



PROGRAM MATERIALS

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The Relevance of Key Circuit Court Splits and Corporate Chapter 11 Venue Considerations

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Important Considerations Regarding Pending Bankruptcy Venue Reform Legislation

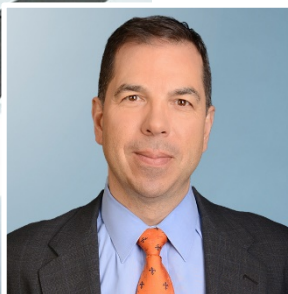
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A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. In the center of the frame, an American flag is flying on a tall pole. The sky is a clear, pale blue. The text "Venue Reform Legislation" is overlaid in white, bold, sans-serif font in the center of the image.

Venue Reform Legislation



Venue Reform Legislation

- Since 2019-2020, corporate bankruptcy venue reform bills remain pending in committees of both the House (HR4421) and Senate (S5032)
- On June 28, 2021, Rep. Lofgren and Rep. Buck sponsored the Bankruptcy Venue Reform Act of 2021 (HR 4193)
- Renews 40 year debate concerning where corporate debtors may file cases
- Some argue that current venue rules are too lax and permit corporate debtors to “venue shop” for “magnet” jurisdictions rather than file in their local jurisdictions
- As discussed below, case law on certain case-critical issues may differ between jurisdictions



Venue Reform Legislation

- At present, 28 U.S.C. 1408 provides that a chapter 11 case may be commenced in the district:
 - (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
 - (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership
- Accordingly, a corporation may file in the district (i) where, for 180 days prior to commencement, (a) it is incorporated (i.e. domiciled), it has its principal place of business, or (c) has its principal assets located, or (ii) the corporate debtor's affiliate has a case pending



Venue Reform Legislation

- The proposed changes to the venue rules
 - Removes the domicile option for corporations
 - Permits filing only in the districts where the principal place of business or the principal assets are located for 180 days prior to commencement
 - Defines principal place of business for SEC reporting companies to mean “the address of the principal executive office of the entity as stated in last annual report filed”
 - Limits affiliate filings to those affiliates that are direct or indirect subsidiaries of the initial debtor



History of Venue Reform Legislation

- The debate concerning bankruptcy venue reform has raged for years on and off between filings in "magnet" versus local jurisdictions
- Proponents for venue reform posit that the current rules are too lax and provide corporate debtors too much flexibility in choosing the district to file chapter 11
 - Employees and local creditors cannot effectively participate in the case
 - Judge would know the affected community and understand the impact to such community
 - Bankruptcy courts are encouraged to rule in favor of the corporate debtor to attract more chapter 11 cases
 - No legitimate basis exists for a handful of judges to handle all the large business cases
 - A more even distribution of cases would better utilize existing judicial resources



History of Venue Reform Legislation

- Opponents to venue reform argue that the venue rules do not need to be changed because
 - Advancements in technology allow for remote participation by all parties in interest
 - Companies are no longer “local”, they have multiple locations with employees and assets located all over the country
 - Currently, other, non-magnet jurisdictions are gaining popularity
 - Judges in the “magnet” jurisdictions have more experience with complex business issues, have issued more opinions on those issues, and are known quantities
 - Venue flexibility provides the best opportunity to maximize estate value



History of Venue Reform Legislation

- Historically, bankruptcy venue reform has been proposed before, but did not gain traction
- The Bankruptcy Venue Reform Act of 2021 may suffer the same fate – it may not leave committee
- Certain retired judges, States Attorney Generals, and academics have expressed support for venue reform; however, there does not appear to be sufficient support for reform
- Although the proposed reforms reduce the venue options, corporations, especially large ones, will continue to have multiple venue options
- Venue reform will not end forum shopping
- Debtor's counsel must consider and compare the different venue options, the law in those venues concerning the material issues in the case, and select the venue that provides the best opportunity for a successful case





Some Key Circuit Court Splits





Non-Consensual Third Party Releases



Non-Consensual Third Party Releases

- Third-party releases references releases of claims against non-debtors by the estate's creditors
- Most third-party releases provided in chapter 11 plans are consensual, either requiring the creditors to "opt in" or "opt out" of the release
- Non-consensual releases constitute powerful tools to promote resolutions of claims the debtor may assert against a non-debtor – the non-debtor is more likely to settle with the debtor and maximize its settlement contribution to obtain releases that protect it from litigation from the estate's creditors



Non-Consensual Third Party Releases

- The 5th, 9th, and 10th Circuits reject third-party releases
- These Circuits rely on Bankruptcy Code section 524(e), which provides that the debtor's discharge does not affect the liability of any other entity for such debt
 - *Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 548 F.3d 229, 252 (5th Cir. 2009)
 - *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (9th Cir. 1995)
 - *Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990)



