The Geography of Bankruptcy

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Companies routinely file bankruptcy cases in venues that have no meaningful connection to the company, its operations, or its stakeholders. This practice (1) divorces bankruptcy and venue from their ties to location; (2) disrupts the fundamental balance underlying the Bankruptcy Code by shifting the focus exclusively to the needs of sophisticated parties; and (3) shuts out parties who have a right to participate in bankruptcy proceedings, which contravenes due process and raises fairness concerns. To solve these problems, this Article proposes new procedures that mandate a thorough discussion of venue considerations in bankruptcy cases. By requiring parties to justify their venue choices under tougher standards and holding companies accountable for their venue decisions, the proposal helps ensure that bankruptcy cases are heard in places where key local voices and issues are recognized and addressed.

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I. INTRODUCTION

An abandoned car dealership sits on Second Avenue in East Harlem, New York. There's no shortage of abandoned buildings in this part of town; what makes this one unique is the role it played in one of the largest bankruptcies in American history. In 2009, General Motors ("GM") used this building, then a struggling Chevrolet-Saturn dealership, to file for bankruptcy in the Southern District of New York.[1]

GM was incorporated in Delaware and headquartered in Michigan.[2] Although the company had nearly two-hundred affiliates,

1. Tom Hals & Martha Graybow, *GM Bankruptcy Forever Linked to Harlem Dealership*, REUTERS (June 1, 2009), http://www.reuters.com/article/2009/06/01/us-gm-harlemdealership-idUSTRE55050V20090601, *archived at* http://perma.cc/K89G-AFRH.

2. *Id.*

none—except for the Harlem dealership, a rare company-owned franchise—were based in New York City.[3] Why would a Delaware-incorporated, Michigan-based company choose to file for bankruptcy in New York, when most of its employees and assets were located hundreds of miles away?

New York was likely attractive to GM for several reasons. First, New York bankruptcy judges have experience with large, high-profile bankruptcy cases ("mega cases" or "mega bankruptcies") and have developed a reputation for being debtor friendly. Second, GM's attorneys were also based in New York, and the company probably assumed that New York-based judges were unlikely to make a fuss over the high fees New York attorneys charge.[4] Finally, 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. GM already had big problems, and filing for bankruptcy close to home might have fueled local tensions, invited more voices into the courtroom, and slowed down the case—all risks GM probably preferred to avoid.

Although it may seem odd for a Detroit-based company to use one tiny dealership to orchestrate a huge bankruptcy filing in New York, GM's actions were both legal and typical. Hundreds of debtors[5] like GM file for bankruptcy in locations with which they have few-to-no meaningful connections. Surprisingly, this forum shopping is rarely objected to, permitting debtors to take advantage of the bankruptcy system's lenient choice-of-venue laws[6] without meaningfully justifying their venue choice.[7] What results is often disastrous: fundamental

3. *Id.*

4. *See, e.g.*, Glen Weissenberger, Dean, DePaul Univ. Coll. of Law, Welcome Address at the DePaul Business and Commercial Law Journal Symposium: Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies (Apr. 10, 2003), *in* 1 DEPAUL BUS. & COM. L.J. 509, 519 (2003) (describing how attorneys prepare a chart looking at whether or not professionals are being paid at their normal rates when deciding where to file a case).

5. This Article refers to forum shopping by "debtors" as a shorthand because it is the debtor entity who files the bankruptcy petition and technically selects a venue for the proceedings (unless the case is an involuntary proceeding). In reality, the debtor entity's venue selection may be influenced by other actors, such as attorneys, secured creditors, and lenders offering postpetition financing. *See* Mark Curriden, *Playing on Home Court: New York and Delaware May Lose Their Grip on Bankruptcy Cases*, 98 A.B.A. J. 16, 17 (2012), *available at* http://www.abajournal.com/magazine/article/playing_on_home_court_new_york_and_delaware_may_lose_their_grip_on_bankrupt/, *archived at* http://perma.cc/MC2W-D6E9 ("Commercial lenders and buyers of distressed debt pressure companies to file bankruptcy in Delaware by sometimes telling them, 'If you want financing, you must file in Delaware or New York.' "). The influence of these parties is discussed *infra* Part III.B.

6. For an explanation of these laws, see *infra* Part I.A.

7. *See* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081, 1133 (discussing how different judges' styles and attitudes can influence where a

bankruptcy principles, such as a proximity to key parties involved in the case and equal treatment of similarly situated stakeholders, are disrupted; smaller voices are completely silenced; and debtors reorganize without paying due recognition to the rights of many of their stakeholders.

This Article illustrates how the location of a bankruptcy case affects core bankruptcy principles and rights. It focuses on how distressed companies affect their communities and smaller stakeholders. Practically speaking, bankruptcy is often used to sort out a debtor's operational and financial problems, and a reorganization or liquidation of any kind will significantly impact the debtor's employees, trade vendors, and centers of operation.[8] Because larger bankruptcies necessarily create wide-ranging problems and affect thousands of people, we need to implement procedures that recognize these problems and mitigate their effects on stakeholders, large and small. The procedural venue rules adopted in bankruptcy directly influence the substance of a bankruptcy case. By modifying venue rules and procedures, we can create more transparency in the bankruptcy process and begin restoring the principles that forum shopping has shattered.

The problems described in this Article are of greater importance in mega and medium-sized cases than in smaller cases, which likely have fewer players and a narrower sophistication disparity among parties.[9] This Article predominantly focuses on mega cases; however, as medium-sized cases face similar problems, this Article's proposed solution is intended to apply to medium-sized cases as well. Because the costs of venue fights in smaller cases may outweigh the benefits, this Article's proposal is inapplicable to small

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debtor files a case). For a more in-depth discussion of the rise of Delaware and New York as "venues of choice" for debtors, see Lynn M. LoPucki & Joseph W. Doherty, *Delaware Bankruptcy: Failure in the Ascendancy*, 73 U. CHI. L. REV. 1387 (2006); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309 (2001).

8. Indeed, "[i]t is the rare corporation that emerges from bankruptcy unchanged, its operations intact and going on as before." Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 426 (1993).

9. *See* MARCIA L. GOLDSTEIN, SCOTT E. COHEN & ROBERT J. WELHOELTER, VENUE CONSIDERATIONS: DIFFERENCES AMONG THE CIRCUITS ON COMMON RECURRING ISSUES IN CHAPTER 11 CASES 2 (Apr. 2004), *available at* http://www.southeasternbankruptcylawinstitute.org/archive/2004/documents/17000000.pdf, *archived at* http://perma.cc/8U9D-DTRB ("Generally speaking, cases involving small business debtors present little or no issue about where they should file for bankruptcy relief, as most of them file in the district where they are located geographically."). Although empirical work does not exist to confirm this point, this observation from experienced practitioners lends support to the theory that larger cases will both be more likely to have a significant impact on a wider range of people and that they are more likely to be forum shopped.

bankruptcy cases. Consequently, it is helpful to have a way to separate the larger cases from the small. One option is to exclude those debtors that fall within the Bankruptcy Code's definition of "small business debtor" from the proposal's application. According to the Bankruptcy Code, a "small business debtor" is an entity that has "aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition . . . in an amount not more than $2,490,925."[10] Cases with debts that exceed this definition's number are likely to have the greatest impact on parties' lives. Alternatively, including a smaller company under the proposal's reach may be appropriate if the bankruptcy involves employers who face significant obligations to retired employees for pension plan benefits, or a corporate bankruptcy where the debtor is the largest employer in the community and the bankruptcy will have profound effects on local economies.[11]

Although analyses of forum-shopping rules in bankruptcy are not new to legal scholarship,[12] a study of how forum shopping

10. 11 U.S.C. § 101(51D)(A) (2012). This number is periodically adjusted by the Judicial Conference of the United States.

11. Peter C. Califano, *Bankruptcy Venue—Current Law Is Going, Going, Going . . . Gone?*, J. NAT'L ASS'N BANKR. TRUSTEES, Summer 2012, at 20, 22, *available at* http://www.clla.org/resources/docs/NABT%20Article.pdf, *archived at* http://perma.cc/BQ9V-LWK6.

12. *See* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2006) (describing how courts contribute to the forum shopping problem by competing for prestigious cases); Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425 (2006) (responding to Professor LoPucki's research and suggesting an efficiency rationale for forum shopping); Ralph Brubaker, *The* Erie *Doctrine, Code Common Law, and Choice-of-Law Rules in Bankruptcy* (pt. 1), Bankr. L. Letter Online (Thompson Reuters), at 4 (June 2012) (describing the effect of venue laws on nonbankruptcy or ancillary proceedings); Marcus Cole, *"Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002) (exploring the impetus for the "Delawarization" of corporate bankruptcy); Michael P. Cooley, *Will* Hertz *Hurt? The Impact of* Hertz Corp. v. Friend *on Bankruptcy Venue Selection*, AM. BANKR. INST. J., May 2010, at 28 (concluding that the Supreme Court's decision in *Hertz Corp. v. Friend* will not have a significant impact on venue or venue-transfer proceedings in bankruptcy); Francesco De Gennaro, *Insolvency Regulations' and Models' Influences on Claw-Backs, Forum Shopping, and Jurisdictional Disagreements*, *in* NAVIGATING CROSS-BORDER INSOLVENCY ISSUES (2012), *available at* 2012 WL 6636430 (describing the rise of forum shopping in international insolvency cases); Dori Kornfeld Goldman, *Venue in Complex Bankruptcies in the Wake of* Volkswagen*: Ammunition to Keep Defendants from Remote Venues in Adversary Proceedings?*, HOUS. LAW., Jan/Feb 2010, at 22 (discussing forum shopping's effects on adversary proceedings); LoPucki & Doherty, *supra* note 7 (describing the rise of forum shopping to Delaware bankruptcy courts); 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 (presenting results of empirical study of forum shopping by large companies); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013) (presenting results of empirical study confirming forum shopping's continued presence in bankruptcy and proposing an array of solutions to alter forum shoppers' incentives

specifically disrupts core bankruptcy goals and disenfranchises small stakeholders[13] is largely absent from the discussion. One need not employ sophisticated empirical methods to see that the current system is flawed. Indeed, the evidence amassed to date demonstrates that forum shopping creates inherently problematic outcomes for small stakeholders and local communities.[14]

At its core, forum shopping has divorced modern bankruptcy practice from traditional historical principles underlying the

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and resources); John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785 (2007) (arguing that territorialism's potential for forum shopping in the international insolvency context is more dangerous than universalism's potential); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000) (encouraging forum shopping by encouraging early venue choice); David A. Skeel, Jr., *European Implications of Bankruptcy Venue Shopping in the U.S.*, 54 BUFF. L. REV. 439 (2006) (describing forum shopping's effects on European proceedings); Skeel, *supra* note 7 (arguing for the merits of forum shopping in Delaware); Andy Soh, *Chapter 15 of the U.S. Bankruptcy Code: An Invitation to Forum Shopping?*, 16 J. BANKR. L. & PRAC. 5 art. 9 (2007) (arguing that the center of main interests test in international insolvencies can be used to mitigate forum shopping concerns); Matthew J. Williams, *Location, Location, Location: Venue and Other Issues in Chapter 11 Bankruptcy Cases*, *in* CREDITORS' RIGHTS IN CHAPTER 11 CASES (2013 ed. 2013), *available at* 2013 WL 936386 (noting that the real issue driving forum shopping is precedent and defending lawyers who encourage their clients to engage in forum shopping).

13. The term "small stakeholders" in this Article refers to parties who have a cognizable claim in the bankruptcy case but who often cannot participate in the case due to lack of resources, time, or money. Employees, stockholders, and local trade creditors are all examples of small stakeholders; however, even larger creditors could be considered to be "small" stakeholders if they have only a small amount of money involved in the case. Elizabeth Warren provides some examples of who these small stakeholders might be: "Older employees . . . , suppliers who would have lost current customers, nearby property owners who would have suffered declining property values, and states or municipalities that would have faced shrinking tax bases." Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 787–88 (1987). Congress sought to protect these stakeholders in a corporate reorganization. Margaret E. Juliano, *Stalemate: The Need for Limitations on Regulatory Deference in Electric Bankruptcies*, 20 BANKR. DEV. J. 245, 249 (2003). *But see* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 101–02 (1984) (arguing that trying to address all of the harms a failing business may bring is "beyond the competence of a bankruptcy court" and advocating a narrower view of bankruptcy policy).

14. *See, e.g.*, Venue Fairness: Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness Submitted in Support of Testimony of Douglas B. Rosner Before the American Bankruptcy Institute Commission to Study the Reform of Chapter 11, at 6 (Nov. 22, 2013), *available at* http://commission.abi.org/sites/default/files/statements/22nov2013/Written-Venue%20Statement-for-ABI-Commission.pdf, *archived at* http://perma.cc/VD4C-NCR9:

> [C]urrent law, as interpreted and applied by courts, has had the unintended consequence of allowing abusive forum shopping with an overwhelming concentration of business cases being filed in Delaware and SDNY. . . . [D]ebtors have been able to exploit loopholes in the current statutory scheme to establish venue in favorable jurisdictions in which they have no operations, office or employees, and in some cases where there is a complete absence of minimum contacts. . . . The time is now to bring fairness and credibility back to the system.

bankruptcy system and venue itself. Large 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. Further, many stakeholders in these bankruptcy cases are effectively deprived of notice and an opportunity to participate, in contravention of fundamental due process and fairness principles.[15] The reforms proposed to address the forum-shopping problem to date do not pay adequate attention to this dynamic and thus do not strike the proper balance between preserving debtor choice and providing small stakeholders with a voice.

This Article proceeds in five Parts. Part II introduces forum shopping and the relevant bankruptcy venue statutes. This context highlights the problems with the current bankruptcy venue procedures, including how the odds are stacked against a party seeking to transfer venue because venue discussions rarely take place in court. Part III explores the negative effects that can arise when a debtor engages in forum shopping, focusing specifically on the effects on smaller stakeholders. This Part establishes how forum shopping destroys historically important principles regarding a bankruptcy case's ties to the location of a company's operations and stakeholders, upsets the Bankruptcy Code's carefully crafted balance between debtors and other parties, and denies smaller stakeholders basic due process rights.

Part IV explains why many current proposals to address forum shopping are either impractical or more harmful than helpful. Proposals that seek to curb debtor choice or to punish debtors for forum shopping may be too rigid to be applied to all cases. Instead, a flexible approach must be crafted—one that accounts for the complexities of large bankruptcy cases. Part V introduces such a proposal. Specifically, Part V proposes new procedures designed to make venue transfer a mandatory consideration in every large- and medium-sized bankruptcy. These procedures remove the presumption in favor of the debtor's choice of venue, provide a greater role for the U.S. Trustee and other parties in venue proceedings, and require parties to justify venue choices under the standards of the bankruptcy venue transfer statute, taking into account the unique circumstances of each case. They also include mechanisms to hold parties

15. *See In re* Peachtree Lane Assocs., Ltd., 188 B.R. 815, 827 (N.D. Ill. 1995) (noting that determination of bankruptcy venue has wide-reaching ramifications and practical consequences for those who may be "dragged" into the bankruptcy via an adversary proceeding and concluding that "fundamental fairness requires that those who have a practical stake in the proceedings be afforded an opportunity to be heard on the issues that affect them").

accountable for their venue choices. These mechanisms help ensure that the case's venue is best suited to address both the problems that drove the debtor to file for bankruptcy and the effects that the bankruptcy will have on all stakeholders.

II. THE BANKRUPTCY VENUE STATUTES

This Part introduces the venue rules and procedures and provides some background as to why stakeholders rarely object to a debtor's choice of venue, even when that choice is ill-suited to their interests.

A. The Bankruptcy Venue Statute and the Rise of Forum Shopping

The bankruptcy venue statute gives a large debtor with extensive operations virtually unlimited choice of where to file its bankruptcy case. The rules governing where debtors can file for bankruptcy are codified in 28 U.S.C. § 1408 ("bankruptcy venue statute"). Under the bankruptcy venue statute, the debtor may file (1) where it is incorporated, (2) where its principal place of business or principal assets are located, or (3) where a case concerning the debtor's affiliate is pending.[16]

Once a debtor has filed a bankruptcy case, its right to remain in that venue is not inviolate. As discussed further in Part II.B, parties may ask the court to transfer venue under 28 U.S.C. § 1412 ("bankruptcy venue transfer statute"), which provides that a court may transfer a bankruptcy case to another district "in the interest of justice or for the convenience of the parties."[17] Although any party in interest may move to transfer venue, if the debtor's choice of venue meets the requirements of the bankruptcy venue statute, a presumption arises in favor of the debtor's venue choice, and the party

16. 28 U.S.C. § 1408 (2012) provides, in relevant part, that:

> a case under title 11 may be commenced in the district court for 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.

