



CLLA HILL DAY

February 26, 2018

BANKRUPTCY VENUE REFORM

1) PROPOSAL

On January 8, 2018 Senators John Cornyn (R-TX) and Elizabeth Warren (D-MA) introduced a bipartisan bankruptcy venue reform bill as S. 2282 entitled the Bankruptcy Venue Reform Act of 2018 to rebalance where commercial Chapter 11 bankruptcy cases are commenced. See Exhibit A for a copy. The proposed law eliminates the place of incorporation in favor of filing where the debtor's principal place of business or principal assets are located. It will also eliminate the affiliate-filing loophole. The result of this effort will make it more likely that local bankruptcy cases will be decided at home.

Retired Bankruptcy Judge Steven Rhodes (Bankr. E. D. Michigan) commented in the *Wall Street Journal* that the current venue law is "the single most significant source of injustice in chapter 11 bankruptcy cases." The National Association of Credit Managers recently asserted that venue shopping in bankruptcy cases "creates significant obstacles for trade creditors....and increases the cost of participation." S. 2282 will put an end to the rampant forum shopping permitted under the current statutory regime.

2) BACKGROUND

A 2015 GAO Report on *Corporate Bankruptcy – Stakeholders Have Mixed Views on Attorneys; Fee Guidelines and Venue Selection for Large Chapter 11 Cases* (GAO-15-839) confirmed that since 2009 nearly 2/3 of large companies (assets and liabilities of \$50 million or more) filed their chapter 11 cases in venues outside of the district where their principal place of business or principal assets are located. And approximately 90 percent of those companies filed in the District of Delaware or the Southern District of New York. (*Id.*, p.3). Our research tracked these same trends for the years from 2004 through 2016, where 735 chapter 11 bankruptcy cases were filed in the District of Delaware and another 125 chapter 11 bankruptcy cases were filed in the Southern District of New York, each involving a business debtor headquartered in a different state. These cases involved approximately \$1 trillion in assets, over \$2 trillion in debt, 6.3 million creditors and more than 2 million employees, all having their rights administered by courts having no meaningful connection with the subject debtors. This trend is not limited to large public companies. Almost a third of the Delaware cases involved smaller businesses with less than \$15 million in assets at the time of filing!



3) WHY VENUE REFORM IS NECESSARY

When troubled companies flee their home states and seek bankruptcy protection in remote jurisdictions, trade creditors, employees, retirees and other parties are disenfranchised, public confidence in the bankruptcy system erodes and local interests are ignored. See **Exhibit B** for maps of VeraSun Energy Corporation, Lily Robotics and Marsh Supermarkets cases to illustrate the problem of filing a Chapter 11 bankruptcy case far away from where the debtor's business was conducted.

Other disinterested bankruptcy experts have noted:

- The 1997 National Bankruptcy Review Commission recognized that forum shopping and the concentration of cases in Delaware made it more difficult for small creditors and employees to actively participate in a bankruptcy case. The mass concentration of chapter 11 cases far from a debtor's home state deprives local constituents of their due process and tilts the playing field toward financially sophisticated parties who regularly appear in large bankruptcy cases. The situation has continued to deteriorate over time, leading to a growing level of indifference among creditor, employee and retiree constituents unable to participate actively in a process that directly affects their interests.
- When a disproportionately high number of large and middle market companies flee to Delaware or New York to seek refuge from their creditors, the process appears to be subject to manipulation by large moneyed interests. In the *Patriot Coal* case it was noted by the press that “[l]enders and lawyers who get the big cases like taking their troubles to courts in New York and Delaware, which are convenient to their homes and offices and attuned to their concerns”. Forum shopping to achieve desired outcomes directly threatens the integrity of the bankruptcy system by eroding public confidence and calling into question the fairness of a bankruptcy system that can be so easily manipulated.
- The logical consequences of a remote business bankruptcy are often most profound in the region and community in which the debtor's principal place of business or principal assets are located. The location of the bankruptcy case can have a tremendous impact on the local economy since the reorganization of a distressed company will impact on local jobs and wages for years to come. Trade creditors, employees and retirees' ability to participate in the bankruptcy is limited when the venue of the case is located thousands of miles away in a remote courtroom.



- The consequences of a business bankruptcy are often most profound in the region and community in which the debtor's principal place of business or principal assets are located. The location of the bankruptcy case can have a tremendous impact on the local economy. Based on estimates from *Bloomberg Businessweek* (February 12, 2012), the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly \$4 billion from local economies.

