# JUDGE SHOPPING IN CHAPTER 11 BANKRUPTCY

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*Forum shopping has long been a feature of large case chapter 11 bankruptcy practice, with debtors picking the judicial district for their case. In recent years, however, debtors have also begun to engage in intra-district judge shopping—picking the individual judge who will hear the case.*

*This Article documents the rise of judge shopping in big chapter 11 cases and shows how it has been facilitated—sometimes deliberately—by bankruptcy courts' local rules. The result has been an extraordinary concentration of big chapter 11 cases before a handful of judges: 55% of the large public company bankruptcy cases filed in 2020 were heard by just three of the nation's 375 bankruptcy judges.*

*This Article argues that judge shopping has undermined the integrity of the chapter 11 system in three ways. First, judge shopping has a chilling effect on creditor behavior. Judge shopping undermines creditors' confidence that they can receive a fair adjudication, which incentivizes them to settle more cheaply with debtors and to not raise even meritorious objections.*

*Second, judge shopping undermines the adversarial process. The concentration of cases before a few judges means that attorneys anticipate making future appearances before those judges. The repeat player dynamic encourages creditors' attorneys to pull their punches and not be zealous advocates for their clients because they fear that angering the judge will harm their future business.*

*Third, judge shopping appears to be outcome determinative. This Article shows that approval of superspeed "drive-thru" bankruptcy plans that contravene clear statutory timelines has been almost exclusively by those three judges who have been landing most of the large, public company bankruptcy cases.*

*In response to the problem of intra-district judge shopping, the Article calls for random case assignment of large chapter 11 cases.*

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## I. INTRODUCTION

"[Y]ou don't get to choose your judge," U.S. District Judge Colleen McMahon curtly informed counsel to opioid manufacturer Purdue Pharma in response to an invitation to preside over a hearing in Purdue's chapter 11 bankruptcy case.[1]

Judge McMahon's reprimand of Purdue's attorneys reflects a basic and commonsense due process norm. Judge shopping is fundamentally contrary to any notion of judicial impartiality.[2] At the very least, it creates an appearance of

1. Letter from Judge Colleen McMahon to Mr. Marshall S. Huebner (June 29, 2021) (on file with author). Purdue was seeking a district judge to preside over a hearing regarding release of personal injury and wrongful death claims because of jurisdictional limitations on bankruptcy judges as non-Article III judges. Letter from Marshall S. Huebner to Judge Colleen McMahon (June 29, 2021) (on file with author).

2. *See* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 102, 168 (2022).

impropriety, and, at worst, it results in a biased adjudication. For this very reason, courts generally engage in random assignment of judges to cases.[3]

Judge McMahon, however, seemed unaware that Purdue had in fact already hand-picked the bankruptcy judge who had been presiding over its bankruptcy for nearly two years.[4] By changing the address of its registered agent for service of process to an address in White Plains, New York, a suburb of New York City, Purdue was able to use the local case assignment rule for the Bankruptcy Court for the Southern District of New York to ensure that its case would be assigned U.S. Bankruptcy Judge Robert D. Drain, the only bankruptcy judge sitting in White Plains.[5]

Purdue would claim that it chose the White Plains venue for convenience to its corporate headquarters in nearby Stamford, Connecticut.[6] Convenience to a debtor's headquarters is rarely a factor in selecting bankruptcy venue, however, and White Plains was hardly a convenient location for Purdue's Manhattan-based attorneys.[7] Instead, Judge Drain appears to himself have been the reason Purdue filed its case in White Plains. Judge Drain's courtroom had already become a favored destination for debtors with no connection whatsoever to the venue based on debtors' attorneys' sense that he would approve their restructuring proposals.[8] Moreover, Judge Drain had issued rulings in previous cases that provided a strong indication that he would be inclined to rule favorably for Purdue on key issues.[9]

Most notably, Judge Drain's previous rulings suggested that he would not appoint an examiner to investigate Purdue's dealings with its owners, the billionaire Sackler family.[10] His previous rulings also indicated that he was likely to approve not just the discharge of Purdue's debts, but also the imposition on Purdue's creditors of a nonconsensual release of their direct opioid-related claims against the Sacklers.[11]

Contrary to Judge McMahon's admonition, Purdue—or really the Sacklers, who controlled the company when it prepared to file for bankruptcy—got to choose the judge, and the Sacklers selected a judge whom they correctly thought would rule in their favor and ultimately sign off on their release from opioid liabilities.[12]

3. Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009).

4. Levitin, *supra* note 2, at 156.

5. *See* Levitin, *supra* note 2, at 155–56.

6. *Id.* at 157; *see also* Paul Schott, *'An Outrage:' Tong, Others Denounce Purdue Pharma and Owners in Congressional Bankruptcy Hearing*, STAMFORD ADVOC. (July 28, 2021, 9:11 AM), https://www.stamfordadvocate.com/business/article/An-outrage-Tong-others-denounce-Purdue-16347094.php [https://perma.cc/FG52-FPG6].

7. *See* Levitin, *supra* note 2, at 157.

8. *Id.* at 158.

9. *Id.* at 160.

10. *Id.* at 166.

11. *Id.* at 167–68.

12. *In re* Purdue Pharma, L.P., 633 B.R. 53, 70 (Bankr. S.D.N.Y. 2021), *vacated*, 635 B.R. 26, (S.D.N.Y. Dec. 16, 2021). Judge Drain also stayed litigation against the Sacklers for nearly two and a half years. Eighteenth Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction, Purdue Pharma

Purdue's judge shopping was not an outlier. In recent years, judge shopping has become standard practice in large chapter 11 bankruptcy cases.

Bankruptcy venue rules have always been extremely permissive, giving debtors substantial choice about the judicial district in which to file.[13] District-level forum shopping has been a regular part of the bankruptcy landscape for decades.[14] In the past several years, however, debtors have learned to use local bankruptcy court rules to hand select individual judges within districts to hear their cases.[15] In some instances, judge shopping occurs through debtors' abuse of courts' case assignment rules.[16] In other instances, however, judge shopping is deliberately facilitated by the "complex case" panels set up by certain judicial districts in an attempt to attract big chapter 11 cases ("megacases").[17]

The ability to engage in judge shopping has hyper-charged the longstanding phenomenon of inter-district competition for large chapter 11 cases. Whereas most judges are not interested in adding more cases to their already busy dockets, a handful of bankruptcy judges are perceived by the bar as competing to land megacases.[18] In order to attract megacases, judges have to accommodate the case placers, first and foremost, debtor's counsel.[19] This means accommodating them in terms of mundane matters like scheduling and fee applications, but also in terms of ruling in favor of the debtor on all key issues in the cases or making clear that certain types of motions, particularly examiner motions or motions to disqualify debtor's counsel, will not be granted, such that creditors will not even bother filing them.[20]

Judge shopping has combined with the competition for megacases to transform the chapter 11 world. In the first instance, it has resulted in an unprecedented concentration of large bankruptcy cases before just a few judges. In 2020, 55% of large, public company bankruptcy filings were heard before just *three* of the nation's 375 bankruptcy judges.[21]

This Article argues that judge shopping has undermined the systemic integrity of chapter 11. Judge shopping damages chapter 11 in three distinct ways: by affecting the behavior of creditors, of lawyers, and of judges.

First, judge shopping creates an appearance of impropriety that undermines parties' confidence that they are receiving a fair adjudication before a neutral

L.P. v. Massachusetts, No. 19-23649 (Bankr. S.D.N.Y. 2021) (total of 645 days of injunction); Twenty-Third Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 1–6, *Purdue Pharma L.P.*, No. 19-23649 (total of 844 days of injunction from October 11, 2019 through February 1, 2022).

13. *See infra* Section II.A.

14. Levitin, *supra* note 2, at 151 n.214.

15. *Id.* at 109–10.

16. *Id.*

17. *Id.* at 152.

18. *Id.*

19. *Id.* at 153.

20. *Id.*

21. 2021 figures are not comparable both because there were only a handful of large, public company bankruptcy filings that year and because one of three leading judges had cases reassigned under a local court order and announced his retirement. Nevertheless, the other two judges still heard 34% of larger bankruptcy filings (companies with at least $500 million of liabilities) in 2021.

tribunal and thereby affects their behavior in chapter 11 cases. Judge shopping signals to creditors that the debtor believes the judge is biased in its favor. If creditors believe that the judge might be biased, they will respond by being more willing to settle disputes with the debtor than risk adjudication before a possibly biased judge. Creditors will also be less inclined to make motions or objections given the certain costs of litigating and the belief that success is unlikely irrespective of the merits of their position because of judicial bias. Thus, even without any actual judicial bias, judge shopping may warp outcomes in chapter 11 cases in favor of the debtor.

Second, judge shopping affects lawyers' behavior. Because judge shopping has concentrated a large percentage of big chapter 11 cases before a handful of judges, attorneys reasonably anticipate making repeat appearances before the same judge. This affects attorney behavior. Repeat player lawyers have to tread carefully and be willing to overlook questionable conduct by judges and case-placing debtors' counsel, lest they create trouble for themselves in the future and jeopardize their future business flows. Clients value counsel with good judicial relationships, and clients may be reluctant to hire attorneys known to be on the "outs" with the judge. If lawyers are pulling punches to avoid annoying the judge, the entire adversarial process on which the bankruptcy system depends becomes compromised.

Third, the effects of judge shopping may go beyond merely creating an appearance of impropriety. Judge shopping may also affect judicial behavior to have a substantive impact on bankruptcy outcomes. It is difficult to prove a causal link between judge shopping and case outcomes. Judicial decisions are frequently susceptible to multiple causal hypotheses. A judge who is doing her level best to apply the law impartially might reasonably reach a pro-debtor result in all manner of instances.

This Article, however, identifies a particular transaction—ultra-fast "drive-thru" bankruptcies in which a chapter 11 plan is confirmed within days or even hours—that has been authorized almost exclusively by the three most shopped judges—those who heard the majority of the large public bankruptcy filings in 2020.[22] Few other judges have been willing to approve a chapter 11 plan so fast, without a finding of cause to reduce timeliness, not least because doing so is contrary to the express provisions of the Federal Rules of Bankruptcy Procedure and injurious to due process.[23] The case of drive-thru bankruptcies presents a strong inference that judge shopping is affecting outcomes.

If judge shopping is affecting observable outcomes, it heightens the concern that judge shopping might also affect outcomes in other, harder to identify instances. In other words, the competition for big cases by a handful of bankruptcy judges may not only create an appearance of impropriety but may undermine the actual integrity of the chapter 11 bankruptcy system.

22. Levitin, *supra* note 2, at 122–25.
23. *Id.* at 125.

The general problem of forum shopping and even judge shopping has long been noted in numerous contexts.[24] In particular, a sizeable literature exists on forum shopping in bankruptcy.[25] In particular, Professor Lynn LoPucki has detailed the intense nature of court competition for big bankruptcy cases and decried the "corruption" this competition has had on the bankruptcy system.[26]

24. *See, e.g.*, Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 J. LEGAL ANALYSIS 341, 341 (2021); Ofer Eldar & Neel U. Sukhatme, *Will Delaware Be Different? An Empirical Study of* TC Heartland *and the Shift to Defendant Choice of Venue*, 104 CORNELL L. REV. 101, 103 (2018); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 582 (2016); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242 (2016); Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539, 543 (2016) [hereinafter Anderson, *Judge Shopping*]; J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 637 (2015); Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 87–88 (2015); William H.J. Hubbard, *An Empirical Study of the Effect of* Shady Grove v. Allstate *on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 152 (2013); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 482 (2011); James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WISC. L. REV. 421, 426–27 (2009); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 395–97 (2006); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC L. REV. 25, 25 (2005); Paul H. Rubin, Christopher Curran & John F. Curran, *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295, 297–98 (2001); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 290 (1999); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIA. L. REV. 267, 268 (1996); Kimberly Jade Norwood, *Double Forum Shopping and the Extension of* Ferens *to Federal Claims that Borrow State Limitation Periods*, 44 EMORY L.J. 501, 502 (1995); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995); Neel U. Sukhatme, *A Theoretical and Empirical Study of Forum Shopping in Diversity Cases*, 20–21 (Working Paper, 2014).

