

**SHOULD DEBBIE DO DELAWARE?
AN EXAMINATION OF BANKRUPTCY PRACTICE
IN THE DISTRICT OF DELAWARE**

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I. INTRODUCTION

In recent years the District of Delaware has received considerable attention and developed a reputation as the hotbed of corporate bankruptcy filings. This reputation has in fact spurred numerous statistical studies, ongoing debates over issues of forum shopping, and even cries for responsive measures by Congress. The implications are clear: during the career of a bankruptcy attorney, and regardless of the geographic locale of one's practice, the probability that a bankruptcy practitioner will find themselves dealing with a case venued in Delaware is significant indeed.

While most commentators agree that Delaware is a popular site for bankruptcy filings, they differ on the reasons behind this popularity, as well as whether this popularity is indicative of some systemic defect which should be addressed. Therefore, to better understand and prepare for the particulars of practicing in Delaware, this article will explore its popularity, the factors and reasons behind it, and what we can expect for the future. Along the way, we focus on the unique aspects of Delaware bankruptcy practice; the advantages, disadvantages and consequences; and those requirements and issues that every attorney should be prepared for.

II. THE BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Before delving into the substantive issues of Delaware bankruptcy practice, it is important to briefly familiarize ourselves with the Delaware Bankruptcy Court. The individual judges which sit on the Court continue to be of great significance to attorneys in deciding whether to advise clients to file in Delaware, how to manage Delaware cases, how to accurately predict rulings on various issues and how to structure arguments and pleadings so as to maximize the prospect of favorable rulings. Accordingly, following is a brief summary of the Delaware Bankruptcy Court's current judges.¹

A. Honorable Peter J. Walsh, Chief Bankruptcy Judge.

Judge Walsh was appointed to the Delaware Bankruptcy Court in 1993. Prior to his appointment, he practiced in commercial litigation and bankruptcy law for over 28 years. Recent large bankruptcies which he has or is currently presiding over include TWA, Montgomery Ward, PennCorp. Financial, and Ameriserve, among others.² He was also assigned the first of the major healthcare company filings, FPA Medical Management, in 1998.³

B. Honorable Mary F. Walrath.

Judge Walrath was appointed to the Delaware Bankruptcy Court in 1998. Judge Walrath has recently presided over the bankruptcy cases of Levitz Furniture, Worldwide Direct, and most importantly, since the FPA filing referenced above began a flood of healthcare company filings in the District of Delaware, all subsequent, large healthcare filings have been assigned to Judge Walrath. These include Vencor, Sun Healthcare, Lenox, Mariner, and Integrated Health Services. In this capacity, Judge Walrath has established a quasi-form, known as the "Lenox Payor Order", for issuing rulings on first day motions with respect to rights of recoupment and set-off in healthcare cases.⁴

¹ Attorneys who wish to explore or refer to existing Delaware Bankruptcy decisions and recent developments in various areas of the Bankruptcy Code with respect to Delaware should look to Patrick J. Charles and David P. King, *Delaware Practice Materials: A Selective Annotated Bibliography*, 89 Law Libr. J. 349 (1997), which contains citations for various manuals, treatises and practitioners' handbooks on various areas of Delaware law, including corporate and bankruptcy developments.

² One of the many useful functions of the Delaware Bankruptcy Court web site at www.deb.uscourts.gov is a listing of opinions issued by the Court's judges, grouped by date, and providing links to those opinions in viewable PDF format.

³ In re FPA Med. Management, Inc., Case No. 98-1596 (PJW). See also, William H. Sudell, Jr. and Eric D. Schwartz, *What's Going on in Delaware?*, 8 Am. Bankr. Inst. L. Rev. 107, 108 (2000).

⁴ Sudell and Schwartz, *supra* note 3, at 112. This is a notable occurrence as it demonstrates how the identity of individual judges will affect the course of, and rulings in, a bankruptcy case. Essentially, counsel

C. Visiting Judges.

The Delaware Bankruptcy Court also has three current standing visiting judges: Hon. Judith K. Fitzgerald (Pittsburgh, PA); Hon. Raymond T. Lyons (Trenton, NJ); and Hon. Judith H. Wizmur (Camden, NJ).⁵

III. THE VENUE OF CHOICE

A. Basic statistics.

1. First, it should be noted that Delaware's bankruptcy preeminence among jurisdictions extends only to corporate filings. Consumer filings, on a national scale, continue to represent the vast majority of bankruptcy filings. Specifically, no federal judicial district in the United States, with one exception, boasts a ratio of business filings to consumer filings above 1:5, or 20%, with most reporting business filing percentages closer to 10%.⁶ The exception of course is Delaware. In 1999, Delaware boasted a staggering ratio of almost 50% business filings. Still, when looking at total numbers of bankruptcy filings per district, one finds that many districts report greater numbers of both business and consumer filings than does Delaware.

B. Applicable venue law.

1. It is important to remember when reviewing this data that an entity filing for bankruptcy is limited to its choice of forum by applicable venue provisions. Bankruptcy venue is governed by 28 U.S.C. § 1408, which provides that a bankruptcy case may be commenced in a 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

2. These options tend to create greater latitude in choice of forum for business entities, due to the greater spread of contacts within varying territorial areas which businesses tend to have over individuals. Therefore, the larger and more complex the corporation, the greater the number of choices it tends to have. Larger entities are more likely to have different states and jurisdictions for their place of incorporation, location of principal assets and headquarters, as well as being more likely to have affiliates in other jurisdictions.⁸ Furthermore, and most

involved in such cases in the future would do well to secure a copy of the "payor order" submitted among the first day filings in the Lennox bankruptcy case, as Judge Walrath has indicated that she will only consider entering such orders if they are substantially equivalent to the order signed in Lennox. In re Lenox Healthcare Group, Inc., Case No. 99-4022. Counsel in Integrated Health and Mariner submitted virtually identical orders prohibiting certain payors from recouping payments owed to debtors against pre-petition claims, and the orders were approved in both cases. Sudell and Schwartz, *supra* note 3, at 112.

⁵ It is almost a certainty that additional standing positions and visiting positions will soon be added to the Delaware Bankruptcy Court; necessitated by the current flood of bankruptcy filings in Delaware and resulting docket congestion. In fact, during the time in which the author began researching this topic, the number of visiting judges in Delaware rose from three to six. See, Shanon D. Murray, *Visiting judge rankles bankruptcy court*, www.TheDeal.com (April 11, 2001).

