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REPORT ON LEGISLATION BY THE
BANKRUPTCY AND CORPORATE REORGANIZATION COMMITTEE

S.2282 **Sen. Cornyn**
Sen. Warren

A bill to amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

The Bankruptcy Venue Reform Act of 2018

THIS BILL IS OPPOSED

On January 8, 2018, Senator John Cornyn introduced and Senator Elizabeth Warren co-sponsored Senate bill S. 2282, the Bankruptcy Venue Reform Act of 2018 (the "Venue Bill"), which would amend 28 U.S.C. § 1408 to alter the existing criteria for determining proper venue for bankruptcy cases. The Venue Bill represents a radical departure from longstanding practice. Exactly contrary to its purpose, by dramatically restricting the ability of corporate debtors to select the forum they determine is best for their ability to successfully reorganize, the Venue Bill would seriously impair corporate debtors' ability to maximize their creditors' recoveries and advance the interests of their employees, vendors, suppliers and the various communities in which they operate – who frequently are far from a debtor's or its parent company's principal place of business or principal assets.

We write on behalf of the Committee on Bankruptcy and Corporate Reorganization of the New York City Bar Association (the "Committee")[1] to register our strong opposition to passage of the Venue Bill.[2]

Our committee is largely comprised of lawyers and other professionals who practice regularly in courts throughout the country – not just courts in New York. In addition, members of

[1] The Committee includes current members of the judiciary. Such members have abstained from supporting the views set forth in this letter and do not express any views with respect to the Venue Bill.

[2] Efforts to modify the business bankruptcy venue rules date back to at least 1996. Most recently, in 2011, Representative Smith introduced H.R. 2533, a bill similar to the Venue Bill and which failed to emerge from the House Judiciary Subcommittee to which it was referred. The Committee has previously written letters to lawmakers, in 2005 and 2011, in opposition to such efforts, which letters are available online at https://www2.nycbar.org/pdf/report/uploads/20072171-LettertoCongressregardingamendmentsto28U.S.C.1408.pdf and http://www.nycbar.org/pdf/report/Bankruptcy_Venue_Bill.pdf.

our committee from the investment community regularly invest in companies that file for bankruptcy and make such investments, in part, because of the flexibility afforded to corporate debtors to choose a venue that will help maximize value for all stakeholders. Our committee's interest is the well-being and efficient functioning of the bankruptcy system as a whole, and not protecting only local interests. We, like the sponsors of the Venue Bill, share the goal of protecting rank-and-file employees during a business bankruptcy case. Our members represent both debtors and creditors (including employees) in business bankruptcy cases and have been involved in some of the nation's larger chapter 11 cases – not just in New York, but across the country as well. It is on the basis of this experience that we oppose the Venue Bill.

The amendments set forth in the Venue Bill would strip away a corporation's right to seek bankruptcy protection in the jurisdiction that best protects its enterprise value. That would penalize every stakeholder in a bankruptcy case – most significantly, the debtors' creditors (who are often small trade creditors) and rank-and-file employees. By focusing on only limited aspects of a debtor's corporate presence – its "principal" place of business and locale of its "principal" assets – the Venue Bill ignores the fact that many corporate debtors have operations in many places around the country, and their creditors and workers are spread across the country as well and often worldwide. And worst of all, the Venue Bill would subject debtors (and thus their creditors, employees and others the bankruptcy courts are obligated to protect) to potentially very unfavorable law in the jurisdiction where the limited aspects of their corporate presence require them to file.

Moreover, the Venue Bill assumes that existing venue rules prevent employees, small businesses, retirees and other parties from "fully participating in bankruptcy cases." That argument rests on a myth. Existing bankruptcy rules and practices safeguard such parties from undue prejudice in numerous ways. First and foremost, existing rules permit transfer of venue, for either the convenience of parties or in the interests of justice. Second, interested parties have greater bankruptcy court access today than when the venue rules were originally adopted as a result of substantial advances in technology and revised local rules of bankruptcy procedure. Telephonic appearances at court hearings and instantaneous online access to electronic court dockets are now commonplace. In addition, claims and noticing agents retained by large corporate debtors and, in some cases, an official committee of unsecured creditors often maintain case information websites that provide visitors with access to court documents free of charge and toll free, 24-hour hotlines to answer questions relating to the bankruptcy case from interested parties. Advisors to unsecured creditors committees typically make themselves available to answer questions or address concerns from parties, including those parties that are not independently represented.

