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Legislative Update

Is the Proposed Guidance for Random Assignment in Civil Cases a Harbinger for Bankruptcy? Experts Weigh In

The U.S. Judicial Conference Committee on Court Administration and Case Management proposed guidance on March 12[1] to promote random case assignment in civil cases (not criminal or bankruptcy cases) in district courts. The Judicial Conference later clarified[2] that case assignment in the bankruptcy context remains under study.

As venue reform remains a spotlight issue for lawmakers, the courts, practitioners and academics, could the issuance of proposed guidance of random case assignment in civil cases be a precursor to consideration of such guidance in bankruptcy cases? Four experts provide their take on the issue.

Prof. Melissa B. Jacoby of the University of North Carolina School of Law (Chapel Hill, N.C.)

Prof. Melissa B. Jacoby

When the U.S. Chamber of Commerce selected a Fort Worth court as the forum to halt implementation of the Consumer Financial Protection Bureau's new credit card late fee rule, a skeptical judge made news by quipping that "venue is not a continental breakfast."[3] A continental breakfast sounds tame relative to what venue in chapter 11 has become: an ever-expanding buffet. Although the Chamber of Commerce dispute shows that forum-shopping arises in many contexts, the bankruptcy venue statute is particularly anomalous in the federal court system.[4] As discussed in my book *Unjust Debts*, chapter 11 has dramatically changed over the course of my professional life, in part because some lawyers have made venue-flexibility an extreme sport.

In March 2024, the Judicial Conference of the United States adopted a proposal that highlights how case assignment contributes to forum-shopping in district courts. The proposal encourages district-wide assignment of certain civil actions to avoid strategic selection of single-judge divisions. More generally, though, case-assignment practices should reflect a list of values, including public confidence in case assignment and avoiding practices that create a likelihood that one judge will receive all cases of a certain type.

Although the March 2024 guidance excluded bankruptcy, the guidance noted that "[c]ase assignment in the bankruptcy context remains under study." What might that entail? Single-judge divisions have indeed been a factor in chapter 11 forum-shopping. Complex chapter 11 case panels also are likely to be under the microscope. More general guidance from the March 2024 document suggests that its scope includes district-wide departures from random assignment, even if not drivers of forum-shopping. This means that some districts' practice of assigning all chapter 13 cases to one judge could be examined as well.

Whatever the Judicial Conference recommends for case assignment should not relieve pressure to revise the bankruptcy venue statute.[5] Although the politics of certain civil

1 "Conference Acts to Promote Random Case Assignment," U.S. Courts Press Release (March 12, 2024), *available at* uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment (unless otherwise specified, all links in this article were last visited on April 17, 2024).

2 Tobi Raji, "U.S. Courts Clarify Policy Limiting 'Judge Shopping,'" *The Washington Post* (March 16, 2024), *available at* washingtonpost.com/politics/2024/03/16/judge-shopping-guidance-abortion-patent-courts (subscription required to view article).

3 Opinion and Order at 5, *Chamber of Commerce v. Consumer Fin. Prot. Bureau*, 24-213 (N.D. Tex. March 28, 2024), Docket No. 67. A divided Fifth Circuit vacated the district court's order transferring the action to Washington, D.C. (after it had been transferred). The majority appeared critical of the district court raising venue concerns sua sponte before considering the plaintiffs' preliminary injunction request. *In re Fort Worth Chamber of Commerce* at 1-2, 7, 24-10266 (5th Cir. April 5, 2024), Docket No. 33-1.

4 Melissa B. Jacoby, "Corporate Bankruptcy Hybridity," 166 *U. Pa. L. Rev.* 1715, 1731-33 (2018); Chapter 11 Bankruptcy Venue Reform Act of 2011, House Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives (Sept. 8, 2011) (statement of Melissa B. Jacoby), *available at* judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2011/09/Jacoby-09082011.pdf.

5 Among other things, Judicial Conference case assignment policies are likely to be precatory and not binding. For statutory allocation of responsibility for dividing court business, *see, e.g.*, 28 U.S.C. §§ 137, 154.

suits have generated a partisan divide over the recent Judicial Conference guidance, those same lawmakers could find common ground on bankruptcy venue reform.

