August 10, 2011

VIA OVERNIGHT MAIL

Re: Possible Business Bankruptcy Venue Amendments

Dear Senators and Representatives:

We understand that one or more amendments to 28 U.S.C. § 1408, which governs the laying of venue for bankruptcy cases, may be introduced in Congress with the intent of radically altering and restricting the choice of venue rules for business bankruptcy cases. We write on behalf of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York to register our strong opposition to any such amendments.

Our committee is largely comprised of lawyers who practice regularly in courts throughout the country. Our members represent both debtors and creditors in business bankruptcy cases involving public and private companies and other entities. Collectively, we have been involved in the restructuring of myriad entities in varied industries and areas of the country. Members of our committee have been involved in nearly every major business bankruptcy filed in recent years. Our work on behalf of our clients directly touches the lives and impacts the economic well-being of the many employees, shareholders, investors and others who are affected when a company files for bankruptcy protection. It is on the basis of this experience that we oppose any modifications intended to further restrict the existing business bankruptcy venue rules.

As we understand them, the potential amendments would take away the right of corporations to seek bankruptcy protection in their state of incorporation or where an affiliate is located and would effectively require that all corporate bankruptcy cases be filed in the jurisdiction where the parent company of a corporate family is physically headquartered or holds its principal assets. Such a proposal would force courts to ignore the often more important considerations examined under current law, such as (a) the location of the principal operating subsidiaries and whether the parent company itself is a mere holding company with no operations of its own, (b) the interests of justice and the convenience of parties who will need to appear during the proceedings to protect their interests and (c) the interests of the state of incorporation.

This current reform effort, like prior failed attempts,[1] is predicated on the unsubstantiated belief that 28 U.S.C. § 1408 is fundamentally flawed and leads to abuses, improper forum shopping and the compromise of the independence of the nation's bankruptcy judges. However, no evidence supports such a belief, and in fact studies have shown just the opposite.

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[1] As you may know, efforts to modify the business bankruptcy venue rules date back to at least 1996 and include past proposals by Senator Jeff Sessions and Senator John Cornyn.

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Any attempt to amend § 1408 to restrict the venue options of business bankruptcy debtors is misguided and would visit both material harm and substantial expense on creditors and debtors in many cases. Such harm and additional expense can ill be afforded in the current economic climate.

We would respectfully urge the defeat of any such proposed amendments for the following reasons:

1. ***The Bankruptcy Code already provides for the transfer of bankruptcy cases to "another district in the interests of justice or for the convenience of the parties."*** 28 U.S.C. § 1412. Indeed, courts regularly transfer cases when they determine that venue was initially chosen in an improper manner or that the initial forum is unduly inconvenient for the relevant parties. Reform legislation is unnecessary because abuses are routinely counteracted under the current statutory scheme. Indeed, the existing statute also comports with the spirit of the venue rules that apply to federal civil actions generally, which offer multiple grounds for establishing appropriate venue, *see* 28 U.S.C. § 1391, and for transfer to another venue in the appropriate circumstances, *see* 28 U.S.C. § 1404.

2. ***There is no reason to believe that the jurisdiction where a corporate parent is headquartered or holds its principal assets is more appropriate or convenient to creditors than the other alternatives provided in the existing venue statute.*** Many large corporations are headquartered and have parent assets in one jurisdiction but have employees elsewhere or own subsidiaries, which may hold the majority of the enterprise's assets, located in other jurisdictions. Most large corporate families are national or international in scale and have creditors and shareholders across the country and/or around the globe. As courts have found, while a headquarters building or a bank account (both of which may have more historic than current relevance) may be in one jurisdiction, oftentimes the locus of the case and the bulk of the creditors, especially those who are most likely to need to appear in court to protect their interests, are actually located elsewhere. Put differently, it would be indefensible for a corporate enterprise with far-flung operations conducted through domestic and foreign subsidiaries to be prohibited from filing for bankruptcy in the court it deems most convenient merely because the ultimate parent entity is headquartered or holds some assets, however meager, in a particular city—perhaps one with limited resources and accessibility.

