Question for Samir Parikh:

1. **In your opinion, are there problems of forum-shopping and venue abuse in bankruptcy litigation which Congress should be concerned about?**

Senator Grassley, thank you for this question. Forum shopping and judge shopping in bankruptcy are serious issues due to the ease with which corporate debtors can engage in these practices and the significant distortive benefits the practices can offer. The end result is that process and outcome uniformity is undermined.

These practices have been detailed exhaustively over the last decade. I include at the end of this answer (i) a November 9, 2021 letter to you and other senators from the National Association of Attorneys General and (ii) a February 26, 2018 letter to you and former Senator Feinstein from various professors of law that provide insight into the harm of forum shopping and pending legislation that could address the problem.

I will not restate the sound policy and practical reasons supporting venue reform. I would, however, like to explain that the current venue rules represent a historical anomaly and offer some simple changes that could be made to address the issue.

I. Historical Clarification[1]

Some commentators have argued that federal bankruptcy law has always been characterized by permissive venue rules for corporate debtors. As explained below, this assertion is false.

Section 2a(1) of the 1898 Bankruptcy Act established the venue rules for debtors. The section allowed "persons" adjudged bankrupt to file a petition in any jurisdiction that had "their principal place of business, resided or had their domicile for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction."[2] The section failed to distinguish between natural persons and fictitious business entities. Courts initially tasked with applying this venue rule to corporate debtors were forced to formulate their own definitions. The primary issue was whether the term "domicile" could apply to a corporation. Courts ruled that the term could in fact apply and indicated a corporation's state of incorporation.

In 1934, Congress affirmed the judiciary's approach by enacting section 77B. The new section allowed corporate debtors to file in their state of incorporation. But the National Bankruptcy Conference's drafting committee (the "NBC Committee") revisited the issue just a few years later and rejected this approach in Chapter X cases, which applied exclusively to large corporations with outstanding public debt or securities. Congress followed the NBC Committee's recommendation and enacted section 128 of the Chandler Act, which effectively supplanted section 77B and allowed Chapter X debtors to file only in a jurisdiction where the debtor had its

[1] This section is drawn from Samir D. Parikh, *Modern Forum Shopping In Bankruptcy*, 46 CONN. L. REV. 159 (2013).

[2] Citations have generally been omitted.

principal place of business or its principal assets. The House Report to the Chandler Act explained the change:

> In general, the bill sets up as the only valid criterion for jurisdiction the company's principal place of business, or the place of location of its principal assets. Selection of any other jurisdiction usually means conducting the reorganization at great distances from the place or places where the corporation does its business. It means putting investors to great expenses and difficulty if they wish to appear and participate in the proceedings. ***It means, also, that inside groups who may be in control of a reorganization are able to search around for the jurisdiction in which they estimate it is least likely, for a number of reasons, that their conduct of the corporation will be examined; that they will be exposed to liability, and their perpetuation in office endangered***. These defects have been met and corrected by the bill, in limiting the venue of reorganization proceedings to the principal place of business or the location of the corporation's principal assets . . . .

This repudiation of the judiciary's interpretation of section 2a(1) of the 1898 Bankruptcy Act was endorsed in 1973 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "JCUS Committee"). The JCUS Committee was tasked with drafting the new bankruptcy rules. Rule 116 was enacted to address venue issues. The rule provided unique and separate treatment for natural persons and fictitious entities. Rule 116(a) allowed corporate debtors to file only in a district where the debtor had its principal place of business or principal assets or where an affiliate of the debtor had already filed. The Advisory Committee Notes that accompanied the change acknowledged that the new rule was specifically derived from section 128 of Chapter X and explicitly "eliminate[d] the notion that residence or domicile may serve as a useful basis for determining venue of a corporation or partnership." The JCUS Committee reasoned that "[t]he place of incorporation [had] no relation to the business activity of the corporation . . . ."

A clear policy rationale supported the venue rules from 1938 to 1978. The Bankruptcy Reform Act of 1978 replaced Rule 116(a) with section 1472. The new section established one venue provision governing all debtors and eliminated the clear demarcation for individual and corporate debtors. Section 1472's legislative history provided no explanation for this consolidation of previously distinct venue provisions. Perhaps Congress intended to return to the venue rules under section 2a(1) of the 1898 Bankruptcy Act. However, if this was Congress's intent, the shift in the venue rules was drastic. For such a drastic change to be made without any discussion or explanation in the legislative history is highly unlikely. Further, if Congress did intend to allow a corporate debtor to rely on its state of incorporation for venue, it could have returned to the explicit language of section 77B of the 1934 amendments to the 1898 Bankruptcy Act. More likely, the genesis for section 1472 was the desire to simplify the language of the 1978 Bankruptcy Act, with unintended consequences regarding forum shopping. If Congress did in fact make such an oversight, its error was at least share by legal commentators at the time. In fact, none of the law review articles that explained the 1978 Bankruptcy Act appreciated the significance of the venue rule changes; the majority of these articles did not even acknowledge that changes had been made.