⁶ From the American Bankruptcy Institute's most recent statistics on bankruptcy filings, 1999. The ABI website, at www.abiworld.org, contains a thorough breakdown of bankruptcy filing statistics, dating as far back as 1980, as well as links, research tools, recent developments, and other useful information. Another useful web site is Bankruptcydata.com, which contains a broad range of information, and both free and charged services which attorneys will find useful.

⁷ Additionally, the Bankruptcy Code defines "person" to include corporations. 11 U.S.C. §101(41).

⁸ Robert K. Rasmussen and Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 Nw. L. Rev. 1357, 1365 (2000).

important to the District of Delaware, current case law authority construes a corporation's "residence" or "domicile", for purposes of Section 1408, to be the corporation's state of incorporation.⁹

C. Delaware corporate law.

1. General. Allowing the state of incorporation to serve as a nexus for venue naturally points to Delaware. Delaware has long been the most popular state for incorporation among large corporations. Delaware leads all states as the state of incorporation for entities listed on the national exchanges, including almost half of all companies on the NYSE, and almost 60% of Fortune 500 companies.¹⁰ In fact, Delaware's popularity is quite lucrative: the state reaps approximately \$440 million per year, 20% of the state's annual income, from franchise taxes and related fees.¹¹ This fiscal benefit would indicate that whatever the reasons behind Delaware's success in the competition among states for corporate charters might be, it is unlikely that Delaware will enact any changes to its system which might jeopardize that position.

2. The regulatory competition. The debate which centers around Delaware's success in the competition for corporate charters has historically fallen into two camps. The first characterizes the charter competition as a "race to the top", arguing that competition among states results in the formulation of bodies of corporate law designed to enhance corporate value. The second camp, signified by the "race to the bottom" doctrine, posits that because managers select the place of incorporation, the end result is a body of corporate law which favors self-dealing by management at the expense of shareholders and other corporate constituencies.¹² Regardless of the differing stances which these two camps take on the effects of the charter competition, they both approach the issue from the same premise. They focus on the statutory and substantive provisions of corporate law among states, and seek to explain corporate decision-making with respect to place of incorporation through a comparison of these various provisions and an analysis of the various advantages and disadvantages they confer upon businesses.

a. Delaware General Corporation Code. Among the most commonly referenced statutory causes behind Delaware's success in the charter competition include minimal scrutiny afforded to compensation of officers, insider contracts and self-dealing issues; provisions which insulate officers from liability stemming from breach of fiduciary duties; inclusion of anti-takeover provisions; restrictions on stockholder derivative actions; flexibility with respect to payments of dividends; optional bylaw provisions which facilitate management and structuring; and provisions which render corporate dissolution more difficult to accomplish.¹³ In addition to these, scholars often point to the priority and speed which Delaware affords to amending its

⁹ See, *In re Ocean Properties of Delaware, Inc.*, 95 B.R. 304, 305 (Bankr. D. Del. 1988). This opinion and holding by the Hon. Helen Balick has been credited as one of the primary factors in the rise of Delaware as the preeminent venue for corporate bankruptcy filings. See also, William Jarblum, *Incorporation Issues: Why Delaware?*, 1999 ABI JNL. LEXIS 137, 7-8 (1999); and Theodore Eisenberg and Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 Cornell L. Rev. 967, 984-85 (1999). See also, 28 U.S.C. § 1391(c). This statute provides that a corporation is deemed to reside in a district in which it is subject to personal jurisdiction. There is some dispute as to whether that encompasses all districts in a multi-district state of incorporation, or only those districts in which the corporation does business, but as Delaware is not a multi-district state, this consideration is not significant here; and 14 A.L.R. Fed. 938 (annotations to section 1391).

¹⁰ See, Demetrios G. Kaoris, *Is Delaware Still a Haven for Incorporation?*, 20 Del. J. Corp. L. 965, 966 (1995); and Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061 (2000).

¹¹ Professor Fisch, *supra* note 10; and David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. Cin. L. Rev. 1243, 1271 (2000).

¹² See, Fisch, *supra* note 10, at 1062; and David A. Skeel, Jr., *supra* note 11, at 1270-71 (2000).

¹³ See, Kaoris, *supra* note 10, at 972-74; and Jarblum, *supra* note 9, at 3-6. For references detailing the specifics of Delaware substantive law, see Charles and King, *supra* note 1.

corporate statutes on a regular basis, making the state more responsive to current corporate and economic issues, arguing that this in turn gives greater security to corporate officers that corrective measures for unforeseen issues will be accomplished in a smooth and timely fashion.¹⁴

b. Defects in the Regulatory Competition Model. There are, however, certain significant problems with attributing Delaware's status as the preeminent state for incorporation based on regulatory competition. First, corporate codes are, for the most part, analogous and tend towards uniformity. Variations among states tend to be relatively minor, and even if such variations significantly influence corporate decision-making, this fails to explain why other states which compete with Delaware have been unable to duplicate its success by simply duplicating, or even improving upon, its statutes.¹⁵ Furthermore, explaining the Delaware phenomenon through statutes designed to enhance corporate value ignores another glaring inconsistency: the fact that Delaware actually charges large corporations up to 500 to 1,000 times the amounts charged by other states for annual incorporation fees.¹⁶ It seems unlikely that Delaware could exact such exorbitant fees in relation to other states if such costs of incorporating in a given jurisdiction are a substantial factor in corporate decision-making. These considerations indicate that statutory and substantive law benefits cannot entirely account for Delaware's success in the charter competition.

c. Alternative explanations. Commentators who have recognized the same difficulties in oversimplifying the incorporation issue have pointed to a number of factors which may play as great a role as statutory provisions and substantive law in luring corporate charters to Delaware.

(1) The Delaware Judiciary and judicial system are widely regarded to be extremely consistent, experienced, predictable and efficient.¹⁷ The Delaware state court system includes Courts of Chancery which have no jurisdiction to hear criminal or tort cases, giving them ample freedom from docket congestion to thoroughly and quickly render decisions and develop corporate common law.¹⁸ In addition, the benefits and dependency of the state upon its success in luring corporate charters and bankruptcy filings results in a high prioritization and responsiveness throughout the entire judicial system in dealing with issues and cases related to that success. Corporate litigation is limited to chancery courts and the state Supreme Court. Thus, the number of judges and courts rendering decisions in the corporate field is much more limited than in other states, thereby increasing reliability and consistency.¹⁹ This idea and issue of looking to specific judges is more intense when evaluating bankruptcy issues, where, the judges are, of course, much fewer in number.

