***ABI Commission to Study Reform of Chapter 11***

**Statement of
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on behalf of the New York City Bar Association’s
Committee on Bankruptcy and Corporate Reorganization
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Austin, Texas**

The charge of this Commission is to examine the rules surrounding venue, including 28 U.S.C. § 1408, which governs the laying of venue for bankruptcy cases, and to suggest changes, if any seem necessary. As a restructuring attorney and bankruptcy litigator, I hope to offer a practitioner’s perspective on the functioning of the current venue rules, and the views of the New York City Bar Association’s Committee on Bankruptcy and Corporate Reorganization, which has discussed and considered this issue at length. I think this Commission should find that, as applied by bankruptcy judges and by practitioners, the current venue rules serve and appropriately balance the judicial concerns of efficiency and justice, equally. I urge the Commission not to recommend any changes to the statute.

The two primary statutes at issue are 28 U.S.C. § 1408, which governs the laying of venue in Chapter 11 cases, and 28 U.S.C. § 1412, which authorizes transfer of venue after a case is initially filed. 28 U.S.C. § 1408 provides that a Chapter 11 case may be commenced “in the district court for the district-

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership.”[[2]](#footnote-3)

28 U.S.C. § 1412 separately provides that after the initial filing, “A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.”

Most suggestions for altering the venue rules would limit the ability of debtors to seek bankruptcy protection in their state of incorporation or where an affiliate’s case is pending, and effectively require that all corporate bankruptcy cases be filed in the jurisdiction where the parent company of a corporate family is physically headquartered or holds its principal assets. Changes such as these would force debtors and courts to ignore the often much more important considerations examined under current law, such as (a) the location of the principal operating subsidiaries and whether the parent company itself is a mere holding company with no operations of its own, (b) the interests of justice and the convenience of parties who will need to appear during the proceedings to protect their interests and (c) the interests of the state of incorporation.

There is no reason to believe that the jurisdiction where a corporate parent is headquartered or holds its principal assets is always a more appropriate venue, or one more convenient to creditors, than the other alternatives provided in the existing venue statute or frankly even as appropriate or convenient as those other jurisdictions. Many large corporations are headquartered and have parent assets in one jurisdiction but have employees elsewhere or own the majority of the enterprise’s assets through subsidiaries located in other jurisdictions. Most large corporate families are national or international in scope and have creditors and shareholders across the country or around the globe. As courts have found, while a headquarters building or a bank account may be in one jurisdiction, oftentimes the locus of the case and the bulk of the creditors, especially those who are most likely to need to appear in court to protect their interests, are actually located elsewhere. Under the existing rules, the debtor’s choice of forum is given great weight when venue is proper pursuant to 28 U.S.C. § 1408. It would be indefensible for a corporate enterprise with far-flung operations conducted through domestic and foreign subsidiaries to be prohibited from filing for bankruptcy in the court it deems most convenient and appropriate merely because the ultimate parent entity is headquartered or holds a few assets, however meager, in a particular city. Even where the majority of employees are in fact located in the headquarters’ jurisdiction, that is often scant reason for requiring a corporation to file for bankruptcy there. In many large cases, and certainly in my home district, the Southern District of New York, and the District of Delaware, where I also appear frequently, employees’ rights are unaffected because of so-called “first day” relief designed to permit the uninterrupted payment of employee claims (wages, salary and benefits). The complex chapter 11 cases of General Motors and Chrysler, many of whose employees are located in Michigan, and Tribune Company, whose publishing and broadcasting operations are based in Chicago, Los Angeles, and elsewhere throughout the country, were effectively administered in the Southern District of New York and the District of Delaware, respectively. In such cases, individual employees had no need to appear in the proceedings. Where employees or retirees are affected, their representatives that actually appear in court to protect their interests—including labor unions and official court-appointed committees—are often based outside the headquarters jurisdiction, and they often employ lawyers based outside of the headquarters jurisdiction. The Airline Pilots Association, for example, has used the same New York law firm to represent its interests in cases filed in Chicago (*United Airlines*), Virginia (*U.S. Airways*) and Honolulu (*Hawaiian Airlines*).

Most often the parties that need to appear most regularly in large, complex chapter 11 cases are financial creditors and counterparties, the vast majority of whom are usually located in or near New York. When extending credit and engaging in other transactions critical to the health and stability of corporate bankruptcy filers, these financial institutions require certainty as to how their investments will be treated by the bankruptcy courts. In analyzing the risks of extending credit, lenders rely on the extensive body of law in experienced jurisdictions, precedents that took years to develop in the many large and complex cases that have been heard in those jurisdictions. Any amendment limiting debtor discretion in selecting the most appropriate jurisdiction in which to file would require those companies located in remote jurisdictions to forgo the benefits of these sophisticated courts and the investor confidence that they bring, in favor of jurisdictions with less predictable and potentially conflicting laws. This could have the unintended consequence of reducing the group of lenders willing to extend credit to these borrowers, or forcing them to pay increased interest rates to compensate lenders for the increased risk of lending in less predictable jurisdictions.