17. *Id.* § 1412.

seeking transfer must prove that a better venue exists by a preponderance of the evidence.[18]

These venue rules and procedures enable forum shopping by allowing debtors to file in places where they believe they will receive a favorable outcome. Despite (or perhaps, because of) the amount of choice debtors have, large debtors have primarily used the venue rules to file in only a handful of courts, most notably the District of Delaware and the Southern District of New York.[19] Both courts are considered "debtor-friendly," and judges in those courts are widely viewed as having specialized expertise concerning mega cases. It is also typically easy for companies to file in these jurisdictions. Many companies are incorporated in Delaware and can therefore file in that state using the bankruptcy venue statute's "state of incorporation" option, even if neither the company nor its creditors have any other connections to Delaware.[20] Many large companies also have a subsidiary or affiliate located in New York, allowing them to take advantage of the bankruptcy venue statute's "affiliate rule" and file in New York.[21]

Indeed, the number of bankruptcy cases in these two jurisdictions is staggering: as of 2011, seventy percent of the largest two-hundred public-company filings since 2005 had been handled in either New York City or Delaware.[22] Although some of these companies were headquartered in New York City, most were based in other cities.[23] The Southern District of New York alone is currently

18. *See In re* Patriot Coal Corp., 482 B.R. 718, 739 (Bankr. S.D.N.Y. 2012) (noting that "[a] debtor's choice of forum is entitled to great weight if venue is proper" and that a party seeking transfer of a bankruptcy case must carry its burden of proof by a preponderance of the evidence); *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, AM. BANKR. INST. J., Oct. 2011, at 10, 93 (noting that judges give deference to the venue choice of bankruptcy debtors).

19. Parikh, *supra* note 12, at 179 (2013) ("Delaware and the Southern District of New York are the courts where these [bankruptcy cases] are invariably landing.").

20. *See* Weissenberger, *supra* note 4, at 518 ("Delaware tends to attract cases that are incorporated in Delaware, but have no connection with the state. In some instances, there isn't even a single creditor on the matrix in the bankruptcy case that is from Delaware.").

21. *Id.* at 515 ("On a practical basis, the affiliated company venue basis oftentimes leads debtors to commence a case for a subsidiary that does not have any assets or has limited operations.").

22. Bill Rochelle, *Lehman, Venue, Innkeepers, Thornburg, Sbarro: Bankruptcy*, BLOOMBERG BUSINESSWEEK (Sept. 12, 2011), http://www.businessweek.com/news/2011-09-12/lehman-venue-innkeepers-thornburg-sbarro-bankruptcy.html#p2, *archived at* http://perma.cc/SF9T-QK9K.

23. *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 60 (2011) (statement of Melissa B. Jacoby, Professor of Law, University of North Carolina at Chapel Hill).

handling 104 mega cases.[24] Empirical studies and reports have consistently confirmed New York's and Delaware's dominance in handling mega bankruptcies.[25]

Not only is this result directly contrary to the bankruptcy principles outlined in Part III—such as bankruptcy's ties to location, principles of due process, and access to courts—it is also unlikely that Congress intended this outcome when it created the bankruptcy system. Members of Congress have attempted throughout the years to curb debtors' venue choice, but their proposed legislation has consistently failed to generate much interest or agreement.[26] Nevertheless, it seems clear that Congress did not intend for New York and Delaware to become the primary mega bankruptcy courts.[27] Members of Congress have consistently acknowledged that bankruptcy can significantly affect local communities, suggesting that bankruptcy laws should recognize and address these effects.[28] Despite some Congress members' expressed desire that more bankruptcy cases

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24. *Current Mega Cases*, U.S. BANKR. CT., S. DISTRICT OF N.Y., http://www.nysb.uscourts.gov/megacases.html, *archived at* http://perma.cc/TUA4-WGKA (last updated Apr. 18, 2014).

25. *See, e.g.*, LoPucki & Whitford, *supra* note 12*;* Parikh, *supra* note 12; *Bankruptcy Mega Cases by State Jan.–June 2012*, BANKRUPT.COM (July 6, 2012, 1:04 PM) http://ezine.bankrupt.com/home/latest-news/bankruptcy-mega-cases-by-state-jan-jun-2012, *archived at* http://perma.cc/329J-AY2N; *Top Mega Bankruptcies by Bankruptcy Court for Jan.–Oct. 2012*, BANKRUPT.COM (Nov. 8, 2012, 5:28 AM), http://ezine.bankrupt.com/ezine/latest-news/top-mega-bankruptcies-by-bankruptcy-court-for-jan-oct-2012, *archived at* http://perma.cc/K7F6-UVC2.

26. *See* Irve J. Goldman, *Bankruptcy Court Rejects Forum-Shopping Ploy*, CONN. L. TRIB., Mar. 11, 2013, *available at* http://www.pullcom.com/news-publications-396.html, *archived at* http://perma.cc/HMH8-ZJU2 (noting that proposed H.R. 2533 called for legislative reform of the bankruptcy venue statute but that it had received little congressional attention); Christopher J. Updike & Thomas Curtin, *SDNY Bankruptcy Court Holds That Venue of Houghton Mifflin Case Is Improper, But Delays Transfer*, MONDAQ (July 15, 2012), http://www.mondaq.com/unitedstates/x/186944/Insolvency+Bankruptcy/SDNY+Bankruptcy+Court+Holds+That+Venue+Of+Houghton+Mifflin+Case+Is+Improper+But+Delays+Transfer, *archived at* http://perma.cc/BVT4-ZJN6 ("While Congress has expressed a desire for more bankruptcy cases to be filed where the debtor operates so local creditors and employees are better able to participate in the bankruptcy process, they have considered other bills that have gone nowhere.").

27. COLLIER ON BANKRUPTCY ¶ 4.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (noting that, while § 1408 has been used to allow blatant forum shopping, it is not clear that Congress intended that this should be the case).

28. Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 553 (1999) (noting Congress's "awareness of how bankruptcy law may affect jobs and local communities"); *see also* Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 410 (2003) ("When large companies file for bankruptcy, the logical result is that many employees lose their jobs.").

be filed closer to the debtor's operational base, efforts to enact reforms that are palatable to all concerned have so far been fruitless.[29]

If the existing bankruptcy venue rules do not provide optimal results, how did we get these rules in the first place? The bankruptcy venue statute was modeled on venue statutes governing nonbankruptcy proceedings.[30] In a civil dispute, however, the plaintiff's choice of venue is constrained by the defendant's location or actions.[31] By contrast, in bankruptcy, the debtor may select a forum without considering any other parties.[32] Indeed, there is no other party in bankruptcy that is the equivalent of the defendant in a civil case.[33] This phenomenon is exacerbated because once the debtor has chosen a forum, it may bring adversary proceedings that "arise[ ] under" or "arise[ ] in" the bankruptcy case against other parties in that same forum, again without regard to the other party's location or connections to the bankruptcy venue.[34]

Additionally, in a civil matter, rules such as subject matter jurisdiction and the minimum contacts requirement further ensure that defendants will not be haled into court in a state with which they have no connection.[35] In bankruptcy, these rules are significantly

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29. *See* Updike & Curtin, *supra* note 26; *see also House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 91 ("It has simply not worked out the way that Congress intended.").

30. *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 93 (differentiating venue considerations in a two-party dispute from considerations in a complex case and noting that the bankruptcy venue rules turn traditional venue principles on their heads).

31. 28 U.S.C. § 1391(b) (2012) provides that:

> A civil action may be brought in—
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> (1) a judicial district in which any *defendant* resides, if all defendants are residents of the State in which the district is located;
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> (2) a judicial district in which *a substantial part of the events or omissions giving rise to the claim occurred*, or a substantial part of property that is the subject of the action is situated; or
>
> (3)) if there is no district in which an action may otherwise be brought as provided in this section*, any judicial district in which any defendant is subject to the court's personal jurisdiction* with respect to such action.

(emphasis added). All of these prongs take the defendant's location or actions into consideration.

32. *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 93 ("[I]t is the debtor that drags the creditors to its chosen forum, not the other way around.").

33. *Compare* 28 U.S.C. § 1408 (referring only to "the person or entity that is the subject of [the] case"), *with* 28 U.S.C. § 1391(b) (referring to defendants).

34. Goldman, *supra* note 12, at 23 (describing the "home court presumption," in which venue for adversary proceedings is favored in the district where a bankruptcy is pending, regardless of the dispute's connection to that venue).

35. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1691 (1993) (describing rules in the civil context that mitigate forum shopping concerns); *see also* Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of* Erie

attenuated and do not provide the same level of protection to creditors or other nondebtor parties.[36] This is not to say that forum shopping does not exist in nonbankruptcy cases. Rather, the problem of forum shopping in the civil context is exacerbated in bankruptcy. Differences between bankruptcy and civil cases mean that venue rules based on nonbankruptcy proceedings may not work as well in the bankruptcy context.

Bankruptcy venue is in many ways a much more powerful tool for bankruptcy debtors than civil venue is for plaintiffs. Bankruptcy venue allows debtors to effectively control many aspects of a case, centralize all of their disputes into one forum, and keep that control throughout the life of the case.[37]

B. The Bankruptcy Venue Transfer Statute

The bankruptcy venue statute does little to restrain forum shopping. As noted, the debtor does not have to prove that its venue choice is the best venue when compared with other options available. Furthermore, once a debtor selects a venue under the broad bankruptcy venue statute, that venue is presumed to be proper. This presumption can be difficult to overcome because the debtor is necessarily the best informed about its own financial situation and bankruptcy case. A debtor is required to justify its venue choice in court only on the rare occasion when a party invokes the bankruptcy venue transfer statute, which requires the court to consider the "interest of justice" and the "convenience of the parties."[38]

The presumption in favor of the debtor, combined with the court's failure to inquire into venue absent a challenge, makes it difficult for a court to overturn a debtor's choice of venue or even for

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Principles, 79 KY. L.J. 231, 249 (noting that "the defendant has the right to veto the plaintiff's choice" of forum in civil proceedings).

36. *See, e.g.*, *In re* Uni-Marts, LLC, 404 B.R. 767, 775 (Bankr. D. Del. 2009) (determining that, even though Fed. R. Civ. P. 4(k)(1)(A) limits personal jurisdiction over nonresident defendants to a court of general jurisdiction in the forum state, Bankruptcy Rule 7004(d), allowing nationwide service of process in bankruptcy cases, falls into the exception created by Fed. R. Civ. P. 4(k)(1)(C) and therefore broadens personal jurisdiction of the bankruptcy courts). The court later discussed the minimum contacts requirement, noting that minimum contacts in bankruptcy proceedings are expanded to a "national contacts" standard. *Id.* at 776. In this way, bankruptcy can "nationalize" many local claims and controversies.

37. Vance & Barr, *supra* note 28, at 383 ("Indeed, debtor control begins even before commencement of the case because it is the debtor who determines where the bankruptcy case will be filed.").

38. 28 U.S.C. § 1412 provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

parties to challenge it. For instance, in the GM case discussed in Part I, although the media and Congress questioned GM's venue choice,[39] no party in the bankruptcy case itself filed an objection.[40] This does not necessarily mean that all parties agreed that New York was the right location for the GM bankruptcy case. To overcome the presumption in favor of the debtor's choice of venue, an objecting party must show by a preponderance of the evidence that a venue that is better for all parties exists.[41] The odds are stacked against a party seeking a change of venue, making it easy to understand why the parties in the GM bankruptcy simply settled for the debtor's choice of venue. Indeed, the majority of cases proceed with little-to-no discussion of venue at all.[42]

In addition to the presumption favoring a debtor's choice of venue,[43] several other factors contribute to the failure of most parties to object, even when venue transfer would be advantageous to those parties.

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39. *See, e.g.*, Jacob Barron, *Bill Introduced to Combat Bankruptcy "Venue Shopping*," NAT'L ASS'N OF CREDIT MGMT., http://www.nacm-se.com/credittrends/articles/Aug_11/Bill%20Introduced%20to%20Combat%20Bankruptcy%20Venue%20Shopping.htm, *archived at* http://perma.cc/H39W-G56B (last visited Jan. 3, 2015) (describing how forum shopping was criticized after General Motors filed in New York, leading two Congressmen to introduce a reform bill, H.R. 2533); Barbara Kiviat, *GM's Potential Bankruptcy: Shopping for a Venue*, TIME, Apr. 9, 2009, http://content.time.com/time/business/article/0,8599,1890171,00.html, *archived at* http://perma.cc/3ZUZ-Q47R (describing the possibility that General Motors would file outside of Michigan).

40. A search of the General Motors bankruptcy docket reveals that certain parties did request a transfer of venue for the specific purpose of litigating a claim within the bankruptcy; however, no party filed an objection seeking to transfer the entire bankruptcy case. Motion for Order to Change Venue for Determination of Claim, *In re* Motors Liquidation Company, No. 09-50026-reg (S.D.N.Y. May 2, 2012), *available at* http://www.motorsliquidationdocket.com/pdflib/11676_50026.pdf, *archived at* http://perma.cc/3PZ2-P4WB.

41. Thomas M. Horan & Ericka Fredricks Johnson, *Basics of Bankruptcy Venue, Transfer of Cases*, AM. BANKR. INST. J., Dec. 2011–Jan. 2012, at 40, 41 ("The party seeking the venue change bears the burden of proof, which must be carried by a preponderance of the evidence.").

42. ELIZABETH WARREN, CHAPTER 11: REORGANIZING AMERICAN BUSINESSES 185 (2008) ("In fact, if a party protests the venue choice of the business, experience shows that courts will often transfer small cases, but that they will almost never transfer a big case."). Lynn LoPucki's Bankruptcy Research Database lists only twenty-six mega cases transferred out of 991 studied. UCLA–LOPUCKI BANKR. RESEARCH DATABASE, http://lopucki.law.ucla.edu/request_download.htm, *archived at* http://perma.cc/RK75-4QDM (last visited Jan. 23, 2014).

43. Leslie R. Masterson, *Forum Shopping in Business Bankruptcy: An Examination of Chapter 11 Cases*, 16 BANKR. DEV. J. 65, 90 (1999) ("The present practice of requiring the moving party (i.e., the creditor) to show that a case should be transferred requires that the creditor understand the debtor's business as well as its bankruptcy case.").

1. Time and Effort

Filing a venue objection in a bankruptcy proceeding requires time, effort, and money.[44] A party must typically hire a lawyer if it wants to succeed in going head-to-head with the debtor's lawyer. The objecting lawyer must argue that a different venue choice would be better, not just for the moving party, but for *all* parties in the case. Small creditors in particular often do not have the resources or the time required to object to venue. This problem is exacerbated when debtors forum shop and file in a court far away from many of their creditors.[45] For example, the parties in the recent *Patriot Coal* case spent millions of dollars and months of work arguing over whether Patriot's chosen venue of the Southern District of New York was proper.[46] Yet, when the judge released her decision, it was clear that Patriot had no basis to file in New York.[47] What should have been an easy question took an extraordinary amount of time and effort to resolve.

2. Information Asymmetries

Information asymmetries can further increase the time and effort needed to raise a compelling venue objection.[48] Courts often give great deference to a debtor's interpretation of its situation, on the theory that debtors know their operations and the true extent of their problems better than any other party.[49] This deference also allows

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44. *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. of the Judiciary*, *supra* note 23, at 31 (testimony of Hon. Frank J. Bailey, U.S. Bankr. Ct., D. Mass.) ("It is enormously expensive for a party to mount a challenge to venue."); Rosner, *supra* note 14, at 1 ("The cost and burden of challenging a debtor's venue choice are prohibitively high even where there are no appropriate grounds to support the debtor's venue selection.").

45. *See In re* Columbia W., Inc., 183 B.R. 660, 664 n.11 (Bankr. D. Mass. 1995) ("Creditors frequently find it difficult to finance an objection because of financial pressures caused by the filing of the case itself. Increasing the physical distance between those creditors and the forum may eliminate the ability of those creditors to object.").

46. *See* Rosner, *supra* note 14 (citing *In re* Patriot Coal Corp., 482 B.R. 718, 739 (Bankr. S.D.N.Y. 2012)).

47. *Id.*

48. *See* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 26 (2004) (describing how reorganization practice is driven by the "enlightened self-interest" of sophisticated parties "with the lowest cost access to relevant information," such as secured creditors and insolvency professionals).

49. *See, e.g.*, *In re* Enron Corp., 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002) (giving deference to debtor's venue choice and noting that choice is entitled to "great weight"); *see also* Adam Levitin, *Borders Improper Bankruptcy Venue*, CREDIT SLIPS (Feb. 28, 2011), http://www.creditslips.org/creditslips/2011/02/borders-improper-bankruptcy-venue.html, *archived at*

debtors to create a sense of urgency about their case that is difficult to verify: is the debtor truly going to fall apart in the time it takes for the case to be transferred, or does the debtor have enough resources to get by for some time? By exploiting information asymmetries, debtors can employ strategic arguments to avoid a change in venue, asserting that they have little time to reorganize and that the parties need to focus on substantive rather than procedural issues.

3. Repeat Players

The bankruptcy bar is a small community, and the handful of professionals who deal with mega cases is smaller still. These professionals are largely clustered in New York and Delaware.[50] They meet regularly, both within the courtroom and outside of it.[51] Although Congress recognized and disapproved of this "bankruptcy ring" when it adopted the Bankruptcy Reform Act of 1978,[52] the strong club atmosphere in many ways continues to exist today. Given this community of repeat players, outsiders may feel that any attempt to transfer venue and thus break up this tight-knit group would be futile or, at the very least, expensive and difficult.

4. Judicial Considerations

Judicial behavior may further discourage parties from attempting a venue-transfer motion. Interestingly, judges can invoke the bankruptcy venue transfer statute themselves;[53] however, they

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http://perma.cc/LEH4-J7UU (noting that Borders's venue filing in New York was improper and speculating that most creditors simply were not aware of the impropriety).

50. *See* Jonathan Lipson, *Revisiting the Contracts Scholarship of Stewart Macaulay, Post VI*, CONTRACTSPROF BLOG (Aug. 28, 2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/08/revisiting-the-contracts-scholarship-of-stewart-macaulay-post-vi-jonathan-lipson.html, *archived at* http://perma.cc/7SXW-EHYF:

> A sophisticated bar of bankruptcy practitioners in high profile cases emerged in New York and Delaware. This community creates bargaining networks in which repeat players seem to have both a strong sense of formal . . . law and the capacity and temperament to compromise in order to produce a plan if possible, and to resolve the case otherwise . . . if not.