¹⁴ See, Kaoris, *supra* note 10, at 971-72. Kaoris explains Delaware's amendment process as follows: [T]he Delaware Bar Association's Section on General Corporation Law has retained responsibility for revising the General Corporation Law. Members of the Section, along with lawyers from other cities, law professors, and corporations, make suggestions concerning amendments to the Delaware General Corporation Law. Proposed amendments are studied carefully by subcommittees. The subcommittee then sends a report recommending adoption or rejection of the amendments to the Council of the Section. If approved by the Council of the Section, the bill proceeds to the Executive Committee of the Bar Association and then to the General Assembly which usually adopts the amendments recommended by the Section (footnotes omitted).

¹⁵ Fisch, *supra* note 10, at 1066-68. Professor Fisch points to a recent effort in the past decade by the state of Nevada to improve its status in the charter competition by adopting the Delaware General Corporate Code and common law, including Nevada district courts following Delaware precedents. This effort has not materialized in any markedly greater success by the state in winning corporate charters.

¹⁶ *Id.* at 1069. The largest Delaware corporations are charged \$150,000 annually. Admittedly, these fees are still relatively negligible amounts to large corporations.

¹⁷ Rasmussen and Thomas, *supra* note 8, at 1385.

¹⁸ Kaoris, *supra* note 10, at 975.

¹⁹ *Id.* at 975-77.

(2) The high priority given to corporate and bankruptcy issues has resulted in the growth of supporting institutions which further raise the convenience and practicality of relying on Delaware. No doubt the state legislature is mindful of the benefits which Delaware reaps from its high rate of corporate and bankruptcy activity. The Secretary of State's Office maintains thorough corporate records, handles assessment and collection of franchise taxes and fees, registers foreign corporations and even receives service of process in some instances, all through the use of state of the art technological systems and support. The presence of efficient corporation service companies which also accept service of process, prepare and file certified corporate documents, and perform database checking services for corporate name preemption, adds to this support network.²⁰

(3) In any event, Delaware's success in the charter business has served mainly to establish Delaware as the most frequently occurring option for corporate bankruptcy filings, due to the relationship of place of incorporation to bankruptcy venue law. Notwithstanding the ancillary effects which might naturally stem from a judiciary and judicial system which are focused upon corporate issues, this still fails to explain why so many corporations choose to take the Delaware option when presented.

D. Business bankruptcy filings and forum shopping.

1. General. While Delaware by far boasts the greatest frequency of business bankruptcy filings relative to total bankruptcy filings, other jurisdictions have reported greater numbers of filings in both business and consumer bankruptcies.²¹ If this is the case, then we must strive to understand why Delaware has occasioned so much furor in bankruptcy venue debates. To begin, just as we saw a considerable difference between analyzing total bankruptcy filings and separating the analysis into business and consumer filings, one sees a commensurate difference in Delaware venue statistics when moving from consideration of business filings generally to a focus on large corporate bankruptcies.

2. Large public corporation filings. In 1996, Delaware attracted 31% of the publicly traded corporations which filed for Chapter 11 protection. In addition, these corporations were proportionally large. While they comprised 31% of the total filings of publicly traded corporations for that year, those same corporations which chose to file in Delaware collectively comprised over 70% of the total assets of publicly traded corporations which filed for Chapter 11 relief that year. In 1997 and 1998, Delaware claimed 22% of national Chapter 11 filings by publicly held corporations. For those same years, the percentages of the total assets of publicly held corporations filing for Chapter 11 nationally, which were held by those filing in Delaware, were 32% and 24%, respectively. For 1999, a full 41% of public corporation filings occurred in Delaware, constituting 69% of the aggregate assets of public corporations filing for bankruptcy that year.²² Between 1995 and the fall of 1997, nine companies with assets exceeding \$1 billion chose to file in Delaware.²³ Delaware claimed ten of the fifteen largest corporate bankruptcy filings in 2000, including five of the six largest filings, by total listed assets.²⁴ Therefore, it is not enough to be mindful of the incidence of bankruptcy filings in Delaware. One must also realize that the economic significance of the trend of large Chapter 11 filings occurring in the district is even more pronounced.

3. Forum shopping. Moreover, the discussion gains an additional dimension when one considers issues of forum shopping. The Delaware phenomenon might occasion less debate if the corporations filing in Delaware all happened to have substantial connections to the district of

²⁰ *Id.* at 977-78.

²¹ *See* Section III(A)(1), herein.

²² All of the foregoing statistics appearing in this section are from Rasmussen and Thomas, *supra* note 8, at 1367 (internal citations omitted).

²³ Mark D. Collins, *Why Delaware?*, 15-FALL Del. Law. 38 (1997).

²⁴ BankruptcyData.com, *Largest U.S. Public Bankruptcies of 2000*.

Delaware - such as primary assets or nerve center contacts/ But this is not the case. Place of incorporation takes on a central role in these issues because of the fact that a large corporation can often file for bankruptcy relief in Delaware simply by virtue of its incorporation in Delaware, notwithstanding that the corporation may maintain no other contacts within the state.

