ABI Commission to Study the Reform of Chapter 11

November 22, 2013 Field Hearing

UT/Westbrook Conference

Austin, TX

Albert Togut: Good morning. We are delighted to tell you that aside from the American Bankruptcy Institute Annual Meeting turnout, when we rolled out the Commission, this is by far the largest turnout we've had this year, or in any of our field hearings. We are very pleased to see you all.

My co-Chair, Bob Keach, unfortunately, got tied up in a case back in Maine, and he just couldn’t get free. He wanted to be here and he, too, wanted to thank you all for coming.

Today I'm going tell you a little bit about the background of the Commission, and I'll do that in a fairly summary way, and then we'll get right to the witnesses because we have a lot to hear about. Today we are going to have witnesses on a number of topics that we believe are important to the Texas insolvency practitioners, including ways to make commercial bankruptcy process more effective and efficient, particularly as it affects the middle market. We are very aware of the fact that the vast majority of corporate Chapter 11 cases are in the middle market.

We'll hear from a prominent appellate advocate about a significant statutory and constitutional challenge, presented by *Stern* *vs.* *Marshall*, as well as about a case to be argued before the Supreme Court in January, and we'll hear views on venue.

Why is there as need for this Commission, and a need for reform? For those of you who've been practicing in bankruptcy for a long time, and who remember the very early days of the Bankruptcy Code, it was a statute that came about as a result of a Commission appointed by the Congress to reform bankruptcy laws, and the phrase most commonly applied to that initial version of the Code was it created a “level playing field,” trying to balance the interest of creditors and the debtors' interest in restructuring. But it all occurred in a very different time in America.

Back in 1978, the typical corporate debtor, and I'm speaking as well of large corporate debtors, were based in America, they made a product in America that was manufactured in America. They had an American workforce, and they sold their product to Americans. They had very little secured debt. Corporations in those days might have account receivable financing, might have taken out some equipment loans, but the unsecured creditors in those days could count on getting a distribution because all the assets were not encumbered.

The creditors, the unsecured creditors, would stay with the case. They had a real interest in debtor reorganizing because they wanted a healthy customer for years to come.

Today we have a completely different dynamic. Today almost every level of asset is encumbered in some fashion. Today you have unsecured creditors who are out of the money. They are not the fulcrum security anymore. You have debtors that are multinational, that don’t manufacture products in the U.S.; that manufacture overseas. You have complex corporate structures, you have unsecured creditors bailing at the earliest possible point in the case, selling their claims to claim traders.

You have an emphasis now on maximizing the returns to creditors, where, under the Code, there isn't the requirement for that. The Code simply says there's supposed to be a negotiated bargain, and so long as the creditors were getting more than the debtor would generate in a [chapter] seven, that would pass the test for confirmation.

It's an entirely different world, and there have been a series of amendments that have done a variety of things: limited judges' discretion, or eliminated judges' discretion in certain instances, imposing time limits, getting administrative expenses for certain kinds of claims and a whole slew of things that just have us in a statutory framework now that is different but not necessarily better. Recognizing the kind of debt structure that these companies have and the fact that most of these cases are not turning out to be traditional rehabilitations, but are turning out to be liquidations of some form.

By the way, we have on this Commission, Professor Ken Klee and Rich Levin, both of whom participated in drafting the original Code, and they would tell you, if they were here, that it was believed back then that their code would have a shelf life of maybe 30 years. Then it would have to be redone; so here we are, and that’s what we are looking at.

We are looking at a top to bottom evaluation of the Code. First, we have the mission statement, which you should take a minute to look at. It talks about trying to achieve rehabilitation, while at the same time balancing the need for maximizing values. The Commission consists of 20 Commissioners, there's the list. If you look at that list it is who is who of bankruptcy in America.

We have a geographically diverse group, we have all kinds of sectors of the restructuring community represented by that group, and we have absolutely brilliant minds looking at this. Then in addition to that we have 150 people populating 13 study groups. By the way, all of this is on the ABI website, and you can take your time and really look at this.

The study groups are looking at a whole variety of topics, that have generated lots of litigation, and that the Commissioners believe need to be studied with the idea of seeing where some reform would be appropriate. We are also looking at conflicts in circuits, believing that if there could be an answer made in a statutory fix that would eliminate all kinds of litigation.

Now, we've had, as Sam mentioned, a number of these field hearings. We had six last year. Those are the venues for 2012, and we've had 11 this year. We are trying hard to get to all parts of the country, to every circuit, and I think we've hit them all except for two right now. We've dedicated substantial resources to the effort, so far ABI and the Endowment, the Schnelling Endowment have, together, dedicated some $200,000 to this effort so far, so this is a very serious effort. We have a reporter, Michelle Harner, who has been just invaluable in what we are doing, and who is going to be a very busy person in the coming year, because once the Commissioners go on retreat, [and] we are going to find some place to closet ourselves up for a few weeks, and do nothing but figure out policy and proposed changes to the Code, and then Michelle gets to write it all up. We are expecting to be able to release our report in a year at the 2014 ABI Winter Leadership Conference which occurs in December.

Now, in addition to the work by the Commissioners and the work done by the study groups, these field hearings have been absolutely invaluable to us. We've had 17 of them, they’ve covered every topic you could imagine, and the testimony that has been received by the Commissioners as a result of these filed hearings have been very, very important to us. We are hearing all kinds of views, some of which go beyond where people were originally thinking, and we are accepting, even now, written submissions by anybody on any topic that you think ought to be considered.

The Commissioners read all this stuff. The testimony from these hearings is posted and they're streamed live, then a recording of them is posted in a movie form. You can see the replay and then 10 days from now there will be a written transcript. We are keeping track of what everybody is telling us, and it will be actively considered even the first hearing which was a-year-and-a-half ago, we are paying attention to that, we are tabulating that, and we are going back and looking at that.

The final goal here is to have a comprehensive report, part blueprint for reform and part catalogue for open issues and current options to be considered in updating Chapter 11.

At the end of the day, our work may lead to consideration of reform legislation, but it will be legislation fully informed by a very careful and complete process. Today's hearing, like all others, will consist of a format where each of the witnesses will have five or six minutes to make their statements. The Commissioners have read everything that you have submitted to us, so you need not read the statement. You can summarize or even augment what you gave us, and then we will have, you'll see, a hot bench here, that will pepper you with questions.

We'll start with our first panel. Bill Greendyke is a Partner in the Houston Office of Norton Rose Fulbright, and is formerly the Chief Judge for the Bankruptcy Court of the Southern District of Texas. Buzz Rochelle is a Partner at Rochelle McCullough in Dallas. Eric Brunstad is a Partner with Dechert, who has previously argued 10 cases before U.S. Supreme Court, and has worked on more than 35 matters in that court, so why don’t we start with Bill.

Bill Greendyke: Thank you. On behalf of the Bankruptcy Section of the [Texas] State Bar, I'm grateful for the opportunity to allow us to report to you upon the result of the survey that the Bankruptcy Section implemented several weeks ago to all the Bankruptcy Chapter 11 practitioners, we got a tremendous reply back from them.

My goal here today is to report to you on the result of that survey or what we found to be the key points of response in that survey, and not so much to give you the viewpoint of Norman Rose Fulbright, to the extent it's a Bill Greendyke comment, and I'll give you a Bill Greendyke comment, based on either judicial prior experience, or my experience in the last nine years as a practicing attorney once again. The survey shows, as I said, and I know you’ve read this, but the people behind me haven’t read this, perhaps, by now, or haven’t heard it mentioned.

The overwhelming response to chapter 11 is much different than it was 10 years ago. It's utilized in a much different manner. Pretty much everybody, two –thirds of the respondents said, [section] 363 Sale or liquidation in connection with the response about why things were different. What was interesting was that not everybody thought this was a bad idea. Overwhelmingly everything is okay indicating this may not be broken, having this kind of process where you have a predominantly sale-oriented process as you described, Mr. Togut, earlier, as opposed to a 1978, 1979 reorganization policy.

Second, 88% of those responding felt that chapter 11 was not utilized near as much as it had been in years past and overwhelmingly, 98% of respondents said it's much more expensive than it has been or was 10 years ago. Interestingly, and probably this has something to do with the [section] 363 aspect, the response overwhelmingly, I thought, was much faster these days than it was in the past.

Several questions asked about the role of the United States Trustee, and we got sort of a mixed response; 21% of the respondents said the role of the U.S. Trustee was positive, 44% said negative, 35% took no position.

The usual comments were, "Kind of depends on where you are." Depends on which city you're in, what region you're in, what district you're in. I think, clearly, we could glean from the comments that everyone felt that things needed to be done uniformly, perhaps more transparency with regard to the role of the U.S. Trustee.

The respondents were equally divided on whether or not the U.S. Trustee Program was obsolete or not, which was, I thought, an interesting response as well.

Fourth, and having attended a similar field event in Atlanta, at the NCBJ, most of the respondents, two-thirds found that the advent and utilization of CROs in restructuring cases was something that was positive.

This was a new development that they had seen based on years and it was something that was good and should be supported.

Fifth, when asked about how to improve the jurisdiction of bankruptcy courts, overwhelmingly the respondents said, "Make them Article III judges." Whether that’s a panacea or not, obviously this is something, it's foremost in everybody's mind, and I know Mr. Brunstad is going to speak extensively about that in a few minutes.

Sixth, when asked to identify what good things were available only in chapter 11, as opposed to any other type of legal proceeding or outside of the court altogether, the number one topic was, clean assets to buy, or a manner of acquisition assets or clean title to assets that was unavailable anywhere else, 84% had that reply. 55% said the positive effect of chapter 11 was having management in control, even in the course of liquidation.

Notwithstanding these benefits, 55% of the respondents felt that chapter 11 reorganizations, specifically, were less successful than 10 years ago. Whether chapter 22 or just an ultimate liquidation where that might be.

One of the unusual things that surprised in the comments, and I know you probably can access the survey through our Jay Westbrook Conference materials, to see the actual question. There were a lot of comments that followed the questions; there were a lot of mention by practitioners here in Texas of needing to fix individual chapter 11 structure and law. Whether it was we just need guidance, or do away with the Absolute Priority Rule, or come up with some type of structure or formula for dealing with exemptions and budgets.

A lot of respondents felt that this was something that was broken, that needed to be fixed, because it's a struggle right now.

Eighth, and finally, there was an overwhelming response that we needed to do something about venue. What do I glean from this is, in effect of reporter of this survey, basically my takeaway is, I don’t think it's broken. I listened to your comments, again, respectfully, Mr. Togut, about how things are different in the financial world over the last 30 or 40 years, and I agree things are different, all you have to do is step into a courtroom and you'll see that.

I think the system itself is not broken, [but] it might need tuning. With regard to the [section] 363 sales, they are fast, efficient, and offer the best, clearest title in the market place. I think the fact that the marketplace or financial world has changed, doesn’t mean our [section] 363 sales need to go away. In fact, my primary point to the Panel, or to the Commission would be, I think we need to make [section] 363 sales a more uniformed and thoughtful process.

You can't do a [section] 363 sale in some courts. Some of the courts just completely ignore that type of rationale and say, "The courts says I can do a 363 Sale, I'm going to a 363 Sale, and it's going to result in the business in the employees ending up in the hands of somebody to continue that business, to continue their employment, to continue that economy.”

The courts that did basically say you have to have a plan, I think, discouraged that kind of behavior resulting in probably forum shopping or going someplace else.

As to jurisdiction, I agree completely with the results of the survey that something needs to be done. While *Stern vs. Marshall* has been an interesting and somewhat entertaining diversion for a lot of us, it's expensive for courts from a judicial resources standpoint. It is expensive for clients from a cost standpoint, and therefore it's expensive, ultimately, to estates that have to deal with unsecured creditors that have to rely upon economy and efficiency and what you received or recovered.

Venue, again, simply stated, I think we ought to get rid of place of incorporation venue, and have the principal place of business or headquarters-focused venue. I saw that as a judge, I was the Chief Judge in Houston when Enron filed in New York. I had to go to church and answer questions about why, why is this company there.

Today, American Airlines is the largest company going on in bankruptcy right now in Dallas. I know a Secretary in Dallas, in our firm there, whose husband is pilot for American Airlines, and when the public said, "Which Judge got it? Did Judge Hale get it, did Judge Houser get it?” I'm like, "No. Somebody in New York got it, and you're going to have to rely upon *ABC News* to figure out what's going in your case." That’s a difficult thing to explain to somebody in the public.

In my experience as a sitting judge has been very favorable with regard to the United States Trustee. I thought they were constructive and helpful in my cases, and I think they have a valuable place in our process, in our system. That said, I think the comments about disparity and treatment across the country, or across divisions is something that I have seen as well, and I think that's something that perhaps you can address, or perhaps just this dialogue will assist with regards to U.S. Trustee.

I was in Atlanta and watched the Commission in Atlanta and, this is very brief, I heard the comments of one of the panelists talking to you all about transparency and I think that’s very important. I think transparency is served by looking at venue. I think transparency is served by looking at attorneys' fees, I think transparency is served by looking at jurisdiction and helping to explain to the people who aren't in our system, why this makes sense and why this works.

With that, I thank you, I thank you for your time and look forward to your questions.

