AMELIORATING BANKRUPTCY'S FORUM SHOPPING CRISIS THROUGH ABSTENTION AND VENUE TRANSFER

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Abstract

In the wake of highly publicized and contentious corporate bankruptcies, scholars and policymakers are reevaluating the Bankruptcy Code's flexible venue statute amid a forum shopping crisis. The current statute allows a corporate debtor to file bankruptcy in any state where it has an affiliate. Big corporations, anxious to choose favorable judges, create affiliates on the eve of bankruptcy to manufacture venue in a given court. Oftentimes, local court rules guarantee that a particular judge will preside. This strategic maneuvering has significant consequences for pending tort claims and other junior claimants who must appear in whatever venue the debtor selects.

Some scholars argue that bankruptcy judges are complicit in debtor forum shopping abuse and that the venue statute must be revised to restore the public's faith in the system. Under this theory, bankruptcy judges make decisions that favor incumbent management and senior creditors to attract Chapter 11 mega-cases. But there is no direct empirical evidence that bankruptcy judges change their substantive rulings to court the favor of large corporate filers. The empirical evidence shows that debtors in conjunction with creditors choose venues which are the most efficient and predictable.

Revising interrelated Code provisions can preserve the benefits of the current venue statute while strengthening procedural protections for junior claimants. Recent scholarship has neglected to consider how other mechanisms in the Code could be used to address the forum shopping crisis. Revising the Code's abstention and venue transfer statutes would allow bankruptcy judges to respond to unfair gamesmanship without destroying the benefits of the current venue statute. This Note takes inspiration for these revisions from a new line of decisions by bankruptcy judges responding to unfair, but legal, forum shopping in their jurisdictions.

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INTRODUCTION

"Even without any evidence of bad faith, courts are not required to 'condone every strategy devised by clever lawyers to outsmart statutory purpose.'"[1]

Bankruptcy Judge Craig Whitley made this observation when analyzing the bankruptcy of a Johnson & Johnson subsidiary.[2] In an effort to bring the bankruptcy case to a favorable court, Johnson & Johnson manufactured bankruptcy venue through their subsidiary, dragging over 38,000 pending ovarian cancer tort cases from New Jersey to North Carolina.[3] This bankruptcy filing put a potential halt on all associated tort claims across the United States and brought them under the jurisdiction of what Johnson & Johnson believed to be a favorable North Carolina bankruptcy court. This is forum

1. *In re* LTL Mgmt. LLC, 2021 WL 5343945 at *6 (Bankr. W.D.N.C. 2021) (quoting *In re* Patriot Coal Corp., 482 B.R. 718, 745 (Bankr. S.D.N.Y. 2012)).

2. *See id.* at *1.

3. *Id.* at *1, *6.

shopping at its finest.[4] And under the current bankruptcy venue statute, this strategic maneuvering is perfectly legal, regardless of consequences to mass tort claimants.[5]

Section 1408 of the United States Bankruptcy Code gives corporate debtors broad power to pick the venue of their Chapter 11 case.[6] Debtors may file in their principal place of business, principle place of assets, or any place where an affiliate has properly filed a bankruptcy case.[7] This affiliate provision effectively allows a company to file wherever it wants.[8] By creating an affiliate in a desirable venue, a large corporation may properly file bankruptcy through that affiliate.[9] This significant flexibility has raised concerns of forum shopping abuse. Pending legislation in Congress seeks to reform the venue statute itself by only allowing a debtor to file in their principal place of business or assets, but this dramatic change will undermine the efficiency and predictability created by the current venue statute.[10] Instead, revisions to the abstention and venue transfer statutes would better address forum shopping concerns without unduly restricting bankruptcy's flexible venue.[11]

Recent prominent corporate bankruptcies have drawn attention to the consequences of venue flexibility, especially in conjunction with the broad grant of authority to bankruptcy judges in section 105(a) of the Bankruptcy Code.[12] The Purdue

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4. *Id.* at *6.

5. *See id.*

6. 28 U.S.C. § 1408 ("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.").

7. *Id.*

8. *See* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 191 (2013).

9. *See* 28 U.S.C. § 1408.

10. *See infra* Section I.B.

11. *See infra* Part III,

12. 11 U.S.C. § 105(a). *See generally In re* L.A. Dodgers LLC, 457 B.R. 308 (Bankr. D. Del. 2011) (ordering the Dodgers to cooperate in good faith with the MLB); *In re* Tribune Co., 464 B.R. 126 (Bankr. D. Del. 2011) (resolving the contentious bankruptcy of the Chicago Tribune, which was filed and heard in Delaware). In his

Pharma OxyContin bankruptcy case used this workaround to pick not only a particular venue, but also a particular judge who was likely to be favorable to a third-party release of liability for the Sackler family.[13] Purdue Pharma filed its bankruptcy case in the highly desirable Southern District of New York (SDNY), despite having only insubstantial ties to the area.[14] Because of the SDNY's local court rules, Purdue was able to select the judge who would hear the case.[15]

More recently, 3M Occupational Safety has attempted to use the bankruptcy system to avoid mass tort litigation related to defective earplugs.[16] It created a funding agreement with its subsidiary Aearo, who later properly filed bankruptcy in Indiana.[17] Aearo moved to stay the ongoing multidistrict tort litigation across the United States against itself and its parent company 3M, or alternatively, to enjoin the actions as against 3M.[18] The Indiana bankruptcy judge refused to grant Aearo's requested relief.[19] Although the case settled before an appellate decision,[20] the order represents the significant power a

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Tribune Co. opinion, Judge Kevin Carey quoted a fable to describe the situation:

> As they both sank to the bottom of the river, Fox, now resigned to the inevitable, said to Scorpion: "You said there would be no sense in stinging me—why did you do it?" Scorpion replied, "It is better we should both perish rather than my enemy should live." There is no moral to this story. Its meaning lies in the exposition of an inescapable facet of *human* character: the willingness to visit harm upon others, even at one's own peril. Our story follows.

Id. at 134–35.

13. Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX L. REV. 1079, 1082, 1132 (2022). The bankruptcy judge resolved the third-party release of liability in favor of the Sackler family. *See In re* Purdue Pharma L.P., 633 B.R. 53, 113–14 (Bankr. S.D.N.Y. 2021) (granting third party release from liability to the Sackler family), *cert. granted*, Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (2023).

14. Levitin, *supra* note 13.

15. *Id.*

16. *In re* Aearo Techs. LLC, 642 B.R. 891, 901 (Bankr. S.D. Ind. 2022).

17. *See id.* at 896–99.

18. *Id.* at 901.

19. *Id.* at 911–12.

20. Nathan Bomey, *3M To Pay $6 billion to Earplug Customers After Bankruptcy Plan Failed*, AXIOS (Aug. 29, 2023), https://www.axios.com/2023/08/29/3m-aearo-technologies-combat-earplugs-settlement [https://perma.cc/6CZJ-FH3C]; Alison Frankel, *3M's Aearo Scores Quick Appeal of Bankruptcy Court's Ruling on Earplug MDL*, REUTERS (Oct. 13, 2022, 5:10 PM), https://www.reuters.com/legal/litigation/3ms-aearo-scores-quick-appeal-bankruptcy-courts-ruling-earplug-mdl-2022-10-13/ [https://perma.cc/FU6R-MXDY].

bankruptcy judge can wield to affect litigation and claimants' rights nationally.

Many politicians and scholars consider this locational flexibility a flaw in the bankruptcy system which promotes forum shopping abuse.[21] SDNY, Delaware, and the Southern District of Texas currently hear the majority of large Chapter 11 cases.[22] Professor Lynn LoPucki, an opponent of the flexible venue statute, theorizes that these forums are connected to favorable outcomes for debtors.[23] The flexibility of the current venue statute may encourage judges and local courts to craft rules which attract mega-cases[24] to their courts.[25] Under this theory, large law firms drive bankruptcy filings to districts which favor incumbent management and senior creditors over other stakeholders.[26] Empirical evidence shows that popular venues decide cases more efficiently than less popular venues.[27] Opponents of the venue statute argue that this evidence indicates popular venues are giving major concessions to

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21. *See* Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 406–09 (2015); Parikh, *supra* note 8, at 162–63; Lynn M. LoPucki & Sara D. Kalin**,** *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 VAND. L. REV. 231, 233 (2001); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968–71 (1999).