Non-Consensual Third Party Releases

- The 2nd, 4th, 6th, 7th, and 11th Circuits permit third-party releases where
 - The non-debtor contributes “substantial” value to the reorganization
 - The releases are essential to the reorganization
 - The affected creditors overwhelmingly support the plan
- These Circuits rely on the equitable powers granted under Bankruptcy Code section 105(a) and find no conflict with Bankruptcy Code section 524(e) (because 524(e) does not prohibit third-party releases, rather it provides that the debtor's discharge does not impact the non-debtor's obligations to the same creditors)
 - *Class Five Nev. Claimants (00-2516) v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002)
 - *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005)
 - *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1079 (11th Cir. 2015)



Non-Consensual Assumption of Executory Contracts



Non-Consensual Assumption

- The debtor, generally, has the ability to assume, or assume and assign, executory contracts without consent of the counterparty if the debtor satisfies certain conditions
- Bankruptcy Code section 365(c)(1), however, bars the assumption or assignment of executory contracts where:
 - (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
 - (B) such party does not consent to such assumption or assignment
- Certain intellectual property licenses constitute an example of contracts that non-bankruptcy law prohibits the assignment without counterparty consent



Non-Consensual Assumption

- The 3rd, 4th, 9th, and 11th Circuits apply a strict textual construction of Bankruptcy Code section 365(c)(1) – the "Hypothetical Test" – and require counterparty consent where the debtor simply seeks to assume the contract, even though the debtor remains the same party under the agreement
 - *Cinicola v. Scharffenberger*, 248 F.3d 110 (3d Cir. 2001)
 - *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257 (4th Cir. 2004)
 - *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999)
 - *Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534, 537 (11th Cir. 1994)



Non-Consensual Assumption

- By contrast, the 1st and 5th Circuits apply the "Actual Test" and allow a debtor to assume the same types of contracts without counterparty consent so long as the court determines that the debtor does not intend to assign the agreement
 - *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997)
 - *Bonneville Power Admin. V. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 249-51 (5th Cir. 2006)



Non-Consensual Short-Sales Free and Clear



Non-Consensual Short Sales

- A short sale occurs where the sale proceeds are insufficient to satisfy the claim secured by the assets sold
- Further, Bankruptcy Code section 363(f) permits a sale "free and clear" of liens, claims and encumbrances where one of the following five conditions are satisfied:
 - (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
 - (2) such entity consents;
 - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
 - (4) such interest is in bona fide dispute; or
 - (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest



Non-Consensual Short Sales

- The courts in various Circuits are split regarding the interpretation of Bankruptcy Code section 363(f)(3), “greater than the aggregate value of all liens on the property,” and whether it permits the debtor to sell its assets where the proposed purchase price is less than the face amount of undisputed liens on the property sold
- Courts in the 9th and 3rd Circuits have required the purchase price to meet or exceed the face amount of the liens against the property being sold
 - *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (BAP 9th Cir. 2008)
 - *In re Criimi Mae Servs. Ltd. P’ship v. WDH Howell, Inc. (In re WDH Howell, LLC)*, 298 B.R. 527, 534 (D.N.J. 2003)



Non-Consensual Short Sales

- Other courts have held that the purchase price must meet or exceed the value of the liens against the property being sold and that such value should be determined in accordance with Bankruptcy Code section 506(a), which allows the bankruptcy court to determine the secured portion of a creditor's claim by determining the value of the property securing such claim
 - *In re Bay Circle Properties, LLC, et al.*, Case No. 15-58440-WLH (Bankr. N. D. Ga. February 14, 2017)
 - *In re Hatfield Homes, Inc.*, 30 B.R. 353, 355 (Bankr. E.D. Pa. 1983)
 - *In re WBQ P'ship*, 189 B.R. 97, 105-06 (Bankr. E.D. Va. 1995)
 - *In re Collins*, 180 B.R. 447, 450-52 (Bankr. E.D. Va. 1995)
 - *In re Terrace Gardens P'ship*, 96 B.R. 707, 712-16 (Bankr. W.D. Tex. 1989)



CONCLUSION



CONCLUSION

- Regardless whether Congress passes Bankruptcy Venue Reform, corporate debtors will continue to have choices regarding venue
- Choices will be more limited if the bill actually goes forward
- Circuit Court splits will continue to drive venue selections





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Richard Bernard counsels clients in the areas of corporate and financial restructuring, business solutions, bankruptcy litigation, secured transactions, corporate governance, mergers and acquisitions, and debtors' and creditors' rights.