Albert Togut: Thank you.

Buzz Rochelle: Ladies and gentlemen, I certainly appreciate this opportunity to visit with you this morning. I don’t want to duplicate what Bill just said, and so let me also warn you that if what I have to say shows good sense, it's probably reflective either of my association with Bill, or what I learned from the survey. Anything inflammatory or ridiculous is my own thought.

Let me just tip my hat, as well, to what today is. Today is November 22nd, and no Texan can sit today, a native Dallasite, such as I, and not be caused to be at least reflective. I would also, however, note that today in the Roman Church calendar is the feast of St. Cecilia, the Patron Saint of Music, and I would hope that perhaps today, from our efforts some concord can be evolved.

That having been said, and speaking as a lawyer who has been at this for 36 years, and who is the son of someone who testified to Congress in the mid-'70s on the proposed bankruptcy Code. I can report that jurisdiction has always been a mess. I went to college on what my father earned litigating jurisdiction in the 1960s.

I can also tell you that my sons went to college on what I earned on jurisdiction litigation. It is not an exaggeration, and to my mind, it seems to me that and I would go substantially further than my friend, Mr. Greendyke. I think we are way past an irritation point now, we are watching, every time the Supreme Court rules on bankruptcy jurisdiction it is more constrained, more limited, more open to question, and as I mentioned in my materials, I actually heard in open court a few weeks ago, someone say to a Dallas bankruptcy judge, that she was not bound by his confirmation order, even though her client was scheduled, because *Stern* said she wasn’t.

That kind of chaos is going to get us nowhere and it is going to accelerate, I expect. I think we are really to the point where there has to be a jurisdictional fix if we are going to have a stable and an effective bankruptcy court.

Mr. Togut, I was intrigued to hear what you had to say about the changes in secured lending over the past 35 years, they certainly mime my own experience in that. I think the slightly larger context of that, is that I think we have seen over the last 15 or 20 years, what I can only describe as a corrosive process. In that, unsecured creditors these days do not regard the bankruptcy court as their friend.

They do not regard the bankruptcy court as a place where they will see substantial justice. I think once you get to that point, you have decoupled society from the court and good things will not follow.

I think quite frankly and quite simply it is a dangerous thing. The message that is sent today in the bankruptcy court is that this is a place for debtor's management, and even more than that, for the secured lender. In that respect, I think it parallels a lot of the changes in our society, the growing exclusion and exclusivity of parts of our political system. It's for some people and not for others. Again, this is corrosive, and it is dangerous.

It's important to remember too, that many of the changes that occurred in the Bankruptcy Code, most especially sections 361 and 362, adequate protection and lift of stay, codification came about because there was nothing there before, and interestingly, and ironically enough, the people who really needed protecting back then were the lenders. I'm not the only one who remembers bankruptcy judges smiling sweetly at lenders wanting to foreclose and saying, "Ha. I've got an awfully crowded docket here in November. I think I can give you 30 minutes next July."

Well, lenders don’t have that problem anymore. They are adequately protected and others are not, and it is my strong suggestion that what we need is a re-striking of that balance. To do that, I realize that what I am talking about is probably close onto heresy for many people, but I think we need to revisit the absolute-priority rule, it is not wholly writ. As those who saw the drafting of the statue in the '70s recalled, it's just something that’s supposed to be a workable accommodation.

We also need to remember that the origins of the Absolute Priority Rule in Oliver Wendell Holmes’ *Northern Pacific Railway* Case, were designed to protect little people, and guess what? It was turned on its head in the course of 30 or 40 years.

Well, it's been taken to a greater extreme now, and so what we have is a bankruptcy court that cannot protect anybody, like the secured lender. I have suggested some ideas in the materials toward moving away from that, I think there's some ready and perhaps even relatively uncontroversial fixes, most especially things such as undoing the deterioration of tax attributes that now occur because of the forgiveness of debts.

I say, relatively uncontroversial because the only people that I know who like chewing up your NOLs are the Internal Revenue Service, and they don’t have nearly as big as lobby as other people, so let's be pragmatic now.

I think there's another thing that is not at all a happy thing for this process, and that is claims trading. I do not know, I do not understand why the bankruptcy court should countenance the sort of casino that goes on in claims trading these people do not serve a real economic function, and it is, I think, not a good thing for our court system.

Finally, on the matter of venue, as Bill indicated, it is certainly from a Texan standpoint to see your largest cases, repeatedly leave, not all of them but most, is a dismaying thing. Leaving Professor LoPucki’s studies to one side, we are familiar with them, I still think that the point that Bill made is perhaps worth remaking, and that is that the social effects of chapter 11, I think need to be seen not just need to occur, and that the people who are affected need to see them.

When it happens halfway across the country, frankly, that just doesn’t happen, and I think, too, there is a value to the judge in the community being the judge who makes the hard decisions. Not somebody completely divorced from the process.

What I am suggesting overall is that as Levin and Klee expected 35 years ago, we need a tune-up. In fact, I think we need to pull the engine and drop the transmission, and to do some pretty serious work on this, and we need to do that to make it responsive to the society that we currently have. We can amend things such that, again, people will think the bankruptcy court is a place where, "I will have my voice heard, and I will receive just treatment," and that’s where it should be.

Mr. Togut: Thank you. Mr. Brunstad.

Eric Brunstad: Thank you, for inviting me here today. I'm going to focus my remarks on jurisdictional statue and *Stern vs. Marshall*, and the upcoming case that the Supreme Court is going to hear argument on, on January 14, the *Bellingham* matter. Or at least, we bankruptcy lawyers like to call our cases by the name of the debtor, Bellingham, the rest of world calls them more by their formal names.

I wanted to start by making the comment that I think it's pretty clear that [under] our jurisdictional statute, 28 U.S.C. Section 157 governing the bankruptcy courts, the bankruptcy judge is exercising jurisdiction that the district courts have is broken. Section 157 is broken. Parts of it have been declared unconstitutional by the United States Supreme Court and because it is broken, it needs to be fixed.

Last year I was asked by the House Judiciary Committee to come up with a solution to what ails Section 157, if I could, and my first response was, "Well, there's one simple solution, that that would be to make bankruptcy judges, Article III judges,” which I heartily support that that should be done, and the very tart and quick response I got back, was, "That’s not going to happen."

That’s a nonstarter, politically that’s not going to happen. "Can you come up with up with a statutory fix?" I did, and part of the materials that I submitted is my redline of the statute where I propose changes to the statute to cure the *Marathon*, *Stern*, etc. problems, in my view, and with comments after the proposed redline of the statute, that sort of explains what I did, and I can run through those.

First I want to talk about a little bit of background, because I think to understand how and why Section 157 is broken, it's important to understand that before you can figure out how it should it be fixed. To understand how and why it's broken, I think we need to go back in time and understand where these problems come from. Of course, they come from our Constitution. Article III of the Constitution, which has a very profound history, and it goes back to England. There was a problem in England, and that was that the judges, the Crown Judges, were not independent of the Crown, and over time, particularly in the 18th Century and the 1700s, the Act of Settlement, et cetera, the English judges, the judges of the King's Bench, the judges of Court of Common Pleas, et cetera, gradually got independence from the Crown.

They eventually got a lifetime tenure and irreducible salary, and when it came time to draft our Constitution, the framers of our Constitution thought that was a fantastic idea, to have an independent judiciary, and so we see in Article III of our Constitution the requirements that the judicial power of the United States shall be, basically, exercised by judges who have lifetime tenure and irreducible salary.

If you read the Federalist Papers, you will see all the explanations for why this was such was such a wonderful thing and, again it has this very profound, historical background to it. Now, bankruptcy judges, as we all know, are not Article III judges, they are not appointed for life. They are not appointed with the salary protection that Article III references. Again, regardless of whether they should, I hardly believe that bankruptcy judges should be Article III judges, for variety of reasons, but given that that’s not likely to happen, the question then becomes: What do we do?

Well, the Supreme Court has given us some guidance initially in the *Marathon* case, and of course, the Supreme Court in *Marathon* was reacting to the statutory setup that came with the original Bankruptcy Code in 1978. That 28 U.S.C. Section 1471(a) vested broad jurisdiction in the newly created bankruptcy courts, gone was the former distinction under the Bankruptcy Act between summary and plenary jurisdiction. Instead, we saw bankruptcy judges vested with broad authority to finally hear, and decide and define orders, and all kinds of matters arising in or arising under related to the Bankruptcy Code.

It's a very broad jurisdiction vested in the non-Article III bankruptcy judges, then along came *Marathon* in 1982, and that of course involved the situation where a bankruptcy judge was asked to finally decide a garden-variety state law breach of contract of action, and the Supreme Court said, no, that could not be done, because under Article III, again, the exercise of the judicial powers ordinarily exercised by judicial officers, with a lifetime tenure and irreducible salary and bankruptcy judges do not have that.

The Supreme Court articulated for us, three exceptions to the requirement of Article III. The first exception of courts martial, of course bankruptcy judges don’t exercise military justice jurisdiction, so that’s off the table.

The next is territorial courts, courts that exist outside the territorial jurisdiction of the United States, of course bankruptcy judges aren't that either. The third category is where the judicial officer is adjudicating what is known as public rights. Of course public rights remains something of a morass, the Supreme Court has never told us exactly what the public rights category actually is.

A good example, I think, would be Social Security benefits. Social Security benefits are an entitlement that Congress has created. It's not a right that exists in the common law. It's not a right that existed before the first Judiciary Act in 1789. It's not a right that existed in England before the revolution. It is something that Congress creates, and so as a quintessential public right, Social Security benefits are something, if they're going to be adjudicated or administered in some way, Congress has a lot of leeway in deciding how they're going to be administered, how they are going to be adjudicated included by non-Article III adjudicators.

A breach of contract action however is clearly not a public right, that’s what we call a private right because it arises under state law, it's not something Congress creates. If it's going to be adjudicated in federal court, outside of bankruptcy, for example, and diversity jurisdiction, it should be decided, it should be finally decided, it should be finally decided by an Article III judge. That’s what the Supreme Court explained to us in *Marathon*, and so because bankruptcy judges are not Article III judges, they therefore cannot finally decide things like garden-variety breach of contract actions.

Well, that was in 1982. In 1984, Congress responded, by revising the jurisdictional provisions, and they came up with what we currently we have, 28 U.S.C. Section 157, that basically provides that there will be the bankruptcy judges who are in each district [that] will exercise the bankruptcy jurisdiction that the district judges have.

Under Section 157(b)(1), bankruptcy judges can finally decide core matters, and under 157(c), they can hear and determine in 137(b) and (c) they can hear and determine non-core matters with the party's consent, as everybody knows they can finally decide non-core matters, but if they are going to decide on non-core matter without the consent of the parties, they should propose findings in fact, in conclusions of law, and 157(b) gives us a laundry list of things, that are supposed to be core.

That was a jurisdictional compromise that Congress came up with in 1984, and then we had a series of cases after that, including *Granfinanciera*, but I think largely, the *Marathon* issues were kind of swept under the rug a bit. Then along came *Granfinanciera*, and there we had a fraudulent transfer cause of action, and the question, it was a jury trial case.

If you have not filed a proof of claim, and you're defending in a fraudulent transfer action, and you're being sued, do you have a right, to assert a jury trial? The Supreme Court ultimately said, said yes, but what's critical for our purposed about the *Granfinanciera* case, and this was, again, picked up in *Stern*, is that the Supreme Court, the majority of the Supreme Court said, in a fraudulent transfer action, which is basically a private right controversy, you have a right to a jury trial, but the analysis under the Seventh Amendment for rights of Jury Trial, and the analysis under Article III, is the same, the Supreme Court said.

Logically you would think, "Well, if you have a right to a trial by jury, therefore you have a right to an Article III judge in the bankruptcy setting. That, of course leads to a problem, because under the Statute under 157(b), you have fraudulent transfer actions or listed as core matters, which bankruptcy judges can finally decide.”

Well, if they're not a public right controversy, if they're a private controversy. Like the breach of contract action in *Marathon*, then we have a clear problem, and that was the Supreme Court's decision in *Granfinanciera*. Again, things got swept, a little bit, under the rug, and then along comes *Stern,* which we can call, I guess, Anna Nicole Smith's contribution to bankruptcy jurisprudence, and/or bankruptcy jurisdictional system.

In that case, the lovely Anna Nicole Smith files for bankruptcy out in California, and Anna Nicole Smith has this ongoing litigation battle with her stepson, Pierce Marshall, over the estate of the late J. Howard Marshall, Jr. And cutting short on all the facts, essentially what happens is Pierce files a nondischargeability action against her in the bankruptcy case and files a proof of claim.

She counterclaims against him, alleging tortuous interference with her expectancy of a gift from her late husband. Her theory was that J. Howard had promised her half, and Pierce had interfered. This cause of action is a tort cause of action. What was the source of the law? The source of the law was Texas law, and the question then became, could the bankruptcy judge finally adjudicate this?

Well, again we have Section 157(b) designates a counterclaim against someone who has filed a proof of claim against the estate, which Pierce had done, as a core matter. The bankruptcy judge said, "This is core matter, I can finally decide this," went up to the Ninth Circuit, and the Ninth Circuit said, "No; this is not properly a core matter." Ultimately the Supreme Court said, "Even though the statute designates a cause of action that the debtor has against someone who has filed a proof of claim as a core matter. That is constitutionally unsound."