22. Jeffrey P. Fuller, *Analysis: Big Bankruptcy Cases on a Roll; Delaware Still Leads*, BLOOMBERG L. (Sept. 7, 2023, 3:15 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-big-bankruptcy-cases-on-a-roll-delaware-still-leads [https://perma.cc/L2MY-LP5F]; *see* Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEVS. J. 463, 470–72 (2021).

23. Eisenberg & LoPucki, *supra* note 21, at 973.

24. *Mega Cases and Designated Cases with Omnibus Hearing Dates and Times*, U.S. BANKR. CT., DIST. OF NEV., https://www.nvb.uscourts.gov/case-info/mega-cases/#:~:text=Mega%20cases%20are%20single%20case,the%20cases%20with%20Ominbus%20hearings [https://perma.cc/8J4V-RMY2] ("Mega cases are [a] single case or set of jointly administered or consolidated cases that involve $100,000,000 or more, 1000 or more creditors[,] or a hold a high degree of public interest.").

25. *See* Casey & Macey, *supra* note 22, at 471.

26. *See* Lynn M. LoPucki, *Courting Failure*, 54 BUFF. L. REV. 325, 333–34 (2006) (discussing how big law firms directed bankruptcy cases to districts that modified their local rules and practices to accommodate "case placers," such as lawyers, corporate executives, banks, and investment bankers) (summarizing LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005)).

27. *See* NAT'L CONF. OF BANKR. JUDGES, NCBJ SPECIAL COMMISSION ON VENUE: REPORT ON PROPOSAL FOR REVISION OF THE VENUE STATUTE IN COMMITTEE BANKRUPTCY CASES 68–69, 71, 74–76 (2018) (discussing the factors that influence venue choice: predictability, developed case law, judicial experience, speed, and cost).

debtors and senior creditors at the expense of less powerful junior claimants.[28] Further, by being able to choose the venue, many debtors are able to choose the law.[29] Different circuits may have more favorable precedent, and the flexible venue statute allows debtors to take advantage of this to a high degree.[30]

On the other hand, proponents of the current venue statute argue that competition for cases promotes efficiency and better administration of complex Chapter 11 filings by the courts.[31] These proponents suggest that forum shopping accusations cast aspersions on the judges administering these cases when there is no conclusive evidence that debtors receive more favorable outcomes in some venues as opposed to others.[32] Further, judges are likely not changing their substantive rulings to attract more cases.[33] Rather, a combination of factors—such as significant experience with Chapter 11 mega-cases and individual court rules regarding judge selection—help drive how favorable a venue may be for filing debtors.[34] Viewed in this light, competition for cases is a race to the top, not to the bottom. Promoting greater predictability and efficiency in case filings is a benefit of liberal venue rules, a net positive for creditors and for debtors.

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28. *See* LoPucki, *supra* note 26.

29. *See In re* Caesars Ent. Operating Co., 808 F.3d 1186, 1189–90 (7th Cir. 2015); Casey & Macey, *supra* note 22, at 479.

30. Casey & Macey, *supra* note 22, at 479.

31. *See* Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 145–47 (2018) (finding greater predictability of outcomes in Delaware and the SDNY, and no evidence of bias); Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 437 (2006); G. Marcus Cole, *Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1909 (2002); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 310 (2001) [hereinafter Skeel, *Delaware*]; Robert K. Rasmussen & Randal S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1359 (2000); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 1–5 (1998) [hereinafter Skeel, *Bankruptcy Judges*].

32. *E.g.*, Ayotte & Skeel, *supra* note 31, at 435, 437; Casey & Macey, *supra* note 22, at 482.

33. *See* Todd Zywicki, *Is Forum Shopping Corrupting Bankruptcy Courts*?, 94 GEO. L.J. 1141, 1167–68 (2006) (reviewing LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005)).

34. Casey & Macey, *supra* note 22, at 476; Skeel, *Bankruptcy Judges, supra* note 31, at 21; Alexander Gladstone et al., *Top Bankruptcy Judge's Exit Shakes Houston Hub He Built*, WALL ST. J. (Oct. 23, 2023, 3:05 PM), https://www.wsj.com/articles/houston-judges-sudden-exit-threatens-bankruptcy-hub-he-built-33026f80 [https://perma.cc/2MJX-M8YK].

Senators Elizabeth Warren and John Cornyn and Representatives Zoe Lofgren and Ken Buck have proposed legislation to reform the bankruptcy venue statute, limiting venue to a debtor's principal place of business or assets.[35] The bill would get rid of affiliate boot-strapping and significantly limit a corporate debtor's ability to select a venue.[36] This legislation comes on the heels of concerns raised above and may alter the landscape of venue selection in the near future.

However, in the meantime, it is worth considering whether there are other less dramatic means to address forum shopping. This Note looks to the bankruptcy abstention doctrines laid out in 28 U.S.C. §§ 1334[37] and 1412[38] for a procedural mechanism to reduce forum shopping without upsetting the benefits of the current venue statute.[39] Section 1334 allows a bankruptcy judge to abstain from hearing adversary proceedings and contested matters in the interest of justice or if those matters would be better heard in a state court.[40] The permissive abstention doctrine has been applied differently across the U.S. Circuit Courts of Appeal.[41] Some circuits take a fairly narrow view of permissive abstention in line with the judicially created

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35. Bankruptcy Venue Reform Act of 2021, H.R. 4193, 117th Cong. (2021); Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong. (2021). Representative Lofgren and Representative Buck reintroduced the proposal in 2023. *See* Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong. (2023). There are no material changes between the 2021 and 2023 version. *Compare id. with* Bankruptcy Venue Reform Act of 2021, H.R. 4193, 117th Cong. (2021).

36. Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong. § 3 (2021).

37. 28 U.S.C. § 1334.

38. 28 U.S.C. § 1412.

39. Section 1334(c) states in relevant part:

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(1-2).

40. *Id.*

41. Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 WASH. U. L.Q. 781, 814 (1998).

abstention doctrines of Article III courts.[42] Other circuits take a more flexible view of permissive abstention as a creature of congressional statute and fair game for greater application.[43]

Section 1412 allows a judge to transfer venue in the interest of justice or for the convenience of the parties.[44] Sometimes courts apply this clause to stop companies from using newly created affiliates to take advantage of a particular venue.[45]

However, advocates of venue reform do not find either of these safeguards sufficient because they rely on judicial discretion.[46] If judges are motivated to keep or attract large Chapter 11 cases, so the theory goes, then discretionary abstention or transfer of venue will not do much to prevent abusive forum shopping.

This Note attempts to balance concerns of judicial overreach while still promoting judicial discretion to resolve particular fact-specific scenarios. To my knowledge, it is the first piece of scholarship to consider abstention and venue transfer as tools to address bankruptcy forum shopping, as well as the first to analyze a similar trend in the caselaw. The suggested statutory revisions in Part III are inspired by the decisions of individual bankruptcy judges reacting to forum shopping permitted under the current venue statute.[47] These cases provide real-life models of how to draw the line between useful forum shopping and unfair manipulation.[48] Further, these models can be incorporated into the Bankruptcy Code to ensure greater uniformity in bankruptcy proceedings across the United States.[49] The Code should be rigid enough to enforce important congressional prerogatives yet flexible enough to account for

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42. *See, e.g.*, *In re* Pan Am. Corp., 950 F.2d 839, 845 (2d Cir. 1991).

43. *See, e.g.*, Asbestosis Claimants v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150, 1152–53 (8th Cir. 1992) (reasoning that only the portion of section 1334(c)(1) that permits district courts to abstain in the interest of comity with state courts or respect for state law codifies pre-Code abstention doctrines).

44. 28 U.S.C. § 1412 ("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.").

45. *See, e.g.*, *In re* Patriot Coal Corp., 482 B.R. 718, 746 (Bankr. S.D.N.Y. 2012); *In re* Winn–Dixie Stores, Inc., No. 05–11063, slip op. at 2 (Bankr. S.D.N.Y. Apr. 13, 2005).

46. *See, e.g.*, LoPucki, *supra* note 26, at 334–36 (2006).

47. *See infra* Section III.A–B.

