co., LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 208 (Oct. 26, 2020).

[36] *In re Johnson & Johnson Talcum Power Products Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2738 (D.N.J.)

[37] TEX. (BUS. ORGS.) CODE ANN. § 10.008 (Sept.1, 2015).

The following facts appear from the debtor's submissions and the court's orders on the LTL docket.[38] LTL commenced its Chapter 11 case on October 14, 2021, in the Western District of North Carolina, Charlotte Division. The initial Texas limited liability company quickly was converted to a North Carolina limited liability company. Nearly all the assets and employees of the debtor and its ultimate parent, Johnson & Johnson, were located in New Jersey. On the petition, the debtor reported a New Jersey mailing address and stated that all corporate affiliates were headquartered in New Jersey. The only employees of the debtor were employees of the parent, and they continued to work in New Jersey. The only assets the debtor owned as of the petition date in North Carolina were a bank account with $6 million in cash and a few intangible assets, including membership interests in a North Carolina limited liability company and the rights to a funding agreement. The debtor conducted no other business in North Carolina.

In submissions to the bankruptcy court, LTL conceded that the corporate restructuring was done to enable the resolution of talc-related claims through a Chapter 11 reorganization without subjecting the entire Johnson & Johnson enterprise to a bankruptcy case and that Johnson and Johnson had engineered the corporate transactions and transferred assets into North Carolina primarily for the purpose of filing bankruptcy in that district.[39] Venue was technically proper in the Western District of North Carolina as the debtor was a North Carolina limited

[38] Informational Brief of LTL Management LLC, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 3, at 2-3 (Oct. 14, 2021); Doc. No. 5, Declaration of John K. Kim in Support of First Day Pleadings (Oct. 14, 2021); Doc. No. 208, Court's Order to Show Cause Why Venue Should not be Transferred to the District of New Jersey (October 26, 2021).

[39] Informational Brief of LTL Management LLC, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 3, at 2-3 (Oct. 14, 2021); Doc. No. 5, Declaration of John K. Kim in Support of First Day Pleadings (Oct. 14, 2021); Doc. No. 208 Order to Show Cause Why Venue Should not be Transferred to the District of New Jersey (October 26, 2021); Doc. 416 Order of Hon. J. Craig Whitley Transferring Case to the District of New Jersey (November 16, 2021).

liability company on the petition date, albeit only for two days.[40] The ostensible reason for the corporate maneuvering and filing in the Western District of North Carolina was to avoid the risk of dismissal of the bankruptcy by filing in a circuit that had a lenient test for dismissal of a case for lack of good faith, and to obtain the assignment of either of two judges in the district who had extended the automatic stay to litigation against parents and affiliates, and who had confirmed plans including nonconsensual releases of non-debtor third parties.[41] The Western District of North Carolina is a two judge court, and one of the judges had a conflict requiring recusal; thus, the debtor was assured of the assignment of Hon. J. Craig Whitley.[42]

At the hearing on first-day motions, Judge Whitley announced he would issue an order to show cause why the Chapter 11 case should not be transferred from the Western District of North Carolina pursuant to the venue transfer statute due to the debtor's manufactured connection to North Carolina.[43] The court's order to show cause was followed by the Bankruptcy Administrator's motion to transfer venue. That motion was joined by numerous interested parties, including many talc claimants.[44] On November 16, 2021, the court transferred LTL's Chapter 11 case to the District of New Jersey, ruling that the convenience of the parties and the interests of justice warranted the case being heard in the District of New Jersey because all the debtor's operations were there; the debtor had no business in North Carolina other than a bank account; resolution of the 35,000 multi-district litigation cases pending in the District of New

[40] *See* 28 U.S.C. § 1408(1); *see also* Order Transferring Case to the District of New Jersey, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 416 (Nov. 16, 2021); *In re Segno Commc'ns, Inc.*, 264 B.R. 501 (Bankr. N.D. Ill. 2001) (business entity's domicile for purposes of bankruptcy venue is its state of incorporation).
[41] *See* Order Transferring Case to the District of New Jersey, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 416 (Nov. 16, 2021) (court referenced split in the 4th Circuit and 3rd Circuit on dismissal standard).
[42] *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C. Oct. 20, 2021).
[42] *See In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.)
[43] *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 119-124, Courtroom Recordings (Oct. 20, 2021).
[44] *See LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C), Doc. Nos. 205, 316, 337, 340, 357.

Jersey could serve as a template for claims estimation and allowance in other mass tort bankruptcy cases; and finally, the debtor was forum shopping and tried to manufacture venue in the Western District of North Carolina to obtain a more favorable dismissal standard than exists in the United States Court of Appeals for the Third Circuit. [45] Since the transfer, LTL's creditors' committee has filed a motion to dismiss the LTL case as a bad faith filing, and that contested matter is pending.[46]

Thus, it was apparent to all—and conceded to by the debtor—that LTL had no real connection with North Carolina and that its case had been shopped to that location. Still, the parties and the court had to engage in motion practice, over a one-month period, to remove LTL from that venue. The amount of money wasted to get LTL into the correct forum was money that could have gone to victims of Johnson & Johnson's talc products. Furthermore, LTL's attorneys' belief that LTL could succeed in blatantly manufacturing venue in North Carolina is proof that the venue system is not working properly.

Another defining case of 2021 exposing abuse of venue choices is the Chapter 11 case of Purdue Pharma and affiliates ("Purdue"), the manufacturer of the highly addictive pain killer Oxycontin, owned by the Sackler family, one of America's wealthiest.[47] The opioid epidemic, a massive public health crisis in this nation, caused nearly half a million deaths and millions of injuries since the late 1990s, and could be traced in large part to the over prescription of opioids manufactured by Purdue. The opioid crisis gave rise to thousands of lawsuits against Purdue and its insiders, brought by individual plaintiffs, hospitals, pharmacies, insurers, the United States,

[45] *See* Order Transferring Case to the District of New Jersey, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 416 (Nov.16, 2021).
[46] *See In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.), Doc. No. 632 (Nov.16, 2021).
[47] The following recitation of facts was obtained from the docket of the debtor's lead bankruptcy case in Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan, *In re Purdue Pharma, L.P.*, No. 19-23649 (RDD) (Bankr S.D.N.Y.), Doc. No. 3786 (Sept. 17, 2021), and decision Hon. Colleen McMahon on appeal at *In re Purdue Pharma, L.P.*

numerous states of the United States, local governmental units, and sovereign indigenous tribes. Moreover, although Purdue pleaded guilty in 2007 to criminal charges brought by the United States for false marketing and fraud, it faced new federal criminal charges of the same nature in 2020 to which it also pleaded guilty. Despite the criminal and civil actions, Purdue was a solvent and financially sound enterprise except for potential judgments in the opioid lawsuits. The Sacklers took distributions from Purdue of over $10 billion between 2008 and 2017, transferring millions offshore or to spendthrift trusts not reachable in a personal bankruptcy.