a. An empirical study. In 1999, Cornell Law Professors Theodore Eisenberg and Lynn LoPucki published their often cited findings from an empirical study conducted on the issue of bankruptcy forum shopping by large corporations.²⁵ For the purposes of their study, forum shopping was defined as a filing in a location other than one which would serve the location of the corporation's chief executive office, and the study was limited to public corporations which listed assets of over \$100 million.²⁶ They found that from 1980 to 1997, the incidence of forum shopping among large corporate bankruptcy filings was high. Of the 284 cases studied, 43% were found to have filed in locations distant from their headquarters, with the percentages increasing over time to a staggering 86% from 1994 to 1996.²⁷ Among these forum shopped cases, the percentages of filings which occurred in Delaware also steadily increased during the period of the study, reaching an impressive 84% from 1994 onward.²⁸

b. Prepackaged and pre-negotiated cases. One explanation for the growth of Delaware filings relates to the use of prepackaged and pre-negotiated cases. These occur when a firm finds itself unable to restructure its debt outside of bankruptcy, but manages, in anticipation of filing, to negotiate agreements with a sufficient number and percentage of its creditors to effectively bind the remainder through voting and cramdown provisions of the Bankruptcy Code.²⁹ Thus, a corporation is able to file for bankruptcy protection and actually enter the proceedings armed with a prepackaged plan, thereby drastically reducing the time and effort expended in navigating the corporation through Chapter 11.³⁰ The difference in prepackaged and pre-negotiated plans essentially contemplates the extent to which the would-be debtor secures or solicits voting commitments prior to filing.³¹ Where this does not occur, the case is considered pre-negotiated rather than prepackaged. Therefore, due to the additional time and effort spent securing and soliciting votes, pre-negotiated cases tend to have slower processing times than prepackaged cases, but still retain a considerable efficiency advantage over cases which are neither prepackaged nor pre-negotiated.

c. Significance of prepackaged cases. These subsets of corporate filings are often considered relevant and useful in analyzing the issue of forum shopping due to the implications which prepackaged cases tend to have upon speed and efficiency concerns.³² It should be mentioned that prepackaged and pre-negotiated cases are a recent phenomenon and still constitute a small percentage of bankruptcy filings in general.³³ Professors Eisenberg and LoPucki found that out of the public corporation filings that occurred in Delaware since 1990, approximately 39% were prepackaged cases, compared to an incidence of only 14.3% for other judicial districts.³⁴ Moreover, Delaware attracts roughly half of all prepackaged bankruptcies filed nationally.³⁵ Due to the rapid pace of confirmation of plans in these cases, significant

²⁵ Eisenberg and LoPucki, *supra* note 9. Lynn LoPucki is currently at UCLA law school.

²⁶ *Id.* at 974-75. This definition was partially the result of correct reasoning that place of incorporation had no commercial significance to the conduct of a bankruptcy case, and partially necessitated by convenience. Information detailing locations for corporate assets is difficult both to acquire and to process.

²⁷ *Id.* at 977-78.

²⁸ *Id.* at 978-79.

²⁹ Rasmussen and Thomas, *supra* note 8, at 1374-75. 11 U.S.C. §§ 1123 and 1126.

³⁰ Rasmussen and Thomas, *supra* note 8, at 1375.

³¹ Eisenberg and LoPucki, *supra* note 9, at 976-77.

³² *Id.* at 987-88.

³³ Rasmussen and Thomas, *supra* note 8, at 1375.

³⁴ Eisenberg and LoPucki, *supra* note 9, at 992-93.

³⁵ Rasmussen and Thomas, *supra* note 8, at 1375.

dangers may exist that parties in interest will not have ample opportunities to be heard on various issues, or that plan defects may go unnoticed.³⁶

d. Transfer statistics. With so many issues surrounding the volume of large Chapter 11 filings occurring in Delaware and the prevalence of forum shopping at the expense of smaller creditors who may find travel costs³⁷, and the additional costs of local counsel³⁸, associated with appearing in Delaware bankruptcy cases, one would expect that transfer requests predicated on improper venue would be very frequent indeed. 28 U.S.C. § 1412 provides that:

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.

One would expect transfer requests, as a mechanism to combat forum shopping by debtors at creditors' expense, to be more frequently filed. In fact, this is not the case at all. Eisenberg and LoPucki found that venue changes occurred in only 5% of cases initiated by debtors in forums wherein the debtors had minimal business activity, but in 62% of cases initiated by creditors in forums wherein the debtors had minimal business activity.³⁹ Moreover, the Delaware Bar Association reported that from 1988 to 1996, the Delaware bankruptcy court granted 18 of 27 requests, demonstrating that transfer requests are rarely made and judicial reluctance to transfer cases is not at the root of these statistics.⁴⁰ Another study revealed that among Delaware cases that were determined to have been "shopped", i.e., filed by Debtors in Delaware despite the absence of any business contacts, only 36% of those cases revealed an objection to the debtor's choice of venue.⁴¹ The implication here is that Delaware is appealing not only to debtors and debtors' attorneys, but also to creditors and their attorneys as well.⁴² However, other explanations relating to the impracticalities of requests for transfer of venue should be considered. First, creditors' committees are appointed at the forum court, and are selected from entities already willing to commit to involvement at that locale. Thus, they are unlikely to seek transfer. Also, smaller creditors are often insufficiently motivated or involved to seek transfer. Finally, the initial days after a voluntary petition are often rather hectic, as first day, procedural motions are addressed, making it counter-productive to thereafter seek transfer. Whereas in the case of involuntary petitions, a debtor's typical reluctance to proceed results in the case becoming rooted in a particular location much more slowly, such that transfer is less

³⁶ Eisenberg and LoPucki, *supra* note 9, at 995.

³⁷ See Rasmussen and Thomas, *supra* note 8, at 1378-79, reciting that travel expenses associated with forum-shopped cases cost parties in interest an average of \$270 more than they would otherwise spend in connection with a bankruptcy case.

³⁸ Delaware Local Bankruptcy Rule 9010-1 states that except as otherwise provided, District Court Rule 83.5(d) shall apply to all bankruptcy proceedings. District Court Rule 83.5(d) states: Association with Local Counsel Required. An attorney not admitted to practice by the Supreme Court of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business, upon whom all notices, orders, pleadings, and other papers filed in the case shall be served and who shall be required to sign all papers filed with the Court, where the signature of an attorney is required, and attend proceedings before the Court, Clerk, United States Magistrate, Bankruptcy Judge, Auditors, Trustees, Receivers, or other officers of the Court.

Local Rule 9010-1 goes on to except filing and prosecution of proofs of claims, unless "the claim litigation will involve extensive discovery or trial time."

³⁹ Eisenberg and LoPucki, *supra* note 9, at 1000.

⁴⁰ *Id.*

⁴¹ Leslie R. Masterson, *Forum Shopping in Business Bankruptcy: An Examination of Chapter 11 Cases*, 16 Bank. Dev. J. 65, 85, 89 (1999).