48. *See, e.g.*, *In re Patriot Coal Corp.*, 482 B.R. at 746; *In re Winn–Dixie Stores*, slip op. at 2; *In re* LTL Mgmt. LLC, No. 21-30589, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021).

49. *See infra* Section III.A–B.

differences in circumstance. The decisions of some bankruptcy courts provide the crash-tested methods for doing so.

Even if Congress passes a venue statute reform, sections 1334 and 1412 remain a viable means to protect the interests of junior claimants in a bankruptcy case when those interests are outside of the venue where the Chapter 11 case is filed. Because the proposed venue reform dramatically reduces the places a debtor can file,[50] there will be instances where cases in the interest of justice may be better heard in a venue other than the congressionally restricted one. A strong conception of sections 1334 and 1412 protects this possibility.

This Note first examines the venue statute, conceptions of its flaws, and proposals for fixing it. Part II explores bankruptcy abstention and venue transfer under sections 1334 and 1412, as well as the ways that those statutes have been used to address unfair forum shopping. Part III examines the interplay of the abstention doctrine, transfer of venue, and the current venue statute to determine how these interrelated provisions may be amended to address forum shopping while still holding onto the strengths of a flexible venue statute.

I. THE COMPETING GOALS OF A VENUE STATUTE

Venue in bankruptcy serves many of the same interests as venue generally in federal court.[51] However, a bankruptcy case is often more like a structured negotiation than an adversary proceeding. This means that additional policy concerns support a more flexible venue statute in bankruptcy than in federal court generally.[52] The proposed congressional revision of the venue statute fails to account for these unique concerns.

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50. *See* Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong. § 3 (2021).

51. *Compare In re* Bestwall LLC, 605 B.R. 43, 53 (Bankr. W.D.N.C. 2019) (evaluating the convenience of the parties and "economic and efficient administration of the estate" in deciding whether to grant a motion to transfer venue) *with* Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1208 (2014) (stating the purpose of venue rules is to "safeguard against the unfairness and hardship involved when [a party] is prosecuted in a remote place" and to "insure that litigation is lodged in a convenient forum . . . " and not an arbitrary place (alteration in original) (quoting United States v. Cores, 356 U.S. 405, 407 (1958) and then quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063 (3d ed. 2002)).

52. Ensuring flexibility is a key ingredient in any bankruptcy reform; not all bankruptcy mechanisms serve all parties evenly. Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359, 411 (2021) (proposing an alternative to Code-based bankruptcy for particular "bankruptcy misfits").

A. *The Importance of Bankruptcy Venue*

The current venue statute allows a corporate debtor to file bankruptcy in any venue where they have a general partner, partnership, or affiliate.[53] Debtors have strategically created general partners or affiliates in desirable venues to take advantage of this feature of the statute, even where they have no material connection to the venue.[54] The SDNY, Delaware, and the Southern District of Texas predominate in complex Chapter 11 filings.[55] Internal court rules intersect with the venue statute and sometimes allow corporate debtors to predict what judge will hear the case.[56] Scholars such as Professor LoPucki argue that this high level of freedom leads to debtor opportunism which is antithetical to fairness in the bankruptcy system.[57] Other scholars such as Professor Jared Ellias see value in a liberal venue statute which promotes court efficiency and greater predictability for all parties.[58]

Balancing these concerns is the challenge of a good venue statute. If the statute is too liberal, it risks the type of gamesmanship that can lead to unfair outcomes and power concentration. If the statute is too restrictive, it risks undermining efficiency and predictability in complex Chapter 11 cases, values beneficial to debtors and creditors alike.

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53. 28 U.S.C. § 1408.

54. *E.g.*, Levitin, *supra* note 13 (discussing how Purdue Pharma L.P. was able to file for bankruptcy in New York despite the holding company being headquartered and incorporated in Delaware).

55. Casey & Macey, *supra* note 22, at 470–71 (2021).

56. This used to be the case in the SDNY, where the address of the affiliate determined what courthouse would hear the filing. The SDNY has two courthouses, one in White Plains and the other in Manhattan. James Nani, *Purdue Bankruptcy Spurs Forum Shopper Pushback in N.Y., Congress*, BLOOMBERG L. (Dec. 6, 2021, 6:00 AM), https://news.bloomberglaw.com/bankruptcy-law/purdue-bankruptcy-spurs-forum-shopper-pushback-in-n-y-congress [https://perma.cc/4YX6-NYLP]. The White Plains courthouse has one judge who hears Chapter 11 cases. Levitin, *supra* note 13, at 1131. By filing with a Westchester County address, a debtor can essentially choose this judge. *Id.* In the Southern District of Texas, there are only two bankruptcy judges which hear complex Chapter 11 cases, so debtors know their case will be heard by one of these two. PROCS. FOR COMPLEX CASES IN THE S. DIST. OF TEX. 1–14 (2023) https://www.txs.uscourts.gov/page/complex-chapter-11-cases [https://perma.cc/HJR2-DR4N].

57. *See* LoPucki, *supra* note 26, at 333–34.

58. *See* Ellias, *supra* note 31, at 147.

The federal venue rules[59] are more restrictive than the bankruptcy venue rules,[60] because the federal venue rules interrelate with other restrictions—like personal jurisdiction—on who can bring a case in district court.[61] The limits on bankruptcy venue are the only real restrictions on where a corporate debtor can file. In contrast, in a federal civil action, the court must still have personal jurisdiction over the defendant, which limits the places a plaintiff can file.[62] Federal venue rules further narrow which court within an appropriate state will hear the case.[63] Bankruptcy courts have nationwide jurisdiction over any case arising under or related to Title 11.[64] Whereas the civil filer is constrained, the debtor gets broad discretion where to file—not simply what district court but also what state.[65]

Venue in bankruptcy plays a much bigger role than venue in federal district courts. Bankruptcy venue determines the state where a case will be heard and the law that may be applied.[66] There is a degree of forum shopping in federal civil cases, but it is necessarily limited to a few places by the difficulty of obtaining personal jurisdiction over a defendant. Even a corporate defendant cannot be sued everywhere.[67] In bankruptcy, a corporate debtor can create an affiliate in

59. 28 U.S.C. § 1391(b) ("Venue in General.—A civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.").

60. 28 U.S.C. §§ 1408, 1412.

61. *See, e.g.*, 18 U.S.C. § 2334 (restricting venue to only a subset of courts based on particular criteria); Markowitz & Nash, *supra* note 51, at 1159–87 (discussing the interrelated development between personal jurisdiction and federal venue).

62. *See* Day v. Cornèr Bank (Overseas) Ltd., 789 F. Supp. 2d 150, 159–60 (D.D.C. 2011) ("Section 1391 is a venue statute and 'has nothing to do with acquiring personal jurisdiction' . . . . [Q]uestions of personal jurisdiction and venue are distinct." (quoting James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 464 (5th Cir. 1971)).

63. 28 U.S.C. § 1391(b).

64. Fed. R. Bankr. P. 7004(d), (f).

65. 28 U.S.C. § 1408.

66. This is true because different courts of appeal have different interpretations of the Bankruptcy Code. Since venue is proper wherever a debtor's affiliate properly files, the debtor can create an affiliate in a venue that will have favorable interpretation of the Code for the debtor's specific facts.

67. *See generally* Daimler AG v. Bauman, 571 U.S. 117 (2014) (discussing personal jurisdiction of corporate defendants).

whatever desirable venue and properly bring the case to that state and that venue.[68] This is great power.

However, both venue statutes allow for some forum shopping.[69] Lawyers will always conduct research on different venues, laws, and judges to make the best, strategic filing decisions for their clients.[70] The greater latitude provided in the bankruptcy venue statute could be a vehicle for abuse, but the flexibility could also be another part of bankruptcy which returns power to the beleaguered debtor.

A bankruptcy venue statute has significant policy concerns that the general civil venue statute does not.[71] Viewing bankruptcy as an adversary proceeding obscures the significant balancing and reshuffling of interests triggered by operation of the Bankruptcy Code. Bankruptcy is more like a negotiation than a traditional adversarial contest in court.[72] Simply, debtors and creditors are trying to work out an arrangement in a Chapter 11 case—they are not diametrically opposed.[73] The parties want to confirm a plan that pays debts, while generally allowing the debtor to continue to operate and preserve value. A flexible venue statute returns some power to the debtor in an ongoing negotiation.[74] Ultimately, the debtor still must convince its creditors to confirm the proposed Chapter 11 plan whatever venue they file in.[75]

Choosing its own venue allows the debtor to retain some measure of control. Bankruptcy is designed to gather all claims against the estate in one place and conduct an orderly distribution of payments to creditors which preserves value.[76]

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68. *See supra* notes 53–54 and accompanying text.