In context, however, this oversight may not be as glaring as it first appears. At the time section 1472 was enacted, there were few large, multimillion-dollar bankruptcy cases, and forum shopping by such debtors was not a concern because venue provisions had not been abused. Without an understanding of the risk of forum shopping and lacking an appreciation of the unique harm that forum shopping in bankruptcy could pose, Congress, legal commentators, and scholars may have all viewed section 1472's changes as mere streamlining of an unnecessarily detailed provision.[3]

II. Suggested Changes

I believe that a multifaceted approach is necessary to address the forum shopping quandary. In the event that current pending legislation fails to pass or an opportunity to modify statutory proposals arises, I suggest considering the following changes:

Revisions To Section 1408:

1) Section 1408's language is ambiguous and groups individual debtors together with fictitious business entities. I think section 1408 should be eliminated as it currently exists. The bankruptcy code should return to Rule 116's language and provide separate subsections addressing natural persons and corporations.

2) Section 1408(2) should be replaced by a new provision that would allow a corporate debtor to file a bankruptcy petition in a district in which there is currently pending a case concerning such debtor's affiliate, general partner or partnership, as long as such debtor has a "meaningful connection" to the district. The term would be undefined in the code, and the judiciary would be allowed to develop the definition to curtail blatant forum shopping. A corporate debtor that relies on the affiliate filing hook but fails to establish the requisite connection to the district could have its case transferred to another district pursuant to rule 1014(a)(2). This new requirement will put the onus on debtor's counsel to select venue after careful deliberation.

Revisions to the Bankruptcy Petition and the Federal Rules of Bankruptcy Procedure:

3) The bankruptcy petition should be revised so that a debtor must affirmatively state the specific section 1408 basis that supports its venue choice.[4]

4) There is currently no instruction to bankruptcy court judges to verify that a debtor's chosen venue is proper. A party that objects to the debtor's venue choice must file a transfer motion and bears the burden of proof. Rule 1014(a) should be modified to provide that courts must verify the propriety of the debtor's venue choice at the outset of the case or as soon as practicable. A corporate debtor should be obligated to file a form with its petition briefly explaining why the chosen venue is appropriate. The debtor should bear the burden of proof in any dispute regarding venue.

[3] Section 1472 was subsequently redesignated as section 1408.

[4] As it currently stands, the following bases are all grouped together: domicile, residence, principal place of business and principal assets. The debtor checks a box if any of these apply.

5) Rule 1014(a)(2) should be modified so that transfer is mandatory – not discretionary – in instances where a case is filed in the improper district unless transfer would cause irreparable damage to the estate.

6) 28 U.S.C. § 1292 should be amended to provide that a ruling on venue is to be considered interlocutory and appealable by any party in interest.

7) Rule 9011(b) should be modified to explicitly provide that by filing in a specific district, debtor's counsel is making a representation that there is a sound basis supporting that decision. To the extent that representation turns out to be erroneous, a bankruptcy judge should have the option of sanctioning the debtor's lead and local counsel. The sanction would be limited to the reasonable attorney's fees and other expenses incurred by any party that brought a transfer motion or otherwise contested the venue choice.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

PRESIDENT
Karl A. Racine
District of Columbia
Attorney General

PRESIDENT-ELECT
Tom Miller
Iowa
Attorney General

VICE PRESIDENT
Josh Stein
North Carolina
Attorney General

IMMEDIATE PAST PRESIDENT
Jeff Landry
Louisiana
Attorney General

Chris Toth
Executive Director

1850 M Street NW
12th Floor
Washington, DC 20036
(202) 326-6000
www.naag.org

November 9, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Re: H.R. 4193 – Bankruptcy Venue Reform Act of 2021
S. 2827 - Bankruptcy Venue Reform Act of 2021

We support H.R. 4193, and S. 2827, the Bankruptcy Venue Reform Act of 2021[1]. Currently, corporations can file in any district in which they are incorporated, have their principal place of business or

[1] The wording of the two bills is virtually identical. The recently introduced Senate bill adds two provisions -- first, the addition of the words "or to the merger, dissolution, spinoff, or divisive merger" to the limitations provision in the wording for new Section 1408(c)(1) and second, the words "in whole or in part" to the language in Section 1408(c)(1)(B). We agree that both additions are useful clarifications that support the overall goals of the bill and ensure that it covers all forms of this conduct.

principal assets – or in any district where an affiliated entity, no matter how small or recently created, has filed bankruptcy using any of these provisions.

There have been numerous examples where corporations have taken advantage of this freedom: Eastern Airlines, based in Florida, filed in New York in the 1980s, relying solely on the location of its frequent flyer club subsidiary. Enron and Worldcom similarly were able to file in New York in 2001 and 2002 based on initial filings by single small subsidiaries affiliated there, even though they were based in Texas and Mississippi, respectively and had by far the largest amount of their operations in those states. General Motors, an iconic Michigan company, used a single dealership based in Harlem to allow it to file in New York in 2009 while Patriot Coal, which was headquartered in St. Louis and had subsidiaries in a number of coal states, filed in New York based on its incorporation of two new subsidiaries there (where it previously had *no* assets) the month before it filed in 2012. Similarly, the Herald newspaper, which had been publishing in Boston since 1846, filed bankruptcy in Delaware in 2017 and that same year, Venoco, LLC, a Denver-based company, also filed bankruptcy in Delaware following massive losses incurred from an oil spill from its Santa Barbara, CA operations. There are many other examples of such filings in venues that have nothing to do with a debtor's primary operations or business.

