APPENDIX D-3

Report of the Delaware State Bar Association in Support of Maintaining Existing Venue Choices

REPORT OF THE

DELAWARE STATE BAR ASSOCIATION

TO THE NATIONAL BANKRUPTCY REVIEW COMMISSION

IN SUPPORT OF MAINTAINING EXISTING VENUE CHOICES

October 3, 1996

TABLE OF CONTENTS

LIST OF EXHIBITS

I. OVERVIEW

A. The Commission's Venue Proposal.

At its June 21, 1996 meeting, the National Bankruptcy Review Commission (the "Commission") adopted the following proposal (the "Venue Proposal") pertaining to venue in cases under the United States Bankruptcy Code, 11 U.S.C. § 101-1330 (the "Bankruptcy Code"):

> Should the current venue system be modified to prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where that district is located or based solely on an earlier filing by a subsidiary in the district? All other venue options should be left intact, and the court's discretionary power to transfer venue in the interest of justice and for the convenience of the parties should not be restricted.

If answered in the affirmative and adopted, the Venue Proposal presumably would be implemented by amending 28 U.S.C. § 1408, which sets forth the standards governing venue of cases under title 11 (the "Current Venue Statute").[1]

The Venue Proposal does not state what standards or rules would govern corporate venue, and it erroneously implies that it merely seeks to prohibit corporate bankruptcy filings "based solely" on the debtor's state of incorporation or "based solely" on an earlier filing by a debtor's subsidiary (emphasis added). This language wrongly suggests that corporate venue would be appropriate if a corporation incorporated in a given state had some other link to or connection with that state. An examination of the minutes of the Commission's February 23, 1996 meeting, however, shows that the goal of the Venue Proposal is to limit venue to a corporate debtor's "principal place of business

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[1] 28 U.S.C. § 1408 provides in pertinent part:

> [A] case under title 11 may be commenced in the district court for the district -
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> (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
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> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Most bankruptcy courts view a corporation's state of incorporation as its domicile for venue purposes, a result that is consistent with the rule in non-bankruptcy cases. See, e.g., Denver & Rio Grande W.R.R. Co. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 560 (1967) ("[u]nder the decisions of this Court, corporations ha[ve] a single residence for venue purposes, the State of their incorporation"); In re F.R.G. Inc., 107 B.R. 461, 471 (Bankr. S.D.N.Y. 1989) ("corporation's domicile is generally held to be its state of incorporation").

or location of its principal assets" and to require a subsidiary to file its bankruptcy petition where its parent filed. (A copy of the relevant portion of those minutes (the "February 23 Minutes") is attached as Exhibit A.)

B. Apparent Rationale For The Venue Proposal.

The February 23 Minutes reflect a belief that (i) practice under the Current Venue Statute is a systemic problem, (ii) venue choice "demean[s] the entire [bankruptcy] system by suggesting that bankruptcy courts are for sale," (iii) a corporation's state of incorporation does not constitute a sufficiently "real connection" to warrant a debtor's filing a bankruptcy petition in a district in that state, and (iv) a corporate debtor only has a connection with a forum "where it [does] business or where its principal assets [are] located." These unsubstantiated beliefs apparently formed the basis for the Venue Proposal.

C. Need For Venue Reform Was Assumed -- Not Demonstrated.

The Venue Proposal is ill-considered for a variety of reasons. As far as can be gleaned from the February 23 Minutes, no attempt was made to test the validity of the beliefs and assumptions expressed by the participants. It simply was assumed that there are serious and systemic venue problems and abuses that must be remedied through federal legislation. No data was presented to the Commission at that time to support the assumptions and beliefs underlying the Venue Proposal. The February 23 Minutes reflect no analysis of filings by district; no analysis of whether asset- and headquarters-based venue predicates are more rational, fair, or meaningful -- and less subject to "abuse" -- than venue predicates based upon corporate domicile; no analysis of whether asset- and headquarters-based venue predicates are in fact more convenient to creditors; no discussion of the potential effect of technology on creditor participation; no analysis of the continuing usefulness of principal assets and principal place of business as venue predicates; and no research or consideration of federal venue statutes outside the context of bankruptcy.

Nor does it appear that the Commission made any attempt to include as participants those who do not believe that corporate filings under the Current Venue Statute are abusive or problematic. The minutes state that "Professor Warren presented arguments against" the proposal to restrict corporate venue choices "[t]o assure that all of the arguments were heard by the Commission before it reached a consensus." The sole argument presented, however, was that the Current Venue Statute allows larger companies "to choose courts that specialize in dealing with large cases and have the resources so that such cases are moved through the system expeditiously." (The courts that supposedly "specialize" in large cases were not identified, but presumably are a reference to the Southern District of New York and the District of Delaware. As Exhibit B shows, however, those two jurisdictions do not have a monopoly on large, complex cases.) This lone "argument" advanced in support of the Current Venue Statute wrongly minimizes or ignores the efforts and abilities of the many able judges sitting in districts that supposedly do not "specialize" in large cases and, understandably, it was given short shrift at the Commission's February 23 meeting. The many valid reasons for not amending the Current Venue Statute were never even mentioned, let alone debated, at the February 23 meeting.

The draft position paper used in connection with the Commission's June 21, 1996 meeting reveals a similarly flawed and biased approach to the question of whether new venue legislation is warranted. That paper, circulated by the Commission at its meeting,[2] reveals that the Commission has continued to assume the existence of a venue choice problem, without any viable underlying analysis to support that assumption. Indeed, the June 20 Position Paper exhibits its bias on venue choice when it notes almost at the outset that "[f]or multi-state corporations venue options are broad, and here is where the mischief begins."[3] The June 20 Position Paper relies, to the exclusion of any other factual source, upon selected information set forth in a single venue study by Professors Lynn LoPucki and William Whitford to support preconceived notions regarding the problems supposedly associated with venue choice.[4] The June 20 Position Paper, however, largely ignores the conclusions reached by Professors LoPucki and Whitford; namely, that there are benefits associated with forum shopping, benefits which militate in favor of accommodating it rather than eliminating it.[5]

The June 20 Position Paper's reliance upon now outdated case studies, and its selective use of the LoPucki/Whitford Study, are not the only troubling aspects of its handling of the Venue Proposal. Equally troubling is its failure to analyze independently the issues and recent data in a systematic and thoughtful way. Nowhere does the paper even discuss, much less question, the LoPucki/Whitford Study's emphasis on "physical presence" in defining "forum shopping."[6] Such a definition is premised upon the erroneous assumptions that (i) a company's incorporation in a

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[2]National Bankruptcy Review Commission, Improving Jurisdiction and Procedure, Proposal #2/Venue (June 20, 1996 Draft) (hereinafter, the "June 20 Position Paper"). A copy of the June 20 Position Paper is attached as Exhibit C.

[3]Id. at 1 (emphasis added).

[4]Lynn M. LoPucki and William C. Whitford, Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies, 1991 Wis. L. Rev. 11 (hereinafter, the "LoPucki/Whitford Study"). The LoPucki/Whitford Study is based on cases (i) filed after October 1, 1979, in which a plan was confirmed before March 31, 1988, (ii) in which the debtor reported at least $100 million in assets, and (iii) in which the debtor had at least one issue of debt or equity security registered with the SEC. Id. at 12 n.1. Thus, the cases used in the study are from 8 to 16 years old.

[5]Id. at 58. Page 4 of the June 20 Position Paper acknowledges that while the LoPucki/Whitford Study documents forum shopping practices, it does "not conclude that such practices be curtailed." The conclusion of the LoPucki/Whitford Study is, in fact, more assertive and forceful than the June 20 Position Paper suggests. Thus, Professors LoPucki and Whitford clearly state that, in their view, "accommodation" of forum shopping is preferable to its "elimination," because forum shopping fosters "competition among districts leading to the development of more effective procedures and techniques for reorganization and liquidation of business enterprises." Id.

[6]The LoPucki/Whitford Study defines "forum shopping" as "the ultimate choice of a venue where the company has little or no physical presence." Id. at 14 (emphasis added).

particular state does not constitute a meaningful connection with that state for venue purposes[7] and (ii) "physical presence" is a more meaningful and easily ascertainable contact.[8]

Moreover, the June 20 Position Paper incorrectly describes some of the key factual conclusions of the LoPucki/Whitford Study. Thus, for example, the paper raises the question of how frequently "forum shopping" occurs and, supposedly on the basis of the 43 cases examined in the LoPucki/Whitford Study, concludes that "venue could be explained only by forum shopping in about 16% of the cases, and another 63% of the cases showed some signs of forum shopping."[9] As discussed below, however, the June 20 Position Paper incorrectly reports the conclusion of the LoPucki/Whitford Study.

The LoPucki/Whitford Study divided the 43 cases into four categories -- the first comprising the seven cases (approximately 16%) filed in a district that was neither the headquarters of the company nor the company's center of operations; the second comprising nine cases (approximately 21%) filed in a district where the company's headquarters were located, but where the debtor had few or no physical assets or operations other than the headquarters itself; the third comprising eighteen cases (approximately 42%) involving national or regional companies having no clear center of operations, where the filing occurred in a district that was both the location of the company's headquarters and the site of some of its business operations; and the fourth comprising nine cases (approximately 21%) involving companies with a clear center of operations whose headquarters were located within that center, which were each filed in the district in which that center was located.[10] Even using the LoPucki/Whitford Study's definition of "forum shopping," only the cases in categories one and two were deemed to involve forum shopping, while those in categories three and four were not. In other words, 63% of the cases studied did not satisfy the LoPucki/Whitford Study's test for forum shopping. Indeed, Professors LoPucki and Whitford clearly state, with respect to category three, that "by our definition, forum shopping did not occur in this category of cases, because each of these companies had a substantial physical presence in the district where it reorganized."[11] The June 20 Position Paper nevertheless includes these cases (42% of the 43 cases involved in the study) when it asserts that "another 63% of the cases showed some signs of forum shopping." In fact, only slightly more than one-third showed such signs under the LoPucki/Whitford definition of "forum shopping."

Also of concern is the June 20 Position Paper's apparent willingness to assert conclusions for which no empirical evidence is available. For example, the June 20 Position Paper seizes upon the LoPucki/Whitford Study's statement that it is difficult to transfer venue in large cases because judges

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[7]See discussion at Section V, infra.

[8]See discussion at Section VI, infra.

[9]June 20 Position Paper at 2.

[10]LoPucki/Whitford Study at 26-29.

[11]Id. at 28-29.

"consider them to be career opportunities and are therefore reluctant to transfer them to other districts."[12] That statement, however, merely reflects what the authors were told by some of the lawyers that they interviewed.[13] It is based upon old and purely anecdotal evidence, "evidence" which should be investigated before the Commission relies upon it. Indeed, in Delaware's case, this "evidence" is belied by the number of venue transfer motions filed and granted.[14] Likewise, the June 20 Position Paper boldly states that "[s]ome of the costs of forum shopping, when it exists, are obvious. Forum selection becomes a strategic tool, available for clever parties to manipulate outcomes to the disadvantage of smaller creditors who are cut out of the bankruptcy process."[15] The June 20 Position Paper cites no factual basis for this dramatic statement and, as discussed below, this conclusion is neither obvious nor correct.[16]

As noted above, having relied almost exclusively on the LoPucki/Whitford Study to support its conclusion that venue choice is a problem, the June 20 Position Paper largely ignores the recommendation of Professors LoPucki and Whitford:

> While elimination of forum shopping is a practical alternative [to dealing with problems allegedly caused by forum shopping], we favor accommodation. We believe that with vigilance, the negative consequences of forum shopping can be identified and addressed. Congress, judges and other members of the bankruptcy community should reconcile the conflicting practices in different districts by clarifying vague standards and narrowing judicial discretion on distributional matters....
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> The primary benefit to be realized from the continuation of forum shopping is competition among districts leading to the development of more effective procedures and techniques for reorganization and liquidation of business enterprises. Such improvements are in the interest of all parties.[17]

Thus, the LoPucki/Whitford Study rejects the notion of dealing indirectly with perceived substantive problems attributed to venue choice through an amendment to the Current Venue Statute. Instead, it opts for the intellectually honest approach of dealing directly with the substantive issues that allegedly are causing "forum shopping."

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[12] Id. at 25.

[13] Id.

[14] See discussion of venue transfer motions at Section III.C., note 38, infra.

[15] June 20 Position Paper at 3.

[16] See discussion at Section III.C., infra.

[17] LoPucki/Whitford Study at 58.

Changes in federal legislation should not be undertaken lightly. Nor should the Commission recommend such changes without (i) clear and convincing evidence to support them and (ii) careful analysis and thought regarding, inter alia, (a) the prevailing system of venue in the federal courts, (b) the benefits of the existing law, (c) the matters or problems sought to be addressed or remedied by statutory change, (d) whether the proposed change in the law are a fair and effective means for implementing or addressing the Commission's goals, and (e) the consequences of statutory change.

It is the position of this paper that (i) the restriction of corporate venue choices that would be effected by the Venue Proposal is not justified by the facts or arguments articulated to date and (ii) to the extent that avenue "reform" is being driven by substantive (as opposed to political) issues, the Commission and Congress should articulate, debate and decide those substantive issues directly rather than seeking substantive change through seemingly procedural legislation. Indeed, anyone concerned about "demeaning the system" should consider carefully whether effecting substantive change and advancing political agendas in the guise of procedural "reform" is an approach that will build confidence in the integrity of that system.

II. HISTORY OF BANKRUPTCY VENUE STATUTES AND RULES

Prior to the 1978 enactment of the Bankruptcy Code, section 2a(1) of the Bankruptcy Act of 1898 (the "Act") controlled the venue of bankruptcy cases involving corporations. Under the Act, bankruptcy courts could:

> [a]djudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months ....

11 U.S.C. § 11a(1) (repealed 1978).

Although section 2a(1) referred only to "persons," the Act defined "person" broadly to include both individuals and corporations. 11 U.S.C. § 1(23) (repealed 1978); see In re Consolidated Burner Service Corp., 32 F. Supp. 835, 835 (S.D.N.Y. 1940). Accordingly, under section 2a of the Act, venue of a corporate debtor's bankruptcy case was proper where the debtor corporation had, inter alia, its residence or domicile for six months preceding the bankruptcy filing.

As early as 1932, courts had decided that for purposes of bankruptcy venue and jurisdiction under the Act, a corporation's state of incorporation was its place of "residence" and "domicile."[18] See, e.g., In re Hudson River Navigation Corp., 59 F.2d 971, 973 (2d Cir. 1932) ("This bankrupt, being a Delaware corporation, had its residence and domicile in that state."); see also In re Hudik-Ross Co., 198 F. Supp. 695, 698 (S.D.N.Y. 1961) ("no question but that" corporate debtor

[18]This interpretation of section 2a of the Act was entirely consistent with longstanding Supreme Court construction of the term "residence" in federal venue statutes generally. See Suttle v. Reich Bros. Constr. Co., 333 U.S. 163, 166 (1948) ("[T]he 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated."') (quoting Shaw v. Quincy Mining Co., 145 U.S. 444, 449 (1892)).

can file petition in district of state of incorporation -- "that state is the place of its 'domicile"'), aff'd sub nom. In re S.O.S. Sheet Metal Co., 297 F.2d 32, 32 (2d Cir. 1961); In re Enjay Holding Co., 18 F. Supp. 445, 447 (S.D.N.Y. 1937).

In 1973, Bankruptcy Rule 116 was promulgated. Rule 116(a) applied different venue rules to natural persons, corporations, and partnerships, and provided that a petition by or against a corporation or partnership could be filed only "in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the bankrupt has property." Fed. R. Bankr. P. 116(a) (superseded 1978). Thus, for five years -- from 1973 until the enactment of the Bankruptcy Code in 1978 -- Rule 116(a) supplanted section 2a(1) and precluded a corporation from basing venue solely on its "residence" and "domicile."