In *Stern*, the Supreme Court resurrected the analysis of *Marathon*, and resurrected the analysis of *Granfinanciera*, and said it again: if we have a matter that involves private rights, a private right controversy, such as in *Marathon*, a garden-variety state court breach of contract action, that something is going to be decided in federal court, should be decided by someone who has the protections of Article III, lifetime tenure irreducible salary.

Here there really is not difference between a garden-variety breach of contract action that issue of *Marathon*, and a garden-variety state law toward action, and which Anna Nicole Smith was asserting against Pierce Marshall. The Supreme Court said, "What we said, in *Marathon*, and what we said in *Granfinanciera*, is how Article III is to be analyzed and applied." It was it was unconstitutional for the bankruptcy court to finally decide this matter, and so Ninth Circuit was correct in affirming vacatur of the bankruptcy court's final judgment.

Now the Supreme Court clarified a few things in *Stern*. The Supreme Court said, "Just because you file a proof claim, does not mean you waive your right to an Article III judge." Again, the Supreme Court did not tell us what constitutes a private right versus what constitutes a public right. The Supreme Court did not go through and systematically give us a nice test or a nice definition of what constitutes a public right versus a private right. The Supreme Court simply says, "Wherever you draw that line, the line must, basically, provide for a state law, breach of contract action, or a state law toward action to be outside of the purview of the public right domain.

Now that’s the lay of the land today; we have the *Stern* case of course which has been very controversial. There have been over 700 published decisions applying *Stern*, when *Stern* was announced in 2011, and causing all kinds of complications, but the Supreme Court didn’t intend that. The Supreme Court said, in its decision that Stern was a narrow decision.

The Supreme Court said that it shouldn’t change the allocation of basic responsibility very much under the jurisdictional statute, but it is clear that *Stern* basically determined that certain parts of 157(b)(2) designated, for example, in 157(b)(2)(C), that counterclaim, the proof of claim that core matters is unconstitutional, but part of the statute is unconstitutional and so now we have a problem that needs a fix.

How do we solve this problem? Well, hopefully the Supreme Court is going to give us some further guidance in the *Bellingham* case, which is going to be argued on January 14. In *Bellingham* we have the primary the issue of consent. Basically, you have this Article III structure, and it's all very well and good, that bankruptcy judges can't decide certain things. Things that involve controversies over private rights, but does that mean that litigants can't consent to have a bankruptcy judge finally decide these things?

Are the consent features of Section 157(c) workable; are they viable? Even further, what kind of consent do you need? Does it need to be express consent? Do you have to express written consent? Or is implied consent by the litigation contact of the parties enough? Those are the issues that are teed up in front of the Supreme Court to be decided, and what they have to say, hopefully will be very helpful, because some courts of appeal, strictly the Sixth Circuit, *Waldman vs. Stone*, has said that, "Well, no. The Article III concerns are what we call structural. They're not personal rights, they're structural."

Which means, "It doesn’t matter whether you consent or not," says the Sixth Circuit. "If you have a private right, a controversy you can't consent away your right to an Article III Judge." This poses a huge problem. We have some guidance from the Supreme Court on this before from the *Shore* case. In *Shore*, the Supreme Court said, "Article III … the right to an Article III Judge is primarily a personal right, subject to waiver.” Subject to waiver, that’s what the Supreme Court said in the *Shore* case, and hopefully, the Supreme Court will reiterate that in *Bellingham* and tell us, "Well, that’s right. The right to an Article III Judge is a personal right. You can waive it, just like you can waive a right to a jury trial, and which would make infinite sense. After all, that’s how our magistrate judge system works, under 28 U.S.C Section 636, much of the jurisdiction of magistrate judges is based on consent.

If the *Waldman vs. Stone* theory were true, that you can't consent to basically have someone other than an Article III Judge decide your case, well that, I think would call into doubt, serious doubt, the whole magistrate judge consent-based jurisdiction. It also, I think, calls into doubt, whether a federal judges can to approve arbitration decisions under the Federal Arbitration Act, et cetera, and there are huge problems with the *Waldman vs. Stone* type of analysis.

If I'm going to make a prediction, of course I'm biased since I represent the trustee in the *Bellingham* case. I would hope that the Supreme Court would conclude that, in fact, you can consent to a non-Article III Judge deciding a private right controversy. In addition, consent can either be expressed or it can be implied by the litigation conduct, but we will see.

How does this all play out in terms of fixing the statute, I think one of the exercises that has to be done, is that we have to divide what we think truly are core matters, that are constitutionally core, that the bankruptcy judge can finally decide and put those in one bucket.

Then we have to decide, I think, what we think are truly private right controversies that are currently designated as core, and move those over into the non-core bucket. That’s what I've tried in this proposed revision of the statute.

For example, I've suggested that we take out fraudulent transfer actions, which are designated in [section] 157(b)(2)(h), and take those out of the core designations, which I think is pretty clearly, the fraudulent transfer actions don’t belong there. Fraudulent transfer actions don’t belong there. Fraudulent transfer actions, the Supreme Court tells us in *Granfinanciera*, are quintessentially disputes over private rights, not public rights.

I think we also have to fix [section] 157(b)(2)(C) counterclaims by the estate against persons filing claims against the estate needs to be taken out of the core bucket, and moved into the non-core bucket. Then the question becomes, looking for these other things: are they properly core or not? I think that by and large, almost all of them are including preferences. Now, even though one might say, "Well preferences are awfully a lot like fraudulent transfer actions," I think that the Supreme Court's decision in *Commonwealth of Virginia vs. Katz*, has a lot to say about this. Where the Supreme Court says, "The preference actions are part and parcel of the bankruptcy," because you may recall from *Stern* that the Supreme Court basically said, that if a matter stems from the constituency itself, or is necessarily resolved in the claims along its process, that that is probably something that’s going to be properly, something the bankruptcy judge can finally decide.

Of course, the Supreme Court in *Katz* tells us essentially that preference actions stem from the bankruptcy itself. They're part and parcel of the bankruptcy, they’ve been that way since, at least, the 1760s and I submit they’ve been that way since the 16th Century in England. I would leave those in the core bucket, but that’s perhaps more of a judgment call.

Things such as, for example, confirming plans, objecting to discharge, determining dischargeability, those things seem to be quite clearly core matters. Maters that involved properly, matters of public right, they are the right to a discharge. The right to the automatic stay, or relief from the automatic stay, things like that; those are things that Congress has created. Those are rights and entitlements that do not exist at common law. They're like Social Security benefits, because Congress has created that, created those kinds of things, they have flexibility in deciding who gets to adjudicate them and decide them.

I think those kinds of things are properly core matters. Again, I think taking *Stern* seriously the issue actually is narrow, it's a very small category of things, that I think need to be moved over from the core bucket into the non-core bucket.

I think it's also important to cure a couple of other problems with the statute and I'll just hit on a couple of, I think, the major ones. What do we do, for example, if it turns out that we are wrong? If it turns out that the statute designates something as core, but constitutionally, it should be designated as non-core.

The argument that we are making in the *Bellingham* case, it's part of our brief, it's a matter of public record, is that there is no so-called gap problem, that in fact if something is designated by the statute's core, but should be treated as non-core for constitutional reasons, that the court can just do that, and the bankruptcy judge can issue proposed findings, in fact, in conclusions of law.

What I proposed in this codification is to actually codify that. A procedure for actually recognizing that, and also in proposed Section 157(g), basically a provision statute that says, that provisions of the statute shall be construed to avoid conflict with the United States Constitution.

This is really a codification of what we already know, it's called the Canon of Constitutional Avoidance. That is, the Supreme Court is directed in a innumerable cases since its decision in *Ashwander*, that in the federal court, you're supposed to construe statutes of progress to avoid constitutional doubt, including adopting interpretations of statutes that avoid constitutional questions, which in some cases have permitted courts great leeway in construing the statute.

This was basically a codification of congressional intent that that happened here. That way the courts will have some flexibility, if there is a problem like construing, for example, an improperly-designated core matter as a non-core. That would actually, I think, also be of assistance.

The goal in this revision is to create a workable jurisdictional provision that gives bankruptcy judges, district judges, court of appeals judges, enough flexibility, that if necessary, they can move things over into the non-core if they needed to.

For example, suppose I'm wrong on preferences and these are divined by the Supreme Court at some point to be public right, not private right controversies, rather than public right controversies? Then the designation of core would improper, but under this revision, that would simply allow the courts to basically put it over into the non-core category.

The second thing is on flexibility, what do we do when we have a matter that the district judge wants to withdraw or something like that? Can they reassign it to a bankruptcy judge for various things, and I try to make clear in this revision, that that was also authorized by the statute. It's trying to cure all of the various issues that have given rise to so much litigation over the last several years following *Stern*. I try to do that statutorily, and try to clean up a few other things in this proposed rewrite.

I have no idea where this sits in Congress, I submitted it quite a while ago, I submitted it actually last year, last summer, and it goes into the legislative process, and where it might end up coming out at some point I cannot say.

Those are my comments, and I want to thank you very much for listening.

Mr. Togut: Thank you. Jack?

Jack Butler: I'm going to go back to Judge Greendyke, and talk about one of the things you said, in your testimony and your papers that I'd like to ask you to reflect on, is in the survey, you reported, "About twice as many of the survey respondents have negative impressions of the U.S. Trustee office than had positive impressions."

Mr. Greendyke: Correct.

Mr. Butler: Yet in your testimony you reflected on your experience as a Judge, which hasn’t been all that different [than] my experience as a practitioner is there in fact can be constructive roles of U.S. Trustee. Quite clearly your survey suggested that there's a negative impression. I wonder if you can reflect on that, and give some sense of what do you think that is, and how that should inform the Commission's thought process?

Mr. Greendyke: I will. It was difficult to discern from the survey results, just exactly what the complaint was. Like I said, one of the most, I guess, frequent comments was, "It depends on where you are." Meaning, with no allocation or attribution to any of the comments, maybe they will explain in Houston, but if you go do Dallas, it's not so fine. If you're in El Paso, it's not so fine. That’s what I glean from that.

I think, personally, that there are different personalities in different offices; there are different personalities of different acting U.S. Trustees or U.S. Trustees as well as different trial attorneys.

I think that's what the results are reflecting is that disparity and prosecutorial discretion maybe, to the extent that that’s a word I glean from an ABI article a long time ago, but I think to the extent that the executive office, has a policy, that policy ought to be implemented uniformly, and to the extent that trial attorneys or regional U.S. Trustees follow a national policy, they ought to follow it uniformly.

I think the lawyers, and I think the judges all deserve the same interface with the U.S. Trustee that I enjoy in the Southern District of Texas for so many years, I think that ought to be nationwide. I think that’s what the results are saying.

No one said that to me, in the answers, but just looking at the answers that we receive with regard to, as you suggested, a twice-as-much negative response. That said, there was a whole third that didn’t care, didn’t have anything to say at all, that’s where I would glean as consistency in the approach. To drill down to talk about what they're doing with regard to the new fee guidelines that just came into effect. I think that’s a good opportunity for uniform application of a policy on a nationwide basis, by the U.S. Trustee.

Whether you like the guidelines or not, I think how they work those, and how they administer those, is going to be very important, and it's going to be interesting to see how the judges and the lawyers respond.

Mr. Togut: Thank you.

James Seery: Mr. Greendyke, same area. Can you just follow up where there's specific examples of areas that the respondents indicated they would like to see the U.S. Trustee's Office focus on? Was it just these [areas mentioned], or conversely were there areas where they gave examples that they would prefer to see the U.S. Trustee's Office stay away from?

Mr. Greendyke: I don’t recall any reflection specifically with regard to these and, Buzz, I'll let him correct me or add in. I don’t see or recall any mention of that. I think some people felt that the intrusion was in some cases, capricious and it cost money. It was expensive to deal with the things that the U.S. Trustee would in a particular case. Again, I don’t have any specific examples, but that would fit in with a question of how to deal with prosecutorial discretion if you will.

Mr. Togut: Thank you. All right.

Prof. Michelle Harner: I would like to thank Judge Greendyke and Mr. Rochelle for administering the survey. I think it will be incredibly helpful to the Commission as it considers the way forward, also thank you to the members of Texas Bar for responding. One thing I'd be interested in, when you're thinking about what the survey tells us as far as good attributes of chapter 11 versus things, perhaps, not working as well as they once did, through reorganizations. Did you see any discrepancy based on the size of the chapter 11?

Or could you glean from your own experiences, are the liquidations under management control, that access to clean titles, is that more important in the large cases, versus the smaller? Is there a need to diversify the way we are treating debtors based on their size.

Mr. Greendyke: I would think, again, I'll let Buzz chip in, if he sees it differently. I would think that given the number of responses that we had, and the fact that you're talking about people from San Angelo, people from Austin, people from Dallas or Houston, all across the board, you're going to have a significant group of middle market respondents. People who deal with cases that are in Texas, as well as people who are with large law firms, and large metropolitan areas, that will work both in Texas and in New York and Delaware, or Pittsburgh, or wherever it might be.