69. *Cf.* Gita F. Rothschild, *Forum Shopping*, 24 LITIG. 40, 40 (1998) ("[C]ourts have recognized forum shopping as a fact of life and potentially a matter of sound litigation strategy.").

70. *Id.* ("If the client's interests are best served by filing the lawsuit in another state, airplanes and a healthy supply of willing local counsel make the decision relatively easy (albeit more expensive).").

71. *See generally* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (discussing different conceptions of bankruptcy goals and policy).

72. *See* ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 7 (2021).

73. *See* Cole, *supra* note 31, at 1900 (observing that, unlike most disputes, bankruptcy cases involve parties whose interests are not necessarily at odds).

74. *See* Stanley G. Joslin, *The Philosophy of Bankruptcy—A Re-Examination*, 17 U. FLA. L. REV. 189, 194 (1964) (recognizing that "[n]ot only has the philosophy of bankruptcy softened in its treatment of debtors, but the changing attitude in the United States toward favoring the debtor" has improved the debtor's position as to his creditors).

75. *See* 11 U.S.C. § 1129(a)(7)(A).

76. *See* WARREN ET AL., *supra* note 72.

Most Chapter 11 bankruptcies are filed voluntarily by the debtor.[77] The filing itself provides an important form of relief through the automatic stay, which bars creditors from continuing to seek payment on their own.[78] Voluntary filing returns power to the debtor.[79] The debtor usually proposes its own Chapter 11 plan and spearheads efforts to get creditors to vote for confirmation.[80] A flexible venue statute is merely another source of power in the debtor's hands, designed to address the present imbalance between the debtor and its creditors.

Concerns about creditor inconvenience and unfairness are often important bankruptcy policy considerations that crop up during venue discussion. But these concerns may only have real weight for certain junior claimants, usually employees, pensioners,[81] small mom-and-pop creditors, and tort claimants.[82] Larger creditors are not going to be severely affected by a finding of proper venue in New York,[83] and may in fact be part of an ongoing negotiation supporting a filing in New York. Instead, opponents of the current venue statute express concern that junior claimants will be unduly burdened by venue in a far-off, unconnected place.[84]

Although this is a valid policy concern, it is difficult to quantify the extent to which junior claims suffer from being heard in a faraway venue.[85] The advantages of insiders and big claimants are still problems whether in a geographically close venue or a faraway one.[86] Creditor inconvenience is an

77. Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 804 (1991).

78. *See* 11 U.S.C. § 362.

79. Block-Lieb, *supra* note 77.

80. *See* 11 U.S.C. § 1121(b).

81. John H. Rains IV, *Searching for Fairness in All the Wrong Places: Valuing the Pension Benefit Guaranty Corporation's Unsecured Claim in Bankruptcy*, 58 U. FLA. L. REV. 1107, 1110 (2006) (noting the important function of the PBGC in guaranteeing pension funds but also noting how difficult it is to value those claims in bankruptcy).

82. *See* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 304–05 (1997), https://govinfo.library.unt.edu/nbrc/facts.html [https://perma.cc/UH4X-BHMP].

83. *See* Ellias, *supra* note 31, at 136 (finding that "the market appears to be better at predicting the ultimate value of the claims of firms reorganizing in more experienced bankruptcy courts," which includes New York).

84. *See* LoPucki, *supra* note 26, at 338.

85. *See* Coordes, *supra* note 21, at 415–16.

86. In many of the cited cases where a debtor filed in a different venue than its

important policy concern captured by the venue transfer statute itself, which allows transfer of venue for the convenience of the parties.[87] Concern for junior claimants is at bottom a concern about fair administration. Venue reform which merely shifts the places where a case can be brought does not directly address lack of fair administration. Instead, reform should be aimed at establishing safeguards that protect interests of junior claimants without undermining system efficiency.

Ultimately, a bankruptcy venue statute should balance the interests of creditors and debtors without giving one an advantage at the negotiating table over the other. The Code uses voluntary filing and the automatic stay to return power to the debtor. A flexible venue statute acts in a similar vein. However, concerns about creditor inconvenience and fundamental fairness are not without bite. The Code balances creditor interests by providing safeguards for creditor claims.[88] A venue statute which significantly disadvantages creditors, specifically junior claimants, cuts against these provisions. Any attempt at reform should keep these competing interests in mind.

B. *The Proposed Venue Reform and Its Shortcomings*

In light of these policy concerns, the current congressional legislation ("the Bill") seeks to reduce forum shopping by limiting a debtor's venue selection to its principal place of business or principal place of assets for the last 180 days prior to filing.[89] The Bill defines principal place of business for a publicly traded company as "the address of the principal executive office of the entity as stated in the last annual report."[90] This means that corporate debtors can only file where their headquarters are located or where their parent company's headquarters are located. Further, the Bill contains a provision stating that a change in ownership or control of an entity has

largest employment center, no party moved to transfer venue. *See* Simon Romero & Riva D. Atlas, *Worldcom's Collapse: The Overview; Worldcom Filed for Bankruptcy; Largest U.S. Case*, N.Y. TIMES (July 22, 2002), https://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html [https://perma.cc/2ALA-BT3H]; Chris Kraul, *Enron's Demise Saps Houston's Energy*, L.A. TIMES (Dec. 2, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-dec-02-fi-10536-story.html [https://perma.cc/TD49-F9AJ].

87. 28 U.S.C. § 1412.

88. *See* 11 U.S.C. § 1129(a).

89. Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong. § 3 (2021).

90. *Id.* § 3.

no effect on proper venue within a year of filing, unless the company can prove by clear and convincing evidence that the change was not for purposes of manufacturing venue.[91]

The Bill references many policy concerns including unfairness to junior claimants; uneven development and concentration of case law, in particular venues antithetical to the laboratory of ideas; and the public's lack of confidence in the fairness of the bankruptcy system.[92] Ultimately, the Bill cited congressional findings that the current system "prevents small businesses, employees, retirees, creditors, and other important stakeholders from fully participating in bankruptcy cases that have tremendous impacts on their lives, communities, and local economies."[93]

Although the Bill purports to accomplish all the above policy objectives, it does so at the expense of the benefits of a flexible venue statute. Whether the Bill would actually achieve its policy objectives is unclear. If junior claimants are being treated unfairly in a bankruptcy case, the location is an ancillary factor. There is no guarantee that a debtor's headquarters will be the primary location of their tort claimants, employees, pensioners, or mom-and-pop creditors. If the public has a lack of confidence in the fairness of the bankruptcy system, forcing debtors to file in more diverse locations will not address the underlying judicial decision-making which raised those unfairness concerns. Frankly, the fact that judges in another venue may make different legal determinations is not going to alter the fact that judges in the SDNY or Delaware will continue making legal determinations in line with their previous decisions. If those decisions are "wrong," the new Bill does nothing to correct them. Savvy debtors will continue to find ways to drag cases to Delaware and New York. The Bill's limitations on manufacturing venue[94] have a built-in loophole; there is nothing to stop companies from changing the addresses of their principal executive office to New York or Delaware in advance of the annual report.

However, even if the Bill's restrictive measures are effective, they create obvious complications for the efficient administration of bankruptcy filings. Creditor convenience is not served by forcing the debtor to file in one or two locations. Bankruptcy filing is part of an ongoing negotiation and

91. *Id.*
92. *Id.* § 2.
93. *Id.*
94. *See id.* § 3.

relationship.[95] Where to file is part of that negotiation.[96] Removing the possibility to file in an agreed upon venue needlessly increases inconvenience and costs without any countervailing benefit. It is speculative that junior claimants in a small range of cases will actually benefit from having the bankruptcy case heard in their venue. Ultimately, the Bill risks throwing the baby out with the bathwater by limiting the flexibility of a debtor's venue selection, leaving a venue workaround for savvy counsel, and imposing new restrictions that do little for creditors and junior claimants.