He represents debtors, official and ad hoc committees, and other constituencies in large-asset bankruptcies, out-of-court workouts and adversary proceedings.

Richard's experience spans numerous industries, including education, energy, mining, aviation, retail, manufacturing, telecommunications, financial services, heavy industry, real estate and hospitality.





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When clients face company-defining financial challenges, Scott Gautier provides the strategies and options they need to take control of the situation. He represents corporate clients in financial distress, with the goal of creating and structuring transactions that maximize value for clients. He counsels corporate owners, boards, fiduciaries and creditors on all facets of corporate insolvency and handles corporate Chapter 11 cases from every vantage point — as counsel to debtors, ad-hoc and official committees, secured creditors and other constituents. He also works on out-of-court financial restructuring matters, distressed mergers and acquisitions, and advises corporate clients on debtor-creditor issues in non-bankruptcy matters.

Scott has represented all constituents in corporate restructuring, with particular experience advising corporate owners, boards and fiduciaries on identifying the best strategic alternatives when faced with financial distress, and serving as lead committee counsel and advising on strategic alternatives in corporate Chapter 11 cases.



Thank you

117TH CONGRESS
1ST SESSION

H. R. 4193

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 2021

Ms. LOFGREN (for herself and Mr. BUCK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Bankruptcy Venue Re-
5 form Act of 2021”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds that—

8 (1) bankruptcy law provides a number of venue
9 options for filing bankruptcy under chapter 11 of

1 title 11, United States Code, including, with respect
2 to the entity filing bankruptcy—

3 (A) any district in which the place of in-
4 corporation of the entity is located;

5 (B) any district in which the principal
6 place of business or principal assets of the enti-
7 ty are located; and

8 (C) any district in which an affiliate of the
9 entity has filed a pending case under title 11,
10 United States Code;

11 (2) the wide range of permissible bankruptcy
12 venue options has led to an increase in companies
13 filing for bankruptcy outside of their home States—
14 the district in which the principal place of business
15 or principal assets of the company is located;

16 (3) the practice described in paragraph (2) is
17 known as “forum shopping”;

18 (4) forum shopping has resulted in a concentra-
19 tion of bankruptcy cases in a limited number of dis-
20 tricts;

21 (5) forum shopping—

22 (A) prevents small businesses, employees,
23 retirees, creditors, and other important stake-
24 holders from fully participating in bankruptcy

1 cases that have tremendous impacts on their
 2 lives, communities, and local economies; and

3 (B) deprives district courts of the United
 4 States of the opportunity to contribute to the
 5 development of bankruptcy law in the jurisdic-
 6 tions of those district courts; and

7 (6) reducing forum shopping in the bankruptcy
 8 system will strengthen the integrity of, and build
 9 public confidence and ensure fairness in, the bank-
 10 ruptcy system.

11 (b) PURPOSE.—The purpose of this Act is to prevent
 12 the practice of forum shopping in cases filed under chapter
 13 11 of title 11, United States Code.

14 **SEC. 3. VENUE OF CASES UNDER TITLE 11.**

15 Title 28, United States Code, is amended—

16 (1) by striking section 1408 and inserting the
 17 following:

18 **“§ 1408. Venue of cases under title 11**

19 **“(a) PRINCIPAL PLACE OF BUSINESS WITH RE-**
 20 **SPECT TO CERTAIN ENTITIES.—**

21 **“(1) IN GENERAL.—**Except as provided in para-
 22 graph (2), for the purposes of this section, if an en-
 23 tity is subject to the reporting requirements of sec-
 24 tion 13 or 15(d) of the Securities Exchange Act of
 25 1934 (15 U.S.C. 78m, 78o(d)), the term ‘principal

1 place of business’, with respect to the entity, means
2 the address of the principal executive office of the
3 entity as stated in the last annual report filed under
4 that Act before the commencement of a case under
5 title 11 of which the entity is the subject.

6 “(2) EXCEPTION.—With respect to an entity
7 described in paragraph (1), the definition of the
8 ‘principal place of business’ under that paragraph
9 shall apply for purposes of this section unless an-
10 other address is shown to be the principal place of
11 business of the entity by clear and convincing evi-
12 dence.