51. *See* H.R. REP. NO. 95-595, at 6011 (1977) (describing the "unseemly and continuing relationship" among members of the bankruptcy bar and referees and noting that the bankruptcy bar in a community is often referred to as a "bankruptcy ring").

52. *Id.*

53. FED. R. BANKR. P. 1014(a)(1) provides:

> If a petition is filed in the proper district, the court, on the timely motion of a party in interest *or on its own motion*, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

rarely do. Judges may be particularly inclined to keep mega cases for themselves, given the prestige and high visibility commonly associated with these cases.[54] Even if the judge has no personal desire to keep a case, the longer a case goes on in a particular venue, the more reluctant the judge will be to transfer it due to concerns that a new judge would face a significant and time-consuming learning curve once the case is transferred.[55] Thus, judges may be reluctant to give up the case even if an alternative venue is proven to be better.[56]

The *Houghton Mifflin* case is an example of judicial reluctance to transfer a case, even after a party brought a venue-transfer motion and venue was found to be improper.[57] Houghton filed for bankruptcy in the Southern District of New York.[58] The U.S. Trustee filed a motion to transfer venue outside of New York, arguing that a New York venue was improper because it failed to meet any of the prongs of the bankruptcy venue statute.[59] The bankruptcy judge ultimately granted the Trustee's motion because the judge determined that venue was, in fact, improper in New York and therefore had to be transferred.[60] Despite this ruling, the judge did not actually transfer the case until after he confirmed Houghton's plan of reorganization, meaning that the bulk of the work in the case had been completed in an improper venue.[61]

The judge in *Houghton Mifflin* characterized his decision as a dilemma: because the U.S. Trustee had raised the venue-transfer issue, he had to move the case, but moving the case at this late date would undoubtedly be harmful to the parties, given the case's progress

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(emphasis added); *see also* COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 4.05 (noting that Rule 1014(a)(1) recognizes the holding of many courts that they have the authority to dismiss or transfer cases on their own motion).

54. *See* LoPucki & Doherty, *supra* note 7, at 1411 (describing how scholars have recognized that courts may "bend the law" in cases to either realize a judge's political preferences or to attract future cases, or both).

55. *See* Weissenberger, *supra* note 4, at 518–19 (describing "learning curve" concerns); *see also* Rosner, *supra* note 14, at 10 (describing the bankruptcy of the Minneapolis Star Tribune and how, even though the company had no assets in New York, by the time the debtor revealed this information, it was too late, practically speaking, to move the case out of New York).

56. *Compare Forum Shopping Reconsidered*, *supra* note 35, at 1691 (noting that courts can invoke venue transfer when an alternative forum would be more convenient for parties), *with* LoPucki & Doherty, *supra* note 7, at 1415 (describing how courts compete for cases), *and In re* Houghton Mifflin Harcourt Publ'g Co., 474 B.R. 122, 124 (Bankr. S.D.N.Y. 2012) (where United States Trustee, not judge, moved to transfer improperly venued case).

57. *In re Houghton Mifflin*, 474 B.R. at 124–25.

58. *Id.* at 126.

59. *Id.* at 124.

60. *Id.*

61. *Id.* at 125.

to date.[62] Yet, this judge *himself* should have raised the venue-transfer possibility earlier in the case. Even had the judge not thought to question the debtor's choice of venue, the U.S. Trustee had expressly preserved a venue objection on the first day of the case. [63] This should have alerted the judge and other parties to give more scrutiny to the debtor's venue choice.

These judicial considerations suggest that small creditors must fight an uphill battle when they object to venue in large cases. The current venue rules make it easy for debtors to engage in forum shopping and to stay in the venue they have chosen—as *Houghton* illustrates, even judges will go along with an improper venue choice until someone objects.[64] Debtors can thus lock in their venue of choice, leaving other stakeholders to fight it or, as is usually the case, to acquiesce.

C. A Bad Analogy: The Sick Debtor

To see how far afield bankruptcy law has come from its core principles of location ties, the balance between debtors and creditors, and respect for stakeholders' rights, it is helpful to examine a popular analogy used in bankruptcy: that of the sick debtor. Some observers dismiss the idea that there is a forum-shopping problem in bankruptcy by comparing a bankrupt company to a sick person; indeed, the "sick company" reference is often used to describe a company in bankruptcy.[65] If a person is seriously ill, they should seek out the best treatment available to them, regardless of location. Extending this argument to bankruptcy, proponents of the "sick debtor" analogy often argue that ailing companies should seek out the best court for their needs, regardless of location.

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62. *See id.* ("[T]he Court will effect the transfer at a time that decreases the resulting prejudice to creditors, the Debtors, and the Debtors' employees.").

63. *Id.* at 130.

64. *See* Weissenberger, *supra* note 4, at 518 (describing the "dirty secret among restructuring professionals" that cases commenced in Delaware and New York are unlikely to have their venue challenged); *see also* COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 4.06 (suggesting that venue is waived unless timely objected to).

65. *See, e.g.*, Katy Stech, *Lawmakers Consider Bankruptcy "Forum Shopping*,*"* WALL ST. J. BANKR. BEAT (Sept. 8, 2011, 4:14 PM), http://blogs.wsj.com/bankruptcy/2011/09/08/lawmakers-consider-bankruptcy-forum-shopping/, *archived at* http://perma.cc/LX52-6K3C (quoting Rep. John Carney of Delaware, who compared forum shopping to a patient seeking out a top surgeon to perform a major medical procedure); *see also* Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979) ("[T]he purpose of an arrangement [reorganization] is to revive a moribund business, not to bury it."); Stewart F. Peck, *Navigating the Murky Waters of Admiralty and Bankruptcy Law*, 87 TUL. L. REV. 955, 968 (2013) (describing the policy of bankruptcy reorganization as "to save a sick business").

This analogy oversimplifies the issues at stake in a large bankruptcy case and downplays venue's importance. If the only entity that the court had to "treat" was the debtor, it would make perfect sense for the debtor to file wherever it thought it would receive the best treatment. Bankruptcy cases, however, can affect thousands of entities and people apart from the debtor, including parties who do business with the debtor, the debtor's employees and stockholders, and the cities and towns in which the debtor operates.[66] When so many entities are affected by a debtor's financial distress, it does not make sense to consider only the debtor's interests in determining where to file a case.

A better analogy is one that recognizes the sick debtor's effects on others. For example, we might compare the debtor to a highly contagious sick person who infects all those he comes into contact with on his way to the hospital. Thus, we ought to focus not simply on the sick debtor but on the disease itself. The "treatment" must cure not only the debtor, but all those the debtor has infected too.

III. THE PROBLEMS OF BANKRUPTCY FORUM SHOPPING

Forum shopping has caused a rift between bankruptcy and its core principles. This Part will discuss these principles, notably (1) bankruptcy's ties to location; (2) the balance the Bankruptcy Code strikes between creditors and debtors,[67] with equality of treatment for similarly situated creditors;[68] and (3) the right of affected parties to participate in bankruptcy proceedings.[69]

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66. WARREN, *supra* note 42, at 3:

> [A] single business case . . . may involve billions of dollars and jobs, retirement accounts, and health benefits for tens of thousands of people. The wake from such a case may rock both stock markets and local neighborhoods across the country, along with the lives of many thousands of families.

67. Kenneth N. Klee, *Introduction*, 32 CAL. BANKR. J. 221, 223 (2012) (discussing how bankruptcy seeks to maximize the debtor's value for the collective benefit of all stakeholders).

68. *See In re* St. Amant, 41 B.R. 156, 160 (Bankr. D. Conn. 1984) (describing "the equal distribution of assets to creditors and the avoidance of windfalls to any creditor" as one of the purposes of bankruptcy law); *Legislative Highlights*, AM. BANKR. INST. J., Feb. 2013, at 10 (describing the goals of Chapter 11 as balancing the effective reorganization of the debtor with the preservation and expansion of jobs and the maximization and realization of asset values for all creditors and stakeholders).

69. *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 93 ("[C]ases should be filed and determined in the place that is most convenient to the stakeholders, i.e. those that have an interest in that case.").

A. Location Matters

We can figure out where best to "treat" a bankruptcy "illness" by returning to some of bankruptcy law's core principles. The first of these principles is location. Venue is a concept tied to the location of a case,[70] and the history and practice of bankruptcy show that a case's location matters.[71] Forum shopping severs bankruptcy's ties to location.

When Congress created bankruptcy laws, it also created a national system of bankruptcy courts scattered throughout the country, with each court addressing bankruptcy problems in a designated region. In contrast to other specialized courts—such as the Tax Court, located in Washington, D.C.,[72] or the Court of International Trade, located in New York City[73]—bankruptcy courts are spread across the country. This means that parties do not have to travel far to address issues that arise close to home. Moreover, Congress has never designated a particular court or set of courts as "mega case courts." Instead, members of Congress have expressed concern that larger cases today are heard in only a handful of courts and have explicitly stated that bankruptcies should play out in the communities that are most affected by the outcomes of the cases.[74]

This concentration of power in the hands of two bankruptcy courts is contrary to the principle of decentralization, which guided the creation of the entire federal judicial system. After the American

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70. *In re* Patriot Coal Corp., 482 B.R. 718, 737 (Bankr. S.D.N.Y. 2012) ("The linkage between venue and particular geographic locations dates back hundreds of years."); Parikh, *supra* note 12, at 164 ("Jurisdiction is about power; venue is about location.").

71. Cole, *supra* note 12, at 1849 (noting that in the late nineteenth and early twentieth centuries, states were the "locus of reorganization law"); Rosner, *supra* note 14, at 16 ("Simply stated, bankruptcy is local.").

72. *About the Court*, U.S. TAX CT., https://www.ustaxcourt.gov/about.htm, *archived at* http://perma.cc/3BX9-E45Y (last visited Oct. 5, 2014). Note that the Court is physically located in Washington, D.C.; however, the judges may travel the country and conduct trials in designated cities.

73. *About the Court*, U.S. CT. OF INT'L TRADE, http://www.cit.uscourts.gov/AboutTheCourt.html, *archived at* http://perma.cc/5M6L-3PHK (last visited Oct. 5, 2014). Judges in this Court may also travel the United States to conduct trials, but the court itself is physically located in New York City.

74. *See* Updike & Curtin, *supra* note 26 (noting that "Congress has expressed a desire for more bankruptcy cases to be filed where the debtor operates so local creditors and employees are better able to participate in the bankruptcy process" but concluding that these efforts have "gone nowhere"); *see also House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 90 (discussing the possibility of venue reform legislation, including proposed H.R. 2533, which "attempt[ed] to rebalance the interests of all parties in bankruptcy by making sure that the bankruptcy reorganization process remains within the regions and communities that have the most significant vested interest in the outcome").

Revolution, the Framers of the new government shied away from the creation of a national judiciary due to mistrust of centralized power.[75] In modern bankruptcy practice, however, centralized power exists because just two courts handle most of the significant bankruptcy cases. This centralization of bankruptcy cases into two courts prevents other courts from influencing the development of critical bankruptcy law. This lack of diversity harms the development of a robust body of bankruptcy law.[76]

Moreover, most companies have at least one operational center, a place where the primary business activities are performed. When companies file for bankruptcy, these operational centers are disrupted because bankruptcy inherently changes the way a company's employees, competitors, suppliers, and communities function.[77] Thus, even a bankruptcy with widespread national prominence can have significant local ramifications. The U.S. government recognized this when it bailed out GM and Chrysler in 2008: in reference to the bailout, President Obama proudly declared, "We refused to let *Detroit* go bankrupt."[78]

Corporate bankruptcies have significant consequences in the region out of which the debtor primarily operates.[79] Naturally, the debtor's employees will be affected, but if the debtor is large enough, the entire local economy could be impacted.[80] Additionally, in many cases, the city, state, or town central to the debtor's operations may have invested heavily in the company or provided economic incentives for the company to do business there, only to see those incentives disregarded as the debtor works out its affairs in a faraway court.[81]

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75. Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, 46 U. KAN. L. REV. 673, 675 (1998).

76. *See* Rosner, *supra* note 14, at 16 ("Such uniformity likely impedes the evolution of bankruptcy jurisprudence, which benefits from diverse viewpoints and discourse.").

77. Many provisions of the Bankruptcy Code change the interactions between a debtor and these other stakeholders. *See, e.g.*, 11 U.S.C. § 1113 (2012) (allowing debtors to assume or reject collective bargaining agreements with employees under certain conditions); *id.* § 365 (giving the debtor the right to assume or reject executory contracts and unexpired leases with counterparties); *id.* § 362 (establishing an automatic stay enjoining many types of actions against the debtor upon commencement of a bankruptcy case).

78. Suzy Khimm, *Why Didn't the Auto Bailout Save Detroit?*, MSNBC (July 19, 2013, 4:24 PM), http://www.msnbc.com/all-in/why-didnt-the-auto-bailout-save-detroit, *archived at* http://perma.cc/XG8V-82MY (emphasis added). Of course, Detroit itself declared bankruptcy in July 2013, but the auto bailout played a significant role in forestalling Detroit's demise. *Id.*

79. Califano, *supra* note 11, at 21–23.

80. *Id.*

81. *See, e.g.*, *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Comm. and Administrative Law*, *supra* note 23, at 39–40 (statement of Hon. Frank J. Bailey, U.S. Bankr. Ct., D. Mass.) (describing the *Evergreen Solar* bankruptcy, in which the company filed in Delaware, to the detriment of Massachusetts, after

Furthermore, as the ripple effects of the debtor's bankruptcy spread throughout the region, many other issues may arise, including those relating to real estate, wages and taxes, or even health and safety.[82] A court with local subject matter expertise is better equipped to hear and decide these issues because that court will not have to spend additional time and resources learning about these significant local issues. Of course, companies may be concerned about local courts having bias toward local stakeholders, but that bias can work both ways, as the following case illustrates.

Polaroid's first bankruptcy demonstrates the difficulties that can arise when a company files far from its primary operating region and the possibility that "mega case" judges will allow for less-than-optimal results. Polaroid was headquartered in Massachusetts and employed thousands of people in the state.[83] The company filed for bankruptcy in the District of Delaware in 2001, using the bankruptcy venue statute's "state of incorporation" prong.[84] As a result, it was difficult for Polaroid's Massachusetts employees to come to court in Delaware to make their views known. It was also difficult for the Delaware court to ascertain how the bankruptcy proceedings would affect Polaroid's Massachusetts connections.[85] In the end, Polaroid was sold to OEP Imaging Corporation, a creation of the venture capital group One Equity Partners, for $255 million in cash (and assumption of $200 million in liabilities).[86] An industry analyst characterized this sale as "a steal," suggesting that OEP should have paid much more for Polaroid and its foreign subsidiaries, which were financially successful.[87] Nevertheless, the Delaware bankruptcy court approved the sale and notably did not require OEP to take over Polaroid's pension plan, which was underfunded.[88] While bondholders, shareholders, retirees, and employees came away nearly empty handed, the analyst speculated that Polaroid's executives and new

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Massachusetts had provided significant financial incentives to the company and its customers to encourage the company to grow in Massachusetts).

82. Califano, *supra* note 11, at 21–23.

83. *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, *supra* note 23, at 38 (testimony of Hon. Frank J. Bailey, U.S. Bankr. Ct., D. Mass.).

84. *Id.*

85. *Id.* at 38–39 ("Thus, any interested party had to either travel to Wilmington, Delaware, or hire a lawyer to appear in the Delaware court in order to make known its views . . . .").

86. Jerry O'Neill, *The New Polaroid: After Chapter 11*, IMAGINGINFO.COM (Oct. 1, 2002), http://www.imaginginfo.com/article/article.jsp?siteSection=27&id=818&pageNum=1, *archived at* http://perma.cc/FR8S-GDGE.

87. *Id.*

88. *Id.*

owners would likely benefit financially from the sale.[89] Had Polaroid filed for bankruptcy in Massachusetts, the judge would have been familiar with the impact of the bankruptcy on all parties, not just the executives and prospective purchasers, making it less likely that Polaroid's sale would have been such a "steal."

1. The Scope of Bankruptcy Actions and the Home Court Presumption

Bankruptcy courts often hear issues arising under state and local law.[90] In addition, bankruptcy rules permit a debtor in bankruptcy to use adversary proceedings to commence lawsuits against other parties in bankruptcy court. The only requirement is that the proceeding be "related to" the bankruptcy in some way.[91] This practice aims to help debtors centralize their disputes and avoid litigating geographically diverse claims while in bankruptcy.[92] Yet, by filing for bankruptcy far from their operating bases, debtors can force adverse parties to litigate in a court with no geographic relation to the contested issues.[93] This may undermine predictability for the debtor's trade vendors and business partners, who may reasonably believe that any dispute would be resolved in a forum closer to home.

The *Enron* bankruptcy case illustrates this so-called "home court presumption" in action. At the time of its bankruptcy filing, Enron's principal operations center, management team, and a sizeable group of its employees were located in Houston.[94] In contrast, Enron had only sixty-three employees in New York, the venue where it chose to file its bankruptcy case.[95] In *Enron Corp. v. Arora*,[96] the bankruptcy court denied certain employees' requests to transfer venue of an adversary proceeding commenced against them in New York. The court noted that, in general, venue of adversary proceedings is *always* proper in the court where the underlying bankruptcy case is

89. *Id.*

90. *In re* Pineda, No. EC-11-1719-MkDJu, 2013 WL 1749554, at *5 (B.A.P. 9th Cir. Apr. 23, 2013) ("[B]ankruptcy courts regularly preside over matters arising under state law . . . .").