Purdue and certain affiliates commenced Chapter 11 cases on September 15, 2019 to resolve both present and future opioid claims. In addition to the automatic stay, Purdue sought and obtained from the bankruptcy court an injunction prohibiting litigation against the Sacklers and other non-debtor affiliates. The debtors' stated intention was also to file a plan granting not only a discharge to the debtors of their debts, but also releases of the Sacklers and other third parties. Specifically, Purdue sought a broad release of direct claims against non-debtor related entities and channeling injunctions benefiting non-debtors, including the Sackler family members. These releases and injunctions are not derivative of the debtors' liability and provide a release of the non-debtors' personal liability for claims for torts such as negligence, willful misconduct, deceptive acts and fraud. Purdue sought this relief even though the non-debtors had not commenced bankruptcy cases for themselves. The releases and injunctions the debtors proposed were nonconsensual and were in effect purchased by the Sacklers in the form of a more than $4 billion contribution to the plan.

Mentioned above, Purdue filed its bankruptcy petition in the White Plains division of the Bankruptcy Court in the Southern District of New York to ensure that Judge Drain would be

assigned to its case.[48] On its petition commencing the case, the debtor represented that its principal place of business was Stamford, Connecticut, and the petition does not reflect any connection to White Plains. According to Professor Levitin, Purdue knew Judge Drain would be assigned the case because his initials were typed in the caption of the uploaded petition, even though the case had not been assigned a number, and assignment rules in other divisions of the Southern District of New York were not applicable to cases commenced in the White Plains division, which has only one judge.[49]

For two years, Purdue engaged in extensive negotiations with interested parties, conducted mediations with creditors, and proposed eleven plans of reorganization. Many objectors withdrew their objections to the plan, although numerous states and creditors continued to object to confirmation. The Eleventh Amended Plan provided for contributions by non-debtors, including the Sacklers, of $4.325 billion, in exchange for a release of claims against them. Judge Drain entered an order confirming the debtors' plan and then modified it, approving the nonconsensual third-party releases.[50] The United States Trustee and several creditors, including several states attorneys general, appealed. The United States District Court reversed the bankruptcy court's approval of the plan because the nonconsensual third party releases set forth in the plan are not authorized by the Bankruptcy Code, except in asbestos cases.[51] The district court comprehensively analyzed the issue of third party releases, which has caused a split in the circuits for decades, rejecting the notion that § 105(a) and other provisions of the Bankruptcy Code contain residual authority for third party releases.[52] District Judge McMahon

[48] BANKR. S.D.N.Y. R. 1073-1. As discussed in Part I, *infra*, this Local Rule has since been amended.
[49] *See* Levitin Testimony, *supra* note 24.
[50] *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).
[51] *In re Purdue Pharma, L.P.*, No. 21 cv 7532, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).
[52] *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at * 49-70.

was troubled by the unfortunate circumstance that the Chapter 11 case proceeded for two years based on the incorrect assumption that third party releases of non-debtors were valid, and significantly denounced opportunistic venue shopping to obtain their approval, commenting: "It should not be left to debtors and their creditors to guess whether [nonconsensual third party releases] are statutorily authorized; and it most certainly should not be the case that their availability, or lack of same, should be a function of where a bankruptcy filing is made."[53]

III. Arguments

A. Venue Shopping Ignores Bankruptcy's Local Effects and Creates an Appearance of Impropriety

Despite the rigorous selection process that ensures that "every federal bankruptcy judge should be capable of handling any bankruptcy case," venue-shopping and judge-shopping have proliferated and resulted in "a concentration of cases before just a few judges, which produces a repeat-player dynamic." [54] This dynamic was on full display in Purdue Pharma's bankruptcy: as Ryan Hampton, co-chair of the creditors' committee in the case, observed, "there were a group of law firms and lawyers that were supposed to be on opposite sides, and they knew each other."[55] One of the principal reasons for enactment of the Bankruptcy Reform Act of 1978 and creation of a new court structure was public dissatisfaction with the "bankruptcy ring" resulting in perceptions of bias in favor of a small group of professionals who had dominated bankruptcy practice nationally.[56] Forty-four years later, there is a new cluster of professionals who dominate

[53] *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *70.
[54] Levitin Testimony, *supra* note 24 at 11.
[55] *Ralph Nader Radio Hour: Did the Sackler Family Get Away With It?* (Dec. 4, 2021), *available at* https://secureservercdn.net/198.71.233.254/c03.434.myftpupload.com/wp-content/uploads/2021/12/Ralph-Nader-Radio-Hour-Ep-404-Transcript.pdf.
[56] *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 80-1 (1997) (describing the bankruptcy ring as one of the reasons for the bankruptcy reform movement in the 1970s).

representation in large reorganization cases—contrary to a fundamental objective of the Bankruptcy Reform Act of 1978.

Venue shopping and judge shopping are also harmful because the bankruptcy of any company has inherently local effects, and those local effects are marginalized when a debtor files in a place that has no connection to its business whatsoever. Congress recognized the local nature of bankruptcy when it created a system of local bankruptcy courts around the country. The choice of a forum and judge located thousands of miles from a debtor's operational center(s) is a choice to distance the decision-maker in the case from those most significantly affected by the case's outcome.[57] If bankruptcy judges' expertise was truly so variable, or if Congress had indicated an intent to create business bankruptcy tribunals to handle complex cases in certain locations, such a choice might be justifiable; however, when every bankruptcy judge in the country has the qualifications necessary to handle every type of bankruptcy case, and absent any indication of congressional intent to concentrate complex cases in a handful of venues, there is simply no legitimate need and no reason to seek a distant forum to resolve inherently local issues.[58]

Opponents of venue reform have downplayed the risk of local stakeholders being shut out of cases, suggesting that remote participation is an able substitute for a party's inability to appear live in the courtroom.[59] Of course, if a remote appearance was truly equivalent to in-person

[57] Frank W. DiCastri, *Cause for Reform: The Bankruptcy Venue Reform Act of 2021*, REINHART LAW BLOG (Oct. 6, 2021), *available at* https://www.reinhartlaw.com/knowledge/cause-for-reform-the-bankruptcy-venue-reform-act-of-2021/.

