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The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration

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The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration

By Brook E. Gotberg*

Large corporate debtors typically file for bankruptcy only after conducting a thorough analysis as to the most favorable venue for the case. Recent legislation has proposed to severely limit all corporate debtors' ability to select bankruptcy venue. The messaging behind calls for venue reform is outwardly altruistic: it is said to be necessary to facilitate access to justice and to prevent abuse of the system. However, the push for venue reform is largely driven by professional envy and a distrust of specific judges based on unpopular high-profile rulings. Placing new constraints on the ability to choose venue will not achieve the reform's stated goals and may instead harm debtors and their creditors by limiting their ability to have complex bankruptcy issues heard in the venue to which they are best suited. A better approach is to facilitate a market selection process in which both debtors and creditors can participate, simultaneously enacting reforms that will facilitate creditor involvement and encourage uniformity among courts in matters of substantive and procedural law.

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CONTENTS

INTRODUCTION	649
I. THE PROBLEM	653
A. Competition for Cases Leading to Corruption of Judges	653
B. Inhibitions on Access to Justice	657
C. Limited Participation in Bankruptcy Cases Within the Bar and the Judiciary	660
1. Unfair Distribution of Benefits Associated with Complex Cases.....	661
2. Lack of Intellectual Diversity.....	662
D. Concerns of Public Perception	664
II. THE PROPOSED SOLUTION.....	665
A. The Bankruptcy Venue Reform Act	666
B. The Lingering Issues	667
1. Differences in Substantive Law and Procedure.....	668
2. Forum Shopping Away from Undesirable Jurisdictions.....	671
3. Perceptions of Unfairness	672
C. The Fallout and Unwanted Consequences.....	673
1. Rigidity in Venue	674
2. Loss of Efficiencies	675
3. Ongoing and Reinforced Suspicion of the Judiciary.....	677
III. REASONS TO DOUBT THE SEVERITY OF THE PROBLEM.....	678
A. Does the Debtor's Selection of Venue Really Influence Creditor Participation?	679
B. Does the Debtor's Selection of Venue Really Increase Costs for Creditors?	683
C. Does the Debtor's Selection of Venue Really Alter Case Outcomes?	685
D. Is Forum Shopping an Issue Outside of Large Corporate Cases?	687
E. Is Forum Shopping a Net Negative in the Bankruptcy Context?	689
IV. ALTERNATIVE SOLUTIONS.....	691
A. Establish More Uniform Laws of Bankruptcy and Eliminate the Judicial Doctrine of Equitable Mootness.....	693
B. Normalize Rules Regarding <i>Pro Hac Vice</i> , First Day Orders, Attorneys Fees, Mediation, and Judicial Assignment.....	695
C. Permit Filing in Any Jurisdiction Found to Be in the Best Interests of the Reorganization and Permit Creditor Objections to be Heard Before the District Court	698
CONCLUSION	702

INTRODUCTION

Recent large, high-profile chapter 11 cases have raised public awareness to differences in statutory interpretation between bankruptcy courts—differences that might otherwise have been noticed only by bankruptcy practitioners and scholars steeped in the literature. Commentators in these high-profile cases have observed that some bankruptcy filers deliberately select jurisdictions where the law favors their desired outcomes.¹ Current venue rules permit a company to file for bankruptcy in virtually any location, regardless of whether the company is physically located in that jurisdiction. The realization that companies can engage in forum shopping led to public outrage, which in turn reignited a longstanding and ongoing discussion within academic circles over whether and how to limit bankruptcy venue.²

The rhetoric on venue is notably heated compared to typical academic discussion on procedural issues. Commentators have suggested that “the wrong venue choice can have devastating effects”³ on bankruptcy proceedings, that forum shopping “is a cancer on our bankruptcy system”⁴ for which the consequences

1. For example, the bankruptcy case of Purdue Pharma was filed in the Southern District of New York, in front of a judge who was known to permit nonconsensual third-party releases. Such a release would allow the Sackler family to avoid future liability from opioid claimants whose claims would be discharged in bankruptcy. See Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEX. L. REV. 1079, 1106–08 (2022); see also Lindsey D. Simon, *Bankruptcy Grieters*, 131 YALE L.J. 1154, 1158 (2022); Jonathan C. Lipson & Gerald Posner, *The Sackler’s’ Last Poison Pill*, N.Y. TIMES, Dec. 5, 2020. As identified by Levitin, some circuits forbid third-party releases entirely.

2. 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); David A. Skeel, *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000); Marcus Cole, “Delaware is Not a State”: *Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002); LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005) [hereinafter *COURTING FAILURE*]; Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013); Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463 (2021).

3. Laura N. Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 434 (2015).

4. Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1143 (2006).

“are grave,”⁵ and that forum shopping has “corrupted” America’s bankruptcy courts.⁶ These cries of alarm are likely overblown or at least misplaced; the primary complaints and concerns nominally associated with venue are more closely connected to unrelated issues, both substantive and procedural. Today’s efforts at venue reform are neither necessary nor sufficient to address the perceived challenges facing the bankruptcy system today and would likely have undesirable negative effects on the ability of businesses to successfully restructure.

Discourse on bankruptcy venue has largely devolved into a placeholder discussion on substantive bankruptcy practices that are currently nonuniform across jurisdictions. The debate has shifted from a conversation about policing forum shopping to a *sub rosa* debate over whether judges should be permitted to exercise their discretion in particular ways to get a plan confirmed.⁷ The real controversy is thus the lack of uniformity in statutory interpretation and application across judges and jurisdictions. But for the differences in the substantive or procedural approach in courts that are “shopped” into and courts that are “shopped” out of, much of the current antagonism associated with forum shopping would disappear.

More vintage arguments in support of venue reform have posited that reform was necessary to improve creditors’ access to justice. However, today these arguments are largely inapposite to the cases in which forum shopping typically takes place. Commentators have historically argued that filing in a remote jurisdiction will limit the meaningful involvement of local creditors in the case. But in modern filings, creditors are spread across the nation,⁸ and today’s technology allows the same access to the

5. Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, American Bankruptcy Institute Commission to Study the Reform of Chapter 11, Field Hearing, Jay Westbrook Bankruptcy Conference (Nov. 22, 2013) at 1.

6. See generally *COURTING FAILURE*, *supra* note 2 (arguing that competition for big business bankruptcy cases has encouraged bankruptcy judges to exercise discretion in favor of debtors).

7. See A. Mechele Dickerson, *Words that Wound: Defining, Discussing, and Defeating Bankruptcy “Corruption”*, 54 *BUFF. L. REV.* 365, 375 (2006) (noting that LoPucki “appears unwilling to acknowledge that reasonable, non-corrupted minds might differ about the legitimacy of the practices he condemns and brands as unlawful”).

8. This was first measured by the Federal Judicial Center in a report issued decades prior to this Article. The report sampled the difference in distance for creditors traveling to

bankruptcy courtroom from across the country as from across the street. Especially in the aftermath of the COVID-19 pandemic, remote appearances, Zoom meetings, and electronic access to dockets is normal and expected. There are other procedural and legal proposals that would be more responsive to concerns regarding access to the courts and less disruptive than imposing draconian restrictions on venue choice.

A less-acknowledged incentive to amend current venue laws is that the prestige and financial benefits associated with administering large, high-profile cases are disproportionately distributed. Under current rules, these benefits are largely reserved to a small group of attorneys who act as local counsel in “shopped” venues and to the judges who preside in these venues. The apparent inequities of concentrating these cases in specific venues has provoked a kind of professional jealousy, leading to cries of unfairness. Even observers who are not themselves competing for bankruptcy cases often feel that the perceived effort of some jurisdictions to attract cases is unseemly. Still others express concern that limiting review of large complex cases to a handful of bankruptcy, district court, and appellate judges limits the healthy exchange of ideas that would result in robust legal standards. Certainly, the concentration of many large cases before a single judge can create real complications if the judge suddenly resigns.⁹ Venue reform would ostensibly equalize opportunities to handle large bankruptcy cases across the country or at least distribute them more widely. However, such a move would likely make bankruptcy filers and their creditors worse off, introducing inefficiencies that prioritize the best interests of bankruptcy professionals instead.

This Article challenges conventional wisdom on the advisability of venue reform as currently proposed by identifying the disconnect between the stated problem—permissive venue

the debtor’s principal place of business versus the place of filing. For the vast majority of cases, the average distance was less than 300 miles and increased the likely travel expenses by merely \$290. See Gordon Bermant, Alene Jorgensen Hillestad & Aaron Kerry, *Chapter 11 Venue Choice by Large Public Companies*, Report to the Judicial Conference Committee on the Administration of the Bankruptcy System at 45–49, 52 (1997).

9. See Alexander Gladstone, Andrew Scurria & Akiko Matsuda, *Top Bankruptcy Judge’s Exit Shakes Houston Hub He Built*, WSJ PRO: BANKR. (Oct. 19, 2023) <https://www.wsj.com/articles/houston-judges-sudden-exit-threatens-bankruptcy-hub-he-built-33026f80>.

rules – and the actual underlying concerns – inappropriate exercise of judicial discretion, limited access to justice, and inequitable distribution of bankruptcy work. The Article fundamentally rejects the current proposed legislation as the best solution to the stated problem. Further, it challenges the intellectual framework regarding forum shopping in the bankruptcy context. Up to now, concerns regarding the harmful effects of forum shopping have been couched in terms of litigation, where permitting one adversarial party to select the venue presupposes that the selection will disadvantage the opposing party. This framing is not conducive to the bankruptcy context, in which the “opposing” parties – debtors and creditors – generally have very similar goals but have not yet agreed on the best path to achieve those goals.¹⁰ A successful chapter 11 reorganization maximizes the return for all creditors and permits the debtor to continue as a going concern, preserving value and legal rights as much as possible. Successful chapter 11 cases often conclude with all parties in agreement that they are at least better off than they would have been without the reorganization. Concerns about permitting forum selection should be significantly reduced as compared to a typical litigation scenario.

The Article is organized as follows: Part I describes the problems associated with the current permissive venue statute in bankruptcy, as presented in academic literature and in calls for reform among practitioners, media personalities, and others outside the bankruptcy system. As will be apparent from this Part, the literature on the topic is extensive. Part II explains proposed legislation that would limit venue for bankruptcy filers and how its enactment would change current practice. Part III explores the motivations underlying the proposed litigation with a critical eye. Part IV offers an alternative slate of legislative actions that would more directly address the concerns that triggered the most recent

10. See Cole, *supra* note 2, at 1900 (observing that “unlike most . . . disputes, bankruptcy cases involve parties whose interests are not necessarily at odds”); LoPucki & Whitford, *supra* note 2, at 44 (“Unlike many other kinds of litigation, bankruptcy is not a zero-sum game.”). Indeed, some of the primary disputes are between creditors, not between the debtor and creditors. See Robert K. Rasmussen, *The Search for Hercules: Residual Owners, Directors, and Corporate Governance in Chapter 11*, 82 WASH. U. L. Q. 1445, 1448 (2004) (noting that in chapter 11 “parties fight over the allocation of the pie” but not how to increase its size).

bout of venue reform proposals and suggests more modest reforms that would emphasize creditor involvement in forum selection.

I. THE PROBLEM

As alluded to above, previous academic discussion regarding bankruptcy venue and the possible need for reform is extensive and wide-ranging.¹¹ Pages of law review articles accompanied by reams of footnotes produced by scores of brilliant authors have been generated on the subject. Yet while much has been studied, researched, and written, substantial debate continues on the fundamental assertions made by both sides. Few dispute that forum shopping exists for large corporate filers,¹² but there is hearty disagreement on whether forum shopping is a net positive or negative for debtors, creditors, and the system as a whole.¹³ Empirical evidence collected on both sides of the debate remains inconclusive.¹⁴ However, many have taken it as an understood conclusion that the existence of forum shopping justifies the need for reform because forum shopping is a blight to the system.¹⁵ Their reasons follow.

A. Competition for Cases Leading to Corruption of Judges

It is generally accepted in the academic literature and frequently acknowledged among bankruptcy practitioners that

11. See Skeel, Jr., *supra* note 2, at 5 (“As if to confirm the old adage that there is nothing new under the sun, the treatment of venue issues in bankruptcy has followed a curious pattern: long periods during which venue concerns remain in the background are periodically interrupted by intense fights about venue.”).

12. See, e.g., Zywicki, *supra* note 4, at 1143; Rasmussen & Thomas, *supra* note 2, at 1360 (“[F]orum shopping is rampant.”).

13. See Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1989 (2002) (“Although ‘forum-shopping’ has slipped into the legal vernacular as a derogatory term, it is rightfully pursued by attorneys, including attorneys for the federal government, in the interests of their clients.”); Rasmussen & Thomas, *supra* note 2, at 1406 (“Scholars have argued endlessly over whether this strategic behavior is a good or bad thing without reaching consensus about anything, even over how frequently the practice occurs.”). Opinions on this topic are subject to fluctuation. Compare LoPucki & Whitford, *supra* note 2, at 44–51 (arguing in favor of permitting ongoing forum shopping), with COURTING FAILURE, *supra* note 2 (arguing strenuously for venue reform).

14. See, e.g., Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933 (2002); Miller, *supra* note 13.

15. See Eisenberg & LoPucki, *supra* note 2, at 971 (Judge shopping “undermines the aphorism that ‘ours is a government of laws, not men.’”).

some bankruptcy judges¹⁶ engage in some level of competition for large, high-profile cases.¹⁷ Current venue laws allow a company to file in its state of incorporation, the location of its principal place of business, or the location of its principal assets.¹⁸ They also permit a company to file in the same jurisdiction as a subsidiary with a currently pending case; companies with the resources and inclination to do so may engage in more aggressive forum shopping by incorporating a subsidiary in the desired jurisdiction and filing there, whether or not there were any previous connections to the location.¹⁹

It is alleged that competition for cases leads to a sort of race to the bottom among bankruptcy judges, who are said to cut corners and accommodate debtor's attorneys in an effort to attract cases. At least one academic—certainly the most prominent author on the topic—has insisted that the only correct term for this alleged propensity is corruption.²⁰ In 2006, Professor Lynn LoPucki published his seminal work on forum shopping in bankruptcy, a culmination of several years of data gathering and scholarly publication on the issue.²¹ LoPucki argued that bankruptcy judges

16. It is widely recognized that most bankruptcy judges “are not looking to attract more cases.” See Adam Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 365 (2023).

17. See, e.g., Cole, *supra* note 2, at 1886 (describing a professional competition among judges, rather than between jurisdictions); Robert K. Rasmussen, *Empirically Bankrupt*, 2007 COLUM. BUS. L. REV. 179, 219 (2007) (“Few seriously question that at least some bankruptcy courts compete for cases.”). It is nevertheless disputed whether judges “compete” for cases to come to their respective jurisdictions, insofar as that term suggests animosity toward other courts or a willingness to engage in untoward behaviors. To the extent courts appear to deliberately create a favorable forum for chapter 11 cases, the motivation may be simply to prevent cases from leaving the jurisdiction due to the misperception that they will be better handled elsewhere. This was a primary motivation, for example, in the recent changes enacted in the Southern District of Texas. See Zoom Interview with Judge Marvin Isgur, Bankruptcy Judge, U.S. Bankruptcy Court for the Southern District of Texas (March 24, 2022). Furthermore, some scholars have cast doubt on the assertion that the alleged competition is the driving force for changes in judicial practices, which may simply reflect a greater embrace of a transaction model for chapter 11. See Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 403 (2006).

18. See 28 U.S.C. § 1408(1).

19. See 28 S.C. § 1408(2); Jared Ellias, *What Drives Bankruptcy Forum Shopping? Evidence From Market Data*, 47 J. LEGAL STUD. 119, 136 (2018) (“Virtually every firm could reach a destination court with a creative bankruptcy lawyer, even if it had minimal contacts prior to bankruptcy.”).