I think you're seeing a real cross-cut of responses. We did not get a lot of specific suggestions about things that needed to be changed, it was just, again, I tried to hit the highlights about the things that I spotted.

Prof. Harner: Thank you.

Mr. Togut: Jim?

James Markus: I'd like to focus a little bit on what seems to be a conflict between the views of Judge Greendyke and Mr. Rochelle. That’s namely, is the purpose of chapter 11 to favor a class of creditors, like an unsecured class? Or, is chapter 11 really, primarily focused on preservation of value, of going concern, of jobs. Then, however the process falls it falls, because it strikes if we are going to create like a statutory surcharge, that might create a conflict between the two goals, you seem to suggest efficiency is a really good thing. Clean assets, clean title. Whereas Mr. Rochelle is suggesting, "Unsecureds are being alienating," I'm trying to see how you reconcile these two views.

Mr. Greendyke: Well, number one we need to reconcile them. This is an old, dear friend, first bankruptcy lawyer I ever met in my whole life, period, and we've gone our different ways, and we stayed friends.

I think the financial marketplace has changed. I don’t think the Code needs to be overhauled because the financial marketplace has changed. I think I said to Mr. Togut in my remarks, there's nothing wrong with a [section] 363 sale if it results in somebody else buying a business and keeping the employees in place, keeping to sell the product.

Whether it's manufactured in Mexico, or whether it's manufactured n plain, old Texas, I think that’s a constructive benefit, that the Code in 1978 contemplated and still utilizes now, albeit more frequently than it used to be back in the mid-'80s or the mid-'90s. The fact that secured lenders are pervasively secured, or predominantly, totally secured, and there's less opportunity for unsecured credit means that there needs to be a tax imposed, if you will, my words, not anybody else's, on secured creditors for receiving a benefit the Code provision is now in existence.

I know Buzz has a completely different viewpoint, and I'll let him respond.

Mr. Rochelle: Well, I'll put down my torch and pitchfork for a minute. I think Bill touched on a significant point here. The Code is the tail of the dog here, the dog has changed dramatically. Secured lending has changed dramatically, and it's not entirely clear to me, that it's changed for the better, is my point.

We have seen huge growth in, I guess you could call them neo-lenders; the hedge funds and other and other non-bank lending creatures, whose whole agenda makes the banks that we all grew up around look like sweet old Sunday school teachers, and really we are talking about a broader social trend here, in what is happening with capital in this country. I'm not sure that one can, in the Bankruptcy Code, change that.

That’s something, a much bigger thing for the Congress and state legislators to change, but my point is that we also don’t just have to lay back and enjoy it, to be kind of rude, I think that there should be some disincentives to that kind of lender that basically grabs onto everything. I would say that that’s how the common law grows. It grows in response to problems and what I'm trying to articulate, however poorly, is that this is a problem.

Maybe it's not going to be completely addressed by the Bankruptcy Code amendments, but maybe there are some nudges that could work because we are a polity, we are not here only for secured lenders. I think really, if it comes to and it seems that it's very close being a situation in chapter 11 where nobody else gets a real benefit.

There's a real question in my mind as to why the federal government should be essentially subsidizing the liquidation efforts of one group of people. Why can't they just take their state remedies and go home? The only real justification that I think of is jobs. That does matter, but also, and this totally my own sense of it, one sees in [section] 363 sales these days, far fewer jobs preserved than one used to.

I would love for some quantifier to look into that, but that is my strong sense these days, that it is not a job preserver, let alone creator.

Mr. Togut: Actually, we are looking at that. We have a group that’s looking at statistics to see if what you just said, and I agree with you, is true. I have a question for Eric.

One of the brilliant things about how chapter 11 used to work was that you had a bankruptcy judge presiding over the entire restructuring, and its complex stuff. The bankruptcy law is complex stuff, and the facts typically in these cases are very complex. The result of particularly the *Stern* decision, is there's a bifurcation now. We appreciate your offer on a statutory fix to define core versus non-core, I'm curious to know what you think could be a fix for being able to get the matter back to a bankruptcy judge, so we can have the one judge really with a complete of the cases, deciding matters.

Mr. Brunstad: That’s an excellent question and I think part of the design of the redraft of the statute, I designed exactly to that; to get as much as absolutely possible in front of the bankruptcy judge.

Mr. Togut: Okay, but I'm asking the stuff that needs to leave, is there a fix to get it back?

Mr. Brunstad: Basically what I provided for is basically a referral, but the District Judge, even for things that needs to leave, can send it back to everything, back to the bankruptcy judge, statutorily, short of, perhaps, having to do with trial in front of the jury or something like that.

I'd like to start with first principles. What kind of court is the bankruptcy court? There's a lot of scholarship about different kinds of courts that we have in the United States. We have a traditional court model, which Article I contemplates, and that’s the neural adjudicator model. Where basically you have a federal trial judge, like a federal district judge, that is supposed to be neutral, and it's supposed to either come and present their arguments and the arbiter just basically follows and does what the District Judge is supposed to do.

Then we have a series of courts in the United States, this has been around for the last century in various forms, of course, that we call problem-solving courts. Courts that we give problems that are really not amenable to solutions in the traditional model. For example, you saw early on, in the early parts of the 1900s, juvenile courts and things like that sprang up. Or courts where it doesn’t work just take someone as a drug addict and throw them into prison. If they have serious medical problem, we need some sort of different kind of solution to make work.

Bankruptcy judges and bankruptcy courts, it seems to be the quintessential problem-solving courts. Most businesses fail, that’s the hard truth, most businesses fail within four years of their inception. What are that reasons we have chapter 11? Well, one of the reasons that we have chapter 11, is because it's very difficult to put together an economically viable corporation that actually employs people, makes products and gives customers the things what they want.

We actually have corporation that might be suffering from financial distress, but has a viable economic core, we want to save it, but as everybody in this room knows there are all kinds of problems that crop in chapter 11 case, and the bigger the case the more complex usually, and the bigger the problems.

There are lots of constituencies that involved. It could be anything. From tort liabilities, to labor problems, to you name it, and we throw all of this into a forum, the bankruptcy court, and the idea the bankruptcy judges should be merely just like district judges, calling balls and strikes and the singer is an umpire. I think it's an illusion and it doesn’t work. Bankruptcy judges are problem-solving jurists, and they should be given all the tools that they need to solve these problems, but I think the fundamental goal has to be kept in mind.

Why do we have chapter 11 in the first place? We have three fundamental policies in bankruptcy law. One is equality of distribution, one is the fresh start of individuals, but a chapter 11 is to salvage viable businesses. They are inherently valuable. They are inherently valuable in our economy, they're inherently valuable for a whole number of reasons, and we want to make sure that bankruptcy judges have all the jurisdiction and all the tools that they need to, and we want to screen out all of the distractions.

All of the opportunities for arbitrage and things like that, which distract from that fundamental mission, it seems to me. Going to the heart of your question, with bankruptcy, what I proposed is to try to put as much jurisdiction and as much power in the bankruptcy court in terms of the authority to decide matters and handle things, so that they can do their problem-solving functions.

Mr. Togut: Thank you. Jack?

Mr. Butler: Just to follow up on the same line of questioning. I found your testimony to be valuable because I share your views, that it's unlikely that everyone is going to want Article III for a bankruptcy judge. The question is what practical fixes can the Commission explore? You certainly have laid out a framework that provides an opportunity to think through these issues.

The one are that I want to explore with you, is how you deal with consent in your proposed statute, because *Bellingham* is from the standpoint of preserving the notions of consent. That is that you can you can actually waive this and it is personal right, and you have consent. In your testimony, you talked about, there's different levels of consent, there's implied consent, consent by conduct, written consent, expressed consent. You’ve chosen in your markup to acquire express consent?

Mr. Brunstad: Yes.

Mr. Butler: Which I would view to be the highest standard. I question, is that really the right place to be? Why isn't implied consent enough? Would you walk me through how you think about those different levels of consent, and why you chose the highest level for your markup?

Mr. Brunstad: Sure. I chose for this markup, the most conservative, because we didn’t have yet a decision from the Supreme Court in *Bellingham*, and I want to make sure that this would work. It's pretty clear from legislative history in 1984, that when Congress was creating a Section 157, it used as its model 28 U.S.C. Section 636. The consent-based jurisdiction of magistrate judges, and it's very clear under the rules of accompanying Section 636 that the kind of consent that is required for magistrate judges to basically be able to perform their functions on consent, is express written consent. That’s how the consent-based rules for magistrate judges are drafted.

We also know that the Advisory Committee notes to Rule 7012 also says that the kind of consent you should have in bankruptcy, just like with magistrates judges express consent. That’s complicated however. That’s the preferred method from the perspective of how the magistrate judge system works, and there's a bunch of policies behind that.

One is that you don’t want to ambush people; you don’t want people to be unsure of their rights, because after all we are talking about a constitutional right here. Your under Article III of our federal Constitution, so we want to make sure that that’s handled in the appropriate way, but we also have the Supreme Court's decision of *Roe vs. Withrow*, and in *Roe vs. Withrow* the Supreme Court said, "Notwithstanding, the requirement of express consent being necessary to basically have a magistrate judge be able to exercise his jurisdiction under Section 636. It's partly through its litigation conduct and basically consent to a final decision by a magistrate judge where there wasn’t express written consent in the record for both parties.”

We know from the Supreme Court that, in fact, implied consent can work under some circumstances, and what we don’t have from the Supreme Court is a definition of exactly what those circumstances are, and so one thing I want to try to avoid, and one of the reasons why I chose express consent in the proposed statute, was I wanted to avoid future litigation, that we can model our system after the magistrate judge system which actually works very well, under the Federal Rule of Civil Procedure, which superintend how consent is obtained in the magistrate judge system, it's administered by the clerk's office.

When you basically are offered the opportunity to have a magistrate judge hear your case, you're basically given a form and you're told you can consent or not consent, please return the form. It's all very open, it's all very transparent. If we use the same thing in bankruptcy, I think that we have a relative degree of certainty that it would work, it would be operative, it would require some paperwork that the clerk's office would have to administer, but we know it would work, because we know that the magistrate judge system works.

If we want to take more risk, and you want to give more flexibility in the bankruptcy system, then I think you could ratchet it down, and you could basically have provisions, like some local rules and some jurisdictions, if you don’t consent by such and such a date, you will be deemed to have consented to a bankruptcy judge finally deciding your case.

I think that is likely to work, and I that that has the virtue of some efficiency. You wouldn’t need necessarily all the paper shuffling to document the consent of the parties, so you would gain some of the efficiency but you would lose some with certainty. I think it depends upon how much risk you're willing to tolerate the kind of proposal that you want to actually come forward with.

Mr. Butler: Thank you.

Mr. Togut: Thank you.

Prof. Harner: Mr. Brunstad, just one quick follow up on the notion of problem-solving courts, just wondering if you had any response to the commentators who critiqued the problem-solving court notion as being inherently limited, because you're asking the judge there to take on a mediator/almost-negotiator role as opposed to the neutral adjudicator. Are you concerned at all, that you might be undercutting the value of your proposal and putting as much in the bankruptcy court's jurisdiction as we possibly can by labeling them as a problem-solving court?

Mr. Brunstad: Well I don’t think we necessarily have to use the label, but I think the reality of large, for example, particularly large chapter 11 cases, and Joseph Story put it well, almost two centuries ago, "The law by reason of its universality mustn't necessarily be defective." We cannot anticipate everything when we draft statutes, and things like that, that the particular judge is going to have to deal with. If that were ever true that is absolutely true in bankruptcy. It's not possible. This is why we have bankruptcy courts or courts of equity. We start out with that premise.

The Bankruptcy Code is basically a codification of principles of equity, it uses lots of open-ended terms of art and it has lots of things that are undefined. Why? Because we cannot conceivably craft a statute that is so rule-bound that it will accurately predict the outcome of every kind of nuanced case that comes before a bankruptcy judge. We have to have flexibility.

I think that basically we have to recognize it's just the reality that bankruptcy courts are equitable tribunals. Bankruptcy judges are the orchestrators of these dramas that basically unfold in these huge cases. Basically, by necessity have to take on sometimes the roles of negotiator, of arbitrator, those kinds of things, they fulfill those functions, and they have to. I think it's important to be upfront about it and recognize it, but make sure that they have all the tools that they need to do to basically do this.

You have a case like the *City of Detroit* bankruptcy, which in a lot of ways is unprecedented in its magnitude. Yes, I know we have the leading judge, here in the audience who is presiding over that. Just put yourself in his position, imagine the magnitude, the magnitude of what you have to deal with in that situation, plus the nuances of chapter 9, where there's no estate. There's no authority to sell things, and things like that. You have to deal with that within the context of a chapter, chapter 9. That really hasn’t been updated in a long, long time.

Mr. Greendyke: It should have been filed in New York too.

Mr. Togut: No. New York has *Patriot Coal*. It can't be done. All right. We've got time for only two more questions. Bill?

William Brandt: A question for each, Judge Greendyke, and Mr. Rochelle.

Mr. Togut: That’s two questions.

Mr. Brandt: Well the brief question is one, Judge Greendyke you talked about the fact that your survey suggested that there was some gratification amongst the respondents that the cases were faster, and so I'd like to know if you would agree that the faster cases are better in the context of what we are dealing with.