91. 28 U.S.C. § 157(c)(1) (2012); COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 3.03 (discussing bankruptcy courts' jurisdiction to resolve related proceedings).

92. *In re* Rader, 488 B.R. 406, 416 (B.A.P. 9th Cir. 2013) (noting that centralized resolution of claims and avoidance of piecemeal litigation are fundamental Bankruptcy Code purposes).

93. *Case Law Developments—Recent Decisions*, 1983 ANN. SURV. BANKR. L. 14 (noting that the underlying policy of the Code is "avoiding 'fragmentation' of the debtor's estate"); Goldman, *supra* note 12, at 23 (describing the "longstanding practice" of debtors haling defendants to a distant venue for adversary proceedings that have no relation to the forum other than the location of the main bankruptcy case).

94. WARREN, *supra* note 42, at 185.

95. *Id.*

96. 317 B.R. 629, 650 (Bankr. S.D.N.Y. 2004).

pending.[97] Consequently, the court refused to transfer the proceeding to Texas, asserting that the home court (New York) was capable of deciding Texas law issues.[98] Thus, the Texas-based employees were forced to travel to New York to litigate Texas legal issues simply because Enron had filed for bankruptcy in New York.

As *Enron* demonstrates, due to the strong policy favoring centralization of a debtor's disputes, opponents of the debtor have an uphill battle to fight in attempting to move the venue of an adversary proceeding.[99] *Enron* exemplifies the absurd result that bankruptcy forum shopping can produce: distant courts are required to hear and settle predominantly local issues, contravening bankruptcy's historic ties to location, harming predictability, and forcing parties to travel to a distant forum even though a more local court is available.[100]

2. Severing Venue's Ties to Location

A case's venue has traditionally been tied to the location of key parties involved.[101] In selecting a venue for a bankruptcy case, however, debtors often base their decision on the jurisdiction's experience with large bankruptcy cases and the jurisdiction's precedent for mega cases, regardless of the debtor's ties to that jurisdiction.[102] In doing so, debtors disregard the benefit of having a court that is familiar with the debtor's local issues and problems, a concept that was recognized by the Supreme Court nearly seventy

97. *Id.* at 637.

98. *Id.* at 645.

99. For an additional example of the uphill battle parties face in resolving disputes outside of the venue of the "main" bankruptcy case, see *In re* Lehman Bros. Holdings Inc., No. 08-13555 (JMP), 2013 WL 5908057, at *4 (Bankr. S.D.N.Y. Nov. 4, 2013) (allowing claims dispute to go forward in New York despite California Bankruptcy Court's connection to the dispute).

100. These absurdities are not limited to Chapter 11 cases or to cases with adversary proceedings. *See* Rosner, *supra* note 14, at 11 (describing the Chapter 7 bankruptcy of Fenwick Automotive Products Limited, where a Delaware-based trustee was appointed to liquidate the debtor's hard assets, most of which were in California).

101. For a discussion of venue's traditional ties to location, see Parikh, *supra* note 12, at 164 ("[V]enue is about location."); Shirley M. Sortor, *Venue Problems in Wisconsin*, 56 MARQ. L. REV. 87, 87–91 (1972) (describing venue under English law); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) ("There is a local interest in having localized controversies decided at home.").

102. *See, e.g.*, John Bringardner & Alan Zimmerman, *Contentious Two-Day Hearing Reveals Patriot Coal Venue Dispute as Vexing Call*, LEVERAGEDLOAN.COM (Sept. 14, 2012, 1:51 PM), http://www.leveragedloan.com/contentious-two-day-hearing-reveals-patriot-coal-venue-dispute-as-vexing-call/, *archived at* http://perma.cc/D6PY-48L5 (describing how New York courts' experience in large exit financing cases was a factor in debtor's venue decision).

years ago[103] and that has been reinforced by the Court in recent years.[104] The reason often cited for not filing in a more "local" jurisdiction—that New York and Delaware have more experience with big cases[105]—can be mitigated: if a court is faced with an issue of first impression, it can look to its sister jurisdictions for guidance, a practice that occurs regularly in both bankruptcy and nonbankruptcy settings.[106] Further, bankruptcy judges across the country are nationally recognized for their significant expertise in bankruptcy law and practice.[107] Bankruptcy courts have adopted procedures designed to accommodate large cases, and bankruptcy judges are prepared to hear those cases.[108] Providing local judges with more mega case experience would help achieve the ultimate goal of having experienced bankruptcy judges spread across the country.[109] Instead of depending on the experience of judges sitting in only two courts with crowded dockets, a national array of experienced judges would provide more efficient and effective resolutions to a larger number of bankruptcy cases.

The *Malden Mills* bankruptcy case exemplifies how debtors can exploit the venue rules to escape accountability for local issues.[110] In that case, debtor Malden Mills and its chief lender deliberately misled Malden's creditors, persuading them to close a pending bankruptcy case in Massachusetts so that it could file a new bankruptcy case in

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103. *See Gulf Oil Corp.*, 330 U.S. at 509 ("In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.").

104. *See* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010) (concluding that a corporation's principal place of business under the federal diversity jurisdiction statute should be the place where the corporation's officers "direct, control, and coordinate the corporation's activities").

105. *See* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1992 (2002) (describing Delaware's "efficiency" and "sophistication").

106. *See, e.g.*, Pension Trust Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc., 730 F.3d 263, 270 (3d Cir. 2013) (noting that the propriety of a rule was an issue of first impression and looking to other courts of appeals for their interpretation of the rule); *In re* Costas, 346 B.R. 198, 202 (B.A.P. 9th Cir. 2006) (applying the reasoning of two bankruptcy decisions to issue of first impression).

107. *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, *supra* note 23, at 30–55 (testimony of Hon. Frank J. Bailey, U.S. Bankr. Ct., D. Mass.).

108. *Id.*

109. This goal is consistent with Congress's establishment of national bankruptcy courts scattered across the country, as discussed *supra* in Part II.A.

110. For other examples of debtors forum shopping to escape problems at home, see Rosner, *supra* note 14, at 9 (describing the bankruptcy of Carey Limousine L.A., a company that operated entirely in California yet filed for bankruptcy in Delaware in an attempt to object to an arbitration award that the California Fair Employment Department had recently obtained against it).

Delaware, far from these creditors and the shadow of its Massachusetts bankruptcy case.[111] The Massachusetts bankruptcy court ultimately "caught" Malden and had the case transferred back to Massachusetts. The court recognized that Malden had attempted to distance itself from the source of its troubles by filing far away from the key parties,[112] in a court unfamiliar with the causes of the company's problems.[113] Although the court corrected Malden's behavior in this instance, debtors who engage in less egregious forum-shopping techniques, such as Polaroid, discussed above, may escape unnoticed.

Filing for bankruptcy in a faraway location eliminates the local court's potential sensitivity to a bankrupt company's impact on the community, making it easier for judges to disregard smaller or more local parties.[114] A recent Massachusetts case demonstrates this type of sensitivity. In that case, the local bankruptcy judge's personal attention and visit to the debtor housing project helped "defuse a seriously and emotionally charged situation" and "led to a positive outcome of the case."[115] Although not every debtor who files in New York or Delaware engages in forum shopping, many of these debtors could not convincingly show that proceeding in those courts would be in harmony with bankruptcy's and venue's ties to location. When debtors try to escape their local problems by evading local courts and filing in a distant locale, they obscure bankruptcy's local nature, risk fragmenting their estates, and contribute to the creation of a centralized system that is contrary to the foundations upon which our judicial system is built.

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111. *In re* Malden Mills Indus., Inc., 361 B.R. 1, 6 (Bankr. D. Mass. 2007) (citing debtor's counsel's argument that debtor refiled in Delaware to deal with a "business problem" and so as "not to be 'burdened by the legacies of the prior [Massachusetts bankruptcy cases]' ").

112. *Id.* at 10 ("[O]ne might even surmise that [the debtor's venue selection] was designed to make the venue *inconvenient* and expensive for some, a fact strongly implied by Debtor's counsel both in this Court and before Judge Kevin Gross in Delaware.").

113. *Id.* (emphasizing the court's familiarity with the facts, litigants, plan of reorganization, and the debtor's troubles).

114. *See, e.g.*, Weissenberger, *supra* note 4, at 524 (2003) (discussing how local courts understand how important a debtor can be to a local community); *see also* Rosner, *supra* note 14, at 9 (describing the bankruptcy of Banning Lewis Ranch Company, which operated one real estate development in Colorado and filed for bankruptcy in Delaware to avoid restrictions placed on it by the City of Colorado Springs and explaining that the City's motion for a change of venue was denied by the Delaware court).

115. *See, e.g.*, Califano, *supra* note 11, at 22 (discussing *In re* Franklin Park Development I, 64 B.R. 253 (Bankr. D. Mass. 1986)).

B. Equality and Balance

In addition to severing bankruptcy's ties to location, forum shopping disrupts the balance the Bankruptcy Code seeks to strike between debtors and creditors. Principles of equality and balance formed the bedrock upon which the Bankruptcy Code was constructed. The 1973 Commission on the Bankruptcy Laws of the United States, tasked with proposing new bankruptcy laws for the country, stressed this balance in two of their goals for the new Code: (1) open access for both debtors and creditors to the bankruptcy process and (2) fair and equitable treatment of creditors' claims.[116] Thus, bankruptcy policy recognizes the fundamental idea of balance: paying attention to the interests of all stakeholders helps the debtor, and vice versa.[117] When debtors engage in forum shopping, they disrupt this balance by grabbing power and focusing the case only on themselves, without regard to the rights and interests of others.

Many modern scholars and practitioners have also recognized the importance of this balance to the effective use of bankruptcy: the interests of the debtor, creditors, and all stakeholders must be considered for the system to work properly and to prevent a rush on the debtor's assets.[118] In spite of this principle calling for focus on debtors *and* creditors, debtors who forum shop predictably minimize the interests of their stakeholders to maximize their own self-interest.

1. Concentration of Power

When debtors forum shop, power is concentrated in the hands of the few at the expense of the many. When a case is filed in a distant jurisdiction, certain creditors may have trouble obtaining information about the case and therefore effectively participating in it. Meanwhile,

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116. COMM'N ON BANKR. LAWS, REPORT ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 76–77 (1973).

117. Clifford J. White III, *Why U.S. Trustee Enforcement Should Not Yield to Debtor and Creditor Preferences*, AM. BANKR. INST. J., March 2013, at 28, 28 ("Congress designed the bankruptcy system to operate for the benefit of all stakeholders—the debtor, its employees, large creditors, small creditors and the general public.").

118. *See* WARREN, *supra* note 42, at 170 ("[P]lan-confirmation provisions . . . also implicate another careful bankruptcy balance: the balance between the interests of the decision makers who file for bankruptcy and the interests of other parties in the case. . . . If this careful balance were upset, bankruptcy policy goals would be compromised."); *Legislative Highlights*, *supra* note 68, at 10 (describing the goal of the American Bankruptcy Institute as balancing the effective reorganization of the debtor with the preservation and expansion of jobs and the maximization and realization of asset values for all creditors and stakeholders); Vance & Barr, *supra* note 28, at 372 ("Bankruptcy . . . protects creditors as well by providing them a single, collective process through which each should expect fair and orderly treatment.").

the debtor and its powerful supporters—including its lawyers and postpetition lenders—run every aspect of the case. This could result in disparate treatment of similarly situated creditors.[119] Because venue decisions are in place from the time a case is filed, this power concentration occurs right at the beginning of a case and is difficult to break. The results can be disastrous.[120]

The strategic advantage a debtor obtains by situating a bankruptcy case in a faraway locale could cause minority creditors to vote for a plan that is not in their best interests in order to avoid protracted litigation in a distant jurisdiction. Professors Lynn LoPucki and Joseph Doherty have argued that because creditors only vote on a plan at the end of a case, more powerful players, such as the debtor's managers, attorneys, or postpetition lenders, have no incentive to select a venue that will protect the interests of smaller creditors.[121] Indeed, without a venue discussion in the court proceedings, these parties have no reason or inclination to consider the interests of anyone other than themselves.

Somewhat counterintuitively, the authors found that this venue choice actually maximizes the disfavored creditors' incentives to vote for a plan because the alternative option of continuing the case in the same distant court is less attractive than ending the case and moving on.[122] In this way, parties vote for a plan that they ought to have objected to. This harms the parties and, ultimately, the debtor, whose problems with these parties may continue postbankruptcy.

Reforming venue may be the only way to give small stakeholders a meaningful opportunity to stand up for their interests in a bankruptcy case. Bankruptcy judges are often on the sidelines when a plan is being negotiated, and they may not be able to evaluate a plan accurately due to information asymmetries and a one-sided story from the powerful parties.[123] Thus, they are not in a strong

119. For an example of Code equality being disrupted, see Vance & Barr, *supra* note 28, at 385–86 (describing the Sun TV bankruptcy and how consumers received nothing in the bankruptcy, despite having priority status under the Code, while the company's secured creditors received both the goods the consumers had purchased and the money the consumers had paid for those goods).

120. *See* LoPucki & Doherty, *supra* note 7, at 1415–16 (2006) (noting that there are virtually no important decisions made later in the case).

121. *Id.* at 1416.

122. *Id.*

123. Miller, *supra* note 105, at 2011:

> Chapter 11 provides no role for the court to participate in the formulation of a plan and only gives the court a limited ability to determine the feasibility of a plan . . . [once a plan is proposed], a bankruptcy court will usually defer to the professed expertise of the parties' financial advisors, investment bankers, and other plan advocates, and confirm the proposed plan.

position to determine the best interests of these smaller stakeholders by the time they examine the plan. Because venue serves as the initial source of the debtor's power over the plan negotiation and confirmation processes, it is critical to focus on making changes at the beginning of the case.

2. A Debtor-Focused Bankruptcy

Although bankruptcy is meant to be a collective process, that does not stop each party from acting in its own self-interest. Forum shopping helps powerful parties focus the bankruptcy case on their interests only, to the exclusion of other stakeholders. While the interests of the debtor and other powerful parties are critically important in a bankruptcy case, the Code's objective of maximizing the debtor's value benefits not only the debtor but *all* stakeholders.[124] Allowing a handful of powerful parties to take over a bankruptcy case will potentially exclude other parties' interests and reduce the benefits to those parties.[125]

Because the powerful parties do not owe a duty to other creditors, they act only in their own self-interest and often impair the debtor's value to the detriment of other creditors.[126] Permissive venue rules encourage self-interested behavior by allowing powerful parties, such as a postpetition lender who mandates that a debtor file in a particular venue as a condition of lending, to control a case at the outset by virtue of its location. The result is a race to the debtor's assets, exactly the situation bankruptcy is designed to prevent.[127] These "races" are becoming more widespread: a 2011 survey conducted by Professors Michelle Harner and Jamie Marincic found that nearly ninety-two percent of professionals and fifty-eight percent of creditors committee members indicated that creditors' self-interested behavior is the most common reason that disputes arise among creditors.[128]

Proposed methods for remedying the role self-interest plays in a bankruptcy case often do not recognize that venue is a powerful mechanism in allowing this self-interest to arise. For example, Harner and Marincic suggest that establishing a creditors committee can help

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124. Klee, *supra* note 67, at 223.

125. Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U. L. REV. 1155, 1158 (2011).

126. *Id.*

127. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 407 (2012) ("[B]ankruptcy policy concerns itself with providing an *orderly, collective* proceeding pursuant to which the assets and/or income of the debtor are distributed to creditors." (emphasis added)).

128. Harner & Marincic, *supra* note 125, at 1180.

mitigate takeover effects by one powerful party.[129] The authors found that a diverse mix of active creditors with varying interests increases returns to all creditors in a Chapter 11 case.[130] But encouraging parties to participate in a case will not work if parties do not have the means to organize into committees in the first place, which is often the case when more powerful parties have situated a case away from these stakeholders. Because venue contributes to the balance-of-power problem in bankruptcy, venue must be part of any solution seeking to combat this problem.

Bankruptcy does not exist solely to protect debtors: small creditors, shareholders, and employees deserve the Code's protection as well.[131] Although the bankruptcy system was designed to accommodate the interests of all parties, in practice, larger bankruptcy proceedings have become increasingly focused on catering to the power players at the expense of the little guys.[132] When forum shopping enables a debtor to promote its interests to the exclusion of others, it distorts the Code's intended balance between debtors and creditors.[133] Debtors thwart fairness when they use the venue statutes to forum shop and to gain more power for themselves.

C. Preventing Meaningful Participation

Perhaps the largest concern is that forum shopping can silence voices that have a right to be heard. Parties whose rights are affected by a proceeding need the opportunity to participate in that proceeding.[134] This principle is evident in the bankruptcy venue transfer statute: the focus on "convenience of the parties" shows that participation matters and that deciding where to situate a case ought

129. *Id*. at 1159.

130. *See id.* at 1179 (comparing returns in cases with multiple creditor committees, one creditor committee, or no committee).

131. *See* WARREN, *supra* note 42, at 72 ("The balance of power in the Code depends in critical part on the interest and involvement of the creditors."); Kuney, *supra* note 48, at 28 n.48 (2004) (citing scholarship and cases noting that unsecured creditors, shareholders, and employees are the intended beneficiaries of the bankruptcy system).

132. *See* WARREN, *supra* note 42, at 57 (describing how "those with the money often call the shots" in bankruptcy).