20. See generally COURTING FAILURE, *supra* note 2.

21. *Id.*

were compelled by virtue of their personal desire for prestige and obligatory ties to the local community to bring big chapter 11 cases into their jurisdiction, thus providing work and prestige for the local bar.²² He suggested that bankruptcy judges attract case placers to their district by advertising their “friendliness” to large chapter 11 cases, approving high fees, declining to appoint trustees, permitting longer periods of exclusivity, and engaging in other debtor-friendly behavior.²³ He then called for venue reform to eliminate the ability of courts to compete for cases.²⁴

The publication of these arguments, particularly the use of the term “corruption,” provoked a visceral response among members of the bankruptcy community.²⁵ Many were offended and believed his assertions were overstated.²⁶ LoPucki held fast²⁷ and has

22. *Id.* at 20. LoPucki’s conclusions are somewhat supported by qualitative interviews conducted among attorneys and judges. *See* Cole, *supra* note 2, at 1892 (describing the cultural influence within Delaware motivating professional judges to develop innovations that would make them more competitive among jurisdictions).

23. COURTING FAILURE, *supra* note 2, at 137–81.

24. *Id.*

25. LoPucki’s broader points about forum shopping were well-known but provoked far less outrage. *See, e.g.,* Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. EMPIRICAL LEG. STUD. 111 (2004); LoPucki & Doherty, *supra* note 14; Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”*, 54 VAND. L. REV. 231 (2001); Eisenberg & LoPucki, *supra* note 2.

26. *See, e.g.,* Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 454 (2006); Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF. L. REV. 343, 345 (2006) (arguing that LoPucki fails to establish a connection between the competition for cases and objectionable practices); Dickerson, *supra* note 7, at 366 (“[A]dopting new procedures and making rulings that may not be favorable to some creditors simply does not equate to being rotten or morally depraved.”); Jacoby, *supra* note 17, at 403 (arguing that LoPucki’s data do not match up with his explanation and lack causative associations); Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 469–70 (2006) (citing critical responses to LoPucki’s book); Zywicki, *supra* note 12, at 1180 (questioning the motivation judges might have to actively compete for cases, particularly those involving prepackaged bankruptcies and section 363 sales); Terrence L. Michael, Nancy V. Alquist, Daniel P. Collins, Dennis R. Dow, Joan N. Feeney, Frank J. Santoro & Mary F. Walrath, *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 810 (2019) (“The inflammatory insinuations of the corruption theorist have no basis in fact and have been soundly refuted by numerous academics and practitioners.”). LoPucki’s earlier work had also been criticized as baseless. *See* Bermant et al., *supra* note 8, at 68.

27. *See* Lynn M. LoPucki, *Where Do You Get Off? A Reply to Courting Failure’s Critics*, 54 BUFF. L. REV. 511 (2006) (defending the irrefutability of his argument that bankruptcy judges are under pressure to attract cases, that they change the rules to do so, and that this constitutes corruption).

continued to defend his conclusions in further works.²⁸ A recent article leans into his previous theme of targeting individual bankruptcy judges as corrupt, but rather than criticizing the Delaware courts, as his earlier work was prone to do, LoPucki now identifies “lawlessness” in the Southern District of Texas bankruptcy court, where case filings skyrocketed beginning in 2016.²⁹

Similarly, Professor Adam Levitin has argued that trends of “judge shopping,” in which local rules permit filers to assure assignment to a particular bankruptcy judge, are “fundamentally contrary to any notion of judicial impartiality.”³⁰ Effective judicial selection is possible in districts where courts have formal or informal geographical divisions, for example,³¹ or where local rules assign complex cases to a limited panel.³² Levitin argues that this phenomenon discourages zealous advocacy by establishing a strong repeat player dynamic in which attorneys are afraid to offend the judge.³³ Moreover, he argues that it reduces creditors’ confidence in the outcome because they are convinced the judge is biased against them.³⁴

The National Conference of Bankruptcy Judges has explicitly denounced LoPucki’s suggestion “that any bankruptcy judges make rulings for reasons other than that which is supported by fact and law.”³⁵ That said, few could dispute that debtors are deliberately selecting particular forums in which to file for chapter 11. The disagreement instead surrounds the reason for the selection, and whether it is good, bad, or neutral.³⁶ Many scholars have argued that the more likely explanation is hardly

28. See, e.g., Lynn M. LoPucki, *Chapter 11’s Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 251 (2022) [hereinafter *Chapter 11’s Descent into Lawlessness*].

29. *Id.*

30. See Levitin, *supra* note 16, at 352.

31. See Local Rule 1073-1(a) (Bankr. S.D.N.Y. 2004) (basing case assignment on the street address on the petition).

32. See Gen. Order 2016-1 (Bankr. S.D. Tex. Mar. 3, 2016).

33. Levitin, *supra* note 16, at 387.

34. *Id.* at 355.

35. Michael et al., *supra* note 26, at 810.

36. See Casey & Macey, *supra* note 2, at 474–82; Edward J. Janger, *Global Erie and Its Limits: Channeling Jurisdictional Competition for Procedure*, 56 TEX. INT’L L.J. 181, 184 (2021) (distinguishing between “good” procedural forum shopping and “bad” distributional advantage forum shopping).

reprehensible; parties seek out judges perceived to hold the necessary skill and experience to accomplish a successful reorganization.³⁷ But many agree that lax venue rules may be problematic for the bankruptcy system, whatever the motivation for forum shopping.³⁸

B. Inhibitions on Access to Justice

Observers have complained for decades that forum shopping leads to unfair results for creditors because cases are filed in far-flung jurisdictions. Geographical distance, it is argued, can cripple the ability of an interested party to appear in hearings and otherwise engage in the bankruptcy process. This was a key finding of the National Bankruptcy Review Commission, formed nearly thirty years ago to investigate issues related to the Bankruptcy Code and to report on the advisability of proposed changes.³⁹ The group was composed of bankruptcy judges, law professors, practitioners, and other experts, who met for many months to discuss potential improvements to bankruptcy procedure and policy.⁴⁰ In its final report, the Commission recommended that venue laws be amended to prohibit corporate debtors from filing in a district based solely on incorporation or on the filing of a

37. See, e.g., Ayotte & Skeel, Jr., *supra* note 26, at 461; Cole, *supra* note 2, at 1863–64 (reporting on interviews with attorneys and judges regarding the reason for the increase in Delaware filings); Samir Parikh, *Bankruptcy Tourism and the European Union's Corporate Restructuring Quandary: The Cathedral in Another Light*, 42 U. PA. J. INT'L L. 205, 254 (2020) (noting that there is no empirical evidence to support the claim that forum shopping produces suboptimal results for creditors). This motivation is supported by LoPucki's own work. See Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 990, 1014 (2015) (linking the survival of the debtor with a judge's experience).

38. See, e.g., Coordes, *supra* note 3; Parikh, *supra* note 2; Tabb, *supra* note 26, at 468 (observing that a significant percentage of bankruptcy academicians agree with LoPucki's basic premise that the bankruptcy venue statute should be revised). It is generally accepted that judicial discretion has an impact on case outcomes; accordingly, the identity of the judge will matter. See Arturo Bris, Ivo Welch & Ning Zhu, *The Costs of Bankruptcy: Chapter 7 Liquidation Versus Chapter 11 Reorganization*, 61 J. FIN. 1253, 1254 (2006) (Judicial identity matters for the length of time in bankruptcy and unsecured creditor recovery.); Nicola Gennaioli & Stefano Rossi, *Judicial Discretion in Corporate Bankruptcy*, 23 REV. FIN. STUDS. 4078 (2010) (theorizing that forum shopping creates the incentive for judges to be pro-debtor, but advocating for forum shopping so long as creditor protections are put in place).

39. See *NBRC Fact Sheet*, NAT'L BANKR. REV. COMM'N (Aug. 12, 1997), <https://govinfo.library.unt.edu/nbrc/facts.html>.

40. See *id.* Notably, Professor LoPucki served as an advisor to the Commission.

subsidiary or other non-parent affiliate.⁴¹ The primary justification for their recommendation was that “the debtor’s choice of venue [can have] the effect of disenfranchising its creditors and may prevent them from actively participating in the case and defending their claims.”⁴² The Commission specifically noted that the disenfranchisement would be felt most by smaller creditors, as “enough money will always be at stake for larger creditors to defend their interests no matter where the bankruptcy case is filed.”⁴³

Perhaps the most-cited example of the harmful effects of forum shopping on small creditors was the bankruptcy filing of Enron Corporation in 2001. With reported assets of \$49.8 billion and listed debts of \$31.2 billion, Enron’s filing was the largest corporate bankruptcy in history up to that point.⁴⁴ Despite its strong and longstanding Texas connections,⁴⁵ Enron chose to file in the bankruptcy court for the Southern District of New York. The basis given for its choice of venue was that its “principal business of trading metals commodities” was conducted out of its New York offices.⁴⁶ Immediately after the filing, a large number of Enron’s creditors filed a motion to transfer venue from the Southern District of New York to the Southern District of Texas.⁴⁷ In denying the motion, the New York bankruptcy court concluded that “while some creditors would best be served by this bankruptcy case being located in Texas, for the remainder of creditors—national and

41. See NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS § 3.1.5, at 719 (1997).

42. *Id.* The Commission also expressed concern that press coverage would be reduced if the case was held in a foreign venue. *Id.* at 777.

43. *Id.* § 3.1.5. See also Coordes, *supra* note 3, at 401, 409–11.

44. See Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron’s Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES (Dec. 3, 2001), <https://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html?searchResultPosition=3>.

45. Enron was formed when the company InterNorth bought out Houston Natural Gas (HNG) in 1985. Prior to that, HNG had operated in Houston since the 1920s. See Michael Frontain, *Enron Corporation*, TEX. STATE HIST. ASS’N (Apr. 27, 2009), <https://www.tshaonline.org/handbook/entries/enron-corporation>.

46. See *In re Enron Corp.*, 274 B.R. 327, 341 (Bankr. S.D.N.Y. 2002).

47. *Id.* at 332.

worldwide, Texas provides no better venue, and perhaps may be more inconvenient, than New York.”⁴⁸

This decision was highly controversial. John Cornyn, the Attorney General of Texas at the time, was particularly incensed by the decision to leave the case in New York, where Enron had 57 employees, rather than returning it to Houston, where Enron had more than 7,000 employees.⁴⁹ When he became Senator, Cornyn introduced the Fairness in Bankruptcy Litigation Act of 2005 to prevent future debtors from doing the same thing.⁵⁰ This legislation would have removed a debtor’s ability to file in the same jurisdiction as a subsidiary’s pending case, permitting a debtor to file in jurisdictions only where a “controlling corporation” had a pending case.⁵¹ Cornyn’s press release on the proposed legislation argued that Enron “was able to exploit a key loophole in current law to maneuver its bankruptcy proceedings far away from Houston.”⁵² The bill was referred to the Committee on the Judiciary, where it quietly died.⁵³

Subsequent large corporate filings followed Enron’s lead, filing in jurisdictions remote from their apparent base of operations. WorldCom, a Mississippi-based corporation, filed for bankruptcy in the Southern District of New York in 2002, shattering the record

48. *Id.* at 345, 351. The Official Committee of Unsecured Creditors strongly opposed the motion to transfer venue, a fact that influenced the court’s decision. See REUTERS, *Senior Enron Employees Seek a Piece of the Leftovers*, L.A. TIMES (Dec. 29, 2001), <https://www.latimes.com/archives/la-xpm-2001-dec-29-fi-creditors29-story.html>.

49. See Chris Kraul, *Enron’s Demise Saps Houston’s Energy*, L.A. TIMES (Dec. 2, 2001), <https://latimes.com/archives/la-xpm-2001-dec-02-fi-10536-story.html>. In Texas Senator John Cornyn’s presentation to Congress of the Fairness in Bankruptcy Litigation Act of 2005, he reports that Houston was home to 7,500 Enron employees, but precise numbers are difficult to locate. 151 CONG. REC. 12 (2005) (statement of Sen. John Cornyn).

50. 151 CONG. REC. 12 (2005) (statement of Sen. John Cornyn).

51. Fairness in Bankruptcy Litigation Act of 2005, S.314, 109th Cong. § 2 (2005).

52. Press Release, John Cornyn, Sen., *supra* note 49. It is worth noting that Enron claimed its principal place of business was located in New York, suggesting that the legislation proposed by Cornyn would not have resolved the issue without a more precise definition of the “principal place of business.” See 28 U.S.C. § 1408; S.314, § 2 (noting only that a debtor corporation’s domicile and residence should be considered located at the debtor’s principal place of business).

53. See LIBR. CONG., S.314 - *Fairness in Bankruptcy Litigation Act of 2005*, COMMITTEES, <https://www.congress.gov/bill/109th-congress/senate-bill/314/committees> (last visited Oct. 23, 2023).

for assets in bankruptcy previously set by Enron.⁵⁴ This time, there were no challenges to venue selection, although many former WorldCom employees argued on a shared website—an early form of social media—that they were excluded from the process.⁵⁵ In 2009, General Motors also filed for bankruptcy in the Southern District of New York despite being headquartered in Michigan.⁵⁶ Again, no one challenged the venue of the bankruptcy case, although several parties requested that specific pieces of litigation connected to the bankruptcy be transferred to other courts.⁵⁷ Proponents for reform have asserted that in these cases and others, “forum shopping prevents small businesses, employees, retirees, creditors, and other important stakeholders from fully participating in bankruptcy cases that have tremendous impacts on their lives, communities, and local economies.”⁵⁸

*C. Limited Participation in Bankruptcy Cases
Within the Bar and the Judiciary*

Another reason for the widespread opposition to venue choice in bankruptcy is more economic: large corporate bankruptcies are a finite resource. Cornyn’s objections to Enron’s placement in New York might have stemmed from irritation at having such a plum case removed from the Houston area, thereby enriching the New

54. See Simon Romero & Riva D. Atlas, *Worldcom’s Collapse: The Overview; Worldcom Filed for Bankruptcy; Largest U.S. Case*, N.Y. TIMES, Jul. 22, 2002 (§ 1), at 1.

55. See Coordes, *supra* note 3, at 416–17.

56. See, e.g., *In re Gen. Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

57. These smaller, separate litigation actions are referred to in bankruptcy cases as “adversary proceedings.” See FED. R. BANKR. P. 7001 (defining the ten types of adversary proceedings). Concerns that creditors would be unfairly forced to travel to participate in similar adversary proceedings led to an amendment of venue rules in 2019 that would permit defendants in an action brought by the trustee to recover less than \$25,000 to insist that the action be brought in the defendant’s home venue. See Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 3(b) (amending 28 U.S.C. § 1409). Unfortunately, the wording of the amendment has raised serious questions as to whether these venue provisions apply to preference actions, despite Congress’s apparent attempt to establish that they do. See Brook E. Gotberg, *Poking at Preference Actions: SBRA Amendments Signal the Need for Change*, 28 AM. BANKR. INST. L. REV. 285, 297–99 (2020).

58. Bankruptcy Venue Reform Act of 2021, H.R. 4193, 117th Congr., § 2(a) (2021). See also NAT’L BANKR. REV. COMM’N, *supra* note 41, at 777 (“[W]hen a debtor with thousands of small local unsecured creditors is able to file for bankruptcy at the other end of the country, it is impossible for these parties to represent their interests in the debtor’s case.”); Coordes, *supra* note 3, at 401–19.

York bar in prestige and fortune at the expense of the Texas bar.⁵⁹ Critics of current forum shopping trends often object to the wealth and prestige associated with large corporate 11 bankruptcy practice being concentrated in only a few locations. They also argue the benefits of applying a diversity of experience and knowledge to large complex cases, a result that is stymied when cases are brought in only a limited subset of courts. The problem may thus be summarized as one of distribution, rather than concerns about judicial fidelity to the law or access to justice for creditors.

1. *Unfair Distribution of Benefits Associated with Complex Cases*

From a pecuniary lens, it is indisputable that many actors within the bankruptcy system have a financial interest in the outcome of the debate over venue. Attorneys and firms with a strong presence in Delaware, New York, and Houston—the currently recognized “magnet” jurisdictions for complex cases—have an advantage over other attorneys competing for business. Local attorneys are more likely to be hired as counsel and will have an easier time attending court in person, where they are also more likely to be acquainted with the bankruptcy judge and familiar with his or her court practices. Many firms specializing in large corporate bankruptcies have structured their organizations, at least in part, on the assumption that cases will be brought in specific jurisdictions. It would be a financial blow to these firms if laws changed to discourage the concentration of bankruptcy filings within these jurisdictions.