Buzz, the issue you raised was claims trading in the casino, and you didn’t offer much explanation. Could you just elaborate a bit on why you think claims trading is bad?

Mr. Greendyke: My conclusion was that the fact that there are perceived to be more [section] 363 sales or liquidation sales, would be part cause of why cases are faster. They also said cases are much more expensive than they used to be and I would think that there's some type of relationship there between the brevity of cases, and either I guess, the frequency of pre-packs and either, I guess, the frequency of pre-packs and frequency of [section] 363 sales in cases that will contribute to both those findings.

Mr. Brandt: Would you generally agree that faster would be better in terms of cost?

Mr. Greendyke: Sure, because faster is going to be less expensive, and that ultimately would take care of the constituency he's talking about as well as to solve all the other problems that were there, to the extent the cases linger on, I think you guys keep this melting quickly.

Mr. Rochelle: Bill, as to your question about claims trading, I think there's a two-part answer. One, out on the frontline what I see frequently in the people who are purchasing claims of generalized unsecured creditors, is a very dicey, unethical situation often, because what's happening is the claims trader has gone and studied real hard on what he thinks is going to be the outcome in the case. Then he goes and he contacts small businesses, little old ladies, you name it, and offers them $0.05 on the dollar, when he knows that it's going to be a $0.22 case.

It's a reality of the debtor's lawyer that you frequently get calls from the little old ladies saying, "Somebody is calling me and wanting to give me $0.05, what should I do?" The first thing that comes at you is, "Oh, I can't give granny a solemn assurance that this is going to be a $0.22 case, I just think it is based on my judgment." How do I keep her away from giving up that upside to the shark?

It's not easy, and it's not a pretty thing that’s going on in the world of commerce. Second in the matter of claims trading, of lenders selling their claims, I think first of all, it's not a good thing for a lender to know that it has that kind of easy out. I think it lowers the underwriting standards of lending in the first place.

Second, if you start out with one set of lenders, a group of line banks for instance, and they're all on the same page, and then half of the banks sell their claims to somebody else. The secured lending group then becomes a genuinely wild place with competing agendas and its own difficulties that would not be there with the original folks there.

It turns into a sideshow very often, and can often turn into things that are not at all good for the reorganization overall, and frankly and I will say what one at least hears on the street, and that is there are often people pushing large claims buyers who have bought claims, and all they're really interested in is the dividend. Not necessarily the reorganization of the company. Now maybe that’s been cleaned up some, but talk about bringing the bankruptcy court into disrepute, that’s not cool.

Mr. Brandt: Let me just ask one brief follow-up. With your remedy would you simply reverse the 1991 change and then ask again, that people come to court when they want to change their claims, or exchange their claims and provide justification for it? What would be your remedy?

Mr. Rochelle: Well, I puzzled some on that. Frankly what I liked is the idea of letting them only vote the amount they paid for the claim. If they paid tiny bankruptcy dollars, let them vote that even though they stand to make more money, it would at least put them in the back seat and not helping to drive the vehicle. I'm not sure that a bankruptcy judge could very effectively probe the conscience or intentions of a claims buyer. To my mind the thing to do instead is just not to make it so very lucrative.

Mr. Seery: Just one follow-up. We have had testimony from representatives of trade groups, that they actually find claims trading important to their constituents who provide credit to debtors and sell widgets and the like, because it allows them, one, to get liquidity, and two, to monetize that claim so that they can extend additional credits. Your proposal would certainly undercut that wouldn’t it?

Mr. Rochelle: Yes it would. I'm not saying it's a be-all and an end-all, and if I were a credit manager I might think differently. I'm talking as someone who is often either a debtor's counsel, or a committee counsel, and again, I get back to be more careful at the frontend, which maybe is a moralistic way of looking at it, but I can't deny, Mr. Seery, what you're saying but that is a problem as well. There is a function served by some claims buying.

Mr. Seery: Thank you.

Mr. Brandt: How would you suggest we balance it? If you're not going back to Rule 3001, what's your suggestion for a balance?

Mr. Rochelle: Most contracts in this world are freely assignable, most debts and so on. What I'm suggesting is that if people want to take a risk that’s fine, but you ought not to give them as much control as oftentimes they get to enjoy in the case because of their buying claims on the cheap. That’s my bottom line. I don’t have a panacea for you.

Mr. Togut: Unfortunately, because this is fascinating, we are out of time. Thank you very, very much. This was terrific, and we need the second panel now to take their seats.

We have an all-star lineup here. We are going to begin; I'll identify everyone, and then Judge Rhodes you're going to lead off. We have with us just an incredible panel here to talk about our second topic, beginning with Judge Steven Rhodes, who's been practicing on the bench for 28 years, pretty impressive.

When you read Malcolm Gladwell's *Blink*, and he talks about how the rock stars had to put in all their time before they became rock stars, and Judge Rhodes, of course, is presiding over the Chapter 9 restructuring of Detroit.

Next, we have Doug Rosner, who is from Goulston & Storrs, and he will be testifying on behalf of the National Ad-Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness. Third, the easiest introduction of the day, Jay Westbrook, there's nothing else I can say. Fourth, is James L. Patton, Jr. from Young Conaway, in Wilmington, Delaware; and finally Michael Luskin, from Luskin and Stern who will be speaking on behalf of the New York City Bar Association's Committee on Bankruptcy and Corporate Reorganization.

With that, Judge Rhodes, it's yours.

Hon. Steven Rhodes: Thank you. Some might argue that one of advantages of being out of the chapter 11 case business is that I don’t have a stake in the outcome of this issue anymore. Some might argue that that might be the only advantage, but okay.

I want to start out with this blunt observation too. The venue law that we have now, I think it's fair to say is actually a venue non-law. What do I mean by that? Any lawyer who has practiced more than a nanosecond can figure out, truly, how to file any chapter 11 case in any district, and that’s why I make this assertion, that our venue law now is a non-law.

I want to address the issue of burden. Those who advocate for our present law, often say that those who would change it have the burden of establishing why that is. To that I would say, since our present law is truly a non-law, and since the purpose of this Commission is to take a fresh look at chapter 11, that the Commission should take a fresh look at venue as well, and not presume anything about the present law and whether it should be maintained or not, but should take a fresh look at our venue law.

That look should begin with, what is the purpose of a venue law? To that, I think there are two essential purposes. One, it relates to the interest of the parties, and the other relates to the interest of the institution as a whole.

The Supreme Court, as I indicated in the papers that I submitted to you, has indicated more than once, and in many lower courts, and the commentators agree, that the purpose of a venue law is to protect the parties that the moving party brings into court from the inconvenience and the unfairness of the selection that the moving party might otherwise make. That’s the purpose of a venue law, and I recognize that the analogy between defendants and the civil case, and creditors in a bankruptcy case is somewhat imperfect, but I think it's good enough that this Supreme Court teaching does have application here.

On the institutional side of the purpose of venue, here we begin to talk about the issue of legitimacy, and I'm going to hold that until the end of my remarks here in just a moment.

Another truth I would ask you to recognize about venue and venue reform is that there is no venue solution that is perfect, at least perfect in the sense that it will solve all of the problems that venue tries to address. For example, access, in the landscape that Al talked about, of multi-state corporations, multinational corporations, facilities in multiple states, we are not going to solve the access problem by a venue statute, no venue statute can create access to all of the constituents in a case like that, and we have to recognize that.

That recognition doesn’t excuse us from doing the best we can in trying to limit access in a way that serves the purposes of a venue statute. I submitted to the Commission in my written statement, a series of 17 topics with a whole lot of sub-questions under them, that I think the Commission seriously needs to consider on this subject. Obviously, we can't address them all here this morning, but this controversial topic deserves the most serious attention and I did the best I could to cobble together my list, there are probably other questions as well.

As I survey the options on how to limit venue in a way that serves the purposes that venue statutes are supposed to serve, it strikes me that the best answer is a principled place of business and so that’s why I advocate to the Commission. Is it perfect? No. The Supreme Court in the *Hertz* case it's not perfect. There are occasions when it might have to be litigated, although the Supreme Court thought that those occasions should be fairly rare given the guidance that it and the lower courts that had adopted the nerve center test that was adopted that case, I have adopted.

Now, I want to turn to the issue of predictability because that is commonly asserted as a reason for the flexibility, if that’s the right word, for the present venue statute that we have. There are really a number of problems with the issue of predictability, the first of course, is that if we had perfect predictability, we wouldn’t need judges, the lawyers would just do what the perfect predictions said should be done.

The second problem is that to the extent we promote predictability as a value in terms of venue, we discount innovation, and we discount experimentation, and one of the great things about our legal system, is that it offers an opportunity for experimentation and innovation, and thereby for improvement, and so that’s a problem with predictability.

Finally, probably, to me, the biggest problem with predictability is that when people say predictability, what they really mean is predictability that “I'm going to win,” and that gets to the issue of law shopping, and to me the greatest single injustice about our present venue law, is that it allows for law shopping. By this I don’t mean to criticize the present practice of law shopping, it has to happen. It's in the client's best interest to do that.

The question though, is whether the law should allow law shopping, and to me the answer to that question is no, it's unprecedented in our law for one party, or one party together with another party to choose a venue so that they choose the law that’s favorable to them, and disfavorable to other interests in the case. We need to think seriously about whether that kind of law shopping is something that our venue law should promote.

Finally, I want to talk about this issue of legitimacy. It was mentioned briefly here by Judge Greendyke, and Mr. Rochelle, here this morning. This is not something that we, in the trenches, commonly think about, but it's an important subject. It gets to the very issue of why courts function. How they function, whey they do as well as they do, or don’t do as well as they don’t do. Courts work because people have confidence that they can take their disputes to them, and we'll have opportunity to be heard, and we'll get a just result. Everything that we do that impacts the confidence of the public in our court, needs to be taken into account on this issue of legitimacy.

Anything we do will ether enhance confidence and therefore legitimacy or detract from it, for the reasons articulated this morning and will be articulated by others here today. Our present venue non-law detracts from that legitimacy.

Mr. Togut: Thank you. Mr. Rosner?

Douglas Rosner: Thank you. Thank you, for giving me the opportunity to testify before the Commission today on this very important issue regarding the need for venue reform.

My name is Douglas Rosner, I am a director in the Bankruptcy Group at Goulston & Storrs, a 200-attorney firm based in Boston, Massachusetts. We represent debtors and other parties in chapter 11 cases throughout the country. I am also a member of a National Ad Hoc Group of approximately 100 bankruptcy practitioners in 35 states.

Our group has joined together with a Commercial Law League in an effort to reform the bankruptcy venue laws. I appear this morning individually and as a member of the Ad Hoc Group, and not on behalf of my firm or clients.

Substantial evidence demonstrates that a disproportionate number of Chapter 11 cases are being filed in Delaware and New York, which have little connection to those forums. A recent study by Associate Professor Samir Parikh of Lewis & Clark School of Law found that 70% of large public companies that have filed bankruptcy in the last five years have forum-shopped, 80% of which filed in Delaware or the Southern District of New York.

Unlike the studies done in the mid-1990s, we know now based on our group study, that forum shopping affects companies of all sizes, almost half of the 559 out-of-state cases have filed in Delaware since 2003 had assets of less than $15 million. Middle market companies comprise the vast majority of the filings in Delaware. The statistics demonstrate that chapter 11 debtors' forum shop at such a staggering rate, it can no longer be ignored.

Using my home state of Massachusetts as an example, since 2003 at least 33 Massachusetts-based companies with more than $6.2 billion of assets and 65,000 employees fled to another state to file for bankruptcy protection. Among them was Evergreen Solar, a company that received $58 million of assistance from Massachusetts; Polaroid which drastically affected local employees and local retirees, and Friendly's Ice Cream, a cultural institution in Massachusetts for more than 75 years.

The current venue rules are broken, as with every broken system there are of course winners and losers, but the short-term benefits for a chosen few come out of significant long-term cost. Forum shopping undermines the integrity and credibility of the bankruptcy system itself. When seven out of 10 public companies forum shop, and the vast majority file in Delaware or the Southern District of New York, the perception is that the process can be manipulated.

This perception erodes public confidence and calls into question the fairness of the bankruptcy system. Such a cynical view is not irrational. The chapter 11 landscape is littered with examples of debtors trying to manufacture venue or using immaterial affiliates as a hook to establish venue. If we continue to countenance a system that allows debtors to choose whatever jurisdiction is, quote, "attuned to their concerns," as *The* *Wall Street Journal* described it, we will end up with a Chapter 11 system perceived as favoring the elite and largest institutions and disenfranchising the majority of affected parties who will have lost their trust in the process.

Creating an accessible chapter 11 process is more than merely a question of geographic distance. It is about creditor expectations, and perceptions that the system is fair and not subject to manipulation. Prior to a bankruptcy filing, a debtor's creditors and employees are used to dealing the company's headquarters. When they read in the papers that they filed in another jurisdiction, the reaction is likely to be one of suspicion.

They can reasonably question, whether the company filed in a distant forum to obtain an advantage over other parties or discourage participation by local interest. If the perception is that the deck is stacked in favor of the debtor and its allies, other affected parties will eventually stop viewing the court as a forum where their rights will be fairly adjudicated.