By incorporating a single subsidiary in a favored jurisdiction, corporations can engage in rampant forum shopping, allowing them to pick a court with favorable law on issues ranging from the merits of the claims against it to the applicable statutes of limitation, the fees that its lawyers will be able to command, and the releases it will seek to provide to its officers, insiders, and non-debtor third parties. This ability to control the law to be applied to one's affairs is not allowed in any other area of the law. At a minimum, it has encouraged placing cases in some of the most expensive legal markets in the country, contributing to the growing costs of these cases.

Under the current venue provisions, for many years the most significant bankruptcy cases were filed in the Southern District of New York or the District of Delaware despite neither being the natural venue for such filings. On a number of occasions this has been done through shell subsidiaries created solely for the purpose of enabling such a filing. The same issue has begun to arise in a few other districts in recent years and while we respect the expertise of the judges in these districts, we reject the argument that other judges are not equally capable of exercising an expertise in corporate cases, large or small or that there is something inherent in

those districts that makes those courts uniquely qualified to handle such cases. Moreover, by allowing debtors to choose their courts – and, in some instances their own judge from a group of only one or two – this inherently exposes those judges and their decisions to heightened scrutiny and criticism. That is particularly true when the ability to choose those courts and judges lies solely within the unilateral control of the debtor itself. No other defendant is allowed such freedom, but the current system plainly allows such abuse.

The issues arising from such forum shopping are problematic enough standing alone; they provide an even greater problem for the overall system in that, no matter how fairly the favored judges attempt to be in their rulings, the debtor's actions inevitably taint how other parties view them. The results from a bankruptcy case are already hard enough to accept for a party that sees itself as victimized by the debtor; that distrust can only be exacerbated if it sees the rulings as coming from a judge hand-picked by the debtor. As such, we agree with the bill's premise that "reducing forum shopping in the bankruptcy system will strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system," by making corporate debtors file in jurisdictions where they chose to place significant aspects of their basic business operations, not where they choose to litigate about the adverse effects of those operations.

The ability of debtors to limit their filings to a few chosen venues and/or judges is even more significant than in ordinary litigation in that bankruptcy cases have a national effect, yet the binding precedent in the large cases may only issue from a very few courts so there is no ability to assess differing views on the issues or to have those debates rise to higher levels on appeal. That limited ability to appeal and to have determinations made at the highest level (including by the Supreme Court) is particularly true in light of the extremely broad statutory and judge-made limits (such as the so-called "equitable mootness" doctrine) imposed on creditors seeking to appeal decisions that confirm plans. As such, the forum shopping process can result in debtors being able to pick not only the initial, but also, in many cases, the final arbiter of their fate.

Those problems are further underscored by the burdens imposed on those who already have suffered as a result of a corporate debtor's financial collapse who may then be forced to spend substantial additional amounts, travel long distances, and often hire additional local counsel simply to participate on an equal footing with the debtor. While the experience over the last 18 months as the courts have dealt with the COVID-19 pandemic have indicated that some of the worst of those effects can be mitigated by allowing telephonic/virtual appearances, no one doubts that the inability to appear in person or to engage in face-to-face discussions with others in

the case puts those in distant locales at a distinct disadvantage. Those disadvantages will reemerge as courts resume in-person hearings, even if they do retain some adaptations. Moreover, even with those alternative means of appearance, districts generally have retained their rules requiring local counsel for out-of-state parties, which can, in many instances, add substantial additional costs and burdens on a creditor that is already far from likely to be able to recover a meaningful amount of its claim.

In short, by ensuring that debtors whose operations have created adverse impacts on their neighbors are called to account in proximity to those same neighbors, H.R. 4193 and S. 2827 will greatly limit forum shopping while helping consumers and many other parties, large and small alike – including creditors, workers, retirees, shareholders, and small business vendors – to represent themselves without undue burden. The additional language in S. 2827 that bars recognition of a new trend of using “divisive mergers” to split a single entity into one company that retains the profitable operating assets and a second left with the burdensome liabilities of the original company and having only the latter file bankruptcy is a welcome addition.

As state attorneys general, we are charged with guarding our states’ financial interests, enforcing consumer protection laws, protecting our citizens from environmental pollution and combating wrongdoing in whatever form it takes. These duties are difficult enough when corporations file bankruptcy and claim to be financially unable to comply with their legal obligations. The difficulties are multiplied when bankruptcy law allows those debtors to seek relief in distant jurisdictions where the debtors hope to find rulings that are friendlier to their interests than to those of persons and agencies located far away and, at the very least, to greatly increase the difficulties imposed on those seeking to be heard in opposition to the debtor’s desires.