[58] *See* DiCastri, *Cause for Reform: The Bankruptcy Venue Reform Act of 2021*, *available at* https://www.reinhartlaw.com/knowledge/cause-for-reform-the-bankruptcy-venue-reform-act-of-2021/; *see also* Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. at 400 ("[E]ven a bankruptcy with widespread national prominence can have significant local ramifications.").

[59] Kenneth Artz, *Anti-Forum Shopping Bill Reintroduced: A Q&A with Cozen O'Connor's Thomas J. Francella, Jr., Marla S. Benedek and Frederick E. Schmidt, Jr.*, LAW.COM (Nov. 15, 2021), https://www.law.com/texaslawyer/2021/11/15/anti-forum-shopping-bill-reintroduced-a-qa-with-cozen-oconnors-thomas-j-francella-jr-marla-s-benedek-and-frederick-e-schmidt-jr/?slreturn=20220004125826 (discussing likely

appearance, the venue of a case should not matter, as everyone participating in the case could simply appear remotely. Indeed, this is likely what should be done to save money—there would be no need to provide the resources of a physical courtroom, for example, or for parties to pay the costs of their lawyers' travel to hearings. Yet, this is not at all what happens in practice, because there are significant drawbacks to remote court appearances. In recognition of this, many courts are transitioning back to in-person proceedings as pandemic restrictions loosen. Connectivity issues, Zoom fatigue, and the overall perception that remote appearances are "not a substitute" for in-person interaction all indicate that remote participation can be inferior to an in-person appearance.[60]

Even when a local stakeholder chooses not to participate in a bankruptcy case, the opportunity to participate has inherent value. A bankruptcy case filed physically near local stakeholders provides those stakeholders with the knowledge "that they *could* participate in the proceeding at a courthouse near where they live and work before a judge that lives in the same community as they do."[61] Having a realistic opportunity to participate in a bankruptcy case affecting their rights lets stakeholders know that the bankruptcy system is open and accessible.[62] Venue shopping, by contrast, further disadvantages those who may already struggle to participate

opposition to the venue reform bill, which includes the argument that technology "facilitates remote appearances by affected parties").

[60] *Working Post-Pandemic*, Survey (Wilkie Farr & Gallagher LLP April 2021); *see* Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. at 422-24 (explaining why in-person hearings provide access to justice in a bankruptcy case).

[61] Written Testimony of the Hon. Frank J. Bailey, Chief Judge, United States Bankruptcy Court District of Massachusetts before the Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law 11 (Sept. 8, 2011) (hereinafter, "Bailey Testimony") (emphasis in original).

[62] Bailey Testimony, *supra* note 61 at 13 ("The ability of smaller stakeholders to attend proceedings, or at least to feel they could if they so desired, is central to their belief that they are being dealt with fairly.").

in a bankruptcy case due to a lack of money or other resources, contributing to the perception that corporate bankruptcy is a system for the "haves" at the expense of the "have-nots."[63]

Beyond stakeholder participation, there is another local aspect to most bankruptcy cases. Bankruptcy law frequently requires bankruptcy judges to interpret and understand state law issues. In *Butner v. United States*, the Supreme Court held that claims and property interests in a bankruptcy case are fundamentally impacted by state law.[64] State law issues are confronted and frequently decided in bankruptcy cases, and a judge familiar with the applicable state law (usually the law of the state in which the debtor conducts its activities) will be able to address these issues more efficiently than a judge in another district.[65]

A common anti-reform argument is that many complex companies are multinational or even global in nature, lacking a true headquarters or true local interests.[66] This is plainly untrue. The Supreme Court has explicitly recognized that all companies have a nerve center and, for purposes of diversity jurisdiction, that nerve center is a corporation's principal place of business.[67] If a company has a nerve center for purposes of civil litigation, it has one for bankruptcy purposes as well. In addition, that a corporation is global in nature does not mean that all venues are equally appropriate for its bankruptcy case. "[C]orporations become citizens of the community in which they operate" and are "woven into the fabric" of local communities.[68] A case filed far away from *any* community in which a corporation is a citizen suggests a disregard for the impacts of that corporate citizen's restructuring on its communities.

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[63] *See* NAAG Letter, *supra* note 6 at 3-4 ("[N]o one doubts that the inability to appear in person or to engage in face-to-face discussions with others in the case puts those in distant locales at a distinct disadvantage.").
[64] *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").
[65] NCBJ Report, 93 AM. BANKR. L.J. at 754.
[66] Kenneth Rosen & Philip Gross, *Bankruptcy Venue Reform Bill Needs Amending*, Law360.com (Oct. 12, 2021), https://www.law360.com/articles/1430213/bankruptcy-venue-reform-bill-needs-amending.
[67] *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010).
[68] Bailey Testimony, *supra* note 61 at 6.

Proponents of the venue status quo argue that judges in the so-called "magnet" courts are more predictable and efficient than judges elsewhere.[69] However, a quicker case is not necessarily a better case. For example, the recent practice of judges confirming Chapter 11 plans a few hours or days after case filing eviscerates the timetable contemplated by the Federal Rules of Bankruptcy Procedure and deprives stakeholders of due process unless certain prerequisites are met and findings of cause are made.[70] Regardless of how experienced a judge is, no human can process the vast amount of information filed in a complex Chapter 11 case within a few hours.[71] A judge who is not deeply informed about the debtor's plan of reorganization cannot ensure that parties' rights are protected. A complex case that resolves in a few days or hours does not provide affected parties the meaningful opportunity necessary to assess the impact on their rights and appear in court if they have objections. These so-called "drive-thru" cases belie the argument that a debtor is choosing a particular forum or judge based on that judge's expertise. As Professor Levitin has pointed out, "There is no possibility for a judge to exercise any skill or expertise in a case that proceeds at such a frenetic pace."[72]

Since the bankruptcy court in the Southern District of Texas, Houston Division established a complex business panel of two judges several years ago, the division has become a

[69] Brian L. Davidoff & Zev Shechtman, *Bankruptcy Venue Reform*, GREENBERG GLUSKER, https://i.emlfiles4.com/cmpdoc/8/7/4/8/2/2/files/23944_doc-5.pdf?utm_campaign=948292_ENL%20Sept%202021&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,KBPG,4R6DBH,2FIFL,1.