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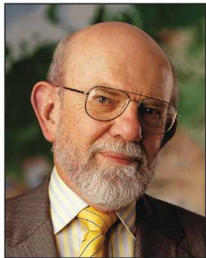
Prof. Jay L. Westbrook of the University of Texas School of Law (Austin, Texas)



Prof. Jay L. Westbrook

Justice must be seen to be done, and transparency is of little value unobserved. These key truths are not always mentioned in discussing the importance of ensuring that bankruptcies happen where they should: in one of the communities that is central to its business. The illustration that sticks in my mind involved international venue but applies just as well when, say, an Enron is filed in New York. When the Bear Stearns bankruptcy was filed in the Caymans some years ago, a reporter called me to ask about a pending motion to refuse to give the foreign proceeding effect in the U.S.:

> "[Reporter] Well, why do people care if the Bear case is here in New York or in the Caymans?"
> "Is your editor going to send you down to the courthouse at Battery Park for the hearing tomorrow?"
> "Of course."
> "If it stays in the Caymans, will you pack your swimsuit for that trip?"
> "No, no. Worse luck. [Pause] Oh, I get it."

Chapter 11 cases in particular should be filed where enough people care about the company to generate the media coverage that is essential to public justice.

A second principle is that our institutions should never put decision-makers in a position of conflict if it can be avoided. Our judges are not corrupt, but they are human. I like to think I am an ethical person. Yet I am not convinced that as a judge I could be unaffected by the knowledge that our loose venue rules mean my decision on an unsettled issue in a pending case might cause other major chapter 11 cases to be filed elsewhere, with the effect of depriving my friends, the lawyers and others with whom I have spent my legal career of wonderful professional opportunities and many millions of dollars in fees.

I am one of those who has spent many hours drafting and redrafting venue reforms, some of which have been introduced in Congress. Perhaps the most obviously simple and effective step would be to eliminate state of incorporation ("domicile") for corporate debtors. A change in the affiliate filing rules is much harder to draft, but doable. Simpler and better would be to use the current "affiliate" definition in § 101(2) of the Code to define a corporate group and apply the principal place of business or principal asset rules to the group. (I hear the corporate lawyers hitting the floor.) Recent events strongly suggest that the time for reform is now.

One of the nation's most distinguished scholars in the field of bankruptcy, Prof. Jay L. Westbrook has been a pioneer in this area in two respects: empirical research and international/comparative studies. He also teaches and writes on commercial law and international business litigation.

Donald L. Swanson of Koley Jessen (Omaha, Neb.)

Donald L. Swanson

Judge-shopping is frowned upon. And when it happens, it's generally considered an abuse of the legal system. The Judicial Conference of the United States is making a new effort to deter judge-shopping by proposing the random assignment of cases among judges within each federal district court. The proposal is based on policies of (1) ensuring that district judges remain generalists, and (2) ignoring perceptions of relative merits or abilities of the various judges. Such a proposal does not apply to bankruptcy courts. And I hope and predict that the proposal will not spread to bankruptcy courts. Here are two reasons why.

First, bankruptcy judges are not generalists. Bankruptcy judges are, at their very essence, specialists within a narrow portion of the federal judicial system. And there is no bankruptcy policy against, for example, (1) assigning consumer cases to one judge and business cases to another, or (2) assigning subchapter V cases to one judge and regular chapter 11 cases to another? In fact, specialization of bankruptcy judges within a district might be the best way to maximize the efficiency and effectiveness of the bankruptcy system.

Second, I am sympathetic with some judge-shopping, as explained below. And I hope that those who establish rules for bankruptcy on such things don't go overboard in trying to prohibit all judge-shopping of every type and stripe.

I suggest that these two adages apply to judge-shopping in the bankruptcy context:

1. The potential for judge-shopping creates a tension to be managed, not a problem to be solved; and
2. The best approach is to keep as much flexibility as possible and to address specific concerns on a case-by-case basis — not by broad prohibitions.