A debtor selecting a venue that is more efficient[97] is not a flaw in the system. Efficiency is a net benefit to all parties involved in the case. Courts that have adopted procedures responsive to the complex demands of Chapter 11 cases are popular for good reason.[98] Other jurisdictions that have not dealt with complex Chapter 11 filings appear to be less predictable and efficient.[99] An ideal system would cultivate predictability and efficiency.[100] The current venue statute, even with its flaws, has developed efficient courts experienced in Chapter 11 filings.[101] Viewing bankruptcy through an adversarial lens obscures the fact that both creditors and debtors alike benefit from certain facets of a flexible venue statute. Allowing debtors to file in venues that are the most efficient benefits the system as a whole,[102] and the Bill eliminates this possibility.[103]

Importantly, the Bill does not address judicial decision-making, which has been a significant concern of the venue statute's opponents.[104] The public perception of the bankruptcy system as being unfair comes from a couple of key, highly publicized, unpopular decisions.[105] Yet the Bill fails to

95. *See* Block-Lieb, *supra* note 77.

96. *See id.*

97. Skeel, *Bankruptcy Judges*, *supra* note 31, at 28.

98. *See id.*

99. *See* Elias, *supra* note 31, at 145–46.

100. *Cf.* Eisenberg & LoPucki, *supra* note 21, at 1003 (noting that because filers seem to be avoiding specific jurisdictions, forum shopping would continue even if venue was limited to exclude the state of incorporation); Cole, *supra* note 31, at 1859–60 (observing that predictability and speed are the two most important factors cited by attorneys in support of their decision to file in Delaware).

101. Skeel, *Bankruptcy Judges*, *supra* note 31, at 28.

102. *See id.*

103. *See* Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong., § 3 (2021).

104. *See id.*

105. *See, e.g.*, Ryan Hampton, *What Americans Don't Know About the Purdue*

meaningfully address these judicial decisions or the possibility for similar decisions in its efforts at reform.[106] If those decisions were "wrong," the Bill leaves them untouched.

Since judicial decision-making is at the heart of many of the fairness concerns, this Note advocates a different mechanism to address the problem. By applying and magnifying procedural safeguards in the Code, Congress could allow for the benefits of a flexible venue statute and curtail instances where the debtor's venue selection is a source of unfairness.[107]

II. THE INTERSECTION OF ABSTENTION AND VENUE

Statutory abstention in the Bankruptcy Code allows judges to abstain from hearing a case or adversary proceeding.[108] Similarly, the venue transfer statute gives judges the discretion to transfer venue for the convenience of the parties or in the interest of justice.[109] These two Code provisions provide a discretionary mechanism which some judges have used to respond to forum shopping. This Part describes how sections 1334 and 1412 function in practice, as well as times where judges have used them to address perceived unfairness due to forum shopping.

A. *Section 1334 Basics*

Section 1334 defines the subject-matter jurisdiction of bankruptcy courts, including the times that bankruptcy courts must abstain or may permissively abstain from hearing a case.[110] This section provides that "district courts shall have original and exclusive jurisdiction of all bankruptcy cases."[111] Section 1334 jurisdiction covers all civil proceedings arising under Title 11, or arising in or related to cases under Title 11.[112] The Code places nearly all debtor property into the bankruptcy

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Pharma Bankruptcy Hurts All of Us, TIME (Oct. 6, 2021, 12:45 PM), https://time.com/6104495/purdue-pharma-bankruptcy-victims/ [https://perma.cc/YY7F-EZ2R].

106. *See* Bankruptcy Venue Reform Act of 2021, S. 2827, 117th Cong., § 3 (2021).

107. *See infra* Part III.

108. 28 U.S.C. § 1334.

109. 28 U.S.C. § 1412.

110. *See* 28 U.S.C. § 1334(c).

111. § 1334(a).

112. § 1334(b) Often, these "arising in" or "related to" proceedings rely only on state law for their resolution. Block-Lieb, *supra* note 41, at 785. This "arising in" and "related to" jurisdiction is considered supplemental jurisdiction because it handles issues supplemental to the core bankruptcy case. *Id.* It differs from diversity jurisdiction and ordinary federal question jurisdiction because bankruptcy jurisdiction only reaches matters related to the bankruptcy case. *Id.*

estate[113] and provides an expansive definition of claims against the estate.[114] This expansive definition means that mass tort litigation and other cases against the estate are affected by the Code's automatic stay barring creditor collection.[115] Consequently, bankruptcy judges may properly hear these claims and enjoin further litigation in other forums.[116]

Section 1334 contains both a mandatory abstention provision and a permissive abstention provision.[117] The mandatory provision under section 1334(c)(2) provides that the court shall abstain from hearing a proceeding on timely motion when that cause of action is based on state law, and related to but not arising under Title 11 such that it could not have been brought in federal court except for the bankruptcy.[118] Courts have generally interpreted the statute to contain four elements for mandatory abstention.[119] In contrast, permissive abstention in the bankruptcy context has its roots in common law abstention doctrine with a few bankruptcy specific requirements.[120] The main differences between mandatory and permissive abstention in section 1334 are that mandatory abstention (1) has rigid requirements,[121] (2) must be brought on motion by a party,[122] and (3) is appealable.[123] Permissive abstention, on the other hand, is (1) not strictly limited to a set of requirements,[124] (2) is raised sua sponte by the court,[125] and (3) is not appealable.[126]

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113. 11 U.S.C. § 541(a).

114. 11 U.S.C. § 502.

115. *See* 11 U.S.C. §§ 362, 502.

116. 11 U.S.C. § 105; 28 U.S.C. § 1334(b).

117. 28 U.S.C. § 1334(c).

118. § 1334(c)(2).

119. *In re* Rupp & Bowman Co., 109 F.3d 237, 239 (5th Cir. 1997) ("Accordingly, under this statute, courts must abstain from hearing a state law claim if the following requirements are met: (1) The claim has no independent basis for federal jurisdiction, other than § 1334(b); (2) the claim is a non-core proceeding, i.e., it is related to a case under title 11 but does not arise under or in a case under title 11; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court.").

120. *See* Block-Lieb, *supra* note 41, at 826, 836; Ryan M. Murphy, *Permissive Abstention in Bankruptcy*, 2011 NORTON'S ANN. SURV. BANKR. L. (2011).

121. *See In re Rupp & Bowman Co.*, 109 F.3d at 239.

122. 28 U.S.C. § 1334(c)(2).

123. § 1334(d).

124. *See* § 1334(c)(1).

125. Gober v. Terra + Corp. *(In re* Gober), 100 F.3d 1195, 1207 n.10 (5th Cir. 1996) (noting that permissive abstention under 28 U.S.C. § 1334(c)(1) may be raised sua sponte by the court).

126. 28 U.S.C. § 1334(d).

In section 1334(c)(1), judges may permissively abstain from hearing any proceeding in the interest of justice or in the interest of comity with state courts or respect for state law.[127] Circuits had interpreted this provision differently[128] before the statute was revised to preclude appellate review of (c)(1) permissive abstention.[129] Outside of the bankruptcy context, abstention is a limited doctrine designed to address state comity concerns.[130] A federal court can commit reversible error by abstaining merely in the interest of justice without underlying comity concerns,[131] but at least one circuit has upheld permissive abstention simply for the interest of justice in a bankruptcy case.[132] At the adoption of section 1334, it was unclear whether Congress intended to overturn common law abstention doctrines or whether Congress intended to codify them.[133] This explains many of the varying circuit interpretations.

In the context of forum shopping, section 1334 permissive abstention may be a useful tool. Several circuits have already condoned the use of section 1334 to abstain in forum shopping cases with state comity concerns.[134] A revision of section 1334 which explicitly removes a state comity requirement would open the doors to a broader conception of the phrase "interest of justice." Since forum shopping is already a factor that many circuits use in weighing whether the district court abused its discretion,[135] codifying forum shopping in section 1334 as a freestanding element is not a dramatic change. Although state comity concerns are still an important animating force behind

127. § 1334(c)(1).

128. *Compare* Asbestosis Claimants. v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150, 1152–53 (8th Cir. 1992) (holding that abstention on interest of justice grounds is not just limited to state-law cases) *with In re* Pan Am. Corp., 950 F.2d 839, 847 (2d Cir. 1991) (rejecting permissive abstention for cases concerning federal preemption).