Corporate Bankruptcy Venue After 1978

With the enactment of the Bankruptcy Code in 1978, section 2a of the Act and short-lived Bankruptcy Rule 116(a) were both superseded. The current bankruptcy venue provision, 28 U.S.C. § 1408, provides a more flexible combination of former section 2a and former Bankruptcy Rule 116(a). Section 1408 provides in pertinent part:

> [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 subject of such case have been located for the one hundred and eighty days immediately preceding such commencement ....

28 U.S.C. § 1408. Thus, although "it is true that Rule 116(a) of the [former] Bankruptcy Rules eliminated domicile and residence as useful bases for determining venue of a corporation or partnership, Congress did not see fit to carry this scheme forward in new 28 U.S.C. § 1472.'"[19]

Section 1408 has brought the bankruptcy venue statutes back full circle to the pre-Rule 116 era. Rule 116(a), to the extent that it eliminated domicile and residence of a corporation as a basis for venue, was an historical aberration that lasted only five years. Once again, under 28 U.S.C. § 1408(1), venue for a corporate reorganization case properly resides in the district of a corporation's "domicile" or "residence," i.e., its state of incorporation. Thus, if adopted, the Venue Proposal would not be reinstating a long-standing statute or practice. Rather, it would be codifying a short-lived rule that was in effect for only five years, a rule that Congress chose not to adopt in enacting 28 U.S.C. § 1408 and its predecessor statute.

[19] In re Landmark Capital Co., 19 B.R. 342,346 (Bankr. S.D.N.Y.), aff'd, 20 B.R. 220 (S.D.N.Y. 1982). 28 U.S.C. § 1408(1) is very similar to 28 U.S.C. § 1472, differing in ways not relevant to this discussion.

III. SUBSTANTIVE REFORM SHOULD NOT BE IMPLEMENTED SURREPTITIOUSLY IN THE GUISE OF MERE PROCEDURAL CHANGE

Legal commentators blame the Current Venue Statute for numerous perceived substantive problems in Chapter 11 cases. Thus, for example, venue "manipulation" has been cited as the cause of routine and excessive extensions of exclusivity, large professional fees, and a lack of direct participation by smaller creditors in large cases.[20] As discussed more fully below, however, these problems (if in fact they are systemic problems, as opposed to isolated, albeit notorious, instances) have little to do with venue. Such problems, to the extent they need to be addressed at all, either cannot be remedied by a change in the venue rules (e.g., the length of time it takes to reorganize in mass tort cases) or should not be addressed indirectly through changes in the Current Venue Statute.

The attack on the Current Venue Statute stems from an overt and stated belief that choice of venue often is outcome-determinative and a covert conclusion and value judgment that the outcomes in certain districts are "wrong." Thus, argue the critics, a change in the venue rules is required -- a change that presumably will be just as outcome-determinative, the only difference being that the critics of the current system will achieve their preferred outcomes.

It is entirely appropriate to debate and propose legislation that deals with abuses, real and perceived, and that addresses and makes value judgments and decisions regarding outcomes. What is inappropriate is to disguise the fact that this is what the venue debate is really about. While debtors certainly choose venues that they hope will be favorable to their rehabilitative and other goals, those who would change the venue rules are seeking to further their substantive goals by influencing and changing not only where a debtor may file, but also outcomes that they perceive to be wrong or inappropriate. The debate -- and the time, energy and money of those reviewing the current system -- should focus on identifying and addressing these underlying goals and outcomes and the substantive issues raised by them. The Commission should reject "stealth legislation" that, in the guise of procedural reform (i.e., venue changes), actually is making substantive judgments about relative rights and distributions among creditor and equity constituencies in a bankruptcy case. Moreover, the Commission should consider carefully whether adoption of the Venue Proposal -- which is perceived as a highly politicized piece of proposed legislation -- is capable of solving anything except perceived political problems. As discussed below, the Venue Proposal will not solve the perceived substantive problems and alleged ills that have been identified, and could well result in increased venue litigation as well as time-consuming and inefficient pre-bankruptcy venue planning.

A. Excessively Long Cases: Exclusivity.

Commentators have long argued that much forum shopping occurs to allow a company to file in New York City, primarily to gain access to routine exclusivity extensions.[21] More recently, others have complained that companies are filing in the District of Delaware to force short, prepackaged and prenegotiated bankruptcies on creditors. The only common thread to the "too long/too short" cri-

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[20] LoPucki/Whitford Study at 31-33,35-40.

[21] Id. at 12.

tiques is a belief that debtors have too much control over their Chapter 11 cases and exercise that control to the detriment of at least some of their creditors.[22] But again, one must ask why this issue should be indirectly and ineffectively addressed in the context of venue.

At the core of the complaint of the LoPucki/Whitford Study is an assumption that exclusivity extensions often are unjustified,[23] particularly in the Southern District of New York, and lead to lengthier cases that are controlled by debtors at the expense of creditors.[24] Even if one assumes that it is exclusivity extensions -- rather than the existence of complex legal issues - that lead to lengthier cases, it usually is hard to conclude that a case is "too long" unless one analyzes what was achieved in the case in question, whether it realistically could have been achieved more quickly given the legal and other problems presented, and whether it was worth achieving. As can be seen from the growing number of lengthy mass tort and retail cases filed outside New York subsequent to the LoPucki/Whitford Study, certain types of cases and issues simply take time to resolve, no matter where the cases are filed. Exclusivity extensions frequently are needed in those cases to enable the debtor to have a meaningful opportunity to build consensus, to motivate the parties to negotiate, and to avoid potentially expensive and disruptive competing plans. Thus, particularly in light of more recent mass tort, retail and other large cases, it is difficult to tie the problem of "overly long" cases

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[22]One is reminded of Goldilocks and the three bears. If the Southern District of New York allows cases to proceed for "too long," and the District of Delaware expedites them so that they are "too short," which district is "just right" and, more importantly, should that question be addressed in the context of venue?

[23]For purposes of argument, it is assumed that the LoPucki/Whitford Study was correct at the time in its thesis that a similarly sized case will stay in Chapter 11 longer in the Southern District of New York than in another district. However, an examination of large cases filed and/or completed subsequent to the LoPucki/Whitford Study strongly suggests that the legal issues -- not the forum -- frequently determine case duration. Thus, for example, asbestos and mass tort cases have taken many years to resolve not only in New York, but in Florida, Illinois, and Virginia as well. Finally, while it is certainly true that the Southern District of New York has had cases that have lasted for years, other jurisdictions have, too. E.g., A.H. Robins Co., Inc. (E.D. Va.); UNR Industries, Inc. (N.D. Ill.); Hillsborough Holdings Corp. (M.D. Fla.); Eagle-Picher Industries Inc. (S.D. Ohio); Braniff Airways, Inc. (N.D. Tex.); Revco D.S., Inc. (N.D. Ohio); The Circle K Corporation (D. Ariz.); Columbia Gas Systems, Inc. (D. Del.); Wheeling-Pittsburgh Steel Corp. (W.D. Pa.); and White Motor Credit Corp. (N.D. Ohio).

[24]As discussed in Section VIII, infra, bankruptcy is not a simple two-sided dispute, with the debtor on one side and all its creditors on the other. Thus, for example, some creditors in a case may support repeated extensions of a debtor's exclusivity, while other creditors, with different interests and goals, oppose such extensions. Many debtors prefer to reorganize out-of-court or through prepackaged or prenegotiated plans of reorganization, all of which require cooperation between a debtor and a significant number and amount of its creditors. Thus, a bankruptcy model -- and a venue analysis -- predicated on the theory that reorganization pits the debtor against all its creditors is fundamentally flawed.

to venue rules that permit New York City filings. Put in the converse, there is no rational basis for concluding that cases will be shorter if they cannot be filed in the Southern District of New York.

More recent criticism of the Current Venue Statute has focused on Delaware.[25] This is ironic because a significant percentage of the large corporate debtors that file in Delaware do so in order to implement "prepackaged" or "prenegotiated" plans which enable them to emerge from Chapter 11 quickly, well within the initial 120-day exclusivity period afforded debtors-in-possession by the Bankruptcy Code.[26] Excessive exclusivity extensions clearly are not an issue in these cases. Nor are excessive fees and reorganization costs. And yet the primary effect[27] of the Venue Proposal is to eliminate Delaware as a venue choice for Delaware corporations, except in those few instances where the corporation's principal assets or principal place of business also are in Delaware. Thus, the Venue Proposal would eliminate an efficient forum that has the time, the ability and the willingness to expedite cases.

Even when one takes into account cases that are neither pre-packaged nor pre-negotiated, the District of Delaware compares favorably with other districts. According to the 1996 Bankruptcy Yearbook and Almanac, the length of time from date of filing to confirmation for public companies reorganizing from 1982 to 1995 was 17.2 months. For the years 1991-1995, the average times to reorganize were as follows:

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[25]See Robert J. Rosenberg and Marla S. Becker, The Perils of Forum Shopping and the Need For Statutory Reform of the Venue Selection Process, printed in The Biased Business of Venue Shopping, 75, 82-85 (July 21, 1995) (the "Rosenberg Article"). The Rosenberg Article was prepared for and at the request of The American Bankruptcy Institute Northeast Bankruptcy Conference, as part of the ABI Bankruptcy Reform Study Project. The authors were assigned the tax of criticizing the Current Venue Statute. Thus, the article does not necessarily reflect the personal views of the authors or their law firm.

[26]Between December of 1990 and July 8, 1996, fifty-six (56) companies with assets in excess of $100 million filed their Chapter 11 petitions in Delaware. Of those 56, twenty-seven (27) were prepackaged or prenegotiated. Of the thirteen (13) Delaware cases involving companies with assets in excess of $1 billion, nine (9) were prepackaged or prenegotiated. (Companies whose headquarters or principal place of assets are located in Delaware are excluded from the above computation, as are cases that were transferred to other districts or dismissed).

[27]Many corporate debtors whose principal assets and principal place of business arguably are located outside New York nevertheless have significant and meaningful contacts with New York (e.g., Bradlees, Inc., Jamesway Corp., Hills Department Stores, Inc.). Given these contacts, and given the difficulty and imprecision inherent in determining where "principal assets" and/or "principal place of business" are located (See discussion in Section VI below), the Venue Proposal is not likely to deflect many cases from New York. It will, however, divert cases from Delaware. Such a result seems grossly at odds with the goal of reducing the duration of Chapter 11 cases and reorganization costs, two of the major complaints of venue critics. It also serves to clarify the "anti-Delaware" impetus between the Venue Proposal.

Year	Nat'l Avg. (w/prepack & preplanned cases)	Delaware (w/prepack & preplanned cases)
1991	12.6	2.4
1992	14.0	12.7
1993	16.8	11.3
1994	18.1	7.0
1995	17.1	14.5

The average time to reorganize between 1991 and 1995 for companies reorganizing in the District of Delaware was approximately 10.6 months. The 1995 Delaware figures include the Columbia Gas case, which took 51.5 months from date of filing (1991) to confirmation (1995).

B. Professional Fees.

Commentators have contended that New York attorneys supposedly prefer New York City as a venue because they charge New York rates which may be more difficult to collect in other districts.[28] Similar arguments apparently are being made about the District of Delaware, which some perceive as being lenient on fees. This argument for changing venue misses the point. Even if New York and Delaware do permit "New York rates" for New York attorneys, that is not inappropriate under the Bankruptcy Code as it exists today. Congress intended that debtors be able to retain bankruptcy counsel of their choice and pay them the rate those counsel charge non-bankruptcy clients.[29] It is other districts that often have refused to enforce this Congressional mandate. Ironically, criticism is being leveled at those districts that are following the Bankruptcy Code.

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[28]LoPucki/Whitford Study at 32-33, 37.

[29]See 11 U.S.C. § 330(a)(3)(E), which states that in determining the amount of reasonable compensation, the court shall consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." H.Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286, explains that if fees were reduced based on other concerns, "attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service." See, e.g., In re Busy Beaver Building Centers. Inc., 19 F.3d 833, 850-51 (3d Cir. 1994) (discussing section 330(a) of the Bankruptcy Code).

Moreover, to the extent that services performed are unreasonable, a bankruptcy court is required to disapprove all or a portion of those fees.[30] There is no evidence whatsoever that bankruptcy courts in Delaware or New York are shirking their responsibilities in this regard. Indeed, in Delaware, like other jurisdictions, there are guidelines and rules that restrict the compensability of certain types of fees. For example, although arguably allowable under the Third Circuit's decision in Busy Beaver,[31] the bankruptcy court in Delaware does not permit professionals to charge the estate for any travel time. Conferences among professionals in the same firm also are discouraged and are subject to being compensated on the basis of the time spent by one attorney. Like other jurisdictions, Delaware frowns on, and will not compensate for, duplicative services. Thus, the court monitors the number of attorneys attending hearings and warns that duplication of effort will not be countenanced.[32] In other cases, the court in Delaware has required financial professionals for different committees to confer with one another and to share their work product.[33] Moreover, although not required by controlling Third Circuit authority, the Delaware bankruptcy court frequently appoints a fee examiner to review fee applications and provide an additional level of scrutiny.[34]

Finally, to the extent that the Commission believes approval of out-of-town rates, methods of judicial review of fees, and the existing fee application process are improper or inadequate, these issues should be addressed directly. Venue choice by corporate debtors did not create the problem of expense in Chapter 11, and the Venue Proposal will not fix it.

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[30]The LoPucki/Whitford Study criticizes bonuses supposedly given to professionals in bankruptcy cases in New York, citing an early Bankruptcy Code case. See LoPucki/Whitford Study at 46 n. 118 (citing In re Penn-Dixie Indus., Inc., 18 B.R. 934 (Bankr. S.D.N.Y. 1981)). As practitioners in New York know, however, bonuses are virtually impossible to obtain in New York. Delaware, too, rarely awards premiums. The rulings denying bonuses, however, have not resulted in published opinions.

[31]19 F.3d 833 (3d Cir. 1994).

[32]See, e.g., In re UDC Homes. Inc., No. 95-558, 6/22/96 transcript at 16-20 (in reluctantly honoring creditors' committee's request to retain two law firms, court (i) stated that "[u]nder these circumstances, the two [fee] applications are subject to closer scrutiny . . .. I mean it when I say duplication will not be tolerated," and (ii) established procedures that would enable the court to monitor the services rendered by the two firms).

[33]In re Harvard Industries. Inc., No. 91-404 (HSB).

[34]Fee examiners were appointed in the following cases: Columbia Gas System, Inc.; Continental Airlines, Inc.; Peter J. Schmitt Holdings, Inc.; Trans World Airlines, Inc.; Wherehouse Entertainment, Inc.; SLM International, Inc.; Burlington Motor Holdings, Inc.; Rickel Home Centers, Inc.; Color Tile, Inc.; Edison Brothers Stores, Inc.; UDC Homes, Inc.; and Lomas Financial Corp.

C. Small Claim Participation.

Without pointing to any specific examples, commentators have argued that "manipulation" of the venue rules deprives creditors with small claims of the ability to participate directly in the case.[35] Some even have argued, without any proof whatsoever, that debtors "frequently" select a forum in order to make it "prohibitively expensive" for "local" creditors . . . to participate" in the case.[36] For common issues, however, unsecured creditors are represented by the official creditors' committee, which is a fiduciary to all unsecured creditors and actively participates in the case and negotiates plan treatment on their behalf. Recognizing this, the LoPucki/Whitford Study and the Rosenberg Article refer not just to the effect of venue choice on creditors with small claims, but to creditors who will not prosecute individual issues (e.g., motions to lift the stay, reclamation motions) because of the increased cost of litigating in a distant court.

Putting aside for the moment the fact that bankruptcy law seeks to limit individual collection efforts in order to foster group action, a venue premised on the "location" of small creditors with unique rights is unworkable. Nor does the Venue Proposal advocate creating a new venue rule based on creditor location.

Instead, the Venue Proposal would address the issue of creditor participation by restricting venue to the district of the debtor's principal place of business or principal assets. However, restricting venue will neither protect nor encourage enforcement of small creditors' unique, individual rights. Large publicly-held and privately-held corporations have creditors all over the country (and world)[37] and, in this era of the global economy, even "small" debtors may have creditors in many districts. It is inappropriate merely to assume that there is a strong, positive correlation between the location of a debtor's principal assets or principal place of business, on the one hand, and the location of a plurality of its creditors, on the other.