133. *See id.* at 28.

134. *See* Robert Haskell Abrams, *Due Process and the Situs of Bankruptcy Litigation: Defending the Reform Act of 1978 Against Constitutional Attack*, 1982 ANN. SURV. BANKR. L. 4, pt. I (noting that bankruptcy courts should be sensitive to claims of inconvenience in venue-transfer proceedings when one of the parties has abused the venue statute to attempt to get opponents to relinquish their legal rights).

to turn on considerations about where the stakeholders are.[135] It is also recognized in the Bankruptcy Rules: Rule 2018 permits the State Attorney General to intervene on behalf of consumer creditors and gives labor unions the right to represent the debtor's employees.[136] Similarly, Rule 6003 provides for a waiting period before the court can grant certain relief, in order to allow more parties notice and an opportunity to be heard.[137]

Most importantly, this principle is grounded in basic due process considerations.[138] In both bankruptcy and nonbankruptcy cases, these considerations give people a voice without regard to the legal merits of their underlying claims.[139] Concerns for procedural fairness are grounded in bankruptcy's roots in equity;[140] however, in modern large bankruptcies, these concerns are often forgotten.[141] Because venue choice has the potential to affect the rights of all stakeholders in a case, providing notice to all stakeholders is critical. When a debtor files a case in New York or Delaware simply to suit its

135. *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, *supra* note 18, at 93.

136. FED. R. BANKR. P. 2018(b), (d).

137. *Id.* at 6003; *see also* Alan N. Resnick, *The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases*, 47 B.C. L. REV. 183, 210–11 (2005) (describing how Rule 6003 was enacted in reaction to criticism about bankruptcy first-day motions being granted without sufficient notice and opportunity to be heard).

138. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (discussing the due process requirements of reasonable notice and a meaningful opportunity to be heard); *In re* First St. Holdings NV, LLC, No. NC–11–1729–MkHPa, 2012 WL 6050459 (B.A.P. 9th Cir. Dec. 5, 2012) (applying due process considerations in the bankruptcy context to conclude that party lacked notice of court's intention to enforce scheduling deadline); Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 483 (2006) ("A full and fair opportunity [to be heard] includes a right to sufficient advance notice of the hearing and the delivery of copies of the relevant documents on which such a determination is sought.").

139. *See* United States *ex rel.* Collins v. Claudy, 204 F.2d 624, 627 (3d Cir. 1953) ("[R]egardless of the merits, the establishment of the essential issues in a civil or criminal case must be after reasonable notice and opportunity to be heard if the procedure is to meet the standards of due process."); *In re* B.L. of Miami, Inc., 294 B.R. 325, 334 (Bankr. D. Nev. 2003) ("[P]articipation [in the reorganization process] is a fundamental predicate of Chapter 11.").

140. *See In re* Fairchild Aircraft Corp., 184 B.R. 910, 927 (Bankr. W.D. Texas 1995) (noting that concerns for procedural fairness in bankruptcy are age old and describing how, because the bankruptcy process is rooted in equity, courts have an affirmative duty to assure that the process has a fair and equitable result).

141. *See* Bufford, *supra* note 138, at 482 n.400 (2006) (describing the "custom" that has developed in U.S. bankruptcies where notice to creditors is limited in most matters to those on a "special notice list" but remarking that, in the international context, notice of venue-related motions should go to all parties in interest).

preferences, smaller stakeholders might be left helpless as decisions about the case are made by sophisticated players in a faraway court.[142]

Forum shopping disadvantages those who cannot participate in a distant case due to lack of time, money, or other resources.[143] As a result, meaningful participation by more than a handful of powerful parties is often missing in modern cases.

1. The Rise of Prepacks

Concern about shutting out stakeholders should be particularly high in the context of an increasingly popular bankruptcy method: prepackaged bankruptcies (hereafter, "prepacks"). In the prepack process, the debtor, its postpetition lender, and a handful of creditors negotiate and agree upon a solution outside of court. The parties then push their solution through bankruptcy court.[144] Allowing a debtor to choose a faraway venue compounds problems of transparency already present in prepacks.

In a typical prepack, for example, the debtor negotiates primarily with only a few major stakeholders.[145] When the debtor actually files for bankruptcy in court, stakeholders who were not involved in the initial negotiations are forced to play catch-up, learning as much as they can about the deal the debtor has struck before voting on a plan or otherwise getting involved. Ensuring that the debtor in a prepack bankruptcy case files in a venue that is convenient to minor stakeholders would alleviate problems stemming from the lack of public disclosure that increasingly characterizes prepacks.[146] Indeed, in such a fast-moving bankruptcy case, focusing

142. *See* Austin, *supra* note 7, at 1136 ("[T]he location of a bankruptcy case may well be dispositive of the rights of the parties.").

143. Vance & Barr, *supra* note 28, at 385–86 ("[D]istance serves to disadvantage creditors, especially employees, consumers, or small trade creditors who lack the resources to fully vindicate their rights."). The authors also argue that in complex cases, this argument diminishes because the disadvantage by distance would be present wherever the case is situated for all but the largest creditors; however, even complex cases may have a center of operations or other indicators of where the majority of the affected parties is located.

144. WARREN, *supra* note 42, at 165 ("To make matters easier, under local rules adopted in some of the federal district courts around the country . . . pre-packs can proceed with far less public disclosure of information in bankruptcy court than the ordinary Chapter 11.").

145. *Prearranged and Prepackaged Restructurings*, KIRKLAND & ELLIS LLP, http://www.kirkland.com/sitecontent.cfm?contentID=218&section=5&subitemid=586&itemid=767, *archived at* http://perma.cc/WW25-Y2VW (last visited Oct. 17, 2014) (noting that the debtor negotiates restructuring terms with its major stakeholders in a prearranged bankruptcy and often enters into a lock-up or plan support agreement with these stakeholders before the case comes to court).

146. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 403, 653–54 (2008).

on venue may be the *only* way to give many stakeholders notice and a say in the outcome of a case, even if they were not involved in the negotiations.

MGM's bankruptcy is an excellent example of the dangers for unwary stakeholders in a prepackaged bankruptcy. MGM filed for Chapter 11 in New York and confirmed its plan less than thirty-five days after it filed.[147] The plan and disclosure statement that MGM distributed to its creditors indicated many times that general unsecured creditors would be "unimpaired" under the plan, meaning that their rights would not be affected by the plan.[148]

In reality, however, MGM's plan did affect these creditors' rights. For example, the plan provided that only "allowed" claims (claims that were undisputed or otherwise proven valid) would be paid in full.[149] If MGM objected to a claim, the plan required the dispute to be resolved in New York, regardless of any forum the parties had previously selected.[150] Even if the court did allow a disputed claim, under the plan MGM could appeal and delay paying the claim for as long as the appeal was pending, possibly for years.[151] Thus, the plan really did not leave all of MGM's unsecured creditors "unimpaired."

MGM also had many valuable license and distribution agreements, all of which it had assumed under the plan. Yet, due to the speed and complexity of MGM's case, the other parties to these agreements had no way to determine whether MGM had any defaults under these agreements before the plan was confirmed.[152] Because MGM had to cure any defaults to assume the agreements, it was important for these parties to know whether defaults existed. The plan provided that if a party discovered a default, it would have to litigate any dispute relating to that default in New York bankruptcy court and not in any forum contemplated by the underlying agreement.[153]

Fortunately for these parties, several creditors caught on and ultimately objected to MGM's plan. MGM then modified the plan to correct some of its problematic treatment of these groups.[154] Yet, if

147. David B. Shemano, *Prepackaged Bankruptcies: The MGM Lesson for Unsecured Creditors*, 5 BLOOMBERG L. REPS. 427, 427 (2011), *available at* http://materials.abi.org/sites/default/files/2011/Sep/BuildingBookOfBusiness.pdf, *archived at* http://perma.cc/6RL5-5TDL.

148. *Id.* at 428.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 429.

154. *Id.*

these creditors and contract counterparties had been represented and considered during the negotiation of MGM's plan, many of these problems would have been avoided. Furthermore, MGM's complex plan that allegedly left unsecured creditors' claims "unimpaired" highlights concerns about the need for representation and meaningful participation of these parties in fast-paced, complex bankruptcies.[155]

2. The Desire to Participate

Those who prefer the current bankruptcy venue rules often argue that smaller players do not actually want to participate in large bankruptcies[156] or that, because of the small nature or amount of their claims, they should not be given much time or attention.[157] But the size or merits of a claim should not excuse the failure to conform to basic principles of due process. And, as we will see below, the premise that stakeholders do not want to participate is untrue in many cases. Small stakeholders do want to participate. Even though many do not come to court or file motions,[158] this does not mean that they cannot valuably contribute to the proceedings by expressing their interests or sharing ideas. Additionally, although an individual claimant's stake in the case may be small, that individual may be part of a larger group of similarly situated (yet unrepresented) stakeholders, whose claims all add up to a significant amount.

When debtors forum shop and situate a case away from stakeholders and those most familiar with the debtor's operations, even informal opportunities to participate in the case are lost.[159] In practice, "interested parties often go down to the local bankruptcy court and meet other similarly situated parties, share information, and develop [informal] alliances . . . to protect their interests."[160] These efforts may ultimately affect the committees formed in the bankruptcy case and can help to shape the debtor's plan of

155. *Id.*

156. Skeel, *supra* note 7, at 310 ("Most small creditors have little involvement in large cases anyway.").

157. *See* Bringardner & Zimmerman, *supra* note 102 (describing debtor's arguments that employees and retirees are unlikely to come to court and would not need to be present in the courtroom).

158. *See id.* ("Experience has shown that the most frequent attendees at court hearings . . . are the debtors' professionals, the lenders' professionals, and other material counterparties and their professionals.").

159. Califano, *supra* note 11, at 22.

160. *Id.*

reorganization.[161] If the bankruptcy takes place in a far-off location, however, "these parties will not be able to take advantage of this informal networking opportunity and their contributions will be [at best] minimized."[162]

The argument that stakeholders do not want to get involved erroneously equates lack of participation in court proceedings with lack of interest. It fails to recognize that parties often lack the freedom to decide whether to get involved in a faraway case. As the two prominent mega cases described immediately below demonstrate, small stakeholders were vocal in their desires to participate in the proceedings.

a. Enron

Consider again the case of Enron, a massive energy company incorporated in Oregon.[163] When Enron filed for bankruptcy, it was the largest bankruptcy in U.S. history (it was later surpassed by WorldCom).[164] Approximately four thousand people, many of them in Texas, lost their jobs because of the bankruptcy.[165] At the time of its bankruptcy filing, Enron had 7,500 employees in Houston, Texas, including its entire management team and an extensive operations center.[166] Only sixty-three employees were based in New York, where Enron chose to file for bankruptcy.[167]

To make it easier for small stakeholders to participate in the case, a group of creditors and state officials moved to transfer venue of the bankruptcy cases to the Southern District of Texas. The moving parties argued that Houston was closer to Enron's operations, assets, creditors, and witnesses and that it would be cheaper for the case to be

161. *Id.*; *see also* Rosner, *supra* note 14 (describing the bankruptcy of Pacific Gas & Electric Company, which filed near its main operations center in Northern California, where a small group of homebuilders formed an informal committee that negotiated with the debtor; as a result, the debtor assumed all of the contracts with the homebuilders, which contracts otherwise might have been delayed or jeopardized).

162. Califano, *supra* note 11, at 22.

163. WARREN, *supra* note 42, at 185.

164. 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, http://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html, *archived at* http://perma.cc/X5AT-7ZS2.

165. Catherine Valenti, *A Year After Enron, What's Changed?*, ABC NEWS (Nov. 27, 2002), http://abcnews.go.com/Business/story?id=86817&page=1&singlePage=true, *archived at* http://perma.cc/4WGN-KGGV.

166. WARREN, *supra* note 42, at 185.

167. *Id.*

administered there.[168] Judge Arthur Gonzalez of the Bankruptcy Court for the Southern District of New York refused to transfer the cases, holding in essence that New York City is the perfect venue for large-scale mega cases. Therefore, New York was presumptively allowed as a venue for Enron.[169] The court acknowledged that Enron's business affected parties around the world but insisted that electronic filing would allow all parties to access the case docket.[170] This was small comfort to Enron's employees, who organized outside of court in an attempt to pool resources so that they could participate in the proceedings.[171] The group raised $360,000 and ultimately succeeded in persuading the court to agree to more generous severance packages; however, the amounts these employees received were significantly less than what they had lost, while many Enron executives walked away seemingly unscathed.[172]

Would Enron's employees have fared better in Houston? It is clear that the effects of Enron's bankruptcy were most greatly felt in Houston. Although Enron was headquartered in Oregon, its "nerve center" was almost certainly in Houston, where Enron's management and operations were located. A judge in Houston might have been more sensitive to the bankruptcy's impact on employees and the city of Houston and therefore allowed Enron's employees more opportunity to influence the outcome of the case.[173] Additionally, Enron's employees would have felt more comfortable coming to court and taking advantage of the informal networking opportunities described above,

168. *Dynegy Wants Enron's Bankruptcy Case in Houston*, NATURAL GAS INTELLIGENCE (Dec. 10, 2001), http://www.naturalgasintel.com/articles/58138-dynegy-wants-enron-s-bankruptcy-case-in-houston, *archived at* http://perma.cc/T4J2-FC79. Ironically, despite Dynegy pushing for Enron to move its bankruptcy case to Houston and despite the fact that Dynegy itself is based in Houston, when Dynegy filed for bankruptcy a few years later, it chose to file in Poughkeepsie, New York. *See* Mike Spector, *Dynegy Files for Unusual Bankruptcy*, WALL ST. J., Nov. 8, 2011, http://online.wsj.com/news/articles/SB10001424052970204554204577024311666924248.

169. *In re* Enron Corp., 274 B.R. 327, 351 (Bankr. S.D.N.Y. 2002) ("The fact that New York is a financial center . . . make[s] New York the most efficient forum for administering these cases."); Weissenberger, *supra* note 4, at 518 ("The *Enron* court said that because New York City is so convenient for everyone to deal with these kinds of large scale, mega cases, New York as the venue is presumptively allowed.").

170. *In re* Enron Corp., 274 B.R. at 347.

171. Martin Kady II, *Ex-WorldCom Workers Unite, Fight Back*, WASH. BUS. J. (Aug. 12, 2002, 12:00 AM), http://www.bizjournals.com/washington/stories/2002/08/12/story5.html?page=all, *archived at* http://perma.cc/YPY4-VD3U.

172. *See* Valenti, *supra* note 165 (explaining Enron CEOs Ken Lay and Jeffery Skilling have not been charged with any crimes).

173. *See* Nancy Sarnoff, *Enron's Collapse May Have Ripple Effect on Downtown Office Market*, HOUS. BUS. J. (Dec. 9, 2001, 11:00 PM), http://www.bizjournals.com/houston/stories/2001/12/10/newscolumn3.html?page=all, *archived at* http://perma.cc/4E4V-SEW2 (discussing the negative impacts on the Houston commercial office market if Enron were to file bankruptcy).

and they would likely not have had to spend such a significant sum in order to do so.

To summarize, Enron's bankruptcy precipitated a global financial meltdown, but it also had a substantial local impact. Having a court familiar with the local effects of Enron's failure may have given Enron's employees a greater voice in the proceedings that substantially affected their lives. Indeed, many in Congress recognized this and introduced venue reform legislation in 2005 as a response to Enron's forum shopping.[174]

b. WorldCom

Enron's reign as the largest bankruptcy in U.S. history was short-lived; WorldCom quickly followed on Enron's heels. WorldCom was a communications company headquartered in Mississippi.[175] The company filed for bankruptcy in the Southern District of New York in 2002, emerging two years later with $5 billion in debt and $6 billion in cash,[176] about half of which was set aside to pay various claims and settlements.[177] WorldCom's former bondholders were paid $0.36 on the dollar in bonds and stock in the new company.[178] The previous stock was canceled.[179] When WorldCom emerged from bankruptcy, many of its creditors remained unpaid, including former employees who were dismissed shortly before the company filed for bankruptcy and whose severance and benefits were withheld after the filing.[180]

WorldCom was a complex bankruptcy with myriad problems, but one thing was clear throughout the case: the company's employees and stockholders felt that they had been shut out of the bankruptcy altogether. After the company filed for bankruptcy, former WorldCom employees seeking payment for their severance benefits formed the

174. Curriden, *supra* note 5. For a discussion of this legislation, see *supra* Part II.A.

175. Jeff Clabaugh, *MCI Dumps WorldCom Name, Relocating Headquarters*, TRIANGLE BUS. J. (Apr. 14, 2003, 11:39 AM), http://www.bizjournals.com/triangle/stories/2003/04/14/daily4.html, *archived at* http://perma.cc/KGP2-V7X7. The company relocated to Ashburn, Virginia, after MCI purchased it in 2003. *Id.*

176. *MCI Emerges from Bankruptcy*, CNN MONEY (Apr. 20, 2004, 10:17 AM), http://money.cnn.com/2004/04/20/technology/mci_bankruptcy/, *archived at* http://perma.cc/A65K-AATV.

177. *WorldCom Bankruptcy Plan Wins Judge's Approval (Update 2)*, BLOOMBERG (Oct. 31, 2003), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adJgtYEEpmu8, *archived at* http://perma.cc/XRN8-SYR8.

178. *Id.*

179. *Id.*

180. *Laid-off Workers to WorldCom: Pay Our Severance*, USA TODAY, Sept. 9, 2002, http://usatoday30.usatoday.com/money/industries/telecom/2002-09-09-worldcom-severance_x.htm, *archived at* http://perma.cc/Y69S-59PV.

