



CLLA HILL DAY

October, 2019

BANKRUPTCY VENUE REFORM **H.R. 4421**

1. PROPOSAL

Representatives Zoe Lofgren (D-Calif. 19th District) and Jim Sensenbrenner (R-Wisc., 5th District) introduced H.R. 4421, a new bipartisan bankruptcy venue reform bill. We are looking for additional bi-partisan co-sponsors. A copy of the bill is attached as **Exhibit A**. It is substantially similar to the S. 2282 introduced last year in the Senate by Senators John Cornyn (R-TX) and Elizabeth Warren (D-MA). 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. Plans are underway to introduce a companion Senate bill in the 116th Session.

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 between 2010 and 2014 nearly 71% of large companies (assets and liabilities of \$50 million or more) filed their chapter 11 cases in the District of Delaware or the Southern District of New York. (Id., p. 35). The GAO Report (p. 42) and an earlier academic study (Parikh 46 Conn. L.R. 159, 179 (2013)), although each using different samplings during different periods of time since 2007, found that approximately two-thirds of larger chapter 11 cases fled their headquarters state to seek bankruptcy protection. Our research tracked these same trends for the years from 2004 through 2018, and found that the overwhelming majority of forum-shopped cases filed in Delaware. This trend is not limited to large public companies. Almost a third of the 796 forum-shopped Delaware cases since 2004 involved smaller businesses with less than \$20 million in assets at the time of filing!

3. THE HUMAN TOLL AND IMPACT OF FORUM SHOPPING

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. In *Verasun*, farmers were forced to retain their own counsel and appear individually over a thousand miles away in Delaware to defend their corn contracts. The solar company *Solyndra* fled California to file in Delaware leaving 1100 employees behind to fend for themselves after the company terminated them without warning. Midwestern-based *Marsh Supermarkets* ran from their employees and retirees in the Midwest to file in Delaware where the company had no nexus whatsoever. It left behind \$80 million of unpaid severance and retirement benefits. The right under Title 28 to seek a transfer of venue after a bankruptcy filing proved to be a superficial remedy for the West Virginia coal miners when *Patriot Coal* fled north to file for bankruptcy protection in a jurisdiction where venue was not even proper. Although the miners eventually prevailed in their motion to transfer venue, it took many months and cost them millions in legal fees.

4. WHY VENUE REFORM IS NECESSARY

- 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 primarily to Delaware 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.
- 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.”



Venue reform will put an end to the rampant forum shopping permitted under the current statutory regime.

- 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 more than \$4 billion from local economies.

5. PARTIAL LIST OF ORGANIZATIONS THAT SUPPORT VENUE REFORM

Bankruptcy & Commercial Law Section of the Dallas Bar Association
Bar Association of San Francisco
Boston Bar Association
Chicago Bar Association
City of Berkeley
California Lawyers Association, Business Law Section
Commercial Law League of America
Illinois State Bar Association
Iowa Bankers Association
National Association of Credit Managers
State Bar of Florida
State Bar of Indiana (Bankruptcy Section)
State Bar of Minnesota
State Bar of South Carolina
State Bar of Texas Bankruptcy Section
Tampa Bay Bar Association
Texas Hotel & Lodging Association
United Mine Workers of America

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EXHIBIT A

116TH CONGRESS
1ST SESSION

H. R. 4421

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

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 2019

Ms. LOFGREN (for herself, Mr. SENSENBRENNER, Mr. CRIST, and Mr. STEUBE) introduced the following bill; which was 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 2019”.

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

1 title 11, United States Code, including, with respect
2 to the entity filing bankruptcy—

3 (A) any district in which the place of in-
4 corporation of the entity is located;

5 (B) any district in which the principal
6 place of business or principal assets of the enti-
7 ty are located; and

8 (C) any district in which an affiliate of the
9 entity has filed a pending case under title 11,
10 United States Code;

11 (2) the wide range of permissible bankruptcy
12 venue options has led to an increase in companies
13 filing for bankruptcy outside of their home States—
14 the district in which the principal place of business
15 or principal assets of the company is located;

16 (3) the practice described in paragraph (2) is
17 known as “forum shopping”;

18 (4) forum shopping has resulted in a concentra-
19 tion of bankruptcy cases in a limited number of dis-
20 tricts;

21 (5) forum shopping—

22 (A) prevents small businesses, employees,
23 retirees, creditors, and other important stake-
24 holders from fully participating in bankruptcy

1 cases that have tremendous impacts on their
2 lives, communities, and local economies; and

3 (B) deprives district courts of the United
4 States of the opportunity to contribute to the
5 development of bankruptcy law in the jurisdic-
6 tions of those district courts; and

7 (6) reducing forum shopping in the bankruptcy
8 system will strengthen the integrity of, and build
9 public confidence and ensure fairness in, the bank-
10 ruptcy system.

11 (b) PURPOSE.—The purpose of this Act is to prevent
12 the practice of forum shopping in cases filed under chapter
13 11 of title 11, United States Code.