A review of eighteen major Chapter 11 cases filed in the District of Delaware shows that the creditors in those cases where widely dispersed and were located in dozens of different states. See Exhibit D-1. Moreover, as Exhibit D-2 shows, in sixteen major cases for which data was readily available, between 65% and 100% of the so-called twenty largest unsecured creditors were located outside the state of the debtor's principal place of business; in half of the cases, more than 90% of the largest unsecured creditors were located outside the state of the debtor's principal place of business. Exhibit D-3, which sets forth the percentage of creditors located outside the debtor's purported principal place of business for eighteen sample cases, also belies the notion that creditor

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[35]LoPucki/Whitford Study at 39 ("with regard to . . . issues such as lifting the automatic stay, obtaining adequate protection, determining the amounts of claims, reclaiming possession of property, . . . [w]hen the case proceeded in a distant forum, the effect probably was to reduce participation on these issues") (emphasis added). The LoPucki/Whitford Study candidly admits that the authors "did not collect data on participation by minor parties." Id. at n.98.

[36]Rosenberg Article at 81.

[37]LoPucki/Whitford Study at 49.

location and debtor location are strongly linked in the types of cases that file in the District of Delaware.

The proponents of the Venue Proposal do not appear to have made any attempt to gather data to determine whether adoption of the Venue Proposal would in fact benefit creditors. Nor have they taken into account the fact that some states are very large geographically. Thus, it may well be that Delaware and New York City are far more convenient to out-of-state creditors than, for example, a west Texas forum is to a creditor located in east Texas.

The Delaware corporations that are filing their Chapter 11 cases in the District of Delaware on the basis of domicile are not single-asset real estate cases, where the assets to be administered, decision making, customers and bulk of the creditors are concentrated primarily in one district or state. They are large, multi-state corporations, with far flung operations, whose creditors are located in many states throughout the United States. In those cases where the "center of gravity" is far from Delaware, the Delaware bankruptcy court has transferred venue.[38] Indeed, the bankruptcy court in the District of Delaware has granted eighteen (18) of the twenty-seven (27) motions to transfer venue that have been filed with it since 1988. Thus, it is simply inaccurate to suggest, as some have, that 28 U.S.C. § 1412 is ineffective because bankruptcy courts cannot be trusted to apply the law properly when presented with a motion to change venue.

If the extent of small creditor participation is of concern to the Commission, it should be explored and addressed directly, not through venue legislation. There are far more effective ways to foster small creditor participation than by adopting the Venue Proposal. Indeed, if small creditor participation truly is one of the Commission's "venue reform" goals, then the Venue Proposal is perplexingly deficient. It doesn't even pretend to deal with the small creditor inconvenience and participation problems that will continue to arise even if state of incorporation is eliminated as a venue choice.

If small creditor participation is a significant concern, the Commission should focus on reforms that would truly foster their participation. However, before adopting measures designed to

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[38] See, e.g., In re Ernst Home Center, Inc., No. 96-1088, 8/28/96 transcript at 3 (more than six weeks into case, court transferred case to Washington state because the "center of gravity of this case is the West Coast and the convenience of the parties and the interest of justice is best served by transferring this case to the appropriate West Coast forum"); see also In re American Community Centers XVL, L.P., No. 91-405; In re F&M Caribbean, Inc., No. 95-539; In re Gilliam, No. 96-1060; In re Hercules Automotive, No. 96-634; In re Mall Development, Inc.,No. 91-1065; In re Marine Petroleum Company, No. 93-360; In re MEI Diversified, Inc., et al., Nos. 93-205 to 93-213; In re Ocean Properties of Delaware, Inc. and Southern Shores Investments Corp., Nos. 88-505 and 88-506 (reported at 95 B.F. 304); In re PEL Associates, Inc., No. 96-775; In Repco Inc., No. 92-1115; In re Sacramento Street Realty Corp., No. 92-251; In re Sam Houston Race Park, Ltd., No. 95-433; In re SHRP Acquisition, Inc. and SHRP Capital Corp., Nos. 95-434 and 95-435; In re Spirit Holding Company, Inc., No. 93-337; In re TPI/CMS St. Paul L.P., NO. 96-1279; In re University Commons, L.P., No. 96-458; and In re Zephyr Hills Associates, L.P., Hudson Partners, L.P., and Winward Park Limited Partnership, Nos. 90-929 and 90-930. Venue was transferred in each of these cases.

foster small creditors participation, it would be useful to analyze whether small creditors do in fact fail to pursue their claims and, if so, why they fail to do so. Is it really due to distance from the courthouse (which can be remedied directly without changes to the venue statute)? Or is it because the size of the claim and the anticipated return on the claim simply don't warrant the cost of hiring a lawyer and investing the claimant's time in pursuing the claim? Regardless of the reasons why some small creditor don't participate, two things are clear. First, there is no reason to believe that eliminating state of incorporation as a venue choice will increase creditor participation. Secondly, there are far more direct and effective ways of dealing with the issue than "venue reform."

IV. MISPERCEPTIONS REGARDING DELAWARE FILINGS

There is a perception that large corporate debtors with no "real" connection to Delaware are filing in the District of Delaware for improper purposes. This perception is wrong.

A. Delaware Frequently Is Not The Forum of Choice in Non-Prepackaged and Non-Prenegotiated Bankruptcy Cases.[39]

Prepackaged and prenegotiated cases aside, an analysis of the data demonstrates that the vast majority of large companies filing for Chapter 11 do not file in Delaware, even though many of them could do so under the Current Venue Statute. A review of plans, disclosure statements and SEC filings on various computerized data bases shows that in non-prepackaged/non-prenegotiated cases -- where speed and certainty are not top priorities -- Delaware generally is not the forum of choice. Thus, as shown by the information in the chart annexed as Exhibit E, many retail, restaurant, casino, and mass tort debtors incorporated in Delaware frequently opt for a non-Delaware bankruptcy forum. This is further demonstrated by an analysis of data set forth in The Bankruptcy Yearbook & Almanac. Of the 254 public companies that filed for Chapter 11 between 1990 and 1995, at least 135 were Delaware corporations. (It is possible that some of the 254 companies that were not Delaware corporations had Delaware affiliates, but this could not be determined from the data.) Of the 135, twenty-seven (27) -- or 20% -- filed their Chapter 11 cases in the District of Delaware; thus, at least eighty percent (80%) chose to file elsewhere. Similarly, of the 425 "notable private bankruptcy filings" from 1992 through 1995 identified in The Bankruptcy Yearbook & Almanac, at least 120 involved Delaware corporations. Of the 120, twenty-six (26) -- or 21.7% -- filed in Delaware. Thus, at least 78.3% chose to file elsewhere.

[39] "Prepackaged cases" are those in which plans of reorganization have been negotiated, drafted and voted upon prior to the filing of a Chapter 11 petition. Companies using prepackaged plans typically spend only a few months, sometimes only a few weeks, in Chapter 11, thus greatly reducing the expenses and business disruption that frequently accompany many Chapter 11 cases. "Prenegotiated cases" are those in which plans of reorganization have been negotiated and drafted, but not formally voted on, prior to the filing of a Chapter 11 petition. In a "prenegotiated case," the plan and disclosure statement usually are filed with or shortly after the filing of the petition, and the debtor emerges from Chapter 11 in a few months.

This data demonstrates that the critics of the Current Venue Statute are responding to a perceived problem, not a real one. Reality -- not perception, not gut feelings -- should be the Commission's polestar.

B. Debtors Selecting Delaware As A Forum Are Not Doing So For Inappropriate Reasons.

Delaware does attract a significant number of prepackaged and prenegotiated case filings by large, multi-state corporations. This skews the statistics and helps foster the misimpression that companies and their lawyers are channeling cases to Delaware to the exclusion of "more appropriate" fora. Any statistical analysis, however, should stratify the sample into prepackaged/prenegotiated cases and non-prepackaged/non-prenegotiated cases. In this way, one gets a more accurate and detailed picture of what is prompting venue choices. Basically, Delaware has been the leader in developing techniques to stabilize a debtor's business operations and to enable debtors to emerge from Chapter 11 quickly, efficiently and cheaply. Creditors as well as debtors favor Delaware for prepackaged and prenegotiated case filings. These goals -- speed, efficiency, cost reduction, and creditor/debtor acceptance -- are goals that the Commission should be fostering. Instead, by proposing to eliminate state of incorporation as a venue choice, the Commission is singling out and punishing a jurisdiction that has been instrumental in developing techniques that enable some companies to avoid lengthy, debilitating stays in Chapter 11. In doing so, the Commission is depriving debtors and creditors of a forum that both groups have viewed favorably in the context of prepackaged and prenegotiated bankruptcies.

It is important for the Commission to note that Delaware does not have a monopoly on prepacks, and that even prepackaged cases will shift to other jurisdictions over time. Indeed, this already is occurring.[40] Thus, eliminating state of incorporation as a venue choice seems to be a gross overreaction to what may be a temporary situation. Indeed, looking at the sparse literature on bankruptcy venue, it is clear that today's perceived problem (i.e., Delaware filings) wasn't even on the radar screen a few years ago. The primary target of criticism several years ago was the Southern District of New York, with its allegedly neverending, expensive megacases. Now, the focus is on the District of Delaware, with its speedy, relatively inexpensive prepackaged and prenegotiated cases.

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[40]Over time, companies have become more willing to file prepackaged plans in jurisdictions other than Delaware. See, e.g., In re Trans World Airlines.,Inc., No. 95-43748-399 (Bankr. E.D. Mo.; filed 6/30/95); In re Live Entertainment, Inc., No. LA-93-13410-M (Bankr. C.D. Cal.; filed 2/2/93); In re Rymer Foods, Inc., No. 93-82333 (Bankr. N.D. Ill.; filed 2/3/93); In re Hadson Corp., No. 92-16777 (Bankr. W.D. Okla.; filed 10/15/92); In re Gaylord Container Corp., No. 92-13849 (Bankr. E.D. La.; filed 9/11/92); In re Edgell Communications, Inc., and New Century Communications, Inc., No. 91-17030 (Bankr. N.D. Ohio; filed 12/23/91); In re San Jacinto Holdings Inc., No. 91-B-14976 (Bankr. S.D.N.Y.; filed 11/5/91); In re JPS Textile Group, Inc., No. 91-B-10546 (Bankr. S.D.N.Y.; filed 2/7/91); In re LaSalle Energy Corp., No. 90-05508-H3-11 (Bankr. S.D. Tex.; filed 8/7/90); In re Republic Health Corp., No. 389-38127-SAF-11 (Bankr. N.D. Tex.; filed 12/15/89); In re Anglo Energy Inc., No. 88-B-10360 (Bankr. S.D.N.Y.; filed 2/22/88). In each of these large prepackaged plan cases, the debtor (or, in the case of Edgell, a filing affiliate) was a Delaware corporation which could have filed its Chapter 11 petition in Delaware.

While prepackaged and prenegotiated cases have constituted a large portion of Chapter 11 filings in Delaware, it is true that a number of large non-prepackaged/non-prenegotiated cases also have been filed in Delaware over the last five years. Rather than blindly eliminating Delaware as a forum, however, the Commission should ask why large cases are being filed in the District of Delaware and deal with the substantive issues that surface as a result of this inquiry. The Commission also should explore whether venue choice is driven by a desire to be in a particular jurisdiction, on the one hand, or by a desire to avoid being in some other jurisdiction, on the other hand. Regardless of whether forum selection or forum avoidance is the impetus, the question that should be asked is "why?" Factors that may be relevant to a debtor in selecting a forum include:

- Predictability and consistency
  - How many judges are in the district?
  - Are their rulings consistent from case to case?
  - Are the judges consistent with each other on key issues and procedures?
  - Are there fundamental philosophic or other differences between the judges or in the way they handle cases?

- Experience
  - Are the judges experienced with the issues likely to arise in the case?
  - Do they have industry expertise?
  - Do the judges decide matters promptly?
  - Are settlements encouraged?

- Availability and efficiency
  - Can the parties get the court time that they need?
  - Are the judges available?
  - Are there procedures to accommodate large cases, such as omnibus hearing dates and scheduling clerks?

- Convenience
  - Is the courthouse easily reached by the debtor, creditors and others?
  - Is transportation to and from the district a problem?
  - Is the case likely to require many hearings over an extended period of time or is it prepacked or prenegotiated, so that few hearings will be required?

Each of these issues affects a debtor's decision regarding where to file and affects creditor acceptance of the selected forum. In assessing these criteria, the bankruptcy marketplace of debtors' and creditors' counsel often prefers the District of Delaware.

V. FEDERAL STATUTES AND CASE LAW REPEATEDLY HAVE FOUND A CORPORATION'S STATE OF INCORPORATION TO BE A MEANINGFUL CONTACT FOR VENUE PURPOSES

Although some commentators have concluded that the Current Venue Statute discourages participation in Chapter 11 cases by holders of small claims, no one has seriously suggested premising venue on creditor location.[41] Indeed, such a venue predicate would be impractical, if not impossible, to apply in many cases.[42] Thus, the Current Venue Statute bases venue on the location of the entity that will become the debtor (or the location of a filing affiliate of such an entity). Generally, the Current Venue Statute provides that venue is properly laid in the district of the debtor's domicile, the debtor's principal assets, or the debtor's principal place of business. In each case, the focus is on the debtor and the debtor's relationship to the district in question.

If adopted, the Venue Proposal would not eliminate debtor-based venue predicates in favor of creditor-based venue predicates. It would, however, eliminate state of incorporation as a venue predicate for corporate debtors, thereby singling out bankruptcy as the one significant federal statute where a company's state of incorporation will not support venue.

Amending 28 U.S.C. § 1408 to eliminate a corporate debtor's state of incorporation as a proper venue would be completely at odds with both the history and current status of federal venue legislation. For over a century, when a venue statute has looked to the location of a corporation to determine venue, that corporation's statue of incorporation has been found to be a proper venue. E.g., Shaw v. Quincy Mining Co., 145 U.S. 444, 449-50 (1892). In fact, courts have been consistent in holding that, absent legislation to the contrary, a corporation's state of incorporation is the only proper venue when a corporation's residence or domicile is the basis for venue. E.g., id.; Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 226, 229 (1957).

For example, under the general federal venue statute, when venue was laid where a party resided, venue was proper with respect to a corporation in its state of incorporation. See Shaw, 145 U.S. at 449-50. Indeed, prior to the enactment of 28 U.S.C. § 1391(c) in 1948, when a federal general venue statue laid venue in the district where one of the parties resided, a corporation was deemed to reside, and venue accordingly was proper, only in its state of incorporation. E.g Shaw, 145 U.S. at 449-50; Johns-Manville Corporation v. United States, 796 F.2d 372, 373 (10th Cir. 1986) (holding that "the residence of a plaintiff corporation under [28 U.S.C. § 1391(e)] is limited to the state of incorporation"). The enactment of Section § 1391(c) generally effected a substantial

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[41] See LoPucki/Whitford Study at 49; Rosenberg Article at 81.