On the other hand, attorneys and firms without a strong presence in the magnet jurisdictions have suffered for decades from forum shopping. The dry-up of work outside of preferred jurisdictions has led to firm closures and the general migration and

59. Robert Rasmussen and Randall Thomas argued two decades ago that the primary motivation for many critics who push for venue reform is greed, spurred by “widespread competition . . . for clients and the attorneys’ fees [chapter 11 cases] generate.” Rasmussen & Thomas, *supra* note 2, at 1361. In the case of *Enron*, Texans were insulted that the Enron executives, having wreaked havoc on the local populace by summarily terminating thousands of employees, then thumbed their noses at the community by fleeing to New York. The Southern District of Texas had been developing processes to create a more favorable environment to handle complex Chapter 11 cases even before the *Enron* case, see Jacoby, *supra* note 17, at 415, but it seems certain that the *Enron* filing encouraged further moves to establish a more attractive jurisdiction.

consolidation of bankruptcy work away from most of the country.⁶⁰ Change in venue laws would undoubtedly lead to some shift in financial benefit away from the current “haves” – firms with connections in favored jurisdictions – to the “have nots” – firms without such connections.

Association with high-profile cases can also bring more ethereal benefits of prestige and notoriety to a bankruptcy professional. LoPucki has suggested that bankruptcy judges may be particularly influenced by these effects.⁶¹ Although a bankruptcy judge’s individual salary is set by factors unrelated to the size or nature of the cases on his or her docket,⁶² the nature of the cases before the judge will determine his or her level of national recognition. Publicity is much more likely to follow a large corporate bankruptcy than anything else coming before the court.⁶³

2. Lack of Intellectual Diversity

A less mercenary objection to forum shopping is that it can limit intellectual contributions to bankruptcy issues. As one scholar put it, lack of diversity within the courts considering complex chapter 11 cases “harms the development of a robust body of bankruptcy law” by limiting the number of individuals considering bankruptcy

60. See Sujeet Indap, *Houston Becomes a Magnet for Blockbuster US Bankruptcies*, FIN. TIMES (Jan. 11, 2022), <https://www.ft.com/content/41c8bfa9-a60b-43a2-917d-323b3ee5e19d> (“Houston has emerged as a favoured destination for companies seeking Chapter 11 protection, a feature of a US system that gives companies the liberty to file their case in virtually any federal bankruptcy venue they like.”).

61. See COURTING FAILURE, *supra* note 2, at 20–24. Others have questioned the power of this element as a motivating factor for judges. See Jacoby, *supra* note 17, at 423 (citing a study in which most judges expressed preferences for small cases over large cases); Zywicki, *supra* note 4, at 1181 (“The incentive for bankruptcy judges to compete for Chapter 11 cases is unclear.”).

62. Bankruptcy judges are paid ninety-two percent of the salary of district court judges pursuant to 28 U.S.C. § 153.

63. See Baird & Rasmussen, *supra* note 26, at 344 (“Bankruptcy judges live to preside over these cases, and most never do.”); see also Cole, *supra* note 2, at 1875 (observing that judges interviewed commented on the “psychic income” associated with the “prestige and satisfaction . . . attach[ed] to hearing and deciding important cases”). Notably, chapter 11 cases are also presumed to take significantly more judicial time and attention than other types of cases. See Benjamin Iverson, *Get in Line: Chapter 11 Restructuring in Crowded Bankruptcy Courts*, 64 MGMT. SCI. 5370, 5374 (2018) (explaining weighting system used by the Judicial Conference of the United States to calculate the caseload for each bankruptcy district).

questions.⁶⁴ Another scholar explained, “[f]ederal trial courts are incubators for legal discourse,”⁶⁵ and the system relies on the appellate review process to create a kind of federal common law.⁶⁶ Development is undermined if only a handful of bankruptcy courts are used to evaluate cases.

The creation of path dependency may be the most pernicious aspect of channeling complex chapter 11 cases into a limited number of jurisdictions. Courts become desirable when they demonstrate a basic competence with complex issues, a reputation for efficiency, and a willingness to approve billing rates.⁶⁷ Once these courts have established the appropriate reputation, they become “safe” filing locations, such that risk-averse attorneys will consistently advise debtors to file in the same place rather than experiment with courts elsewhere.⁶⁸ This results in a feast-or-famine scenario when it comes to chapter 11 filings, with some courts overwhelmed by the caseload and other courts receiving very few large chapter 11 cases.⁶⁹ There is reason to be concerned both with the overloading of courts and their under-utilization. Such distribution is inefficient and may result in worse outcomes for filers and their creditors.⁷⁰

64. See Coordes, *supra* note 3, at 400.

65. See Parikh, *supra* note 2, at 198.

66. See Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 3 (2006) (arguing for use of federal common law as a framework for analyzing non-Code practices utilizing judicial discretion in bankruptcy cases).

67. See Rasmussen & Thomas, *supra* note 2, at 1368–69.

68. See *id.* at 1368–72.; see also Richard M. Cieri, Judith Fitzgerald & Judith Greenstone Miller, *Forum Shopping, First Day Orders, and Case Management Issues in Bankruptcy*, 1 DEPAUL BUS. & COMM. L.J. 515, 516 (2003); Cole, *supra* note 2, at 1859 (identifying predictability as the most important factor in the choice of Delaware as a forum).

69. See Levitin, *supra* note 1, at 1151–52 (expressing the concern that judges in magnet jurisdictions “will end up overworked”); see also James L. Patton Jr., Robert S. Brady & Ian S. Fredericks, *A Modern History of Bankruptcy in Delaware*, DEL. LAW., Winter 2006, at 12, 16 (reporting that the Delaware District Court decided to “withdr[a]w the automatic referral of bankruptcy cases to the Bankruptcy Court” in 1997 when “[c]onfronted “with overworked and overwhelmed bankruptcy judges”). On the other hand, judges in the Southern District of Texas reported no backlog despite having half of all large cases filed in that district. Email from J. Isgur, Bankr. J., U.S. Bankr. Ct. S.D. Tex. (Jul. 5, 2022).

70. See Iverson, *supra* note 63, at 5370–71 (finding that the caseload for the judge deciding a chapter 11 case impacted overall creditor recovery, the likelihood of dismissal, and other factors).

D. Concerns of Public Perception

In addition to the specific claims of judicial corruption, inhibitions on creditor involvement, and unfair or undesirable distribution of cases, commentators raise more general concerns that the bankruptcy system has lost its credibility due to lax venue rules. As one scholar explained, when filers are permitted to “flee to one of two [or more] bankruptcy courts, the process appears to be manipulable[,]” especially if the legal opinions being issued from those courts are noticeably different than what could be found elsewhere.⁷¹ This perception is fueled as commentators increasingly link venue choices to other issues they identify as undesirable within the bankruptcy system. A primary example of an issue linked to venue is nonconsensual third-party releases, but nearly every major issue arising in the literature today has been tangentially linked to venue.

In a law review article focused on the bankruptcy case of Purdue Pharma, Professor Adam Levitin argued that the procedural checks and balances on chapter 11 had broken down to permit a profoundly undesirable outcome in that case.⁷² Because not every court permits third-party releases, Levitin argued that Purdue “handpick[ed]” the Hon. Robert D. Drain, a bankruptcy judge in the White Plains division of the Southern District of New York, to be its judge, knowing that Judge Drain would permit third-party releases.⁷³ Levitin further argued that “[w]hen debtors can pick their judges in a system that usually precludes meaningful appellate review, the entire system—including good and well-meaning judges—becomes suspect.”⁷⁴

This sense of suspicion certainly played out in the general coverage of Purdue Pharma’s bankruptcy. In the Last Week Tonight television program airing August 8, 2021, popular late-night host John Oliver described the “insidious” element of the third-party release proposed to be granted to the Sackler family, noting:

[I]f it sounds weird to you that a company can basically declare bankruptcy and then a bunch of individuals get shielded from

71. See Parikh, *supra* note 2, at 197.

72. See generally Levitin, *supra* note 1. As of the time of this writing, the case is pending before the U.S. Supreme Court.

73. See *id.* at 1106, 1109, 1131–32.

74. *Id.* at 1148.

liability, that's because it is In fact, some bankruptcy courts don't allow these third-party releases at all, but Purdue very carefully chose one that they knew probably would.⁷⁵

Oliver condemned this result, noting, “[i]t may well be true that this is the best deal we can get under our current system, but the fact that that's the case doesn't speak well to this deal or, indeed, the system itself.”⁷⁶ Cases like Purdue Pharma have led to a populist backlash, fueled in part by the perception of misconduct associated with forum shopping.⁷⁷ This may explain why cries for venue reform, although persistent for decades, have reached a heightened pitch.

As discussed below in Part III, there is reason to be skeptical that forum shopping is responsible for much of the perceived problems with specific bankruptcy cases. A more likely explanation for the public outcry is the perceived unfairness of bankruptcy proceedings generally, insofar as the public perceives bankruptcy to permit companies to avoid the consequences of their mass torts. But even beyond that, there is reason to doubt that the solutions being set forth in Congress would address the underlying concerns. Part II explains the proposed legislative solution, what it would and would not do, and the likely impact it would have on bankruptcy filers and the bankruptcy system.

II. THE PROPOSED SOLUTION

Proposals to limit venue for corporate filers have been floated for as long as the Bankruptcy Code has been in existence, and disagreements on appropriate venue predate the Code.⁷⁸ Recent calls for reform have sought to address a debtor's ability to file in

75. *Last Week Tonight: Opioids III – The Sacklers* (HBO television broadcast Aug. 8, 2021).

76. *Id.*

77. *See, e.g.,* DAVID SKEEL, BROOKINGS, *THE POPULIST BACKLASH IN CHAPTER 11* (2022).

78. *See* Skeel, *supra* note 2, at 5 (observing that venue issues were vigorously debated in the 1930s). *Compare* Chandler Act, ch. 575, 52 Stat. 840, 886 (1938) (limiting jurisdiction to “court[s] in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction”), *with* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, sec. 1472 (expanding venue options to current selection, which includes a debtor's residence). Parikh has argued that the shift to include state of incorporation as a possible venue was inadvertent, insofar as it was contrary to recommendations made by the National Bankruptcy Conference in the 1930s and there is no explanation for the change. *See* Parikh, *supra* note 2, at 167-71, 187.

its state of incorporation and to limit so-called “bootstrapped” filings – cases in which a parent company files in the jurisdiction of a much smaller subsidiary.

A. The Bankruptcy Venue Reform Act

Bills grappling with bankruptcy venue have appeared on both the House and the Senate floor.⁷⁹ On June 28, 2021, Zoe Lofgren, a Democrat house member from California, introduced the Bankruptcy Venue Reform Act of 2021 on the House floor on behalf of herself and her co-sponsor, Ken Buck, a Republican from Colorado. On September 23, 2021, less than one week after Judge Drain filed his order confirming the Plan of Reorganization proposed by Purdue Pharma,⁸⁰ Senator Cornyn introduced the Bankruptcy Venue Reform Act of 2021 in the Senate on behalf of himself and Senator Elizabeth Warren, a Democrat from Massachusetts.⁸¹ The Senate Bill was substantially identical to the House Bill introduced several weeks earlier. On February 14, 2023, nearly two years later, and after both 2021 bills had died, Representative Lofgren introduced the Bankruptcy Venue Reform Act again in the House.⁸² The discussion below will refer to these bills collectively as “the Bill.”

The Bill articulated Congressional findings that forum shopping “prevents small businesses, employees, retirees, creditors, and other important stakeholders from fully participating in bankruptcy cases that have tremendous impacts on their lives, communities, and local economies[.]”⁸³ Furthermore, the Bill noted that forum shopping, by “concentrati[ng] . . . bankruptcy cases in a limited number of” jurisdictions, “deprives district courts of the United States and courts of appeals of the United States of

79. Previous iterations of similar bills have also been brought in the Senate in 2020 and the House in 2019. See Bankruptcy Venue Reform Act of 2020, S. 5032, 116th Cong. (2020); Bankruptcy Venue Reform Act of 2019, H.R. 4421, 116th Cong. (2019).

80. See *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y.), *vacated*, 635 B.R. 26 (S.D.N.Y. 2021).

81. Prior to her career in politics, Warren was a law professor, teaching at University of Houston from 1978–1983, and then at the University of Texas from 1983–1987. From there, she moved to University of Pennsylvania in 1987, then to Harvard in 1995. During her time at Harvard, she served as the Reporter for the National Bankruptcy Review Commission. See NAT'L BANKR. REV. COMM'N, *supra* note 41.

82. See Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong. (2023).

83. Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong. § 2(a)(5) (2021).

the opportunity to contribute to the development of bankruptcy law in the jurisdictions of those district courts.”⁸⁴ Finally, the Bill suggested that “reducing forum shopping in the bankruptcy system will strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system.”⁸⁵

The Bill proposed to limit a corporate debtor’s venue choices to the jurisdiction in which the principal place of business or principal assets of the entity had been located for the 180 days prior to the case’s commencement.⁸⁶ For public companies, “principal place of business” is defined under the Bill as “the address of the principal executive office of the entity as stated in the last annual report.”⁸⁷ There is no definition provided for non-public companies, although controlling caselaw would put the principal place of business at the company’s “nerve center,” defined as “the place where the corporation maintains its headquarters.”⁸⁸ Companies may also file in a jurisdiction in which a parent company or general partner has a bankruptcy case pending, so long as “the pending case “was properly filed in that district in accordance with this section.”⁸⁹ In other words, under the Bill, corporate debtors can only file in the jurisdiction where headquarters are located, or where the headquarters of a parent company or general partner are located.

B. The Lingering Issues

This legislation is unlikely to succeed in Congress for a variety of reasons, some purely political.⁹⁰ But even if it were pushed

84. *See id.* § 2(a).

85. *Id.* § 2(a)(6).

86. *Id.* § 3.

87. *See id.*

88. *See Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (interpreting the term “principal place of business” in 28 U.S.C. § 1332 to be “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities”).

89. *See Bankruptcy Venue Reform Act of 2021*, S. 2827, 117th Cong. § 3 (2021).

90. Commentators have observed that the Bill is unlikely to become law over the objection of President Joe Biden, a former senator from Delaware. *See Levitin, supra* note 16, at 1151 (“The opposition of the Delaware (and sometimes New York) Congressional delegations as well as a President from Delaware likely dooms current attempts [at venue reform].”). These observations have persisted for decades. *See Cieri et al., supra* note 68, at 522; Cole, *supra* note 2, at 1855 (“Senator Joseph Biden of Delaware has publicly stated that as long as he is on the Senate Judiciary Committee, it is unlikely that any so-called anti-Delaware amendment will be incorporated into the Bankruptcy Code.”). A current Senator from Delaware, Chris Coons, has made similar statements, reflecting his belief that the

through, the Bill is unlikely to resolve the core concerns that prompted its drafting. It does nothing to constrain differences in judicial approach or inform interpretation of the substantive or procedural issues that currently differentiate bankruptcy courts. It also does nothing to encourage the public that bankruptcy judges will be consistent in their approaches. Instead, the Bill attempts to lock debtors into a predetermined location for filing. It fails to change the pressures that lead to forum shopping and instead limits the ability of affected parties to respond to those pressures.

1. Differences in Substantive Law and Procedure

Some of the earliest would-be reformers recognized that venue reform alone would not likely alter judicial behavior. As noted by Eisenberg and LoPucki in 1999, “curtailing forum shopping will not produce uniformity; it will leave debtor-friendly courts and creditor-friendly courts each free to process cases in their own biased fashion.”⁹¹ Insofar as case law has developed to enshrine particular judicial philosophies or approaches, the passage of the Bill will not affect that precedent. Circuit splits will remain, and there are reasons to doubt that such splits will be resolved absent further reform unconnected with venue.