129. 28 U.S.C. § 1334(d).

130. Block-Lieb, *supra* note 41, at 782.

131. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 362 (1989) (declining to find that *Burford* abstention was warranted when electric utility brought action in federal district court seeking injunctive and declaratory relief).

132. *See In re* Apex Oil Co., 980 F.2d at 1152–53.

133. Block-Lieb, *supra* note 41, at 783.

134. *See, e.g.*, *In re* L & S Indus., Inc., 989 F.2d 929, 935 (7th Cir. 1993) (noting that a state law issue combined with a finding of plaintiff forum shopping is a "significant consideration" in deciding whether permissive abstention is warranted).

135. *In re* Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990) (setting forth a twelve-factor test for discretionary bankruptcy abstention) (citing *In re* Republic Reader's Serv., Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

abstention doctrine, in the bankruptcy context, an "interest of justice" analysis could be used to combat Chapter 11 forum shopping while still preserving the virtues of a flexible venue statute.

A more detailed discussion of section 1334 revision follows in Part III. For now, it helps to understand the various applications of section 1334 permissive abstention across circuits.

B. *1334 Abstention and Forum Shopping*

A court of appeals' interpretation of section 1334—as either codifying common law abstention doctrines or overthrowing them—determines whether the section is currently available to address forum shopping in a given circuit. Some circuits consider section 1334 a codification of judicially created abstention doctrines, which carry their own restrictions on when a judge may properly abstain from hearing a case. The Second Circuit[136] and the Seventh Circuit[137] have explicitly held section 1334 as mere codification, and those cases have been cited approvingly by various bankruptcy and district court judges.[138] Under that formulation, a bankruptcy judge may not permissibly abstain *unless* there is a state law or state comity concern inherent in the proceeding.[139] Therefore, a bankruptcy judge would not be able to abstain from hearing a proceeding based predominantly on federal law involving forum shopping.

However, there is a growing trend to embrace the reasoning in the Eighth Circuit's *In re Apex Oil Co.*[140] In that case, the Eighth Circuit held that a plain reading of section 1334 does not require state law or comity concerns to permissibly abstain.[141] As the statute specifically says "in the interest of justice or in the interests of comity,"[142] applying judicially-created abstention doctrines requiring state comity concerns cuts against the express language of the statute.[143] Other circuits have agreed with the Eighth Circuit's interpretation by

136. *In re* Pan Am. Corp., 950 F.2d 839, 845 (2d Cir. 1991).

137. *In re* United States Brass Corp., 110 F.3d 1261, 1268 (7th Cir. 1997) (citing *In re* Pan Am. Corp., 950 F.2d 839 (2d Cir. 1991)).

138. *See, e.g.*, Lindsey v. Dow Chem. Corp. *(In re* Dow Corning Corp.), 113 F.3d 565, 571 (6th Cir. 1997) (citing *In re* Pan Am. Corp. with approval).

139. *See In re* Pan Am. Corp., 950 F.2d at 846.

140. *See* Asbestosis Claimants v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150, 1152–53 (8th Cir. 1992).

141. *Id.*

142. 28 U.S.C. § 1334(c)(1).

143. *In re* Apex Oil Co., 980 F.2d at 1152–53.

creating their own tests for when a judge may permissively abstain in a bankruptcy proceeding.[144] The Ninth Circuit's formulation is the most common and includes twelve factors.[145] One factor is "the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties."[146] Numerous district courts outside of the Eighth and Ninth Circuits have adopted the factor test, as well as the Eighth Circuit's contention that state comity is not a necessary factor.[147]

At the same time, it seems that many permissive abstention cases involve some form of state law claim. The Ninth Circuit's factor test contains at least three factors which highlight state law concerns,[148] but it is theoretically possible to pass the factor test without any state law issues. Interestingly, courts applying the factor test tend to highlight certain factors over others as the basis for their decision to abstain.[149] State law factors still predominate, but courts have emphasized factors which speak to the broader "interest of justice" part of the statute.[150] Courts are concerned with efficiency and the access of non-debtor parties to a jury trial.[151] When a litigant appears to be forum shopping—even amid state law concerns—courts tend to highlight that fact.[152] The broad reach of the phrase "interest of

144. *See In re* Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990).

145. *Id.* Multiple courts have adopted the same or materially similar factors. *See, e.g.*, *In re* Loewen Group Intern., Inc., 344 B.R. 727, 730–31 (Bankr. D. Del. 2006); Block-Lieb, *supra* note 41, at 816 & n.170 (identifying the *In re Tucson Estates, Inc.* factor test as the "most influential").

146. *In re* Tucson Estates, Inc., 912 F.2d at 1167.

147. *See, e.g.*, *In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993) (applying *In re Tucson Estates* and stating that "[c]ourts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative."); *In re* L & S Indus., Inc., 989 F.2d 929, 935 (7th Cir. 1993) (citing *In re Tucson Estates* with approval).

148. *In re* Tucson Estates, Inc., 912 F.2d at 1167.

149. Stabler v. Beyers (*In re* Stabler), 418 B.R. 764, 770 (8th Cir. BAP 2009) ("Of the factors weighing in favor of abstention, the tenth factor—the likelihood one of the parties is forum shopping—deserves particular note because of how apparent and egregious it is that the Debtors were forum shopping."); New Eng. Power and Marine, Inc. v. Tyngsborough (*In re* Middlesex Power Equip. & Marine, Inc.), 292 F.3d 61, 69 (1st Cir. 2002) ("The bankruptcy court also sagely commented on 'avoidance of forum shopping' as a reason to defer to the Land Court.").

150. Chamberlain Group, Inc. v. Lear Corp. (*In re* Lear Corp.), 2009 WL 3191369 at *3 (Bankr. S.D.N.Y. 2009).

151. *See In re* Stabler, 418 B.R. at 769–70.

152. *See, e.g.*, *id.* at 770.

justice" gives courts the flexibility to abstain for many more reasons than state comity.

C. *Abstention Under Related Statutes and Forum Shopping*

There are two other abstention-related statutes worth mentioning: sections 305[153] and 1412.[154] These statutes can also be revised to better address forum shopping concerns caused by the liberal venue statute.

Section 305 allows the bankruptcy court to completely dismiss a case under Title 11 at any time if "the interests of creditors and the debtor would be better served by such dismissal or suspension."[155] Like the permissive abstention provision in section 1334, section 305 is not appealable[156] and can be raised sua sponte by the court.[157] Because section 305 allows abstention from the entire bankruptcy case and is not appealable, it has been used sparingly by courts.[158] One situation where section 305 has been used to abstain is when another forum is available to determine the party's interests and an action has started.[159] Generally, this other forum has played a continuous role in the receivership process or the adjudication of major claims under other controlling statutes, like the Fair Labor Standards Act.[160] At the very least, section 305 is focused on the best interests of the debtor and creditors[161] and could be revised to address more specific forum shopping concerns.

Section 1412 is the venue transfer statute that allows a court to transfer a case or proceeding to another district "in the interest of justice or for the convenience of the parties."[162] Transfer of venue is discretionary, and the moving party must establish its burden by preponderance of the evidence.[163] Note the same phrase "interest of justice" is used in section 1412 and

153. 11 U.S.C. § 305.

154. 28 U.S.C. § 1412.

155. 11 U.S.C. § 305(a)(1).

156. § 305(c).

157. *See In re* O'Neil Vill. Pers. Care Corp, 88 B.R. 76, 80 (Bankr. W.D. Penn. 1988).

158. *Id.* ("As § 305(c) provides that an Order under this section is not reviewable by appeal or otherwise, courts generally, and this Court specifically, only grant this type [of] relief in an egregious situation.").

159. *In re* Onyx Recs., 42 B.R. 156, 157 (Bankr. S.D.N.Y. 1984).

160. 29 U.S.C. § 203; *see In re* Onyx Recs., 42 B.R. at 157.

161. *See* 11 U.S.C. § 305(a)(1).

162. 28 U.S.C. § 1412.

163. *In re* Whilden, 67 B.R. 40, 42 (Bankr. M.D. Fla. 1986).

section 1334(c)(1) permissive abstention.[164] The phrase's flexibility allows judges in both contexts to craft fact-specific solutions.