[42] Basing venue on creditor location would be time-consuming and litigable. Is a creditor "located" at its billing address? its corporate headquarters? the address from which it ships or provides services to the debtor? the location of its "workout" department? If a debtor were required to file based on the "location" of most of, or a plurality of, its creditors, how would this be determined? On the basis of number of creditors? the dollar amounts of the creditors' claims? How would contingent, unliquidated or disputed claims be dealt with? Creditor-based venue, if it worked at all, would not work well.

expansion of venue choices for plaintiffs suing corporations, but did not remove the corporation's state of incorporation as a proper venue.[43]

Similarly, a corporation's state of incorporation has been a proper venue under various specific venue provisions. For example, under the patent venue statute, [a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides . . . ." 28 U.S.C. § 1400(b). The Supreme Court has held that, for purposes of this provision, a corporation resides only in its state of incorporation. Fourco Glass, 353 U.S. 222, 226, 229 (1957).[44]

In a similar vein, venue in an action under the antitrust laws is proper against a corporation in a judicial district where the corporation is an inhabitant. See 15 U.S.C. § 22. Under this provision, "[t]he word 'inhabitant' is synonymous with 'resident"' and "[a] corporation is a resident of the state in which it is incorporated." Aro Manufacturing Co., Inc. v. Automobile Body Research Corp., 352 F.2d 400, 404 (1st Cir. 1965) (citing Shaw. 145 U.S. at 449-450). Accordingly, a defendant corporation's state of incorporation is a proper venue under 15 U.S.C. § 22. Id., See also 42 U.S.C. § 9613(b) (venue proper in an action under CERCLA in the district where the defendant resides); 15 U.S.C. § 77v (venue proper in an action under the Securities Act of 1933 in the district in which the defendant resides); 15 U.S.C. § 78aa (venue proper in an action under the Securities Exchange Act of 1934 in the district in which the defendant is an inhabitant); 15 U.S.C. § 80b-14 (venue proper in an action under the Investment Advisors Act in the district in which the defendant is an inhabitant).

Based on the foregoing, removing a debtor's state of incorporation as a proper venue in bankruptcy cases would be inconsistent with the rule established under federal law in virtually all non-bankruptcy cases. Since most of the other statutes lay venue based on the defendant's residence, there is no reason not to look at a debtor corporation's residence in bankruptcy cases. Given the numerous parties in interest involved in many bankruptcy cases, there is no single meaningful entity other than the debtor to look to in determining a proper venue, and, in the case of a corporate debtor,

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[43]As enacted in 1948, Section 1391(c) provided that "[al corporation may be sued in any judicial district in which it is incorporated or licensed to do business or doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C. § 1391(c) (1948). As amended in 1988, Section 1391(c) now provides in pertinent part that, "[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." This would include Delaware for a Delaware corporation.

[44]The Fourco Glass Court found that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions," and that it is not supplemented by the provisions of 28 U.S.C. § 1391(c). Id. at 229. As discussed in note 43 above, 28 U S.C. § 1391(c) was amended in 1988. The phrase "under this chapter" in amended Section 1391(c) refers to chapter 87 of title 28, which encompasses §§ 1391-1412 and includes Section 1400(b). Thus, one court has held that Section 1391(c) now "clearly applies to § 1400(b) and . . . redefines the meaning of the term 'resides' in that section." VE Holding Corporation v. Johnson Gas Appliance Company. 917 F.2d 1574, 1578 (Fed. Cir. 1990). This expansion of a plaintiffs choice of venue in patent infringement litigation does not remove a defendant corporation's state of incorporation as a proper venue.

state of incorporation consistently has been found to be a meaningful and relevant contact for venue purposes.

Certain commentators -- not legislators or courts -- have asserted that state of incorporation is too ephemeral a contact to support venue. The Rosenberg Article argues that the portions of 28 U.S.C. § 1408 that permit "venue to be proper in the forum of a debtor's incorporation should be abolished" because state of incorporation "may well already be a product of forum shopping" and "has so little to do with 'the interests of justice' and 'the convenience of the parties' . . ."[45] The Supreme Court of the United States, however, is not as quick to dismiss a corporation's state of incorporation as insignificant or meaningless; nor does it view principal place of business as a superior or more meaningful contact than state of incorporation. Thus, in State of Delaware v. State of New York, 507 U.S. 490 (1993), a case addressing escheat rights, the Supreme Court rejected the notion, advanced by the Special Master, that location of executive offices, rather than state of incorporation, should control escheat rights.[46] The Special Master, ignoring prior Supreme Court precedent, had concluded that the state in which the principal executive offices were located, not the state of incorporation, was entitled to the unclaimed funds. The Supreme Court disagreed on grounds of "precedent, efficiency and equity," saying:

> A company's arguably arbitrary decision to incorporate in one State bears no less on its business activities than its officers' equally arbitrary decision to locate their principal executive offices in another State. It must be remembered that we refer to [the intermediary's] State of incorporation only when the [beneficiary's] last address is unknown or when the [beneficiary's] State does not provide for escheat. When the [beneficiary's] State cannot assert its predominant interest, we detect no inequity in rewarding a State whose laws prove more attractive to firms that wish to incorporate.

507 U.S. at 507.

A significant number of corporations have chosen to incorporate in Delaware. As Delaware residents, these corporations are entitled to the benefits (and subject to the burdens) of Delaware corporate law and are subject to suit in Delaware state and federal courts. It is arbitrary, to say the

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[45]Rosenberg Article at 94-95. The Rosenberg Article's reference to "convenience of the parties" seems to be indirectly supporting creditor-based venue. As discussed in note 42, however, a creditor-based venue scheme is unworkable.

[46]The case involved unclaimed dividends, interest and other securities distributions held by various financial intermediaries (whose principal offices were located mostly in New York) in their own names for the accounts of beneficial owners who could not be identified or located. New York escheated $360 million in such funds without regard to the beneficiary's last known address or the intermediaries' states of incorporation. After Delaware sued New York, the Special Master filed a report recommending that escheat rights be awarded to the state in which the principal executive offices of the securities issuer are located. The Supreme Court held that, as to distributions held by intermediaries for beneficial owners whose "last address is unknown," the state in which the intermediary was incorporated had the right to the unclaimed funds.

least, to eliminate the federal bankruptcy court in Delaware as a proper forum for a troubled Delaware corporation, whose status as a Delaware corporation is a matter of public record and easily ascertained. The fact that a significant number of large corporate debtors have chosen Delaware as a forum for their Chapter 11 cases[47] is not a compelling reason to single out the venue provisions pertaining to bankruptcy cases as the one federal statute where a corporation's state of incorporation will not support venue.

The Delaware corporations that have filed their Chapter 11 petitions in Delaware do business across the country and often internationally; they own significant assets in many jurisdictions. These companies have chosen Delaware as their corporate residence deliberately and in light of all the factors that affect corporate life. These factors include: the corporation laws of the various states, see Daniel R. Fischel, Organized Exchanges and the Regulation of Dual Class Common Stock, 54 U. Chi. L. Rev. 119, 129 (1987) ("Managers . . . have strong incentives to decide where to incorporate based on which set of state laws is suitable for the particular needs of their firms."); whether the state's laws are flexible enough to allow the corporation to operate efficiently, see Frank H. Easterbrook, Managers' Discretion and Investors' Welfare: Theories and Evidence, 9 Del. J. Corp. L. 540, 548-49 (1985); whether the state in question can offer a credible commitment to predictable and stable legal rules, see Roberta Romano, Law As A Product: Some Pieces of the Incorporation Puzzle, 1 J. L. Econ. & Org. 225, 280 (1985); whether the state has a well developed body of case law and a legislature that is responsive to the needs of corporations; the quality and efficiency of the state's court system, see G. Richard Shell. Arbitration and Corporate Governance, 67 N.C. L. Rev. 517, 573 (1989); the franchise taxes and other fees imposed by the various states; and the efficiency and responsiveness of the state agencies responsible for corporate filings and records, see Lewis S. Black, Jr., Why Corporations Choose Delaware (Prentice Hall Legal & Financial Services 1993). The factors influencing selection of a state of incorporation are as important and as significant as those that influence a corporation's decision regarding where to locate its headquarters, manufacturing facilities, or other assets. All of these decisions are of importance to a corporate enterprise, and all give rise to a "real connection" with the state in question. Recognizing this, both Congress and the courts have long acknowledged the importance of a corporation's state of incorporation both generally and as it relates to venue statutes.

It is highly unlikely that most debtors select their states of incorporation with a view toward a subsequent Chapter 11 case. Thus, selection of state of incorporation is driven by non-bankruptcy factors. Although commentators have noted the ease with which principal assets can be manipulated and have even identified some companies that may have done so,[48] they have "found no evidence that any of the companies studied [selected or changed their states of incorporation] . . . in connection

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[47]From 1990 through the first half of 1996, 120,636 Chapter 11 cases were filed in the United States. Of those, only a small percentage -- 0.77% or 934 cases -- were filed in the District of Delaware. That volume of cases hardly warrants federal legislative change. However, a significant number of large, high profile cases have been filed in Delaware, which may explain the move to change the Current Venue Statute.

[48]LoPucki/Whitford Study at 18-22.

with a venue strategy."[49] Indeed, they consider "use of reincorporation as a venue strategy unlikely, both because shareholder approval is required to change the state of incorporation and because there are easier ways to create or enhance venue choice opportunities."[50] Nevertheless, it is state of incorporation that is viewed with suspicion and singled out for "reform" in the Venue Proposal.

VI. THE VENUE PREDICATES THAT WOULD REMAIN UNDER THE VENUE PROPOSAL ARE LITIGABLE AND LIKELY TO BECOME LESS MEANINGFUL AS TECHNOLOGY PROGRESSES

The Commission is considering eliminating the one venue choice that is clear, easily ascertainable by everyone in advance, and not subject to litigation. This is hardly consistent with the goal of making bankruptcy less litigious and cheaper. Moreover, as technology advances -- with computers, faxes, E-Mail, the "Net" and the "Web" -- decision making will become more and more diffuse. The concept of corporate headquarters (or a corporation's principal place of business) could well become meaningless in a few years. And yet "principal place of business" will continue to be a venue choice under the Commission's proposal.

"Place of principal assets" is also fact intensive and litigable much of the time, and is likely to be litigated more if the Venue Proposal becomes law. In the case of companies whose primary value is in the form of intangible assets (such as trademarks, tradenames, patents, technology, computer-related products, information systems, licenses, contracts, etc.), the term has little meaning. In these cases, "place of principal assets" is far less "real" a contact than state of incorporation, and it is a great deal more difficult to determine. Even with respect to debtors whose value is in the form of "hard assets," like inventory, stores, restaurants, and other non-movable assets, a quick glance at the larger retail[51] and restaurant[52] cases shows that place of "principal assets" is not easily ascertained.

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[49] Id. at 17.

[50] Id.

[51] See, e.g., Ames Department Stores, Inc., (690 stores located in N.Y. (98), Fla. (83), Pa. (71), Ohio (59), Mass. (50), Md. (47), Va. (39), Ill. (34), Me. (33), Ind. (29), N.H. (26), Conn. (20), W. Va. (18), N.C. (17), Vt. (14), Mich. (13), Del. (10), Ky. (10), R.I. (10), N.J. (8), and D.C. (1)); The Caldor Corporation (163 stores located in N.Y. (53), Conn. (31), N.J. (25), Mass. (24), Md. (12), Pa. (9), Del. (3), R.I. (3), Va. (2) and N.H. (1)); Best Products Co., (194 catalog stores located in East (62), Central (60), and Western states (72), plus 36 jewelry stores in 9 states and D.C.); Carter Hawley Hale Stores, Inc. (88 stores in Cal., Ariz., Colo., Nev., N. Mex., and Utah); Bradlees, Inc. (136 stores located in Mass. (37), N.J. (36), Conn. (24), N.Y. (13), Pa. (11), N.H. (8), Me. (4), Va. (2) and R.I. (1)); Hills Department Stores, Inc. (214 stores in 12 states); Jamesway Corp. (90 stores located in Pa. (28), N.Y. (24), N.J. (23), Va. (6), Del. (4), Md. (4) and W. Va. (1)); Jamesway Corp. (108 stores located primarily in N.Y., N.J. and Pa. (88), Va. (9), Md. (6), Del. (4) and W. Va. (1)).

[52] See, e.g., Gilbert/Robinson Inc. (104 restaurants in 25 states); Sizzler International, Inc. (debtors and their affiliates operated or franchised over 700 restaurants in 27 states, as well as a

Retailers, for example, may have stores in several states. Should one merely count the number of stores in determining where the "place of principal assets" is? Or should one look at sales volume of the stores in questions? Perhaps the profits of those stores? The likely liquidation value of the assets? What if the debtor plans to eliminate operations in a certain jurisdiction, but has not yet done so at the time of the filing? Can the filing nevertheless occur in the jurisdiction where assets slated for disposition are located? Determining the appropriate venue in these cases can be expensive and time consuming It is wasteful and, if anything, it points out the need to expand rather than limit venue choices so as to reduce litigation, uncertainty and expense.

As the LoPucki/Whitford Study acknowledges, technology can dramatically reduce the burdens on creditors who would like to pursue individual rights, but who supposedly do not do so because of cost and inconvenience.[53] Electronic filings, videotape, teleconferencing, on-line access to docket information, and a host of other developments will do far more than any venue proposal to increase and facilitate creditor participation, to the point where "the physical site of the forum [will] be relatively unimportant."[54] Moreover, anyone who has ever been involved in a major Chapter 11 case knows that the "principal place of business" and the "place of principal assets," even if readily ascertainable, bear little relationship to the "location" of creditors. (See Exhibit D, setting forth "locations" of creditors in various large Chapter 11 cases.) Indeed, trying to ascertain the "location" of creditors raises a whole separate set of issues which are beyond the scope of this paper.

The venue choices that would remain untouched by the Venue Proposal will be less and less meaningful in large cases as technology develops and will, therefore, be subject to increasing litigation. Indeed, the "principal place of business" and "location of principal assets" tests already have spawned a myriad of decisions in various contexts.[55] Unlike state of incorporation, principal place of business and place of principal assets are not easily ascertainable, fixed criteria. Rather, they are mixed questions of law and fact for which no single bright-line test exists.[56] Over the years, courts have employed a variety of tests to determine principal place of business, including, but not limited

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dozen foreign countries).

[53]LoPucki/Whitford Study at 49.

[54]Id.

[55] See, e.g., Shearin v. Cortez Oil Co., 92 F.2d 855 (5th Cir. 1937); In re Peachtree Lane Associates, 188 B.R. 815 (Bankr. N.D. Ill. 1995); In re J & L Plumbing & Heating Inc., 186 B.R. 388 (Bankr. E.D. Pa. 1995).

[56]Compare Quality Refrigerated Services. Inc. v. City of Spencer, 908 F. Supp. 1471, 1483 (N.D. Iowa 1995) (principal place of business is mixed question of law and fact, although primarily one of fact) with Gavin v. Read Corp., 356 F. Supp. 483, 486 (E.D. Pa. 1973) (although the determination of a corporation's principal place of business is a question of fact, the determination as to what facts are helpful in deciding a corporation's principal place of business is a question of law).

to, the nerve center test,[57] the center of activity test,[58] and the operating assets test.[59] Regardless of the test employed, if venue predicated on principal place of business or location of principal assets is contested, an evidentiary hearing is required.[60] Indeed, the fact-intensive and litigable nature of these tests led the United States Supreme Court to reject them in favor of a state-of-incorporation test in resolving escheat disputes among the states.[61]

Regrettably, the proponents of the Venue Proposal are moving in the wrong direction, oblivious to changes in technology and the types of businesses in which debtors of the future will be engaged, seemingly unconcerned about the increased costs and litigation that may flow from adoption of the Venue Proposal. All this for the sake of dealing with a temporary "problem" that is not really there at all.

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[57]Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862 (S.D.N.Y. 1959) (under the facts presented, corporation's principal place of business was its headquarters).

[58]Kelly v. U.S. Steel Corp., 284 F.2d 850 (3d Cir. 1960) (under the facts presented, corporation's principal place of business was where business operations were conducted, not where policy decisions were made).

[59]In re Lakeside Utilities, 18 B.R. 115 (Bankr. D. Neb. 1982).

[60]E.g., In re Macon Uplands Venture, 2 B.R. 435, 439 (Bankr. D. Md. 1979).