I’d also point out that the public has greater access to bankruptcy courts in these jurisdictions today than when the venue rules were originally adopted, as a result of substantial advances in technology and revised local rules of bankruptcy procedure. Telephonic appearances at court hearings for those unable to attend in person and online access to electronic court dockets are now commonplace.

It is sometimes suggested that corporate debtors choose their venues based upon the likelihood of getting higher professionals’ fees approved. This argument is utterly unfounded, both because no corporate debtor has any interest in paying above-market rates for its representation and because it ignores the reality of the multi-variable choice that debtors’ boards of directors and officers must make when considering possible venues. Fiduciary duties, the expressed preference of the largest stakeholders and other legal and factual considerations weigh heavily in the decision-making process. There are external checks against abuse as well. The Southern District of New York first adopted retention and fee guidelines for professionals in 1991 and has modified them over the years, most recently in early 2013.[[3]](#footnote-4) In addition, the Office of the United States Trustee supervises the payment of professional fees and has just revised its rigorous guidelines that are national in scope. Moreover, in many large cases, courts appoint fee examiners or establish fee committees whose sole role is to review and, where appropriate, question professionals’ fees, and their work has resulted in substantial savings in many cases.

Some proponents of changing the venue rules claim that federal judges are pressured to issue improper rulings in order to entice or placate debtors and their professionals. These accusations are baseless and an insult to the members of our federal judiciary. The suggestion that judges would compromise the independence of their decision-making to expand their already burgeoning caseloads is difficult to take seriously. The attractiveness of experienced jurisdictions to both bankruptcy filers and to prospective lenders does not stem from the existence of “favorable” case law in those jurisdictions, but rather from the predictability that comes from a well-developed body of case law that simply does not exist in other jurisdictions.

Another criticism of the current venue statute is that, even if the venue chosen by the debtors truly is proper for many reasons—compliance with the statute, the convenience of the parties, presence of sophisticated courts and accessibility to all parties’ professionals—it may be unfair to certain stakeholders who lack the ability to fully participate and make their objections heard. This criticism has been made particularly by employees and retirees, some of whom have demonstrated vociferously against out-of-town filings.[[4]](#footnote-5) This can be a real concern to us professionals – we are dedicated not only to the rehabilitation of businesses but also to the integrity of the system. We must all ensure that, as Judge Henry Friendly once wrote, “the conduct of bankruptcy cases should not only be right but must seem right.”[[5]](#footnote-6) However, recent experiences teach us that, in practice, the venue statute as currently drafted appropriately addresses this supposed failing. In light of this, altering the statute would serve only to narrow debtors’ options and constrain courts’ ability to exercise their judgment, with the negative consequences discussed above, in order to remedy a problem that does not exist in the courts today.

The Patriot Coal Corporation bankruptcy, filed in the Southern District of New York last year, offers a timely demonstration of the fact that the current venue statute functions very well to protect the interests of all stakeholders. Based on the size and complexity of the matter, the location of the creditors and all parties’ professionals, the need for extensive and complicated first-day relief and the scarcity of published decisions in other jurisdictions, the company commenced its case in the Southern District of New York, believing it was the appropriate venue as a fiduciary for all of its stakeholders and the corporate domicile of one of its filed subsidiaries. Patriot Coal’s unions moved to transfer venue to the District of West Virginia, where certain of Patriot Coal’s mining operations were located, and the U.S. Trustee moved to transfer venue to “a district where venue is proper.” The Court ordered the cases transferred to the Eastern District of Missouri in St. Louis, where Patriot Coal’s headquarters are. Although there was no question that Patriot satisfied the formal requirements of 28 U.S.C. § 1408 to lay venue in the Southern District of New York, the Court closely examined the fundamental fairness of hearing the case in New York and determined, very much in line with long-settled caselaw, to transfer the cases in the “interests of justice” pursuant to 28 U.S.C. 1412. The decision illustrates well the way in which these two statutory provisions work together, to appropriately give debtors flexibility in choosing what in their view is the most appropriate venue, while still allowing the presiding judge flexibility to later transfer venue if he or she deems that transfer necessary in the interests of justice or for the convenience of the parties.