Accordingly, we agree with the tests set forth in H.R. 4193 and S. 2827, limiting where businesses may file by ensuring that they will do so in a jurisdiction in which their “principal assets” or their “principal place of business” are located, and ensuring that it is the *parent’s* status, not that of a minor affiliate, that will determine where the overall case will be heard. These provisions should go far to ensure that bankruptcies are filed in jurisdictions where debtors have the closest connections and where their filings will impose the largest impacts.

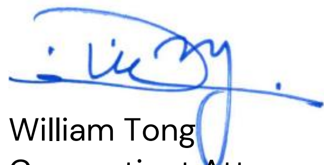
We also support the bills because of their provisions providing for a new rule to be drafted dealing with appearances by governmental attorneys. In our role as representatives of both the state and its aggrieved citizens, we often have to appear in distant jurisdictions because many debtors have nationwide operations that may

affect citizens in states all across the county. We recognize and accept that a consequence of this bill will be that we may need to appear in "home courts" of companies throughout the country, not just Delaware and New York. Each such court currently sets its own requirements for allowing non-local attorneys to appear, including deciding whether to charge an admission fee in each case, and /or to require that we must associate local counsel, even as to matters involving only our own state's laws.

This is by contrast to the Rules for Multidistrict Litigation, which similarly group entities from all over the country into a single litigation forum, but which allow *all* parties to appear by right and without local counsel. The 1994 Bankruptcy Code amendments (Sec. 304 of P.L. 103-394) does grant those rights to governmental child support creditors and this provision has worked without incident. This bill would require rules to be prescribed to similarly allow *all* government attorneys to appear without charge and without being required to associate local counsel. Most courts extend those privileges to counsel for the United States; the bill would simply provide the same treatment for other governmental entities, thus facilitating our ability to appear in bankruptcy courts without delay or unnecessary financial burdens.

For all these reasons, we strongly support this bill and urge you to advance its passage. As the chief legal officers of our states, we have a particular interest in ensuring that we and our citizens can protect our interests by effectively participating in these cases.

Sincerely



William Tong
Connecticut Attorney General

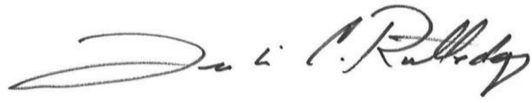
Brian Frosh
Maryland Attorney General

Dave Yost
Ohio Attorney General

Ken Paxton
Texas Attorney General

Treg R. Taylor
Alaska Attorney General

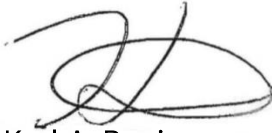
Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General

Rob Bonta
California Attorney General

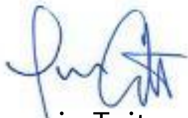
Phil Weiser
Colorado Attorney General



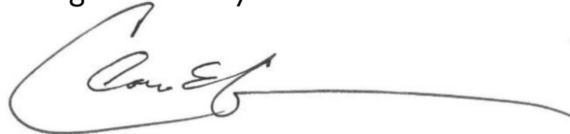
Karl A. Racine
District of Columbia Attorney General

Ashley Moody
Florida Attorney General

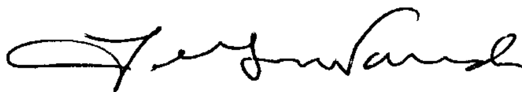
Christopher M. Carr
Georgia Attorney General



Leevin Taitano Camacho
Guam Attorney General



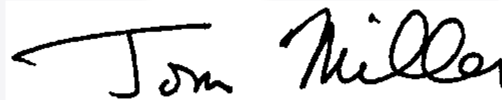
Clare E. Connors
Hawaii Attorney General



Lawrence Wasden
Idaho Attorney General

Kwame Raoul
Illinois Attorney General

Todd Rokita
Indiana Attorney General



Tom Miller
Iowa Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

Aaron M. Frey

Maura Healey

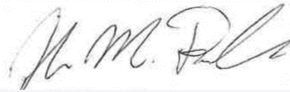
Maine Attorney General

Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Aaron D. Ford
Nevada Attorney General



John M. Formella
New Hampshire Attorney General

Hector Balderas
New Mexico Attorney General

Letitia James
New York Attorney General

Wayne Stenehjem
North Dakota Attorney General

John O'Connor
Oklahoma Attorney General

Ellen F. Rosenblum
Oregon Attorney General

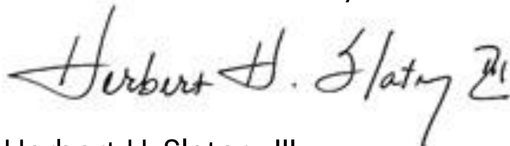
Josh Shapiro
Pennsylvania Attorney General

Domingo Emanuelli-Hernández
Puerto Rico Attorney General

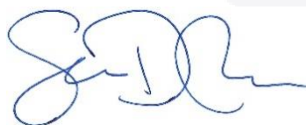
Peter F. Neronha
Rhode Island Attorney General