Bankruptcy cases experience inherent constraints when it comes to appellate review, as well as some artificial restraints that ultimately harm the development of bankruptcy precedent. The inherent constraints deal with resources, particularly cash, which is necessary to conduct litigation and of which debtors seem to be perpetually short. Put simply, parties in a bankruptcy dispute are disincentivized to fight legal battles to their ultimate conclusions by the knowledge that resources are already insufficient to meet current liabilities. Litigating may simply be pouring good money after bad. In addition, bankruptcy cases tend to fizzle out before reaching the highest courts because they experience an extra level of appellate review. Bankruptcy courts are Article I courts, taking cases referred to them by Article III district courts pursuant to

bankruptcy court is a pillar of the local economy. Chris Coons, *Bankruptcy Legislation Could Devastate Delaware*, DEL. ONLINE (Jan. 25, 2018), <https://www.delawareonline.com/story/opinion/contributors/2018/01/25/sen-chris-coons-bankruptcy-legislation-could-devastate-delaware/1065030001>.

91. Eisenberg & LoPucki, *supra* note 2, at 1003.

statute.⁹² Appeals from bankruptcy court decisions will go to the district court or, in circuits in which a Bankruptcy Appellate Panel (BAP) has been formed and the parties consent to its jurisdiction, to a panel of three bankruptcy judges sitting on appeal.⁹³ To reach the circuit courts, the case must then be appealed again. A relatively small number of bankruptcy cases come before the Supreme Court, despite the prevalence of circuit splits.⁹⁴

More troubling, effective review of bankruptcy court decisions is often precluded by the judicial doctrine of equitable mootness, which leads appellate courts to dismiss bankruptcy cases rather than evaluate the issues they raise on the merits. The doctrine of mootness arises from the Supreme Court's interpretation of Article III of the U.S. Constitution. The reference therein to cases and controversies has been held to require dismissal of a case when no effectual relief can be fashioned.⁹⁵ In bankruptcy cases, courts have expanded the doctrine of mootness to cover situations where "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."⁹⁶ As described by the Third Circuit, the use of the word "mootness" in the bankruptcy context is actually "a shortcut for a court's decision that the *fait accompli* of a plan confirmation should preclude further judicial proceedings . . ."⁹⁷ In the Seventh Circuit, Judge Easterbrook attempted to remove the term "mootness" from the calculation altogether, instead categorizing the decision as a determination "that reliance on the plan of reorganization makes it imprudent to revise things."⁹⁸

92. See 28 U.S.C. § 157(a).

93. See 28 U.S.C. § 158(b).

94. See Parikh, *supra* note 2, at 205-06 ("[F]rom 1991 to 2010, the Supreme Court granted certiorari in approximately 1,812 cases . . . [O]nly forty-one of these were bankruptcy cases (2%), and only nineteen of the 1,812 cases (1%) involved corporate debtors." (footnotes omitted)).

95. See *Mills v. Green*, 159 U.S. 651, 653 (1895).

96. *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993).

97. *In re Continental Airlines*, 91 F.3d 553, 559 (3d Cir. 1996). For criticism of the Third Circuit's opinion dismissing this case, see Ross E. Elgart, *Bankruptcy Appeals and Equitable Mootness*, 19 CARDOZO L. REV. 2311 (1998).

98. *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ("In common with other courts of appeals, we have recognized that a plan of reorganization, once implemented, should be disturbed only for compelling reasons."). See *In re Phila. Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012) (Courts making a determination of equitable mootness consider "prudential" factors such as "(1) whether the reorganization plan has been substantially

However it is termed, the doctrine of equitable mootness effectively removes appellate consideration from the calculation for many large chapter 11 cases. Without meaningful appellate review differences of substantive law will persist across jurisdictions. Judges in the Southern District of New York will likely continue to confirm plans that call for nonconsensual third-party releases, whether or not commentators object.⁹⁹ Judges in the Southern District of Texas will likely continue to confirm prepackaged bankruptcies on a short time frame, whether or not commentators consider this behavior to be “lawless.”¹⁰⁰ Furthermore, these differences will continue to exist between courts regardless of whether debtors are permitted to forum shop between judges and jurisdictions.

Even if one accepts the precept, forwarded by LoPucki, that many of the current legal differences developed as a consequence of judges competing for favor among case filers, there is no reason to believe that removal of that competition will automatically result in a reversion of the law away from permitting third-party releases or prepackaged bankruptcies.¹⁰¹ Instead, it seems more likely that courts that currently allow such practices will continue to do so. These developments may even spread to other jurisdictions. Precedent will then fortify and enshrine them until they are overturned, which may never occur under today’s system of bankruptcy appeals.¹⁰²

consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.”). Although several petitioners have invited the Supreme Court to consider the issue, thus far the Court has not directly addressed equitable mootness. *See* U.S. Bank Nat. Ass’n v. Windstream Holdings, 2023 WL 6377801 (Oct. 2, 2023) (denying petition for cert).

99. This particular issue may be resolved by the Supreme Court. *See* Abbie VanSickle & Jan Hoffman, *What the Supreme Court’s Decision to Hear the Purdue Pharma Case Means*, N.Y. TIMES (Aug. 11, 2023).

100. *See* LoPucki, *supra* note 27, at 251.

101. *See also* Jacoby, *supra* note 17, at 437 (“[W]e cannot simply assume that a venue restriction will alter the handling of large cases in some fundamental—and fundamentally positive—way.”).

102. Some have argued that expanding the number of courts considering the issues may lead to substantive reform, *see* NAT’L BANKR. REV. COMM’N, *supra* note 41, at 782, but it may only lead to more substantial circuit splits so long as the doctrine of equitable mootness remains in force.

2. Forum Shopping Away from Undesirable Jurisdictions

The Bill is unlikely to eliminate strategic behavior by case filers. Recent history has demonstrated that bankruptcy attorneys can be exceptionally creative in working around and within legislative regimes. Although the Bill anticipates many of the more obvious strategic efforts, it is unlikely to catch all potential machinations.

The Bill defines a public company's principal place of business by the address stated in the last annual report required to be filed under the Securities Exchange Act, "unless another address is shown to be the principal place of business of the entity by clear and convincing evidence."¹⁰³ Accordingly, a public debtor seeking to game the system by transferring its address would need to do so prior to submitting its latest annual report, and would need to overcome any clear and convincing evidence that suggested the actual principal place of business was elsewhere. Going further, the Bill gives no effect to a change in the ownership or control of an entity that takes place within a year before the case filing or for the purpose of establishing venue.¹⁰⁴ It may be that a significant proportion of filers who would otherwise attempt to shop for venue will be deterred by the comprehensive safeguards in the text and the extensive preplanning necessary to shop for a desirable forum.

On the other hand, advance planning is nothing new in the world of large corporate bankruptcies. If the underlying problems regarding lack of uniformity among the courts are not resolved,¹⁰⁵ the incentive to plan around legal constraints to reach a favorable forum will remain. Indeed, the ability of creative and motivated filers to successfully influence their case assignment should not be underestimated. One recent study, having observed systematic patterns in case assignments, concluded that chapter 11 debtors may time their filings to exploit nominally random assignment patterns within a given district.¹⁰⁶ Bankruptcy filers also tend to shop out of districts where there is unfavorable law or uncertainty in how the case will be treated.¹⁰⁷ These filers – typically large, well-

103. See Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong., § 3 (2021).

104. *Id.*

105. As noted above, the bill would do nothing to encourage harmonization of decisions across bankruptcy courts. See discussion *supra* note 90.

106. See Niklas Hüther and Kristoph Kleiner, *Are Judges Randomly Assigned to Chapter 11 Bankruptcies? Not According to Hedge Funds* (June 28, 2022) (on file with the author).

107. See Eisenberg & LoPucki, *supra* note 2, at 1003.

represented corporations – may be willing and able to plan ahead in order to successfully avoid an undesirable venue.

Even assuming that the proposed legal constraints are sufficient to prevent companies from engaging in forum shopping and that the system cannot be gamed, the Bill may discourage companies from filing for bankruptcy at all. As others have noted, state insolvency proceedings have become increasingly sophisticated and may provide relief, particularly for smaller companies or companies within a particular specialization.¹⁰⁸ Large, multinational debtors might seek insolvency relief in another country altogether.¹⁰⁹ If the disincentives for debtors to file within a particular jurisdiction – that is, the risks of unexpected outcomes, unfamiliar judges, and excessive delays in cases – are not removed, companies looking for insolvency relief may simply consider alternative remedies. To the extent these remedies are less equitable, less complete, or less efficient than bankruptcy proceedings would have been, this outcome reflects a net loss for all involved.

3. *Perceptions of Unfairness*

Finally, it is unlikely that restricting a company's ability to file for bankruptcy outside predesignated venue spaces will rehabilitate the public image of bankruptcy proceedings, especially if differences between court proceedings remain. If bankruptcies are limited to perceived favorable jurisdictions because companies located elsewhere choose alternative remedies, the Bill may even serve as a validation for current criticisms. Allowing ongoing differences to persist between jurisdictions undermines the principle of uniformity in bankruptcy proceedings and will inevitably lead to feelings of unfairness.

108. See, e.g., Andrew B. Dawson, *Better Than Bankruptcy?*, 69 RUTGERS U. L. REV. 137 (2016) (observing that small businesses in Florida are increasingly turning to state laws as an alternative to bankruptcy relief); Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L. Q. 1375 (2004) (observing that high-tech firms in California have a preference to pursue an assignment for the benefit of creditors over bankruptcy proceedings).

109. See Casey & Macey, *supra* note 2, at 468 (“Although chapter 11 is often regarded as the gold standard for corporate reorganizations, in recent years, foreign jurisdictions have emerged as convenient forums for distressed debtors.”).

The Bill is also unlikely to help creditors feel that they are closer to the action and better able to participate in the proceedings. Most large companies will have creditors spread across the United States, such that any location is likely to be inconvenient for some subset of creditors.¹¹⁰ In cases involving mass tort claims, where many venue objections have arisen in recent years,¹¹¹ tort claimants will not necessarily be centered in the same jurisdiction as the debtor's nerve center. Limiting venue without engaging in other reforms will neither increase access nor improve the perception of access to the bankruptcy court.¹¹²

If limiting venue is successful in encouraging companies to file in a wider variety of jurisdictions, it may give more judges the opportunity to hear large chapter 11 cases. But whether venue reform will expand the employment opportunities for bankruptcy attorneys is primarily a function of individual state laws regarding the ability of attorneys barred in other jurisdictions to appear in court *pro hac vice*. Without local protectionism, large chapter 11 bankruptcy work is unlikely to move away from the currently established law firms. Put another way, debtors and large creditors are likely to continue to employ professionals based primarily on their skill and experience, not their locality. The only likely change would be the employment of different firms as local counsel.¹¹³

C. The Fallout and Unwanted Consequences

The Bill imposes rigidity on venue that can lead to perverse outcomes for debtors and creditors. It may also undermine efficiency, which is crucial to the success of many chapter 11 bankruptcy proceedings. If the narrative of “corruption” among

110. See Skeel, *supra* note 2, at 36.

111. See, e.g., Joan Feeney, Adam Levitin, Steven Rhodes & Jay Westbrook, *Now is the Time for Bankruptcy Venue Reform*, THE HILL (Aug. 6, 2021, 6:30 PM) <https://thehill.com/blogs/congress-blog/judicial/566729-now-is-the-time-for-bankruptcy-venue-reform/> (criticizing the bankruptcy filings of The Boy Scouts of America and the National Rifle Association); Andrew Scurria & Jonathan Randles, *J&J Talc Bankruptcy Case Moved to New Jersey from North Carolina*, WSJ PRO: BANKR. (Nov. 10, 2021, 7:33 PM) <https://www.wsj.com/articles/north-carolina-judge-moves-j-j-talc-bankruptcy-to-new-jersey-11636572841> (discussing the filing of Johnson & Johnson subsidiary LTL Management LLC).

112. See discussion *supra* note 90.

113. See discussion of *pro hac vice* rules *infra* note 139 and accompanying text.

judges prevails, it may also diminish talented attorneys' interest in rising to the bench.

1. *Rigidity in Venue*

It is understood by most who study chapter 11 cases that the choice of where to file, although made by the debtor with the advice of counsel, is not a decision made in a vacuum. To the contrary, other vital participants in the proceedings have a significant impact on the filing location, resulting in a choice that is most convenient for the most influential parties.¹¹⁴ For example, proximity to Wall Street and to the headquarters of many of the largest law firms trained to assist in financial deals make the Southern District of New York a particularly attractive forum in many cases.

Under the Bill, strict venue rules might require debtors to file in locations that are fundamentally inconvenient, particularly for parties who must appear in court on a more regular basis.¹¹⁵ Corporations historically have not chosen their principal place of business with an eye toward eventual reorganization. Instead, such choices are based on factors like tax preferences, access to natural resources, proximity to shipping lanes, or any number of other unrelated reasons. Requiring corporations to reorganize where they do business could lead to highly inconvenient forums, thus leading to greater expenses for the estate and a reduction in overall efficiency. This is particularly true in situations where the corporation has a national presence with creditors dispersed nationwide. In that situation, requiring a corporation to file where its nerve center is located would likely be to all parties' individual detriment and to the detriment of the case as a whole.

114. Crucially, this analysis does not assume that the most influential parties are necessarily the most important parties, although they will certainly play the largest role in deciding the fate of the company. In many large corporate cases, the precipitating factor to the bankruptcy is the advent of a major tortious event that leads to significant claims against the debtor from tort victims. In this scenario, it is easy to concede that tort victims are extremely important parties. However, even when their claims have largely been the cause for the bankruptcy filing, they are unlikely to have as significant an impact on the ultimate direction of the case due to their lack of security in the debtor's collateral and lack of priority in repayment under the Bankruptcy Code. See Ayotte & Skeel, *supra* note 26 (observing the rise of the "creditor-in-possession"); Cole, *supra* note 2, at 1869 ("These days, secured creditors call all of the shots.").

115. See Coordes, *supra* note 3, at 421 (observing that "[r]estricting venue choice may also cause suits to be filed in inappropriate courts[,] especially for large companies).

2. Loss of Efficiencies

Beyond inconveniencing the parties, rigidity in venue choice would also eliminate access to efficient procedures that have developed over time, or at least limit access to those efficiencies based on a party's location. This point is at the heart of much of the debate over bankruptcy venue thus far. One camp has touted the benefits of filing in Delaware courts, which have historically seen the bulk of large chapter 11 filings and established procedures and timetables that permit efficient resolution of cases. The other has decried these same efficiencies as a willful violation of procedural protections.¹¹⁶

David Skeel is a prolific author in the pro-Delaware camp. He has argued that, by increasing the speed of reorganization within its courts, Delaware has "successfully addressed the single biggest problem with Chapter 11 in recent years[.]"¹¹⁷ On the other hand, LoPucki has argued that courts competing for large chapter 11 filings permit a "[r]outine disregard" for procedural protections which "creates a gangster-like atmosphere in which the case placers not only appear to be, but actually are, above the law."¹¹⁸ Whether the increase in efficiencies is worth the apparent cost in procedural fidelity appears to be a matter of opinion, insofar as there is no agreement on how to measure the value of either efficiency or procedure.

Certainly, evidence suggests that filers forum shop away from jurisdictions perceived to be slow or unpredictable.¹¹⁹ One would expect some courts to be less responsive to litigant requests, less available for hearings, or less adroit in drafting opinions on complex chapter 11 issues than others.¹²⁰ One would further expect that not every jurisdiction has both the ability and the desire to

116. See discussion *supra* note 29.

117. Skeel, *supra* note 2, at 28.

118. See LoPucki, *supra* note 27, at 252.

119. See Eisenberg & LoPucki, *supra* note 2, at 1003 (noting that because filers seem to be avoiding specific jurisdictions, forum shopping would continue even if venue was limited to exclude the state of incorporation); Cole, *supra* note 2, at 1859-61 (observing that predictability and speed are the two most important factors cited by attorneys in support of their decisions to file in Delaware).