This current reform effort, like prior failed attempts, is a solution in search of a problem. Indeed, the Venue Bill is predicated on the unsubstantiated belief that existing venue rules lead to abuses, improper forum shopping and the compromise of the integrity of the nation's bankruptcy judges. Any attempt to amend §§ 1408 and 1412 to restrict the venue options of business bankruptcy debtors is misguided and ill-founded. It would be detrimental to all of the parties with an interest in a company's successful reorganization, a goal at the heart of the Bankruptcy Code. Furthermore, the Venue Bill, if passed, would be considered a resounding victory for bankruptcy practitioners overseas who seek to avoid the more participatory practice in the United States in the administration of complex cross-border bankruptcy cases.

We would respectfully urge the defeat of the Venue Bill for the following reasons:

l. The Bankruptcy Code already provides for the transfer of bankruptcy cases to "another district in the interests of justice or for the convenience of the parties." 28 U.S.C. § 1412.

Supporters of the Venue Bill contend that the Venue Bill will "strengthen the integrity, build public confidence, and ensure fairness in the bankruptcy system." But those are myths. The argument fails to recognize that abuses are few to start with, and when they exist, courts do not hesitate to transfer cases when they determine that venue was initially chosen in an improper manner or that the initial forum is unduly inconvenient for the relevant parties. Indeed, the existing statute also comports with the spirit of the venue rules that apply to federal civil actions generally, which offer multiple grounds for establishing appropriate venue, *see* 28 U.S.C. § 1391, and for transfer to another venue in the appropriate circumstances, *see* 28 U.S.C. § 1404.

2. In recent years, many large and complex business bankruptcy cases have been filed in venues outside of New York and Delaware.

Some supporters of the Venue Bill contend that existing venue laws deprive bankruptcy courts outside of New York and Delaware from meaningfully developing bankruptcy law in their jurisdictions, due to the concentration of prominent business bankruptcy cases in only a few districts. This contention is at odds with a recent increase in filings of large business bankruptcies in districts other than those historically known for handling significant bankruptcy cases. In 2016, three of the five largest public company bankruptcy cases – Peabody Energy Corporation, LINN Energy, LLC and Arch Coal, Inc. – were filed in bankruptcy courts in Missouri and Texas. Similarly, the high-profile bankruptcy cases of Toys "R" Us, Alpha Natural Resources, Inc. and Gymboree Corporation were each filed in Virginia. Many of the cases filed during the recent span of distress in the oil and gas industry were filed in Texas. Where the circuit (and other applicable) law permits, debtors can and do file in districts across the country already.

3. There is no reason to believe that the jurisdiction where a corporation or its corporate parent is headquartered or holds its principal assets is more appropriate or convenient to small businesses, employees, retirees, creditors and other important stakeholders than the other alternatives provided in the existing venue statute.

Many large corporations are headquartered and have assets in more than one jurisdiction but have employees elsewhere. Most also own subsidiaries, which may hold the enterprise's most significant assets – or, more significantly, conduct their operations – in other jurisdictions. Most large corporate families are national or international in scale, and have employees and creditors across the country and/or around the globe. Without knowing where the operations – and more importantly, the people who will need to be heard in court – are, arbitrary rules dictating the place of filing will do no good, and will often make things worse. But ironically, the existing transfer rules permit attention to exactly those concerns. To that end, we would note the following:

- While a headquarters building or a significant asset like a manufacturing facility or warehouse may be in one jurisdiction, oftentimes the locus of the case and the bulk of the creditors – especially those who are most likely to need to appear in court to protect their interests – are actually located elsewhere.