The interplay between the general venue statute in Title 11, the venue transfer statute, and the bankruptcy rules can create surprising results. Just like the broad, discretionary powers granted in the permissive abstention statute section 1334, courts have wide latitude in deciding whether transfer is appropriate, even holding onto a case where venue may not be proper. If no motion to transfer is presented, the bankruptcy court does not need to take action and may retain the case even if venue does not appear proper.[165] Further, "[I]t can also be argued that . . . venue need not be proper in the transferee district, and the transferee court may retain the case if no further motion is filed."[166] Although retention by the Bankruptcy Court is not specifically authorized after it has been determined that venue is improper, neither is retention specifically prohibited.[167] Therefore, the venue transfer statute mirrors the largely discretionary grant of power in the permissive abstention statute.[168]

Just as with section 1334, courts have used the venue transfer statute to address forum shopping concerns. A consideration of the "convenience of the parties" prong of section 1412 generally includes (1) the proximity of all creditors to the court, (2) the proximity of the debtor to the court, (3) the proximity of witnesses, (4) the location of assets, (5) the economic administration of the estate, and (6) the necessity for ancillary administration.[169] Even if none of these factors specifically address forum shopping, they seem to address some of the concerns surrounding forum shopping such as disadvantage to far-off creditors.

Further, under section 1412, a judge may still transfer venue in "the interest of justice."[170] Interestingly, one of the bankruptcy judges with the most infamous track record for attracting forum-shopped cases[171] transferred venue for this

164. 28 U.S.C. § 1412; 28 U.S.C. § 1334(c)(1).

165. *In re* Cap. Hotel Grp., 206 B.R. 190, 193 (Bankr. E.D. Mo. 1997).

166. *Id.*

167. *Id.*

168. This example also illustrates the power that parties have over where their case is heard in bankruptcy. If the creditors and the debtor accept venue—even improper venue—the court is not required to act.

169. *In re* Baltimore Food Sys., Inc., 71 B.R. 795, 802 (Bankr. D.S.C. 1986).

170. 28 U.S.C. § 1412.

171. *E.g.*, Levitin, *supra* note 13.

reason. Judge Robert Drain, the same judge in the Purdue Pharma case,[172] transferred Winn–Dixie's bankruptcy from the SDNY to the Middle District of Florida, despite finding that venue was proper and the convenience of most major parties—debtor and creditors—would be served by administration in New York.[173] On the eve of bankruptcy, Winn–Dixie created a subsidiary in New York, which allowed the company to properly file in the Southern District.[174] That subsidiary had been created only twelve days before the bankruptcy filing,[175] and the debtor stipulated that the subsidiary was created solely to establish venue and had "no economic substance" or "separate and valid reason for existing."[176] Judge Drain acknowledged that the text of the venue statute technically allowed the debtor to manufacture venue in this way, but that he personally felt this loophole should be closed in the interest of justice by a transfer of venue.[177]

His Winn–Dixie opinion has spawned several similar opinions in the SDNY and the District of Delaware.[178] Judge Shelley Chapman of the United States Bankruptcy Court for the SDNY relied heavily on Judge Drain's reasoning when she transferred Patriot Coal Corporation's Chapter 11 case to the Eastern District of Missouri.[179] Patriot Coal Corporation and its affiliates are one of America's largest companies, headquartered in Missouri, employing over 4,000 people and insuring 11,860 retirees.[180] Shortly after Patriot Coal filed in New York, several surety insurance companies and the West

172. *Id.*

173. *See In re* Winn–Dixie Stores, Inc., No. 05–11063, slip op. at 2 (Bankr. S.D.N.Y. Apr. 13, 2005); Transcript of 4/12/05 Proceedings, at 158, 165–69, *In re* Winn–Dixie Stores, Inc., No. 3:05-bk-03817 (Bankr. M.D. Fla., Feb. 22, 2005), ECF No. 865 [hereinafter *Winn–Dixie* Transcript].

174. Motion of Buffalo Rock Company to Transfer Venue of the Debtors' Bankruptcy Cases to the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division or Such Other District Where Venue Would Be Appropriate Under 28 U.S.C. § 1408 at 2, *In re* Winn–Dixie Stores, Inc., No. 05–11063 (Bankr. S.D.N.Y. Apr. 13, 2005).

175. *Id.*

176. *Winn–Dixie* Transcript, *supra* note 173, at 168–69.

177. *Id.* at 166–67 ("[I]t is [not] an unacceptable judicial intrusion . . . to find that the interests of justice require transfer here and to close a loophole in the statute that would otherwise, according to the statute's plain terms, permit venue to be properly established here on the eve of filing.").

178. *See, e.g.*, *In re* Houghton Mifflin Harcourt Publ'g Co., 474 B.R. 122, 124 (Bankr. S.D.N.Y. 2012) (transferring venue because none of the debtors were incorporated in New York and their principal assets were located elsewhere).

179. *See In re* Patriot Coal Corp., 482 B.R. at 745 (Chapman, J.).

180. *Id.* at 730, 734.

Virginia Attorney General moved to transfer venue to West Virginia.[181] The U.S. Trustee also moved to transfer venue without specifying a particular location.[182]

Ultimately, Judge Chapman took issue with Patriot Coal creating a subsidiary on the eve of bankruptcy to establish venue in New York.[183] The court found that allowing the debtors' venue choice to stand solely on the creation of the New York subsidiaries would "elevate form over substance in [a] way that would be an affront to the purpose of the bankruptcy venue statute and the integrity of the bankruptcy system."[184] The court was concerned that allowing this behavior would encourage and permit forum shopping in opposition to the interest of justice.[185] However, Judge Chapman ultimately refused to grant transfer to West Virginia, because it would not be "in the interest of justice merely to swap one party's perceived home field advantage for another."[186]

The court cautioned that its decision to transfer venue was not a categorical rule.[187] Rather, the conflict among creditors, the debtor, and interested parties counseled a reconsideration of the best venue.[188] The result may have been different if only one party requested a change of venue.[189] In that situation, Judge Chapman noted, it would be difficult to square the interest of justice with the "purposeful infliction of economic harm on a debtor's creditors."[190]

More recently, Judge Craig Whitley (quoted in the introduction) relied on Judge Chapman's Patriot Coal opinion to reject Johnson & Johnson's subsidiary's attempt to manufacture venue in North Carolina.[191] Johnson & Johnson used a relatively new technique called "the Texas Two-Step"[192]

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181. *Id.* at 722–23.
182. *Id.* at 723.
183. *Id.* at 743.
184. *Id.* at 744.
185. *See id.*
186. *Id.* at 750, 753.
187. *Id.* at 748.
188. *See id.*
189. *Id.*
190. *Id.*
191. *In re* LTL Mgmt. LLC, No. 21-30589, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021).
192. *The Third Circuit Rejects Texas Two-Step Bankruptcy Strategy: A Funding Agreement with Affiliates Made the Debtor Too Financially Sound To Seek Bankruptcy Relief*, BAKER BOTTS (Feb. 13, 2023), https://www.bakerbotts.com/thought-leadership/publications/2023/february/the-third-circuit-rejects-texas-two-

to shift all liability for talc-related injury claims to a subsidiary.[193] The debtor was formed as a limited liability company in Texas which assumed responsibility for all talc-related tort claims.[194] This company then converted to a North Carolina limited liability company.[195] Two days after that conversion, the company filed bankruptcy in North Carolina.[196] The debtor had no operations in the state, and the debtor's assets were "all created to effectuate a bankruptcy filing and have no other business purpose."[197] Judge Whitley granted a motion to transfer venue to New Jersey where the multidistrict litigation of Johnson & Johnson talc claims was headquartered.[198] The court reasoned that "the purposeful creation of venue, although not dispositive by itself, must be considered in the interest of justice analysis."[199]

The debtor presented the novel argument that venue should lie in North Carolina because this court was the only court with experience handling Texas Two-Step cases.[200] Therefore, leaving the case in North Carolina better served the interest of justice. Judge Whitley was not convinced.[201] He observed that all four of the pending Texas Two-Step cases had a similar set of facts: "[A] corporation with substantial asbestos liability hired the law firm of Jones Day, the corporation used the 'Texas Two Step' to create a North Carolina entity with limited assets and all or most of its predecessors' asbestos liability, and [then] the North Carolina entity filed for bankruptcy in this district . . . ."[202] This degree of gamesmanship led the court to conclude that venue, although legally obtained, was not appropriate in North Carolina.[203]

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step-bankruptcy-strategy [https://perma.cc/R4GR-G6UT] ("The Texas Business and Organizations Code allows an entity to divide into two or more new entities, vesting the predecessor's assets and valuable business segments in one entity and the predecessor's liabilities in the other. . . . Companies with mass tort liability have utilized the Texas Two-Step as a mechanism to isolate and seek to resolve globally mass tort claims under a chapter 11 plan without exposing valuable business segments or the entire corporate enterprise to a bankruptcy proceeding.").