[61]In Texas v. New Jersey, 379 U.S. 674 (1965), the Court rejected a proposal to award the secondary right to escheat to the state where the debtor's principal offices were located because its application "would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located." Texas. 379 U.S. at 680. The Court refused to adopt a "rule leaving so much for decision on a case-by-case basis." Id. Instead, the Court adopted a primary rule which subjected the claims to escheat by the state of the last-known address of the creditor, as shown by the corporate debtor's books and records. Id. at 601. In formulating the secondary rule, to be applied to property owed by persons as to whom there was no record of any address at all, the Court looked to the debtor's state of incorporation, finding it the most efficient way to locate a corporate debtor. Id. at 682. When recommending continued application of the Texas secondary rule, the Special Master in Pennsylvania v. New York. 407 U.S. 206 (1972), stated that that rule "presents an easily administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely." Pennsylvania. 407 U.S. at 213. Similarly, in Delaware v. New York. 507 U.S. 490 (1993), the Court upheld the Texas secondary rule and rejected the Special Master's suggestion that the rule depend on the location of the corporation's principal executive office, finding that "[t]he mere introduction of any factual controversy over the location of a debtor's executive offices needlessly complicates an inquiry made irreducibly simple by Texas' adoption of a test based on the state of incorporation." Delaware. 507 U.S. at 506. Again, the Court expressly concluded that "determining the state of incorporation is the most efficient way to locate a corporate debtor." Id. at 506.

VII. AFFILIATE-BASED VENUE CHOICES ARE APPROPRIATE

Allowing a debtor to file anywhere that an affiliate has filed is the broadest venue predicate for entities that are part of large corporate enterprises. It allows the whole family of companies to file in any district in which any one of them could properly file.

Most commentators neither quarrel with the notion that related companies should be administered in the same court nor propose to eliminate this venue predicate altogether. The reluctance to eliminate affiliate-based venue is well founded and reflects an awareness that administrative costs would skyrocket and rehabilitation would be hampered were related companies forced to file in separate districts. Indeed, related companies tend to suffer from the same problems and require the same treatment -- to force them to see separate judicial "caregivers" makes little or no sense. Thus, permitting affiliates to file in the same location is not thought to be per se abusive. The perceived "abuse" seems to be when related debtors base their filings on venue of a member of the group that is either (a) not "natural" or "logical," in the sense that that particular group member is not the ultimate parent corporation or may not itself be the primary or major cause of the group's financial difficulty, or (b) not bona fide, in that the group member was formed in anticipation of bankruptcy and has no financial problems. With respect to the latter point, there simply is no evidence that debtors are creating new affiliates on the eve of bankruptcy in order to create a new venue choice for an existing troubled company that could not otherwise file in that district.[62] Even if isolated instances exist, they should be dealt with in other ways, such as a motion to transfer venue or a bad-faith filing motion, not by eliminating state of incorporation and affiliate filings as venue predicates.[63]

With respect to the former ''abuse," the range of possible "solutions" creates more issues, problems and potential litigation than it solves. One possible "solution" is to force an affiliate to file based solely on the ultimate parent's venue choices. This does not solve the problem, however, because in large corporate families the parent may only be a holding company with few creditors and no tangible assets. The majority of creditors of the operating companies may have no relationship with the parent or with other companies in the corporate group. Moreover, trying to identify the "sickest" member of a corporate group for purposes of determining venue, or the member of the group that "caused" the financial epidemic sweeping through the corporate empire, is not a useful way to determine venue either. For example, is the "cause" of the financial disaster the

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[62]Experienced bankruptcy counsel most likely would counsel against such a strategy. The likelihood that the case would be transferred seems high. Thus, in analyzing such a strategy, the debtor must consider not only the expense and disruption of moving the case, but also whether it wants to run the risk of having to conduct its Chapter 11 case in a forum that it has obviously gone to great lengths to avoid.

[63]An analogy can be drawn to cases involving individuals who move to states with liberal personal exemptions and then file for bankruptcy. This problem should not be dealt with by tinkering with the venue statutes, but rather by dealing with the underlying substantive problem by either holding that the new forum's exemptions are not available to the debtor, dismissing the case, or denying discharge.

decision-making at the ultimate parent level, where there may be few or no creditors? Is it the company whose operations are losing the most money on an operating basis? Is it the company with the most overall debt (in dollars)? The one with the largest number of creditors? The company that is the most insolvent? The one that is most illiquid? Basing venue on these types of factors will neither add to predictability nor ensure greater creditor access to the courthouse. Moreover, these venue tests (to the extent one can characterize something so arbitrary as a "test") in many cases will be subjective and litigable themselves.

VIII. THE VENUE PROPOSAL WILL NOT INCREASE RESPECT FOR THE PROCESS OR FAIRNESS TO THE PARTIES

Critics of the Current Venue Statute argue that "[t]he current liberal choice of venue provisions readily lend themselves to 'forum abuse through selection of distant, inconvenient locations for litigation"' and "effectively permit debtors to manipulate the proper forum or 'natural venue' in which the debtor's bankruptcy case should be heard."[64] They characterize venue choice as "forum shopping," an "evil," a "wrong," alleging that it "generates cynicism about and disrespect for the bankruptcy process."[65] They decry debtors' attempts to obtain a modicum of predictability and certainty through venue selection and characterize such attempts as "mischief."[66]

It has been said that venue choice (a/k/a "forum shopping") is "wrong" because it "permits a debtor to manipulate outcomes by seeking particular courts (and judges) known to be sympathetic to their positions."[67] In less pejorative terms, venue choice permits a debtor to select a forum with a track record and precedent on key issues that affect the debtor's rehabilitative goals. It may help create predictability on some issues of importance both to the debtor and other parties in interest. Why is this "wrong"? If it is "wrong" because the critics believe the outcomes achieved by debtors in certain courts are "wrong," then those outcomes should be addressed directly, not indirectly through the Venue Proposal.[68] If it is "wrong" because it favors certainty over uncertainty, that makes no sense unless one is committed to the notion that a system is somehow fairer if no one can predict or affect the outcome on key issues, what Roscoe Pound called the "sporting theory of justice."[69] As one writer described it:

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[64]Rosenberg Article at 77.

[65]Id. at 78.

[66]June 20 Position Paper at 1.

[67]Rosenberg Article at 78.

[68]See Section III, supra.

[69]R. Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Rep. 395, 417 (1906), as cited in the Harvard Note, note 70, infra.

> Popular moral conceptions of law and justice reflect a prevailing belief that insofar as the law has unavoidable elements of chance, the parties should not be able to manipulate these elements for their own advantage. If neither legislatures nor courts can predict and prescribe for all possible events, the resolution of some situations will depend on the fortuity of law as it happens to be at the time of the event . . . . Forum shopping seems to make random elements in law amenable to ex post manipulation, violating fair play by allowing parties to circumvent fate.
>
> This perception of forum shopping draws on what Roscoe Pound called the "sporting theory of justice," according to which the law is a sort of game in which the contestants must surmount the obstacles that chance or the system impose, with no assistance given to either side. On this view, instead of accepting the vagaries of the law, forum shoppers appear to "cheat" by predicting which forum is likely to provide the desired relief before selecting it. The legal system, however, has repeatedly rejected the view that plaintiffs must rely on games of form and chance and has opted instead for rules that better accommodate litigants by removing obstacles to justice . . ..
>
> Forum shopping highlights elements of randomness in the administration of justice. Statistical disparities -- especially when there is some expectation of similarity, such as when courts are construing the same law or constitution -- embarrass the courts . . .. [C]ivil forum shopping . . . reminds the legal system that different courts produce different visions of justice.[70]

A legal system based on precedent and principles of stare decisis by definition seeks to foster certainty and predictability. The Venue Proposal, however, seeks to eliminate certainty and predictability afforded by laying venue in a corporate debtor's state of incorporation, apparently in order to make the system seem fairer and to reduce "cynicism about and disrespect for the bankruptcy process."[71] But, one needs to ask, "fairer to whom?" To the man on the street, who has no economic interest in the case and may care nothing about it? Or to the man out of a job because his corporate employer didn't survive its Chapter 11 case, a case that could have been successful in a different district? Fairer to the woman who goes out of business because her key customer couldn't pay its prepetition debt until the end of the case? Fairer to unsecured creditors who receive nothing in a liquidation because the debtor was forced to file in a district holding that assigned rents are not property of the estate and cannot be used by the debtor? "Fairness" cannot be judged in a vacuum; it is judged with reference to outcomes. If there are differences in outcomes, if there are inconsistencies in courts' interpretations and applications of the Bankruptcy Code, the Commission should examine and propose a principled resolution of these disparate outcomes and these judicial differences.

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[70]Note, Forum Shopping Reconsidered. 103 Harv. L. Rev. 1677, 1687-89 (1990) (footnotes omitted) (hereinafter the "Harvard Note").

[71]February 23 Minutes.

Venue choice generally -- and erroneously -- is viewed as something that helps the debtor to the detriment of its creditors. Those who assail it incorrectly view forum selection in a Chapter 11 case as a zero sum game, where the debtor wins and, therefore, the creditors lose. Chapter 11, however, is not a simple two-party dispute, where one party wins and one party loses. In a complex case, it may involve hundreds or thousands of parties, some of whose interests are aligned with the debtor at times, some of whose interests are not. As the above examples show, perceptions of fairness and propriety depend upon outcomes and upon "whose ox is being gored."[72]

Similarly, to the extent that the "average person" has a view on the bankruptcy process, let alone a cynical one, that view, too, is more likely to be influenced by outcomes than venue issues. Where do cynicism and disrespect on the part of the average American come from? Is it from the fact that Eastern Airlines filed its Chapter 11 case in New York? That a corporate debtor filed its case in its state of incorporation? Or is it more likely to come from a case where a multi-millionaire walks away from hundreds of millions of dollars in bank debt and guaranties, with estates, yachts, and jewelry intact, while an "average" American, out-of-work and unable to pay his or her debts, loses his or her house and assets?

The Current Venue Statute should not be changed to accommodate vague, unsubstantiated fears that venue choice (or forum shopping) is destroying the public's respect for the bankruptcy system. Nor should it be changed on the ground that it is somehow "fairer" to stake millions of jobs and billions of dollars on the luck of the draw in filing a case than it is to permit a debtor to select a forum that reduces uncertainty for debtor and creditor alike. Bankruptcy is not a crap game. Nor should it be treated like one. Thousands of jobs and lives, and billions of dollars, are at stake. Is it really fairer (and if so, to whom), and does it really inspire public confidence, to enact procedural legislation that makes the bankruptcy process more random and less certain?

IX. "NATURAL VENUE" AND THE "EVILS" OF FORUM SELECTION

A. The Myth Of "Natural Venue."

One recurring criticism of the Current Venue Statute, and an oft-cited rationale for venue "reform," is that the present system "has allowed debtors to choose venues other than their 'natural venue.'"[73] Indeed, the Rosenberg Article contends that "[t]he current system effectively permits debtors to manipulate the proper forum or 'natural venue' in which the debtor's bankruptcy case should be heard."[74]

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[72]Goad v. Celotex Corp., 831 F.2d 508, 512 (4th Cir. 1987) (discounting defendants' forum-shopping arguments).

[73]Faye Knowles, Choice of Venue: Planting the Abominable Seedline? printed in The Biased Business of Venue Shopping (July 21, 1995) at 23, 26 (the "Knowles Article").

[74]Rosenberg Article at 77.

The premise that there is a "natural venue" in which a bankruptcy case should be filed has a certain intuitive resonance; certainly one may have a "gut feeling" for where a bankruptcy case "should" be filed.[75] Intuition, however, is no substitute for legal analysis, facts, and precedent. Stripped of its superficial appeal, the notion that every bankruptcy case has a "natural venue" is no more than a bare normative conclusion that should be rejected for being grounded more in the gut than in the law.

Both the Knowles Article and, by reference to the Knowles Article, the Rosenberg Article adopt the same definition of "natural venue:" "the court 'closest to, most knowledgeable about, or most accessible to the litigants."'[76] Developed with scant support from a single sentence in the Harvard Note, the concept of "natural venue" was intended to apply to traditional, two-party civil litigation, not to bankruptcy cases.[77] And with good reason. Large, complex bankruptcies can involve multiple debtors and tens of thousands of creditors. In such a case, the questions that must be asked in order to locate a case's "natural venue" are not easily answered. Who are the litigants in a bankruptcy case against which the definition of "natural venue" should be measured? Should one or all of the debtors be considered? Are a debtor's assets of paramount importance, or its liabilities? Should those assets and liabilities be consolidated for multiple debtors, or considered separately? Should the debtors be viewed as plaintiffs seeking relief, or as defendants who are the targets of creditor actions? And what of the creditors -- secured, unsecured, pre-petition, post-petition, priority, nonpriority, contingent, filed -- all of whom have a stake in the outcome of the case; which of these creditors (or what combination) should be considered in making the determination that will tip the balance toward one jurisdiction over another?

As much as one would like an easy answer, the fact is that in the context of many large bankruptcy cases, the definition of "natural venue" fails; there is no single court that can be said to be "closest to, most knowledgeable about, or most accessible to the litigants." And even if there were, is it worth renouncing the most easily determined venue situs, place of incorporation, in favor of certain litigation to determine which venue is "natural?"

B. The Myth Of The Evils Of Forum Shopping.

The notion that venue should be restricted to a debtor's "natural venue" is premised on a belief that debtors (and plaintiffs in the context of a civil suit) will practice an evil type of forum

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[75]Such a definition of venue is not unlike Justice Potter Stewart's "I know it when I see it" definition of obscenity. See Jacobellis v. Ohio, 378 U.S. 184. 197 (1964) (Stewart J., concurring). Venue, unlike obscenity, need not be defined in vague terms and with elusive standards.

[76]Knowles Article at 26, citing The Harvard Note, note 70, supra; Rosenberg Article at 77.

[77]Reliance on the Harvard Note for the proposition that the concept of "natural venue" has lasting vitality is misplaced. The Harvard Note "argues that actions described as 'forum shopping' lie on a continuum of activities, many of which are integral to the legal system and may actually enhance its capacity to provide needed remedies." Harvard Note at 1677.

selection -- "forum shopping" -- to gain an improper advantage over their creditors.[78] Even if accurate at one time in the context two-party civil litigation,[79] the notion that forum shopping is a pervasive evil is simplistic, inaccurate, and outdated. As the LoPucki/Whitford Study states, forum shopping can in fact be beneficial; it can be an important tool to facilitate the development of more effective procedures and techniques for reorganization and liquidation of business enterprises.[80]

Those who seek to change the Current Venue Statute cite no credible evidence that debtors cross the line -- if indeed there is a line -- from acceptable forum selection to improper forum shopping. Statutory venue "reform" and the elimination of venue predicates should be based on demonstrated abuses, not on vague notions like "natural venue" and the "evils of forum shopping."

X. CONCLUSION

At the root of the complaints about venue is a belief that debtors are granted too much choice for case filings and that these choices may be "manipulated" to effect a change in the substantive law that will benefit debtors at the expense of creditors. Implicit in this attack on venue is that the commentators and critics disagree with the outcomes produced and the substantive law applied by the courts in the Southern District of New York, the District of Delaware, and (perhaps) other districts. The real problem, therefore, is a lack of uniformity in what is supposed to be a uniform system of bankruptcy law and a fundamental disagreement with the outcomes produced as a result of the substantive law applied by the courts in certain districts. If certain courts are perceived to be "overly" or "improperly" used, then the question the Commission should ask is "why?" The issues that are identified as a result of that inquiry can then be dealt with directly and openly. Any other approach is disingenuous and merely implements the value judgments of those who disagree with the Current Venue Statute, all without the benefit of direct, open and honest debate on the underlying substantive and political issues.

Any proposal to amend the Current Venue Statute should be based on a demonstrated need for change, supported by cold, hard facts. Proponents of the Venue Proposal rely not on facts, but on supposition, innuendo, and anecdotes. Why? Because the facts simply do not support their position. Rather, the facts show that (i) the vast majority of corporations that could file their Chapter

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[78] See, e.g., Knowles Article at 25 (noting that forum shopping is "the ethically suspect practice of attempting to have one's case heard in the court where it will receive the most favorable treatment on particular issues") (citation omitted); Rosenberg Article at 78 (forum shopping "permits a debtor to manipulate outcomes by seeking particular courts (and judges) known to be sympathetic to their positions; it offers a result-oriented debtor benefits to which it is not necessarily entitled . . . it generates cynicism about and disrespect for the bankruptcy process.").