13 “(b) VENUE.—Except as provided in section 1410,
14 a case under title 11 may be commenced only in the dis-
15 trict court for the district—

16 “(1) in which the domicile, residence, or prin-
17 cipal assets in the United States of an individual
18 who is the subject of the case have been located—

19 “(A) for the 180 days immediately pre-
20 ceding such commencement; or

21 “(B) for a longer portion of the 180-day
22 period immediately preceding such commence-
23 ment than the domicile, residence, or principal
24 assets in the United States of the individual
25 were located in any other district;

1 “(2) in which the principal place of business or
2 principal assets in the United States of an entity,
3 other than an individual, that is the subject of the
4 case have been located—

5 “(A) for the 180 days immediately pre-
6 ceding such commencement; or

7 “(B) for a longer portion of the 180-day
8 period immediately preceding such commence-
9 ment than the principal place of business or
10 principal assets in the United States of the en-
11 tity were located in any other district; or

12 “(3) in which there is pending a case under
13 title 11 concerning an affiliate that directly or indi-
14 rectly owns, controls, or holds 50 percent or more of
15 the outstanding voting securities of, or is the general
16 partner of, the entity that is the subject of the later
17 filed case, but only if the pending case was properly
18 filed in that district in accordance with this section.

19 “(c) LIMITATIONS.—

20 “(1) IN GENERAL.—For the purposes of para-
21 graphs (2) and (3) of subsection (b), no effect shall
22 be given to a change in the ownership or control of
23 an entity that is the subject of the case, or of an af-
24 filiate of the entity, or to a transfer of the principal
25 place of business or principal assets in the United

1 States of an entity that is the subject of the case,
2 or of an affiliate of the person entity, to another dis-
3 trict, that takes place—

4 “(A) within 1 year before the date on
5 which the case is commenced; or

6 “(B) for the purpose of establishing venue.

7 “(2) PRINCIPAL ASSETS.—

8 “(A) PRINCIPAL ASSETS OF AN ENTITY
9 OTHER THAN AN INDIVIDUAL.—For the pur-
10 poses of subsection (b)(2) and paragraph (1) of
11 this subsection—

12 “(i) the term ‘principal assets’ does
13 not include cash or cash equivalents; and

14 “(ii) any equity interest in an affiliate
15 is located in the district in which the hold-
16 er of the equity interest has its principal
17 place of business in the United States, as
18 determined in accordance with subsection
19 (b)(2).

20 “(B) EQUITY INTERESTS OF INDIVID-
21 UALS.—For the purposes of subsection (b)(1),
22 if the holder of any equity interest in an affil-
23 iate is an individual, the equity interest is lo-
24 cated in the district in which the domicile or
25 residence in the United States of the holder of

1 the equity interest is located, as determined in
2 accordance with subsection (b)(1).

3 “(d) BURDEN.—On any objection to, or request to
4 change, venue under paragraph (2) or (3) of subsection
5 (b) of a case under title 11, the entity that commences
6 the case shall bear the burden of establishing by clear and
7 convincing evidence that venue is proper under this sec-
8 tion.

9 “(e) OUT-OF-STATE ADMISSION FOR GOVERNMENT
10 ATTORNEYS.—The Supreme Court shall prescribe rules,
11 in accordance with section 2075, for cases or proceedings
12 arising under title 11, or arising in or related to cases
13 under title 11, to allow any attorney representing a gov-
14 ernmental unit to be permitted to appear on behalf of the
15 governmental unit and intervene without charge, and with-
16 out meeting any requirement under any local court rule
17 relating to attorney appearances or the use of local coun-
18 sel, before any bankruptcy court, district court, or bank-
19 ruptcy appellate panel.”; and

20 (2) by striking section 1412 and inserting the
21 following:

22 **“§ 1412. Change of venue**

23 “(a) IN GENERAL.—Notwithstanding that a case or
24 proceeding under title 11, or arising in or related to a case
25 under title 11, is filed in the correct division or district,

1 a district court may transfer the case or proceeding to a
2 district court for another district or division—

3 “(1) in the interest of justice; or

4 “(2) for the convenience of the parties.

5 “(b) INCORRECTLY FILED CASES OR PRO-
6 CEEDINGS.—If a case or proceeding under title 11, or aris-
7 ing in or related to a case under title 11, is filed in a
8 division or district that is improper under section 1408(b),
9 the district court shall—

10 “(1) immediately dismiss the case or pro-
11 ceeding; or

12 “(2) if it is in the interest of justice, imme-
13 diately transfer the case or proceeding to any dis-
14 trict court for any district or division in which the
15 case or proceeding could have been brought.

16 “(c) OBJECTIONS AND REQUESTS RELATING TO
17 CHANGES IN VENUE.—Not later than 14 days after the
18 filing of an objection to, or a request to change, venue
19 of a case or proceeding under title 11, or arising in or
20 related to a case under title 11, the court shall enter an
21 order granting or denying the objection or request.”.

○