⁴² Collins, *supra* note 23, at 40, noting that major lending institutions regularly suggest Delaware as a bankruptcy forum to struggling debtors.

disruptive in the early stages when requests are most likely to be made.⁴³ These various considerations support the position that transfer of venue under 28 U.S.C. § 1412 is an insufficient mechanism to remedy the issues of forum shopping. This is especially true in light of case law developments with respect to transfer, holding that there is a presumption of proper venue in the district in which the debtor chooses to file, such that the party seeking transfer has an affirmative burden to show that venue is properly in another district.⁴⁴

IV. CAUSES AND CONSEQUENCES OF THE DELAWARE FORUM SHOPPING PHENOMENON

A. Case processing time.

1. General. The most frequently enunciated factor behind Delaware's marked success in attracting large corporate bankruptcy filings is speed or case processing time.⁴⁵ In the Federal Judicial Center's 1997 report on the forum shopping phenomenon, 77 public corporation bankruptcy cases from 1994-95 were studied. The study included 17 Delaware cases, of which 13 were prepackaged or pre-negotiated. All 13 of these cases were confirmed in less than 50 days. For the Southern District of New York, another district which is frequently cited as a destination for forum-shoppers, the number of cases was approximately the same, but case processing time varied from 53 days to 5.9 years.⁴⁶

2. Underlying practices of the bankruptcy court. Some of the explanations behind Delaware's reputation for speed include certain practices of the Delaware bankruptcy courts. A recent article authored by two Bankruptcy Judges sitting in Texas districts, the Hon. Leif M. Clark and Douglas E. Deutsch, noted the following:

The regular practice was for the chief bankruptcy judge to be notified by debtor's local counsel before large cases were filed so as to arrange a convenient time to hear first day orders; that the chief judge examined both her own case load and the other judges' case loads to determine who should get the case prior to filing; that local counsel was notified of the chief judge's decision concerning judge assignment prior to the case's filing; and finally, that local counsel provided a list of first-day motions to the assigned judge the day before the case was filed.⁴⁷

3. The automatic reference. In January of 1997, then Chief District Judge for the District of Delaware, Hon. Joseph F. Farnan, Jr., issued an order terminating the automatic referral of bankruptcy cases to bankruptcy judges, thereby interrupting the existing manner of case assignment and halting the practices of pre-filing communications between debtors' counsel and

⁴³ These alternate considerations are discussed by Lynn M. LoPucki and William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 Wis. L. Rev. 11, 24-26 (1991).

⁴⁴ See, e.g., *In re Manville Forest Products Corp.*, 896 F.2d 1384 (2nd Cir. 1990); and *In re Pettit*, 183 B.R. 6 (Bankr. D. Mass. 1995). This presumption in favor of the debtor's choice of forum may also help to explain why transfer tends to occur more frequently in involuntary cases filed by creditors.

⁴⁵ See, Skeel, *supra* note 11, at 1276; and Federal Judicial Center Report to the Committee on the Administration of the Bankruptcy System, *Chapter 11 Venue Choice by Large Public Companies*, III(9)-III(10) (1997).

⁴⁶ Masterson, *supra* note 41, at 70.

⁴⁷ Hon. Leif M. Clark and Douglas E. Deutsch, *The Delaware Gap: Exposing New Flaws in the Scheme of Bankruptcy Referrals*, 5 Am. Bankr. Inst. L. Rev. 257 (1997). These practices were originally reported by the Federal Judicial Center, see note 45 herein.

bankruptcy judges.⁴⁸ Judge Farnan's termination of the automatic reference and his personal assumption of case assignment duties came on the heels of the Federal Judicial Center's report detailing these practices. This measure resulted in an almost immediate, though temporary, slowdown of large filings in Delaware, as attorneys and parties suddenly faced the possibility that their case would be assigned to a district court judge rather than one of the two bankruptcy judges with whom they had become so familiar.⁴⁹ Although Judge Farnan justified his measure as an effort to address docket congestion, this explanation was viewed by many as pretextual, and in actuality directed at addressing the perceived improprieties of ex parte communications and shopping for judges.⁵⁰ First, this was the first withdrawal of the automatic referral by any judicial district since all districts had issued general orders of reference in the mid-1980's. Secondly, the Delaware bankruptcy judges had not, at the time, made any complaints or requests with respect to docket congestion.⁵¹ On December 15, 2000, current Chief District Judge Sue L. Robinson signed an order, effective February 3, 2001, reinstating the automatic reference of bankruptcy cases to bankruptcy judges in the District of Delaware.⁵² Chief Judge Robinson's reinstatement of the automatic reference lasted all of two months. Effective April 6, 2001, Chief Judge Robinson signed an order revoking her earlier December 15, 2000 reinstatement of the automatic reference, once again making district court judges available to hear bankruptcy cases and returning responsibility for assigning bankruptcy cases.⁵³

4. Other practices. Other practices have developed in Delaware with respect to case management which commentators frequently point to in explaining perceptions on the efficiency of the Delaware bankruptcy court:

Omnibus hearing dates in major cases could be scheduled months in advance so that an attorney could know in January when he or she would be in Delaware in July. Long range scheduling was not only possible, but "prepacks" could on the filing date have the time set for the confirmation hearing. Emergency scheduling could be done by merely calling the Judge's scheduling clerk instead of going through the usual route of the Clerk's Office. That Office, in turn, proved to be incredibly well organized. Personnel responded to questions immediately and made sure no calls were unreturned, and when returned they were handled by appropriate personnel. Judges were willing to postpone hearings (often at the expense of their own convenience) to allow last minute negotiations to be completed. In fact, [then] Chief Bankruptcy Judge Helen Balick even went so far as to return two weeks ahead of schedule after surgery to handle the confirmation hearing in Continental Airlines.⁵⁴

⁴⁸ Clark and Deutsch, *supra* note 47, at 257-58.

⁴⁹ Eisenberg and LoPucki, *supra* note 9, at 986-87.

⁵⁰ Clark and Deutsch, *supra* note 47, at 258.

⁵¹ Rasmussen and Thomas, *supra* note 8, at 1379-80.

⁵² A copy of the order is available in PDF format from the Delaware Bankruptcy Court web site. *See* note 2 *supra* herein for the URL. The Court's web site currently includes an announcement that the Court is replacing its case management system with the Federal Judiciary's new Case Management/Electronic Filing System. The conversion is scheduled to be completed in early Summer 2001. The new system will require users to login with passwords, and will enable electronic filing and retrieval of documents and case information.