- In business bankruptcy cases involving product liability, asbestos or other tort litigation, claimants are typically dispersed throughout the country, not based in the corporate debtor's home jurisdiction.

- Even where the majority of employees are in fact located in the headquarters' jurisdiction that is often scant reason for requiring a corporation to file for bankruptcy there. In most large cases, employees' rights are unaffected because of so-called "first day" relief designed to permit the uninterrupted payment of employee wages, fringe benefits and similar claims. It is rare for individual employees to have a need to appear in the proceedings. Additionally, as noted above, technological advances, such as claims agents' websites, telephonic court appearances and resources provided by advisors to creditors committees afford parties with unprecedented access to court documents and the ability to partake in the bankruptcy process, regardless of where such parties are located.

- Where employees or retirees are affected in a material way, their needs and concerns are typically handled by representatives, such as official court-appointed committees, their unions and multi-employer funds. Their representatives represent the affected employees or retirees wherever they live or might have worked – often outside of the headquarters jurisdiction. And counsel representing them will only by happenstance be based in the district where a filing would be required under the proposed venue change. The UMWA Health and Retirement Funds, for example, has used law firms located in Washington, D.C. and Philadelphia to represent its interests in cases filed in St. Louis (Arch Coal) and Virginia (Alpha Natural Resources).[3] Labor organizations will have competent counsel as appropriate for the case. The venue of the proceeding will have little effect on that decision.

- Increasingly, the parties that have a need to appear most regularly in large complex business bankruptcy cases are financial creditors and counterparties, who rarely are where a company's headquarters or principal assets are located. Predictability and consistency in the law that will govern relations with the debtor and other creditors is important to almost any creditor, and to financial creditors, that predictability and consistency is of particular importance. Uncertainty can result in higher interest rates and other costs, at the expense of the debtors and other creditors. When extending credit and engaging in other transactions critical to the health and stability of

[3] Similarly, in airline bankruptcy cases administered in New York, such as the American Airlines, Delta Air Lines, Pinnacle Airlines and Republic Airlines cases, pilots' unions were represented by law firms based in New York.

corporations, creditors hope and expect that they will find that predictability and consistency in the judicial districts with substantial precedent (where the substantive law matters) and established practices on matters where judges exercise discretion – precedents and practices that took years, if not decades, to develop. Such creditors are more comfortable in such districts not because the judges lean in their favor, but simply because they can act with knowledge of the law and practices that will be applied. The Venue Bill, if passed, would deny many companies the benefits of such courts, in favor of less experienced jurisdictions with potentially less predictable and conflicting law.

- While current venue standards based on the state of incorporation or venue of affiliate filings are subject to certainty, the Venue Bill could invite litigation regarding the location of a corporate debtor's principal assets or principal place of business.

- Finally, support for the Venue Bill rests on the mistaken assumption that large business bankruptcies are most often characterized by disputes between a corporate debtor and its employees, vendors, suppliers, retirees or other constituencies rooted in the community in which the debtor is located. To the contrary, chapter 11 bankruptcies have evolved significantly over the past few decades such that the most prominent disputes in large bankruptcy cases are most commonly *between various creditors*, typically secured and unsecured creditors, creditors holding various tranches of debt of different priority or creditors of particular debtors in multi-debtor cases. Also, the proliferation of distressed debt investing and claims trading has reduced the influence of local concerns, and rapid bankruptcies known as "prepacks" often leave trade creditors (those most likely to have a foothold in the area where the corporate debtor is located) unimpaired. Proponents of the Venue Bill disregard the reality of contemporary corporate bankruptcies by erroneously suggesting that corporate debtors "forum shop" as a means of prejudicing local employees and creditors. That is myth; not reality.

4. The limited flexibility afforded under current law in choosing venues enables corporate debtors to select forums within jurisdictions with favorable case law that is most likely to maximize enterprise value.