[70] Levitin, *Judge Shopping*, *supra* note 12 at 6. *See* 11 U.S.C. § 1125(g) (prepetition solicitation of plan acceptance must comply with applicable nonbankruptcy law); 11 U.S.C. § 1126(b) (prepetition voting on plan permitted if disclosure complies with nonbankruptcy law or if disclosure was adequate as defined in § 1125(a)); FED. R. BANKR. P. 2002 (b) (requiring 28 days' notice of objections and hearing on adequacy of disclosure statement and confirmation of Chapter 11 plan); FED. R. BANKR. P. 3016 (b) (disclosure statement is to be filed within time fixed by the court); FED. R. BANKR.P. 3017 (requirements of notice of objection deadline and hearing on disclosure statement), 3017(b) (prepetition vote on plan may be stricken if the court finds that an unreasonably short time for voting was prescribed); FED. R. BANKR. P. 9006(c) (court may reduce time under rules for cause shown).

[71] Levitin, *Judge Shopping*, *supra* note 12 at 43 ("The judge can ask some questions, but ultimately, there is no opportunity for a judge [in a drive-thru case] to do anything but get out of the way and rubber stamp the case.").

[72] Levitin, *Judge Shopping*, *supra* note 12 at 43.

magnet court for debtors seeking speedy approval of prepackaged plans ("prepacks"). Recently, the court has confirmed a number of prepacks within twenty-four hours of case commencement in complex, multi-debtor cases, over the objection of the United States trustee, who has argued that more time for review by parties is necessary in light of the volume of issues presented, including broad third-party releases in the plans.[73] Professor Levitin has denounced these cases, denominating them "drive-thru" bankruptcies without adequate findings of fact and rulings of law to support the extraordinary and quick relief requested as required by the Federal Rules of Bankruptcy Procedure, denying parties reasonable notice and an opportunity to be heard as required by due process.[74]

Opponents of venue reform also advocate flexibility to venue shop due to the importance of predictability. They argue that a debtor should be able to choose among available venues or courts in accomplishing its reorganization agenda, and that all parties and professionals are able to give better advice about the likely outcome of a case if they know how an issue is likely to be decided.[75] Predictability may be a valuable goal to the extent that counsel will be able to give advice to clients on the potential outcome of important issues.[76] However, in the venue context, the term "predictability" is also a euphemism for the pervasive and presumptive control given a debtor and its attorneys over case venue (and sometimes the judge). This power can create the appearance of manipulation, gamesmanship, and unfairness to the other constituents of the case.[77] Professor Levitin posits that when lawyers refer to the value of predictability, they really mean that a court accommodates a debtor's requests; a court will be labeled as unpredictable and

[73] *See In re Seadrill New Finance Ltd.*, No. 22-90001 (Bankr. S.D. Tex.), Doc. No. 36 (Jan. 11, 2022).
[74] Levitin, *Judge Shopping*, *supra* note 12 at 67-70.
[75] Andy Dietderich, *Confessions of A Forum-Shopper: Part 1*, XL No. 9 AM. BANKR. INST. J. 28, 52 (2021).
[76] Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, Center for Law and Society Research Paper Series, No. 21-42, SSRN id 3928944, at 17, 22-23 (Sept. 15, 2021).
[77] Ryan Hampton, UNSETTLED: HOW THE PURDUE PHARMA BANKRUPTCY FAILED THE VICTIMS OF THE AMERICAN OVERDOSE CRISIS (St. Martin's Press 2021).

an unfavorable venue choice if it rules against the debtor and its allies, and thereafter cases will be commenced in other venues.[78] Moreover, as will be discussed below, in many cases, debtors have chosen venues despite applicable unfavorable legal precedent, and thus we question the legitimacy of the predictability argument.

Recent venue shopping trends further undercut the arguments advanced by venue reform opponents about predictability and efficiency. Cases are *already* being shopped to venues outside of the two traditional "magnet" courts—Delaware and the Southern District of New York—to places like the Eastern District of Virginia and the Southern District of Texas.[79]

The effects of venue shopping are felt throughout the entire bankruptcy case. The debtor's control of where the case will be heard sets the tone for how the case will proceed. As Ryan Hampton, a member of the creditors' committee in the Purdue Pharma bankruptcy, observed with respect to that case, "If Purdue wasn't willing to do something, it didn't happen. . . . The debtor . . . run[s] the show."[80] Thus, venue shopping trends have contributed to an appearance of excessive debtor control, which in turn results in loss of confidence in the bankruptcy system. [81] Bankruptcy judges, like all judges, must avoid the appearance of impropriety.[82] Yet, venue shopping and judge picking have a negative effect on the very judges to whom cases are shopped. When the bankruptcy system no longer seems fair, the judges within

[78] Levitin Testimony, *supra* note 24 at 11.
[79] *See* Rosen & Gross, *supra* note 66 (including the Eastern District of Virginia and the Southern District of Texas as "magnet bankruptcy districts").
[80] *Ralph Nader Radio Hour*, *supra* note 55.
[81] Rosen, *The Reason Bankruptcy Venue Is Needed Now*, 35 COM. L. WORLD at 11 ("[R]eform is necessary to eliminate the negative perception of the bankruptcy court system as a whole.").
[82] Code of Conduct for United States Judges, Canon 2 (Mar. 12, 2019), *available at* https://www.uscourts.gov/judges.

that system no longer appear as neutral arbiters but rather as parties with a stake in the case or a thumb on the scale in favor of the debtor—even if they are, in fact, impartial and evenhanded.[83]

B. Venue Reform is Necessary to Further the Robust and Uniform Development of Bankruptcy Law

Another concern about the overly permissive venue options available in current bankruptcy law is the negative effect venue shopping has had, and will continue to have, on the development of bankruptcy jurisprudence. The concentration of large Chapter 11 cases in a small number of districts has impaired the development of uniform, business reorganization law on legal issues arising in complex business cases, at all levels of the federal courts. As the National Bankruptcy Review Commission found twenty-five years ago:

> A cornerstone of our judicial system is that the law be subject to a variety of interpretations at the trial level. More importantly, a cornerstone of our judicial system is that the law be subject to a variety of interpretations and made uniformly applicable by the courts of appeals and the Supreme Court. But when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down. There may be no need to make substantive law reform . . . . Deleting state of incorporation as a venue option increases the number of courts that can decide important issues, and the number of appellate courts that can eventually exercise review over those decisions. Ultimately, this approach is more likely to yield thoughtful decision making and policy applicable to big cases. [84]

The bankruptcy courts in the venue-shopped districts or divisions, referred to as "magnet courts," have dominated Chapter 11 reorganization practice and rulings in business reorganization cases for many years.[85] According to recent statistics compiled by Professor Levitin, the concentration of mega Chapter 11 cases in 2020 is significant. Just three bankruptcy

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[83] *See, e.g.*, Valentina Di Liscia, *A Protest Against Purdue Settlement Transforms Courthouse Landscape into a Graveyard*, HYPERALLERGIC (Aug. 9, 2021), https://hyperallergic.com/669004/pain-sackler-protest-against-purdue-settlement-transforms-courthouse-landscape-into-graveyard/ (describing protests against "what [advocacy organizations] view as *Judge Drain's* protection of the billionaire [Sackler] family and an all-too-lenient bankruptcy restructuring plan") (emphasis added).
[84] NBRC Report, *supra* note 7 at 782.
[85] NCBJ Report, 93 AM. BANKR. L.J. at 744-55.

judges in two districts have handled 58 percent of the cases; if the Southern District of Virginia is added to the equation, 63 percent of mega cases were heard by just five bankruptcy judges out of the approximately 375 bankruptcy judges sitting in this nation.[86] Professor Levitin ascribes the trend to individual judge shopping by debtors' attorneys, enabled by bankruptcy courts' local rules and standing orders on judge assignments in divisions of certain districts. He theorizes that this trend has many harmful consequences to parties and the bankruptcy system, including promoting less than zealous advocacy by lawyers who are repeat players in certain courts and denial of due process in drive-thru bankruptcies.[87]

Considering the development of the law, the concentration of Chapter 11 cases in a few preferred districts has resulted in important legal issues being decided by a handful of bankruptcy judges and a disproportionate number of appellate decisions from the reviewing courts in those few circuits, thus skewing the law of Chapter 11.[88] Absent an appeal, the bankruptcy court's decisions are final,[89] and given practical and procedural difficulties in the pursuit of bankruptcy appeals, including costs and delay, appellate review is often not sought.[90] In addition, statutory limitations on appellate review to bankruptcy judges' final orders,[91] statutory and equitable mootness resulting in dismissal of many appeals,[92] the clearly erroneous standard of review for findings of fact,[93] and restrictions on direct appeals to the courts of appeals,[94] reduce the number of appellate opinions by the intermediate appellate courts, circuit courts of appeals, and

[86] Levitin, *Judge Shopping*, *supra* note 12 at 32-33.
[87] Levitin, *Judge Shopping*, *supra* note 12 at 1,70.
[88] *See* Califano, *Bankruptcy Reform - Everything You Need to Know is in This Article*, 29 COM. L. WORLD at 12.
[89] NCBJ Report, 93 AM. BANKR. L.J. at 764.
[90] *See* Levitin, *Judge Shopping*, *supra* note 12 at 46-47.
[91] 28 U.S.C. § 158(a) (only bankruptcy judge's final orders can be appealed absent approval of appeal of interlocutory order).
[92] *See* 11 U.S.C. § 363(m) (mootness of sale orders); 11 U.S.C. § 364(e) (mootness of borrowing orders); *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015) (discussing equitable mootness warranting dismissal of appeal).
[93] *See Jenkins v. Hodes (In re Hodes)*, 402 F.3d 1005 (10th Cir. 2005) (factual findings are reviewed for clear error).
[94] *See* FED. R. BANKR. P 8006 (procedure for certifying direct appeal to the court of appeals).

ultimately the Supreme Court of the United States. Bankruptcy court decisions that are not appealed are left unchallenged and then given repeated application by magnet court judges.[95]

The domination of several districts in venue shopped cases results in fewer circuit Courts of Appeals reviewing bankruptcy courts' decisions. A survey of the business reorganization opinions of the courts of appeals from the twelve circuits that hear bankruptcy appeals since the inception of the Bankruptcy Code[96] reveals that the Second and Third Circuits (where the Southern District of New York and the District of Delaware are located) have produced more opinions on reorganization issues than the court of appeals in any other circuit.[97] Since the effective date of the Bankruptcy Code in October 1979, the Third Circuit has issued 16 percent of all opinions on Chapter 11 issues, and the Second Circuit has issued 15 percent of the total Chapter 11 decisions. Thus, 31 percent of the circuit level law on business reorganization has been generated by two of the smallest circuits. The largest circuit by far, the Ninth Circuit, has issued 12.5 percent of the reorganization opinions. The Fifth Circuit, in which appeals are taken from the magnet bankruptcy court, the Southern District of Texas, has 12.5 percent of the business Chapter 11 opinions. Surprisingly, the Eleventh Circuit, a large and populous circuit comprised of Alabama, Florida, and Georgia, only has approximately 2.5 percent of the opinions on Chapter 11 issues. The development of the law of business reorganizations in all the other circuits (the First, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and the District of Columbia) significantly trails behind the Second, Third, Fifth, and Ninth circuits.

[95] Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. at 198 ("Without discourse across bankruptcy courts, these inaccuracies [of the magnet courts] remain unchallenged and are actually strengthened by repeated application to a long string of cases.").
[96] The Court of Appeals for the Federal Circuit hears appeals from certain specialized trial courts, and not the bankruptcy court.
[97] *See* Prof. Margaret Howard, Ed., American College of Bankruptcy, Circuit Review (Dec. 2017).