⁵³ A copy of the April 6, 2001 order is available in PDF format on the Delaware District Court's web site at www.ded.uscourts.gov. This unusual move may have been necessitated by a very recent spike in Delaware filings which may themselves have been partially the result of Chief Judge Robinson reinstating the automatic reference. The problem of congestion in the bankruptcy court has clearly been building for some time, however, and is more extensively treated in the final section of this paper.

⁵⁴ Collins, *supra* note 23, at 40. Collins' quote refers to these practices in the past tense because this portion of his discussion is framed from the particular view of the Continental Airlines bankruptcy case (Case No. 90-00932), which occurred some time ago.

In addition, Delaware's bankruptcy PACER site - which allows parties to access case, party, and docket information and to download various pleadings - is considered to be extremely convenient and well-functioning.⁵⁵

5. Case processing time - Deficiencies. While the foregoing practices of coordination between judges and counsel in anticipation of filing can greatly assist in case management, the explanation of speed as the cause behind Delaware's success has also been questioned. Professors Eisenberg and LoPucki criticize this rationale based upon two premises. First, their empirical data suggests that there is no statistically significant difference between Delaware and other jurisdictions in case processing time which could not be explained through alternative causes.⁵⁶ Second, the Southern District of New York, once itself a hotbed of forum shopping, has case processing times much greater than other districts.⁵⁷ By way of explanation, Eisenberg and LoPucki point to Dallas, Texas as the city with the largest proportion of outbound-shopped cases in the nation, noting that case processing times in Dallas are either on par with, or shorter than, the processing times for Delaware and the Southern District of New York, the primary destinations for those cases.⁵⁸ Therefore, there must be some other impetus behind Delaware's current popularity.

B. Shopping for judges.

1. General. The primary explanation behind Delaware's popularity in attracting large corporate Chapter 11 filings offered by Professors Eisenberg and LoPucki is that when corporations consider filing in Delaware, they are not shopping for a particular forum, they are shopping for particular judges.⁵⁹ This is a particularly significant concern, for while commentators have historically debated the systemic benefits and disadvantages of forum shopping, judge shopping is uniformly considered to be the most pernicious and improper basis for forum shopping.⁶⁰ First, the idea that success in navigating a client through bankruptcy is dependent upon procuring the "right" judge to rule on important issues which are anticipated by counsel severely detracts from the concept of the Bankruptcy Code as a uniform system of law.⁶¹ Second, the perceived impropriety of variations in rulings among judges which can be anticipated by counsel is magnified by the practices of the Delaware bankruptcy court which allow an attorney to know in advance which judge will hear the case if the client decides to file in Delaware, and also to engage in ex parte contacts with judges prior to filing.⁶² Finally, remedial measures in this area encounter conflicting policies of maintaining the uniformity of interpretations of the Bankruptcy Code while preserving the independence of judges.⁶³

2. The reality of shopping for judges.

a. Whatever one's particular stance on the social utility of shopping for judges, a review of our current bankruptcy system indicates that this is indeed a primary factor behind the tendencies of large corporations to forum shop. First, Delaware initially had only one standing bankruptcy judge, and the current number of standing judges is two.⁶⁴ The fewer the number of bankruptcy judges in a given district, the more certainty that an entity contemplating filing for bankruptcy has that its case will be handled by a specific judge, and commentators have made much of the consistency maintained among Delaware's two judges.⁶⁵ This is evidenced by the

⁵⁵ Eisenberg and LoPucki, *supra* note 9, at 995.

⁵⁶ *Id.* at 993-95.

⁵⁷ *Id.* at 992.

⁵⁸ *Id.* at 998-99.

⁵⁹ *Id.* at 1002.

⁶⁰ Masterson, *supra* note 41, at 67.

⁶¹ Rasmussen and Thomas, *supra* note 8, at 1397.

⁶² Clark and Deutsch, *supra* note 49, at 258.

⁶³ *See, e.g., Id.* at 284.

⁶⁴ Rasmussen and Thomas, *supra* note 8, at 1406.

⁶⁵ *Id.* at 1373, 1406. Rasmussen and Thomas cite number of judges as a primary factor behind Delaware's supplanting of the Southern District of New York as the most popular destination for forum shoppers. In

temporary but dramatic fall of filings in Delaware immediately after the 1997 withdrawal of the automatic reference of bankruptcy matters to bankruptcy judges, which effectively added 3 district judges to the pool of possible judges to whom a case could be assigned.⁶⁶ One can similarly point to the assignment of virtually all recent healthcare bankruptcies to Judge Walrath. Healthcare cases are notoriously complex, and one should certainly expect that Judge Walrath's efficiency in handling such cases will grow with this experience. At the same time, this allows attorneys to know with reasonable certainty who their judge will be, and to anticipate rulings on certain issues. Furthermore, the close nature of the national bankruptcy bar facilitates the sharing of information among practitioners regarding the tendencies of various individual judges, and whether those judges are perceived as pro-debtor or pro-creditor.⁶⁷ This community, especially with respect to large corporate bankruptcies, is also self-perpetuating. Between 1980 and 1998, only thirty-four firms, nationally, represented three or more public corporations with assets exceeding \$100 million. Of these, only six firms represented more than ten such corporations.⁶⁸

b. Not only will corporations and attorneys shop for particularly favorable judges based upon the anticipated issues which their bankruptcy case will present, but they will also shop away from certain judges. Often times, the primary concern behind forum shopping is simply to avoid a certain judge who is perceived to have an onerous stance with respect to an important issue in a case.⁶⁹ This can be problematic for the reason that it deprives judges sitting in other jurisdictions of the opportunity to develop experience and reputations in handling the most desirable and high profile bankruptcies of large public corporations, in much the same perpetuating manner as law firms with reputations of handling such cases have been successful in excluding "outsider firms" from gaining such representation.⁷⁰

C. Attorney incentives.

1. General. Another area of consideration which deserves treatment as a contributing factor in forum shopping to Delaware is attorneys' perceptions regarding the practicalities of practicing in Delaware. Delaware employs various practices which make performing case duties more convenient for attorneys (such as the PACER site, electronic filing, pre-filing coordination with judges, omnibus hearing dates and judges' perceived flexibility with respect to scheduling). Of course, attorneys will be concerned with case processing efficiency and a judge's position with respect to substantive case issues, commentators have also focused on two other attorney incentives: comfort and fee applications.⁷¹

2. Comfort. Commentators have noted a variety of factors contributing to attorney comfort with practicing in Delaware. Among them are the presence of affordable travel and hotel accommodations, proximity to New York City, where many attorneys travel from, and

1990, when Delaware was making its rise, it had only one bankruptcy judge, whereas at the same time, the Southern District of New York had five.