When considering venue, corporate debtors routinely consider the impact of the case law in the different circuits (or districts) in which they might file on their efforts to reorganize and to protect and maximize the value of the assets in their estates, focusing on the case law most likely to be relevant to the most critical issues at stake in the bankruptcy. For example, certain circuits vary drastically in case law related to debtors' ability to assume intellectual property licensing agreements on which the value of their businesses rest. And if they need to sell all or substantially all of their assets to meet their obligations to their creditors (as they did in General Motors), they know that circuits comfortable with free and clear sales will typically enable estates to get more robust bidding for their assets – directly benefiting the creditors who will be hoping for more and higher bids. Similarly, in circuits whose law permits it, vendors and other counterparties to executory contracts often are protected by the courts' approval of the assumption of their executory contracts (as they were in General Motors), allowing those vendors to be paid in full. Forcing debtors to file in districts with adverse law at the circuit level will risk the loss of millions or tens of millions of enterprise value—all to the loss of the creditors, the employees and the communities the Venue Bill is supposed to help.

5. Accusations that federal judges might issue improper rulings in order to entice or placate debtors and their professionals – apart from being unfair to our judiciary – are untrue.

It is still occasionally alleged that federal bankruptcy judges "compete" with other bankruptcy courts for major cases by ruling in favor of debtors and their attorneys in cases before them. This simply is untrue. Apart from the fact, as noted above, that large chapter 11 cases are often characterized by inter-creditor disputes and not battles between debtors and creditors, this accusation is baseless and unfair to the members of our federal judiciary, who already have an enormous amount of work to do, typically are paid significantly less than such individuals would earn in the private sector and are under intense pressure to review hundreds of pages of documents on short notice and adjudicate complex disputes in a timely manner. Bankruptcy courts are obligated to faithfully apply the Bankruptcy Code and governing bankruptcy law, which, as noted above, already provide significant safeguards to employees, labor unions, retirees and small businesses. Such safeguards cannot be revoked even were a court inclined to issue an improper ruling. The suggestion that judges would compromise the integrity of their decision-making to expand already demanding caseloads is difficult to take seriously.

6. The allegation that corporate debtors choose their venues based upon the likelihood of getting higher professionals' fees approved is unfounded.

The argument has been made in the past, and sometimes is still repeated, that bankruptcy professionals steer corporate debtors toward venues more accommodating of high professional fees. But this argument ignores the reality of the multi-variable choice that debtor's boards of directors and officers must make when considering venue. And it elevates fee concerns over the most important considerations – the need for predictability and, especially, the need to avoid circuit law that would impair the ability to maximize value. Fiduciary duties, the expressed preferences of the largest stakeholders, and other legal and factual considerations weigh heavily in the decision-making process. There are external checks against abuse as well. The Office of the United States Trustee, an arm of the Department of Justice, supervises the payment of professional fees and has established guidelines that are generally national in scope and uniform in application. Creditors have the opportunity to object to professionals' fees and many courts have *sua sponte* raised concerns with professionals over their requested fees and expenses. Moreover, in many large cases, courts appoint fee examiners or establish fee committees whose sole role is to review and, where appropriate, question professionals' fees.

In sum, there are no grounds for supporting passage of the Venue Bill and upending the longstanding and critically important flexibility embodied in the existing venue rules. The current rules already more than satisfactorily protect against abuse; they enable estates to maximize the value of their assets for distribution to their creditors (including employees), an ability that often would be forfeited if they had to file in jurisdictions with less favorable law, and are consistent with the existing Federal jurisprudence for venue in the Federal Courts for litigation involving corporate entities. The development of an extensive body of case law and experienced courts have enabled companies with complex cases to complete the bankruptcy process faster and with more predictability, thereby benefiting creditors, employees and the marketplace. The efficient administration of cases of the magnitude of General Motors, Chrysler, Lehman Brothers, MF Global, Residential Capital, Cengage Learning, Energy Future Holdings and others throw into sharp relief the benefits of orderly and efficiently handled cases that permits the preservation of enterprise value and jobs.

We would welcome the opportunity to discuss these matters further at your convenience.

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