Alan Wilson
South Carolina Attorney General

Jason R. Ravnsborg
South Dakota Attorney General



Herbert H. Slatery III

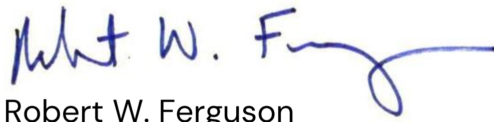


Sean D. Reyes

Tennessee Attorney General

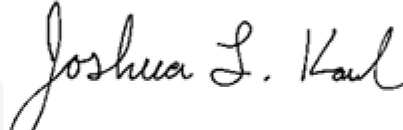
Utah Attorney General

T.J. Donovan
Vermont Attorney General



Robert W. Ferguson
Washington Attorney General

Patrick Morrisey
West Virginia Attorney General



Joshua L. Kaul
Wisconsin Attorney General

Bridget Hill
Wyoming Attorney General

Bankruptcy Venue Reform

S. 2282

February 26, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

We are law professors who teach and study bankruptcy. We write to support S. 2282, the "Bankruptcy Venue Reform Act of 2018,'' bipartisan reform legislation introduced initially by Senators John Cornyn and Elizabeth Warren. The bill seeks to eliminate provisions in existing law that permit a corporate group to file bankruptcy, typically Chapter 11 reorganization cases, in some part of the country far removed from their principal place of business. Most often this results in a filing in Delaware, although filings are also made in New York and other districts far-removed from a corporation's home base.

The bill adopts a simple, straight-forward rule to ensure that a bankruptcy case is filed in the federal district where the corporation has its principal assets or its corporate headquarters. For a public company registered with the SEC, its headquarters as specified in its filings with the SEC would presumptively be regarded as its principal place of business. In the case of a corporation with various subsidiaries, they would be permitted to follow the parent by filing in the parent's home district. Any of us would be happy to answer staff questions about the details of the bill.

There have been academic debates about permitting businesses to forum-shop to certain courts that their management or lawyers may consider most favorable for their purposes, leaving behind the communities that supported them. Some claim that certain courts, notably bankruptcy courts in Delaware, have experience and expertise that makes them more efficient in large cases. Others suggest that the professional and community benefits of attracting such cases encourages those courts to look with too much favor on the compensation of managers and lawyers and on

the interests of large lenders rather than employees and investors. The latter concern is supported by the fact that the filing of a large case may give a community the economic equivalent of gaining a factory—hundreds of millions or even billions of dollars in professional fees and related services. Although the bankruptcy bench is notably professional and expert, it would be hard for anyone to be completely immune to the pressures generated by the prospect of these benefits.

In the end, however, the right policy may rest more upon the common-sense policies upon which all venue statutes rest. A bankruptcy proceeding should bring together all of the stakeholders in a corporation to deal with the crisis of financial distress that threatens them all. Its home base is the right place for them to gather to resolve that crisis as fairly and successfully as possible. It is the most predictable location for those extending credit or investing their careers in that enterprise. It is also the one least subject to manipulation for the benefit of insiders.

In response to the claims that the distortions of forum shopping are balanced by the availability of judicial expertise in certain courtrooms, one function we can perform as experts in the field is to assure the Congress that outstanding bankruptcy judges with substantial business experience are found all over the country. On the other hand, local expertise is often a more important element of an efficient and fair result. The bankruptcy judges in Manhattan are first-rate, but when they were recently asked to apply Texas real estate law in oil and gas cases, many observers thought the Texas bankruptcy courts would have been better equipped to get the right legal result.

It is important that bankruptcy proceedings be brought where there is likely to be convenient and affordable access to them by all of the stakeholders in a business. If a stakeholder does become aware of a troubling aspect of a distant proceeding, it may be difficult or impracticable for the stakeholder or the stakeholder's lawyer to attend, to investigate the relevant files, to talk to those who have followed the case, and so on. The local legal community in the distant venue may be close knit and frugal in the information it shares, while unconflicted local counsel may be hard to find and costly in proportion to their rarity.

Beyond the purely financial considerations, bankruptcies profoundly affect human lives. For that reason, justice must not only be done, but must be seen to be done. A proceeding in a court distant from the relevant community will most often fail this second test and therefore fail in an important part of its political, social, and economic role. The need for justice "to be seen to be done" encompasses not merely the importance of citizen confidence that justice is being sought, and is often achieved, in legal proceedings but also the public exposure of legal procedures or results that concern citizens. That public exposure can build momentum for improvement in our laws. To accomplish those ends, it is not enough that the result satisfies the

parties represented in court. Many still remember the employees of Enron, having lost their life savings in its collapse, standing in the street in front of its Houston headquarters stunned to find that its bankruptcy proceeding had been filed in Manhattan.

Not only does distance prevent participation by stakeholders, but affordable access is important for media and commentators who will report the proceedings to those who cannot attend. As those Enron employees could testify, a proceeding in a distant court will not receive the same degree or quality of media coverage as one filed in the company's principal place of business. Instead, such media coverage as there may be is likely to be found primarily in the financial press and perhaps in industry-specific publications, but not in the media upon which most citizens rely. The company and its strongest creditors will be able more easily to manage the limited news coming from the distant proceeding in ways useful to their purposes and to the image they want the matter to project to the public.