120. Evidence suggests that the responsiveness and availability of the judges within a particular jurisdiction are major factors amongst attorneys in deciding where to file. See Cole, *supra* note 2, at 1864-65.

eliminate inefficiencies within judicial procedure in order to accommodate chapter 11 filings. If parties are unable to select jurisdictions that will be more responsive, available, and familiar with complex financial issues, they will be worse off.¹²¹

Taking the argument one step further, a common response to the concern that forum shopping permits complex chapter 11 cases to be centralized in only a few courts is that this centralization also permits the specialization of those courts.¹²² Just as there is a debate over the benefits of trading speed and efficiency for procedural safeguards, there is a debate over the desirability of specialization. Notably, LoPucki—the chief proponent of venue reform—has advocated for specialized courts to deal with complex chapter 11 cases, but has suggested that these courts should be established deliberately by Congress at three or four locations across the United States, and should handle “only the largest cases.”¹²³ Strictly enforcing geographical limitations on venue is likely to undermine the possibility of specialized courts, even as it makes such courts more essential.

The argument for preserving efficiencies brought about by specialization or judicial innovation assumes that there are efficiencies that benefit all parties. It does not ignore the continued need for fairness and equity in proceedings but recognizes that it may be better to permit filers to select those jurisdictions that are generally more efficient over jurisdictions that are less efficient.¹²⁴ This argument is addressed more fully in Part III.

121. See Levitin, *supra* note 16, at 363 (acknowledging that forum shopping can in theory be positive or negative).

122. See, e.g., LoPucki & Whitford, *supra* note 2, at 40 (noting the benefits of specialization as a consequence of forum shopping); Parikh, *supra* note 36 (arguing that forum shopping or “bankruptcy tourism” may be overall good for the European Union as a method of developing judicial hubs that can specialize in complex restructuring); Zywicki, *supra* note 4, at 1141 (too much spreading of large complex cases would eliminate big-case expertise among the courts). On the flip side, there may be benefits to permitting some courts to specialize primarily in consumer cases, considering that judges may develop particular skills for handling individual chapter 7 and chapter 13 filings, just as others develop specialization for chapter 11 cases. There may be some advantages in knowing the nature of cases a court is likely to attract and selecting a bankruptcy judge best suited for the job.

123. COURTING FAILURE, *supra* note 2, at 252–53.

124. It may be even better to permit filers to distinguish between jurisdictions based on their respective strengths. See, e.g., Ayotte & Skeel, *supra* note 26, at 437 (arguing that the choice of courts identified by LoPucki is efficient because companies that seek faster, less costly workout procedures with less staying power may do so based on rational choice and the desired end).

3. Ongoing and Reinforced Suspicion of the Judiciary

Those in support of the Bill have suggested that reform is necessary to redeem the judiciary in the eyes of the public. They argue the existence of forum shopping for high-profile cases has led to the public perception that companies can pick their outcome by picking their judges, and that these selected judges consistently choose outcomes that favor company insiders over creditors, including tort victims. Proponents of the Bill seem to argue that by eliminating the ability of a debtor to select its judge, the public's perception of the judiciary may improve.

This argument wholly fails to appreciate the genesis and direction of public outcry against the judiciary in bankruptcy cases. Using Purdue Pharma's bankruptcy case as an example, it is hard to imagine an outcome that would not have been subject to extensive criticism, irrespective of venue. The hard reality of bankruptcy cases is that some class of creditors—frequently tort victims—will almost inevitably receive less than full compensation, wherever the case is managed. It may be a depressing truth that bankruptcy proceedings will always be viewed askance by the general population. By establishing a collective action forum, the bankruptcy court makes itself a target for collective discontent. The public was upset by the availability of third-party releases in the Purdue case, but this is a matter of substantive law. Put another way, there is no reason to think that the outcry over the third-party releases would be any less if granted by a judge located in the District of Connecticut, where Purdue Pharma's headquarters are located.¹²⁵

The argument that forum shopping has promoted or caused the corruption of bankruptcy judges undermines the legitimacy of bankruptcy judges, and indulging in that argument reinforces public suspicion. The corruption narrative assumes that judges are so concerned with their perceived importance in big cases that they will alter their rulings to attract more big cases. If these assumptions are true, public suspicion is justified regardless of venue reform. If courts are so self-motivated, every decision is presumptively self-interested.

125. See PURDUE PHARMA, <https://www.purduepharma.com/about/locations-operations> (last visited Oct. 20, 2023).

Once we indulge in the belief that bankruptcy judges rule out of self-interest, we invite other claims of bias and favoritism among the judiciary. We might even assume that bankruptcy judges will be systematically hostile to foreign creditors, issuing rulings that will undermine their legitimate claims to favor local industry.¹²⁶

If we cannot trust judges to rule based on the facts rather than out of self-interest, then all judicial opinions should be met with suspicion. Adopting this viewpoint is cynical and self-defeating. Under this lens the role of the bankruptcy judge is sullied, judges who currently fill these positions are demoralized, and otherwise interested applicants are discouraged from taking the bench.¹²⁷ It may be satisfying to some to blame the ills of the system on its most visible symbols, but holding judges accountable for broader dissatisfaction with the substantive law is unfair and unproductive. If judges are issuing improper rulings, the correct approach is to clarify the substantive law and facilitate appellate review, not to assume improper motives.

III. REASONS TO DOUBT THE SEVERITY OF THE PROBLEM

Thus far, this Article has assumed the validity of the stated problem—that is, that forum shopping is problematic to the overall system insofar as it undermines the legitimacy of bankruptcy courts and their judicial opinions, leads to inconsistent results among debtors, interferes with the involvement of creditors, and gives professional opportunities to attorneys in certain jurisdictions to the exclusion of other jurisdictions. As has been explained above in Part II, even if these concerns are legitimate, the proposed legislative solution is unlikely to resolve these issues.

126. See Casey & Macey, *supra* note 2, at 475 (“[D]ebtors may use liberal venue rules to avoid local bias. Home venues may be particularly vulnerable to economic disruptions that affect employment in the area. A bankruptcy rule that forces debtors to file in their home venues could put a thumb on the scale of local and regional interests. Local judges may, for example, be skeptical of value-enhancing reorganizations that adversely affect local employment, or they may be influenced by local political pressures.”); Zywicki, *supra* note 4, at 1165 (suggesting that the decision to stay in a debtor’s home district may be its own form of forum shopping based on the belief that the local court will be more responsive to local managers and employees).

127. See Michael et al., *supra* note 26, at 813 (“[M]embers of the bankruptcy bench are sincere, well-meaning, and conscientious, and . . . have given up the opportunity to earn multiples of a bankruptcy judge’s salary in order to ‘do the right thing.’” (quoting Michael St. James, *Why Bad Things Happen in Large Chapter 11 Cases: Some Thoughts About Courting Failure*, 7 TENN. J. BUS. L. 169, 176 (2005) (alterations in original))).

Differences will persist between jurisdictions, the economic realities of large cases will continue to leave many smaller creditors essentially voiceless, and debtors will continue to pick their forum – even if that means abjuring bankruptcy altogether to avoid an undesirable venue.

This Part abandons the assumed validity of the stated problem and instead expresses skepticism of the supposed ills of forum shopping. As noted in Part I, many have responded to LoPucki's claims regarding the corruption of bankruptcy judges with skepticism, if not incredulity.¹²⁸ As described below, there is reason to doubt other aspects of the argument as well. Many of the stated underlying motivations for venue reform appear inaccurate, overestimated, or even overblown.

*A. Does the Debtor's Selection of Venue Really Influence
Creditor Participation?*

Commentators have suggested that choice of venue is crucial to the participation of smaller stakeholders. This argument was made with particular force in the National Bankruptcy Commission's 1997 Report¹²⁹ and by Laura Coordes in a more recent article.¹³⁰ The National Bankruptcy Commission recognized that being able to choose a venue that would maximize the shared interests of debtors and creditors would be mutually beneficial. However, it expressed concern that the choice of venue could have "the effect of disenfranchising [the debtor's] creditors and may prevent them from actively participating in the case and defending their claims."¹³¹ Referencing a specific example, Coordes asserted that "running the bankruptcy from New York could make it more difficult for GM's Detroit-based employees, trade creditors, and other stakeholders to interfere in the case."¹³² This conclusion is assumed as a matter of common sense—distance increases difficulty—but when tested, the syllogism breaks down. In any

128. See discussion *supra* note 26.

129. See NAT'L BANKR. REV. COMM'N, *supra* note 41, at 771.

130. See Coordes, *supra* note 3.

131. See NAT'L BANKR. REV. COMM'N, *supra* note 41, at 771.

132. See Coordes, *supra* note 3, at 383. Later, Coordes suggests that "[l]arge bankruptcies now cater almost exclusively to the wishes of power players, to the detriment of smaller stakeholders who would have a better chance of getting their views heard if the bankruptcy proceedings happened close to home." *Id.* at 387.

bankruptcy proceeding, members of the public cannot meaningfully influence the outcome simply by strolling into the courtroom and making noise.

In fact, most individual stakeholders will not have any significant influence over large cases due to the sheer number of claimants and the amount of the claims involved. For instance, GM carried liabilities of over \$172.8 billion into bankruptcy.¹³³ Of that amount, general unsecured claims amounted to somewhere between \$34.4 and \$39 billion, and included claims by suppliers, unions, landlords, tort victims, and others.¹³⁴ Creditors are permitted to vote on any proposed plan of reorganization, but their vote is weighted by dollar amount within a given class of creditors.¹³⁵ Beyond voting, each individual creditor can object to a plan on the basis that they receive less under the plan than they would receive in a chapter 7 liquidation,¹³⁶ or that the plan is likely to result in a future bankruptcy.¹³⁷ Beyond these objections, the opposition of individual unsecured creditors is largely irrelevant. Recognizing this, most individual creditors make a rational decision not to become deeply involved in proceedings, relying instead on representation through a creditors' committee, which is permitted to appoint its own attorney using funds paid by the bankruptcy estate.¹³⁸

If influence over the case outcome is possible, it is primarily achieved through motion practice, which is almost always accomplished by attorneys. Individuals who seek to be heard must follow the same procedural protocols as legal counsel; accordingly, it is usually best to hire an attorney. For most creditor appearances, admission *pro hac vice* will not be required, so there is no

133. Disclosure Statement for Debtors' Amended Joint Chapter 11 Plan, *Campbell v. Motors Liquidation Co.* (*In re Motors Liquidation Co.*), 428 B.R. 43, 57 (Bankr. S.D.N.Y. 2010) (copy on file with the author).

134. *Id.* The claims of employees, who Coordes suggested might also want to appear and have a say in the outcome, amounted to less than \$1.5 million and were paid in full pursuant to the proposed plan of reorganization. Coordes, *supra* note 3, at 383.

135. See 11 U.S.C. § 1126. This vote is historically conducted through the mailing of paper ballots, although it has also been digitized in many if not all cases. Accordingly, location is irrelevant for the vote.

136. See 11 U.S.C. § 1129(a)(7).

137. See 11 U.S.C. § 1129(a)(11). In addition to these specific objections, a party in interest may be heard on any issue in a Chapter 11 case. See 11 U.S.C. § 1109(b).

138. See 11 U.S.C. § 1102; see also Skeel, *supra* note 2, at 36–37.

requirement that the attorney be local to the filing.¹³⁹ For other actions, most bankruptcy courts permit an out-of-jurisdiction attorney to appear *pro hac vice* upon approval of the court. Unfortunately, at present the rules are not uniform. Local rules govern the practice,¹⁴⁰ and many jurisdictions, including Delaware,¹⁴¹ require association with local counsel to ensure that at least one member of the team can be held accountable for improper conduct in the case.¹⁴² Other jurisdictions, including the Southern District of New York, do not require affiliation with local counsel.¹⁴³ If the goal is to expand access to parties, policy recommendations that facilitate *pro hac vice* appearances by offering permissive acceptance with minimal constraints may be the first place to start.

Technological advances have significantly facilitated the remote appearance of attorneys on a *pro hac vice* basis. They also provide easy access to up-to-date information regarding a case to all observers with internet access. In her piece, Coordes acknowledges that “[t]echnological advances can help address problems relating to lack of stakeholder participation[.]” But, she cautions, “they are not a panacea for venue problems.”¹⁴⁴ Some of the concerns she raises include that stakeholders might not be aware that they can appear in court hearings remotely, or might have to travel considerable distances to access the technology necessary to do so.¹⁴⁵ In the aftermath of COVID-19, when all Americans—from kindergarten students to Supreme Court

139. Creditors may file a claim, request service of documents, or appear at a § 341 meeting without needing local counsel. See David Hadas & Richard E. Mikels, *Pro Hac Vice Pro or Con*, AM. BANKR. INST. J. (Dec.–Jan. 2001).

140. See *id.*

141. See Del. Bankr. L.R. 9010-1(c) (requiring association with an attorney who is a member of the Delaware Bar and maintains an office in that jurisdiction “unless otherwise ordered”).

142. See Hadas & Mikels, *supra* note 139.

143. See U.S. Bankruptcy Court for the Southern District of New York, Local Rule 2090-1. The Comment to the rule notes that subdivision (c) of the rule was repealed in 2004 insofar as it could have been construed to require retention of local counsel.

144. Coordes, *supra* note 3, at 422. Later, Coordes acknowledged, “[i]t is now easier than ever for parties to access and participate in bankruptcy proceedings, regardless of where they take place[.]” but reaffirmed that “venue reform is desperately needed for Chapter 11 cases” insofar as technology did not resolve the problems associated with situating a bankruptcy case far from key stakeholders. Laura N. Coordes, *New Rules for a New World: How Technology and Globalization Shape Bankruptcy Venue Decisions*, 17 ASPER REV. INT’L BUS. & TRADE L. 85, 97, 99, 103 (2017).

145. Coordes, *supra* note 3, at 422–23.

litigants—became intimately familiar with virtual platforms, these arguments seem outdated.¹⁴⁶ Not only has web conferencing become ubiquitous for court proceedings,¹⁴⁷ the technology is accessible to anyone with a device that can support an app, including most cellular phones.¹⁴⁸

In sum, the importance of venue to facilitate court access may be overblown. Even if we accept that a case should be geographically convenient to at least some parties, accommodating one creditor in a large public case is likely to inconvenience another.¹⁴⁹ Further, creditors cannot simply walk into the bankruptcy court to influence the outcome;¹⁵⁰ they need to file motions and bring arguments under normal procedure, tasks that are better suited to attorneys. The location of the attorneys may be relevant, except that local rules frequently permit *pro hac vice* appearances, and current technological advances allow them to do so from any location. These advances also permit individual

146. See Brian Dean, *Zoom User Stats: How Many People Use Zoom in 2023?*, BACKLINKO (Aug. 23, 2023), <https://backlinko.com/zoom-users> (tracing the increase in Zoom annual meeting minutes from 97 billion in October 2019 to 3.3 trillion in October 2020).

147. See David Horrigan, *COVID Technology Law Update: The Law of Virtual Court Proceedings*, LAW.COM (Feb. 8, 2022, 7:00 AM), <https://www.law.com/legaltechnews/2022/02/08/covid-technology-law-update-the-law-of-virtual-court-proceedings>.

148. See ZOOM, *Getting Started Guide for New Users* (Oct. 17, 2022), <https://support.zoom.us/hc/en-us/articles/360034967471-Getting-started-guide-for-new-users>. That said, it is undeniable that there are still large portions of the population without easy access to broadband internet. There may also be inequalities, real or perceived, when some parties appear in person and others via Zoom.

149. See Miller, *supra* note 13, at 1995 (noting that creditors in large cases are located all over the United States and often all over the world); LoPucki & Whitford, *supra* note 2, at 49 (“What is convenient for some will be inconvenient for others, and this problem would remain even if forum shopping were eliminated entirely.”).