Critics of reform point to 28 U.S.C. Section 1412 as creating an appropriate balance. They say *Patriot Coal* as an example of the system working. I see it as a failure. Certainly the court eventually transferred venue, however, it took over four months and required parties and interests to spend millions of dollars in professional fees. That is not venue fairness. As *Bloomberg* reported after that decision, there was, instead, a demonstration of the near and possibility of having venue-transferred large cases.

Change is needed, and the time is now to break the rampant practice of forum shopping, the venue statute must be amended to eliminate state of formation, and the affiliate loophole, and with that bring credibility and fairness back to the system.

Thank you, again, for considering our views on the subject, and I look forward to your questions.

Mr. Togut: Thank you. [Mr. Westbrook,] now I want to give the rest of your introduction. We have been all over the country. We have been to many conferences, as we are popular these days. We get invited to a lot of these. This conference is fantastic, it's a tribute to you, and I'll tell you that when we were discussing which venues we would accept from and which not, yours was the quickest discussion we had. It was a no-brainer.

Professor Westbrook.

Prof. Jay Westbrook: You're very kind. It's not a tribute to me, it's a tribute to a wonderful bankruptcy bar in the state of Texas, for which I'm very grateful. I'm also grateful for giving me an opportunity to talk about the venue problem. The bad news is I didn’t turn in my witness statement until this morning, so you probably haven’t had a chance to look at it.

Mr. Togut: That’s all right.

Prof. Westbrook: I was going to say, the good news is, it's short. I'm going to share it with you now.

Justice must not only be done, but it must be seen to be done. A proceeding in a court distant from the relevant community will most often fail the second test, and justice be seen to be done, and therefore fail in an important part of its political, social, and economic role. That aspect of the venue problem has been little considered. I have been delighted this morning that both in the first panel and again now, with the two witnesses that proceeded me some attention has been given to this issue.

In academic scholarship, it's been all about what is efficient and all that sort of thing, which is all relevant and good. I have no doubt that the very excellent Reporter that the Commission has working for it will furnish you with all the relevant authorities and background literature and all of that, all of which I urge you to read, but I thought I might speak a little bit about this different point, which has received so little attention in discussing the venue problem.

That is the social, political and economic role in which venue serves. I should start by emphasizing that venue in a globalizing world has an international as well a domestic dimension. I want to share my thoughts with you about both.

My views about each share a fundamental point, that public observation of the law in action, especially in a court of law, functioning among familiar symbols of justice and due process, is crucial to both acceptance of the consequences of legal proceedings, and to the provocation of useful, legal reform. Litigation is part of our political system as well as our judicial system.

Thus the need for justice to be seen to be done encompasses not merely the importance of citizen confidence that justice is being sought, and is often achieved in legal proceedings, but also the exposure of procedures or results that troubles citizens. That exposure may begin to build momentum for improvement in our laws, often reform of our laws comes from the spectacular trial, or the puzzling verdict in the minds of the public.

To accomplish these ends, it is not enough that the result satisfy the immediate parties, which is often a defense of the system, and everyone is happy to be in a particular venue.

That’s not enough, it is crucial that the venue statutes satisfy these social needs, in addition to the basic needs of at least a settlement of disputes. For these reasons, it is important that bankruptcy proceedings be brought, where there's likely to be convenient and affordable access to them, but all of the stakeholders in a business, and at least as important that such access is available where media and commentators will report the proceedings to those who cannot attend.

A proceeding in a distant court will not receive the same degree or quality of media coverage, as one filed in the principal place of business of the company, within the United States or in its international equivalent, its center of main interest, under chapter 15. Instead, such media coverage as there may be, is likely to be found primarily in the financial press, and perhaps in industry-specific publications, but not in the media upon which most citizens rely; and the company and its strongest creditors will be able more easily to manage the limited news coming from the distant proceedings, in ways useful to their purposes, and to the image they want the matter to project to the public.

If a stakeholder does become aware of the troubling aspect of distant proceeding, it may be difficult or impractical, for the stakeholder's lawyer to attend, to investigate the relevant files, to talk to those who have followed the case, and so on. The local legal community in the distant venue, may be close-knit and frugal in the information it shares, while unconflicted local counsel may be hard to find, and costly in proportion to its rarity.

Equally important, the stakeholder may be far less able to generate a political stir. With a distant proceeding any public debate must rest on a thin media reed, conversely any stir the stakeholder does create in the company's hometown, may be too distant to attract the attention of public officials or company officials, in the distant jurisdiction. While a proceeding in the company's home jurisdiction might have made those officials pay closer attention and they might have felt more incented to act in some way useful to the concerned stakeholders, for example, by intervening in the proceeding.

Some observers might regard the detachment created by a distant proceeding as desirable. I am not among their number. Echoing what Buzz Rochelle said a little earlier today: detachment is not necessarily the way in which we should view these proceedings of profound importance to thousands, sometimes millions of our fellow citizens.

Of course if a company is large, as Judge Rhodes suggested, and mostly exploits the court venue rules, it can't be bankrupt in every town where it's important, but if it's required to file in its principal place of business it will be closer to the relevant citizen route.

A truly transparent proceeding, one in which the windows of the corporation are not frosted by distance, will provide impetuous for healthy debate about legal reforms, and will give more stakeholders the social comfort of feeling the law is being thoughtfully applied.

By contrast, and this goes for the point made by the witness just before me, the removal of proceedings to a distant place seems to the average citizen to defy common sense, and may leave local citizens suspicious of the motives behind it.

Let me finish with a little story that I recounted in a recent article that touched on the perspective that I'm offering to you today. When the *Bear Stearns* case was pending in New York before Judge Lifland, I had this conversation with a reporter; Reporter: "Well, why do people care if the *Bear* case is here in New York or in the Caymans? Is your editor going to send you down to the courthouse at Battery Park for the hearing tomorrow?" "Of course." "If it stays in the Caymans will you pack your swimsuit for that trip?" "No, no, worst luck." "Oh, I get it."

That’s what I had to share with you about venue. I have some more points in my witness statement, but I'll leave those for when you have a chance to read them.

I wonder though, following the precedent of our predecessors in the first panel, if I can make two general comments. As some of you know, I spend a lot of time worrying about international and comparative bankruptcy law, and much of my scholarship is devoted to that subject.

I wanted just to remind you of two points. Perhaps the principal one is, chapter 11 has been enormously influential all over the word. All over the world and part because of the interest of the World Bank and the International Monetary Fund, and partly spontaneously, chapter 11-like structures have been adopted in many countries. Britain is a famous example, Germany and other, and I could make quite a list from there.

It is almost a requirement under the rope with World Bank guidelines that people adopt something like chapter 11 to try to promote reorganization. Interestingly enough these adoptions have taken place in countries like Britain, that previously had a system, are you ready for this, entirely dominated by secured creditors. I want to urge you, keeping that thought in mind, that the question, it seems to me, should not be merely, do we somehow adapt chapter 11 to "the way things are," but should it be one of our overall social and economic values that are at stake in this process of dealing with troubled businesses which might be salvageable, including all of the rules which are now in Article 9, as well as in Bankruptcy Code.

Is it really a good idea to have a legal system that produces results so dominated by lenders? Do we really think that entrepreneurs should be in the hands of bankers? Is that the best way that we will have economic growth and development? And so forth, many questions that you can address at least as well as I can, but I want to urge you to think about them, it should not be simply that we adjust the system a little bit, to reflect the way the world has become, you need to think, I hope, seriously about the way the world should be, and I suppose that was the essence of what my friend, Buzz Rochelle, was saying this morning.

The people around the world did not adopt a set of legal rules, when they began adopting chapter 11. They adopted what seemed to them to be values. Community values, economic values, social values, that were really important and good values to pursue. In contrast to the secured-creditor dominated systems that they had before.

Final point this morning, Elizabeth Warren and I have done a lot of incredible work in this area, chapter 11 was already pretty fast, if you look at our Michigan article from 2009, but we have an ongoing project that we are in the process, I hope, of finishing up now. It's seems like forever.

In that process we have found that, yes, secured credit has become enormously more important than I give, that is domination by secured creditors, but it's now a parallel system. There are also a substantial number of chapter 11 cases, especially when you look, as we do, not just at the largest cases that are in when you look up in the LoPucki database and so forth, but when you look across a cross-section of chapter 11, such as our study, you find there's a substantial group of cases, less than half, but quite substantial, in which there is not a dominant secured creditor, in which the more traditional chapter 11 process is going on.

I simply urge you to keep that in mind, and overstate, or over-reflect in your own minds that the whole system is completely over on one side. I think that’s not true. Thanks for your patience and your attention.

Mr. Togut: Thank you. Jim?

James Patton: Thank you very much. Thank you, for the opportunity to appear before you all today, and thank you, for making it possible for a bankruptcy lawyer from Delaware to cross the border into Texas. [laughter] This is an important issue and the arguments about venue and its present and proposed structure are many and varied, and I'm very sympathetic to those that express a great deal of concern for those many and far-flung creditors and employees, and other stakeholders of businesses who feel disenfranchised when a case is not filed and run in their own backyard.

I am sympathetic to the concerns that folks have been expressing of late, about the impact of a case pending in, say, Delaware or New York on public perception and public confidence; where I think that I part company is that I don’t see the venue statute or an amendment to the venue statute being the solution to those problems. The problems that arise when it comes to the question of convenience and access are problems that can be and should be addressed by providing access, conveniently, to parties and stakeholders in bankruptcy cases.

The cases we are talking about here today are, as Professor Westbrook said, by and large, very large companies that have many, many locations, and folks in one location are always going to feel disenfranchised and left out when the case proceeds at another location's backyard.

Today I really want to focus on two things. I want to focus on what we will be giving up if we were to change the venue statute to eliminate place of incorporation, and what we might be getting if we were to change the statute to eliminate place of incorporation.

One thing we'll be giving up, which is important to keep in mind, is the only incontestable standard for establishing venue in the first place, place and corporation. One of the things that would happen, I believe, is that we would find ourselves in the same situation we see in the chapter 15 environment, where battles over COMI predominate at the beginning of many chapter 15 cases, if we eliminate place of incorporation from our venue statute, and are left only with the principal place of business, or the location of the principal assets of a debtor.

I'll come back to this, but just because the place of incorporation is eliminated doesn’t mean that the quest for an appropriated or desirable venue will change, or go away. That fight and that struggle will continue regardless of what the statute says with respect to appropriate venue.

Something else that would be lost, if we eliminate place of incorporation from the venue statute is that we would be depriving many of the opportunity to come to a court that has a great deal of depth, that has established a very, very long an strong body of case law. A court that has gained a great deal of experience in handling complex chapter 11 cases, and has gained that experience over many decades and that case law has evolved over many decades.

That is of considerable value to corporate America. Eliminating place of incorporation does not mean that a bundle of additional Wilmington, Delawares will string up all around the country. I submit that eliminating place for incorporation means that we will never again be able to grow another forum that has the depth of experience that the Delaware court has been able to gain over the decades that it's been handling chapter 11 cases, and the body of case law that we've seen in the Third Circuit will be replicated.

Simply because there will be no other place where such cases can be concentrated, that’s simply a byproduct of the way the statute works, and the way Delaware corporate statute works, and whether you think that’s a good thing or a bad thing, it is the fact that a lot of experience and a lot of case law has developed, it's very deep, and it gives parties to the bankruptcy proceedings a lot of predictability and opportunity to forecast how cases will proceed. I submit that’s a value, but it will undoubtedly be lost if we change the statute.

Something else that will be lost if we change the statute, or at least it will be severely weakened, is a very powerful tool in the hands of those who run and administer chapter 11 cases to achieve maximum creditor value. What I'm focusing on is forum shopping and law shopping. I'll pick on the Third Circuit a little bit. One of the things that we know about the Third Circuit is that if a company has a great deal of its value tied up in intellectual property and it has to restructure, filing its proceedings in the Third Circuit could be a disastrous mistake for its creditors because of the application of the hypothetical test in our courts.

For those of us who advise debtors and who contemplate the question, where should a case be filed, the very first question we ask, is in what jurisdiction can I maximize value for the stakeholders? To the extent that I'm unable to take advantage of those jurisdictions where value can be maximized, is the extent to which the stakeholders and the proceedings are going to be disenfranchised and harmed with respect to their potential recoveries.

We can argue whether or not law shopping or forum shopping is a good thing, or a bad thing, but the flexibility that’s provided by having multiple choices of fora to file, is a significant tool in maximizing creditor recoveries and stakeholder returns. By limiting choices one will diminish the opportunity to take advantage of fora where a company can obtain higher values for its stakeholders.

Let's talk a little bit about what we will get. One thing we won't get is a solution to the access problem or solution to the question of convenience. Of the chapter 11 business cases that were filed in a year that ended in the first quarter of 2013, 14.5% filed in New York and Delaware, the balance filed elsewhere.

Those that filed in New York and Delaware tended to be those with multiple headquarters, multiple places for the production of their products, multiple locations for the delivery of their services, multiple locations for their operations and their creditors, and their stockholders and their employees were scattered all over the country, and all of the world.

Filing in some other jurisdiction besides New York or Delaware isn't going to solve the access problem at all. In those cases where there is a concentration of interest in one jurisdiction or one location, a concentration of the creditors, a concentration of the shareholders, a concentration of the employees.