25. *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 16 (2005) [hereinafter LOPUCKI, COURTING FAILURE]; Anthony Joseph Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEVS. J. 101, 102 (2021); Terrence L. Michael et al., *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 742 (2019); Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 120 (2018); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 384 (2015); Oscar Couwenberg & Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 BUS. LAW. 719, 720 (2015); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 162 (2013); G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 512 (2010) (noting forum shopping between bankruptcy and nonbankruptcy venues); John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 786 (2007); Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 427 (2006); Lynn M. LoPucki, *Where Do You Get Off? A Reply to* Courting Failure*'s Critics*, 54 BUFF. L. REV. 511, 512 (2006) [hereinafter Lopucki, *Where Do You Get Off*]; A. Michele Dickerson, *Words That Wound: Defining, Discussing, and Defeating Bankruptcy "Corruption"*, 54 BUFF. L. REV. 365, 370–71 (2006); G. Marcus Cole, *'Delaware is Not a State': Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1848 (2002); Robert K. Rasmussen & Randal S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1358 (2000); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968 (1999); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 1 (1998) [hereinafter Skeel, *Bankruptcy Judges and Bankruptcy Venue*]; Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 12 (1991).

26. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 180; LoPucki, *Where Do You Get Off*, *supra* note 25, at 517; Eisenberg & LoPucki, *supra* note 25, at 969; LoPucki & Whitford, *supra* note 25, at 40.

Professor LoPucki has argued that competition for big cases has affected courts' willingness to push out debtors' management by appointing a trustee and to approve professionals' fees, executive compensation, payments to supposedly "critical" vendors, sweetheart asset sales, and "prepackaged" cases.[27] Professor LoPucki has also argued that this competition has resulted in insufficient oversight of large cases, resulting in restructurings that fail to adequately address firms' financial problems, as evidenced by an increase in repeat chapter 11 filings by the same debtor.[28]

The existing bankruptcy forum shopping literature is heavily focused on district-level forum shopping.[29] This Article brings the bankruptcy forum shopping literature up to date by identifying the shift from district-level forum shopping to shopping for individual judges. The ability to hand-pick a particular judge has supercharged forum shopping and rendered it even more toxic than the older literature identified. The existing literature has emphasized the interplay of district level forum shopping and competition among districts for cases.[30] This Article shows how the shift to shopping for individual judges has not only intensified court competition to attract debtors' business, but also affected the behavior of creditors and lawyers in ways that undermine the bankruptcy process.

In particular, what has changed in recent years is that courts' local rules for divisional assignment and administration of complex cases have been used—sometimes with the courts' deliberate encouragement—to allow debtors to select individual judges within a single district.[31] These local rules and the dodgy tactics they have spawned, such as debtors renting short-term or even virtual office space to provide an in-venue address to produce the desired case assignment, have not been previously addressed in the literature. Nor has the existing literature ever addressed the effect that forum shopping has on attorneys' behavior. Instead, it has always been focused on the effect on judicial behavior, but the literature has never previously been able to show a direct connection between judge shopping and judicial outcomes, only conjecture.[32] This Article presents the strongest evidence to date that forum shopping is affecting case outcomes.

27. LOPUCKI, COURTING FAILURE, *supra* note 25, at 139–80. A prepackaged case involves a pre-bankruptcy solicitation of votes on a plan presented to the bankruptcy court upon the filing of the case.

28. *Id.* at 113; Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1945 (2002) (finding refilling rate for large public company chapter 11s filed in Delaware was three times that in other courts and concluding "Delaware-reorganized firms were significantly more likely to refile . . . and significantly less likely to perform successfully under their plans of reorganization"); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Evidence of a "Race to the Bottom"*, 54 VAND. L. REV. 231, 235, 248 (2001) (noting the increased likelihood of large public companies filing for chapter 11 in Delaware to refile relative to companies that file for chapter 11 in other courts). Professor Stephen Lubben has taken issue with LoPucki's claim that venue is affecting repeat filings. Stephen J. Lubben, *Delaware's Irrelevance*, 16 AM. BANKR. INST. L. REV. 267, 267–68 (2008).

29. *See* sources cited *supra* note 25.

30. LoPucki & Whitford, *supra* note 25, at 13.

31. *See infra* Part III.

32. *See, e.g.*, LOPUCKI, COURTING FAILURE, *supra* note 25, at 24.

This Article proceeds as follows. Part II reviews bankruptcy law's highly permissive venue rules, the motivations for forum shopping, and the phenomenon of judicial competition for bankruptcy megacases. Part III then shows how forum shopping has been transformed into judge shopping through debtors' abuse of courts' divisional case assignment rules and debtors' use of courts' complex case panel rules that affirmatively invite judge shopping.

Part IV discusses the effects of judge shopping on bankruptcy venue. It demonstrates that judge shopping has concentrated large bankruptcy cases before just a few judges in a few judicial districts producing a marked shift in the preferred filing venue. Part V shows how judge shopping undermines the integrity of chapter 11 by affecting case outcomes, both indirectly, through chilling the behavior of creditors and lawyers, and directly, through shopped judges' willingness to approve drive-thru bankruptcies, sometimes in under twenty-four hours.

Part VI responds to the argument that judge shopping is a feature, not a bug, because it reflects a desire of debtors to have their cases heard by the best and most expert judges. This Article argues that drive-thru cases underscore that the most sought-after judges are not selected by debtors for their expertise—judges have no chance to exercise any in a twenty-four-hour case—but for their willingness to rubberstamp procedurally illegal transactions. Expertise is simply irrelevant. Judge shopping is not driven by debtors' desire to have a good judge, but to have a judge who is good for them. What the debtor wants is a judge who will accede to its demands, and by approving drive-thru cases, judges signal that they are willing to do just that, thereby attracting future cases to their courtrooms. Part VII concludes with proposals to address judge shopping, focusing on solutions that can be achieved without Congressional action.

## II. FORUM SHOPPING IN CHAPTER 11

### *A. Bankruptcy Venue Rules*

For the past two decades, venue has been perhaps the most controversial topic in business bankruptcy because of allegations that forum shopping in large, complex chapter 11 cases has "corrupted" the bankruptcy system.[33] Venue is not jurisdictional in federal courts,[34] but having local concerns addressed by a local court plays an important role in the legitimacy of the legal system. Moreover, venue can affect the outcome of a case because it can affect what law applies, the identity of the judge who applies the law, the ability of parties to participate in the case, and the political pressures on the judge.[35]

33. *See generally* LOPUCKI, COURTING FAILURE, *supra* note 25.

34. *See* 28 U.S.C. § 1406(b) ("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.").

35. *See* Ellias, *supra* note 25, at 145–46.

Federal law gives debtors substantial flexibility when choosing where to file their bankruptcy cases. The bankruptcy venue statute permits a business entity debtor to file in any district:

1. where it has been headquartered for the previous 180 days;
2. where its principal assets have been located for the previous 180 days;
3. where it or its general partner has been incorporated for the previous 180 days;[36] or
4. where one of its affiliates or its general partner or its partnership already has a pending bankruptcy case.[37]

It should be of little surprise that a debtor could file for bankruptcy in a district where it is headquartered or has its principal assets.[38] The debtor has a meaningful and public connection with those jurisdictions. Similarly, incorporation provides both a public and formal, if less meaningful, connection to a jurisdiction.

The fourth possibility, however—filing where an affiliate's case is already pending—enables debtors to file in jurisdictions where they themselves have no connection whatsoever.[39] Suppose firm *A* is headquartered in district *X* and incorporated in district *Y*. If firm *A* has a subsidiary *B* that is incorporated in district *Z*, firm *A* could file for bankruptcy in district *Z* if its subsidiary *B* files there first.

A creditor of firm *A* could reasonably anticipate a bankruptcy filing in districts *X* or *Y*, but the creditor might have no knowledge of the existence of subsidiary *B*, because firms do not publicly list all of their subsidiaries, and ownership of some types of firms, such as Delaware LLCs, is not public.[40] Therefore, a creditor might find itself forced to deal with a bankruptcy in district *Z*, despite having never had any basis to think that the debtor has any connection with district *Z*.

The bankruptcy venue statute's flexibility has enabled rampant forum shopping in large chapter 11 cases. In 2020, nearly 80% of large, public company chapter 11 cases were forum shopped, in that they were filed in a district other than the location of the debtor's headquarters.[41] For example, the Los Angeles Dodgers filed for bankruptcy in the Delaware, where they have an incorporated

36. Corporations are treated as "domiciled" in their state of incorporation. 28 U.S.C. § 1408(1). 1 COLLIER ON BANKRUPTCY ¶ 4.02 (16th ed. 2020); *see also* LOPUCKI, COURTING FAILURE, *supra* note 25, at 56–57 (explaining the history of this interpretation).

37. 28 U.S.C. § 1408(2). If a debtor or its assets have been located or incorporated in more than one district or for less than 180 days, the relevant district is the one where more time within the 180-day period has been spent than the others. 28 U.S.C. § 1408(1). Creditors are not "defendants" in a bankruptcy case, but the minimum contacts doctrine for personal jurisdiction does not apply to their claims because bankruptcy law provides for nationwide service of process. FED. R. BANKR. P. 7004(d).

38. 28 U.S.C. § 1408(1).

39. Coordes, *supra* note 25, at 391–92.

40. *Id.*; William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1438–39 (2022).

41. *See infra* Figure 1 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author). Forty-five of fifty-six cases in 2020. *Forum Shopping By Year*, FLA.-UCLA-LOPUCKI BANKR. RSCH. DATABASE, https://lopucki.law.ufl.edu/design_a_study.php?OutputVariable=Shop (last visited Nov. 12, 2022), [https://perma.cc/7CKD-ZL5P].

entity, but no assets or operations or even substantial creditors.[42] Similarly, the Boston Herald,[43] the Dallas Stars,[44] the Chicago Tribune,[45] Washington Mutual,[46] Nebraska Book Company,[47] and Tropicana Las Vegas Casino[48] all filed their chapter 11 cases in Delaware.

In terms of forum shopping, Delaware is a destination unto itself. From 2016 to 2020, there were approximately 591 unique (meaning unaffiliated) chapter 11 bankruptcy cases filed in the District of Delaware.[49] Only twenty-nine (4.9%) of those cases were actually of companies with a Delaware headquarters. Looking just at public or large private companies (at least $50 million in assets or liabilities), there were 306 unique chapter 11 bankruptcy cases filed in the District of Delaware between 2016 and 2020.[50] Of these 306 cases, only a single case (0.3%) was for a company with a Delaware headquarters.[51] The rest presumably had venue based on a Delaware entity in the corporate family.[52] Unlike principal place of business, however, place of incorporation is a largely meaningless relationship to a jurisdiction, particularly in bankruptcy, as the bankruptcy estate is a creation of federal law, and its governance should be guided by federal law, not state law.[53] Figure 1, below, summarizes.

