



Bankruptcy Venue: Location, Location, Location!

*Judge Christopher M. Lopez, U.S. Bankruptcy
Court, Southern District of Texas*

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Agenda

- Current Law
- Considerations
- Venue Reform
- Q&A

Current Venue Law: Statute

- Relevant statute:

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—

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

(2) in which there is pending a case under title 11 concerning such person's **affiliate, general partner, or partnership**.

28 U.S.C. §1408 (emphasis added).

Current Venue Law

1. Principal Place of Business

- Fact question
- Supreme Court in *Hertz Corp v. Friend*, 559 U.S. 77 (2010) :

“Principal place of business as referring to the place where the corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s “nerve center.” And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.* the “nerve center,” and not simply an office where the corporation holds its board meeting (for example, attended by directors and officers who have traveled there for the occasion).”
- Major business decision test vs operational test

2. Principal Assets

- Fact question
- Assets principally used in the operation of a debtors’ business.

Current Venue Law

3. Domicile

- State of incorporation
 - Not a uniformly held view – key target of venue reform.
 - Venue is proper in any district within the debtor’s state of incorporation. *In re ERG Intermediate Holdings, LLC*, 2015 Bankr. LEXIS 3639, at *11 (Bankr. N.D. Tex. Oct. 26, 2015).

4. Affiliates under 28 U.S.C. §1408(2) – the “Affiliate Rule”

- Venue is proper where an affiliate has a case with proper venue.
- This provision is the basis and justification for filings in “magnet courts.”
- Although the rule is permissive, *i.e.* affiliates can file cases in multiple venues, corporate families almost always file in the same venue.

Dismissal or Transfer of Filing in a Proper District

- Federal Rule of Bankruptcy 1014(a)(1)
 - If a petition is filed in a proper district, the court on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the **interest of justice** or for the **convenience of the parties**.
- **“Interest of Justice”** considerations and factors:
 - whether transfer will promote economic and efficient administration of the estate;
 - whether interests of judicial economy will be served;
 - whether parties will be able to receive a fair trial;
 - whether either forum has an interest in having the controversy decided in its borders;
 - the enforceability of any judgment; and
 - whether the original forum should be disturbed.

Dismissal or Transfer of Filing in a Proper District (continued)

- **“Convenience of Parties”** considerations and factors:
 - the proximity of creditors of every kind to the court;
 - the proximity of the debtor;
 - the proximity of witnesses necessary to the administration of the estate;
 - the location of the assets;
 - the economic administration of the estate; and
 - the necessity for ancillary administration if liquidation should result.
- **Burden of Proof and Timing of Motion**
 - On the party moving to change venue and is determined by a preponderance of the evidence.
 - Motion must be “timely” filed and timeliness is measured on the “facts and circumstances” of a case.

2020 Bankruptcy Filings in Numbers

- In the first three quarters of 2020, **111 of 138** bankruptcies of companies with over \$100 million in assets were filed in the District of Delaware, Southern District of Texas, and Southern District of New York.
- **57%** of energy cases filed in SDTX, up from 30%-32% in 2016-2019.
- **13.40%** of energy cases filed in Delaware, down from 21%-29% in 2016-2019.

Bankruptcies by Venue (2005 through Q3 2020)

Court	Average 2005–2019	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Delaware	32	10	14	19	54	67	25	33	21	34	25	33	39	30	37	39	49
Texas - Southern	5	1	0	1	4	4	0	2	1	1	2	5	13	14	9	14	41
New York - Southern	14	10	11	4	20	28	22	10	22	9	10	5	14	18	11	18	21
Virginia - Eastern	1	0	1	1	3	0	2	0	1	0	1	3	2	2	2	1	5
Georgia - Northern	1	2	0	1	6	2	0	1	1	0	0	0	0	1	0	2	1
Texas - Northern	2	0	1	1	2	5	0	0	2	0	1	2	2	3	2	3	1
California - Central	2	0	0	3	5	8	3	0	2	0	0	1	0	0	1	2	0
Other	17	20	7	9	34	47	17	11	11	10	8	15	14	21	11	19	20
Number of Bankruptcies	73	43	34	39	128	161	69	57	61	54	47	64	84	89	73	98	138



Source: Schwartz & Doyle, Bankruptcy Venues: An Excerpt from Trends in Large Corporate Bankruptcy and Financial Distress, National Law Review, *available at*: <https://www.natlawreview.com/article/bankruptcy-venues-excerpt-trends-large-corporate-bankruptcy-and-financial-distress>

Venue Considerations

- Access to the Court and hearings (*e.g.*, by creditors (including employees), witnesses, and other stakeholders)
 - Impact of COVID-19 and technological advances – what is the future of traveling to hearings post COVID-19? Will parties be able to join by video for what was traditionally purely in-person hearings?
- Judges' familiarity with type of business (*e.g.*, oil and gas)
- Non-bankruptcy litigation (*e.g.*, anticipated adversary proceedings and removal)
- Precedent
- Administrative procedures (*e.g.*, complex case procedures)
- Administrative costs

Bankruptcy Venue Reform: For

- Arguments for Venue Reform
 - Improving public confidence and integrity
 - Development of uniform national bankruptcy law
 - Aligning with the interest of Congress for a nationwide bankruptcy system
 - Justice for creditors
 - More efficient use of judicial resources
 - Reduce administrative expenses
 - Interest of local economies
- Examples of highly prolific cases with minimal ties to the forum other than incorporation/affiliate rule:
 - Enron (Houston HQ; filed in S.D.N.Y.)
 - WorldCom (Virginia HQ; filed in S.D.N.Y.)
 - General Motors and Chrysler (Michigan HQ; filed in S.D.N.Y.)
 - Los Angeles Dodgers (LA team; filed in Delaware)

Bankruptcy Venue Reform: Against

- Not actually an issue
 - Small or medium-sized business cases account for the majority of business cases, 73% of which are not filed in Delaware, New York, or Texas.
- Predictability
- Precedent
- Experience
- Speed and cost
- Eliminating venue choices will not benefit creditors
 - See above about predictability, precedent, experience, speed and cost.
 - Empirical evidence suggests that cases are more successful when filed based on state of incorporation.

Bankruptcy Venue Reform Act of 2019 (H.R. 4421)

- Like many previous bankruptcy reform bills, this act has stalled in Congress.
- Under the proposed bill, a corporation could only establish venue in three places:
 - District where its “principal assets” were located in 180 days before filing;
 - District where it maintains its “principal place of business”; or
 - District where an affiliate’s case is pending, such affiliate holding 50% or more of the later-filed debtor’s outstanding voting securities.
- **Domicile would no longer be a basis for venue.**
- Changes of control or of the “principal place of business” in the year before filing or conducted for the purposes of establishing venue would be disregarded.

Bankruptcy Venue Reform Act of 2019 (H.R. 4421)

- Congress's third (failed) attempt in the last 10 years to pass a major bankruptcy reform bill.
- The latest bill has the support of the National Association of Attorney Generals ("NAAG"), which sent a letter signed by 42 state attorney generals to Congress supporting the Venue Reform Act.
 - NAAG highlighted that most significant bankruptcy cases are filed in SDNY or Delaware.
 - Senator Elizabeth Warren has long been a proponent of bankruptcy reform.
 - Although President-Elect Joe Biden has endorsed Senator Warren's bankruptcy reform initiatives, venue reforms has been conspicuously absent from any discussion.
 - It is unlikely that the new administration would enact a bankruptcy venue reform law.

Questions?