"exWorldCom 5100" group.[181] The "5100" represented the number of employees dismissed immediately before the filing.[182] With no way to participate meaningfully in the bankruptcy case,[183] these employees instead used an Internet website to organize outside of bankruptcy.[184]

The WorldCom stockholders also organized. This group formed a website to serve as an online meeting place and forum where they could discuss their concerns, including how to find counsel to represent them in New York.[185] The group posted multiple statements on the website to reflect their concern that they could not participate in WorldCom's bankruptcy because the New York-based trustee had refused to appoint a committee to represent their interests.[186] Several selections from the website are worth reprinting in their entirety, as they reflect a firsthand account of how these stakeholders felt shut out and overpowered by forces beyond their control:[187]

- "The bondholders have exploited [the Trustee's failure to appoint an equity committee] and taken total control of the bankruptcy reorganization process."
- "The stockholders have been excluded from effective participation in the creation of the reorganization plan by the . . . decisions made by bureaucrats in the New York district."
- "Stockholders need to have some presence in the bankruptcy court to take the necessary legal steps that oppose the original plan and request creation of a better plan."
- "The company management . . . [has] been given virtually unlimited power . . . . They consider themselves to be invulnerable in bankruptcy court."

These stockholders obviously wanted a greater say in WorldCom's bankruptcy proceedings, which significantly impacted them. Because they could not participate actively themselves, they

181. Kady, *supra* note 171.

182. *Id.*

183. *Id.* (quoting a former employee who noted that "there's no one to talk to and it's hard to get information").

184. *Id.*

185. *Background Document on the WorldCom/MCI Bankruptcy*, WORLDCOM/MCI STOCKHOLDER WEB SITE, http://www.wcom-iso.com/ou4001.html (last visited Oct. 9, 2014), *archived at* http://perma.cc/Z3HK-BD4U.

186. *Id.*

187. *Id.* All quotations are taken from the stockholders' website.

struggled to organize and find counsel who could represent them in New York.

3. Appropriate Participation and Harm to Debtors

There is, of course, a fine line between enabling small parties to participate in a case and allowing those parties' interests to dominate and overcomplicate a case. Indeed, many debtors argue that they file far from "home" to prevent employees and other stakeholders from coming to court and "[making] things difficult."[188] Yet when a company has benefitted from local stakeholders and policies, filing in a faraway jurisdiction can leave the home jurisdiction feeling betrayed and less likely to offer companies incentives to locate there in the future.[189] Furthermore, filing so far from home that local stakeholders cannot participate *at all* creates its own problems. A court may need to decide the extent to which smaller issues are discussed in a large case, but the opportunity for stakeholder involvement must be made feasible in the first place, something that did not happen in *Enron* or *WorldCom*.[190] Indeed, possessing the opportunity to get involved in a case is one of the most important rights a stakeholder has.[191]

Silencing the voices of small stakeholders harms the debtor as well as the silenced parties.[192] For example, small stakeholders can draw a debtor's attention to problems that the debtor may have otherwise overlooked or underestimated. Professors LoPucki and Doherty documented the refiling rates in bankruptcy courts across the country and determined that the rates in New York and Delaware are

188. *See* Weissenberger, *supra* note 4, at 523 ("[T]he reason [United Airlines] may not have wanted to file [bankruptcy] in Chicago [its home court] is because it's a very easy place for all the employees to come to court, make things difficult, and have more of a presence in the bankruptcy proceedings.").

189. *See, e.g.*, *Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the H. Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, *supra* note 23, at 39–40 (statement of Hon. Frank J. Bailey, U.S. Bankr. Ct., D. Mass.) (expressing concern that Evergreen Solar, a company that had taken advantage of many favorable Massachusetts incentives, had chosen to file for bankruptcy in Delaware).

190. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.").

191. Bufford, *supra* note 138, at 484 (2006) ("One of the most important procedural rights in a court is the right to present evidence on one's own behalf.").

192. Indeed, silencing these voices may be harmful to society as a whole. *See* Rosner, *supra* note 14, at 15 ("Absent widespread input, legal discourse begins to decline, predictability becomes paramount and constituents (including the general public) become more disillusioned and indifferent.").

higher than in other courts.[193] The authors conclude that this refiling occurs not because of the companies but because of the way that the courts (particularly Delaware) hear cases and confirm plans.[194] The authors note that "no party wants the firm to actually face up to its problems" and that "the Delaware bankruptcy court's certification [of a plan] has not only been cheap, quick, and easy to obtain, but it has also had even greater credibility than the certification of other courts."[195] Accordingly, the authors suggest that repeat trips to bankruptcy court show that a debtor's problems are not adequately addressed the first time around. Although this is only one of many possible conclusions the authors could have reached from the data, it raises the possibility, present in at least some of the cases, that by creating plans that do not adequately account for local problems, debtors may need to file for bankruptcy a second time to correct these issues.[196]

The current bankruptcy venue rules and procedures have created a system that too often fails to recognize and involve small stakeholders in large bankruptcy cases. In spite of the principles and policies in favor of hearing cases in locales where more parties can participate,[197] many cases still play out in communities that do not have a significant interest in the outcome of the case. What can be done to change these rules and procedures and to help realign bankruptcy with its foundational principles? Before turning to the proposal advocated by this Article, it is helpful to examine why proposals that seek to curb a debtor's choice of venue options may create more problems than they solve.[198]

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193. Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1939 (2002).

194. *Id.* at 1983–85. This view has been challenged by others who argue that external factors occurring after a company's emergence from bankruptcy may also cause refiling. *See, e.g.*, Miller, *supra* note 105, at 2005 (describing the multiple filings of Continental Airlines).

195. *See* LoPucki & Doherty, *supra* note 195, at 1983–85.

196. The Memorex Telex bankruptcies are an illustration of a company rushing through its first Chapter 11 filing and ignoring key problems. *See* Mitch Maurer, *Bankruptcy Court OKs Memorex Telex Reorganization Plan*, TULSA WORLD (Mar. 15, 1994, 12:00 AM), http://www.tulsaworld.com/archives/bankruptcy-court-oks-memorex-telex-reorganization-plan/article_71ad9736-5b31-5527-b817-65047aa1bfdb.html, *archived at* http://perma.cc/E43Y-4EJV. When Memorex Telex filed a preapproved Chapter 11 reorganization plan in 1992, it was the fastest Chapter 11 proceeding of its time. *Id.* Two years later, however, the company was back in bankruptcy court. *Id.*

197. *See, e.g.*, Goldman, *supra* note 12, at 26 (2010) (noting that changes to the venue transfer statute expanded the court's transfer powers and "should result in a greater willingness to transfer cases").

198. Proposals to curb debtor choice are prevalent throughout scholarly literature and legislation. *See, e.g.*, Chapter 11 Bankruptcy Venue Reform Act of 2011, H.R. 2533, 112th Cong. (2011) (proposing the debtor's state of incorporation as a venue option); Parikh, *supra* note 12, at

IV. THE VALUE OF FORUM SHOPPING

To solve the forum-shopping problem, a number of scholars and members of Congress have suggested that the bankruptcy venue rules should be changed to restrict debtor choice.[199] This Part argues that such proposals are unlikely to succeed, both because forum shopping can positively affect certain cases and because these proposals do not account for some of the negative effects outlined in Part III.

A. Problems with Curbing Forum Shopping

Many practitioners and scholars argue that forum shopping is necessary—and may even be an ethical requirement—for zealous client representation.[200] Lawyers have a duty to represent their clients to their best ability, and finding the most favorable forum available is part of that duty. In bankruptcy in particular, filing a case in a specific forum may help a debtor seal a deal with a lender who is on the fence about providing necessary postpetition financing. Or it may ensure that a case is heard by a judge with expertise in handling complex corporate cases.[201] Nevertheless, lawyers' ethical duties toward zealous representation do not always mesh with what is utility maximizing for debtors, stakeholders, and society as a whole.

Debtors may be inclined to file a case in Delaware because of Delaware's reputation as a corporate law center, or they may choose New York because of its strong connections to capital markets and finance. Thus, in certain cases, forum shopping's benefits may outweigh its bad effects. Restricting debtors' choice of venue could eliminate these benefits.

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200 (proposing to restrict venue for corporations to the location of the debtor's principal place of business or principal assets or to a district where there is a pending case against the debtor's affiliate if the debtor has a "meaningful connection" to the affiliate's district); Rasmussen & Thomas, *supra* note 12, at 1397 (proposing to restrict bankruptcy venue choice to selections made when a firm seeks capital in the markets).

199. *See* sources cited *supra* note 198.

200. *See, e.g.*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 111 (1999) ("[E]thical rules require attorneys to use rules and procedures to the fullest benefit of their clients"); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336 (2006) ("[F]orum shopping is a strategy for the purpose of finding the most favorable set of rules for litigation."); Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 25 (2005) (noting that forum shopping was "simply the first step" in achieving the goal of prevailing for one's client); Miller, *supra* note 105, at 1988 ("Choosing the most favorable venue in which to commence a case is one of the responsibilities that an attorney owes his client.").

201. Miller, *supra* note 105, at 1990 ("[A] debtor must consider [a] court's past experiences and performances in administering Chapter 11 cases of comparable size and/or complexity.").

In some ways, forum shopping may also be consistent with bankruptcy's policy of helping the debtor—part of the overall balance between debtors and creditors. The venue rules encapsulate the idea that the debtor should have a choice of locations where its affairs will be sorted out, and giving the debtor a range of options may help improve its chances of a successful reorganization.[202] Those who advocate restricting a debtor's venue choice by, for example, removing the option for debtors to file in their state of incorporation, ignore the value of debtor choice.

Restricting venue choice may also cause suits to be filed in inappropriate courts. For example, restricting a company's filing to the location of its corporate headquarters may be ineffective if the debtor's true "nerve center" is somewhere else. The H.J. Heinz Company, for instance, is headquartered in Pittsburgh, Pennsylvania, but the company has negligible operations in Pittsburgh.[203] If Heinz was required to file for bankruptcy in Pittsburgh, the same problems described in Part III would likely arise because the bankruptcy would take place far from most of Heinz's stakeholders.

Requiring companies to file only where their nerve center is located creates different problems. For example, certain companies, such as resorts and hotel chains, may lack a true nerve center for purposes of a bankruptcy filing. Where is the nerve center of Hilton Worldwide, a company that manages 4,200 hotels in ninety-three countries?[204] Is it in McLean, Virginia, the site of Hilton's headquarters? In Memphis, Tennessee, the site of its operations center? In one of its three regional offices around the globe? At its customer care center in Carrolton, Texas?[205] Establishing a bright-line

202. *See* LoPucki & Whitford, *supra* note 12, at 14–15 (1991) ("Policymakers at least occasionally intend to permit venue choice or even forum shopping . . . . the statute governing venue in bankruptcy clearly permits venue choice."); Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 492 (2006) (noting Congress's reluctance to limit a debtor's choice of venue); Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1153–54 (2006) (describing how choice among competing jurisdictions encourages competition to improve the law and enables parties to escape from inefficient courts and legal systems).

203. *See* Teresa F. Lindeman, *Heinz Production Returning to Pittsburgh, with Baby Food*, PITTSBURGH POST-GAZETTE (Sept. 17, 2014, 12:00 AM), http://www.post-gazette.com/business/2014/09/17/Heinz-production-returns-to-Pittsburgh/stories/201409160068, *archived at* http://perma.cc/7NGT-45LP; *About Heinz*, HEINZ, http://www.heinz.com/our-company/about-heinz.aspx, *archived at* http://perma.cc/8PGZ-RA8T (last visited Oct. 11, 2014). This example was also referenced in Richard Cieri et al., First Panel at the DePaul Business and Commercial Law Journal Symposium: Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies (Apr. 10, 2003), *in* 1 DEPAUL BUS. & COM. L.J. 515, 523 (2003).

204. *About Us*, HILTON WORLDWIDE, http://hiltonworldwide.com/about/, *archived at* http://perma.cc/8RP2-LJ28 (last visited Oct. 11, 2014).

205. *Id.*

rule that limits the debtor's choice of venue in some way is particularly problematic with mega cases because these cases are often complex, with many variables and unknowns. Every mega case, and indeed every debtor, is different. Proposals dealing with forum shopping must be flexible enough to accommodate these differences in order to create the best outcome for all parties involved.

Finally, attempts to restrict venue choice have been unpopular in practice, likely due to the hold that Delaware and New York already have on mega cases.[206] Thus, proposals that seek to eliminate forum shopping entirely are, at this stage at least, impractical.

In short, prior attempts to curb forum shopping often did not recognize that, in some cases, forum shopping has value. That value needs to be weighed against the drawbacks of forum shopping in each particular case, not discarded entirely. Forum shopping is not necessarily bad simply because it can produce negative effects, and many proposed remedies may be too harsh or impractical given forum shopping's potentially positive aspects.[207] The proposal outlined below recognizes that forum shopping is an inherent part of many bankruptcy cases and seeks to mitigate its negative effects in the cases where it has the ability to do the most harm.

B. Technology's Role in Mitigating Stakeholder Shutout

Before moving on to the proposal, it is worth addressing one common argument put forward by proponents of forum shopping: technology's potential to reduce forum shopping's negative effects. Technological advances can help address problems relating to lack of stakeholder participation, but they are not a panacea for venue problems. Although all bankruptcy courts currently accept electronic filings,[208] technological glitches and other problems still abound, making remote participation inferior to face-to-face interaction in several ways.[209]

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206. Algero, *supra* note 200, at 82 ("[F]orum shopping is an intrinsic part of the American judicial system.").

207. *See, e.g.*, Parikh, *supra* note 12, at 203 (2013) (arguing that bankruptcy judges should be authorized to award sanctions for "reckless" forum shopping); Tabb, *supra* note 202, at 501–02 (2006) (proposing a specialized "reorganization court" just to hear mega cases so that venue choice is eliminated).

208. *See Courts Accepting Electronic Filings,* USCOURTS.GOV, http://www.uscourts.gov/FederalCourts/CMECF/Courts.aspx, *archived at* http://perma.cc/4PZG-8S4M (last visited Sept. 29, 2014).

209. *See, e.g.*, Patrick Cormier, *The Opportunities and Challenges of Court Remote Appearances*, SLAW (Nov. 6, 2013), http://www.slaw.ca/2013/11/06/the-opportunities-and-challenges-of-court-remote-appearances/, *archived at* http://perma.cc/DE74-HYKG (listing the

In a recent study of technology in the courtroom, Erich Schellhammer makes several observations suggesting that modern technology will not solve all of the problems that forum shopping can create.[210] For example, Schellhammer notes that stakeholders may not be aware of what technology is available to them or how it could be used.[211] This may be particularly true with smaller, unsophisticated stakeholders: even if these parties are represented by local counsel, their local counsel may not be familiar with the technology available in a different jurisdiction. Additionally, because technology changes are not always readily accepted,[212] courts may be reluctant to implement cutting-edge technology. Further, Schellhammer finds that it is not necessarily cost efficient to use remote technology, especially given the imperfect transmission of the information.[213] For example, teleconferencing only transmits the voice; it fails to communicate the speaker's nonverbal cues.[214]

For its part, video conferencing often requires a significant amount of setup and still requires the remote person to travel to the technology's location, something that may be difficult in smaller towns and cities.[215] Also, many types of business-oriented video conferencing technology are expensive and may be of poor quality.[216] Finally, Schellhammer notes that all technologies may be awkward for those unfamiliar with them, which suggests that parties using unfamiliar technology may appear distracted or uncomfortable.[217]

In short, problems with technology can make remote participation inferior to face-to-face interaction and may not present small stakeholders in their best light. Even in situations where

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difficulties of implementing remote appearances, including the need for a high-quality appearance, a camera setup allowing the remote party to see the other parties in the courtroom, and secure communication); Chris Welch, *George Zimmerman Trial Briefly Halted After Court Skype Account Bombarded with Calls*, THEVERGE.COM (July 3, 2013), http://www.theverge.com/2013/7/3/4490508/george-zimmerman-trial-halted-after-court-skype-account-barraged-with-calls, *archived at* http://perma.cc/GHH4-6DPP (describing how the court's Skype account, which was being used for remote witness testimony, was overwhelmed with incoming call requests, to the point where it was impossible to continue the testimony).

210. Erich P. Schellhammer, ASS'N OF CANADIAN COURT ADM'RS, A TECHNOLOGY OPPORTUNITY FOR COURT MODERNIZATION: REMOTE APPEARANCES, *available at* http://www.acca-aajc.ca/2012-white-paper.pdf, *archived at* http://perma.cc/9KTQ-PNWD (last visited Sept. 29, 2014). Although this is a study of courtroom technology in Canada, there is no reason to think the information ascertained would be significantly different in the U.S.

211. *Id.* at 5.

212. *Id.*

213. *Id.* at 57–58.

214. *Id.* at 67.

215. *Id.* at 75–76.

216. *Id.* at 49.

217. *Id.* at 63.

technology operates smoothly, a party's lack of physical presence in the courtroom can impede that party from adequately standing up for his or her rights.[218] For example, courts may perceive a party participating remotely as less involved or less interested, as evidenced by the phrase "phoning it in" to mean completing a task with only a minimum of effort.[219] Finally, even if technology helps small stakeholders to "appear" in the courtroom, it cannot replace the value of a presiding judge who is already familiar with the local issues at stake. Nor can technology replace the informal interactions and alliances stakeholders can form when they physically come to court.