⁶⁶ Jarblum, *supra* note 9, at 10.

⁶⁷ Rasmussen and Thomas, *supra* note 8, at 1369-70.

⁶⁸ *Id.*

⁶⁹ Eisenberg and LoPucki, *supra* note 9, at 997-98.

⁷⁰ See Rasmussen and Thomas, *supra* note 8, at 1370, 1401.

⁷¹ One survey selected a panel of eight attorneys, based outside of New York and Delaware, who had experience handling large corporate bankruptcy cases. The panel was asked what factors, in addition to fees, most influence attorney decision-making with respect to choice of venue. The responses included: predictability, uniformity and reliability of judges, speed, and convenience. The same panel recited the ability to obtain aggressive first day orders as a primary incentive of filing in Delaware. Michele Johnson (ed.), *What type of judge is more likely to retain the megacase generated in his or her jurisdiction?*, BCD News and Comment, Vol. 33, No. 14 (January 12, 1999).

convenience of access to and from New York City.⁷² In addition, attorneys are comforted by the perceived consistency of Delaware's judges, thereby raising predictability.⁷³

3. Fee applications. Under the Bankruptcy Code, attorneys and other professionals involved in a bankruptcy case will be paid out of the debtor's estate. 11 U.S.C. §§ 503 and 507(a). These professionals include attorneys for debtors, official committees, secured creditors and in certain instances, fees incurred by creditors making a substantial contribution to the estate. Accordingly, these professionals must submit fee applications to the court for approval of compensation. 11 U.S.C. § 331.

a. Delaware fees. Approval of fees in connection with a bankruptcy case is, of course, a significant concern for professionals and will almost certainly influence their opinion on the desirability of practicing in a given district. This is especially true in light of the fact that courts differ on how they will scrutinize fee applications and whether they will limit approval of hourly rates to the customary local rate, or allow an attorney to charge their own customary rate.⁷⁴ Not surprisingly, Delaware bankruptcy judges are perceived as unlikely to quibble over fee requests, instead leaving it to creditors and the Office of the United States Trustee to "police" these requests.⁷⁵ It seems reasonable that Delaware's proximity to New York City benefits its bankruptcy community in this respect. New York rates rank among the highest in the nation, and clearly exerts some influence on what is perceived as "customary" for the area.

b. Committee member fees. Judge Walrath has recently addressed the issue of reimbursement of committee members' professional fees. Last year, the Court of Appeals for the Third Circuit held that a straightforward reading of Section 503(b) of the Bankruptcy Code permits reimbursement of professional fees incurred by individual committee members.⁷⁶ Section 503(b) provides for the allowance as an administrative expense:

(3) the actual, necessary expenses...incurred by-

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee.⁷⁷

⁷² Collins, *supra* note 23, at 40.

⁷³ *Id.*

⁷⁴ Rasmussen and Thomas, *supra* note 8, at 1369-70. Rasmussen and Thomas cite to a recent effort by the Southern District of Texas to form a committee charged with recommending ways to attract large Chapter 11 filings. Among the complaints lodged by local attorneys was the reluctance of the District's bankruptcy judges to approve rates in excess of \$300 per hour. *Houston, We Know We Have a Problem (But We're Working on It!)*, 35 Bankr. Ct. Dec. (CRR) No. 12 (February 8, 2000). *See also, Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253 (3rd Cir. 1995) (reversing lower court's refusal to allow New York customary rates.).

⁷⁵ Rasmussen and Thomas, *supra* note 8, at 1373, 1393.

⁷⁶ *First Merchants Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 398 (3rd Cir. 2000).

⁷⁷ Section 1103 of the Bankruptcy Code enumerates a non-exclusive list of certain duties and services to be rendered by committees, including:

- 1) consult with the trustee or debtor in possession concerning the administration of the case;
- 2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- 3) participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
- 4) request the appointment of a trustee or examiner under section 1104 of this title; and
- 5) perform such other services as are in the interest of those represented.

Judge Walrath has indicated that she will strictly enforce the requirement of proving necessity where a committee member opts to use its own counsel in the performance of its duties as a committee member.⁷⁸ Judge Walrath based her ruling on the grounds that there are different standards for what qualifies as necessary for committees and what is necessary for individual committee members, especially in light of the fact that large cases usually entail committees which are well armed with professionals retained to accomplish their necessary duties.⁷⁹ The Court reasoned that the need for a committee member to retain its own counsel in such cases consequently is often obviated, and such need should arise only in unusual circumstances.⁸⁰

V. LOOKING FORWARD

Having evaluated the rise of Delaware as the preeminent forum for large corporate bankruptcy filings, it is appropriate to discuss what disadvantages, if any, are developing in Delaware as a result of its popularity and to review what we can expect for the future.

A. Remedial measures.

1. General. As noted previously, Delaware's popularity, and certain perceived improprieties associated with the practices of Delaware bankruptcy judges with respect to case management, prompted an unprecedented move by then Chief Justice Farnan to revoke the automatic reference of bankruptcy matters to bankruptcy judges in the District. This measure was temporary. In light of the furor which resulted from the revocation, it is unlikely that such a move will be repeated in the future to address the same concerns.⁸¹ Other remedial measures designed to address these issues have been endorsed: (i) amending the venue statute; and (ii) commitment to a predetermined forum.