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

15 Title 28, United States Code, is amended—

16 (1) by striking section 1408 and inserting the
17 following:

18 **“§ 1408. Venue of cases under title 11**

19 **“(a) PRINCIPAL PLACE OF BUSINESS WITH RE-**
20 **SPECT TO CERTAIN ENTITIES.—**

21 **“(1) IN GENERAL.—**Except as provided in para-
22 graph (2), for the purposes of this section, if an en-
23 tity is subject to the reporting requirements of sec-
24 tion 13 or 15(d) of the Securities Exchange Act of
25 1934 (15 U.S.C. 78m, 78o(d)), the term ‘principal

1 place of business', with respect to the entity, means
2 the address of the principal executive office of the
3 entity as stated in the last annual report filed under
4 that Act before the commencement of a case under
5 title 11 of which the entity is the subject.

6 “(2) EXCEPTION.—With respect to an entity
7 described in paragraph (1), the definition of the
8 ‘principal place of business’ under that paragraph
9 shall apply for purposes of this section unless an-
10 other address is shown to be the principal place of
11 business of the entity by clear and convincing evi-
12 dence.

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

16 “(1) in which the domicile, residence, or prin-
17 cipal assets in the United States of an individual
18 who is the subject of the case have been located—

19 “(A) for the 180 days immediately pre-
20 ceding such commencement; or

21 “(B) for a longer portion of the 180-day
22 period immediately preceding such commence-
23 ment than the domicile, residence, or principal
24 assets in the United States of the individual
25 were located in any other district;

1 “(2) in which the principal place of business or
2 principal assets in the United States of an entity,
3 other than an individual, that is the subject of the
4 case have been located—

5 “(A) for the 180 days immediately pre-
6 ceding such commencement; or

7 “(B) for a longer portion of the 180-day
8 period immediately preceding such commence-
9 ment than the principal place of business or
10 principal assets in the United States of the en-
11 tity were located in any other district; or

12 “(3) in which there is pending a case under
13 title 11 concerning an affiliate that directly or indi-
14 rectly owns, controls, or holds 50 percent or more of
15 the outstanding voting securities of, or is the general
16 partner of, the entity that is the subject of the later
17 filed case, but only if the pending case was properly
18 filed in that district in accordance with this section.

19 “(c) LIMITATIONS.—

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

1 States of an entity that is the subject of the case,
2 or of an affiliate of the person entity, to another dis-
3 trict, that takes place—

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

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

7 “(2) PRINCIPAL ASSETS.—

8 “(A) PRINCIPAL ASSETS OF AN ENTITY
9 OTHER THAN AN INDIVIDUAL.—For the pur-
10 poses of subsection (b)(2) and paragraph (1) of
11 this subsection—

12 “(i) the term ‘principal assets’ does
13 not include cash or cash equivalents; and

14 “(ii) any equity interest in an affiliate
15 is located in the district in which the hold-
16 er of the equity interest has its principal
17 place of business in the United States, as
18 determined in accordance with subsection
19 (b)(2).

20 “(B) EQUITY INTERESTS OF INDIVID-
21 UALS.—For the purposes of subsection (b)(1),
22 if the holder of any equity interest in an affil-
23 iate is an individual, the equity interest is lo-
24 cated in the district in which the domicile or
25 residence in the United States of the holder of

1 the equity interest is located, as determined in
2 accordance with subsection (b)(1).

3 “(d) BURDEN.—On any objection to, or request to
4 change, venue under paragraph (2) or (3) of subsection
5 (b) of a case under title 11, the entity that commences
6 the case shall bear the burden of establishing by clear and
7 convincing evidence that venue is proper under this sec-
8 tion.

9 “(e) OUT-OF-STATE ADMISSION FOR GOVERNMENT
10 ATTORNEYS.—The Supreme Court shall prescribe rules,
11 in accordance with section 2075, for cases or proceedings
12 arising under title 11, or arising in or related to cases
13 under title 11, to allow any attorney representing a gov-
14 ernmental unit to be permitted to appear on behalf of the
15 governmental unit and intervene without charge, and with-
16 out meeting any requirement under any local court rule
17 relating to attorney appearances or the use of local coun-
18 sel, before any bankruptcy court, district court, or bank-
19 ruptcy appellate panel.”; and

20 (2) by striking section 1412 and inserting the
21 following:

22 **“§ 1412. Change of venue**

23 “(a) IN GENERAL.—Notwithstanding that a case or
24 proceeding under title 11, or arising in or related to a case
25 under title 11, is filed in the correct division or district,

1 a district court may transfer the case or proceeding to a
2 district court for another district or division—

3 “(1) in the interest of justice; or

4 “(2) for the convenience of the parties.

5 “(b) INCORRECTLY FILED CASES OR PRO-
6 CEEDINGS.—If a case or proceeding under title 11, or arising in or related to a case under title 11, is filed in a
7 division or district that is improper under section 1408(b),
8 the district court shall—

10 “(1) immediately dismiss the case or proceeding; or

12 “(2) if it is in the interest of justice, immediately transfer the case or proceeding to any district court for any district or division in which the
13 case or proceeding could have been brought.

16 “(c) OBJECTIONS AND REQUESTS RELATING TO
17 CHANGES IN VENUE.—Not later than 14 days after the
18 filing of an objection to, or a request to change, venue
19 of a case or proceeding under title 11, or arising in or
20 related to a case under title 11, the court shall enter an
21 order granting or denying the 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