These numbers show that the concentration of cases in several courts impedes the evolution of American bankruptcy jurisprudence and undermines the sound development of bankruptcy law. If Chapter 11 cases are more widely disseminated around the country, there will be more precedent in each of the circuits. The entire bankruptcy system, including its practitioners, will benefit from decisions from the various bankruptcy courts and circuits throughout the country.[98] Venue reform can assist in this result by preventing the concentration of case filings.

A review of circuit court of appeals opinions in business bankruptcy cases reveals a curious phenomenon. The Third Circuit, which includes the District of Delaware (which generates most of the bankruptcy appeals in that circuit) has developed unquestionably anti-debtor/anti-reorganization case law on several issues. For example, the law is well-settled in the Third Circuit that cause for dismissal of a Chapter 11 case exists when a debtor lacked good faith in the commencement of the case.[99] Indeed, the Court of Appeals for the Third Circuit has ruled twice that a debtor's filing of a Chapter 11 petition for the purpose of using the limitation on a landlord's claim permitted under 11 U.S.C. § 502(b)(6) is not in good faith and requires dismissal.[100] Other circuits employ more objective tests than the Third Circuit, ruling that the bankruptcy court cannot dismiss a Chapter 11 petition for lack of good faith unless no legitimate possibility of reorganization exists, or unless multiple factors evidence bad faith.[101] The Third

[98] NCBJ Report, 93 A. Bankr. L.J. at 765; Ivan Reich, *Making the Case for Bankruptcy Venue Reform*, FLA. B. ST. - TO - ST. NEWSL. 11-12 (Spring 2013), *available at* https://flabaroutofstaters.org/wp-content/uploads/2020/02/OOS-2013-spring.pdf.

[99] *See, e.g.*, *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999) (debtor lacked good faith in commencing Chapter 11 case where it did not file petition with a valid reorganizational purpose).

[100] *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108 (3d Cir. 2004); *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197 (3d Cir. 2003).

[101] *See, e.g.*, *Fields Station LLC v. Capitol Food Corp. of Fields Corner (In re Capitol Food Corp. of Fields Corner)*, 490 F.3d 21 (1st Cir. 2007) (debtor's subjective intent is insufficient to establish bad faith); *Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir. 1989) (bankruptcy court cannot dismiss a petition for bad faith unless it also finds that no legitimate possibility of reorganization exists); *Michigan Nat'l Bank v. Charfoos (In re Charfoos)*,

Circuit law on assumption and assignment of intellectual property licenses also does not favor reorganization, prohibiting assumption of a license by a debtor in possession and assignment of a license agreement when applicable law makes the identity of the licensee crucial to the licensor.[102] At least one other circuit has law more favorable to reorganizations on the issue of Chapter 11 debtors' assumption and assignment of intellectual property licenses.[103] It is surprising that so many Chapter 11 cases are commenced in the District of Delaware in view of the Third Circuit's harsh standard for avoiding dismissal of a Chapter 11 case for lack of good faith and a Chapter 11 debtor's limited ability to assume or assign intellectual property licenses, especially when compared to the law of other circuits on these issues. The trend of filing in the Southern District of Texas is also notable and curious, given the Fifth Circuit's prohibition of nonconsensual third-party releases,[104] compared to authority in other jurisdictions permitting such releases.[105] Thus, if predictability of favorable law were the genuine reason for venue shopping, districts such as Delaware or the Southern District of Texas would not be preferred choices.

Lawyers who represent debtors in large Chapter 11 cases rarely speak publicly about motivations for seeking out particular districts, divisions, or judges other than the assertion that

30 F.3d 734 (6th Cir. 1992) (in determining good faith of the debtor in commencing case eight factors are relevant to the evaluation). *See also In re Victoria Ltd. P'ship*, 187 B. R. 54 (Bankr. D. Mass. 1995) (rejecting good faith filing requirement under 11 U.S.C. § 1112(b)).

[102] *In re West Elecs., Inc.*, 852 F. 2d 79 (3d Cir. 1988) (if nonbankruptcy law requires consent to assignment to someone other than the debtor then the debtor in possession cannot assume the contract).

[103] *See, e.g.*, *Insitut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997) (adopting actual test and allowing assumption of intellectual property license); 11 U.S.C. § 365(a), (f).

[104] *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995) (bankruptcy court exceeded its powers when it enjoined pursuit of claims against nondebtor parties in violation of 11 U.S.C. § 524(e)).

[105] *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070 (11th Cir. 2015) (affirming bankruptcy court's approval of release of key employees of reorganized debtor from claims of nonconsenting creditor as § 105(a) authorizes such a release which was necessary for debtor to reorganize); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002) (bankruptcy court may enjoin nonconsenting creditors' claims against nondebtor parties when seven factors are present); *In re Specialty Equip. Cos.*, 3 F.3d 1043 (7th Cir. 1993) (Section 524(e) does not prohibit bankruptcy court from granting a release to a third party).

they seek out venues with law favorable to their clients for reasons of "predictability."[106] Professor Levitin theorizes that lawyers have shifted from district venue shopping to divisional and individual judge shopping to achieve particular and fast outcomes, which has "hyper-charged the ills of forum shopping," resulting in unethical advocacy due to the repeat lawyer dynamic and quick outcomes that violate due process.[107] In July of 2021, at a hearing on pending legislation to prohibit nonconsensual third party releases in Chapter 11 plans before the United States House of Representatives, Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, Professor Levitin testified about the harmful effects of the judge shopping trend, which are enabled by local rules and standing orders.[108] As a result, several members of Congress voiced concern over current judge assignment rules and venue shopping to achieve outcomes, and a discussion was begun as to how venue reform can prevent these problems.[109] Because of substantial questions raised by these trends, Congress should conduct further hearings to explore whether the passage of pending venue reform bills would assist in solving the problems and abuses of venue shopping and the related manipulative trend of individual judge picking.