Of course, a company cannot file for bankruptcy in every town where it is important. But if it is required to file in its principal place of business or where its principal assets are located, it will be closer to the relevant citizenry and the media who serve them. A truly transparent proceeding, one in which the windows of the courtroom are not frosted by distance, will provide impetus for healthy debate about legal reforms and will give more stakeholders the comfort of feeling law is being justly applied. By contrast, the removal of proceedings to a distant place seems to defy common sense and may leave local citizens suspicious of the motives behind it. For example, the filing in Delaware by Energy Future put into a distant courthouse the financial future of the major supplier of electricity to millions of north Texans. It may not be coincidental that the case has languished in bankruptcy in part because of an inability to obtain the approval of the Texas regulators for the various resolutions that have been proposed.

There are many examples of the fate of businesses that are important to a particular region or state being resolved in a faraway city. One from the heartland is Hobbico, Inc.—the largest model hobby company in the world, and the largest U.S. distributor of radio-control and general hobby products. Although its headquarters is in Illinois, along with more than 330 of its employees who also own the company through an employee stock ownership plan, those employee-owners find that the fate of their company and their jobs now rests with a court located in Wilmington, Delaware.

A far from exhaustive list of other large companies filing far away from their headquarters includes: Los Angeles Dodgers (California),VeraSun Energy (South Dakota), Hawkeye Renewables (Iowa), SemCrude (Oklahoma), Smurfit-Stone Container (Illinois), Tribune Company (Illinois), Flying J (Utah), Corinthian Colleges (California), RadioShack (Texas), American Airlines (Texas), Woodbridge Group (California), Boston Herald (Massachusetts), KB Toys (Massachusetts), Tropicana Resort & Casino (Nevada), and

Washington Mutual (Washington). Forum shopping is not limited to large (mega) company cases either. From 2002-2016, nearly 270 companies with $50 million or less in debts fled their home states to file in Delaware or New York, and that number increases to 400 for companies with debts of $100 million.

As academics, we hope we have a little detachment from the everyday concerns that practicing lawyers may feel, which often include a natural resistance to change familiar procedures. In the long run, maintaining the connection between enterprises and their employees and communities will best serve all the purposes of bankruptcy law, including maximizing value and ensuring fairness. We hope the Congress will adopt S. 2282 and will be glad to help in any way we can.

Respectfully,

Patrick B. Bauer
Professor of Law
College of Law
The University of Iowa

Charles D. Booth
Professor of Law
Director, Institute of Asian-Pacific Business Law
William S. Richardson School of Law
University of Hawai‘i at Mānoa

Ralph Brubaker
Carl L. Vacketta Professor of Law
University of Illinois College of Law

Laura N. Coordes
Associate Professor of Law
Sandra Day O'Connor College of Law

Danielle D’Onfro
Lecturer in Law
Washington University School of Law

Sally McDonald Henry
Professor, Texas Tech School of Law.”

Dan Keating
Tyrrell Williams Professor of Law
Washington University School of Law

Robert M. Lawless
Max L. Rowe Professor of Law
University of Illinois College of Law

Adam J. Levitin
Agnes N. Williams Research Professor &
Professor of Law
Georgetown University Law Center

Lynn M. LoPucki
Security Pacific Bank Distinguished
Professor of Law
UCLA Law School

Angela Littwin
Ronald D. Krist Professor in Law
University of Texa

Lois Lupica
Maine Law Foundation Professor of Law
University of Maine School of Law

Bruce A. Markell

Professor of Bankruptcy Law and Practice
Northwestern University Pritzker School of Law

Roger A. McEowen
Professor of Law, Rutgers Law School.
Kansas Farm Bureau Professor of Agricultural Law and Taxation
Washburn University School of Law

Chrystin Ondersma
Professor of Law, Rutgers Law School

Samir Parikh
Professor of Law, Lewis & Clark Law School
Kenneth H. Pierce Faculty Fellow
Director, Bates Center for Entrepreneurship and Leadership

Katie Porter
Professor of Law
University of California-Irvine School of Law

John A. E. Pottow,
John Philip Dawson Collegiate Professor of Law,
University of Michigan Law School

Marie T. Reilly
Professor of Law
Penn State Law | Penn State University

Jay L. Westbrook
Benno C. Schmidt Chair
Of Business Law
The University of Texas
School of Law

William C. Whitford
Emeritus Professor, Wisconsin Law School

Questions from Senator Thom Tillis
for Samir Parikh

1. **Multidistrict litigation is often the alternative to bankruptcy settlements in mass tort cases. Can you speak further about how some plaintiffs may be better served by the bankruptcy process? I'm interested in hearing about how plaintiffs may benefit both in terms of financial recovery and also the efficacy of the process.**

Senator Tillis, thank you for the opportunity to answer your question. As I noted in my oral testimony, At the turn of this century, the Supreme Court ostensibly eliminated Rule 23's class aggregation option for most mass tort cases. MDL's rise was a rushed effort to address the gaping resolution void that emerged. Section 1407 of the U.S. Judicial Code creates the MDL infrastructure and allows one federal judge to streamline pretrial – general procedural – matters. At the conclusion of pretrial proceedings, however, the statute mandates that cases be remanded to the districts where they were originally filed. The MDL court is not intended to be a destination; it is merely a stop along the path to resolution.