42. Voluntary Petition at 1, *In re* LA Dodgers LLC, No. 11-12010 (Bankr. D. Del. 2011).

43. Voluntary Petition at 1, *In re* Herald Media Holdings, Inc., No. 17-12881 (Bankr. D. Del. 2017).

44. Voluntary Petition at 1, *In re* Dall. Stars, L.P., No. 11-12935 (Bankr. D. Del. 2011).

45. Voluntary Petition at 1, *In re* Tribune Media Co., No. 08-13141 (Bankr. D. Del. 2008).

46. Voluntary Petition at 1, *In re* Wash. Mut., No. 08-12229 (Bankr. D. Del. 2008).

47. Voluntary Petition at 1, *In re* Neb. Book Co., No. 11-12005 (Bankr. D. Del. 2011).

48. Voluntary Petition at 1, *In re* Tropicana Ent., LLC, No. 08-10856 (Bankr. D. Del. 2008).

49. *See infra* Figure 1 (data obtained from BANKRUPTCYDATA, https://www.bankruptcydata.com). This figure treats all affiliated cases as a single case. The precise number of unique cases can only be approximated because affiliations have to identified based on factors such as consecutive case numbers, identical or similar addresses, and identical attorneys. While usually one or more of these factors will identify firms as affiliated, occasionally affiliated cases are for firms with different addresses that do not file on the same or consecutive days and therefore do not have similar case numbers.

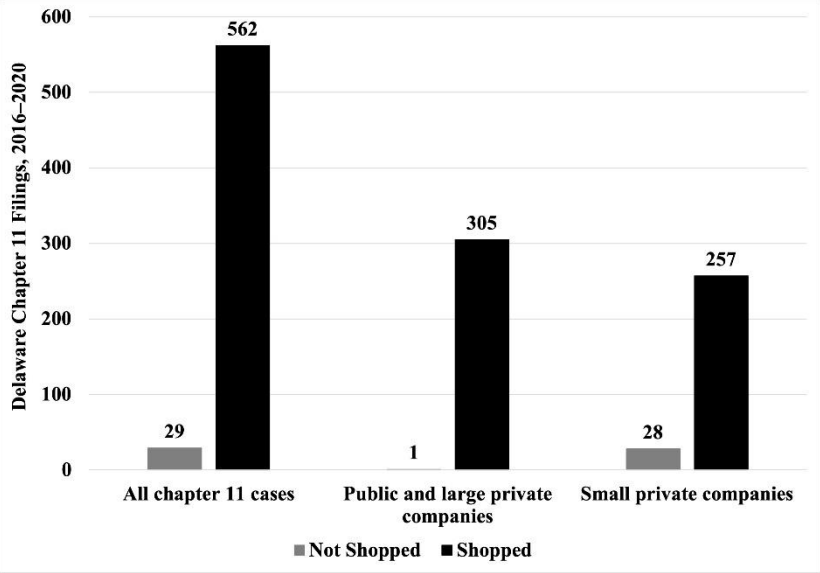
50. *See infra* Figure 1. This figure treats all affiliated cases as a single case.

51. *See infra* Figure 1. In other words, for smaller private filings in Delaware, twenty-eight of 285 (9.8%) were for firms headquartered in Delaware. Forum shopping is more of a large case phenomenon.

52. *See infra* Figure 1.

53. *See, e.g.*, Ellias, *supra* note 25, at 120.

FIGURE 1: DELAWARE CHAPTER 11 FILINGS, 2016–2020[54]




Acquiring venue through the bankruptcy of an affiliate is known as "bootstrapping" and is a common technique in large chapter 11 cases.[55] The bootstrapping phenomenon has been on display in major bankruptcy cases since at least the early 1980s, when Eastern Airlines, a Texas-based airline, bootstrapped its bankruptcy filing into the Southern District of New York ("SDNY") by having its affiliate Ionosphere Club file first in SDNY.[56] This practice has since been repeated in many major bankruptcies. Thus, Enron, a giant Houston, Texas firm, filed in SDNY by virtue of having a small Manhattan-based subsidiary with sixty-three employees.[57] Similarly, General Motors, an iconic Detroit firm, filed for bankruptcy in SDNY, bootstrapping its entire corporate family into the venue based on the initial filing of a wholly-owned dealership, Chevrolet-Saturn of Harlem, Inc.[58]

Bootstrapping has resulted in a proliferation of chapter 11 megacase filings in venues with only a nominal connection to the debtor. In particular, because so many firms are incorporated in Delaware, most large businesses will have the possibility of filing for bankruptcy in Delaware based on having at least one affiliate that is a Delaware entity.[59]

While the venue statute allows for bootstrapping, it can also easily be abused through the creation of new affiliates for the purpose of manufacturing a

54. Large private companies are defined as having either $50 million in assets or liabilities scheduled. "Shopped" is defined as cases where the debtor's principal place of business on its petition is not in Delaware.

55. *See, e.g.*, Levitin, *supra* note 2, at 150–51.

56. LoPucki & Whitford, *supra* note 25, at 22.

57. Coordes, *supra* note 25, at 402–03.

58. *Id.* at 382–84.

59. *Id.* at 389.

venue hook in a jurisdiction. For example, Boy Scouts of America, a federally chartered nonprofit corporation, headquartered in Texas, filed for bankruptcy in the District of Delaware by virtue of the existing bankruptcy case of an affiliate, Delaware BSA, LLC.[60] The Delaware affiliate had been incorporated approximately 222 days before the bankruptcy filings and had assets of no more than $50,000 (and possibly zero), consisting primarily (or perhaps solely) of a bank account in Delaware.[61] The Delaware affiliate carried on no business and had no employees.[62] Yet the sham Delaware affiliate's pending bankruptcy filing in Delaware was enough for the Boy Scouts of America to have its own bankruptcy heard in Delaware.[63]

Similarly, the National Rifle Association, a New York nonprofit corporation headquartered in Virginia, created a Texas subsidiary fifty-nine days before its bankruptcy filing in order to claim venue in Dallas.[64] Likewise, Patriot Coal, based in Missouri, sought SDNY venue by creating a pair of New York subsidiaries the month before its bankruptcy filing.[65] Neither subsidiary had an office in New York, and they held only minimal assets in New York.[66] One had a bank account in New York, and the other owned a stock certificate that was physically held in New York by counsel to one of its lenders as collateral.[67] The Jacksonville, Florida-based grocery store, Winn-Dixie, created a New York affiliate for bootstrapping purposes a mere twelve days before its bankruptcy filing.[68] And Johnson & Johnson, a venerable New Jersey corporation, based in New Brunswick, New Jersey, created a new North Carolina-incorporated subsidiary, LTL Management LLC, a mere two days before it caused the subsidiary to file for bankruptcy in the Western District of North Carolina.[69]

60. Disclosure Statement for the Chapter 11 Plan of Reorganization for Boy Scouts of America and Del. BSA, LLC at 26, *In re* Boy Scouts of Am. & Delaware BSA, LLC, No. 20-10343, (Bankr. D. Del. Feb. 18, 2020), 2022 WL 3030138.

61. *Id.*; Voluntary Petition for Non-Individuals Filing for Bankruptcy at 3, *In re* Del. BSA, LLC, No. 20-10342 (Bankr. D. Del. 2020).

62. Disclosure Statement for the Chapter 11 Plan of Reorganization for Boy Scouts of America and Del. BSA, LLC at 20–21, *In re Boy Scouts of Am. & Delaware BSA, LLC*, No. 20-10343.

63. *Id.* at 9.

64. Eric B. Fisher, *NRA Fires Off Bankruptcy Petition, Raising Questions About Good Faith and Venue*, NAT'L L. REV. (Jan. 21, 2021), https://www.natlawreview.com/article/nra-fires-bankruptcy-petition-raising-questions-about-good-faith-and-venue [https://perma.cc/C4KX-TRQ9]. The NRA's petition was dismissed because it was not filed in good faith, but not because of manufactured venue. *In re* NRA of Am., 628 B.R. 262, 283 (Bankr. N.D. Tex. 2021).

65. *In re* Patriot Coal Corp., 482 B.R. 718, 726–27 (Bankr. S.D.N.Y. 2012) (transferring venue to the Eastern District of Missouri).

66. *Id.*

67. *Id.*

68. Michael et al., *supra* note 25, at 772–73. Winn-Dixie's venue was transferred to the Jacksonville division of the Middle District of Florida.

69. *In re* LTL Mgmt. LLC, No. 21-30589, 2021 Bankr. LEXIS 3173, at *2 (Bankr. W.D.N.C. Nov. 16, 2021) (transferring venue to the District of New Jersey). I am a consultant to certain creditors in the case.

### *B. Motivations for Forum Shopping*

There are numerous reasons why, in theory, a debtor might forum shop. A debtor might be seeking favorable law in the district or a judge who is known to be likely to approve certain transactions.[70] A debtor might be seeking judicial expertise and experience managing a large, complex case.[71] A debtor might want a venue where there is certainty about the law on particular issues.[72] A debtor might want a forum that is inconvenient to creditors, particularly disgruntled employees.[73] A debtor might want a forum that is convenient for the debtor's attorneys and financial advisors, or at least one that will accommodate them by holding omnibus hearings, rather than separate hearings on each matter, making it easier for out-of-town lawyers to participate in cases by requiring less regular court attendance.[74] And a debtor might want a forum where the judge will not hesitate to approve high fees—above the prevailing local rate—for attorneys and financial advisors.[75]

The effects of forum shopping can, in theory, be positive or negative. To the extent that forum shopping results in cases ending up before the most capable judges, it is a good result.[76] And if forum shopping minimizes attorney and financial advisor travel, it might save costs for the bankruptcy estate.[77]

Yet these potential benefits have to be weighed against its possible harms. Forum shopping can exclude certain creditors—particularly smaller, less well-heeled creditors—from participating in the case.[78] For example, an elderly sex abuse victim in Texas might find it physically and financially onerous to travel to Delaware to attend hearings in the Boy Scouts' bankruptcy. Likewise, whatever savings might result from a more convenient location might be offset if the court is willing to sign off on professionals' fees at higher than the prevailing local rates.[79] Moreover, many instances of forum shopping do not involve selection of convenient locations for attorneys and financial advisors, such that forum shopping is likely to often add costs to a case.[80] The cost of New York attorneys and financial advisors regularly traveling to favored venues, such as Houston, Texas, or Wilmington, Delaware, can be substantial.[81]

70. LOPUCKI, COURTING FAILURE, *supra* note 25, at 79.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *See id.* at 79–80.
77. *See id.* at 44, 79–80.
78. See NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 777 (1997).
79. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 44. *But see* Order Requiring Submission of Approval of Petition for Attorneys' Fees to District Court at 1, Patterson v. Mahwah Bergen Retail Group, Inc., No. 3:21-cv-00167-DJN, (E.D. Va. 2022) (ordering that attorneys' fees not exceed the prevailing market rates in Richmond, Virginia); Transcript of Hearing at 79:5–80:2, *Patterson*, No. 3:21-cv-00167-DJN (noting that Kirkland & Ellis was charging twice the rate of a "very good local firm" in Richmond).
80. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 30.
81. *Id.* at 44.

Forum shopping can also affect the law that applies to a case. As Professors Marcus Cole and Todd Zywicki have observed, "[t]he 'nightmare' forum-shopping scenario is one in which a dispute between two parties receives dramatically different treatment depending upon which forum was used to adjudicate the dispute."[82] Given the existence of circuit splits, this nightmare scenario is entirely possible in chapter 11 cases.