4) PARTIAL LIST OF SUPPORTING ORGANIZATIONS

Texas Hotel & Lodging Association
Iowa Bankers Association
City of Berkeley
National Association of Credit Managers
National Association of Attorneys General (pending)
Commercial Law League of America
State Bar of California
State Bar of Florida
State Bar of Minnesota
State Bar of South Carolina
State Bar of Indiana (Bankruptcy Section)
Boston Bar Association
Tampa Bay Bar Association
Bankruptcy & Commercial Law Section of the Dallas Bar Association
State Bar of Texas Bankruptcy Section

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EXHIBIT A

115TH CONGRESS
2D SESSION

S. 2282

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

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 2018

Mr. CORNYN (for himself and Ms. WARREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Bankruptcy Venue Re-
5 form Act of 2018”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds that—

8 (1) bankruptcy law provides a number of venue
9 options for filing bankruptcy under chapter 11 of
10 title 11, United States Code, including place of in-

1 corporation, principal place of business and assets,
2 or where an affiliate has filed a case under chapter
3 11;

4 (2) the wide range of permissible bankruptcy
5 venue options has led to an increase in companies
6 filing for bankruptcy outside of their home States,
7 or the district in which their principal place of busi-
8 ness or principal assets are located, a practice
9 known as forum shopping, and has resulted in a
10 concentration of bankruptcy cases in a few districts;

11 (3) bankruptcy forum shopping prevents small
12 businesses, employees, retirees, creditors, and other
13 important stakeholders from fully participating in
14 bankruptcy cases that will have tremendous impacts
15 on their lives, communities, and local economies, and
16 deprives district courts of the United States of the
17 opportunity to contribute to the development of
18 bankruptcy law in their jurisdictions; and

19 (4) reducing forum shopping and manipulation
20 in the bankruptcy system will strengthen the integ-
21 rity, build public confidence, and ensure fairness in
22 the bankruptcy system.

23 (b) PURPOSE.—The purpose of this Act is to prevent
24 the practice of forum shopping in cases filed under chapter
25 11 of title 11, United States Code.

1 **SEC. 3. VENUE OF CASES UNDER TITLE 11.**

2 Title 28, United States Code, is amended—

3 (1) by striking section 1408 and inserting the
4 following:

5 **“§ 1408. Venue of cases under title 11**

6 “(a) DEFINITION.—In this section, the term ‘prin-
7 cipal place of business’ means, with respect to a person
8 or entity that is subject to the reporting requirements of
9 section 13 or 15(d) of the Securities Exchange Act of
10 1934 (15 U.S.C. 78m, 78o(d)), the address of the prin-
11 cipal executive office of the person or entity as stated in
12 the last annual report filed under that Act prior to the
13 commencement of a case under title 11 by the person or
14 entity, unless another address is shown to be the principal
15 place of business by clear and convincing evidence.

16 “(b) VENUE.—Except as provided in section 1410,
17 a case under title 11 may be commenced only in the dis-
18 trict court for the district—

19 “(1) in which the domicile, residence, or prin-
20 cipal assets in the United States of an individual
21 who is the subject of the case have been located for
22 the 180 days immediately preceding such commence-
23 ment, or for a longer portion of the 180-day period
24 than the domicile, residence, or principal assets in
25 the United States of the individual were located in
26 any other district;

1 “(2) in which the principal assets or principal
2 place of business in the United States of a person
3 or entity, other than an individual, that is the sub-
4 ject of the case have been located for the 180 days
5 immediately preceding the commencement, or for a
6 longer portion of the 180-day period than the prin-
7 cipal place of business or principal assets in the
8 United States of the person or entity were located
9 in any other district; or

10 “(3) in which there is already pending a case
11 under title 11 concerning an affiliate that directly or
12 indirectly owns, controls, is the general partner, or
13 holds 50 percent or more of the outstanding voting
14 securities, of the person or entity that is the subject
15 of the later filed case if the pending case was prop-
16 erly filed in that district under this section.

17 “(c) LIMITATIONS.—

18 “(1) IN GENERAL.—For the purposes of para-
19 graphs (2) and (3) of subsection (b), no effect shall
20 be given to a change in the ownership or control of
21 a person or entity that is the subject of the case or
22 its affiliate, or to a transfer of the principal assets
23 or principal place of business of a person or entity
24 that is the subject of the case or its affiliate to an-
25 other district, that takes place—

1 “(A) within 1 year before the date on
2 which the case is commenced; or

3 “(B) for the purpose of establishing venue.

4 “(2) PRINCIPAL ASSETS.—For the purposes of
5 subsection (b)(2) and paragraph (1) of this sub-
6 section, principal assets do not include cash or cash
7 equivalents.

8 “(d) BURDEN.—The person or entity that com-
9 mences a case under title 11 shall bear the burden of es-
10 tablishing by clear and convincing evidence that venue is
11 proper under this section.”; and

12 (2) by striking section 1412 and inserting the
13 following:

14 “**§ 1412. Change of venue**

15 “Notwithstanding that a case or proceeding under
16 title 11 is filed in the correct division or district, a district
17 court may nevertheless transfer a case or proceeding
18 under title 11 to a district court for another district or
19 division, in the interest of justice or for the convenience
20 of the parties. If a case or proceeding under title 11 is
21 filed in the wrong division or district, the district court
22 shall transfer, dismiss the case or proceeding, or, if it be
23 in the interest of justice, transfer the case or proceeding
24 under title 11 to any district or division in which it could
25 have been brought. The court shall enter an order on any

1 objection to or request to change venue of a case or pro-
2 ceeding under title 11 not later than 14 days after the
3 filing of such objection or request.”.