The proliferation of conflicting opinions at the circuit court of appeals level, referred to as "circuit splits," on important issues of bankruptcy law has in turn encouraged venue shopping. Attorneys maintain that they often choose venues for their Chapter 11 cases due to the ability to

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[106] Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. at 62.
[107] Levitin, *Judge Shopping*, *supra* note 12 at 1, 69-70.
[108] *See* Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, United States House of Representatives, "Oversight of the Bankruptcy Code: Part I: Confronting Abuses of the Chapter 11 System," July 28, 2021, available at https://judiciary/house.gov/ July 28, 2021 ("July 28 Judiciary Committee Hearing"); *see also* Levitin Testimony, *supra* note 24.
[109] July 28 Judiciary Committee Hearing, *supra* note 108.

predict favorable or unfavorable law in a particular venue for a debtor's Chapter 11 cases.[110] They argue that they have a legal and ethical obligation to commence a Chapter 11 case where the best legal precedent for their client exists, recognizing the diversity of authority on many issues around the nation.[111] Even accepting this assertion at face value, venue reform nonetheless will assist in resolving circuit splits because it will increase the number of judges who issue opinions at both the bankruptcy court and intermediate appellate levels, and generate more appeals from those courts to the various other circuits. These positive developments resulting from more venues with Chapter 11 cases and more circuit level opinions on business bankruptcy issues could result in more uniform interpretation of the Bankruptcy Code.

The only court that can resolve a circuit split is the Supreme Court of the United States, and the primary reason the Court grants review in bankruptcy cases is to resolve circuit splits of authority.[112] While the Supreme Court has resolved many circuit splits during the forty-three year history of the Bankruptcy Code,[113] many remain, either because the losing party does not file a petition for certiorari after a circuit level decision, or because the Supreme Court denies certiorari despite a circuit split or grants certiorari and then reverses allowance.[114] In the fall 2021 term alone, the Supreme Court denied certiorari in four cases that involve circuit splits of

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[110] *See* Dietderich, *"Confessions" of A Forum-Shopper: Part 1*, 40-Sep. AM. BANKR. INST. J. at 28 ("Variance in case law is the first and most important reason why corporate debtors forum-shop . . . [a] well-advised corporate debtor will file in whatever available forum has the best legal precedent for its reorganization purpose.")

[111] Dietderich*, "Confessions" of A Forum-Shopper: Part 1*, 40-Sep. AM. BANKR. INST. J. at 28-9 (cautioning that a lawyer should not advise a client to commence a Chapter 11 case in a district in the Third Circuit if the Chapter 11 debtor seeks to assume or assign an intellectual property license).

[112] *See* Kenneth N. Klee, BANKRUPTCY AND THE SUPREME COURT, at 5-7 (Am. Coll. of Bankr. Lexis Nexis 2008) (hereinafter "Bankruptcy and the Supreme Court"). Congress also can resolve variations in the case law by enacting legislation. *See, e.g.*, 11 U.S.C. § 548(a)(2)(A), (B) (amendment to fraudulent transfer avoiding power for charitable contributions added by Congress in 1998 in response to judicial decisions ordering recovery of charitable contributions to churches when parishioners filed for bankruptcy). *See* Congressional Record Statements, P.L No. 105-183, 105 Cong. Rec. S. 10294 (Oct. 1, 1997).

[113] *See, e.g.*, *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 126 S. Ct. 2105, 165 L. Ed. 2d 110 (2006); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 443, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999); *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992).

[114] Klee, BANKRUPTCY AND THE SUPREME COURT, at 5-14.

bankruptcy issues,[115] leaving unresolved bankruptcy law issues relating to state sovereign immunity,[116] bankruptcy preemption of state law tortious interference claims against non-debtors,[117] and equitable mootness.[118] In the last term, the Supreme Court denied a petition for certiorari in a bankruptcy case involving the circuit (and widespread lower court) split on the significant question of the enforceability of arbitration agreements in bankruptcy cases.[119] Circuit splits that leave important questions of bankruptcy law unresolved promote venue shopping by debtors' lawyers seeking a favorable outcome for their clients. If the Supreme Court were to grant more petitions for certiorari and resolve inconsistencies in the circuits, venue shopping would be reduced. However, there is no ability to review the discretion of the Supreme Court in denying a certiorari petition. If more circuits were to decide reorganization issues because cases are more evenly distributed around the country due to diminished venue shopping, circuit splits may grow more extensively, and the Supreme Court may be more inclined to grant certiorari in cases that are the subject of a widespread split in the circuits. The result would be more Supreme Court involvement in bankruptcy cases and more uniform interpretation of the Bankruptcy Code.

Restriction of bankruptcy venue choices will have a ripple effect. Elimination of state of incorporation as a venue option will assist the twin goals of uniformity and development of

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[115] *See* Corinne Ball, *SCOTUS Passes on Bankruptcy Law Cases Leaving Circuit Splits* (Dec. 2021), *available at* https://www.lawjournalnewsletters.com/2021/12/01/scotus-passes-on-bankruptcy-law-cases-leaving-circuit-court-splits/.

[116] *California State Lands Comm'n v. Davis*, ___ U.S. ___, 124 S. Ct. 231, 211 L. Ed. 2d 102 (2021), *denying cert*. 998 F.3d 94 (3d Cir.).

[117] *Pilevsky v. Sutton 58 Assoc's LLC*, ___ U.S. ___, 142 S. Ct. 53, 210 L. Ed. 2d 1023 (2021), *dismissing cert*. 164 N.E. 3d 984 (N.Y. 2020).

[118] *Hargreaves v. Nuverra Envtl. Solutions, Inc.*, ___ U.S. ___, 142 S. Ct 337, 211 L. Ed. 2d 179 (2021), denying cert. 834 F. App'x 729 (3d Cir.); *GLM DFW, Inc. v. Windstream Holdings, Inc.*, ___ U.S. ___, 142 S. Ct. 226, 21 L. Ed. 2d 102 (2021), *denying cert*. 838 F. App'x 634 (2d Cir.).

[119] *GE Capital Retail Bank v. Belton*, ___ U.S. ___, 141 S. Ct. 1513, 209 L. Ed. 2d 252 (2021), *denying cert.* 961 F.3d 612 (2d Cir. 2020).

bankruptcy law. If Chapter 11 cases are handled in more districts, more judges will write opinions and more appellate courts will review them. The bankruptcy system will benefit from the decisions of bankruptcy judges with different perspectives and from appellate decisions from different intermediate appellate courts and different courts of appeals.[120] With an increase in the number of circuits reviewing bankruptcy appeals, circuit splits may also increase, resulting in the Supreme Court reviewing more bankruptcy cases and resolving more circuit splits. Venue reform is thus a starting point for the promotion of better jurisprudence in the robust development and uniformity of bankruptcy law.