Even if technology does become a valuable means of allowing remote access to the courtroom, more sophisticated parties could also use this technology to participate in a case situated in a courtroom that is distant from them. Indeed, because this technology is expensive and often requires special equipment, the more sophisticated party would be more able to bear the burden of using it.[220] Smaller or less sophisticated parties are less able to bear the cost and effort burden of appearing remotely.

The large financial institutions that lend to debtors are typically sophisticated players that regularly conduct business around the world. For example, JPMorgan Chase, a frequent player in mega bankruptcies,[221] describes itself as having "one of the most

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218. *See, e.g.*, Kacey Marr, *The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. CIN. L. REV. 1515, 1531–32 (2013) (arguing that "Skyping in" parolees to hearings at which their liberty is at stake violates their due process rights). Although a bankruptcy stakeholder's rights may not be as elevated as a parolee's rights in a probation hearing, the fact remains that not being physically present in court puts a party at a disadvantage compared to those who are in the courtroom.

219. The phrase "phone it in" is defined in an open-content dictionary to mean, "To fulfill a responsibility with a minimum effort rather than the appropriate level of effort." *Phone it in*, WIKTIONARY.ORG, http://en.wiktionary.org/wiki/phone_it_in, *archived at* http://perma.cc/J7PY-RGNH (last visited Sept. 29, 2014). In the Oxford online dictionary, the phrase is defined as to "[w]ork or perform in a desultory fashion." *Phone it in*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/phone-it-in, *archived at* http://perma.cc/J856-FPT3 (last visited Sept. 29, 2014).

220. For example, CourtCall is a service that provides for telephonic and video remote appearances. Use of CourtCall services requires payment of fees in addition to any telephonic appearance fee that a court may charge. CourtCall charges a separate fee for each individual party appearing by telephone so, for example, a party and his attorney would be charged twice if both wanted to appear telephonically in court. *See generally Frequently Asked Questions*, COURTCALL.COM, http://www.courtcall.com/ccallp/info?c=CCFAQ, *archived at* http://perma.cc/XY5W-JHVP (last visited Sept. 29, 2014).

221. *See, e.g.*, Kaja Whitehouse, *MF Global Clients Cry Foul over JPMorgan Tactics in Bankruptcy Recovery*, N.Y. POST, Nov. 14, 2011, http://nypost.com/2011/11/14/mf-global-clients-cry-foul-over-jpmorgan-tactics-in-bankruptcy-recovery/, *archived at* http://perma.cc/QKU9-6SK9 (noting that JPMorgan was a prominent lender in the bankruptcy of MF Global, the eighth-largest bankruptcy in US history); *Bankruptcy Matters*, DAVIS POLK & WARDWELL LLP,

comprehensive global product platforms available."[222] There is no reason why a large player like JPMorgan cannot travel or otherwise arrange for remote participation in a court located near the debtor's operational center but outside of New York or Delaware. In modern bankruptcies, however, it is the sophisticated players who insist that the debtor and all of its stakeholders come to them, not the other way around.

V. TRANSPARENCY AND ACCOUNTABILITY

Given the benefits of debtor choice and the practical limitations on eliminating forum shopping, the best reform proposal is one that preserves debtor choice but requires courts to examine whether the harms outweigh the benefits in each particular case. If we continue to value the rights of small stakeholders, the balance among all parties that the Bankruptcy Code strikes, and bankruptcy's ties to location, we must take the first steps toward reducing forum shopping in cases where it does more harm than good. Curtailing forum shopping is particularly important in cases involving small, local stakeholders. These first steps therefore require an awareness of the problems that lack of attention to venue can create and necessitate an informed conversation about venue in every large bankruptcy case.

A. Proposal

Venue transfer should be a mandatory consideration at the beginning of every large case.[223] This will ensure that venue considerations are not lost amidst the competing concerns of a large bankruptcy and give courts a chance to consider whether the case is taking place in the best possible venue. The parties who chose the case's venue[224] would be required to explain that venue choice using

http://www.davispolk.com/practices/corporate/insolvency-and-restructuring/bankruptcy-matters/, *archived at* http://perma.cc/48V3-UUQQ (last visited Sept. 29, 2014) (listing JPMorgan as a party in the bankruptcies of Polaroid, Meridian Automotive Systems, Enron, Delphi, Bethlehem Steel, and Crown Paper).

222. *About Us*, J.P. MORGAN, https://www.jpmorgan.com/pages/jpmorgan/about, *archived at* http://perma.cc/N6SH-CYY4 (last visited Sept., 29 2014).

223. At least one other scholar has suggested that the judge be required to make a venue ruling early in the case, albeit under different procedures. *See* Parikh, *supra* note 12, at 201–02 (suggesting burden be shifted to debtor to justify venue choice at outset of case).

224. These parties include the debtor and any other parties who may have influenced the debtor's venue choice, such as a lender who has conditioned financing on the debtor filing in a particular location.

the standards articulated in the bankruptcy venue transfer statute.[225] Specifically, these parties should submit briefs supporting their venue choice as part of the initial pleadings in the case. They should then argue their briefs in court no later than two weeks after the initial hearing.[226] In addition, the U.S. Trustee should submit a brief outlining the allowable venue choices under the bankruptcy venue statute. The Trustee's brief should recommend a venue based on the Trustee's knowledge of the case and the venue transfer statute factors including the interest of justice and the convenience of the parties. In this way, all possible venue options will be set before the judge.

Setting the hearing two weeks after the commencement of the case will also give other parties in interest the opportunity to receive notice and participate in the proceedings by submitting additional briefs. Indeed, because venue significantly shapes a case's trajectory, all parties in interest should be entitled to notice of when the venue hearing will take place and how they can participate in that hearing. Further, debtors should be held to strict timelines for filing financial schedules and statements early in the case.[227] Ensuring that everyone is informed and can participate will help the judge to gather information he or she might not otherwise possess about the extent of the debtor's operational difficulties.

All briefs submitted in this context should recommend or advocate for a particular venue based on the standards outlined in the bankruptcy venue transfer statute: the interest of justice and the convenience of the parties. This will force parties to justify their venue choice beyond merely checking a box on the bankruptcy petition or arguing that their venue choice falls within one of the broad allowable categories of the bankruptcy venue statute. The focus on the convenience of the parties, in particular, will help the judge to see the extent to which local issues are truly a concern in a given case.

In addition, the presumption in favor of the debtor's venue choice should be removed; instead, all venue options should be given

225. These standards and the factors used to determine whether these standards have been met are already well established. *See, e.g.*, *In re* Patriot Coal Corp., 482 B.R. 718, 740 (Bankr. S.D.N.Y. 2012) (describing the factors courts weigh to determine the interest of justice or convenience of the parties); *In re* Enron Corp., 274 B.R. 327, 343 (Bankr. S.D.N.Y. 2002) (same).

226. Another possibility is to have parties argue these briefs at the first-day hearing, if such a hearing is provided for in the jurisdiction. Yet, because first-day hearings are often ex parte, it would be desirable to wait for a brief period after the first-day hearing to give other parties the opportunity to learn about the case and participate in it. *See* WARREN, *supra* note 42, at 59; Vance & Barr, *supra* note 28, at 386.

227. This recommendation has recently been proposed in testimony delivered to the ABI Commission to Study the Reform of Chapter 11. *See* Mark A. Gittelman, *A Proposal for Changes to the Chapter 11 Administrative Process*, AM. BANKR. INST. J., July 2014, at 34 (2014).

equal consideration by the judge.[228] Eliminating the presumption will help remove venue choice from the exclusive control of the debtor and the parties influencing the debtor. Instead, all moving parties should make the case for their venue choice by a preponderance of the evidence.

After all the parties have submitted briefs and argued their positions, the judge should issue a written decision outlining the key considerations in his or her deliberations. In addition to discussing the interests of justice and the convenience of the parties, the judge should also consider what the bankruptcy case is trying to accomplish, the issues likely to arise in the case, and who will be affected by the outcome. To avoid having cases drag on in potentially improper venues, the judge should be required to issue the decision within two weeks of the hearing.

The judge's venue decision should be appealable immediately to the relevant district court to provide a check on any self-interested behavior by judges. Although venue decisions are not currently immediately appealable as a matter of right,[229] many courts and scholars have indicated that appeals from bankruptcy venue orders should be more readily obtained because of the small chance of success on an appeal that is taken after the bankruptcy case has been closed.[230] The harmful effects for small stakeholders if the "wrong" venue is chosen, illustrated above, also support the notion that venue decisions should be immediately appealable. The prospect of an

228. An additional possibility is not only to remove the presumption but to give affirmatively less weight to the debtor's venue choice when the court has reason to believe that the debtor has engaged in harmful forum shopping. This practice has already been used in some nonbankruptcy cases. *See* Alisha Kay Taylor, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?* 6 J. MARSHALL REV. INTELL. PROP. L. 570, 578 (2007) (citing Rayco Mfg. Co. v. Chicopee Mfg. Co., 148 F. Supp. 588 (S.D.N.Y. 1957), as one example of this practice).

229. COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 4.06[2] (explaining that, unless leave is granted, a venue order will not be appealable until the merits of the case have been decided in an appealable final order).

230. *See, e.g.*, *In re* Sorrells, 218 B.R. 580, 582–83 (B.A.P. 10th Cir. 1998) (noting that a leading bankruptcy treatise and several courts have found that the traditional test for interlocutory review should be lessened in determining the appealability of interlocutory venue orders in bankruptcy cases because these orders are not final until the bankruptcy case is closed, at which point there is a small chance of success on appeal); *see also* ICMR, Inc. v. Tri-City Foods, Inc., 100 B.R. 51, 54 (D. Kan. 1989) (granting leave to appeal because appeals relating to venue orders should be more readily granted in bankruptcy due to the potentially lengthy nature of the proceedings); Kristin D. Kiehn, *Jurisprudence and Jurisdiction: Toward a More Flexible Approach to Bankruptcy Interlocutory Appeals*, 67 FORDHAM L. REV. 3261, 3295 (1999) (citing venue orders as presenting a situation in which immediate appeal may be warranted because the length of the bankruptcy proceedings is likely to render chance of success on appeal highly unlikely).

immediate appeal, combined with the requirement that the judge put his or her decision in writing, will help ensure that the judge's decision is based on the considerations outlined in the venue transfer statute rather than the judge's own self-interest.

Requiring the U.S. Trustee to become more involved in venue proceedings may be a novel idea,[231] but it is consistent with the U.S. Trustee's mandate to protect the integrity of the bankruptcy system and to enforce the bankruptcy laws.[232] Indeed, one of the chief tasks of the U.S. Trustee is to consider the best interests of the creditor body as a whole, regardless of the size of the creditor.[233] The U.S. Trustee is also required to monitor the progress of cases and to take appropriate actions to prevent undue delay in bankruptcy cases.[234] Given that a poor venue choice can disrupt the integrity of the bankruptcy system, fail to reflect the best interests of all the creditors, and potentially cause delay as parties get bogged down with venue issues, having the U.S. Trustee play a role in venue proceedings is consistent with the Trustee's articulated duties. It would also help make sure that the venue decision recognizes and accounts for the interests of smaller stakeholders.

The U.S. Trustee is in a particularly good position to act on venue issues. It is required to receive notice of a bankruptcy filing and is certain to get that notice, unlike small stakeholders who may be overlooked by the debtor.[235] The U.S. Trustee already has the right to appear and be heard on issues relating to improper venue and may be better equipped to do so than small stakeholders, who may face a collective action problem.[236] Thus, the U.S. Trustee already plays a significant role in bankruptcy cases generally and venue proceedings specifically.

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231. Although no one has previously advocated for an *increased* role for the U.S. Trustee in venue proceedings, the U.S. Trustee Program director himself has recognized the critical importance of the U.S. Trustee's role in seeking transfer of venue when no one else has objected to the debtor's venue choice. *See* White, *supra* note 117, at 29 ("There is no better standard for the USTP to uphold than the 'interests of justice'—and we will continue to do that even if it means we must act alone.").

232. *See* WARREN, *supra* note 42, at 58 (stating that the U.S. Trustee can enter a case to raise his own objections if the parties are not following the bankruptcy rules and that the U.S. Trustee must generally ensure compliance with the bankruptcy rules); *see also* 28 U.S.C. § 586(a)(3) (2012) (requiring U.S. Trustees to supervise the administration of cases in bankruptcy).

233. Christopher A. Ward, *Is Chapter 11 Heading in a New Direction?*, *in* BANKRUPTCY AND FINANCIAL RESTRUCTURING LAW 2010 (2010), *available at* 2010 WL 562663 ("[T]he United States Trustee focuses on . . . what is best for the creditor body as a whole.").

234. 28 U.S.C. § 586(3)(G) (2012).

235. *See* FED. R. BANKR. PROC. 1002.

236. *Id.* at 1014, Notes of Advisory Committee—1991 Amendment.

Bankruptcy differs from civil cases in that a U.S. Trustee—a government-created watchdog—is already involved in every case.[237] U.S. Trustees typically have experience in bankruptcy cases and may therefore have a better grasp of the debtor's situation than smaller stakeholders. The U.S. Trustee will also have access to the debtor's financial information and will be able to parse this information more quickly than a small stakeholder. This makes the U.S. Trustee less susceptible to the information asymmetries that can plague small stakeholders in a larger case. For all these reasons, the U.S. Trustee's venue brief should be given great weight by the judge.

Giving the U.S. Trustee greater involvement in venue proceedings has other advantages as well. U.S. Trustees are generally more independent than other parties in the case and therefore less subject to the influence of any one party.[238] As demonstrated by *Houghton-Mifflin*, U.S. Trustees are already vocal and effective in venue-transfer proceedings. As the bankruptcy "watchdog,"[239] the U.S. Trustee is in the best position to take a more active role in proceedings involving venue.

Congress has begun to recognize the important role of the U.S. Trustee, and recent Bankruptcy Code amendments have trended toward a larger role for the U.S. Trustee. For example, the Bankruptcy Abuse Prevention and Consumer Protection Act amendments, enacted in 2005, provide that small business cases are subject to greater monitoring by the U.S. Trustee.[240] This represents a potentially important shift toward involving the U.S. Trustee in business operations, as well as case administration.[241] Thus, this proposal is consistent with the recognition that U.S. Trustees should play a greater role in bankruptcy cases, particularly when the concern arises that the debtor is engaging in unfair or abusive practices.

Bankruptcy courts have recognized the value of allowing parties who represent the public interest to have a voice in bankruptcy proceedings. For example, in *In re Public Service Co.*,[242] the United

237. *About the Program*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/ust/eo/ust_org/index.htm, *archived at* http://perma.cc/7L5K-4NQJ (last visited Oct. 1, 2014) ("The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public.").

238. White, *supra* note 117, at 28 (describing how the U.S. Trustee's role is to protect all interests, including less-powerful economic interests and the public interest).

239. *About the Program*, *supra* note 237 ("The primary role of the U.S. Trustee Program is to serve as the 'watchdog over the bankruptcy process.' ").

240. *See* WARREN, *supra* note 42, at 144.

241. White, *supra* note 117, at 28 (describing Congress's "desire" for the U.S. Trustee to become more active in policing the bankruptcy system).

242. 88 B.R. 521 (Bankr. D.N.H. 1988).

States Bankruptcy Court for the District of New Hampshire allowed regulatory agencies to intervene as parties in interest in electric utility Public Service Company of New Hampshire's ("PSNH") bankruptcy case. The court recognized that the agencies could be effective resources with regard to the effects of rate increases on their constituencies.[243] In essence, the court allowed these agencies to intervene so that they could serve as a voice for rate-paying consumers, whose rights were profoundly affected by PSNH's bankruptcy, but who would not otherwise have had a say in the case's outcome.[244] Similarly, this proposal recognizes the value of allowing the U.S. Trustee to make venue recommendations and to serve as a voice for any stakeholders not represented in court.

B. Benefits of the Proposal

The proposal set forth above has many benefits. Its most significant and obvious advantage is that it forces issues that can substantially affect a case to be discussed, litigated, and settled within a prescribed period of time. As mentioned above, despite venue's obvious and lasting importance to a case, venue issues are rarely given the attention they deserve. This proposal will remedy that defect.

Furthermore, by giving multiple parties the opportunity to participate in a venue hearing, this proposal signals to small stakeholders that their rights are valued, even in a large bankruptcy case. By requiring parties that have influenced the debtor to submit briefs, the proposal recognizes that the debtor very often does not act alone in choosing a venue. By removing the presumption in favor of the debtor's choice and holding venue choice to a higher standard than required by the bankruptcy venue statute, this proposal recognizes that location can shape a bankruptcy case. Additionally, providing a hearing and anchoring venue in the standards of the bankruptcy venue transfer statute will help make sure that venue choice is meaningful and tied in some way to the issues the debtor is facing in the case. Above all, this proposal broadens the scope of issues and players considered in a bankruptcy case, putting the focus on the "disease"—the debtor's problems—rather than simply on the debtor itself.

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243. *Id.* at 557.

244. *See* John F. Lomax, Jr., *Future Electric Utility Bankruptcies: Are They on the Horizon and What Can We Learn from* Public Service Co. of New Hampshire*'s Experience?*, 12 BANKR. DEV. J. 535, 566–70 (1996) (describing and praising the court's decision in *PSNH*).