[79] The Harvard Note points out that the "modern tendency to condemn forum shopping stems largely from two Supreme Court decisions," Erie Railroad v. Thompkins, 304 U.S. 64 (1938), and Hanna v. Plumer, 380 U.S. 460 (1965). Harvard Note at 1680.

[80] LoPucki/Whitford Study at 57-58; see Harvard Note at 1692-93.

11 cases in the District of Delaware do not and (ii) two-thirds of the motions to transfer venue filed in the District of Delaware have in fact been granted.

Moreover, the Venue Proposal does nothing to rectify any genuine concern regarding the lack of small creditor participation in large cases. Again, the facts show what all bankruptcy practitioners know to be true about "mega" cases -- i.e., that no one jurisdiction is convenient to all, or even a supermajority of, creditors. The Venue Proposal proponents also fail to take into account creditor preference for certain districts, including the District of Delaware. They ignore the fact that not every result that is "beneficial" to or sought by debtors is "adverse" to or opposed by creditors.

Finally, the Venue Proposal proponents utterly fail to consider, much less analyze, why it is that some debtors and creditors seek to file cases in Delaware and, presumably, avoid other jurisdictions. Efficiency, consistency, and predictability are key. Given the District of Delaware's success in pioneering methods and procedures to expedite cases and cut costs, it seems counterproductive and counterintuitive, to say the least, to eliminate the District of Delaware as a bankruptcy forum for Delaware companies under the guise of venue "reform."

EXHIBIT A

THE NATIONAL BANKRUPTCY REVIEW COMMISSION
MINUTES OF MEETING HELD:

Friday, February 23, 1996, Washington, D.C.
Saturday, February 24, 1996, Washington, D.C.

[TO BE SUPPLIED BY SUSAN JENSEN-CONKLIN]

Prepared by: Susan Jensen-Conklin
Deputy Counsel

Approved: April 19, 1996

EXHIBIT B

Rose's Stores Inc.	E.D.N.C.
Sizzler International, Inc.	C.D. Cal.
Stuarts Department Stores Inc.	W.D. Mass.
Trump Taj Mahal Corp.	D.N.J.
UNR Industries, Inc.	N.D. Ill.

EXHIBIT C

Agenda for June Meeting

IMPROVING JURISDICTION AND PROCEDURE
PROPOSAL #2/VENUE

Background

Title 28 provides that the proper place to file a petition under the Bankruptcy Code is in the district where the debtor's domicile, residence, principal place of business, or principal American assets have existed for a greater part of the preceding 180 days. Property venue also exists in any district where a case involving a debtor's affiliate, general partner, or partnership is pending. 28 U.S.C. § 1408.

Proposal

The current venue system should be modified to prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where that district is located or based solely on an earlier filing by a subsidiary in the district. All other venue options should be left intact, and the court's discretionary power to transfer venue in the interest of justice and for the convenience of the parties should not be restricted.

Reasons for the Change

Debtors file for bankruptcy where they are located. Most cases involving consumer debtors or small businesses present no question about where to file. In some jurisdictions, near state borders, for example, some problems arise when debtors attempt to choose a more convenient courthouse or a more debtor-friendly forum. In general, however, venue issues do not arise in these cases.

But in a global economy, the questions of venue are not so obvious. For multi-state corporations venue options are broad, and here is where the mischief begins. Title 28 permits a corporation to file a bankruptcy petition in its state of incorporation, the location of its "principal place of business," or the location of its "principal assets." For the multi-state corporation, the ability to manipulate the location of both the "principal place of business" and the "principal assets" provides a choice of a number of different jurisdictions. As more businesses incorporate in a state that is not where they do business, the magnitude of this opportunity, and its effect on the bankruptcy system, increases.

In addition to the state-of-incorporation option, Title 28 multiples the opportunities for filing by corporations that have related entities. A corporation may follow its corporate affiliate into bankruptcy in the same jurisdiction, even if it has no other ties to that jurisdiction. So, for example, a corporation with an affiliate in bankruptcy in State A can file a bankruptcy in State A even if it meets none of the other criteria for filing in State A. The famous example of this method of forum selection is Eastern Airlines. Its frequent flier club, Ionosphere, Inc., filed for bankruptcy in New York. The huge corporation, Eastern Airlines, then followed its tiny affiliate into a New York bankruptcy court without establishing any contacts with New York.

Does forum shopping occur frequently? In their landmark study of the bankruptcies of publicly traded companies in the 1980s, Professors Lynn LoPucki and William Whitford documented the

companies' choices for filing locations. They concluded that venue could be explained ONLY by forum shopping in about 16% of the cases, and another 63% of the cases showed some signs of forum shopping. In large cases, the widespread perception is that companies can - and frequently do - choose their fora based on a number of criteria other than those listed in the statute.

The reasons for forum shopping vary among debtors and their attorneys. Some debtors claim they choose a forum because its well-developed case law or proximity to large, knowledgeable law firms actually decrease the cost of the bankruptcy. Respect for a local judiciary with demonstrated abilities to handle large cases may account for the disproportionate migration of large cases to one or two cities.

Other reasons are less benign. Professors LoPucki and Whitford identify the desire among debtors' counsels to go to fora that permit high attorneys' fee and do not pro-actively review fee applications. Gaining strategic advantage over other litigants, such as choosing a forum where a harmful ruling is not applicable, is another frequently cited reason to select one forum over another. Sometimes a venue is chosen for its inaccessibility for certain litigants, driving up the costs of their pursuit of their claims and making it difficult for them to serve on committee. Such strategies can affect the outcome of cases.

Professors LoPucki and Whitford demonstrate that parties cannot effectively fight forum shopping. The debtor nearly always makes the initial forum selection by choosing its filing location. For creditors to protest, they need local counsel and they need to mount an expensive suit at the inception of the case. Because bankruptcy cases often have a number of issues decided in the first few days, judges often feel that by the end of the week, the case is already theirs.

The law gives the initial judge great discretion in deciding forum disputes. Professors LoPucki and Whitford report that attorneys in big cases explained that judges were unlikely to turn away high-visibility cases because they "consider them to be career opportunities and are therefore reluctant to transfer them to other districts." In the LoPucki-Whitford sample of publicly traded cases, no voluntary cases were moved after filing, despite some challenges to venue and the fact that nearly 80% of the cases showed some signs of forum shopping.

Some of the costs of forum shopping, when it exists, are obvious. Forum selection becomes a strategic tool, available for clever parties to manipulate outcomes to the disadvantage of smaller creditors who are cut out of the bankruptcy process. Because forum shopping is available in its extreme forms only to large companies, it also involves an element of discrimination against smaller businesses and consumers who have no such choices.

The real costs of forum shopping, if it is widespread, might be even greater. The damning charge that forum shopping is used to select fora that are fee-friendly, combined with the allegation that judges want to keep high visibility cases, raises a troubling specter of courts competing for big-case bankruptcy business. If they do compete, they would do so by making lawyer-friendly, debtor-friendly rulings. Of course, the application of these rulings is not limited to the mega-cases they attract; these rulings also affect every other business case before the courts. Given the complex appellate structure currently in existence and the extraordinary discretionary decision-making vested

in the bankruptcy courts, the impact of forum shopping is compounded. Court competition for cases could distort analysis of legal problems and undermine the fairness - real or perceived - of the bankruptcy system.

These proposals for change in forum selection criteria are not novel. In large part, they reflect the state of the law on forum selection in bankruptcy prior to the 1978 Amendments.

Competing Considerations

Restricting forum choices would undoubtedly increase litigation over the appropriateness of forum choices. The desire to move to a forum where the debtor perceived advantages could be gained would not go away. While some debtors could be expected to comply with the more restricted provisions, undoubtedly there would be other debtors who would challenge the statute at the margins by selecting a friendly forum, prompting their creditors to challenge the forum choice.

"Principal place of business" is not an entirely rigid criterion. The main debates under this system, however, would likely be over whether the "principal place of business" was at the location of corporate headquarters or the location of most of the assets. In either case, the venue choices would be sharply narrowed. More importantly, whatever venue was selected would bear a significant relationship to the operation of the business.

For some businesses, "principal place of business" would remain an illusive concept. As companies do more work by computer, the "virtual headquarters" may be located anywhere. Moreover, as more businesses consist of intangible assets, questions about where the assets are located or where the business transactions take place become ephemeral. The courts would be called on to develop new guidelines for new kinds of corporations.

It is important to note that not all commentators believe that forum shopping is an inherently evil practice. Professors LoPucki and Whitford documented the forum shopping practices of the publicly traded companies as they decided where to file for bankruptcy, but they did not conclude that such practices be curtailed. Forum shopping permits a few courts to develop expertise in dealing with large bankruptcy cases. It also encourages the law to develop in ways that facilitate large bankruptcy reorganizations. These may be positive, rather than negative implications of the current system.

EXHIBIT D

The Fifty States	Anacomp, Inc.	Bill's Dollar Stores, Inc.	Braun's Fashions, Inc.	Burlington Motor Carriers, Inc.
ALASKA	7			1
ALABAMA	51	1750		334
ARKANSAS	25	521	4	228
ARIZONA	134	7	3	41
CALIFORNIA	1633	83	7	392
COLORADO	137	4	1	47
CONNECTICUT	292	13	3	162
DISTRICT OF COLUMBIA	21			21
DELAWARE	49	7		64
FLORIDA	665	213	3	503
GEORGIA	317	1248	16	1210
HAWAII	17	2		
IOWA	65		38	98
IDAHO	8		5	15
ILLINOIS	611	91	40	940
INDIANA	2158	6	15	999
KANSAS	78	121	2	93
KENTUCKY	129	54	8	518
LOUISIANA	42	1477		604
MASSACHUSETTS	365	29	5	1608
MARYLAND	162	16	2	194
MAINE	28			82
MICHIGAN	293	20	19	419
MINNESOTA	257	11	114	166
MISSOURI	210	193	9	505
MISSISSIPPI	24	3122		267
MONTANA	14		2	8`
NORTH CAROLINA	245	74		366

The Fifty States	Anacomp, Inc.	Bill's Dollar Stores, Inc.	Braun's Fashions, Inc.	Burlington Motor Carriers, Inc.
NORTH DAKOTA	3		13	10
NEBRASKA	82	4	25	58
NEW HAMPSHIRE	77	1		73
NEW JERSEY	473	73	3	460
NEW MEXICO	38			22
NEVADA	50			11
NEW YORK	788	419	13	712
OHIO	603	36	45	833
OKLAHOMA	52	508	4	178
OREGON	81	4		39
PENNSYLVANIA	448	47	1	714
RHODE ISLAND	38	4	7	64
SOUTH CAROLINA	50	182	1	285
SOUTH DAKOTA	9		6	13
TENNESSEE	101	398	5	485
TEXAS	630	2432	1	1079
UTAH	37	6	12	24
VIRGINIA	142	5	1	414
VERMONT	9	1		26
WASHINGTON	136	5	3	48
WISCONSIN	168	14	31	239
WEST VIRGINIA	18			102
WYOMING	4		2	5
FOREIGN	2			
NO ADDRESS	2023		16	

The Fifty States	DEP Corporation	Grand Union Company	Homeland Stores, Inc.	Industrial General Corporation	Lomas Financial Corp. & Mortgage USA, Inc.
ALASKA	1		2	4	77
ALABAMA	2	4	2	18	184
ARKANSAS	2	9	48	1149	140
ARIZONA	21	6	16	13	894
CALIFORNIA	722	120	117	18	4924
COLORADO	10	8	12	3	672
CONNECTICUT	10	213	26	29	606
DIST. OF COLUMBIA	8	8	37	4	273
DELAWARE	4	9	19	23	85
FLORIDA	26	109	35	53	1674
GEORGIA	18	87	49	24	958
HAWAII	7		6		111
IOWA	5	3	10	6	198
IDAHO		8	1	1	184
ILLINOIS	41	84	121	127	1316
INDIANA	4	12	10	100	430
KANSAS	5	7	521	7	250
KENTUCKY	18	4	14	20	363
LOUISIANA	3	3	8	7	276
MASSACHUSETTS	16	88	23	201	1031
MARYLAND	14	28	53	6	427
MAINE		22	4	4	195
MICHIGAN	8	26	24	197	712
MINNESOTA	10	37	40	19	693
MISSOURI	2	28	113	24	415
MISSISSIPPI	1		5	19	127
MONTANA	3	1	4		90
NORTH CAROLINA	12	59	26	13	414
NORTH DAKOTA	1	1	2	1	53
NEBRASKA	5	3	13	2	104

The Fifty States	DEP Corporation	Grand Union Company	Homeland Stores, Inc.	Industrial General Corporation	Lomas Financial Corp. & Mortgage USA, Inc.
NEW HAMPSHIRE	2	34		66	162
NEW JERSEY	56	853	38	18	1263
NEW MEXICO			15		143
NEVADA	1		7		167
NEW YORK	48	1484	212	134	1564
OHIO	25	66	44	2352	778
OKLAHOMA	4	3	10106	4	321
OREGON	4	14	22	5	184
PENNSYLVANIA	51	168	46	103	1517
RHODE ISLAND		5	1	3	173
SOUTH CAROLINA		2	3	11	156
SOUTH DAKOTA	1		3		24
TENNESSEE	20	20	26	42	449
TEXAS	25	51	2073	35	12755
UTAH	4	3	7	1	319
VIRGINIA	10	22	7	12	664
VERMONT	2	259	1		75
WASHINGTON	13	16	13	3	576
WISCONSIN	14	22	15	25	202
WEST VIRGINIA		1		3	49
WYOMING			3	1	43
FOREIGN	20	37	1	1	
NO ADDRESS	30		164	90	

The Fifty States	Morrison Knudsen Corporation	Pic 'N Pay Stores, Inc.	Rickel Home Centers, Inc.	Silo, Inc. (FRETTER)	SLM International
ALASKA	197	3	3	6	11
ALABAMA	284	1707	24	3	9
ARKANSAS	355	138	13	7	14
ARIZONA	517	73	23	747	44
CALIFORNIA	5769	106	256	1779	235
COLORADO	3064	15	27	479	92
CONNECTICUT	363	17	146	88	119
DIST. OF COLUMBIA	350	80	34	8	14
DELAWARE	112	88	618	265	12
FLORIDA	1772	2026	182	281	100
GEORGIA	635	2473	93	24	89
HAWAII	2486	1	1		7
IOWA	195	4	19	3	67
IDAHO	4111	3	5	3	3
ILLINOIS	1710	101	255	1883	236
INDIANA	274	151	38	153	34
KANSAS	199	7	17	66	41
KENTUCKY	268	642	25	94	44
LOUISIANA	159	357	13	373	6
MASSACHUSETTS	535	43	251	35	533
MARYLAND	752	718	1086	31	50
MAINE	43	3	16	2	52
MICHIGAN	718	18	65	130	181
MINNESOTA	376	11	43	15	155
MISSOURI	2147	39	49	94	83
MISSISSIPPI	111	701	14	5	4
MONTANA	395		2	1	6
NORTH CAROLINA	733	3218	112	29	91
NORTH DAKOTA	148		2	1	11
NEBRASKA	179	5	6	3	14

The Fifty States	Morrison Knudsen Corporation	Pic 'N Pay Stores, Inc.	Rickel Home Centers, Inc.	Silo, Inc. (FRETTER)	SLM International
NEW HAMPSHIRE	85	2	172		870
NEW JERSEY	762	85	19653	689	209
NEW MEXICO	405	3	4	122	3
NEVADA	363	8	5	154	14
NEW YORK	1809	155	5514	815	492
OHIO	2583	543	164	1799	77
OKLAHOMA	198	14	12	114	8
OREGON	1482	10	10	293	18
PENNSYLVANIA	2784	138	5255	4228	238
RHODE ISLAND	47	2	134	1	41
SOUTH CAROLINA	269	1354	13	18	21
SOUTH DAKOTA	54	2	2		10
TENNESSEE	2008	1508	55	19	22
TEXAS	2533	1428	110	261	108
UTAH	574	2	8	383	10
VIRGINIA	685	1196	337	32	35
VERMONT	47	2	5	2	690
WASHINGTON	1765	9	18	1020	54
WISCONSIN	412	6	59	15	87
WEST VIRGINIA	538	369	13	10	3
WYOMING	175		1	2	1
FOREIGN		9			1035
NO ADDRESS		626		8	