My first experience with recognizing my own judge-shopping problem occurred in the 1990s. I had filed a chapter 11 case in a faraway district that had one bankruptcy judge, and this was my first experience with that judge.

That judge had a good reputation for handling chapter 7 and chapter 13 cases. But I soon learned that chapter 11 was not his forte. It seemed to me, at every turn in the case, that the judge either didn't want to deal with my case — or didn't know what to do. On very basic issues, the judge failed to act decisively. And I soon started saying to myself and to my client, "This judge doesn't want chapter 11 cases filed in this court!"

Ultimately, in great frustration, we dismissed the case voluntarily, and with creditor consent. And I vowed to never file another case in that judge's court again — ever! If I couldn't get a different judge, I'd decline the representation.

So, in addressing judge-shopping concerns in bankruptcy, let's not go overboard. Sometimes, a limited right to avoid a specific judge can be a blessing for a debtor's counsel.

With over 40 years of experience and utilizing his specialization in the industry, Donald L. Swanson has developed creative strategies to resolve chapter 11 problems that have enabled him to develop and confirm reorganization plans for business clients in bankruptcy. He also has extensive experience and expertise in subchapter V bankruptcy.

Thomas J. Salerno of Stinson LLP (Phoenix)

Thomas J. Salerno

The current legal system deals with the outlier instances of bad judicial actors and lawyers who unlawfully abuse venue provisions. Despite aspersions cast on judges (who cannot really defend themselves in fora outside of the courtroom), the vast majority of bankruptcy judges I have interacted with over the last 42 years have been honorable, hardworking people who endeavor to do the right thing to the best of their abilities and experiences under difficult circumstances.

Are all judges equal as far as experience, temperament and proclivities? Of course not — not any more than all bankruptcy professionals are. This reality necessarily plays a part in venue-selection. Moreover, despite conspiracy theorists' nightmares, judges can and do change venue. And of course, despite painstaking venue analysis, even judges in "friendly" places do not do the bidding of those who brought them to the dance.[6]

Will these latest dust-ups create materially new venue laws, or will all the hand-wringing be gone with the next news cycle? This author does not believe it will or should create new venue rules. While often in error but never in doubt, my parting advice on this topic is as follows.

To politicians who muster moral outrage on cue about this practice depending on what side of the judicial decisions they find themselves, I suggest that they should think of judge-shopping as equivalent to lawful voting district manipulation to maximize votes — an age-old political practice going back to the early 1800s. While egregious attempts are struck down by courts as gerrymandering, many survive. Change venue laws if you want, but do not feign "shock" when lawyers use Congress's venue laws for tactical advantage. If Congress wants to change venue laws (which has been a hot topic for at least the last 30 years), do it, but leave the faux outrage at the door. The ball, as they say, is in their court.

For professionals who bemoan the loss of potentially lucrative representations in cases filed in other jurisdictions, I empathize. That said, clients choose their representation, and that representation can, should and does involve analyzing venue/judge draws as a tactical decision that must be made. To those lawyers who do not aggressively analyze venue/judges as part of planning a commercial restructuring, I say shame on them.

To those (such as academics and others) who breathlessly predict the end of life as we know it because sophisticated lawyers apply rules for the advantage of their clients, however "shocked" I may be, I say, "Get over it. This is what lawyers are paid to do. Until then, work within the system as it is." Despite rumors of its demise, the reorganization laws in the U.S. are viewed favorably outside of this country as offering distressed businesses a fighting chance to survive.

Judges presiding over matters have real-world consequences in real-world dynamics that can impact jobs and lives. If there is a lawful choice in the matter, lawyers can, will and should seize it. Is it imperfect? It is. Then again, we live in an imperfect world.

Thomas J. Salerno brings global and international experience with out-of-the-box solutions to his work with complex commercial corporate restructurings. He advises clients from a variety of industries. abi

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6 One need only look at the NRA chapter 11 in which venue was transparently engineered in Dallas. That case certainly did not go as planned by NRA's counsel.