150. Parties may nevertheless prefer that a case be filed in a closer jurisdiction, for reasons that are idiosyncratic or based on feelings rather than a rational belief that the location may change the outcome. See, e.g., Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 13 (quoting a retiree saying “[i]f someone is going to take my health care away from me, I think I ought to be able to watch them do it with my own eyes”). In testimony before Congress, Chief Judge Frank J. Bailey of the Bankruptcy Court for the District of Massachusetts further emphasized that it is important to stakeholders to have the perception that the opportunity for participation is “real and accessible.” *Hearing on Chapter 11 Bankruptcy Venue Reform Act of 2011 H.R. 2533*, 112th Cong. 11 (2011) (written statement of the Hon. Frank J. Bailey). As noted in this section, watching the proceedings may now be realistic even when they occur in remote venues by virtue of advances in technology and the increased willingness to facilitate virtual participation, but this may not satisfy those for whom this perception is paramount.

creditors to attend hearings remotely and stay informed and engaged in the proceedings from the comfort of their own homes. Accordingly, venue seems largely irrelevant for most meaningful creditor participation.¹⁵¹

*B. Does the Debtor's Selection of Venue Really Increase
Costs for Creditors?*

Some argue that a remote venue increases costs of participation for the creditor, insofar as the creditor needs to hire local counsel or travel to the venue in order to conduct the case.¹⁵² These concerns have been partially addressed above. Surely, the law could do more to facilitate appearances *pro hac vice* and eliminate the need for local counsel. But the experience of “going remote” during the COVID-19 pandemic has demonstrated that the business of law can easily be conducted over diverse locations, saving counsel and parties the costs of driving to the courthouse and obtaining parking. For some more daring individuals, it may even save the cost of wearing pants.

Separately, some have argued that particular venues, such as Delaware and the Southern District of New York, are more expensive for creditors because local counsel charge more expensive professional fees.¹⁵³ Some jurisdictions may also mandate mediation, which can arguably increase expenses without accelerating outcomes.¹⁵⁴ A debtor's managers may be insensitive to these increased administrative costs when selecting venue

151. There is an argument to be made that creditor expectation about the likely forum may be important. See Janger, *supra* note 36, at 182 (identifying as an article of faith the belief that debtors should not be permitted to frustrate the legitimate expectation of creditors). However, it seems unlikely that most creditors would engage in meaningful reliance on the likelihood of a debtor's bankruptcy being held in a particular forum, especially in light of historical forum shopping.

152. Some evidence suggests that the costs of hiring local counsel have not deterred forum shopping into Delaware. See Cole, *supra* note 2, at 1873.

153. See LoPucki & Doherty, *supra* note 25, at 131 (finding that Delaware courts awarded fees that were thirty-two percent higher than those awarded in other courts after controlling for firm size, length of the proceeding, and the number of professional firms in the case). Professor Nancy Rapoport has also theorized that the large law firms appearing as repeat players in chapter 11 cases rarely object to one another's fee applications, reducing the overall scrutiny the applications receive. Nancy Rapoport, *Rethinking Professional Fees in Chapter 11 Bankruptcy*, 5 J. Bus. & Tech. L. 263, 274 (2010).

154. See, e.g., Delaware Local Rule 9019-5(a) (“Except as may be otherwise ordered by the Court, all adversary proceedings filed in a chapter 11 case . . . shall be referred to mandatory mediation.”).

because they are borne primarily by the creditors in the form of a reduced payout.¹⁵⁵ But empirical evidence indicates that filers are sensitive to costs associated with a particular venue.¹⁵⁶ As creditors are permitted greater weigh-in on venue selection, these concerns may be further ameliorated. As explained in greater detail below, this Article also recommends greater uniformity across jurisdictions in allowing professional fees and requiring mediation, which could further answer this concern.¹⁵⁷

In most large chapter 11 cases, there are no objections to a debtor's selected venue, which may evidence that the perceived benefits associated with transferring venue are outweighed by the costs of bringing the venue motion itself.¹⁵⁸ Another explanation for the lack of interest in motions to transfer venue may be that more influential creditors may have been consulted in advance regarding where to file or may have otherwise influenced the choice of venue on the front end.¹⁵⁹ The costs of transferring a case increase the longer the original court retains it.¹⁶⁰

The act of forum shopping may be costly and may thus reduce a creditor's recovery, especially when the debtor takes more extreme actions to situate itself within a particular jurisdiction. For example, a debtor might expend capital in opening a subsidiary within a desired jurisdiction in order to obtain proper venue. These costs are ultimately borne by the creditors when the debtor is insolvent. If the Bill raises those costs without removing

155. See Rapoport, *supra* note 153, at 265.

156. See Ayotte & Skeel, Jr., *supra* note 26, at 457 (arguing that DIP financiers play an essential role in choosing venue and running the case and would be unlikely to countenance filings that paid professionals exorbitant amounts).

157. See discussion *infra* Section IV.B.

158. See Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 9; Cieri et al., *supra* note 68, (observing that challenges to venue are rare in cases filed in Delaware or New York). As currently proposed, the Bill states unequivocally that the district court shall dismiss or transfer an incorrectly filed case. However, a finding that the case was incorrectly filed seems to require an objection raised by a party in interest. Once the objection is raised, the court must consider the request within fourteen days. Presumably, if objections are not raised, the court cannot unilaterally transfer venue. See Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong., § 3 (2021). The U.S. Trustee's office can bring a motion to transfer venue, but rarely does so.

159. See Ayotte & Skeel, Jr., *supra* note 26, at 460–61 (finding a high level of prediction between levels of secured debt and the choice to file in bankruptcy, suggesting that bank lenders influence the decision of where to file).

160. See Bermant et al., *supra* note 8, at 7.

the motivations behind forum shopping, it may further harm creditors. Permitting a debtor and creditors to agree on a desirable forum may ultimately reduce costs and correspondingly increase creditor recovery.¹⁶¹

C. Does the Debtor's Selection of Venue Really Alter Case Outcomes?

Returning to observations of the Purdue Pharma bankruptcy, much of the outrage associated with the case was directed towards Judge Drain, who oversaw plan confirmation.¹⁶² As noted above, Judge Drain confirmed a plan that allowed for non-consensual third-party releases of the Sackler family, contingent on their contributing billions of dollars to the Purdue bankruptcy payout.¹⁶³ This was possible based on applicable precedent in the Southern District of New York but may not have been possible in other jurisdictions with different precedent. Absent these differences of substantive law, it is hard to say with any certainty whether a different judge in a different jurisdiction would have substantively altered the outcome, and in what direction.¹⁶⁴ Certainly, differences in law across jurisdictions will inform the case, but how much does the judge individually affect the outcome?¹⁶⁵

Significant literature has considered evidence that the personnel associated with a particular case can affect the case outcome, independent of jurisdictional differences. One recent empirical study suggested that judges in New York and Delaware issue more predictable rulings than judges in other jurisdictions.¹⁶⁶

161. See discussion *infra* Section IV.C.

162. See, e.g., Brian Mann, *The Sacklers, Who Made Billions from OxyContin, Win Immunity from Opioid Lawsuits*, NPR (Sept. 1, 2021, 7:33 PM) <https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxycotin-opioid-epidemic>.

163. *In re Purdue Pharma, L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated* 635 B.R. 26 (S.D.N.Y. 2021).

164. Charles Tabb pointed to a similar line of inquiry in evaluating the decision in the Enron case not to appoint a trustee, which Lynn LoPucki asserted was evidence of the judge's desire to accommodate case filers at the expense of creditors. See Tabb, *supra* note 26, at 490 ("The problem with this line of argument is that proving a counter-factual is difficult, if not impossible, and linking up the causal relationship is not so tidy.").

165. See Levitin, *supra* note 16, at 388 ("It is generally difficult, if not impossible, to show that judge shopping actually affects outcomes."). Professor Levitin has argued that judge shopping does impact case outcomes. He points to these effects in "drive-thru bankruptcies," which only a handful of jurisdictions permit and which, he argues, are illegal. *Id.*

166. See Ellias, *supra* note 19, at 119. Notably, this study did not find that New York and Delaware courts exhibited a bias in favor of senior secured creditors, as many critics of forum

Another recent study found substantial variation in the conversion rates of chapter 11 cases to chapter 7 cases across judges, even controlling for differences in precedent across districts.¹⁶⁷ Debtors with a particular attribute—namely the participation of a large hedge fund—were systematically assigned to judges with lower conversion rates, suggesting that debtors were able to time their filings in such a way as to overcome methods of random assignment within the jurisdiction.¹⁶⁸ A 2003 study concluded that the identity of the judge may impact the recovery for unsecured creditors; notably, female judges tended to oversee cases in which creditors were paid more.¹⁶⁹ Still another study found different outcomes in individual chapter 7 cases depending on the identity of the chapter 7 trustee, and a corresponding effort to systematically select some trustees over others even when assignment of those trustees was nominally random.¹⁷⁰

It should be unsurprising to observe judges converting chapter 11 cases to chapter 7 at different rates, or trustees spending more or less time reviewing a debtor's claimed exemptions. Substantive and procedural constraints, including appellate review, will naturally cabin these differences into a fairly narrow band with outliers identified and sheared on a regular basis to ensure consistency. Most observed differences are not disturbing except insofar as they create a sense of unfairness and injustice. The study of chapter 7 trustees is a meaningful example. In that instance, the differences between trustees were systematically exploited by attorneys who filed on behalf of their clients, creating an injustice for pro se filers who lacked the institutional knowledge to choose a more lenient

shopping had suggested. *Id.*; see also Coordes, *supra* note 144, at 100-101 (suggesting that because senior lenders can influence where the debtor files for bankruptcy, they can push for venues that will benefit them to the detriment of other stakeholders).

167. See Hüther & Kleiner, *supra* note 106.

168. *Id.*

169. Bris et al., *supra* note 38, at 1297, 1301. Attorneys were paid less when appearing before female judges, which may account for some of the discrepancy.

170. See Edward R. Morrison, Belisa Pang & Jonathon Zytnick, Manipulating Random Assignment: Evidence from Consumer Bankruptcies in the Nation's Largest Cities (Dec. 13, 2022) (Colum. L. and Econ. Working Paper No. 614) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444949. This study discovered a systemic bias in favor of represented parties whose attorneys were able to systematically avoid stricter chapter 7 trustees. See also Cole, *supra* note 2, at 1870 (noting that lawyers may forum shop to avoid trustees they believe are exceeding the scope of their administrative powers in harmful ways).

trustee. In that system, debtors with more sophisticated attorneys obtained more favorable treatment than similarly situated self-represented debtors.

Empirical evidence has yet to identify a systemic pattern of unfairness among judges in chapter 11 cases, but the perception of unfairness remains. There are two conceivable methods of counteracting this perception. First, the law could constrain judicial discretion to establish greater uniformity across all cases and reduce or eliminate any advantage that might accrue to shopping for a particular forum or judge. Alternatively, all filers could select their own judges in a free market. This alternative model would place all filers on an equal playing field with an equal opportunity to select a “good” judge for reorganization.¹⁷¹

D. Is Forum Shopping an Issue Outside of Large Corporate Cases?

Many scholars have commented on the increasing prevalence of forum shopping, and most high-profile bankruptcy cases appear to have carefully considered venue prior to filing. That said, forum shopping may be mostly limited to larger chapter 11 cases. In his work on the subject, LoPucki has relied primarily on information derived from a database of public companies, which is a small subset of the overall chapter 11 docket.¹⁷² Professor Samir D. Parikh relied on the same database to draw his conclusion that forum shopping had increased over time. Parikh’s study involved 159 cases filed between January 1, 2007, and June 30, 2012.¹⁷³ During that same time period, there were over 60,000 total chapter 11 cases filed by businesses.¹⁷⁴

171. If there is “market irregularity” in forum shopping today, reflected by the disproportionate number of cases filing in New York and Delaware, this may be because the market is currently constrained by venue rules and that the irregularity would be corrected by allowing parties to file in more locations. See Parikh, *supra* note 2, at 181; see also LoPucki & Doherty, *supra* note 14 (questioning parties’ choice of Delaware as a forum when statistical analysis demonstrates that case outcomes are worse).

172. See, e.g., LoPucki & Doherty, *supra* note 25, at 113 (describing the use of the data set to compile information on professional fees and expenses). LoPucki created the UCLA-Bankruptcy Research Database (BRD) to compile data from all large public companies. UCLA-LoPucki Bankruptcy Research Database, *A Window on the World of Big-Case Bankruptcy* (March 2022), <https://lopucki.law.ucla.edu>.

173. See Parikh, *supra* note 2, at 175. This analysis focuses on cases with at least \$1.2 billion in assets and is not representative of chapter 11 cases in general.

174. See *Caseload Statistics Data Tables*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/caseload-statistics-data->

Large public companies are very different from the typical chapter 11 debtor, and much more likely to engage in forum shopping. Empirical evidence supports this conclusion: small businesses do not engage in forum shopping the way large corporations do.¹⁷⁵ An obvious reason is the expense: forum shopping involves a level of hassle—like incorporating new subsidiaries or moving assets—that would only make financial sense to a very large corporation.

When done in cases involving large public companies, forum shopping may be of less concern in terms of its impact on stakeholders. As noted above, large corporate filers are likely to have creditors, shareholders, and other stakeholders spread across the nation, such that any given venue is likely convenient for some subset of interested parties and inconvenient for another subset.¹⁷⁶ There may also be less perceived benefit in having a local judge, who is presumably more familiar with the local market and the local economy, oversee the case of a complex corporation with wide-ranging operations.

If smaller corporations do not engage in forum shopping and venue selection is less impactful for national corporations, drastic alterations to venue rules that would affect all parties make little sense. At best, these alterations would have no impact on most cases and only create further complications for large corporations to grapple with in their decision-making. At worst, they would lead to the unintended consequences explained above.¹⁷⁷

tables?tn=&pn=All&t=534&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=2012 (last visited Sept. 30, 2023) (reporting 56,917 chapter 11 filings from 2007–2011).

175. See Leslie R. Masterson, *Forum Shopping in Business Bankruptcy: An Examination of Chapter 11 Cases*, 16 BANKR. DEV. J. 65, 79 (1999) (finding very limited forum shopping in a random sample of all business filings in the Southern District of New York); NAT'L BANKR. REV. COMM'N, *supra* note 41, at 774 (Oct. 20, 1997) ("Most cases involving consumer debtors or small businesses present no question about where to file."). *But see* Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 1 (asserting that most of the companies filing in Delaware in the last ten years have been smaller companies with no assets or operations in Delaware).

176. See discussion *supra* note 149; Skeel, *supra* note 2.

177. See discussion *supra* note 115.

E. Is Forum Shopping a Net Negative in the Bankruptcy Context?

The baseline assumption for most observers is that forum shopping is “a terrible thing, practiced by only the most manipulative and devious attorneys.”¹⁷⁸ However, observers may have a very different reaction to permitting a company to incorporate in the state of its choice. Although both are overseen by members of the judicial branch, most commentators would be quick to explain that a chapter 11 bankruptcy is a fundamentally different process than simple (or even complex) litigation. A chapter 11 case is more a structured deal, a reorganization of equity, and a refinancing rolled into one. It is group problem solving—admittedly coercive in nature—with a baseline requirement that the result must be superior to the next best alternative for all parties.

Several scholars have suggested that debtors ought to select a proposed bankruptcy venue in advance, pre-committing to the choice of venue when the incentives of managers and future creditors are still fully aligned. Robert K. Rasmussen made this argument extensively in the late 1990s,¹⁷⁹ and it has since been echoed in recommendations made by others.¹⁸⁰ Many scholars have pointed to a perceived “race to the top” in the realm of incorporation, which they argue has given Delaware primacy through the development of rules that promote good corporate governance and predictability.¹⁸¹ The same could occur, Rasmussen and others argued, in bankruptcy courts, with Delaware taking the lead for many of the same reasons it was successful in the realm of incorporation.¹⁸²

178. See Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 (1999).

179. See, e.g., Rasmussen & Thomas, *supra* note 2.

180. See, e.g., Casey & Macey, *supra* note 2, at 498–99.

181. See, e.g., Rasmussen & Thomas, *supra* note 2, at 1382; see also Gennaioli & Rossi, *supra* note 38, at 4079 (arguing that judicial discretion generates a race to the top so long as creditor protection is strong enough). *But see* LoPucki & Kalin, *supra* note 25, at 232–33 (casting doubt on the efficiency of Delaware’s corporate law program). At least one scholar has rejected the comparison entirely. See Jacoby, *supra* note 17, at 409–10 (“The analogy between a state corporate charter competition and a federal bankruptcy venue competition is a rough one at best.”).

