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Venue Reform Three Years Later

Reluctance to Adopt Venue Reform Remains as Prevalent as Reluctance to Transfer Bankruptcy Cases Away from Delaware and New York

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House bill H.R. 2533 was introduced three years ago with much fanfare by the then Chairman of the House Judiciary Committee. H.R. 2533 proposes amending "title 28 of the United States Code with respect to proper venue for cases filed by corporations under chapter 11 of title 11 of such Code." It is intended to reduce the number of jurisdictions available for filing a bankruptcy case by effectively eliminating a debtor's "place of incorporation" as a venue option. Current federal law, first enacted in 1979, allows a bankruptcy case involving a business entity to be commenced in a host of different venues, including the debtor's place of incorporation, where its principal assets are located, where it is headquartered, or where the bankruptcy case of a corporate affiliate is pending. New York and Delaware bankruptcy professionals have been the biggest beneficiaries of the current venue provisions and would likely see their work diminish if the H.R. 2533 legislation succeeded.

H.R. 2533's proponents liken the current venue provisions to a "forum-shopping" license, enabling practitioners to choose a bankruptcy court that is most convenient for a particular party or that may offer a strategic advantage, such as favorable decisional law on a certain topic. Critics of H.R. 2533 argue that the amendment would devastate the proficiencies and competence established in the bankruptcy courts in New York and Delaware.

According to the American Bankruptcy Institute (ABI), the last attempt at venue reform before H.R. 2533 occurred in 2005, following Enron's decision to file its chapter 11 bankruptcy case in New York instead of Houston, Texas, where it was headquartered and where the bulk of its creditors and employees were located. The ABI reported that efforts to change the law failed due to the force of then-Senator Joe Biden of Delaware, who chaired the Senate Judiciary Committee.

Regardless of the cogency of the competing arguments, it is safe to say on the three-year anniversary of H.R. 2533 that its passage remains as doubtful as its predecessor in 2005 while the need for reform remains an ever-present topic of conversation among bankruptcy practitioners nationwide. Two recent orders entered in bankruptcy courts in Delaware and New York are not likely to end the debate.

The courts in *In re Energy Future Holdings Corp.*, Case No. 14-10979 (Bankr. Del., May 23, 2014) and *In re Jacoby & Meyers Bankruptcy, LLP*, Case Nos. 14-10631 and 14-10642 (Bankr. S.D.N.Y., May 29, 2014) denied motions—by a creditor in one case and the debtors in the other—to have the bankruptcy cases transferred to judicial districts where the debtors' headquarters and operations were located.

In *Energy Future,* Wilmington Savings Fund Society, FSB, the indenture trustee for certain bondholders, moved to have the debtors' chapter 11 cases transferred from the District of Delaware to the bankruptcy court in Dallas, Texas. In arguing that transfer was appropriate, Wilmington Savings highlighted the

debtors' deep Texas roots: Energy Future was headquartered in the Lone Star State, all their employees and customers were located there, the bulk of their business operations were housed in Texas, and the debtors' energy-related business was highly regulated by Texas-based governmental units. Conversely, the creditor noted that the only connection between Energy Future and Delaware was that some of its corporate affiliates had incorporated in the First State. Notably, the indenture trustee pointed out that the debtors' corporate headquarters location was less than a ten-minute walk from the Dallas bankruptcy court while the Delaware bankruptcy court was 1,436 miles away, and any court appearance in Delaware would include costly and time-consuming travel. In short, according to Wilmington Savings, Dallas was a more convenient venue for the company's constituents and executives. In denying the indenture trustee's motion, the Delaware bankruptcy court concluded that the decision on the motion *was not even* a "close call." The judge stated that the statutory venue provisions authorized the chapter 11 filing in Delaware in the first instance because certain of Energy Future's corporate affiliates were incorporated there. Once venue was deemed appropriate, the court's discretion to retain the case was all but unfettered. Critically important to the judge's decision in *Energy Future* was that the debtors were in chapter 11 to restructure their balance sheet, and the financial restructuring was dependent on the participation of financial professionals, all of whom were located in the northeastern United States, not in Dallas.

Creditors in *Jacoby & Meyer*, a now-defunct consumer law firm headquartered in Chicago, filed an involuntary bankruptcy petition in the bankruptcy court in Manhattan. Representatives of the debtor moved to have the case dismissed or, alternatively, transferred to the bankruptcy court in Chicago. In support of transfer, the debtor argued that Chicago was the proper forum because the debtor's headquarters, operations, and managerial decisions occurred in Chicago, and its organizational documents reflected Chicago as its principal place of business. The petitioning creditors countered that they had not filed in Manhattan for strategic reasons, but rather because there was a close nexus between the law firm and New York. The alleged close nexus included arguments that the firm's principal place of business was in New York, that it had ten offices there, and that it had filed 90 consumer bankruptcy cases in New York bankruptcy courts in Manhattan, White Plains, and Poughkeepsie, among other things. The bankruptcy court denied the motion without decision, implying that the alleged factual history giving rise to the filing of the involuntary petition in the first instance necessitated the existence of a bankruptcy case.

The lesson of *Energy Future* and *Jacoby & Meyer* is that, as long as venue is plausibly supported by current statute, bankruptcy courts will be wholly reluctant to transfer a bankruptcy case to a new venue, even if the debtor's connections to the new venue are formidable and connections to the existing venue are tenuous. The lesson of H.R. 2533 is that venue reform is not likely to occur in the near future.

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