Requests for venue change are granted rather routinely. In fact, just yesterday Judge Scheindlin transferred the *Gold King* case to Texas, to Houston, and that happened very early in the lifecycle of that case.

Venue transfer request where the requests are made in Delaware are granted far more often than denied, and in situations where there is a clear center of gravity in some other jurisdiction, they are granted quickly. We've had at least three occasions, I can think of, where our bankruptcy judges raise the issue and transferred venue with no motion at all, and required no expenditure on the part of any party to fight the issue.

The question of getting a case that doesn’t belong in Delaware because it is too small, because it does have a clear center of gravity, is a question that’s being addressed adequately by the law as it stands today.

And as alluded to just a few minutes ago, one of the things that we won't get by changing the placement corporation is we won't get an end of forum shopping. A lot of the recent writing on this topic has acknowledged this fact, and research has revealed things like a survey of 50,000 companies in an effort to determine where they are headquartered. Establish that on average of that universe of 50,000 corporations, on average, they had 15 headquarters, 15 places to choose from for purposed of establishing venue. Either inside the United States or outside if they wish to proceed outside the United States and bring a chapter 15 here.

Since lawyers are duty-bound to try to choose a forum in which a restructuring can succeed and in which stakeholders returns can be maximized, the only thing I can imagine that will eliminate forum shopping, is to eliminate the duty to maximize creditor returns. If you eliminate place of incorporation we are all still going to try to find a way to get our debtors into jurisdictions where the return to creditors and stakeholders will be maximized. In those jurisdictions where the returns are going to be impaired, creditors are going to champion debtors' lawyers who are attempting to find a way to get that case into some other jurisdiction.

The search for a jurisdiction that’s going to be beneficial to the debtor and to the restructuring process will never end as well as we have the responsibility that we have and we will always have this responsible to maximize returns to stakeholders.

Any change to the venue statute is not going to end the search for a favorable forum. One of the interesting things I note in the data is there's an attempt to identify companies and cases where forum shopping did not happen. If we are talking about large corporations that have multiple operations in multiple states, and multiple locations where they could file bankruptcy, and if they competent council, then forum shopping has happened in 100% of those cases.

They may have chosen to file in a location where they have had or they have a headquarters, or where they have operations, but they have shopped, and they’ve decided that that is a favorable forum for that bankruptcy. I don’t believe there's a case in this country where there is a choice of venue where forum shopping hasn’t happened, it just simply may be invisible.

An argument that has emerged somewhat recently is that the existing venue statute is hampering the evolution of bankruptcy jurisprudence. I've seen no statistical analysis to support that proposition. I will note that Mr. Brunstad's presentation with respect to what's happening, following the *Stern v. Marshall* case, identified the top four decisions that have followed the *Stern v. Marshall* decision at the appellate court level, not one of those was in the Third Circuit.

Its paper identified 600 opinions on the matter, I don’t think any of them, except perhaps one or two, came from Delaware. As far as I can tell, the evolution of the jurisprudence of bankruptcy is not being affected by the existing venue statute. As I said a few minutes ago, the vast majority of chapter 11 business cases are not taking place in New York and Delaware, and those cases are every bit as vibrant as the large cases you see in New York and Delaware, and they generate their own case law and we saw that evolution in the daily bankruptcy report, or we see that evolution in the reported cases from around the country.

In short, I see only disadvantages to changing the venue statute. To me this appears to be a situation that we often see generals criticized for. Generals are often criticized for fighting today's war using yesterday's tactics. The battle over the venue statute and the place of incorporation rule is a battle that on the one side is waged by those who imagine and envision corporate America as a place where corporations have headquarters and operations and employees and creditors within a tight geographic location, where there is some theoretical best place for filing a bankruptcy.

We are rapidly moving to a world where that is rare indeed. We have corporations and businesses with creditor all around the country, all around the world. They have operations all around the country and all around the world, and if anything that is a process that is accelerating and is becoming more and more acute. The real issue is access and the way to accomplish increased access is to use the tools that are being used today. That is telephonic, hearings, using multiple hearing locations, and video conferencing, and improving the ability of creditors wherever they are located to participate in these processes.

Mr. Togut: Thanks very much. Mike?

Michael Luskin: Thank you. I am from the Southern District of New York. Well, I was going to begin by saying I'm from the Southern District of New York and I'm here to help, but instead I'm going to thank you for inviting Jim Patton from Delaware, and having him sit next to me.

I am here as a representative of the Committee on Bankruptcy Reorganization of the New York City Bar, this is a committee made up of lawyers from large and small firms, from in-house lawyers; from the judges from the Southern and Eastern District of New York, from the U.S. Trustee, and from academia.

Venue has been a topic of interest to us for some time since the last round of legislative proposals. The Committee has written on it at length, in particular a few years back, and as you’ve seen we've submitted a short piece today. Our basic theme is that as applied by judges and practitioners the current statute serves the balanced interests of efficiency and justice. My own experience over 30-plus years is that when cases should be transferred, they are transferred, that sometimes happen so it's partly from the court.

I've had that experience in Delaware and in New York. I think that the requirement that, or the adoption that’s been proposed, of the nerve center kind of test to determine where the corporate headquarters is, is as Jim Patton said, going to engender litigation of the type that we've seen in chapter 15 with COMI litigation, and I think that without the bright line of the current statute as a fall back, if nothing else, what we are going to end up with is litigation that will be as fact-intensive and time consuming and as expensive as any litigation can be.

Critics and others at this table have pointed out that filings, in particular in the mega cases, are made far away from operations, or employees. We've heard, and we all know the names of those cases, the fact of the matter is though, that there are of course, multiple constituencies in all of these cases. It's not just us, just them, and it's certainly not just employees against the debtor, anymore than it is just the company against the banks.

These are complex cases with multiple constituencies and many moving parts, and it's a rare mega case where anyone is truly disenfranchised to pick up the term that’s used to my left here. Retirees have committees, one is sitting up here co-chairing the Commission today, in a big multinational case and international case in Delaware, *Nortel*. Unions have committees, or unions, rather, have representation, employees have committees, all of these committees and unions manager to find superb representation, they appear in cases and participate in very, very active ways. If there is a problem with access to large cases, he solution isn't venue, the solution is, make sure that these people are given the opportunity to participate in a way that matters. I'm sorry, watching the news or being able to bet it in your local paper versus watching it on *ABC News*, is not really the important thing in most of these cases.

Participation in a meaningful way, reviewing the papers putting a position on the DIP financing, putting a position on planned negotiations, having a say on the form of the exit financing, that’s what's important, and that has nothing to do with what appears in the local newspaper.

One example, I mean many of you in front of me have been involved in the airline cases, I know many of those have raised significant venue issues, and many are unhappy, many people in Texas are unhappy about venue cases in the airline matters.

Employees, take the Airline Pilot Association, they have a union, they have counsel, counsel happens to be located in New York. The cases as you all know have been in Chicago, they’ve been in Alexandria, Virginia, they’ve been in New York, they’ve been in Phoenix, they’ve been in Honolulu, and the same law firm appears representing these employees and they do a real good job of it. The same is true of any significant employee or retiree group that I'm aware of in any mega case, any large case. Certainly the venue statute is not the way to correct the perceived problem with access by those people.

Now, I don’t want to hide the fact that my practice and my committee has many, many banks and other financial institutions on it, and that is certainly the group with which I am most familiar. We certainly do appear in most large cases as others have pointed out, but not every case is dominated by a secured lender. Many big cases, and in particular many airline cases, for instance, don’t have a secured lending group. They have lots of secured loans on aircraft, but no big bank group.

We certainly take an active role in all stages of the proceeding, or even before the proceeding, negotiating in the conference room before the filing, dealing with cash collateral, dealing with the debt financing, dealing with the planned negotiations, and dealing with potential exit financing or new equity, and the fact is, and we cannot from it, that many of the people that I represent; members of my committee represent, are located in or near New York.

Many who aren't, the other members of the banks' syndicate, for instance, or financial advisors, full well expect and have no issue with having to travel to New York. That is, as I say, a fact that we can't run from. I think another fact that we can't run from in many of these large cases, is that the reason they're in bankruptcy is because there's something drastically wrong with the capital structure. That is what's driving a lot of these cases, and it should be no surprise that financial institutions are taking an active role and should be able to have a large say in these cases.

As you’ve heard, as you know, going to the Southern District and going to Delaware and frankly going to some other jurisdiction around the country now, does give us a place to go where the procedures are certainly predictable. Is the outcome predictable? I think it was suggested that we know for certainty what's going to happen when we spin the wheel, get a judge and file.

I don’t think that’s the case, but there is certainly a great advantage to the case as a whole, when it is administered in a court, that not only has a bench, but a deep bench, and we certainly have that in the Southern District, and certainly other courts do as well. It's not just the judges who are experienced; we have a courthouse that’s set up to deal with these cases. We have the Clerk's Office, we have the IT people, we have court reporters, we can run hearings, at least before sequestration, till all hours of the night, to get these things done. I think that that is important not just for the financial interest but it's important for everybody, and I frankly don’t see what's wrong with developing and acknowledging that kind of expertise.

On accessibility, the Southern District, the current Chief Judge, was one of the pioneers in electronic filing, and e-filing, and the PACER system. That has certainly made access much easier. We have telephonic appearances, which are now available and virtually any case you want and not just for big hearings but for discovery conferences. I just had one yesterday. We have video hearings, the *Patriot Coal* case video trial was televised to St. Louis, and I believe West Virginia, I may be wrong on that, but it certainly went to St. Louis.

In the *Nortel* case in Wilmington, the cross-border case involving chapter 11 in Delaware, a *CCAA* case in Toronto, and a bankruptcy in London. We have video conferences that go on simultaneously between Wilmington and Toronto, the time zone is a little much for the London guys. We have joint hearings done with two judges and two sets of layers, and two cases and complete coordination, open to anybody. There's no reason why that technology can't be made available in every case of the single retiree who really is interested in watching a particular proceeding at a particular time, can't dial in or see it the same way this proceeding today is being streamed on the Internet.

That’s a problem, and that’s something that can be solved, but changing the venue statutes isn't doing that, that’s something to talk to Congress about, getting some money and dealing with the judicial conference about opening up proceedings. That will do more to democratize bankruptcy than anything that I've heard today.

What is the real issue? At some point, maybe not too recently, we've been criticized that this is a money grab by practitioners in New York to get high fees. I don’t think so, I haven’t heard that criticism so much as hourly rates around the country crept up, and caught up with New York in a lot of ways.

More importantly we have local guidelines, governing fees in New York and the Southern and Eastern Districts, like Gotham and Delaware. We now have another set of national U.S. Trustee guidelines governing fees. Certainly the standard in most large cases, certainly large cases in the Southern District where there are tens of millions of dollars of fees likely to be generated. We have fee examiners, one of my partners just finished a stint as fee examiner in *Kodak*, that’s a case where there were nearly $100 million in fees, but through the process, one of the interesting things, is that process imposed a kind of discipline so that the fee examiner could do actually less and less as it went along. Notwithstanding that there were substantial reductions taken. I think that everyone would agree that the fee examiner process, at least in the Southern District has worked well. I think frankly the only fallout from it, is it hasn’t made any new friends for my partner.

On the law shopping point that Judge Rhodes and Professor Westbrook raised, I guess it's theoretically possible to pick a venue to file based on the particular law involving a particular issue, but boy, oh, boy, I wouldn’t have wanted to advise a client in most cases, in doing that. You're going to get great laws on your DIP financing, but what happens down the line when the banks have to deal with the creditor's committee action against the banks. Some kind of lender liability theory, and you find yourself in the jurisdiction with really, really bad *in pari delicto* law. How much are you going to think about that on day one in the conference when you're planning the case? I think it's a very, very risky course of action to try to advise a client to law shop.

That case that I'm talking about where you're balancing DIP loans, favorable DIP loan treatment against unfavorable *in pari delicto* treatment is the *Adelphia* case, which is 232 related entities, one of which was incorporated, or the parent of which was incorporated in Pennsylvania, filed in the Southern District. Could I suppose they filed in Philadelphia, or Pittsburgh, and ended up in 10 years of litigation against the banks where *in pari delicto* was what was driving things? I just don’t buy law shopping, and I certainly don’t buy judge shopping.

I think the only other point I'd make is, in conclusion I think the system works, unlike others who criticize the *Patriot Coal* case, I think that’s the case that proves the point. I think you have a case there where the court considered the location of assets, the location of employees. Where the headquarters is, where those affiliates are, the litigation tactics that were involved, not only in creating the affiliates, but also in, where do you want the case to go. The unions who were moving to transfer the case were looking for it to go, not to headquarters in St. Louis, but to West Virginia.

They had their own very parochial litigation tactics in mind, and the judge saw that. It was the U.S. Trustee's motion that was open-ended, transferred to a district that’s appropriate and that’s what was granted.

So in conclusion, this is a solution in search of a problem. There is no problem, the statute gives the judges all of the flexibility and discretion they need, and I would urge the Commission to leave it as is. Thank you.

Mr. Togut: Okay. Thank you. I'm sure we've got questions up here. Go ahead.