182. See Ayotte & Skeel, Jr., *supra* note 26, at 455.

With nominally uniform laws across all states,¹⁸³ bankruptcy venue selection is more about selecting the judge who will oversee the case than it is about selecting a state's legal regime.¹⁸⁴ The ability to pre-identify the judge was a primary reason for Delaware's initial ascendancy as a forum of choice for bankruptcy. Until 1993, there was only a single bankruptcy judge in Delaware.¹⁸⁵ When a second judge was appointed that year, the advantages of predictability were preserved through a system under which filers could call the court and be informed in advance which of the judges they were likely to draw.¹⁸⁶ Until recently, cases in the Southern District of New York were assigned based on which courthouse received the initial filing, and the White Plains courthouse held a single judge known and respected among bankruptcy filers, Judge Drain.¹⁸⁷ More recently, the Southern District of Texas facilitated its rise as a desirable venue by designating two judges to handle all complex cases, creating a much more limited pool of assignment for prospective filers.¹⁸⁸ The notion of judge shopping is universally condemned,¹⁸⁹ but it may ultimately benefit parties seeking more efficient reorganization proceedings.¹⁹⁰

At its core, the objection to forum shopping presupposes that the selection of a forum by one party must disadvantage another party—an assumption that buys into the zero-sum perspective of litigation, rather than the mutually beneficial

183. *But see supra* note 23 and accompanying text.

184. *See, e.g.,* Rasmussen & Thomas, *supra* note 2, at 1360 (“While a few commentators endorse forum shopping in limited circumstances, none condones judge shopping.”).

185. *See* Patton Jr. et al., *supra* note 69, at 14.

186. *See* Bermant et al., *supra* note 8, at 40–41.

187. Judge Drain announced his decision to retire shortly after confirming the plan in *Purdue Pharma*. Following this announcement, the Southern District of New York announced that mega cases filed in that district would no longer be assigned to a particular division within the district but would instead be spread among judges. *See* James Nani, *N.Y. Mega Bankruptcies to Get Random Judges After Purdue Furor*, BLOOMBERG LAW (Nov. 22, 2021, 11:39 AM), <https://news.bloomberglaw.com/bankruptcy-law/new-york-chapter-11-mega-cases-to-be-assigned-random-judge>.

188. In 2000 the Southern District of Texas adjusted its bankruptcy procedures to create a separate pathway for complex cases in an effort to be more flexible and responsive to parties in large chapter 11 cases. *See* Cole, *supra* note 2, at 1856; *see also* Mark Curriden, *Meet the Judge Who Saved State Bankruptcy Practice*, HOUSTON CHRONICLE, Sept. 3, 2020.

189. *See* Levitin, *supra* note 16.

190. *See* Cole, *supra* note 2, at 1877; LoPucki & Kalin, *supra* note 25, at 271 (noting that competitions among bankruptcy courts have the beneficial effects of encouraging development of effective procedures and techniques for reorganization).

perspective of deal-making.¹⁹¹ It is at least theoretically possible to construct a judicial system in which there can be no unfair advantage by selecting one forum over another, a possibility that seems much more attainable in a system like bankruptcy, where the statutorily dictated outcome is one in which all parties are made better off by virtue of the bankruptcy.¹⁹² In this system, concerns of forum shopping may be inherently overstated and may mask the real underlying issues of non-uniformity, unpredictability, and perceived unfairness due to lack of input. The proposal below seeks to address these issues.

IV. ALTERNATIVE SOLUTIONS

This Part proposes an alternative approach to the perceived problem of forum shopping in bankruptcy proceedings. Forum shopping is considered to be anathema to the legal system because it creates an inherent advantage for one side—the filing party, who selects the venue—over the opposing party. As described below, this framing is less applicable in bankruptcy, where the dynamic is rarely the filing party (the debtor) in opposition to non-filing parties (the creditors). Instead, conflicts arise between those who believe reorganization will maximize their returns (typically the debtor, unsecured creditors, and equity shareholders) and those who do not (often secured creditors). For the most part, participants in a chapter 11 filing have shared goals—to recover as much as possible for creditors and, if possible, to preserve the debtor's going concern value to maximize creditor recovery and minimize waste. In a successful chapter 11 case, all parties will be at least as well off as they would have been under state law, and preferably better.¹⁹³ The function of the chapter 11 process is to identify a plan under which the debtor can successfully repay creditors the maximum amount, according to their statutory priority.¹⁹⁴ Although typically

191. Rasmussen & Thomas, *supra* note 2, at 1358 (noting that in the litigation setting one party is attempting to gain an advantage over the other party); Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 11.

192. At the very least, they cannot be made any worse off than they would have been in liquidation. *See* 11 U.S.C. § 1129(a)(7).

193. *See id.*

194. *See generally id.* § 1129 (setting the requirements for a confirmable plan under chapter 11).

the debtor proposes the plan, creditors may propose their own plans¹⁹⁵ and have the right to vote on whatever plan is ultimately adopted.¹⁹⁶ In this way, bankruptcy cases more closely model structured deals than litigation, with the bankruptcy judge in place to oversee the process and ensure that legislative structures are followed.¹⁹⁷ When seen in this light, allowing debtors to choose their bankruptcy jurisdiction and even their judge is less objectionable, particularly if creditors have an equal say in the choice.

Rasmussen and others have argued for a more limited version of venue selection, in which debtors would be permitted to select their proposed venue in advance.¹⁹⁸ Although these proposals move in the right direction, they are likely insufficient to resolve the perceived problems associated with forum shopping. Requiring debtors to commit to a forum in advance would reinforce the trend of businesses filing exclusively in a small number of venues deemed in advance to be “safe,” by virtue of their past treatment of chapter 11 cases and the perceived predictability of future bankruptcy decisions.¹⁹⁹ Indeed, it should be assumed that debtors who pre-select venues are likely to select the “safest” of venues—Delaware.²⁰⁰ There is no reason to believe that permitting debtors to pre-select a venue will resolve the concerns of disunity across jurisdictions, lack of access by creditors, or perceived and real disparities of how cases are distributed.

Beyond that, this solution might still result in undesirable forums because the pre-selected forum may no longer be a rational choice by the time the company needs to file. Between incorporation and bankruptcy, changes may occur within the firm or within the pre-selected venue that diminish its desirability.

195. 11 U.S.C. § 1121.

196. See 11 U.S.C. §§ 1126, 1129(a)(8).

197. See Jacoby, *supra* note 17, at 428 (noting that a chapter 11 bankruptcy case “is not now, and never was, a typical case in the federal judicial system”). Jacoby argues that the change in court practices LoPucki appears to have observed was simply a “growing recognition” that chapter 11 filings were better understood under a “transactional model.” *Id.* at 431.

198. See discussion *supra* note 181.

199. See Casey & Macey, *supra* note 2, at 474 (observing the argument that venue choice is driven by the need for predictability, developed case law, judicial expertise, and speed).

200. See Rasmussen & Thomas, *supra* note 2, at 1406 (citing Delaware as an example of a consistently favorable venue).

In other words, for the very reason requiring venue selection at the time of incorporation is attractive—it locks in the choice before insolvency actually develops—it is also problematic.

Furthermore, Rasmussen's solution presupposes that relevant interest-holders may "shop" for desirable venues by virtue of choosing which debtors to do business with. It is true that many creditors may adjust their behavior by only lending or investing in companies who have pre-selected a venue of which they approve. However, this assumption disregards the likely large population of stakeholders who do not inform themselves regarding the proposed bankruptcy venue, do not care about the proposed bankruptcy venue, or never have an option to select their connections with a particular bankruptcy venue because they are involuntary creditors of the bankrupt debtor (such as tort victims).

The solution to the perceived problem of forum shopping must be more comprehensive than simply toying with the venue statute²⁰¹ and may warrant a shift towards more permissive venue selection, with the additional caveat that workload between courts must be appropriately balanced and creditors must be given a say. Simply placing limits on venue will not resolve the problem. But a multi-faceted approach to reform would encourage greater fairness and transparency. This Article proposes the following three-pronged solution, addressing issues of substantive law, procedure, and creditor involvement.

*A. Establish More Uniform Laws of Bankruptcy and Eliminate the
Judicial Doctrine of Equitable Mootness*

It is hardly novel to recommend that Congress act to resolve the discrepancies which have arisen in substantive bankruptcy law.²⁰² The principal concern with forum shopping arises from the fear, real or perceived, that the debtor may select a venue based on some

201. *Id.* at 1393 ("Indeed, if legal reform efforts focus on fiddling with the venue rules, rather than addressing these problems directly, they will create only poor second-best solutions.").

202. *See, e.g., id.* ("[T]hese concerns are best addressed through changing existing substantive laws, rather than tinkering with the venue procedures."); Casey & Macey, *supra* note 2, at 106 ("[L]awmakers should . . . whenever possible, resolve inconsistencies in substantive law across venues and forums."); Tabb, *supra* note 26, at 492-93 (suggesting the need for Congress to put statutory restrictions on disfavored practices); NAT'L BANKR. REV. COMM'N, *supra* note 41, at 781 (quoting the Delaware Venue Report that substantive issues should not be remedied through procedural venue reform).

advantage in the law that will correspondingly disadvantage creditors. A prime example is the bankruptcy filing of LTL Management, LLC, which was created by a divisive merger of Johnson & Johnson (J&J) in Texas.²⁰³ J&J was based in New Jersey but filed the LTL bankruptcy in North Carolina to avail itself of the Fourth Circuit's comparatively lower standard for a good faith filing.²⁰⁴

Creditors successfully moved the North Carolina court to transfer the case to New Jersey, then immediately filed a motion to dismiss the case pursuant to case law in the Third Circuit.²⁰⁵ In considering the motion to dismiss, the bankruptcy judge mused:

The Court cannot help but ponder how a bankruptcy filing, which took place in North Carolina and most likely satisfied the good faith standards under the applicable law in that jurisdiction, suddenly morphs post-petition into a bad faith filing simply because the case travels 400 miles up I-95 to Trenton, New Jersey.²⁰⁶

It would be preferable to have consistent rules across jurisdictions and Circuits, removing any possibility for a debtor to attempt to game the system by filing in the jurisdiction with the most favorable laws. Harmonization of substantive laws through Congressional action would also be preferable to simply relying on judicial precedent.

A secondary step in the direction of creating more uniform laws across jurisdictions would be to eliminate or at least severely curtail the judicially created doctrine of equitable mootness.²⁰⁷ Allowing greater opportunities for appeals in the chapter 11 context would

203. See Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (July 18, 2021, 10:50 AM), <https://www.creditslips.org/creditslips/2021/07/the-texas-two-step.html>.

204. See Jamie R. Netznik, Sean T. Scott & Aaron Gavant, *J&J Talc Bankruptcy Case: Events Leading Up to Potential Dismissal Battle*, LEXOLOGY (Dec. 6, 2021), <https://www.lexology.com/library/detail.aspx?g=ce80ca1a-b097-4f67-b864-be27e67e0994>. The Third Circuit has held that a chapter 11 case may be dismissed for "cause" under 11 U.S.C. § 1112(b) if the debtor has not "filed in good faith." See *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999).

205. See *In re LTL Mgmt., LLC*, 637 B.R. 396, 406 (Bankr. D.N.J. 2022), *rev'd*, 64 F.4th 84, 111 (3d Cir. 2023).

206. *Id.* The case was ultimately dismissed under the Third Circuit's good faith standard. See *In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023).

207. See discussion *supra* note 98.

permit more legal precedent to be drafted regarding the extent to which bankruptcy judges are or are not permitted to exercise discretion in overseeing chapter 11 cases. This would create greater clarity and predictability within each appellate jurisdiction, and ideally lead to greater uniformity across jurisdictions. The greater the uniformity, the less powerful the motivation to shop for a desirable forum, as each forum would be equally desirable in terms of substantive law. A similar but distinct proposal would be to create a separate court of appeals to exclusively handle bankruptcy appeals, as has been suggested by several prominent writers in the field.²⁰⁸

B. Normalize Rules Regarding Pro Hac Vice, First Day Orders, Attorneys Fees, Mediation, and Judicial Assignment

Another way to minimize the harmful effects of forum shopping would be to standardize procedural rules that currently vary widely across jurisdictions. Bankruptcy courts should harmonize rules regarding *pro hac vice* to facilitate creditor appearances, so that creditors can be represented by local attorneys who can appear remotely as needed.²⁰⁹ This would immediately ameliorate concerns that filing in a particular jurisdiction unfairly enriches the attorneys of that jurisdiction.²¹⁰ This reform might be unpopular with individual state bars, who are accustomed to establishing their own rules and protocols even in federal court. However, federal concerns of uniformity should override local preferences.²¹¹

208. See generally Parikh, *supra* note 2, at 159; Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 134 (1997). A related suggestion is that all motions for transfer of venue in large chapter 11 cases be heard by a single, predesignated panel of judges. See LoPucki & Whitford, *supra* note 2, at 43-44.

209. The Delaware Bankruptcy Court's local rules currently permit an attorney to appear *pro hac vice* without a local attorney only in uncontested matters. See Bankruptcy Court for the District of Delaware Local Bankruptcy Rule 9010-1. It is worth noting that Delaware's local rules regarding appearance *pro hac vice* are not the extreme. While some jurisdictions permit appearance *pro hac vice* without requiring local counsel, see Southern District of New York Local Bankruptcy Rule 2090-1, others do not allow any admission *pro hac vice*, see District of Colorado Local Bankruptcy Rule 9010-1.

210. Rasmussen and Thomas identify the practice of hiring local counsel as a primary driver of the debate over venue selection among attorneys and bankruptcy professionals. See Rasmussen & Thomas, *supra* note 2, at 1376.

211. See U.S. CONST. art. I, § 8.

In a similar vein, courts should harmonize procedure regarding first-day orders to standardize how quickly a debtor's motions for cash collateral, utility payments tax payments, employee payroll, and other high-priority short-term matters will be heard.²¹² Current practices vary widely across jurisdictions. A universal recommended timeline for first day orders would establish greater predictability and increase debtors' willingness to file in places outside New York and Delaware. Similarly, rules regarding mandatory mediation should be standardized across courts, so as to avoid any real or perceived "chilling" effect in courts where mediation is used more extensively.

Bankruptcy courts should also standardize the going rate for attorneys' fees in chapter 11 cases. A primary concern among those who have petitioned for venue reform is the perennial complaint that judges work to attract cases by being more generous than they ought to in permitting attorneys' fees.²¹³ In bankruptcy proceedings, attorneys representing the debtor and the official creditors' committees are compensated from the bankruptcy estate—the same pool of money used to repay creditors.²¹⁴ This arrangement can lead to a moral hazard problem, insofar as the individuals managing the use of attorneys' time are not directly responsible for paying those fees.²¹⁵ It is the responsibility of the court to review and approve requests for attorneys' fees before they are paid.²¹⁶ One of the most controversial practices with attorneys' fees across jurisdictions has been to permit attorneys practicing out

212. See Miller, *supra* note 13, at 1992-93 (noting the importance for debtors to have first day motions approved to provide a seamless transition into formal reorganization).

213. See, e.g., COURTING FAILURE, *supra* note 2, at 41-44; NAT'L BANKR. REV. COMM'N, *supra* note 41, at 776 (citing LoPucki & Whitford, *supra* note 2, at 45-46); Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 18.

214. See 11 U.S.C. § 330(a); 11 U.S.C. § 503(b)(2) (listing attorneys' fees as included in administrative expenses receiving first priority in repayment).

215. See LoPucki & Doherty, *supra* note 25, at 133; Rapoport, *supra* note 153, at 265; Rasmussen & Thomas, *supra* note 2, at 1369 (identifying agency problem when managers who hire attorneys have little incentive to monitor fees, which are borne by unsecured creditors).