○

EXHIBIT B

VeraSun Energy Corporation Case Facts

Case no. 09-12606-BLS

Filed: October 31, 2008

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters: Sioux Falls, SD

Corn Producers: 7,800 corn contract holders, over 6,000 from Iowa

Plants: 17 production facilities in eight states



Lily Robotics Case Facts

Case no. 17-10426-KJC

Filed: February 27, 2017

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters and sole location: San Francisco, CA

Distance from Headquarters to Nearest Bankruptcy Court: Less than 5 miles

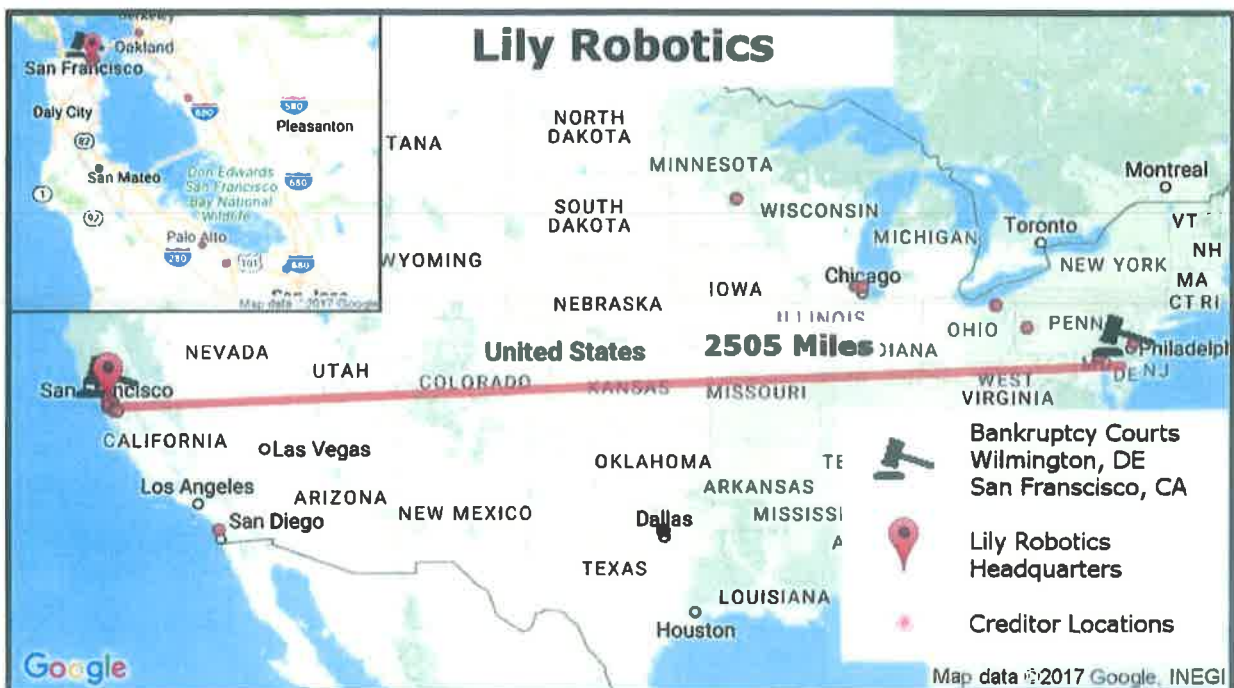
Subsidiaries/Affiliates: None

Assets: \$32,995,584.66 including \$25,660,972.52 cash and \$4,274,323.73 receivables

Location of Creditors: 15 of the 30 largest unsecured creditors listed when petition was filed are from California.

Location of Equity Holders: 55 of the 71 equity holders are in California.

Addressees on Matrix: 16 of the 30 entries on the Consolidated Creditor Matrix are from California.



Marsh Supermarkets Case Facts

Case no. 17-11066-BLS

Filed: May 11, 2017

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters: Indianapolis, IN

Employees: 4,400

Assets: 60 stores in Indiana and Ohio

Trade Payables: \$30,000,000.00

Underfunded Pension: \$21,750,000.00

Multiemployer Pension Plan Liability: \$55,000,000.00

Location of Largest

Unsecured Creditors:

State	Number	State	Number
CA	1	MI	1
Canada	1	MN	2
CT	1	NH	1
FL	1	NJ	1
GA	1	NY	1
IL	3	NC	4
IN	11	PA	1

