

THE "DELAWARE" PHENOMENON

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During the last several years, the District of Delaware has received considerable attention and developed a reputation as **the** hotbed of corporate bankruptcy filings. Until recently, there has been much debate over whether this popularity is symptomatic of some defect of the bankruptcy system or merely the result of various benign factors. In light of the assertion of forum shopping often associated with Delaware filings over the last 10 years, one might wonder why these issues have escaped notice during this current period of impending bankruptcy reform, which has instead focused primarily upon consumer filings.

The "problem" of Delaware's excessive attractiveness to large corporations considering Chapter 11 may be beginning to resolve itself. In other words, regardless of whether Delaware's popularity can be beneficial for the system, recent developments remind us of that old saying, that it's quite possible to have *too much* of a good thing.

Delaware's bankruptcy preeminence extends only to corporate filings. Nationally, consumer filings constitute the vast majority of bankruptcy filings, and some jurisdictions do report more total business filings per year than Delaware. All federal jurisdictions report business filing percentages, compared to consumer filings, at only 10%, with none exceeding 20%, except Delaware. In 1999, Delaware boasted a staggering ratio of almost 50% business filings. The disparity is even more pronounced when one focuses only on *large* corporate bankruptcies.

In 1996, Delaware attracted 31% of all publicly traded corporations filing for Chapter 11. Those same corporations collectively comprised over 70% of the total assets of publicly traded corporations filing under Chapter 11. That trend continued in 1997-98, and in 1999, a full 41% of public corporation filings occurred in Delaware, constituting an even greater 69% of the aggregate assets of public corporations filing that year. Between 1995 and the Fall of 1997, nine companies with assets exceeding \$1 billion filed in Delaware. Delaware claimed 10 of the 15 largest corporate filings in 2000, including five of the six largest companies by listed assets. Therefore, the incidence of filings in Delaware tells only part of the story. Delaware hasn't just attracted company filings, but successfully lands the most coveted cases among them. Large business filings constitute the "choice" cases among bankruptcy attorneys and judges alike. They present more complex, novel and challenging issues, typically are "high-profile" cases conferring more notoriety and recognition, and of course, generate substantial fees.

Delaware is available as a choice for businesses considering Chapter 11 due to favorable, and favorably construed, venue laws. These statutes allow several venue options to choose from, including an entity's "domicile." Domicile, as applied to business entities, has been construed to include the state of incorporation. Many companies choose to incorporate in Delaware to take advantage of its favorable corporate code, and are therefore eligible to file for bankruptcy there as well, even if there are no other contacts or dealings with Delaware. Other venue provisions also give companies great latitude. These companies may have primary assets in one state,

headquarters in another, an affiliate in bankruptcy in yet another, and even another as its incorporation state.

Still, simply being an available option only goes so far. To be so popular, Delaware must also be the most attractive option. Commentators focus on Delaware's emphasis on corporate law, elaborate support structures and policies making case management as convenient and predictable as possible. These policies include pre-filing conferences, technically advanced systems, and service companies which assist the bankruptcy practitioner in performing logistic and formal tasks, its reputation for rapidly processing cases, proximity to New York City, and the reputation of its bankruptcy judges for their reliability, accessibility and pro-debtor disposition (as well as tendencies not to quibble over attorneys' fees).

These perceived benefits and advantages have gone a long way towards Delaware's bankruptcy preeminence, which has rapidly and consistently grown over the past decade. However, in late 2000 and early 2001 signs of a reversing trend began to appear. First, the Delaware District Court's practice of automatic reference of bankruptcy cases to the two sitting bankruptcy judges was temporarily halted for the first time in history making several federal district judges available to hear bankruptcy cases. Secondly, the bankruptcy judges for the district began to openly admit that the district is overburdened with bankruptcy filings. Finally, Delaware began adding visiting judges to its Bankruptcy Court in an effort to stay abreast of its burgeoning case load.

As these changes have now made their way through the bankruptcy bar and the legal community, the flow of cases into Delaware has begun to even out, and even decrease. This phenomenon demonstrates that, at some point, Delaware's case load

approached a point at which it began to undermine the very factors behind Delaware's popularity. As docket congestion increases, it negatively impacts prospects for orderly administration, accessibility of judges and speed of processing. Even the remedial measure of adding judges in an effort to compensate can only go so far, for as the pool of available judges increases, the likelihood of getting a case assigned to a particular judge decreases, taking with it the predictability, reliability and confidence which has been so fundamental in Delaware's success.

As Delaware becomes a less attractive option, competing jurisdictions may gain a significant opportunity to attract corporate filings and raise their own reputations for efficiency, a fact which has not been lost upon the Northern and Southern Districts of Texas, both of which have promulgated complex case guidelines in an effort to lure such filings.