Yet the number of issues on which there are clear circuit splits is relatively limited. And while debtors do seek legal certainty, that certainty is desired only if it is certainty of favorable law.[83] If there is certainty of unfavorable law, a debtor will avoid the venue and find an alternative.[84] Thus, to the extent debtors are seeking certainty, it is certainty that they will benefit from the law in the chosen venue.[85]

More often, however, the motivation for forum shopping is not picking clear law on a single issue, but instead picking a court that is likely to go along with the debtor's proposals on all significant matters.[86] Thus, debtor's counsel will seek to have their cases heard not just by judges whose past rulings indicate that they will favor the debtor on key issues, but by judges who have signaled their interest in attracting megacases to their courtrooms.[87]

It bears emphasis that the forum shopping phenomenon is one limited to larger bankruptcies.[88] Although chapter 11 is a procedure used by businesses of all size, as well as by well-heeled consumers, small businesses and consumers are unlikely to forum shop for several reasons. Counsel for small business debtors and consumers is likely local and not eager to load on expenses with travel.[89] Counsel for these firms also tend to bill at whatever the local market will bear; Kansas counsel is not concerned about the ability to get New York rates in other markets.[90] Moreover, the local firms representing smaller businesses and consumers may simply lack experience with other jurisdictions, such that they cannot readily evaluate the full benefits of forum shopping without experience of the judges.[91]

What this means is that forum shopping is likely to be most visible with the largest debtor firms. These firms often engage leading national bankruptcy firms that bill at New York rates and are willing to travel as needed.[92]

82. Cole & Zywicki, *supra* note 25, at 511.
83. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 39–47.
84. *See id.*
85. S*ee* Cole, *supra* note 25, at 1859–60.
86. *See id.*
87. *See id.* at 1875.
88. *See* Parikh, *supra* note 25, at 178.
89. *See* Stephen J. Lubben, *Choosing Corporate Bankruptcy Counsel*, 14 AM. BANKR. INST. L. REV. 391, 392 (2006).
90. *Cf.* LOPUCKI, COURTING FAILURE, *supra* note 25, at 44.
91. *See* Lubben, *supra* note 89, at 392; *cf.* Coordes, *supra* note 25, at 423.
92. *See* Coordes, *supra* note 25, at 413–14.

### *C. Judicial Competition for Megacases*

Professor Lynn LoPucki has argued that the ability of debtors to choose venue has led to a type of destructive competition between bankruptcy courts trying to attract "business" in the form of filings.[93] If this competition takes the form of a willingness to countenance more aggressive restructuring proposals from debtors, to provide less oversight over debtors and their professionals, and to issue more debtor-friendly opinions, it results in a systemic debasement.[94]

Most of the nation's 375 bankruptcy judges (including twenty-eight retired judges temporarily recalled to active duty[95]) are not looking to attract more cases. These judges already have overloaded dockets and are not compensated more for heavier caseloads.[96] The last thing most of them want is more work.

A handful of judges, however, appear eager to preside over megacases.[97] These judges are not seeking to attract small business or individual consumer cases. No judge wants to add a bunch of cases involving corner dry cleaners or local landscaping services or KFC franchises to her already busy docket. Judicial competition to attract bankruptcy filings is limited to megacases.[98]

One can only speculate as to the motivations of the judges who appear to be competing to land megacase filings. For example, because the judge is the star and the ringmaster of a megacase, presiding over such a bankruptcy might be appealing to personalities seeking a captive audience and a type of celebrity within the bankruptcy world.[99] Likewise, judges who themselves come from big case chapter 11 practices are likely to want to deal with their "peer" bar of big case chapter 11 lawyers, rather than the less fancy lawyers who handle the bankruptcies of consumer or small businesses.[100]

Professor LoPucki has argued that there are also indirect economic benefits from presiding over megacases.[101] He has suggested that judges who attract large chapter 11 cases might have better post-judicial employment opportunities; retired judges who have handled large chapter 11 cases frequently become partners at large law firms.[102] Additionally, judges who preside over megacases that are shopped in from other states are able to indirectly channel business back to the local bankruptcy bar that supported the judge's appointment in the first place.[103] Being able to provide business to the local bar can create goodwill that can benefit the judge in terms of post-retirement business.[104]

93. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 251.
94. *See id.* at 97–104; Parikh, *supra* note 25, at 197–98.
95. *See* 28 U.S.C. § 375 (authorizing recall of retired bankruptcy judges).
96. *See* Cole, *supra* note 25, at 1898.
97. *See id.* at 1875.
98. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 19–24.
99. *See id.* at 20.
100. *See id.*
101. *See id.* at 20–21.
102. *See id.*
103. *Id.* at 21–24.
104. *See id.*

Whatever the motivation, judges who want to attract megacases are able to signal their interest to the chapter 11 bar in a number of subtle ways. Judges telegraph their interest in attracting megacases by adopting courtroom procedures that accommodate bankruptcy professionals and the debtor. For example, judges can make clear their willingness to immediately hear motions and enter orders on the very first day after a filing.[105] They can also make efforts to accommodate attorneys' schedules, including holding telephonic hearings, holding omnibus hearings, or holding hearings at unconventional times and dates.[106] They can refrain from questioning professionals' fees, even if the fees are out of sync with rates in the local market.[107] They can engage in lopsided questioning at hearings, effectively arrogating the role of debtors' counsel to themselves.[108] And they can be sure to deny the type of motions that debtors dread because they can result in loss of control over a case, namely motions to appoint a trustee or examiner or to curtail plan exclusivity.[109]

Once the bar perceives that a judge is interested in attracting megacases to his courtroom, the game is afoot. The perception that a judge wants to attract megacases provides an assurance to the debtor's counsel and other case placers that the that the judge will go along with the restructuring contemplated by the debtor and not rule against the filer on significant issues.[110] Among other things, this means that: (1) the judge will not transfer the case based on improper venue or dismiss the filing as in bad faith; (2) the judge will sign off on major transactions proposed by the debtor; (3) the judge will extend the debtor's plan exclusivity to the maximum term allowed by statute and even after exclusivity is exhausted not entertain alternative plans; and (4) that the judge will refuse to appoint an examiner or a trustee, even if one is allowed as a matter of right by statute.[111]

This does not mean that the judge will always rule for the debtor. The judge will sometimes rule against the debtor on noncritical matters and will sometimes even push back on some of the debtor's asks on key matters.[112] Big bankruptcy cases involve dozens of judicial decisions to which the debtor is a party. A judge can rule against the debtor on all sorts of less critical issues—overruling the debtor's objections to relatively small claims, for example—without materially affecting the case.[113] Indeed, a judge can even rule against a debtor on a high-profile motion—when the relief sought is not urgent and the debtor is not precluded from revisiting the issue.[114]

105. *See* Cole, *supra* note 25, at 1864–65.
106. *See id.* at 1865.
107. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 45.
108. *Cf. id.* at 28, 244.
109. *See id.* at 11–14.
110. *See* Parikh, *supra* note 25, at 197–98.
111. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 11–12, 40–31, 93.
112. *See infra* text accompanying notes 115–20.
113. *See infra* text accompanying notes 115–20.
114. *See infra* text accompanying notes 115–20.

For example, in *Sanchez Energy*, Judge Marvin Isgur of the Bankruptcy Court for the Southern District of Texas denied the debtor's motion to obtain new, debtor-in-possession ("DIP") financing to fund its operations while in bankruptcy.[115] On its face, this was an exceedingly unusual outcome. DIP financing motions are rarely denied, in part because doing so is usually tantamount to deciding to pull the plug on the debtor right at the beginning of the case, before the court has a good sense of the whether the debtor is a viable business.[116] Courts are concerned about sounding a premature death knell for the debtor by denying it financing.[117]

Yet in *Sanchez*, the denial of the DIP financing motion was much less of a big deal than it might seem because the debtor had no immediate need for the financing[118] and the denial was without prejudice.[119] In other words, creditors that are not allied with the debtor are allowed to win, but only when there is little at stake.[120] By ruling for outside creditors in these lower stakes situations, a court can present an impression of fairness, even if it will never rule against the debtor on the issues that really matter.[121] Indeed, if the outside creditors have a particularly strong legal case, the judge can still run interference for the debtor by pushing the matter off into mediation in order to encourage a settlement that is favorable for the debtor.[122]

The very fact that certain districts and judges seek to attract megacases and maintain their megacase "franchises" is the assurance to debtors that they will not be disappointed by steering their cases to them.[123] If a judge fails to deliver, the judge will be branded as "unpredictable," and cases will flow to other courts.[124]

## III. FROM FORUM SHOPPING TO JUDGE SHOPPING

The scholarly literature has debated the merits of forum shopping in bankruptcy for three decades,[125] but it has not previously noted a new development in the phenomenon. When the bankruptcy forum shopping phenomenon began in the 1980s, it was primarily about shopping cases into SDNY. Cases were supposed to be randomly assigned among SDNY's bankruptcy judges, but in the

115. Transcript of Hearing at 274:11–279:2, *In re* Sanchez Energy Corp., No. 19-34508-H1-11 (Bankr. S.D. Tex. 2019) (denying the debtor's motion to obtain new, debtor-in-possession (DIP) financing to fund its operations while in bankruptcy).

116. *See id.* at 277:4–278:8; LOPUCKI, COURTING FAILURE, *supra* note 25, at 242.

117. *See, e.g.*, Transcript of Hearing at 277:4–278:8, *In re Sanchez Energy Corp.*, No. 19-34508-H1-11.

118. *Id.* at 274:11–18.

119. *Id.* at 277:4–16.

120. *See supra* text accompanying notes 115–19.

121. *See supra* text accompanying notes 115–20.

122. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 46.

123. *See* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 256 (2022).

124. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 134, 159, 249–50.

125. *See* sources cited *supra* note 25.

1980s, a statistically improbable number of large, public company bankruptcy filings were assigned to a single judge.[126]

The Bankruptcy Court for the District of Delaware was the next court to get into the game. Until 1992, there was only one judge on the court,[127] so forum shopping into Delaware was judge shopping. The success of forum shopping in Delaware necessitated an expansion of the number of judges in the district, however.[128]

Because case assignment within a district is generally random, forum shopping became about shopping for a district, rather than a particular judge. That is how forum shopping has operated until the last few years. From the 1980s until around 2016, forum shopping was primarily a Delaware and SDNY game, with short-lived challenges in the early 2000s from Chicago and Houston.[129] After Delaware and SDNY established themselves as the go-to districts, the chapter 11 megacase bar took care to ensure that "good" judges were appointed there, so the bar had confidence in the overall quality of the district's bench and random assignment did not particularly matter.[130] And when a rogue "unpredictable" judge slipped through and added some risk to the random draw, some of the case filings shifted to other districts.[131]

In the past few years, however, a new phenomenon has emerged: forum shopping that enables the debtor to hand-pick a single judge or be guaranteed one of two judges.[132] The key to this development are local case assignment rules.

Bankruptcy courts are empowered by the district courts to enact their own local rules and standing orders.[133] These local rules have the effect of steering large chapter 11 cases to a limited number of judges or even to a single judge.[134] These rules come in two varieties: divisional case assignment rules and complex case panel rules.[135] The first type of rule is susceptible to forum shopping abuse by debtors, while the second type of rule deliberately invites forum shopping.[136] The following Sections review each of these types of rules.

126. LOPUCKI, COURTING FAILURE, *supra* note 25, at 45–47.

127. *Id.* at 56.

128. *See* 28 U.S.C. § 152(a)(2) (providing for single bankruptcy judge for the District of Delaware); Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, § 3(a)(3), 106 Stat. 965, 965–66 (1992) (providing an additional temporary bankruptcy judge for the District of Delaware); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 1223(b)(1)(C), 1223(b)(2)(c), 119 Stat. 23, 196-97, 198 (2005) (providing four additional temporary bankruptcy judges for the District of Delaware); Additional Supplemental Appropriations for Disaster Relief Requirements Act, Pub. L. No. 115-72, § 1003(a)(1), 131 Stat. 1224, 1231 (2017) (providing two additional temporary bankruptcy judges for the District of Delaware).