Although the Court explicitly found that the cases had not been filed in bad faith, and acknowledged that considerable efficiencies would be had by hearing the cases in New York and that many stakeholders supported hearing the case in New York, the Court was sensitive to other considerations too. The union in that case, the United Mine Workers of America, communicated to the court the feeling of its miners: that a case heard in New York would not be fair to them, arguing that the cases should instead be heard in West Virginia near the mining operations.[[6]](#footnote-7) The court, however, viewed the issue with more nuance, writing:

[T]his chapter 11 proceeding is not a two-party dispute. “It is not “*UMWA v. Patriot*.” It is not “*us v. them*.” It is a collective proceeding in which the Bankruptcy Court is charged with applying the Bankruptcy Code and other applicable law to achieve the overarching goal of chapter 11—to maximize the value of the Debtors’ estates for the benefit of all stakeholders and to guide the Debtors, if at all possible, through chapter 11 and beyond to emergence as a stronger company, financially and operationally.[[7]](#footnote-8)

The Court went on to apply the flexible standard that has long characterized the Second Circuit’s—and other courts’—interpretation of 28 U.S.C. 1412 and determined that transfer of the cases to the Eastern District of Missouri was warranted. While both New York and West Virginia were perceived to be hostile territory by certain constituencies, the Bankruptcy Court for the Eastern District of Missouri was a proper venue that could best serve the interest of justice and the convenience of the parties. The Court took into account not only the location of Patriot Coal’s headquarters, but also the accessibility of the courthouse for miners and retirees as well as many other practical factors. Perhaps most importantly, St. Louis was free of the “perception issues” that plagued both West Virginia and New York.

This is precisely the kind of nuanced decision-making that we have seen from bankruptcy courts confronting venue issues under the current venue statutes, whether the courts in *Patriot*, *Winn-Dixie* or *Dunmore Homes*, where venue transfer was granted, or in *Enron* or *Manville Forest Products*, where it was denied.[[8]](#footnote-9) These decisions show that the present statute strikes the proper balance: debtors are permitted considerable flexibility and their choices are accorded substantial weight, but courts are free to transfer venue when necessary in the interests of justice. Debtors are not straitjacketed by the circumstances of where their headquarters might happen to be or some other narrow criterion, but the judges are also not forbidden to transfer venue where doing so is necessary to ensure that the administration of bankruptcy not only is right, but seems right too.

It bears emphasis that debtors and their professionals have fiduciary duties to plan and execute a bankruptcy in the manner most likely to maximize the value of the enterprise. Selection of an appropriate jurisdiction in which to commence the case plays no small role in the maximization of value, given the increased predictability of experienced jurisdictions and the increased comfort that it brings to key constituencies. Limitation of debtors’ flexibility in selecting an appropriate jurisdiction in which to commence their cases could have the unintended consequence of a loss of value due to reduced predictability, as noted above.

In sum, there are no grounds for upending the longstanding and sensible bankruptcy practices embodied in the existing venue rules. The current rules protect against abuse and foster the development of experienced courts that enable companies with complex cases to complete the bankruptcy process faster and more efficiently, thereby benefiting creditors, employees and the market place. This is not just theory: It has been proven in practice. Corporations in financial distress, as well as their employees, their communities and other companies that rely on them as customers and suppliers, all benefit from the willingness of commercial lenders to extend loans to those corporations, which willingness is in part due to the lenders’ knowledge of and comfort with the bankruptcy courts and the body of jurisprudence built up in those courts. The orderly and efficient administration of cases of the magnitude of *General Motors*, *Chrysler*, *Tribune Company*, *Lehman Brothers*, *CIT* and *Washington Mutual* could not be effected without such sophisticated courts. These trying economic times throw into sharp relief the benefits of orderly and efficiently handled cases that preserve enterprise value and jobs, as opposed to more time-consuming, less efficient and more expensive alternatives. At the same time, the current venue statute and the jurisprudence surrounding it strike the appropriate balance between debtors’ honest judgment, practical considerations and the fairness and integrity of the bankruptcy system, both in appearance and in fact. I urge this Commission to recommend that the statute be maintained in its current form.

1. Partner, Luskin, Stern & Eisler LLP. New York, New York. [↑](#footnote-ref-2)
2. 28 U.S.C. § 1408. [↑](#footnote-ref-3)
3. SDNY General Order M-447, January 29, 2013 [↑](#footnote-ref-4)
4. *In re Enron Corp.*, 284 B.R. 376 (Bankr. S.D.N.Y. 2002). [↑](#footnote-ref-5)
5. *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966). [↑](#footnote-ref-6)
6. *In re Patriot Coal Corp.*, 482 B.R. 718, 750 (Bankr. S.D.N.Y. 2012) [↑](#footnote-ref-7)
7. *Id.* at 722. [↑](#footnote-ref-8)
8. *In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012); *In reWinn-Dixie Stores, Inc.*, Case No. 05-11063 (RDD) (Bankr. S.D.N.Y. April 12, 2005); *In re Dunmore Homes, Inc.*, 380 B.R. 663, 671-72 (Bankr. S.D.N.Y. 2008); *In re Enron Corp.*, 284 B.R. 376 (Bankr. S.D.N.Y. 2002); *Gulf States Exploration Co. v. Manville Forest Prod. Corp. (In re Manville Forest Prod. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990). [↑](#footnote-ref-9)