Deborah Williamson: I have a brief one for Mr. Patton, in your paper you make reference to a local rule requirements for local counsel not existing, I think for 30 days after a significant motion. Some courts are adopting basically no local counsel requirement across the board. Some courts are looking at National Admissions Standards across the board. You used a phrase that we are using yesterday's techniques to fight today's war. Isn't the local counsel requirement one of yesterday's techniques?

Mr. Patton: It may well be. The trend, even in Delaware, is to liberalize that rule, and the rule as it stands today, and you as reflected has that 30-day requirement, and as technology catches up with the demands of corporate America and the business reality, that these companies face, I would expect that rule to continue to evolve.

Ms. Williamson: Thank you.

Mr. Togut: Jack.

Mr. Butler: First, I want to thank everybody for their testimony. I think it's not a mistake that the Commission left *Stern* and venue to our final hearing of the year, and in this environment with this number of practitioners, and with the richness of testimony we've gotten today, it's an important thing.

In a minute I'm going to ask every one of the members of the panel to step outside of the box. I'm going to ask those who said nothing needs to change, to tell you that’s not a possible result, and therefore what would you change? And those who would only rely on eliminating the state of incorporation, I'd ask you to think about a result where that’s not going to be the answer, what else would you do?

I'm asking people to think a bit outside of the box in this debate from what I view to be, frankly, sitting as a Commissioner, as a parochial argument between people who say, "Keep it just the way it is," and people will say, "No, eliminate the state of incorporation so everything comes to my place."

Instead, ask you to think about this issue, because it's something the Commission is taking very seriously. Seriously enough, the Commission has a working group of Commissioners working on this. Our reporter has worked with us extensively on looking at the whole range of venue debate over the last number of years, and all the solutions that have been proposed, and has developed a white paper for the Commission to look at on these issues.

I speak for myself, but I think it resonates with many of the other Commissioners and it's something Professor Westbrook said, Judge Rhodes said, and others have said, which is, the debate has gotten loud enough that you do need to worry about justice seeming to be done, in the public perceptions of things.

From a personal experience I've had, and I'm a hybrid guy, I didn’t grow up in New York, I didn’t grow up in Texas, I'm a Mid-Westerner. I've spent a third of my career working in a regional law firm, and two-thirds of my current big law firm, and I have appeared in bankruptcy courts in more than 40 states, and there aren't all that many people who can say that. The fact is, I've worked with those benches and those bars, and they are good everywhere. The fact of the matter is, the secret is, all the experts, aren't located in the east coast, they are good everywhere. I see that and I recognize it.

On the other hand, Mr. Luskin's point that there is an efficiency in mega cases, and one of the comments I, Mr. Rosner, you made in your testimony, a criticism, was "Let's not have a national bankruptcy court for mega cases.” But I don’t know if that is a solution, it's certainly been suggested in the literature, that a national bankruptcy court for mega cases where the judges were drawn from all over the country, and some type of rotating basis.

I'd like to start with you Judge Rhodes, and if you could comment on a suggestion other than the one you landed on. I'd like you to go right down the line. Other than the one you landed on, what would you have the Commission think about?

Judge Rhodes: The only other one I can think of is the one you just dissed, and that’s the National Bankruptcy Court process.

Mr. Butler: There's no diss there.

Judge Rhodes: No?

Mr. Butler: I asked a legitimate question.

Judge Rhodes: All right. My reaction to that suggestion is that the devil of it is in the details. How is it going to be set up? If it is set up with the genuine intent and effect of carrying out the purposes of a venue statute, which I tried to outline for you, it could work. I think there is merit to the idea that in a certain class of cases, and by the way, how you define that class is one of the details that has to be worked out.

Efficiency of process and predictability is important, and to the extent that such a court meets that goal, that’s great, but at the same time, there has to be access and if the answer to access is technology, okay, but that has to be studied too, because there are costs associated with it. There is the current prohibition in the judiciary against the broadcast of proceedings. I'm very happy to hear that in certain cases, in the Southern District of New York, there was a broadcast of some proceedings, but I have to tell you that is in direct violation of judiciary policy right now.

The Judicial Conference of the United States prohibits the audio and video broadcasting of judicial proceedings including bankruptcy proceedings. It does. I know that from my own Detroit case where I wanted to broadcast, and they said, no. They said no to audio, and they said no to video. That all can be worked out, but it has to be worked out.

The issue of law shopping, I think the best answer to the issue of law shopping is to reconsider this bizarre appellate structure that we have in bankruptcy, if you were going to create a complex, bizarre structure, you couldn’t think of one more bizarre than the one we have.

It takes two appeals to get a binding decision, which takes and money neither of which we have in bankruptcy. Then there is the issue of the inner circuit conflict, so I would even favor a national appellate court for bankruptcy on top of the national bankruptcy court for a certain class of cases. I'm perfectly willing to think outside the box, but the details are what are going to make or break that.

Mr. Togut: I want to follow up on that notion, because I was actually going to ask the panel about this. Isn't a lot of forum shopping a result of a split in circuits, and trying to file where you get the more favorable law? If we did what you're talking about, and so you didn’t have that as an ongoing problem, don’t you think that would cut down too, on forum shopping?

Judge Rhodes: I think it would, but I have to say that since I never practiced chapter 11 law, I don’t know about the extent to which circuit splits drive bankruptcy, I only know what I've heard in these debates and what I see happening. While I take to heart my colleagues on the panel assertions that it's not a huge deal, one does see law firms publish circuit law charts, where the differences are highlighted for the purpose of selecting venue. So this is a question the Commission, I think, has to study. How much is law shopping going on? I only assume it is because I'm told it is, but you all would know better and if that’s happening, and if you decide it's a problem, I think the issue of a national appellate court is a good solution.

Mr. Rosner: To me, I think the overriding question is keeping the system honest. I don’t think there's one particular, I think it's a combination of keeping companies at home and you can shift the burden on [Section] 1412, because the debtor is the one choosing the venue. If the debtor wants to go somewhere else, to another jurisdiction, the burden should be on the debtor to demonstrate why that’s in the best interest of the estate, of the creditors, employees, other constituencies and the like.

I think the argument about accessibility through technology misses the point as far as legitimacy. To me, accessibility isn't geographic, it's the legitimacy of allowing the debtor to pick among multiple forums, because the perception is that you pick a forum for a reason. The reason to those outside the core group of constituents is that, they're not doing it to help me, and "me" is the vast majority of the parties and interest in the case.

I think a combination of keeping companies at home, and shifting the burden so companies can still go in and try to seek venues somewhere else. It's just that the burden isn't on the small creditor to spend millions of dollars, the burden is on the debtor to show that it's right.

Prof. Westbrook: There's something to be said for thinking outside the box. Of course whenever us academics do it, we always put on top, "Do not quote or cite this," so with that understanding, first of all, I think there's something to be said, for a national bankruptcy court, it will help some in terms of the selection process, and concern about different laws being applied. I think that’s true, I'm not sure it's the best way to solve that problem, and I'd want to think about that a little bit.

It's not obvious to me why Delaware, or New York, or any other particular place ought to be the home of a national bankruptcy court, which is more or less between Delaware and New York in what we have now. I like writing to sell it, but it's not really essential to the bankruptcy process.

It seems to me it would also make a difference to perception. If the judges were appointed freely from around the country rather than being just judges from New York or Delaware, and so forth, so I can imagine that being an improvement in the system and in the perception of justice it does not really solve the community problems that I was talking about before. Maybe, however, given political realities it's the best that can be done.

Mr. Patton: In the cases that I confront, there's always going to be a choice regardless of what the venue rules look like because these cases are all situations where there are multiple locations that could be identified by those of us who were preparing the cases to file. The community problem is not going to be solved by a venue solution. I think it needs to be addressed. I think it needs to be solved.

One way to do it would be, I guess, this is similar to what others have suggested is to require a determination at the outset by whichever judge is selected by the debtor. The debtor has to select the judge in a voluntary 11, and a choice has to be made. No matter what venue rule we adopt among all of those that I've seen, the corporations and businesses I deal with, will still have a choice to make and they will have to make that choice.

Have the judge at the outset make a decision. Is there a place that could better serve the interest of justice and those parties who are involved? If not, another place, what could be done in the context of this case to solve the problem?

Anecdotally, there was a bankruptcy case I was involved in, that was overseen by Judge Walsh. It was a case that had all of the earmarks of a case that belonged in the Northern District of Florida. We filed in Delaware for a variety of reasons. The employees fought the transfer motion, and they fought to keep it in Delaware. It was a very unusual situation, those who were seeking transfer were representatives of the local municipality whose local economy was going to be affected. The water treatment, for example, was going to have problems operating.

Judge Walsh said, "I tell you what, since everybody else wants their case to stay in Delaware, including all of the folks who are in Florida, the employees and the other creditors, I'm going to require the debtor to pay to fly and house, first-class, at the Hotel Dupont, representatives of those who were seeking to transfer venue, and that’s not the solution for every case, but it's not the solution for every case, but it does point to a path forward for these large cases where there is a crying need for community involvement.

For restoration of enfranchisement of those round the country, to put the burden at the frontend of the process, on both the court and the debtor, to address these problems and find solutions to them, and if the solution isn't moving the case to another jurisdiction, if the solution isn't moving the mountain to another jurisdiction, perhaps the solution to finding a way to bring the communities into the process through teleconferencing or other creative solutions.

The burden doesn’t have to be borne by the federal courts and by the taxpayers. It's something that could be imposed upon the debtors themselves if they wish to take advantage of these jurisdictions perhaps they should pay.

Mr. Togut: Mike?

Mr. Luskin: Very briefly, and this is of course is me, not my Committee. First, make it easy to get to court and that’s for the lawyers too. Strike down these barriers, if you are admitted in one federal court, you're admitted in them all. If some of issue of local law comes up, get local counsel, but just break down the barriers.

In most courts now, certainly in New York we've almost done away with the pro hac motions. If you’re an outside lawyer, you're on the phone at a hearing, you say, "Judge, I'm not admitted,” “admitted," boom, move on. I would just as soon see that formalized. I see no reason why it shouldn’t be and I think that to the extent rules and different courts and different districts vary and would prevent that. It seems to me that’s an easy fix for access.

We've talked about technology. It seems to me that frankly, I'm horrified to learn that the judicial conference prohibits or restricts audio and video coverage of hearings, I understand it should be at the option of the local Chief Judge, or the Judge, and maybe parties should help pay for it, but maybe that raises other issues.

That also seems to me to be an easy fix, that if there's a demand for access, including Internet access, I can't think of a single reason, other than cost, not to do that. More important substantive access, if there truly are constituencies that are being deprived of access, give them committees, I know it's an unpopular thing in some areas, so last thing we need are more committees, more expense, more expense to the debtor.

If you're going to have a case that’s really going to be driven by labor you're going to be rejecting a bunch of CBAs or something, you're going to have a trial. Obviously, people have to be represented, not just the union, but maybe there ought to be employees there. Certainly it ought to be televised. Maybe there ought to be a provision to have that particular trial done in a better location. A more sensible location, lots of money, I don’t know if there's jurisdiction for a judge in New York to conduct a CBA Trial in Dallas. That’s it. Thank you, again.

Mr. Togut: Thank you.

Prof. Westbrook: Just one last thought, if you'll forgive me. Another possibility would be a bankruptcy multi-district court, much like the multi-district litigation court, to take a look at this and at least it would be a neutral decision, or perceived as being a more neutral decision as to venues.

Mr. Markus: Just quick, I think this concept of community problem and public perception legitimacy, it's something there hasn’t been as much written study, but there is one panel that I think has unique qualifications to give us some commentary and that’s Judge Rhodes, because you have two of the most influential cases in your district. The *GM* case, which many perceive was "venue shopped" away from you district, and the *Detroit* Case, which is pending in your district.

As the person that’s adjudicating the case, how does this really affect how the case is administered, by having the ability for the constituents, not the main stakeholders because they aren't going to be in any district, but the little guys, being able to watch what's happening.

Judge Rhodes: There are, of course, substantial differences between chapter 9 and chapter 11 and we can't minimize those. Chapter 9 is as much a political process, as it is a legal process. I think that’s much less so in a chapter 11 case, but having said that, I will report two features of the case that the Commission may want to take into account.

First, citizens come to every hearing I have, even if it's on the most mundane, lift stay issue in the case. I use the biggest courtroom in the federal district court building, and it's full, or almost full for every session, and there are two overflow rooms, which are also used, by close-circuit video. Apparently that is allowed, whereas broadcast is not.

Citizens come, and they watch, and they are very attentive, this is their case, so they are very interested in everything that happens, and of course, I don’t need to tell you that everything is reported, but apart from that there was a day that I devoted to the 90 citizens, unrepresented, who filed eligibility objections, and I gave them each … well, I said three minutes, but it was really three to five, and one after another, they addressed me, and they were thoughtful, they were compelling, they were articulate, they were angry, and giving these people the opportunity to address me as the decision-maker over this case was of extraordinary value in promoting our democratic principles. It was an extraordinary day of process, of democracy and I said that the time, and I was as grateful as I could be to have participated in that day.

Mr. Togut: On that note, I want to thank the panel, and thank the attendees of the Westbrook Conference, and to thank Professor Westbrook, for your hospitality. Thank you very much.