2. Amending the venue statute. Opponents of Delaware have argued for a provision in the Bankruptcy Code expressly removing state of incorporation as a basis for venue.⁸² Alternative amendments include removing the "affiliate rule" which gives corporations additional venue choices based upon the venue selected by an affiliate, construing residence and domicile as being determined by principal place of business, and simply removing the applicability of certain of Section 1408's venue options from "fictitious entities".⁸³ Congress has not to date, seen fit to implement any amendments. It has been speculated that the negative impact which any amendment would have on Delaware's bankruptcy practice ensures that no amendment will be forthcoming so long as Delaware's Senator Biden remains in a position of influence.⁸⁴ Furthermore, at least one commentator has argued that the case law interpreting

⁷⁸ In re Worldwide Direct, Inc., 2001 Bankr. LEXIS 152 (Bankr. D. Del. 2001). 11 U.S.C. § 503(b)(3)(F). In Worldwide, the committee member submitted no services rendered for its personal benefit, and couched its submissions within the guidelines of Section 1103. Reimbursement was denied however.

⁷⁹ *Id.* at 8, 9.

⁸⁰ *Id.* at 9, 10.

⁸¹ The article by U.S. Bankruptcy Judges Clark and Deutsch (Texas Districts), cited *supra* note 47, focuses on this measure and roundly criticizes the actions of Judge Farnan.

⁸² *See, e.g., Report of the National Bankruptcy Review Commission*, 779 (October, 20, 1997).

⁸³ Rasmussen and Thomas, *supra* note 8, at 1381; and *Summary of submissions to the National Bankruptcy Review Commission* (posted January 12, 1998), at www.abiworld.org/nbrcab/jurisvenue.html. The issue of the applicability of Section 1408 to "fictitious entities" arises from the fact that the section is drafted with respect to "persons". While "persons" is interpreted to include corporations - see note 7, *supra* herein - this raises issues of whether "domicile" under the statute, should be applied to corporations, and if so, whether it is properly construed to include the corporation's state of incorporation.

⁸⁴ Rasmussen and Thomas, *supra* note 8, at 1381; and Hon. James F. Queenan (ret.), *Filings in the state of incorporation: Are they legal?*, BCD News and Comment, Vol. 17, No. 2 (January 17, 2001).

state of incorporation as a corporation's "domicile" is questionable, and that such artificial and archaic interpretations of the venue statute should be overturned.⁸⁵

3. Predetermined forum selection. Another option is to permit or require corporations to commit in advance to a particular forum, either in the corporation's charter or pursuant to agreements with major lenders. The key is to secure commitments some time prior to the onset of financial difficulties. By doing this, creditors are less likely to be prejudiced by surprise and the need to attend proceedings in an inconvenient forum. At the same time corporate management, who control venue selection, are forced to make a decision on the issue when their company is still financially solvent, while their interests align with those of shareholders, investors and creditors, instead of being confronted with the issue on the eve of bankruptcy.⁸⁶

B. Future expectations.

1. Current Status. As Delaware's popularity continues to grow, considerations of congestion and case back-log become more and more real. The effects are already beginning to manifest. In fact, the past six months has marked an extremely significant period in the debate over Delaware's bankruptcy pre-eminence. Simply stated, it appears that Delaware's bankruptcy practice and caseload are quickly attaining "critical mass". First, we have already noted Chief Judge Robinson's April 6, 2001 reinstatement of the order withdrawing the automatic reference of bankruptcy cases to bankruptcy judges. This move, together with then Chief Judge Farnan's original withdrawal of the automatic reference, marks the only 2 occasions in which any district has issued such an order. Interestingly, while the basis and rationale of docket congestion for the initial withdrawal order was questioned by many commentators, the recent reinstatement of that order, also predicated upon the rapidly growing case load of the Delaware Bankruptcy Court, has not received similar criticism.

A primary reason behind the criticisms of the initial order was that the bankruptcy judges had not at that time expressed any concern over their respective case loads. The bankruptcy judges for the District of Delaware have in recent months admitted that the district is overburdened with bankruptcy filings. Delaware's contingent of visiting judges was recently doubled from three to six. Among them, visiting Judge Randall Newsome recently adopted a sua sponte approach to questioning the propriety of venue selection in cases to which he has been assigned. This practice was short lived and earned a stiff rebuke from Chief Judge Robinson, who responded by removing certain cases (those in which he had questioned venue) from Judge Newsome's docket.⁸⁷

2. Consequences. Clearly, there are problems and issues developing around Delaware's bankruptcy popularity which will strain the legal system as the mass of filings continue to pour in especially in light of the recent downturn in the national economy. One consequence of this popularity is that reform movements will undoubtedly receive added impetus.⁸⁸

These claims for reform will naturally expand as perceptions of Delaware's inability to handle its case load become more prominent. Clearly, if docket congestion problems persist, there will be a point at which it will impair many of the advantages historically attributed to Delaware. Additionally, to the extent that judge shopping represents a primary objective behind the forum shopping phenomenon, one should expect the addition of visiting judges, and the removal of the automatic reference, to significantly affect Delaware's popularity.⁸⁹

⁸⁵ Queenan, *supra* note 84.

⁸⁶ This is the position espoused by Rasmussen and Thomas, *supra* note 8.

⁸⁷ Murray, *supra* note 5. Apparently, Judge Newsome's measures occasioned considerable comment and furor from the local bankruptcy bar.

⁸⁸ See, Johnson, *supra* note 71.

⁸⁹ The perception of Delaware as a haven for bankruptcy is already beginning to change. Most notably, Professor LoPucki recently released a further study which reveals that, with the sole exception of New

VI. CONCLUSION

It may be some time before these various concerns and developments play out on the Delaware bankruptcy landscape. At this point, it is apparent that the recent problems in Delaware have reached a point of considerable tension among competing interests and policies. Any remedial measures predicated on diminishing the flow of filings into Delaware will surely be met with stiff resistance from the local bankruptcy bar and other interest groups in the state. At the same time, there is undoubtedly a limit to how far the system can expand to cope with the current rate of filings, either by adding judges or by attempting to process individual cases more quickly. The current economic conditions may further exacerbate the Delaware system. Only time will tell whether the system will be changed or simply collapse under the weight of the ever growing caseload.

York, Delaware suffers from a re-filing rate six to seven times higher than any other district in the nation. *See, e.g.,* Michelle Johnson (ed.), *Has the market misgauged Delaware's efficiency?*, BCD News and Comment, Vol. 36, No. 9 (August 10, 2001). Professor LoPucki additionally maintains a very useful web site which enables visitors to perform research in his database compiled on large chapter 11 bankruptcy cases. The address is www.lopucki.com. The study is unpublished, but is on file with the authors, 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* (Aug. 13, 2000).