129. LOPUCKI, COURTING FAILURE, *supra* note 25, at 123–35.

130. *See id.* at 132–33.

131. *See id.* at 159.

132. *See* Kahan & McKenzie, *supra* note 24, at 3.

133. *See id.*

134. *See id.*

135. *See* discussion *infra* Sections III.A–B.

136. *See infra* text accompanying notes 157, 173.

### *A. Local Divisional Case Assignment Rules*

One type of local rule that is often exploited for judge shopping is a divisional case assignment rule. Many courts have formal or informal geographical divisions with separate courthouses. For example, the Bankruptcy Court for the Central District of California, which covers the greater Los Angeles metro area, has five formal divisions for its twenty-two judges: Northern Division (Santa Barbara), San Fernando Valley Division, Los Angeles Division, Santa Ana Division, and Riverside Division.[137]

The number of judges in a division can vary greatly. Thus, the Los Angeles Division of the Bankruptcy Court for the Central District of California has ten judges, nine of whom work exclusively in that division.[138] In contrast, the Northern Division has only two judges, both of whom spend part of their time in other divisions.[139]

When courts have multiple divisions, they generally have local rules for assignment of cases to particular divisions. For example, a local rule of the Bankruptcy Court for the Central District of California provides that cases must be filed in the applicable division, namely the division where the debtor's residence, principal offices, officers, and books and records or majority of assets are based.[140]

Similar rules or general orders can be found in a number of other bankruptcy courts.[141] For example, the Bankruptcy Court for the District of Nevada has a Northern Division (Reno, with one full-time judge, one part-time) and

137. *Court Divisions: Contact: Federal Holidays*, U.S. BANKR. CT. FOR CENT. DIST. OF CAL. https://www.cacb.uscourts.gov/the-central-guide/court-divisions-contact-federal-holidays (last visited Nov. 12, 2022) [https://perma.cc/8NJF-W6QF].

138. *Judge Directory*, U.S. BANKR. CT. FOR THE CENT. DIST. OF CAL., https://www.cacb.uscourts.gov/judges/judge-directory (last visited Nov. 12, 2022) [https://perma.cc/YPT2-9FP5].

139. *Id.*

140. BANKR. C.D. CAL. R. 1071-1(a)(1).

141. *See, e.g.*, E.D. MICH. LBR 1071-1; E.D. MICH. LBR 1073-1; D. CONN. BANKR. L. R. 1073-1(a); M.D. GA. LBR 1071-1; BANKR. C.D. CAL. R. 1071-1(a)(1); General Order 2021-4, (Bankr. N.D. Tex. Apr. 8, 2021) (assigning 100% of cases filed in the Abilene, Amarillo, Lubbock, San Angelo, and Wichita Falls Divisions to a single judge); General Order 2014-3, (Bankr. W.D. Pa. Apr. 17, 2014) (assigning all cases filed in the Johnston counties of the Pittsburgh division to a single judge). Some courts lack any equivalent local rule. For example, no parallel local rule exists for the seven-judge Bankruptcy Court for the Northern District of California, the four-judge Bankruptcy Court for the Southern District of California, or the four-judge Bankruptcy Court for the Eastern District of Wisconsin. Other courts randomly assign all cases. For example, no parallel local rule exists for the seven-judge Bankruptcy Court for the Northern District of California, the four-judge Bankruptcy Court for the Southern District of California, or the four-judge Bankruptcy Court for the Eastern District of Wisconsin. And some courts expressly provision for random assignment cases within multi-judge divisions. *See, e.g.*, BANKR. M.D. FLA. R. 1073-1(a) ("In a Division with two or more resident judges, the Clerk shall assign cases to an individual judge using a blind draw system to ensure the random assignment of cases or as directed by the Chief Judge. Neither the Clerk nor any member of the Clerk's staff shall have any power or discretion in determining the judge to whom any case is assigned. This method of assignment is designed to prevent anyone from choosing the judge to whom a case is to be assigned, and all persons shall conscientiously refrain from attempting to circumvent this rule."); BANKR. N.D. OHIO R. 1073-1(a). Indeed, the local rules of the Bankruptcy Court for the Northern District of Illinois goes so far as to threaten sanctions against any person who reveals its case assignment sequence and to provide for the firing of any court employee who does so. BANKR. N.D. ILL. R. 1073-2.

Southern Division (Las Vegas, with three full-time judges, one part-time) based on counties.[142] Petitions must be filed in the division in which venue is based.[143]

Local case assignment rules have the effect of steering cases filed in those divisions to the limited number of judges in the division.[144] They are generally not drafted with large chapter 11 cases in mind, but instead reflect the majority of the bankruptcy docket: consumer and small business cases, where judge shopping is a rarity.[145] Judge picking in large chapter 11 cases is an unintended abuse of local divisional case assignment rules.

For example, prior to November 2021, the SDNY Bankruptcy Court had a local rule that assigned all cases where the debtor's address on the bankruptcy petition is in Rockland or Westchester counties to its single-judge White Plains Division in the New York City suburbs.[146] In other words, if a debtor filed for bankruptcy listing a Rockland or Westchester county address, it was guaranteed to have its case assigned to a particular judge.[147] This was precisely the trick used by Purdue Pharma to get its case before Judge Robert Drain in the White Plains Division.[148]

Divisional case assignment rules combined with the ease of district choice under the venue statute mean that debtors can readily file their cases in divisions with just one judge, meaning that they can pick their judge.[149] Even when a division has two judges, judge picking is still often possible if one of the judges can be conflicted out, such as by hiring the judge's spouse or child's law firm as local counsel.[150]

To be sure, there are myriad courts where the debtor is assured to draw a particular judge or one of two judges even without local rules playing a role. Fourteen federal districts have but a single bankruptcy judge, twenty-three have just two judges, and others have multiple judges but one-judge divisions.[151]

Local rules and district sizes present an extensive menu for judge-picking debtors. So why has judge shopping been limited to just a few districts?

142. *See* BANKR. D. NEV. R. 1071(a); *Locations and Hours*, U.S. BANKR. CT. FOR D. OF NEV., https://www.nvb.uscourts.gov/about-the-court/locations/ (last visited Nov. 12, 2022) [https://perma.cc/GX3W-QH5X].

143. BANKR. D. NEV. R. 1071(b).

144. *See* Kahan & McKenzie, *supra* note 24, at 342.

145. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 109.

146. BANKR. S.D.N.Y. R. 1073-1(a) (basing case assignment on "the street address on the petition"); BANKR. S.D.N.Y. R. 1073-1(a) (1996) (basing case assignment on the "the street address of the debtor set forth on the petition"); BANKR. S.D.N.Y. R. 5(a) (1986) (basing case assignment on the "the street address of the debtor set forth on the petition"). The current version of the rule, dating from May 22, 2020, bases case assignment on "the principal place of business of the Debtor set forth on the petition." BANKR. S.D.N.Y. R. 1073-1(a). A general order of the court now provides that an unspecified percentage of the chapter 11 cases assigned to White Plains shall go to another specific judge. General Order M-547, (Bankr. S.D.N.Y. 2020).

147. *See* sources cited *supra* note 146.

148. *See* Alex Wolf, *Purdue Pharma Bankruptcy Spotlights Venue Shopping Battle*, BLOOMBERG, https://news.bloomberglaw.com/us-law-week/purdue-pharma-bankruptcy-spotlights-court-venue-shopping-battle (Aug. 2, 2021, 10:33 AM) [https://perma.cc/SJ2P-CFWN].

149. LOPUCKI, COURTING FAILURE, *supra* note 25, at 15.

150. *Cf.* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, *supra* note 24, at 295.

151. *See* 28 U.S.C. § 152(a)(2).

The reason likely involves a combination of geography, variation in judicial background among districts, and judicial personalities. In terms of geography, the single-judge and two-judge districts tend to be smaller population centers with more limited transportation options.[152] The professionals involved with placing major bankruptcy cases—particularly debtors' counsel and DIP financier's counsel—tend to be based in a handful of major urban bankruptcy practice centers.[153]

The ease of transportation from these centers to some of the single-judge districts can be an obstacle. If there is only one flight a day between New York City and Burlington, Vermont, for example, it makes Vermont a much less appealing venue for a New York attorney who is worried that if a hearing runs late he will miss the only flight for the day (or that if a flight is cancelled, he is marooned for a full day). In contrast, Houston, New York, and Wilmington (easily served by the Philadelphia airport) offer excellent transportation options.

Beyond geography, judicial backgrounds are likely to vary among districts. The judges who sit in the one- and two-judge districts are likely to have different professional backgrounds than the bankruptcy judges in the District of Delaware or Manhattan or Houston. They are much less likely to have practiced on the megacase circuit and are more likely to have practiced in smaller chapter 11 and consumer cases in their own district.[154]

The likely divergence in judicial backgrounds has two implications. First, their more limited personal connections to the megacase bar makes it less likely that case placers will even think of them when deciding where to file cases. Second, they may simply have less interest in attracting megacases. Judges are human and a common human trait is the need to be validated by one's perceived peers.[155] If the judges in the one- and two-judge districts do not see their peer group as being part of the megacase chapter 11 bar, but the bankruptcy bar of their own district, they are unlikely to seek validation from the megacase bar by attracting and presiding over megacases.

Finally, it bears underscoring that only a handful of judges appear to want to compete to land large cases. Bankruptcy judges have some of the heaviest caseloads in the entire judicial system, and most judges see no reason to increase their caseloads simply to preside over a larger and potentially more complex case.[156]

But it only takes a handful of judges who want to attract large cases to set off intra-district competition. To the extent that the judges in these single- or two-judge divisions are willing to compete for megacase filings, they are able to do

152. *See id*.

153. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 40.

154. *See generally* Anderson, *Judge Shopping*, *supra* note 24 (discussing the use of assignment procedures in the Eastern District of Texas to judge shop and noting the judge's background in patent cases).

155. Geetika Sachdev, *Why Do Some People Need Constant Validation? An Expert Tells Us All*, HEALTH SHOTS (Jan. 10, 2022, 4:04 PM), https://www.healthshots.com/mind/mental-health/need-for-validation-and-its-effects-on-mental-health/ [https://perma.cc/8DPY-DZ8T].

156. *See* In re LTL Mgmt. LLC, No. 21-30589, 2021 WL 5343945, at *7 (Bankr. D.N.J. Nov. 16, 2021).

so even if the other judges in the district are not willing to engage in the competition because debtors can choose to file the cases in the divisions that will get the judges who are "selling" the venue.[157]

### *B. Complex Case Assignment Rules: The Rule of Two*

The other type of local rule that is used for judge shopping is a "complex case" assignment rule that assigns "complex"—that is large—cases to a limited panel of judges in the district or a division thereof.

Certain bankruptcy courts have long had local "complex case" procedures designed to help them compete to attract large cases. These complex case procedures guaranty quicker hearings with more predictable timelines and easier and laxer procedures regarding professionals' fees, including disbursement of fees prior to court review, not requiring documentation for ordinary course professionals, and more regular disbursement of professionals' fees.[158] When these courts had only a single judge or two judges, as was the case in the 1990s, these rules had the effect of facilitating district shopping, which was equivalent to judge shopping.[159] Moreover, some districts seem to have had nonrandom case assignments at certain points.[160]

In addition to complex case procedures, local rules in some districts assign large, complex cases to a limited panel of judges. Such panels have been adopted by the Northern District of Georgia,[161] Southern District of Ohio,[162] and Southern District of Texas.[163]

Given that bankruptcy judges are all merits appoints by the courts of appeals, rather than political appointments by the President and Congress, every federal bankruptcy judge should be adequately qualified to handle any bankruptcy case, even "complex" chapter 11 cases.[164] There is no reason to create a complex case panel except to guaranty to debtors that they will be able to get a particular panel of judges.[165] Thus, the creation of such panels is itself an unsubtle signal to debtors that a district is seeking to attract filings.