216. 11 U.S.C. § 330(a). This can be a time-intensive process, difficult to outsource to those who might be less familiar with the case and accordingly less well-situated to determine if the hours billed are reasonable. See generally Rapoport, *supra* note 153, at 264-65 (observing that there is "no easy mechanism to ensure that [attorneys'] fees stay reasonable" in chapter 11 proceedings).

of New York but appearing in distant jurisdictions to charge their standard New York rates, which are typically much higher than what would be standard in the local jurisdiction.²¹⁷ A simple solution would be to adopt a nationwide standard for attorneys' fees, perhaps scheduled along a gradient depending on the size of the case.²¹⁸ This would remove the perceived benefits of filing in a "fee-friendly" jurisdiction.

Finally, jurisdictions across the country should normalize their process of judicial assignment. The true insult of forum shopping in bankruptcy is, to many, the ability to shop for a particular judge.²¹⁹ It is undeniably enticing for risk-averse attorneys seeking the best outcome possible for their bankruptcy filing to know in advance which judge will be assigned to the case.²²⁰ As a matter of fairness and uniformity, the rules should be consistent across jurisdictions. In some districts, the identity of the assigned judge is available by default, because there is only one possible bankruptcy judge to oversee the case.²²¹ In other districts, where cases are distributed among dozens of judges, assignment is more unpredictable and therefore more risky, particularly if one or more

217. See, e.g., LoPucki & Whitford, *supra* note 2, at 33. There is some evidence to suggest that some debtors deliberately avoided jurisdictions that seemed poised to fight over attorneys' fees. In particular, it has been reported that the Chief Judge of the United States Bankruptcy Court for the Southern District of Texas responded to the flight of Enron to New York by declaring that "the war on attorneys' fee applications is over" in an effort to discourage future defections. See Cole, *supra* note 2, at 1867.

218. Charles Tabb has previously analyzed the possibility of normalizing attorneys' fees across the country, suggesting that a cap might be more productive than providing more particularized guidelines. See Tabb, *supra* note 26, at 494-95; Charles J. Tabb, *The Future of Chapter 11*, 44 S.C. L. REV. 791, 843-44 (1993) (analyzing proposed legislation that would provide more specific guidelines for courts to consider in setting attorneys' fees in chapter 11). An alternative method might be that proposed by Nancy Rapoport, who suggested that courts could establish no-look fees for standard, common activities, such as stay relief motions. Rapoport, *supra* note 153, at 286.

219. It seems self-evident, based on the current importance of judicial discretion in chapter 11 cases, that this is what is happening. See Cole, *supra* note 2, at 1886 ("[V]irtually all of the factors listed by the lawyers making the venue-selection decision are considerations revolving around the personal characteristics of bankruptcy judges.").

220. See Cieri et al., *supra* note 68, at 519 (observing that practitioners consider the judge in choosing where to file).

221. Of the ninety-four judicial districts, at least twelve have only a single sitting bankruptcy judge, not including visiting or recalled judges, or judges sitting by designation. These districts include District of Columbia, Hawaii, Middle District of Louisiana, Montana, New Hampshire, North Dakota, Eastern District of Oklahoma, Rhode Island, Vermont, Northern District of West Virginia, Southern District of West Virginia, and Wyoming. Many others have just two judges. See 28 U.S.C. § 152.

judges within that jurisdiction is perceived to lack the skill or the temperament to successfully oversee a chapter 11 case.²²²

The rule should be standard across jurisdictions that a designated panel of judges will be assigned all complex chapter 11 cases.²²³ Random assignment across all bankruptcy judges may discourage filing in a particular district. It should be abandoned as a pretense, at least for large chapter 11 cases.²²⁴ Instead, districts might adopt the approach of the Southern District of Texas or the Southern District of Ohio.²²⁵ This approach is proven to reduce the perceived risk of filing in a particular jurisdiction and would likely encourage filings in a wider range of jurisdictions.

*C. Permit Filing in Any Jurisdiction Found to Be in the
Best Interests of the Reorganization and Permit Creditor Objections
to be Heard Before the District Court*

When differences in substantive law and procedural law are eliminated, what remains to distinguish jurisdictions is the bankruptcy judges themselves. Bankruptcy judges are distinguishable by differences of temperament, judgment, experience, articulation, and similar qualities, which cannot be externally standardized and may be subjective in their desirability. This proposal would permit corporate debtors²²⁶ to select a forum based on considerations that would include the perceived quality of judges on the complex chapter 11 panel. Corporate debtors could file anywhere they have sufficient minimal contacts to justify appearance in that forum: in addition to the principal place of assets, principal place of business, or state of incorporation, debtors could also file wherever employees are located or where there is a

222. See Cieri et al., *supra* note 68, at 520.

223. Although this proposal departs significantly from the status quo, similar proposals have been made in the past. See Cole, *supra* note 2, at 1898–1901 (suggesting that bankruptcy judges in demand for overseeing chapter 11 cases might operate at-large, as private mediators, or by “riding the circuit”).

224. For a contrary point of view, see Levitin, *supra* note 16, at 415 (arguing for a federal rule requiring random case assignment in all jurisdictions).

225. See Roy M. Terry, Jr. & Klementina V. Pavlova, *Local Ch. 11 Rules for Complex Cases and Venue Selection Emerge from the Pandemic*, 42 AM. BANKR. INST. J. 36 (Feb. 2023).

226. Debtors filing under subchapter V of chapter 11 would be more limited in their choice of filing, and rules regarding venue for individual debtors would be unchanged.

nexus of creditors, including potential DIP financiers.²²⁷ This would permit debtors to file in a preferred location without engaging in costly gamesmanship.

But this proposal would also allow creditors²²⁸ to make an immediate challenge.²²⁹ The challenge would be heard by the district court referring the case.²³⁰ The challenge need not be heavily supported by evidence and could simply reflect creditors' belief that an alternative venue, proposed by the creditors, would be superior.²³¹ The district court would consider the challenge on an Emergency Basis and determine which of the two proposed venues—the debtor's initial choice or the creditors' proposed alternative—is in the best interests of creditors. In making this determination, the district court would consider the physical location of the parties and the assets, statements made by creditors for and against venue transfer, and the current caseload held by judges at each of the proposed venues.²³² If the creditors' motion to

227. These factors are some of those historically used by courts in determining whether or not a case should be transferred "in the interest of justice" and for the "convenience of the parties" under the current statute. See Michael et al., *supra* note 26, at 751–52. It is worth emphasizing that this Article would not expand the freedom to select venue to individual debtors, who would instead remain constrained to file in the venue in which they resided for the previous 180 days prior to filing. See 28 U.S.C. § 1408. The reason for the distinction is simple: the role of the judge in a consumer case is significantly reduced with minimal discretionary decisions, the dollar amounts at stake substantially lower, the impact of local state law significantly more substantial (by virtue of state law exemptions coming into play), and the issues generally less complex. In light of these differences, there is no meaningful justification for allowing consumers to select their venue or their judge.

228. Such a challenge would likely require a minimum number of creditors holding a minimal value of assets to be considered, akin to the standard for involuntary bankruptcy petitions. See 11 U.S.C. § 303. A challenge might also be brought by the U.S. Trustee operating on behalf of creditors. See LoPucki & Whitford, *supra* note 2, at 43 (recommending that the U.S. Trustee require a debtor file an explanation of its basis for believing that the venue selected is the most appropriate).

229. See LoPucki & Whitford, *supra* note 2, at 24 ("[T]o change venue months into a large case would inconvenience just about everybody.").

230. This would remove the temptation for bankruptcy judges who may have already issued orders and familiarized themselves with the case to hold on to the case in spite of a meritorious challenge to venue. See NAT'L BANKR. REV. COMM'N, *supra* note 41, at 778 (noting that bankruptcy judges may feel that the case is theirs within a week and be reluctant to transfer the case elsewhere). Charles Tabb has previously offered this change as a tentative suggestion to improve the bankruptcy court system. See Tabb, *supra* note 26, at 500.

231. In other words, creditors would not be expected or required to raise specific claims against any particular bankruptcy judge, including that he or she is biased, for example.

232. Additional factors for consideration may also be warranted. For a list of proposed considerations garnered from a survey of bankruptcy judges, see Bermant et al., *supra* note 8,

transfer venue is granted, the costs of bringing the motion should be treated as administrative expenses with priority repayment in the bankruptcy case.²³³ If the creditors' motion is denied but with no finding of frivolousness, the costs of bringing the motion should be allowed as a claim against the estate with normal priority. If the creditors' motion is found to be frivolous, creditors should bear their own costs of bringing the motion.

Commentators have asserted that the costs associated with bringing a motion for change of venue and the low likelihood of the motion being granted will fundamentally discourage creditors from raising the issue.²³⁴ A classic example of a venue motion resulting in a financial loss for creditors is the case of Patriot Coal Corp., a large public filing initially made in New York. Patriot Coal was based out of St. Louis, Missouri, which served as its corporate headquarters, but incorporated two subsidiaries in New York and then put them into bankruptcy to establish venue for its own bankruptcy filing.²³⁵ Unusually, its venue choice was challenged in court not once, but multiple times. The first motion to transfer the case was filed by the United Mine Workers of America (UMWA) who sought to have the case moved to the Southern District of West Virginia, where nine of the debtor's twelve active mining complexes were located.²³⁶ A group of insurance companies filed a similar motion a month later.²³⁷ The U.S. Trustee then filed a separate motion seeking to transfer the case "to a district where venue is proper."²³⁸ These motions provoked a series of filings,

Chapter 11 Venue Choice by Large Public Companies; Report to the Judicial Conference Committee on the Administration of the Bankruptcy System, *supra* note 8, at 26. A prepackaged bankruptcy creditor votes may not warrant an in-depth venue consideration because a majority of creditors would have already agreed to the selected venue. Although prepackaged bankruptcies pose a procedural problem to some observers, particularly when notice requirements are disregarded, they have been consistently upheld as a valid use of the bankruptcy process. See *Chapter 11's Descent into Lawlessness*, *supra* note 28, at 273.

233. Administrative expenses receive priority repayment in bankruptcy. See 11 U.S.C. § 507.

234. This is particularly true when a creditors' committee has been formed and an attorney obtained in the current venue. See LoPucki & Whitford, *supra* note 2, at 24.

235. See *In re Patriot Coal Corp.*, 482 B.R. 718, 728 (Bankr. S.D.N.Y. 2012) (finding particularly significant the parties' stipulation that Patriot Coal formed these two subsidiaries solely to ensure that the provisions of 28 U.S.C. § 1408(1) were satisfied).

236. *Id.* at 722-23.

237. *Id.* These motions were then joined by multiple additional parties.

238. *Id.* at 723.

including objections by the debtors, joinders by third parties, memoranda, declarations, and a stipulation of facts.²³⁹ The court ultimately transferred the case out of New York to Missouri,²⁴⁰ a result which disappointed most parties.²⁴¹ The expense and the unsatisfactory result in *In re Patriot Coal Corp.* are emblematic of the perceived weaknesses in the current system.

In contrast, this proposal facilitates creditor weigh-in and encourages pre-filing negotiation in venue selection. The cost-shifting provisions for all nonfrivolous claims offset concerns that bringing a venue motion would be prohibitively expensive. The fact that the motion would be brought before the district court removes any concern that the bankruptcy court will deny the motion out of self-interest.²⁴² Requiring the district court to consider the current caseload in both proposed venues will direct cases away from magnet jurisdictions and to less busy courts, promoting judicial efficiency and a diversity of opinions. Permitting both the debtor and creditors to weigh in on the proposed venue incentivizes both parties to agree on a filing in a location that is mutually beneficial and supportable against any further challenge.²⁴³

An important caveat is needed here. Adversarial proceedings brought by the debtor, the DIP, or another third party against any party other than the debtor should only be permitted in the defendant's local jurisdiction, absent the defendant's consent to appear elsewhere.²⁴⁴ Adversarial proceedings in bankruptcy are treated like standard lawsuits, with a plaintiff filing a complaint

239. *Id.*

240. *Id.* at 754 (“[T]he Court concludes that transferring these cases to the Eastern District of Missouri will serve the interest of justice and, as among venue choices other than this District, best serve the convenience of the parties.”).

241. Although it has been raised as a supporting example in many articles, *In re Patriot Coal Corp.* is generally not referenced in positive terms.

242. See LoPucki & Whitford, *supra* note 2, at 37–38 (discussing the particular pressures placed on bankruptcy judges in venue transfer motions).

243. There remain some concerns that most creditors would be insufficiently involved or aware at the beginning of the case to challenge a venue placement, leaving the system to rely on those creditors with the most at stake. However, this is nothing new – it is always the most active and most engaged creditors who challenge the debtor's decisions with regards to plan proposal and confirmation as well.

244. This approach would track the typical nature of lawsuits, in which plaintiffs are limited to filing in a location where the defendants are subject to suit. See NAT'L BANKR. REV. COMM'N, *supra* note 41, at 783.

against one or more defendants.²⁴⁵ They include actions to recover preferential transfers or fraudulent conveyances, and actions to challenge to the validity of a lien.²⁴⁶ Forum shopping in adversarial proceedings much more closely resembles forum shopping in standard litigation, where the concern is that a plaintiff can create a strategic advantage over the defendant.²⁴⁷ This advantage should be denied to preserve a sense of equity and equal footing.²⁴⁸ This is particularly true insofar as adversarial proceedings often hinge on local state law rather than federal law.²⁴⁹ Requiring adversarial proceedings to be brought in the forum of the defendant-creditor resolves many of the stated concerns regarding forum shopping²⁵⁰ and is consistent with other recent legal reforms in the realm of preferential transfers.²⁵¹ This venue rule also provides an important incentive for debtors to select a forum in which creditors subject to adversarial proceedings would agree to stay, so as to avoid the costs of conducting litigation in a remote forum.

CONCLUSION

This Article's proposal embraces the possibility of judges competing for influential chapter 11 cases—but not on the basis of substantive law or procedure that could be detrimental or unfair to

245. See CORPUS JURIS SECUNDUM, *Adversary Proceedings in Bankruptcy as Separate Actions*, CORPUS JURIS SECUNDUM BANKR. § 298 (2022).

246. See FED. R. BANKR. P. 7001.

247. See *In re Abacus Broad. Corp.*, 154 B.R. 682, 687 (1993) (finding that the debtor filed in a remote forum in order to make it more difficult for its principal creditor to defend its rights).

248. See Michael et al., *supra* note 26, at 769 (maintaining that arguments of efficiency cannot defend a system where small creditors, unions, or landlords are burdened with legal costs).

249. Fraudulent conveyance actions are an obvious example. Although there is a bankruptcy statute permitting relief of fraudulent conveyances, see 11 U.S.C. § 548, the DIP may also bring any state law actions that would be available to creditors, including a cause of action for fraudulent conveyance under state law, see 11 U.S.C. § 544. This would permit the DIP to use what may be a more generous statute of limitations. See Coordes, *supra* note 144, at 90 (2017) (noting the ongoing importance of local law even in globalized cases).

250. Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, *supra* note 5, at 14.

251. See 28 U.S.C. § 1409. Currently, actions to recover a debt from a non-insider arising in or related to a bankruptcy case must be brought in the district court where the defendant resides if the action is for less than \$25,000. The law is unclear as to whether this includes preference actions, for reasons of textual interpretation identified in *In re Sunbridge Capital, Inc.*, 454 B.R. 166 (Bankr. D. Kan. 2011).

parties. It would eliminate differences of substantive and procedural law that might benefit one party over another, including differences in attorneys' fees, first-day procedure, and judicial selection. Doing so would limit the points of competition among courts to attributes that should be beneficial to all parties to a bankruptcy dispute, such as responsiveness, consistency, predictability, fairness, speed, and skill.²⁵² Strict limits on venue selection would introduce inconvenience and inefficiency for debtors and creditors alike; it may even discourage bankruptcy filings in favor of other, less efficient solutions. Permitting a well-regulated market for judicial selection accessible by debtors and creditors should be preferred.

252. See Rasmussen & Thomas, *supra* note 2, at 1359 (noting that competition among courts for bankruptcy cases encourages courts to increase their efficiency in handling chapter 11 cases).