The Fifty States	Smedley Industries (Buddy L)	Smith Corona Corporation	Spectravision Inc.	Today's Man, Inc.
ALASKA	3	1	33	
ALABAMA	5	17	56	2
ARKANSAS	5	15	29	
ARIZONA	8	51	128	1
CALIFORNIA	83	797	871	20
COLORADO	6	78	162	6
CONNECTICUT	29	484	108	72
DISTRICT OF COLUMBIA	2	43	78	23
DELAWARE	11	8	65	22
FLORIDA	40	234	624	50
GEORGIA	15	116	283	20
HAWAII	2	8	110	
IOWA	3	24	30	
IDAHO	4	10	16	
ILLINOIS	74	348	337	515
INDIANA	12	64	70	7
KANSAS	6	19	24	1
KENTUCKY	4	39	44	5
LOUISIANA	1	18	117	
MASSACHUSETTS	37	187	213	16
MARYLAND	10	64	104	184
MAINE	5	12	28	
MICHIGAN	22	102	190	4
MINNESOTA	34	58	157	1
MISSOURI	22	58	130	4
MISSISSIPPI	1	5	13	1
MONTANA	2	3	5	
NORTH CAROLINA	21	102	136	14
NORTH DAKOTA	1	2	6	1
NEBRASKA	3	9	9	

The Fifty States	Smedley Industries (Buddy L)	Smith Corona Corporation	Spectravision Inc.	Today's Man, Inc.
NEW HAMPSHIRE	2	22	20	
NEW JERSEY	117	293	178	980
NEW MEXICO		2	30	
NEVADA	3	18	88	
NEW YORK	917	4285	554	959
OHIO	31	170	217	8
OKLAHOMA	1	25	45	
OREGON	7	20	55	1
PENNSYLVANIA	55	270	168	706
RHODE ISLAND	9	15	28	2
SOUTH CAROLINA	2	19	62	2
SOUTH DAKOTA		15	4	
TENNESSEE	10	54	110	6
TEXAS	24	250	1634	9
UTAH	8	39	33	
VIRGINIA	11	92	206	207
VERMONT	5	8	18	
WASHINGTON	21	45	95	1
WISCONSIN	21	59	100	
WEST VIRGINIA	1	9	18	2
WYOMING		3	12	
FOREIGN	1	1	290	4
NO ADDRESS				67

	Anacomp	Bill's Dollar	Burlington	Color Tile	DEP	Homeland	Industrial	Lomas
TOTAL LIABILITIES	$575,206,644	$97,966,000	$357,945,000	$526,690,313	$77,283,000	$160,074,513	$62,500,000	$960,417,000
20 LARGEST CREDITORS-TOTAL LIABILITIES	$334,432,717	$76,101,646	$110,557,038	$246,147,874	$3,207,292	$15,575,908	$8.122,390	$481,611,513
% OF 20 LARGEST CREDITORS TO TOTAL LIABILITIES	58.14%	77.68%	30.89%	46.73%	4.15%	9.73%	13%	50.15%
PRINCIPAL PLACE OF BUSINESS LISTED ON PETITION	INDIANA	MISSISSIPPI	INDIANA	TEXAS	CALIFORNIA	OKLAHOMA	OHIO	TEXAS
# OF 20 LARGEST CREDITORS NOT IN HOME STATE	19	19	12 OF 13 CREDITORS	20	14	16	16	21 OF 32 CREDITORS
% OF 20 LARGEST CREDITORS NOT IN HOME STATE	19/20 = 95%	19/20 = 95%	12/13 = 92%	20/20 =100%	14/20 = 70%	16/20 = 80%	16/20 = 80%	21/32 = 66%

	Monlson	Rickel	Silo	SLM	Smedley	Smith	Spectravision	Spectradyn
TOTAL LIABILITIES	$783,597,000	$268,650,831	$202,852,870	$184,566,443	$212,101,600	$198,863.241	$521,739,326	$70,488,252
20 LARGEST CREDITORS - TOTAL LIABILITIES	$108,094,859	$144,312,491	$4,246,691	$79,650,111	$84,908,284	$4,446,370	$294,768,000	$46,626,930
% OF 20 LARGEST CREDITORS TO TOAL LIABILITIES	13.79%	53.72%	2.09%	43.16%	40.03%	2.24%	56.50%	6.05%
PRINCIPAL PLACE OF BUSINESS LISTED ON PETITION	IDAHO	NEW JERSEY	MICHIGAN	NEW YORK	NEW YORK	CONNECTICUT	TEXAS	TEXAS
# OF 20 LARGEST CREDITORS NOT IN HOME STATE	15 OF 15 CREDITORS LISTED	17	19	14	13	18 OF 18 CREDITORS LISTED	33 OF 35 CREDITORS LISTED	13
% OF 20 LARGEST CREDITORS NOT IN HOME STATE	15/15 = 100%	17/20 - 85%	19/20 = 95%	14/20 = 70%	13/20 = 65%	18/18 = 100%	33/35 = 94%	13/20 = 65%

Location of Creditors

Name of Debtor	Location	Total No. of Creditors w/Addresses	% Outside Purported Principal Place of Business
Anacomp, Inc.	Carmel, IN	12,076	82.13%
Bill's Dollar Stores, Inc.	Jackson, MS	13,328	76.6%
Braun's Fashions, Inc.	Plymouth, MN	467	75.6%
Burlington Motor Holdings Inc.	Daleville, IN	15,779	93.7%
DEP Corporation	Rancho Dominguez, CA	1,279	43.5%
Grand Union Company (The)	Wayne, NJ	4,047	78.9%
Homeland Stores, Inc.	Oklahoma City, OK	14,004	27.83%
Industrial General Corporation	Elyria, OH	4,911	52.97%
Lomas Financial Corporation	Dallas, TX	39,505	67.7%
Morrison Knudsen Corporation	Boise, ID	48,635	91.6%
Pic N Pay Stores, Inc.	Charlotte, NC	19,604	83.6%
Rickel Home Centers, Inc.	South Plainfield, NJ	36,297	45.8%
Silo Holding, Inc.	Brighton, MI	16,585	99.2%
SLM International, Inc.	New York, NY	6,403	92.3%
Smedley Industries, Inc.	New York, NY	1,717	46.6%
Smith Corona Corporation	New Canaan, CT	8,700	94.4%
SpectraVision, Inc.	Richardson, TX	8,141	79.9%
Today's Man, Inc.	Moorestown, NJ	3,856	74.6%

EXHIBIT E

MAJOR CHAPTER 11 CASES THAT COULD HAVE
BEEN FILED IN THE DISTRICT OF DELAWARE BUT WERE NOT

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Best Products Co., Inc. - - - - - - - - - - - - - - - - Best Products Co., Inc. - - - - - - - - - - - - - - - - BAC Holdings Group, Inc. - - - - - - - - - - - - - - - - (+ 3 other affiliates)	Va. - - - - - - - - - - - - - - - - N.Y. - - - - - - - - - - - - - - - - **DEL.**	Va. Comment: 194 catalog stores located in 27 states; 62 in the East (primarily mid-Atlantic); 60 in Central states; 72 in Western states. Plus 36 jewelry stores in 9 states and D.C.	S.D.N.Y. (1/4/91)
Best Products Co., Inc.	**DEL.**	Va.	E.D. Va. (9/24/96)
Carter Hawley Hale Stores, Inc.	**DEL.**	Cal. Comment: 88 stores in Cal. (72); Ariz. (8); Nev. (3); Utah (3); Colo. (1); and N. Mex. (1).	C.D. Cal. (2/11/91)
Doe-Spun, Inc.	**DEL.**	N.Y.	S.D.N.Y. (4/9/93)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Bradlees, Inc. - - - - - - - - - - - - - - - Bradlees Stores, Inc. - - - - - - - - - - - - - - - Bradlees Administrative Co., Inc. - - - - - - - - - - - - - - - Dostra Realty Co. - - - - - - - - - - - - - - - Maximedia Services, Inc. - - - - - - - - - - - - - - - New Horizons of Bruckner, Inc. - - - - - - - - - - - - - - - New Horizons of Westbury, Inc. - - - - - - - - - - - - - - - New Horizons of Yonkers, Inc.	Mass. - - - - - - - - - - - - - - - Mass. - - - - - - - - - - - - - - - Mass. - - - - - - - - - - - - - - - Mass. - - - - - - - - - - - - - - - Mass. - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - **DEL.**	Mass. Comment: 136 stores located in Mass. (37); N.J. (36); Conn. (24); N.Y. (13); Pa. (11); N.H. (8); Me. (4); Va. (2); and R.I. (1).	S.D.N.Y. (6/23/95)
Federated Department Stores, Inc. - - - - - - - - - - - - - - - Allied Stores Corp. - - - - - - - - - - - - - - - (+ 40 affiliates)	**DEL.** - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - 38 **DEL.** 1 Fla. 1 Mass.	Ohio	S.D. Ohio (1/15/90)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Gilbert/Robinson, Inc. - - - - - - - - - - - - - - - - Gilbert/Robinson Holding Corp. - - - - - - - - - - - - - - - - I&M Acquisition Corp.	**DEL.** - - - - - - - - - - - - - - - -	Mo. Comment: operated and owned 104 restaurants in 25 states and D.C. at time of filing, as well as exclusive franchise arrangements in N.Y.; as of 5/15/92, owned and operated 94 restaurants in N.C. (12); Pa. (11); Mo. (8); Fla. (6); Va. (6); Del. (5); N.J. (5); Cal. (4); Ga. (4); Ala. (3); Ohio (3); N.Y. (3); Tenn. (3); Ariz. (2); Ind. (2); Kan. (2); Ky. (2); Md. (2); Mass. (2); Mich. (2); Tex. (2); Colo. (1); Conn. (1); D.C. (1); La. (1); Wisc. (1) - - - - - - - - - - - - - - - -	S.D.N.Y. (11/26/91)
Lomas Financial Corp. - - - - - - - - - - - - - - - - Roosevelt Office Center, Inc. - - - - - - - - - - - - - - - - (+ 6 affiliates)	**DEL.** - - - - - - - - - - - - - - - - N.Y. - - - - - - - - - - - - - - - - 2 Tex. 1 Nev. 1 **DEL.** 2 Unknown	Tex.	S.D.N.Y. (9/24/89)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Revco D.S., Inc. - - - - - - - - - - - - - - - - (+ 15 affiliates)	**DEL.** - - - - - - - - - - - - - - - - **DEL.**, Ohio, Mich. (possibly others)	Ohio	N.D. Ohio (7/28/88)
Greyhound Lines, Inc. - - - - - - - - - - - - - - - - Eagle Business Manufacturing, Inc. - - - - - - - - - - - - - - - - GLI Food Services, Inc. - - - - - - - - - - - - - - - - GLI Holding Co. - - - - - - - - - - - - - - - - -other filing subs.	**DEL.** - - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - - Arizona, Tex.	Tex.	S.D Tex. (6/4/90 and11/1/90)
G. Heilman Brewing Co., Inc. (+ 6 affiliates)	**DEL.**	Wisconsin	S.D.N.Y. (1/24/91)
Hexcel Corporation	**DEL.**	Cal.	N.D. Cal. (12/6/93)
Alexander's, Inc. (+ 16 affiliates)	**DEL.**	N.Y.	S.D.N.Y. (5/15/92)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Sizzler International, Inc. - - - - - - - - - - - - - - - Sizzler Restaurants International, Inc. - - - - - - - - - - - - - - - Collins Properties, Inc. - - - - - - - - - - - - - - - Tenly Enterprises, Inc. - - - - - - - - - - - - - - - Buffalo Ranch Steakhouses, Inc.	**DEL.** - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - Pa. - - - - - - - - - - - - - - - Cal. - - - - - - - - - - - - - - -	Cal.	C.D. Cal. (6/2/96)
Herman's Sporting Goods, Inc.	**DEL.**	N.J.	D.N.J. (4/26/96) (3/15/93)
House of Fabrics Inc.	**DEL.**	Cal.	C.D. Cal. (11/2/94)
Rose's Stores Inc.	**DEL.**	N.C.	E.D.N.C. (9/5/93)
Trump Taj Mahal Funding, Inc. - - - - - - - - - - - - - - - Trump Taj Mahal, Inc. - - - - - - - - - - - - - - - Trump Taj Mahal Associates - - - - - - - - - - - - - - - Trump Taj Mahal Corp.	N.J. - - - - - - - - - - - - - - - N.J. - - - - - - - - - - - - - - - N.J. (gp) - - - - - - - - - - - - - - - **DEL.**		D.N.J. (__/__/91)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Ames Department Stores, Inc. - - - - - - - - - - - - - - - - (+ 52 affiliates)	**DEL.** - - - - - - - - - - - - - - - - 32 **DEL.** 3 Mass. 3 Pa. 2 Ga. 2 N.Y. 2 N.J. 2 Conn. 1 each La., Va., N.C., Ind., Minn.	Conn. Comment: 690 stores located in N.Y. (98); Fla. (83); Pa. (71); Ohio (59); Mass. (50); Md. (47); Va. (39); Ill. (34); Me. (33); Ind. (29); N.H. (26); Conn. (20); W. Va. (18); N.C. (17); Vt. (14); mich. (13); Del. (10); Ky. (10); R.I. (10); N.J. (8); D.C. (1).	S.D.N.Y. (4/25/90)
Allegheny International, Inc. - - - - - - - - - - - - - - - - (+ 12 affiliates)	Pa. - - - - - - - - - - - - - - - - 8 **DEL.** 1 Pa. 2 Cal. 1 Ohio	Pa.	W.D. Pa. (3/28/88 and 5/3/88)
U.S.H. Corporation of New York - - - - - - - - - - - - - - - - U.S. Home Corporation - - - - - - - - - - - - - - - - (+ various subsidiaries)	N.Y. - - - - - - - - - - - - - - - - **DEL.** - - - - - - - - - - - - - - - -	Tex. - - - - - - - - - - - - - - - - Tex. - - - - - - - - - - - - - - - - Fla., Tex.	S.D.N.Y. (4/15/91)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
PHAR-MOR, INC. - - - - - - - - - - - - - - - (+15 affiliates	Pa. - - - - - - - - - - - - - - - 7 **DEL.** 3 Wisc. 2 Ohio 1 Va. 1 Pa. 1 Mich.		N.D. Ohio (8/17/92)
Interco, Inc. (+ affiliates)	**DEL.**	Mo.	E.D. Mo. (1/24/91)
The Caldor Corporation - - - - - - - - - - - - - - - Caldor, Inc. - N.Y. - - - - - - - - - - - - - - - Caldor, Inc. - CT	**DEL.** - - - - - - - - - - - - - - - N.Y. - - - - - - - - - - - - - - - Conn.	Conn. Comment: 163 stores in N.Y. (53); Conn. (31); N.J. (25); Mass. (24); Md. (12); Pa. (9); Del. (3); R.I. (3); Va. (2); N.H. (1)	S.D.N.Y. (9/18/95)
Bally Entertainment Corp.	**DEL.**	Ill.	(11/__/95)
Johns-Manville Corp. - - - - - - - - - - - - - - - (+ 21 affiliates)	**DEL.** - - - - - - - - - - - - - - - 13 **DEL.** (minimum)	Colo. - - - - - - - - - - - - - - -	S.D.N.Y. (8/26/82)
Eagle-Picher Industries, Inc. - - - - - - - - - - - - - - - (+ 7 affiliates)	Ohio - - - - - - - - - - - - - - - 1 **DEL.** 3 Mich. 1 Nev. 2 Unknown	Ohio - - - - - - - - - - - - - - -	S.D. Ohio (1/7/91)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
Celotex Corp.	**DEL.**	Fla.	M.D. Fla. (10/12/90)
UNR Industries, Inc. - - - - - - - - - - - - - - - - - - (+ 10 affiliates)	**DEL.** - - - - - - - - - - - - - - - - - - 2 Ill. 1 Ind. 1 Tex. 1 Ala. 1 W. Va. **4 DEL.**	Ill. - - - - - - - - - - - - - - - - - - -	N.D. Ill. (7/29/82)
National Gypsum Co. - - - - - - - - - - - - - - - - - - Aancor Holdings, Inc.	**DEL.** - - - - - - - - - - - - - - - - - - **DEL.**	Tex. - - - - - - - - - - - - - - - - - - -	N.D. Tex. (10/28/90)
Keene Corp.	**DEL.**	N.Y.	S.D.N.Y. (12/3/93)
Raytech Corp.	**DEL.**	Conn.	D. Conn. (3/10/89)
Hillsborough Holdings, Inc. - - - - - - - - - - - - - - - - - - (+ 32 affiliates)	**DEL.** - - - - - - - - - - - - - - - - - - 13 **DEL.** (minimum)	Fla. - - - - - - - - - - - - - - - - - - -	M.D. Fla. (12/27/89) (32) and (12/3/90) (1)
Hills Department Stores, Inc. - - - - - - - - - - - - - - - - - - (+ 5 affiliates)	**DEL.**	Mass. Comment: 214 stores in 12 states, including N.Y.; fashion buying and other offices located in N.Y., Pa. and Conn.	S.D.N.Y. (2/4/91)