I acknowledge that MDL has been instrumental in resolving complex cases and preserving the viability of the judiciary in the face of potentially overwhelming case volume. Nevertheless, MDL has evolved in ways that undermine the resolution model for many mass tort cases.[1] The promise of procedural streamlining is a mirage that has led parties into quicksand. The worst kept secret in mass tort litigation is that transferred cases do not return to their transferor courts. Only 3% of transferred cases escape MDL capture; 97% of transferred cases are resolved in the MDL court by dispositive motion or settlement. [2] Victims do not receive their "day in court." And this number says nothing about the efficiency and equity of the resolution process. Keep in mind that there are no statutory requirements that an MDL court review or assess the integrity of any settlement or the settlement process itself. And most courts do not undertake such inquiries. Unfortunately, a structure consumed with efficiency through procedural devices undermines just outcomes if it lacks the ability to assure claim merit, defendant culpability, or settlement integrity.

All of these factors highlight victims' lack of control in an MDL.[3] A truly surprising facet of the process is that victims are unable to exit. MDL judges are invested in these cases and have exhibited a propensity to compel settlements that may be coercive to individual plaintiffs.[4] More fundamental, the process contravenes policy objectives by failing to deter undesirable behavior.

[1] *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022).

[2] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 6 (2018).

[3] *See, e.g.,* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

[4] For example, in *In re* Nat'l Prescription Opiate Litigation, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), Judge Polster stated that his sole goal was to see an immediate global settlement of the cases. He stated that "[p]eople aren't interested in depositions, and discovery, and trials. So my objective is to do something meaningful to abate this crisis and to do it [immediately]….[W]e don't need a lot of briefs and *we don't need trials*." *See id*. at 4-6 (emphasis added).

Compelled settlements rarely consider culpability, heightening the possibility of extortion litigation. Deterrence is unrealized because there are significant lottery effects; in other words, corporate actors that conform their behavior to legal strictures are no better off than those that do not.

Further, unlike bankruptcy's public forum, MDL settlements can live in the shadows. Settlements do not need court approval, and confidentiality agreements invariably prevent publication or an assessment of the details. Corporate abuses do not come to light in a process where there are ostensibly no trials and no attempts are made to investigate malfeasance.

Bankruptcy's structural, procedural, and substantive benefits provide optionality that serves in sharp contrast to MDL's settlement fixation. For example, bankruptcy courts enjoy jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11."[5] The seemingly boundless reach of bankruptcy court jurisdiction allows the court to marshal all state and federal matters affecting a debtor in one single venue for prompt and efficient adjudication for the benefit of all stakeholders. MDL does not enjoy this reach. Further, bankruptcy's powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors in order to allow all key parties to focus on negotiating a global settlement. This reduces the risk of precious resources being squandered on one-off litigation matters that ultimately fail to move the parties any closer to settlement. I argue that these resources should be devoted to victims.

Most cases in bankruptcy – including those involving mass tort claims – enjoy a speed premium; to the extent that the case can be resolved quickly, additional funds can be devoted to creditors. The Bankruptcy Code authorizes courts to identify claims subject to pending litigation against the debtor and estimate the aggregate value of the claims that cannot be resolved in a timely manner.[6] Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter months. Victims are allowed to participate in this process and argue for the valuation they believe is just. Keep in mind, the bankruptcy judge is not unilaterally deciding what each victim will receive. Rather, the judge is determining the total value of all claims against the debtor and allowing the debtor to propose a settlement to victims based on that figure. This settlement will be delineated in the debtor's plan of reorganization. Victims are not bound by this offer. The United States Trustee appoints an official committee of tort claimants to represent the interests of all current claimants. This committee, which retains independent legal and financial advisors, plays a key role negotiating with the debtor to develop settlements that the committee can endorse and recommend for approval. Ultimately, bankruptcy allows these creditors to vote on whether they believe that the debtor's proposal is the best offer they can secure.[7] In fact, victims – as a collective – could choose to reject the debtor's offer. This would put pressure on the debtor.

---

[5] 28 U.S.C. §1334(b).

[6] *See* 11 U.S.C. §502(c).

[7] In the Purdue Pharma bankruptcy case, more than 95% of the approximately 120,000 submitted votes were in favor of approving the debtor's proposed plan of reorganization. *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425 (2022).

After a certain number of rejections, there is a distinct possibility that the court will dismiss the bankruptcy case, which could be disastrous for the debtor and other key-decision makers in the case.