193. *See In re LTL Mgmt. LLC*, 2021 WL 5343945, at *1.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at *6.
198. *Id.* at *1, *7.
199. *Id.* at *6.
200. *Id.*
201. *See id.* at *7.
202. *Id.* at *6.
203. *See id.*

These cases follow a trend of bankruptcy courts scrutinizing "manufactured" venue on the eve of bankruptcy.[204] This may be in part because of the heightened attention brought on by the venue/forum shopping debate.[205] However, it indicates that even judges and districts with reputations for attracting forum-shopped cases draw the line somewhere and that the Code affords them the tools to draw that line even within a flexible venue statute.

III. REVISING ABSTENTION STATUTES TO ADDRESS UNFAIRNESS IN VENUE SELECTION

There are a few ways to amend the abstention and transfer statutes explored above to address forum shopping concerns. Many of the abstention statutes are extremely flexible and provide judges with broad discretion on when to abstain.[206] In general, this is a good trait for an abstention statute. Yet when flexible abstention statutes combine with flexible venue statutes, the Code may give judges too much discretion in an area where more rigidity could promote consistent decision-making and reduce unfair forum shopping.

This debate, perhaps unintentionally, has often characterized judges and districts as complicit in debtor forum shopping abuses.[207] However, judges have used the current statutes to abstain from hearing cases brought by unfair forum shopping, even when that shopping may be allowed under the current venue statute.[208] Although not all judges think uniformly on this issue, some judicial opinions exhibit creative solutions which could inspire positive change to the Code. Previous cases show what issues commonly arise in forum shopping cases and how judges have narrowed in on significant factors to make abstention and transfer decisions. Instead of restricting venue itself, the Code should be amended to reflect the combined experience of bankruptcy judges across districts

204. *See, e.g.*, *In re* Houghton Mifflin Harcourt Publ'g Co., 474 B.R. 122, 124, 126–27 (Bankr. S.D.N.Y. 2012) (transferring venue because none of the debtors were incorporated in New York and their principal assets were located elsewhere); *see also* Gulf States Expl. Co. v. Manville Forest Prods. Corp. (*In re* Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d. Cir. 1999) ("The 'interest of justice' component of § 1412 is a broad and flexible standard which must be applied on a case-by-case basis.").

205. *See* Levitin, *supra* note 13, at 1080.

206. *See supra* Part II.

207. *Cf, e.g.*, LoPucki, *supra* note 26, at 333–34 (detailing how judges were pressured to accommodate big law firms).

208. *See supra* Part II.C.

as they balance flexible venue with unfair gamesmanship.

This Note proposes three changes which could be implemented in combination or on an individual basis to reduce unfair forum shopping in Chapter 11 cases.

A. *Direct Codification of Forum Shopping in Section 1334*

First, codifying some of the factors found in the cases interpreting section 1334 would provide a means to reduce forum shopping by clearly signaling to judges what the congressional prerogatives for abstention are. The broad phrase "in the interest of justice" has been used creatively in both the section 1334 context and the venue transfer context.[209] The beauty of the phrase is that it allows judges flexibility to look at the individual circumstances of their cases and abstain when appropriate. Given the broadness of the phrase, Congress likely intended to allow this flexibility. An amendment to section 1334 should not take away this freedom.

Congress could append a list of things which implicate the "in the interest of justice" phrase. The factors developed by the Ninth Circuit are a useful place to start, especially since one of them is the likelihood that parties are forum shopping.[210] The amended statute might read:

> [] nothing in this section prevents a district court in the interest of justice, such as in the interests of preventing unfair forum shopping or last-minute venue qualification . . . from abstaining from a hearing . . .

This amendment still provides broad discretion to judges. However, the updated statute gives a clear signal for the kind of thing that Congress wants a judge to consider. This guidance has been missing from the Code.

209. *See, e.g.*, *In re* Manville Forest Prod. Corp., 896 F.2d at 1391.

210. *In re* Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990).

B. *Requirement Considering Eve of Bankruptcy Filings and Number of Transfer Motions*

Second, the Code should be revised to include venue "time" considerations and "majority or number" of venue challenges. Flexible abstention statutes and flexible venue statutes respond to flexible facts across cases. However, a survey of cases indicates that there are a few venue manipulations which regularly cross the line and a few party responses which tend to persuade a judge that transferring venue is in the interest of justice.[211] Codifying these factors into the venue transfer statute would guarantee basic protections of fairness against the whim of any individual judge.

The first factor addresses "manufactured" venue. In both Patriot Coal and Winn–Dixie, those courts found that venue created on the eve of bankruptcy was unfair and not in the interest of justice even if generally allowed under the venue statute.[212] Congress could modify section 1412 to include consideration of the time in which a subsidiary properly had venue in the district. The amended statute might read:

> When considering a venue transfer in the interest of justice, the court should look to the time period in which venue was established. If that time period is unreasonably short, there is a rebuttable presumption that keeping the case in the original venue is not in the interest of justice.

This is different from altering the venue statute itself because this alteration still allows leeway for the individual circumstances of Chapter 11 cases. There may be some circumstance where venue is proper, such as venue created in the last twelve days, and the case should remain where it is. This revision recognizes that circumstance, while also recognizing that it would be a rare circumstance.

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211. *See In re* Patriot Coal Corp., 482 B.R. 718, 744 (Bankr. S.D.N.Y. 2012); *In re* Winn–Dixie Stores, Inc., No. 05–11063, slip op. at 2 (Bankr. S.D.N.Y. Apr. 13, 2005); *In re* Tucson Estates, Inc., 912 F.2d at 1167.

212. *In re* Patriot Coal Corp., 482 B.R. at 744; *Winn–Dixie* Transcript, *supra* note 173, at 166–67.

The second factor addresses the cumulative effect of transfer motions. In reality, a successful transfer motion is often accompanied by additional transfer motions from other interested parties. The Code could protect against rogue decision-makers by adding this factor into a judge's consideration of transfer. The amended statute might read:

> The filing of transfer motions by the majority of interested parties creates a rebuttable presumption that keeping the case in the original venue is not in the interest of justice.

This revision still places the lion's share of responsibility on the moving parties, but it forces the judge (and the debtor) to consider this factor when making venue choices.

The suggested revisions to sections 1334 and 1412 can be passed in conjunction or separately. Neither purport to be a comprehensive solution but are merely attempts to erect clearer procedural safeguards against egregious forum shopping. Judges are likely to heed clearer guidelines in the Code, especially when judges have already used the loose parameters of abstention to avoid similar instances of unfair gamesmanship.

C. *Allowing Appeals for Decisions Under Sections 1334 and 1412*

Third, Congress should create an exception to section 1334 and section 1412 limits on appeal. Right now, parties may not appeal venue transfer decisions or permissive abstention.[213] The language of the suggested changes is intentionally discretionary because of the limited opportunity for appeals of venue transfer or abstention. The changes could be made most effective if Congress allowed some form of appellate review for decisions under section 1334 and section 1412. This would likely address the concerns of opponents of broad judicial discretion, because that judicial discretion would be limited by clearer congressional prerogatives in the Code and further review on appeal.

213. 28 U.S.C. §§ 1412; 1334(d).

CONCLUSION

Bankruptcy judges are not unresponsive to concerns about unfair forum shopping. Instead, judges have used the flexible phrase "in the interest of justice" to balance the debtor's venue selection with the welfare of junior claimants. Statutory revision would ensure that bankruptcy judges across the country are making consistent, fair decisions. However, even without any changes to the Code, this trend in recent cases creates reason for hope. Judges are already using procedural safeguards in the Code to give all parties a seat at the negotiating table.