Name of Debtor(s)	State(s) of Incorporation	Executive Offices; Misc. Comments	Date and Place of Chapter 11 Filing
R.H. Macy & Co. - - - - - - - - - - - - - - - - - - (+ 87 affiliates)	**DEL.** - - - - - - - - - - - - - - - - - -	N.Y. - - - - - - - - - - - - - - - - - - -	S.D.N.Y. (1/27/92) (10) (1/31/92) (78)
Leslie Fay Companies	**DEL.**	N.Y.	S.D.N.Y. (4/5/93)
Stuarts Department Stores Inc.	**DEL.**	Mass.	W.D. Mass. (5/16/95)
Prime Motor Inns	**DEL.**	N.J.	S.D. Fla. (9/18/90)
Pan Am Corp.	**DEL.**	N.Y.	S.D.N.Y. (1/8/91)
First Executive Corp.	**DEL.**	Cal.	C.D. Cal. (4/13/91)
America West Airlines, Inc.	**DEL.**	Ariz.	D. Ariz. (6/27/91)
Orion Pictures Corp.	**DEL.**	N.Y.	S.D.N.Y. (12/11/91)
McCrory Corp. - - - - - - - - - - - - - - - - - - McCrory Parent Corp.	**DEL.**	N.Y. - - - - - - - - - - - - - - - - - - - Comment.: approx. 820 stores	S.D.N.Y. (2/26/92) - S.D.N.Y. (2/28/92)
Gaylord Container Corp.	**DEL.**	Ill.	E.D. La (9/11/92)
The Conran Stores, Inc.	**DEL.**	N.Y. Comment: 145 stores in N.Y., N.J., Conn., Mass., Md., Val., Cal., and D.C.	S.D.N.Y. (1/7/94)

EXECUTIVE SUMMARY OF THE REPORT OF THE DELAWARE STATE BAR ASSOCIATION TO THE NATIONAL BANKRUPTCY REVIEW COMMISSION IN SUPPORT OF MAINTAINING EXISTING VENUE CHOICES[1]

At its June 21, 1996 meeting, the National Bankruptcy Review Commission (the "Commission") adopted the following proposal (the "Venue Proposal") pertaining to choice of venue in bankruptcy cases:

> Should the current venue system be modified to prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where that district is located or based solely on an earlier filing by a subsidiary in the district? All other venue options should be left intact, and the court's discretionary power to transfer venue in the interest of justice and for the convenience of the parties should not be restricted.

The Venue Proposal has been referred to by some as the "Delaware amendment," because it appears principally intended to limit the ability of Delaware corporations to file for bankruptcy in the District of Delaware. This effort to restrict venue choice erroneously assumes the existence of abuses and problems with the existing venue choices without any viable underlying fact gathering or analysis. In fact, an analysis of the chapter 11 cases filed in the District of Delaware over the last five years, as well as a review of the history of the relevant venue statutes, exposes the frailty of the arguments offered in support of the Venue Proposal.

Most Corporations That Could File In Delaware Do Not

Statutory reform should not be implemented without careful thought and analysis regarding the need for, and the fairness and consequences of, the proposed change. The Commission has issued the Venue Proposal without any analysis of the need for or the consequences of a change to the existing statute. In advocating the Venue Proposal, the proponents' overarching argument for change rests on an assumption that companies are abusing venue choice by filing for bankruptcy in their state of incorporation, purportedly to gain advantage over their creditors. The facts, however, belie the proposition that debtors are utilizing state of incorporation any more than other statutory predicates in their selection of venue. Despite the availability of the venue choice, only a minority of large Delaware corporations that file for bankruptcy elect to do so in the District of Delaware. Based in part upon the information set forth in the Bankruptcy Yearbook and Almanac (published by New Generation Research) (the "Bankruptcy Almanac"):

* Of the forty largest bankruptcies of all time (through 1995), 26 were Delaware corporations, but only 5 filed in Delaware. Thus, 80.1% of the "mega cases" that could have been filed in Delaware were filed elsewhere.

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1. The full Report is available upon request from Delaware Legal Copy (302-426-1500). The Report contains a more detailed and substantive analysis of the positions stated in this summary.

* Of the 120,636 chapter 11 cases filed during the period 1990 through the first half of 1996 in the United States, only 934 (.77%) were filed in the District of Delaware.

* Of the 254 public companies that were identified as having filed for bankruptcy in the years 1990 through 1995, only 39 filed in the District of Delaware (including 3 cases that were subsequently transferred to other districts). Accordingly, only 11% of the largest public bankruptcy cases were filed in the District of Delaware over the past six years.

* Of the foregoing 254 public companies, 135 were Delaware corporations, but only 27 of those Delaware corporations elected to file in Delaware (i.e., 80% elected to file outside of Delaware).

* Of the 444 "notable private bankruptcy" cases that were identified in the Bankruptcy Almanac as having been filed in the years 1992 through 1995, only 32 were filed in the District of Delaware (including one case that was subsequently transferred to another district). Accordingly, only 7.2% of the "notable private bankruptcy" cases were filed in the District of Delaware.

* Of the 444 companies noted above, 126 were Delaware corporations, but only 27 of those Delaware corporations elected to file in Delaware (i.e., 78.6% elected to file outside of Delaware).

Enactment Of The Venue Proposal
Will Not Affect Convenience To Creditors

Although numerous commentators have assumed that the current venue statute discourages small creditor participation in chapter 11 cases, no one has tested that premise, nor has anyone seriously suggested premising venue on creditor location. Given the wide geographic diversity of creditors in large bankruptcy cases, venue premised on creditor location would be unworkable. For example, of thirteen randomly-selected large chapter 11 cases filed in the District of Delaware (ranging in number of creditors from 1,279 to 40,941 and having an average of 13,140 creditors each) in which we were able to determine the location of most creditors, 73.6% of the creditors were located outside of the state of the debtors' headquarters (as listed on the debtors' petitions), as were 83.9% of the debtors' largest unsecured creditors (as listed in the debtors' petitions). These figures also reinforce what most practitioners know from experience: that the correlation between creditor location and a debtor's principal place of business that may exist in small chapter 11 cases generally is not found in large cases. Thus, the argument that creditors are inconvenienced by a filing in the debtor's state of incorporation rather than its "home" state (assuming that a corporate debtor's "home" can be easily determined) ignores entirely the typical creditor makeup of large corporations. If the Commission's goal truly is to encourage creditor participation in chapter 11 cases, it will not be achieved through the Venue Proposal.

Perceived Substantive Problems
Are Not Promoted By Venue Choice

Some commentators have suggested that venue choice results in a "race to the bottom," with debtors seeking out districts where judges are inappropriately lenient on fees and liberal in their extensions of exclusivity. Although evidence for this belief appears to be more anecdotal than empirical, even if such substantive problems exist, they should be addressed directly through revision of the relevant sections of the Bankruptcy Code and not indirectly through a misguided change to the venue statute. Indeed, this is the approach recommended by Professors LoPucki and Whitford in Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies, 1991 Wis. L. Rev. 11. In all events, an expectation of fee and exclusivity leniency would not explain the desirability of the District of Delaware as a forum. In large cases, the Delaware bankruptcy judges routinely appoint a fee examiner to review the fee applications of all professionals and to recommend appropriate reductions, and fee enhancements are extremely rare. Further, in Delaware the average chapter 11 debtor between 1991 and 1995 reorganized in just 11.7 months (as compared with the national average of 15.7 months for the same time period). More likely, debtors' and creditors' attorneys are seeking a forum where the judges are predictable, consistent, experienced, accessible to the parties and procedurally accommodating in the handling of complex chapter 11 cases, and where there is a track record of efficient and successful chapter 11 reorganizations. Rather than trying to close the District of Delaware to Delaware corporations, the Commission should be examining why debtors are avoiding certain districts, and address through substantive reform the problems exposed by that inquiry.

Transfer Of Venue Provisions Adequately
Protect Against Abuse Of Venue Choice

Proponents of the Venue Proposal suggest that transfer of venue provisions of 28 U.S.C. § 1412 do not protect against abusive venue choices because courts are reluctant to transfer cases. If this were true, the appropriate response would be to change section 1412, not to arbitrarily restrict venue choices. However, an analysis of the 28 motions to transfer venue filed in Chapter 11 cases in the District of Delaware since 1988 proves that Section 1412 is not being disregarded in Delaware, with 19 of those motions (68%) having been granted.

The Venue Proposal Would Result In Greater Litigation

Far from making venue issues clearer, the Venue Proposal would spawn litigation by limiting venue choice to "principal place of business" and "place of principal assets," both fact intensive and litigable issues in many cases. As technology advances -- with computers, faxes, E-mail, the "Net and the "Web" -- and decision making becomes more and more diffuse, the concept of corporate headquarters (or a corporation's principal place of business) could well become meaningless. When Scott Paper Company moved its corporate headquarters (but little of its headquarters staff) to Boca Raton, Florida, from Philadelphia, for example, where was its "principal place of business" for venue purposes? Likewise, in the case of large companies, the "place of principal assets" is seldom easily ascertainable. In the case of major national retailers such as Edison Brothers Stores or Federated

Department Stores, or a nationwide natural gas distributor such as Columbia Gas, or a nationwide distributor of pharmaceuticals such as FoxMeyer Corporation, one would be hard pressed to identify the locus of principal assets with any degree of certainty. It is hardly consistent with the goal of making bankruptcy less litigious and less expensive, then, to eliminate the one venue choice that is clear, easily ascertainable by everyone in advance, and not subject to litigation.

State Of Incorporation Is A Significant
Consideration In Determining Appropriate Venue

At its most intellectually honest level, the Venue Proposal boils down to a belief by some that state of incorporation is an insignificant consideration when determining appropriate bases for venue selection. However, this belief in inconsistent with more than a half-century of federal venue legislation and decisions. Indeed, as recently as 1993 the Supreme Court of the United States refused to dismiss a corporation's state of incorporation as insignificant or meaningless or to view principal place of business as a superior or more meaningful contact than state of incorporation. In State of Delaware v. State of New York, 507 U.S. 490 (1993), a case addressing escheat rights, the Supreme Court rejected the conclusion that the state in which the principal offices were located, rather than the state of incorporation, was entitled to unclaimed funds, ruling that a company's decision to incorporate in one state bears no less on its business activities than its officers' decision to locate their principal executive offices in another state. The Delaware corporations which have filed their chapter 11 petitions in Delaware do business across the nation and often internationally; they own significant assets in many jurisdictions. These companies have chosen Delaware as their corporate residence deliberately and in light of all the factors that affect corporate life. To suggest that corporate domicile is not every bit as important in the affairs of a major corporation as the location of its principal offices ignores the historical and practical significance of state of incorporation.

State Of Incorporation Historically
Has Been An Appropriate Basis for Venue

Amending section 1408 to eliminate state of incorporation as a proper basis for venue would be contrary to the history of federal venue legislation. For over a century, when a statute has looked to the location of a corporation to determine venue, that corporation's state of incorporation has been a proper venue. Thus, a defendant corporation's state of incorporation is a proper venue under, among other federal statutes, the patent laws, the antitrust laws, CERCLA, the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisors Act. Indeed, courts have consistently held that, absent legislation to the contrary, a corporation's state of incorporation is the only proper venue when a corporation's location is the basis of venue. In accord with that view, starting as early as 1932 courts had decided that for purposes of venue and jurisdiction under the Bankruptcy Act of 1898, a corporation's state of incorporation was its place of "residence and a domicile." After decades with a venue statute that was judicially interpreted to embrace state of incorporation, the venue restrictions that proponents of the Venue Proposal now advocate were implemented in 1973 in Federal Rule of Bankruptcy Procedure 116(a), which provided that a petition by or against a corporation or a partnership could be filed only in the district where the debtor had its principal place of business or its principal assets. However, Congress did not see fit to carry that restrictive venue scheme forward when, just five years later, it brought bankruptcy venue statutes

back full circle to the pre-Rule 116 era with the enactment of the Bankruptcy Code and section 1408. Today, as in 1978, there is no demonstrated need for a return to the restrictive venue policy of Rule 116. As stated by Judge Leif M. Clark in ruling to retain a case filed in an improper venue, "the hallmark for venue issues in Title 11 cases should be maximum flexibility[.]" In re Lazaro, 128 B.R. 168, 173 (Bankr. W.D. Tex. 1991).

The Venue Proposal Will Not Increase Respect For The Process Or Fairness To The Parties

Critics of the current venue statute argue that the existence of venue choices results in "forum abuse through selection of distant, inconvenient locations for litigation," and allege that it "generates cynicism about and disrespect for the bankruptcy process." They decry debtors' attempts to obtain a modicum of predictability and certainty through venue selection at a time when the very existence of the corporation, the thousands of jobs it provides and the source of recovery for thousands of creditors around the country is at stake.

Venue choice permits a debtor to select a forum with a track record and precedent on key issues that affect the debtor's rehabilitative goals. It may help create certainty on some issues of importance both to the debtor and other parties in interest. Why is this "wrong"? If it is "wrong" because the critics believe the outcomes achieved by debtors in certain courts are "wrong," then those outcomes should be addressed directly, either by appeal or substantive statutory reform, not indirectly through venue restrictions. If it is "wrong" because the critics favor uncertainty over certainty, that runs counter to a legal system based on precedent and principles of stare decisis, which by definition seeks to foster certainty and predictability.

Venue choice generally--and erroneously--is viewed as something that helps the debtor to the detriment of its creditors. Those who assail it incorrectly view forum selection as a zero sum game, where the debtor wins and the creditors lose. Chapter 11, however, is not a simple two-party dispute, where one party wins and one party loses. In large, complex cases, it involves hundreds or thousands of parties, some of whose interests are aligned with the debtor at times, and some of whose interests are not. The current venue statute should not be changed on the ground that it is somehow fairer to stake millions of jobs and billions of dollars on the luck of the draw in filing a case than it is to permit a debtor to select a forum that reduces uncertainty for debtor and creditor alike. Bankruptcy is not a craps game. Nor should it be treated like one.

Conclusion

With the many serious substantive reforms being considered by the Commission, it is disappointing that the Commission and bankruptcy practitioners would devote such time and effort to an initiative as patently parochial and vindictive as the Venue Proposal. When one examines the facts and discards the hyperbole, it is evident that the change in longstanding law and policy advocated by the Venue Proposal is unwarranted.