The complex case system for Bankruptcy Court for Southern District of Texas ("SDTX") has been by far the most successful at attracting business. In 2016, SDTX issued a general order assigning complex chapter 11 cases filed in

157. *See id.*

158. LOPUCKI, COURTING FAILURE, *supra* note 25, at 125–26; Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423, 450 (2009).

159. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 16.

160. *See id.* at 46–47 (noting that the odds of a particular SDNY bankruptcy judge getting the number of large cases he did was six in a thousand).

161. General Order 26-2019, (Bankr. N.D. Ga. Nov. 4, 2019) (assigning loosely defined "complex" cases filed in the Atlanta division to one of two judges).

162. General Order 30-4, (Bankr. S.D. Ohio Feb. 24, 2021) (assigning complex cases to one of two judges); General Order 30-1, (Bankr. S.D. Ohio, Sept. 28, 2018) (assigning complex cases to one of two judges).

163. General Order 2018-1, (Bankr. S.D. Tex. Jan. 25, 2018); General Order 2016-1, (Bankr. S.D. Tex. Mar. 3, 2016).

164. *See* 28 U.S.C. § 152.

165. *See* LOPUCKI, COURTING FAILURE, *supra* note 25, at 125–26.

Houston to a panel of just two judges.[166] Two years later it expanded the system to cover the entire district, channeling all complex cases to two judges—Chief Judge David R. Jones and Judge Marvin Isgur.[167] This was part of a deliberate strategy to attract megacases to Texas, and in case debtors' counsel did not get the signal that Houston was open for business, SDTX even set up a "complex case" advisory committee of bankruptcy attorneys, many of whose members are not even admitted to practice in Texas, but who are important case placers.[168]

David R. Jones, the Chief Judge for the SDTX Bankruptcy Court, has explained the impetus behind the complex case system:

> Very few (large-dollar) complex bankruptcies were getting filed here. There was not a next generation of Texas lawyers in the bankruptcy practice because there wasn't a need. I was worried we would not have a generation of bankruptcy lawyers left in Texas. I'm not married and have no children—just me and my three rescue dogs—and that has allowed me to put so much time and focus into making this work.[169]

Chief Judge Jones set up the complex case system to attract big cases, which is important to him as a personal matter; he is a self-confessed workaholic who "screwed up two [marriages] pursuing the practice of law because I loved this a whole lot more than I did my family."[170]

Judge Isgur has been even more explicit about how SDTX has aimed to attract cases: "David [Jones] shows that the force of one determined person to get something done. He decided everything we did would be more consumer friendly. The fact is, he just did it. He did it, and then he persuaded me to do it."[171] Tellingly, when Judge Isgur says "consumer friendly," he is not referring to actual consumer debtors, but to megacase debtors as the "consumers" of bankruptcy jurisdiction.[172] In other words, the SDTX bankruptcy court is "selling" its venue, and part of its unique selling proposition is a guaranty of case assignment to one of two judges who want to attract megacases and understand the need to "sell" the venue to debtors.[173]

166. General Order 2016-1, (Bankr. S.D. Tex. Mar. 3, 2016).

167. General Order 2018-1, (Bankr. S.D. Tex. Jan. 25, 2018).

168. *See, e.g.*, General Order 2018-6, (Bankr. S.D. Tex. June 29, 2018) (appointing a Complex Case Committee consisting of twenty members, including the head of Kirkland & Ellis LLP's bankruptcy practice, who is not admitted to practice in Texas).

169. Mark Curriden, *Meet the Judge Who Saved the Texas Bankruptcy Practice*, TEX. LAWBOOK (Aug. 23, 2020), https://texaslawbook.net/chief-judge-david-jones-the-man-who-saved-the-texas-bankruptcy-practice/ [https://perma.cc/7LN7-ZNQV]. Judge Jones's reasoning regarding the need for big case bankruptcy lawyers in Texas appears tautological: it would only be important for there to be a generation of big case Texas bankruptcy lawyers if Texas would be getting big case bankruptcies, but Judge Jones's stated reason for attracting those cases is to train lawyers for them. *Id.*

170. Transcript of Hearing at 183:12-14, *In re* Westmoreland Coal Co., No. 18-35672-H2-11 (Bankr. S.D. Tex. 2020); *see also* Motion Hearing at 101:17-21, *In re Westmoreland Coal Co.*, No. 18-35672-H2-11 ("I believe in lawyers getting paid for what they do, because I know how many nights you don't get to spend with your family. And, you know, I worked my way through two divorces as a judge—not as a judge, as a lawyer. I get it. I do. I know how hard it is.").

171. Curriden, *supra* note 169.

172. *See id.*

173. *See id.*

A key part of SDTX's complex case system is the guaranty that a debtor will get one of two judges. As Chief Judge Jones articulated, there is a Rule of Two:[174] "[t]here will never be more than two judges on the complex panel. It doesn't work if there are more than two."[175] With more than two judges, the predictability of rulings becomes diceyer. Thus, a megacase filed SDTX appears to have a 50% chance of getting one of the two judges on the panel.

Yet because of another SDTX local rule, the chance of getting a particular bankruptcy judge in SDTX might actually be 100%. A SDTX Bankruptcy Court General Order provides that in each of its seven divisions (except Houston), 100% of the chapter 11 cases—complex or not—go to a single judge.[176] What appears to occur is that cases likely to be designated as a "complex" case will be filed in a division where 100% of the chapter 11 cases go to one of the two judges on the complex case panel.[177] When the case is subsequently designated as a complex case, it remains with the judge to whom it was originally assigned, rather than going through the random assignment between the two complex case judges, which would be the procedure if the case were originally assigned to another judge.[178] Thus, a complex case filed in SDTX's Corpus Christi or Laredo divisions is guaranteed to be assigned to Chief Judge Jones.[179]

By making itself a judge shopping district, Houston was able to attract a megacase clientele, as the next Part discusses. In the years following the adoption of the complex case system, Houston went from being a bankruptcy backwater to becoming *the* single most popular destination for large, public company bankruptcy filings.[180] The complex case system worked: the fact that SDTX sought to attract these cases was itself the assurance that case placers needed—if SDTX wanted their ongoing business, it would have to give them the rulings they wanted on key issues.

174. *Rule of Two*, WOOKIEEPEDIA, https://starwars.fandom.com/wiki/Rule_of_Two (last visited Nov. 12, 2022) [https://perma.cc/9J7H-KZFA].

175. Curriden, *supra* note 169.

176. General Order 2019-1, (Bankr. S.D. Tex. Jan. 1, 2019), *amended by* General Order 2019-4, (Bankr. S.D. Tex. Jul. 18, 2019).

177. *Id.*; *see* Curriden, *supra* note 169.

178. *See* Curriden, *supra* note 169.

179. General Order 2019-1, (Bankr. S.D. Tex. Jan. 1, 2019). In judicial districts with two or three judges or with complex case panels with two judges, it is sometimes possible for a debtor to still pick the judge by ensuring that the other judge(s) are conflicted out of the case. The easiest way to do this is if a judge has a spouse or child who is an attorney. If the debtor engages the judge's family member's firm as local counsel, the judge will be conflicted off the case. *See* MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 2020). Additionally, when there are a limited number of judges in a district or on a complex case panel, it is sometimes also possible to pick a judge by timing a filing to coincide with a judicial vacation. Because of the need for urgent first day relief in bankruptcy, if a judge is unavailable, the case will be assigned to another judge who is available. *Cf. supra* Section V.B. (discussing drive-thru bankruptcies). While it is possible that the case will be reassigned subsequently, the decisions made at the start of the case can be extremely consequential. Debtors counsel with good local contacts will often be aware of judicial vacation schedules, which will be known in advance because of scheduling in other cases. This allows debtors to steer cases to a preferred judge in some instances.

180. *See* Curriden, *supra* note 169.

## IV. THE EFFECTS OF JUDGE SHOPPING ON BANKRUPTCY VENUE

The use and abuse of local case assignment rules enables debtors to either pick a single judge or be guaranteed one of two judges if they file in a particular district (or division).[181] This sets the stage for debtors to engage not just in the longstanding practice of district-level forum shopping, but also in judge shopping for individual judges.

In the patent context, Professor Jonas Anderson has shown that local rules have concentrated over a quarter of all patent cases before a single judge.[182] While there are far fewer megacase bankruptcies than patent suits, a similar phenomenon is observable among megacase bankruptcies. Local rules that concentrate cases with a limited number of judges facilitate judge shopping.

The result of judge shopping has been four-fold. First, it has resulted in a shift in the preferred filing venue away from Delaware to SDTX—Houston.[183] Second, it has consolidated filings in just a handful of districts.[184] Third, it has consolidated filings among just a handful of judges within those districts.[185] And fourth, it has created a repeat player phenomenon in chapter 11 cases.[186] There is now a high likelihood that attorneys will appear before the same handful of judges in the future, which in turn discourages the zealous advocacy upon which the adversarial system depends. The following Sections review these changes.

### *A. A Shift in Preferred Filing Venue for Megacases*

One key effect of judge shopping is a marked shift in the preferred filing venue for cases. For decades, Delaware was the preferred filing venue for large public companies, followed by SDNY.[187] In recent years, however, SDTX—Houston—has become the preferred filing venue. Houston has surpassed both Delaware and SDNY as a filing destination. (See Figure 2, below.)

181. *See* Kahan & McKenzie, *supra* note 24, at 341.

182. *See* Anderson, *Judge Shopping*, *supra* note 24, at 544–50 (describing how local rules in the Eastern District of Virginia and Eastern District of Texas produce a high concentration of patent cases before a few judges).

183. *See infra* Figure 2 (based on data from UCLA-LoPucki Bankruptcy Research Database, on file with author).

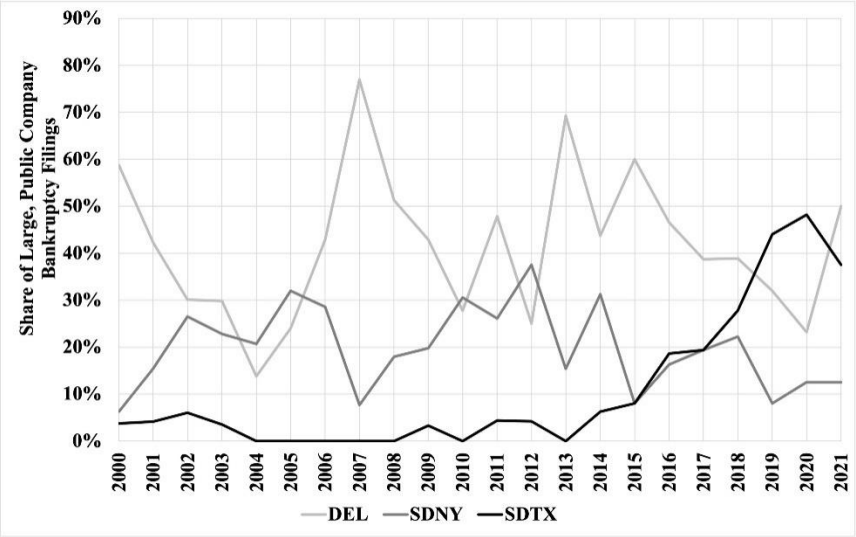
184. *See infra* Figure 3 (based on data from UCLA-LoPucki Bankruptcy Research Database, on file with author).

185. *See infra* Figure 5.

186. *See supra* Figure 1.

187. *See infra* Figure 2.