Even where the majority of employees are in fact located in the headquarters' jurisdiction, that is often scant reason for requiring a corporation to file for bankruptcy there. In many large cases (particularly in the more experienced jurisdictions), employees' rights are unaffected because of so-called "first day" relief designed to permit the uninterrupted payment of employee claims. The complex chapter 11 cases of General Motors and Chrysler, many of whose employees are located in Michigan, and Tribune Company, whose publishing and broadcasting operations are based in Chicago, Los Angeles and elsewhere throughout the country, were and are being effectively administered in the Southern District of New York and the District of Delaware, respectively. In such cases, individual employees have no need to appear in the proceedings. Where employees or retirees are affected, their representatives— including labor unions and official court-appointed committees—are often based outside of the headquarters jurisdiction, and they often employ law firms based outside of the headquarters jurisdiction. The Airline Pilots Association, for example, has used the same New York law firm to represent its interests in cases filed in Chicago (United Airlines), Virginia (US Airways) and Honolulu (Hawaiian Airlines).

More often, however, the parties that have a need to appear most regularly in large, complex chapter 11 cases are financial creditors and counterparties, the vast majority of whom are usually located in New York. When extending credit and engaging in other transactions critical to the health and stability of corporations, these financial institutions rely on the consistency and certainty of the legal standards and practices in experienced jurisdictions—law that took years to develop. The proposed amendment would require those companies

located in remote jurisdictions to eschew the benefits of these sophisticated courts, in favor of inexperienced jurisdictions with less predictable and potentially conflicting laws.

We also note that the public has greater court access today than when the venue rules were originally adopted as a result of substantial advances in technology and revised local rules of bankruptcy procedure. Telephonic appearances at court hearings and online access to electronic court dockets are now commonplace.

3. ***The allegation that corporate debtors choose their venues based upon the likelihood of getting higher professionals' fees approved is unfounded.*** The argument has been made in the past that bankruptcy professionals steer corporate debtors toward venues more accommodating of high professional fees, but this ignores the reality of the multi-variable choice that debtor's boards of directors and officers must make when considering venue. Fiduciary duties, the expressed preferences of the largest stakeholders, and other legal and factual considerations weigh heavily in the decision-making process. There are external checks against abuse as well. The Office of the United States Trustee, an arm of the Department of Justice, supervises the payment of professional fees and has established guidelines that are generally national in scope and uniform in application. Moreover, in many large cases, courts appoint fee examiners or establish fee committees whose sole role is to review and, where appropriate, question professionals' fees.

4. ***Any accusation that federal judges might issue improper rulings in order to entice or placate debtors and their professionals is untrue and an insult to our judiciary.*** It is sometimes alleged that federal bankruptcy judges have an incentive to compete with other bankruptcy courts for major cases by ruling in favor of debtors and their attorneys in cases before them. This accusation is baseless and insulting to the members of our federal judiciary, who work for less than what is paid to junior associates at large law firms and who have had to redouble their efforts to keep up with the spike in personal and corporate bankruptcy filings in the wake of the recent economic crisis. The suggestion that judges would compromise the independence of their decision-making to expand their already burgeoning caseloads is difficult to take seriously.

In sum, there are no grounds for upending the longstanding and sensible bankruptcy practices embodied in the existing venue rules. The current rules protect against abuse and foster the development of experienced courts that enable companies with complex cases to complete the bankruptcy process faster, thereby benefiting creditors, employees and the marketplace. Corporations in financial distress, as well as their employees, their communities and other companies that rely on them as customers and suppliers, all benefit from the willingness of commercial lenders to extend loans to those corporations, which willingness is in part due to the lenders' knowledge of and comfort with the courts and the body of jurisprudence built up in those courts. And the orderly and efficient administration of cases of the magnitude of General Motors, Chrysler, Tribune Company, Lehman Brothers, CIT and Washington Mutual could not be effected without such sophisticated courts. These trying economic times throw into sharp relief the benefits of orderly and efficiently handled cases that preserve enterprise value and jobs as opposed to longer, less efficient, and more expensive alternatives.

We would welcome the opportunity to discuss these matters further at your convenience. We would be more than happy to help answer any questions you might have and to provide further support for the arguments made herein.

Yours truly,

Committee on Bankruptcy and Corporate Reorganization

By: ______________________________
Damian S. Schaible, Chair

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