C. Venue Transfer is an Inadequate Remedy

As long as venue shopping exists, there will be litigation over whether venue is proper, as well as motions to transfer venue. However, a party's ability to move for change of venue under the venue transfer statute is not meaningful for several reasons. First, the costs and delay of challenging the debtor's choice of venue are substantial. Venue transfer litigation necessarily requires an evidentiary hearing, because the two prongs considered under the venue transfer statute -- the interests of justice and the convenience of the parties -- are fact intensive. Such hearings—at any stage of a case—are disruptive, may prejudice numerous parties, and can jeopardize the outcome of the debtor's bankruptcy case.

Moreover, the costs of litigating venue transfer can be exorbitant. In the *Patriot Coal* case, the parties spent months and millions of dollars in legal fees on the transfer litigation. The judge ultimately transferred the case after concluding that the debtor, a coal manufacturing company with 4,000 employees, had no connection to New York. In the *Winn-Dixie* case, the

[120] NCBJ Report, 93 AM. BANKR. L.J. at 765.

parties spent hundreds of thousands of dollars to litigate and successfully obtain a transfer of a case improperly filed in New York to the Middle District of Florida.[121] Although both *Patriot* and *Winn-Dixie* resulted in transfers of venue—albeit after expensive, extensive litigation—there are hundreds of cases in which parties do not seek transfer of venue because the costs and delay are prohibitive.[122] And parties trapped in an inconvenient or unfavorable venue cannot depend on judges to issue an order to show cause why venue should not be transferred—as Judge Whitley did in the LTL case discussed above. Most bankruptcy judges are simply not that activist.

Conclusion

Venue shopping and its more sinister corollaries—shopping a case to a particular division of a district or judge—are harmful to the bankruptcy system and bankruptcy law. These practices, which have increased in recent years, undermine public confidence in the courts, undercut the integrity of the bankruptcy system, stifle robust development of bankruptcy law in all districts and circuits, and may well produce unfair and inappropriate decisions. Bankruptcy professionals, academics, and judges should not sit idly by as the problems resulting from these practices proliferate. The momentum for venue reform has been bolstered by recent cases of perceived abuse.[123] In addition to *Purdue Pharma* and *LTL*, the United States District Court for the Eastern District of Virginia, in reversing a bankruptcy court's confirmation order granting broad nonconsensual third-party releases, criticized the venue shopping of cases to the district's Richmond Division due to the lower court's frequent grant of such releases.[124] Even several bankruptcy judges in the magnet courts now publicly support venue reform. Southern District of

[121] *See In re Winn-Dixie Stores, Inc.*, No. 05-11063 (RDD) (Bankr. S.D.N.Y. 2005); *see also In re Dunmore Homes, Inc.*, 380 B.R. 663 (Bankr. S.D.N.Y. 2008).
[122] Rosen, *The Reason Bankruptcy Venue Is Needed Now*, 35 COM. L. WORLD at 13-14.
[123] David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS INST. (Jan. 12, 2022), https://www.brookings.edu/research/the-populist-backlash-in-chapter-11/ (describing four practices, including venue shopping, that have prompted a populist backlash in chapter 11).
[124] *Patterson v. Mahwah Bergen Retail Grp., Inc.*, No. 3:21cv167 (DJN), 2022 WL 135398 (E.D. Va. Jan. 13, 2022).

Texas Judge Marvin Isgur, a founder of the complex bankruptcy business case panel in that district, recently joined Southern District of New York Judge Shelley Chapman in calling for venue reform, to restore public confidence in the bankruptcy process.[125]

The United States courts can attempt to fix the problem of judge shopping. The Judicial Conference of the United States and circuit councils can recommend changes to divisional assignment procedures.[126] The individual United States district courts can amend local rules to stop divisional assignment maneuvering.[127] Chief Justice Roberts has made elimination of venue abuse in federal patent cases one of the priorities of the United States judiciary for 2022 and has recommended action by Congress as appropriate.[128] The same worthy goal should be undertaken for bankruptcy cases.

A number of other judicial solutions to the problems of venue shopping have been proposed, including a United States Court of Appeals for Bankruptcy, a national court to conduct appellate review beyond the intermediate appellate level,[129] and the creation of a specialized panel of experienced bankruptcy judges in each circuit to handle large business bankruptcy reorganizations in the first instance.[130] These proposals are inventive and worthy of discussion; however, without more, they will not curb venue shopping. The establishment of bankruptcy judge business panels in each circuit is likely to shift preferred courts to a new set of fewer courts at great expense. The creation of a national court of appeals is an excellent idea; however, it

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[125] Nani, *Purdue Bankruptcy Spurs Forum Shopping Pushback in NY, Congress*, BLOOMBERG LAW (Dec. 6, 2021).
[126] 28 U.S.C. §§ 331 & 333 (establishing the Judicial Conference of the United States and circuit judicial conferences); 28 U.S.C. § 137 (federal courts have the power to enact their own rules of operation).
[127] See FED. R. BANKR. P. 9029 (the United States district courts have the power to make bankruptcy rules for their districts).
[128] Chief Justice John Roberts, 2021 Year-End Report on the Federal Judiciary, at 5, Supreme Court of the United States (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.
[129]Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. at 206-07.
[130] Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, Center for Law and Society Research Paper Series, No. 21-42, SSRN id 3928944 (Sept. 15, 2021).

would be expensive as it will require appointment of Article III judges, and the new court will take years to contribute to the development of consistent case law and decrease the problem of circuit splits.

Restricting venue choices by amending the Judicial Code's bankruptcy venue statutes is a straightforward method for addressing the harm caused by the practices of judge and venue shopping. Elimination of venue shopping should be a goal of bankruptcy professionals, judges, and academics and a bipartisan priority of Congress. The polarization of the debate on venue reform by advocates and opponents of reform is not productive. Restriction of venue choices may not be a perfect solution to the problems of venue shopping, but the bipartisan bills currently pending in Congress are the only proposal to date and thus are a necessary starting point for a new and robust discussion.

What this article hopes to make clear is that the current system is untenable. All options to change the current untenable system should therefore be investigated and scrutinized. Congress and the United States courts should act to ensure that debtors and their professionals are prohibited from manipulating venue choices and judge assignment procedures to turn judges into instruments for achieving their clients' particular goals and case outcomes. Dialogue—and particularly dialogue that leads to a solution—is necessary now.