The proposed procedures remove venue choice from the debtor's exclusive control but place no statutory bar on the venue choices available to the debtor. Indeed, there is no reason to foreclose a debtor's choice of venue because, under this proposal, that choice must be justified in writing and in open court. Instead of restricting venue choice outright, this proposal requires the debtor to meet higher standards when choosing where to file a case. Furthermore, although the presumption in favor of the debtor's venue choice is removed, the burden does not shift to the debtor alone to justify its venue choice. Rather, all parties will have the opportunity to contribute to the debate, and parties who may have influenced the debtor will be required to participate. In this way, the proposal recognizes the balance between all parties that underlies the Code. Finally, the U.S. Trustee's brief will allow the court to see all available venue options, not simply the debtor's venue choice and the options proffered by dissenting parties. The court will thus be able to make a more informed decision about which option is best suited to the case.

By giving all stakeholders notice and an opportunity to be heard, these procedures will enable small stakeholders to participate if they so desire. Indeed, setting a consistent timeline for venue arguments to be heard signals to stakeholders that their voices matter and reduces the perception that New York and Delaware are exclusive venues where only the powerful have a say.

This proposal may make it more likely that venue is transferred. Or it may simply make it more likely that a case is filed in a "good" venue in the first place—one that accounts for the interests of justice, the convenience of the parties, and the problems that drove the debtor to file for bankruptcy. Among other consequences, the proposal should give debtors pause when they are determining where to file a case, forcing them to think about whether they can justify their filing decision.

In addition, this proposal accounts for the complex and unique nature of large bankruptcy proceedings. Rather than prescribing one type of venue (e.g., state of incorporation or "nerve center"), the proposal is sufficiently flexible to take into account the reasons the debtor filed for bankruptcy in the first place and to recommend a venue based on those problems. The proposed procedures give the court time to figure out what problems might arise in the case and where these problems should be sorted out.

For example, if a case involves no small stakeholders and simply requires a reshaping of the capital structure, the judge might determine that New York (or Delaware) may be an appropriate venue. Alternatively, imagine a debtor with headquarters in Albuquerque,

New Mexico, and operations in Albuquerque; Boulder, Colorado; and Phoenix, Arizona. Due to labor problems at its Phoenix plant, the debtor has filed for bankruptcy. Even though its "nerve center" might be in Albuquerque, in this instance, the debtor should file in Phoenix. The proposal will force the judge to explicitly consider the case's unique facts. In this way, the proposal links venue choice to the debtor's problems, allowing bankruptcy to more effectively address those problems.

This proposal forces both a full-fledged venue discussion early on in every case and a consistent time for venue-related hearings. Because the facts and circumstances of cases vary depending on when a venue-transfer motion arises, it has previously been difficult to establish consistent, reliable precedent for venue-transfer cases. Ensuring that venue-transfer decisions are heard at a consistent time at the beginning of every case would aid in the development of more reliable precedent.

Providing timing constraints on when venue is briefed and decided also eliminates the "learning curve" concerns judges have expressed about transferring venue in the middle of a case. Resolving the venue question within a prescribed time period at the outset of a case means that, if the case is transferred, the new judge will not need to take much extra time to catch up on the case. Of course, any proposal must balance judicial efficiency in time-sensitive cases with the desire to inform and involve all parties in venue decisions. This proposal strikes that balance by giving greater time and attention to venue considerations, while still imposing a strict timeline for venue discussions.

These procedures will provide more transparency and accountability to the venue consideration process, reducing the likelihood that any one entity will manipulate the system. All parties, including the judge, will have to justify their venue choice in writing. Requiring parties to articulate and defend their choices will help ensure that there are legitimate reasons for filing in a given venue beyond convenience to certain parties only.

Moreover, the open procedures contemplated by this proposal will ensure that the interests of smaller creditors will be taken into account. This, in turn, will make it more difficult for powerful parties to place a case in a venue that will not protect smaller interests. The procedures will force them to recognize the debtor's value to all parties in the case and will reduce the power grabbing that bankruptcy was designed to prevent.

The proposed procedures for venue are also consistent with the principles that underlie the center of main interests ("CoMI") in

international insolvency proceedings. In the international context, a debtor's CoMI helps determine which country's insolvency laws will govern the main aspects of an insolvency proceeding. The European Court of Justice issued a ruling in 2006 holding that an entity's CoMI must be determined from the viewpoint of third-party creditors and other parties in interest.[245] Furthermore, the European Union Insolvency Regulation provides that two factors matter in determining CoMI: (1) where the debtor conducts the administration of its interest on a regular basis, and (2) what is apparent to third parties, especially creditors.[246] The proposal here would align domestic venue considerations with those already operational in international insolvencies by recognizing, clarifying, and respecting the viewpoints of multiple parties.

In essence, these procedures will allow courts to weigh the costs and benefits of venue choices. Both the judge and the public at large will be able to see the issues driving the debtor to bankruptcy and how a debtor's choice of venue affects all parties. These procedures will help shift the focus of bankruptcy cases toward *all* stakeholders and will force the local ramifications of national bankruptcies to be acknowledged. Indeed, when these considerations are found to play a central role in determining how to maximize the debtor's value, the court should recognize that a more local venue will be optimal. By tying bankruptcy venue to the location of the debtor's problems, requiring open proceedings and multiple viewpoints, and giving parties notice and an opportunity to be heard about where a case is situated, this proposal realigns bankruptcy procedure with many of the values and goals bankruptcy seeks to accomplish.

C. Anticipated Objections and Responses

Despite this proposal's merits, it is not without some disadvantages. Indeed, no single policy represents a perfect solution to the challenges of bankruptcy venue. On the whole, however, the proposal strikes a more reasonable balance among the competing considerations.

245. Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The* Eurofood *Decision of the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351, 352 (2007).

246. Bufford, *supra* note 138, at 437.

1. Cost and Time

One set of objections to the proposal likely relates to the additional costs it could add to the bankruptcy process. Under the current system, parties who object to venue do so because they believe it is worthwhile; parties who do not object have weighed the costs and benefits and determined that objecting is not worth the time or effort. Why, then, should a judge take up valuable case time with a full-fledged venue hearing, particularly if the current venue procedures already provide a mechanism for parties to object? The answer is that the current system is not good enough, particularly when it comes to protecting the due process rights of stakeholders. Further, because venue sets the tone of an entire bankruptcy case, it deserves its own hearing. Getting venue right matters because the wrong venue choice can have devastating effects on the debtor and, in particular, smaller stakeholders. In addition, as we have seen, parties face many obstacles in bringing venue objections and are often discouraged from bringing such objections even when it is in their interest to do so. Thus, these proposed procedures serve as a corrective mechanism, enabling parties to stand up for their interests and protecting those parties who may not be able to do so without considerable obstacles.

Furthermore, the costs of requiring parties to brief and argue venue in each case are not as great as they may seem. For the debtor, major lenders, and creditors, venue discussions typically occur well before a case is filed, so the parties should not have to expend great effort to put those discussions in writing. Moreover, the proposal does not impose additional costs on small stakeholders. If these stakeholders want to get involved, they will have the opportunity to do so; if they do not, the U.S. Trustee will highlight their interests in its brief. Either way, the timing guidelines set out in this proposal will ensure that stakeholders, large and small, have the opportunity to make a more informed decision about the costs and benefits of raising a venue objection.

Although this proposal necessarily imposes additional costs on the U.S. Trustee as well, these costs are consistent with the U.S. Trustee's mandate to serve as a "watchdog" in the bankruptcy system and are not insurmountable. As this proposal is implemented, it may be necessary to provide the U.S. Trustee's office with additional resources and personnel. Given the importance of having a venue discussion at the outset of the case, however, providing additional resources to the U.S. Trustee's office to help the U.S. Trustee perform its enlarged role is cost justified.

Critics might also argue that the proposal will adversely impact the timing of the disposition of bankruptcy cases. Certain bankruptcy cases, such as prepacks and quick sales, tend to move quickly through bankruptcy, and time may be of the essence in these cases. In addition, many of the plans of reorganization in these cases are consensual and noncontroversial.[247] Thus, in these cases, the costs of a full-blown venue hearing may outweigh the benefits. Yet, it is precisely because so many of the negotiations take place behind closed doors that it is important to openly discuss venue issues in these cases—to give parties who were not previously involved in the negotiations a chance to learn about the case and participate.[248] And where time truly is of the essence, the timeline for briefing and hearing venue issues could be expedited; the timing guidelines discussed above are only outer boundaries.

In short, the objections relating to cost and timing do not recognize that it is better to get venue right at the beginning of a case rather than trample on stakeholders' rights later on. The cost of a few extra arguments at the beginning of a case is a small price to pay for the benefits of ensuring that all stakeholders and issues are recognized and accounted for. In a large case, with many livelihoods and interests on the line, preventing problems within the bankruptcy system should outweigh the cost of a few extra briefings and an extra hearing.

2. A Simpler Solution?

Even those who recognize the value of modifying the venue procedures may argue for a simpler solution: a presumption that venue is proper wherever the majority of the debtor's assets or claimants is located. Such a presumption could save time and spare some parties the burden of filing a motion to propose or defend their venue selection. The problem, however, is that these benchmarks may be difficult to ascertain and subject to manipulation. For example, using the number of claimants a debtor has is impractical because some claimants may not be identified until much later in the case, after the deadline for filing claims (the "bar date") has passed. Although a debtor may certainly estimate its claimants before the bar date, the debtor could easily manipulate its estimate. Alternatively,

247. *See* Miller, *supra* note 105, at 2001–02 (noting that Chapter 11 plans in prepackaged bankruptcies are negotiated prefiling, are consensual with respect to the economic stakeholders, and do not ordinarily present much controversy).

248. WARREN, *supra* note 42, at 164 ("The basic idea behind a pre-pack is that much of the bargaining that takes place inside a Chapter 11 is conducted before the filing.").

claimants could assert multiple claims or claims for larger amounts to influence the presumption.

If the location of a debtor's assets determines venue, debtors may shift their assets around to obtain venue in a desired location. For example, debtors can create entirely new entities on the eve of bankruptcy and then file for bankruptcy in New York.[249] Other companies have moved their headquarters and then filed in a desired venue.[250] This sort of behavior supports the argument that debtors will move their assets to their desired venue. Indeed, it is easy for companies to change the location of their principal assets through strategic acquisitions and divestitures.[251] In short, the difficulty with establishing blanket prohibitions on venue choice is that such prohibitions may encourage a debtor to develop structures or purchase assets to ensure access to a particular venue, even though that venue may not be the best choice for the debtor once it commences its bankruptcy case.

It may also be simpler if parties were to decide to file in a specific bankruptcy venue in advance using something akin to a choice-of-forum clause in a contract. Yet, it is easy to see why this practice has not arisen in bankruptcy. No one likes to contemplate bankruptcy or, for that matter, to deal with a company that appears to be contemplating bankruptcy. Thus, companies may be concerned that stating a bankruptcy venue preference in advance of actually filing for bankruptcy would signal that they might be in trouble. Furthermore, the venue should be a convenient forum for resolving the problems that drove the debtor to bankruptcy, and the debtor will not be able to determine venue in advance because it will not know what specific problems it might face.[252]

Additionally, truly global companies with many locations may not have a clear "nerve center" for their problems. Even in these cases, it is worth discussing all possible venues to see whether one location offers superior benefits to the parties in the case. In some cases, this location may be Delaware or New York; in others, it may be elsewhere. Even if the case ultimately remains in its initial venue, it is critical to

249. *See, e.g.*, *In re* Patriot Coal Corp., 482 B.R. 718, 743 (Bankr. S.D.N.Y. 2012) (acknowledging that debtors had created affiliates in New York on the eve of bankruptcy filing).

250. *See* LOPUCKI, *supra* note 12, at 32–33 (discussing examples including Tacoma Boatbuilding and Baldwin-United).

251. *See id.* at 34 (describing how Dreco Energy, a Canadian corporation, sold some of its Canadian assets and established a new headquarters in Texas simply so that it could file for bankruptcy in the United States).

252. *Cf.* Rasmussen & Thomas, *supra* note 12, at 1357 (advocating restricting bankruptcy venue selections to those made when a firm seeks capital in the markets, but before financial insolvency).

incorporate a venue discussion at the outset of a case to ensure that stakeholder rights are valued and protected, important information about the debtor's locations and operations is revealed, and the bankruptcy system is not manipulated by self-interested parties.

What if the debtor is not the driving force behind venue choice? For example, many lenders condition the availability of their loans or the terms of their financing on the debtor's filing in a particular location. If venue is transferred or if these proposed procedures cause the debtor to file in a location that is unsatisfactory to the lender, the lender may refuse to offer financing on favorable terms, thus harming the debtor and its stakeholders. This type of control by lenders has become increasingly worrisome in large bankruptcy cases.[253] In time, additional measures may be needed to curb such manipulation, but the proposed procedural changes should provide some initial checks on this behavior. Lenders who require debtors to file in a given venue will be required to submit their own briefs detailing the reasons for their requirement. Courts will then be able to determine whether the lender is acting in its own self-interest or whether the lender's motive satisfies the standards of the venue transfer statute. If the court determines that the lender is acting only in its own self-interest, it may be able to use its equitable powers to prevent the lender from changing the terms of the loan simply because the venue has changed. Also, if courts start signaling that they will take venue seriously by holding a venue hearing in every case, lenders themselves may stop engaging in this manipulative behavior.

3. Claims Trading

The rise of bankruptcy claims trading may present another concern. Claims trading enables stakeholders to sell their claims, meaning that stakeholder composition may change as the case goes on. Claims trading occurs when hedge funds or other sophisticated parties buy tranches of smaller claims.[254] These parties may simply want to make a profit by buying smaller claims for less than the claims' true values, or they may want to influence the outcome of a case by purchasing a significant number of claims.[255]

253. *See* Harner & Marincic, *supra* note 125, at 1158 (describing the shift in control from debtors to one or more secured creditors or lenders as cause for concern); Kuney, *supra* note 48, at 27–28 (describing how control by secured creditors does little to benefit bankruptcy's intended beneficiaries).

254. Troy A. McKenzie, *"Helpless" Groups*, 81 FORDHAM L. REV. 3213, 3228 (2013).

255. *Id.*:

Although a full discussion of claims trading and its effect on the Bankruptcy Code principles is outside the scope of this Article, several features of claims trading mitigate the concern that local stakeholders may sell their claims rather than remain parties to the bankruptcy case. First, although claims trading may occur at any stage in the case, the bulk of trading typically does not occur immediately at the case's commencement.[256] Thus, claims traders will generally not be taken into consideration during the proposed venue proceedings. Yet, it would be worrisome if venue was situated in a given locale to suit the interests of a group of entities who then would sell to claims traders at the earliest opportunity, thereby giving up their stake in the case.

This concern could be mitigated if, in the proposed venue hearing, a court could get a sense of what the stakeholders' interests are and how invested or committed these stakeholders are to the case. Stakeholders with significant rights at stake or those with concerns that go beyond monetary payment will be less likely to sell out their stake in the case. Further, because creditors might hold on to their claims if they believe that they have a reasonable possibility of participating in the case, this proposal may even discourage some claims trading in the long run.

VI. CONCLUSION

The proposal outlined in this Article strikes the right balance between protecting debtor choice and returning bankruptcy to its foundational principles. Using transparency and accountability mechanisms, it places checks on behavior by self-interested parties who use venue as a means to shut out stakeholders and divorce bankruptcy from geography. At the same time, it allows debtors to choose where to file but holds their choice to higher standards. The

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> Relatedly, the rise of claims trading in bankruptcy has produced the phenomenon of committees that play a significant role in bankruptcy cases despite a lack of formal recognition. It is not uncommon for sophisticated hedge funds to buy up tranches of smaller claims and then seek to have their voices heard in the case under the guise of an "ad hoc" committee of claimants.

256. *See* Seth Brumby & Nicoletta Kotsianas, *Lehman Brothers Special Financing's Derivative Claims Secondary Market Grows After Proof-of-Claims Revision*, SECONDMARKET (July 8, 2009), https://www.secondmarket.com/education/news/press/lehman-brothers-special-financing%E2%80%99s-derivative-claims-secondary-market-grows-after-proof-of-claims-revision, *archived at* http://perma.cc/VPA9-HZFQ (noting that as the bar date approaches, claim trading volume should pick up); *AMR Update: Claims Trading Opportunities*, SIDLEY AUSTIN, LLP (AUG. 8, 2012), http://www.sidley.com/amr-update-claims-trading-opportunities-08-08-2012/, *archived at* http://perma.cc/L7UW-VD26 ("Typically, bankruptcy claims trading increases as the proceedings get closer to a plan of reorganization.").

proposal is intended to require all parties to more carefully consider how their decisions affect others when deciding where to situate a case. Finally, this proposal seeks to eliminate forum shopping's negative effects on small stakeholders by making sure that those effects are acknowledged and addressed early on in the case.

Venue choice significantly influences the role parties are able to play in a case, the problems and claims that are heard in a case—and ultimately the outcome of a case. Addressing problems with the bankruptcy venue statutes and procedures can realign bankruptcy with the bedrock principles it has strayed from in practice. Giving venue earlier and greater consideration, removing the presumption in favor of the debtor's venue choice, and requiring venue choice to be backed up by the standards of the bankruptcy venue transfer statute helps to ensure that a bankruptcy case's venue is conducive to resolving the debtor's problems in accordance with the interests of all concerned parties. Providing more transparency and accountability with respect to venue allows for small stakeholders to voice their concerns and reduces the disconnect between the problems a debtor is facing and the solutions that bankruptcy can provide. Reforming venue procedures will better account for bankruptcy's effects on all stakeholders and will help realign bankruptcy cases with the principles of justice, fairness, and access underlying the Bankruptcy Code and the American judicial system.