FIGURE 2: VENUE OF LARGE, PUBLIC COMPANY BANKRUPTCY FILINGS




This does not tell the full story, however. In SDNY, the filings shifted from the court's eight-judge Manhattan division to the single-judge White Plains division.[188] Between 2018 and 2020, there were as many or more large public companies filing before the single judge in White Plains than before the other eight judges in Manhattan.[189] And the Richmond Division of the Bankruptcy Court for the Eastern District of Virginia also emerged as an occasional filing destination, matching White Plains in 2019 and 2020.[190] Figure 3, below, shows that Houston rose to dominate the competition for large cases, while Manhattan fell out of the competition, surpassed by both Richmond and White Plains.[191]

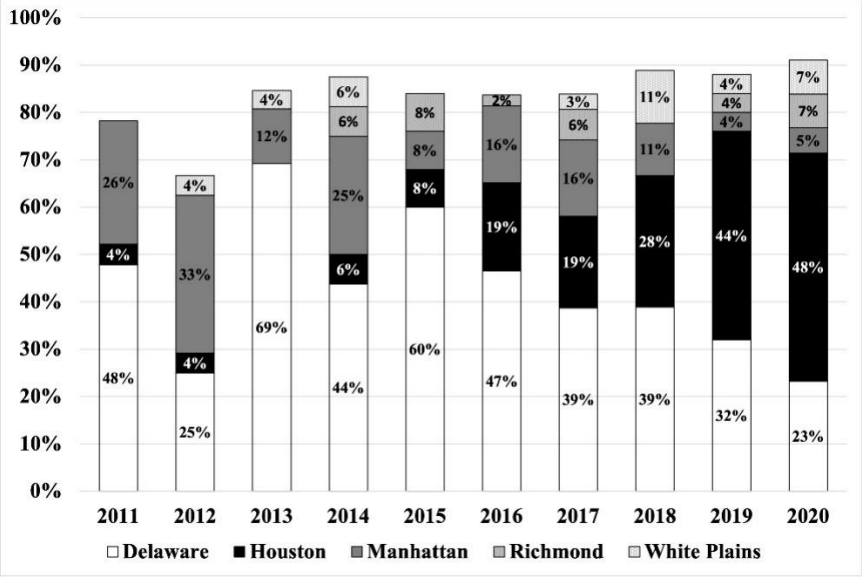
188. *See infra* Figure 3.

189. *See infra* Figure 3.

190. *See infra* Figure 3.

191. *See infra* Figure 3. It is noticeable that Manhattan's decline as a venue followed Judge Chapman's 2012 decision to transfer the venue of Patriot Coal's bankruptcy. *In re* Patriot Coal, 482 B.R. 718, 754 (Bankr. S.D.N.Y. 2012). The decision signaled that Manhattan was not necessarily a safe place for forum shoppers.

FIGURE 3: VENUE OF LARGE, PUBLIC COMPANY BANKRUPTCY FILINGS




The shift in preferred venue is from Delaware, and secondarily Manhattan, venues where a debtor could end up with one of seven or eight judges, to venues where the debtor is guaranteed a particular judge or pair of judges: Houston, Richmond, and White Plains.[192] In all, Houston, Richmond, and White Plains attracted 63% of large public company bankruptcies in 2020, compared with the mere 29% of cases filed in either Delaware or Manhattan.[193]

The rapid shift in preferred venue is significant because it indicates that the shopping is not based on judicial experience. By rejecting Delaware and Manhattan, debtors were shopping away from the judges with large case experience.[194] Indeed, among the large, public company cases that filed in Houston in 2019 and 2020 were three "chapter 22s"—companies going through their second chapter 11.[195] Two of those chapter 22s involved debtors that had filed their first chapter 11 in either Delaware or Manhattan but moved to Houston for their second filing.[196]

192. *See supra* Figure 3.

193. *See supra* Figure 3 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author).

194. To be sure, the Houston judges are now quite experienced with large cases.

195. *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Pacific Drilling, S.A., No. 17-13193 (Bankr. S.D.N.Y. 2017); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Pacific Drilling, S.A., No. 20-35212 (Bankr. S.D. Tex. 2020); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Halcon Resources, Corp., No. 1:2016-bjk 11724 (Bankr. D. Del. 2016); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Halcon Res., Corp., No. 19-34446 (Bankr. S.D. Tex. 2019). The third chapter 22 did both of its filings in Houston.

196. *See* cases cited *supra* note 195.

Part of the shift to Houston has been due to an uptick in oil-and-gas bankruptcies, some of which involve Houston-based firms.[197] To the extent that Houston-based oil-and-gas firms chose to file their bankruptcies in Houston, rather than Delaware, however, it represents a reversal from the historic patterns of forum shopping, as many oil-and-gas cases were historically filed in Delaware.[198]

The shift in filings to Houston is not just attributable to oil-and-gas megacases. In 2017, only 8% of large, public non-oil-and-gas bankruptcies filed in SDTX.[199] By 2020, 27% of the large, public non-oil-and-gas megacases were filing in SDTX.[200] Instead, the real driver of the shift to Houston appears to be its adoption in 2016 of its "complex" case assignment rule, followed in 2018 by an expansion of the rule's application.[201]

### *B. Consolidation of Megacases into a Handful of Districts*

A second effect of judge shopping is the continuation of the longstanding trend of consolidation of the big case bankruptcy business in just a handful of districts. Together, Delaware, SDNY, SDTX, and EDVA had 91% of all big cases filed in 2020.[202]

The fact that cases have not all consolidated in one preferred venue is notable, however. For forum shopping—and judge shopping—to have its maximum benefit for case placers, it is necessary that courts compete with each other, and that requires courts to be faced with a credible threat of losing their business if they are not sufficiently compliant.

Consider, for example, the behavior of Kirkland & Ellis LLP, the leading debtor-side bankruptcy firm today. Kirkland has represented the debtor in over 20% of the large public company bankruptcy cases in the past decade, more than twice the share of its closest competitor.[203] In the years prior to 2017, Kirkland had previously regularly filed three to four megacases in Delaware annually, never going more than a few months without filing a case.[204] Kirkland, however, ran into trouble in its representation of Samson Resources in Delaware.

197. *See* Tom Hals, *Houston Court Cuts into Delaware's Bankruptcy Business*, REUTERS (May 11, 2016, 4:26 PM), https://www.reuters.com/article/usa-court-bankruptcy/houston-court-cuts-into-delawares-bankruptcy-business-idINL2N1830OC [https://perma.cc/M5YW-4H7A].

198. *Id.*

199. *See supra* Figure 3 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author).

200. *See supra* Figure 3 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author).

201. General Order 2016-1, (Bankr. S.D. Tex. Mar. 3, 2016); General Order 2018-1, (Bankr. S.D. Tex. Jan. 25, 2018).

202. *See supra* Figure 3.

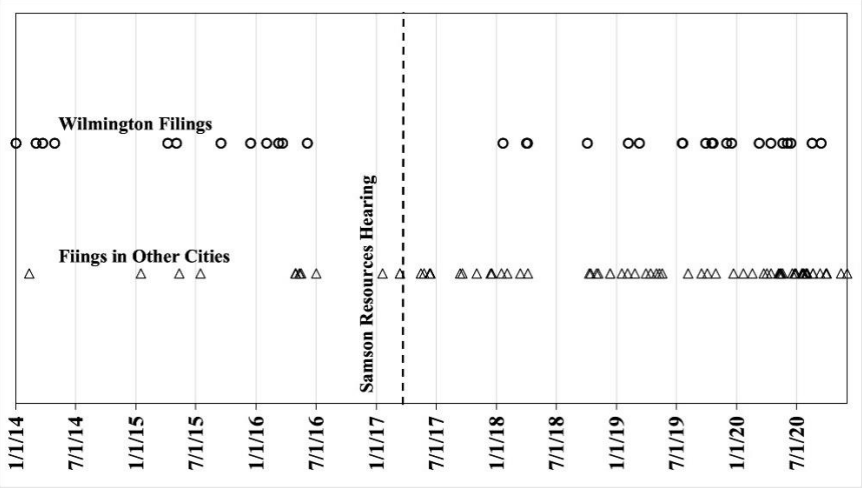
203. *See supra* Figure 3 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author). 287 large public companies filed for bankruptcy between 2011 and 2020. *Id.* Kirkland & Ellis represented sixty-two (21.5%) of them. Its closest competitor, Weil Gotshal & Manges, LLP represented twenty-seven (10.1%) such companies in the same time period. *See supra* Figure 3; *see also* Lubben, *supra* note 89, at 401 (referring to Kirkland as one of the "big three" debtor firms).

204. *See infra* Figure 4 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author).

First, the Bankruptcy Judge Christopher Sontchi said that he was "furious" regarding the terms on which lenders in *Samson Resources* consented to let the debtor use their collateral during the bankruptcy.[205] Next, Judge Sontchi denied a fee application for hours Kirkland billed defending its own services.[206] And then in March 2017, Judge Sontchi exploded in court at Kirkland attorneys for pulling a sharp move on a pro se creditor in the case, threatening to "shut this whole F'ing case down."[207]

Following the judicial "f-bombing," Kirkland appears to have withdrawn its business from Delaware. 327 days elapsed before Kirkland's next Delaware filing, resulting in an unprecedented gap of 616 days between Kirkland filings in Delaware.[208] During this time, Kirkland filed fourteen megacases filed in other venues, particularly Houston, Manhattan, White Plains, and Richmond.[209] Figure 4, below, shows Kirkland bankruptcy filings in Delaware (circles) and elsewhere (triangles).[210] There is a noticeable gap in the Delaware filings following the *Samson Resources* hearing (dotted vertical line) while Kirkland filed cases elsewhere.[211]

FIGURE 4: KIRKLAND & ELLIS BANKRUPTCY FILINGS, 2014–2020




205. *See* Stephanie Gleason, *Big Law Firm's New Strategy in Retail Bankruptcies? Avoid Delaware*, YAHOO! FIN. (June 28, 2017), https://yhoo.it/2OuiNH5 [https://perma.cc/YR5G-MCFS].

206. *Id.*

207. Transcript of Hearing at 14:4–15, *In re* Samson Resources Corp., No. 15-11934 (CSS) (Bankr. D. Del. 2017) (Sontchi, Bankr. J: "You can't treat these people like this. I will not allow it. I will shut this whole F'ing case down prior to this. Get out of your own way. I need a recess.").

208. *See infra* Figure 4.

209. *See infra* Figure 4.

210. *See infra* Figure 4.

211. *See infra* Figure 4.

Kirkland's message to Delaware was clear—give us grief, and we'll take our business elsewhere.[212] Coming from a firm that handles a fifth of all megacase filings, it is a weighty threat, especially to a judicial district like Delaware that is able to justify its seven temporary bankruptcy judgeships based solely on its flow of large chapter 11 filings.[213] Unlike any other firm around, Kirkland exercises market power over bankruptcy courts.[214] It is not clear how the situation was resolved, as Kirkland did return to filing in Delaware,[215] but it raises the possibility that a law firm was able to exert monopsony power over a federal court to bring the court to heel.

The consolidation of megacase practice into just a few districts is likely to continue. Following the circulation of a draft version of this Article and congressional testimony highlighting the problem of judge shopping, the bankruptcy courts for the Eastern District of Virginia and Southern District of New York changed their case assignment rules to provide for random assignment.[216] The change in case assignment combined with district court rulings on third-party releases, judge assignment, and fees in those districts[217] are likely to make them less attractive forum shopping venues going forward, such that cases are likely to further consolidate in Delaware and Houston.