As detailed in my answer to "Question 2" below, individual victim autonomy is sacrificed in bankruptcy, but that is the case in all aggregation processes involving thousands and thousands of claims.[8] Not every plaintiff can have her day in court when thousands of claims are outstanding. The defendant's legal expenses would consume everything, leaving little for the vast majority of victims. I also acknowledge that the claim estimation process in bankruptcy has deficiencies. But bankruptcy court judges can easily address them. For example, if there are concerns about a bankruptcy court judge estimating personal injury claims, the judge could lift the automatic stay as to a particularly subset of cases and allow the MDL district court to adjudicate them.[9] The resultant rulings could help provide some concrete data that would help the bankruptcy judge in her claim assessment process. This hybrid joins the advantages of MDL, which offers a jurist experienced in adjudicating personal injury claims, and bankruptcy, which offers victims an accelerated recovery and the chance to vote on the treatment they will ultimately receive.

2. **Do plaintiffs in multidistrict litigation always "get their day in court" more so than plaintiffs who receive a settlement through a company's bankruptcy proceedings?**

The "Day in Court" Fallacy[10]

Improving recoveries for deserving mass tort victims is attainable only if we attempt to understand the key issues precluding resolution. Unfortunately, the resolution debate is distorted by a significant misconception. One of the primary arguments used to undermine the bankruptcy process is that victims lose their "day in court" – a reference to the Due Process Clause and the Seventh Amendment right to a jury trial. In fact, when Aearo Technologies filed for bankruptcy, MDL Judge Rodgers wrote that "hundreds of thousands of individual plaintiffs will be deprived of their constitutional right to a jury trial." But the truth is that claimants lost that right the day the Combat Arms MDL was ordered. This is the case in almost every modern mass tort dispute.

The day-in-court argument assumes that this right is sacrosanct and bankruptcy deprives victims of the right. That's not entirely true. As noted above, certain mass tort claimants in bankruptcy could have their day in court through bellwether trials conducted by a federal district court with the bankruptcy court's permission. But I acknowledge that this is a small portion of the claimant pool.

---

[8] *See* Parikh, *The New Mass Torts Bargain*, *supra* note 1.

[9] *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325 (2022). Note that the bankruptcy court's estimation of such claims does not actually fix the amount any creditor will receive for her injury.

[10] This answer is derived in large part from my recent opinion piece, Samir D. Parikh, *'Day-In-Court' Ideal Is Distracting From Victim Recovery*, LAW360 (March 16, 2023). Internal citations have been omitted.

Mass tort plans of reorganization include an opt-out for claimants that allows those who exercise the right to have their day in court by bringing suit directly against the settlement trust. But there are a number of strings attached to this right. For example, in Purdue Pharma, the recovery for claimants who opted out was capped at the amount the claimant would have received if they had not opted out. These restrictions certainly diminish a victim's ability to enjoy their day in court. Supreme Court jurisprudence indicates that these restrictions are Constitutional, but that doesn't change the fact that something is lost.

The statement that mass tort claimants lose their day in court in bankruptcy is not inaccurate. It is incomplete, however, because mass tort claimants also lose their day in court in MDL. It is this corollary that is being intentionally avoided. The argument goes that bankruptcy prevents mass tort claimants from enjoying their day in court. But that is a false narrative. For all intents and purposes, plaintiffs in the bankruptcy cases involving 3M, Johnson & Johnson, and Purdue Pharma were in a multidistrict litigation proceeding prior to the dispositive bankruptcy filing. Even if the relevant bankruptcy case was dismissed, the dispute would return to MDL. But MDL does not offer plaintiffs their day in court, either.

Once a case becomes part of MDL, claimants cannot opt out to continue their litigation. Claimants must sit and wait, sometimes for years. This MDL reality has earned the process a significant amount of criticism.[11] MDL has bellwether trials, but that's just for a handful of claimants. 3M's Combat Arms MDL is the largest MDL in history with over 200,000 claims, but there have been only 16 bellwether trials. Finally, MDL settlements are conditioned on a limited number of opt-outs; the deal falls apart if the threshold is crossed. Therefore, plaintiffs' attorneys and consenting claimants are all incentivized to dissuade opt-outs. The impact of these efforts cannot be overstated.

Only a handful of the hundreds of thousands of claimants involved in these mass tort cases will ever get their day in court. The "day in court" ideal is invariably a fallacy in the mass torts context. But that is unavoidable in these type of cases. Attempting to preserve a day-in-court right for a few victims would significantly diminish the overall distribution to the victims' collective. Claim adjudication in this alternative reality would take decades. Initial judgments would exhaust funds, and lottery effects would leave the vast majority of claimants without restitution – an archetypical collective action problem that policymakers should not encourage. Attempting to formulate a "day in court" option in mass tort cases can actually do more harm than good for mass tort claimants.

Mass tort claimants lose their day in court in bankruptcy and MDL, but that is a necessary evil when the legal system is forced to resolve thousands and thousands of claims. The "day in court" ideal permeates discussions about the optimal venue to resolve mass torts, but it shouldn't. Ultimately, the overriding objective in these cases should be securing meritorious claimants the

[11] *See, e.g.,* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

largest recovery possible on the shortest timeline – a result that bankruptcy often furthers. This first principle should not be obscured by misguided arguments.