### *C. Consolidation of Megacases Before Three Judges*

Most remarkably, judge shopping has resulted in the majority of large, public company bankruptcy filings being before just three of the nation's 375 bankruptcy judges: Robert D. Drain in White Plains, Marvin Isgur in Houston, and David R. Jones in Houston.[218] (See Figure 5, below.) In 2020, 55% of large,

212. A similar incident reportedly occurred in 2003, when Delaware Judge Mary Walrath tangled with Kirkland & Ellis over its fees. In re Fleming Cos., 304 B.R. 85, 88 (Bankr. D. Del. 2003). Delaware's share of filings fell sharply the next year. *See supra* Figure 2. It remains unclear why Kirkland returned to Delaware.

213. *See Kirkland, Weil and Latham Corner 28% of Large Cases*, KIRKLAND & ELLIS (June 30, 2022), https://www.kirkland.com/news/in-the-news/2022/06/tw-restructuring-practice_-josh-sussberg [https://perma.cc/S8RM-WSYJ].

214. *See* Lynn M. LoPucki, *Who Rules Big-Case Bankruptcy?*, DAILY J. (May 24, 2021), https://www.dailyjournal.com/articles/362862-who-rules-big-case-bankruptcy [https://perma.cc/5JLZ-NJVD].

215. *See infra* Figure 4.

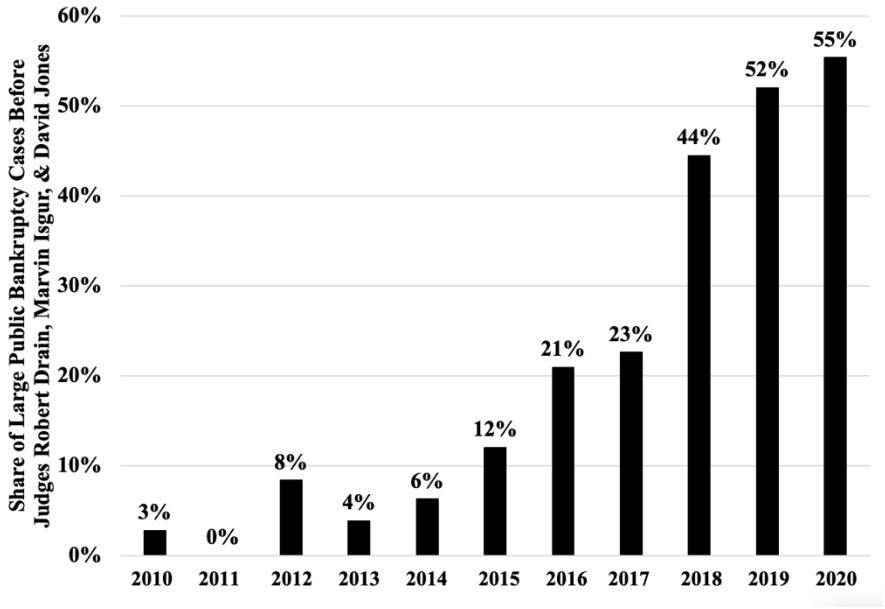
216. General Order M-581, (Bankr. S.D.N.Y. Nov. 30, 2021); Standing Order 21-21, (Bankr. E.D.Va. Nov. 30, 2021).

217. *See In re* Purdue Pharma, L.P., 635 B.R. 26, 78 (S.D.N.Y. 2021) (reversing plan confirmation on grounds that nonconsensual nondebtor releases are not authorized by the Bankruptcy Code outside of asbestos cases); *e.g.*, Patterson v. Mahwah Bergen Retail Grp., Inc., 636 B.R. 641, 703 (E.D. Va. Jan. 13, 2022) (reversing plan confirmation on grounds that nonconsensual nondebtor releases are beyond the constitutional authority of the bankruptcy court and unsupported by the facts and reassigning the case to a randomly selected bankruptcy judge); Order Requiring Submission of Approval of Petition for Attorneys' Fees to District Court, Patterson v. Mahwah Bergen Retail Grp., Inc., No. 3:21-cv-00167-DJN (E.D. Va. 2022) (ordering that attorneys' fees not exceed the prevailing market rates in Richmond, Virginia).

218. There were fifty-six large public company bankruptcies in 2020. Fourteen megacases ended up with Chief Judge Jones and fourteen before Judge Isgur. *See infra* Figure 5 (data on file with author). (The UCLA-LoPucki Bankruptcy Research Database lists thirteen for Judge Isgur but omits Carbo Ceramics, Inc.). Judge Drain came in fourth nationwide with three, having been bested by Judge Karen Owens in Delaware with four cases. *See infra* Figure 5 (data on file with author). Judge Owens has never previously had any large public bankruptcies in her courtroom.

public companies that filed for chapter 11 had their cases heard by these three judges.[219]

FIGURE 5: SHARE OF LARGE, PUBLIC COMPANY BANKRUPTCY CASES BEFORE THREE JUDGES[220]




While forum shopping in bankruptcy has always been about judge shopping, there has never previously been such a concentration of megacases before so few judges. The implications of this intense concentration of major bankruptcy cases before a handful of judges are also discussed in the following Parts.

## V. THE EFFECTS OF JUDGE SHOPPING ON CASE OUTCOMES

Judge shopping undermines the integrity of chapter 11 by affecting case outcomes. It does so in three distinct ways, two indirect and one direct. First, judge shopping chills creditors' behavior. Judge shopping results in creditors believing that judges are biased against them, encouraging them to accept lower settlements. Second, by creating a repeat player dynamic, it chills lawyers' behavior because lawyers are concerned about staying in judges' good graces lest it affect their future employment. And third, judge shopping directly determines case outcomes, as the most notoriously shopped judges have been willing to approve a type of patently illegal transaction—the "drive-thru" bankruptcy—that

219. If the two judges in the Richmond division of the Eastern District of Virginia are added, 63% of large, public company cases filed in 2020 were heard by just five judges. *See infra* Figure 5. Regarding 2021 figures, see *supra* note 21 and accompanying text.

220. Author's calculations were made using the UCLA-LoPucki Bankruptcy Research Database. The database does not have complete judge assignment for 2019 and 2020 cases in SDTX, so I hand-collected judge assignments for those years from the dockets of the cases in the UCLA-LoPucki Bankruptcy Research Database.

other judges have not. This Part addresses in turn each of these channels by which judge shopping affects case outcomes.

### *A. The Chilling Effect on Creditors' Behavior*

At the very least, judge shopping creates an appearance of judicial bias in big chapter 11 cases.[221] Even if there is no actual impropriety, forum shopping creates an innuendo of impropriety.

Even if the judge has no interest in attracting big cases, the fact that a debtor has selected the judge to preside over its case creates an inference that the debtor believes that the judge is biased in its favor.[222] To this point, judge shopping is implicitly insulting of the selected judges, by tarring them with the suggestion that they are biased.

The taint of judge shopping is an indelible original sin that colors every decision the judge makes in the case. Instead of parties being able to have confidence that the judge made a decision in good faith, when a case is judge shopped, parties are left wondering if the judge ruled a certain way because the judge was selected by the debtor due to actual bias. Judge shopping is thus damaging to parties' confidence in the integrity of the chapter 11 system; they cannot be sure they have received a fair adjudication before a neutral tribunal.

This is particularly harmful in cases involving mass torts, where many individual tort victims are unlikely to be represented by counsel.[223] These tort victims rely on the judge providing a check on unfair restructuring proposals by the debtor and favored creditors, and if they cannot have confidence that the judge has discharged her duties fairly and neutrally, they are likely to feel mistreated by a bankruptcy system that is already likely to pay them only pennies on the dollar for their harms.[224]

The concern about judicial bias is also likely to affect creditors' behavior. If creditors believe that the judge might be biased against them, then creditors are more likely to be willing to settle matters with the debtor for a lower price, rather than risk going before the judge for a ruling.[225] Similarly, if creditors

221. *See Patterson*, 636 B.R. at 703 at n.16 (reversing a plan in a forum-shopped case and ordering the case to be reassigned on remand to a bankruptcy judge outside of the Richmond Division while noting that "the practice of regularly approving third-party releases and the related concerns about forum shopping call into question public confidence in the manner that these cases are being handled by the Bankruptcy Court in the Richmond Division").

222. *Id.*

223. House Committee on the Judiciary, Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System, YOUTUBE (July 28, 2021), https://www.youtube.com/watch?v=bmMfiy4IJm4 [https://perma.cc/RC3K-TBU8] (testimony of Hon. William Tong, Attorney General of the State of Connecticut) ("The threat of being able to abuse this process, that the Sacklers might be able to secure nonconsensual nondebtor releases, that threat looms large over this entire process. And with respect to my [attorney general] colleagues and lawyers for victims and families like Ms. Pleuss's family, that threat, that the Sacklers might get away with it, pushes that [settlement number] down. So people rush to make a deal because they're worried if they don't make a deal the judge will cram the deal down and force us to accept releases.").

224. *Id.*

225. *Id.*

believe that the judge is biased for the debtor, they might not even bother making certain motions and objections, because they will weigh the certain cost of the motion or objection against what they gauge as the remote chance of success.[226] Judge shopping, in other words, has a chilling effect on creditor behavior.

For example, in opioid manufacturer Purdue Pharma's bankruptcy, many creditors were willing to accept a restructuring proposal that would release the Sackler Family, the owners of Purdue, from all manner of liability for opioid harms, while allowing the Sacklers to keep most of the billions of dollars taken out from the company.[227] Creditors' willingness to accept this deal was likely shaped by their sense that it was all but inevitable that Judge Drain, the bankruptcy judge hand-picked by Purdue and the Sacklers, would approve such release even over their objections, as he in fact did.[228] Thus, even if the judge is not actually biased, debtors garner substantial benefits from judge shopping by creating the impression among creditors of judicial bias.

### *B. The Chilling Effect on Lawyers' Behavior*

Because judge shopping is concentrating cases before just a handful of judges, there is a high likelihood that an attorney with a big case bankruptcy practice will make repeat appearances before one of those judges.[229] This dynamic makes it imperative for these repeat players to ensure that they stay in the judge's good graces.[230] They fear that if they anger the judge by being zealous advocates, they will bear the consequences the next time they appear before the

226. Levitin, *supra* note 2, at 139–40.

227. House Committee on the Judiciary, *supra* note 223.

228. *Id.* ("The threat of being able to abuse this process, that the Sacklers might be able to secure nonconsensual nondebtor releases, that threat looms large over this entire process. And with respect to my [attorney general] colleagues and lawyers for victims and families like Ms. Pleuss's family, that threat, that the Sacklers might get away with it, pushes that [settlement number] down. So people rush to make a deal because they're worried if they don't make a deal the judge will cram the deal down and force us to accept releases.").

229. At a *Purdue* hearing, Judge Drain, in response to a draft version of this Article, stated that:

> Just in this case alone, Davis Polk, which is the lead counsel, the whole firm has appeared in front of me in two cases in my almost 20 years on the bench. So, it's not really a repeat player. Mr. Kaminetzky, who is the only common person in those cases, Delphi and Frontier Airlines, won one and lost one.

Transcript of Hearing at 33:3–8, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021), (No. 19-23649 (RDD)), *vacated sub nom. In re* 635 B.R. 26 (S.D.N.Y. 2021) *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). Judge Drain's representations were incorrect. He neglected to mention that Davis Polk also appeared before him in the Minneapolis Star Tribune's bankruptcy. Voluntary Petition at 3, *In re* The Star Tribune Co., No. 09BK10245 (Bankr. S.D.N.Y. Jan. 15, 2009), 2009 WL 103527. The lead attorney for Davis Polk in that case was Marshall Huebner, who was also Purdue's lead attorney. Mr. Huebner has also appeared before Judge Drain as counsel for various creditors in the bankruptcies of MPM Silicones and of the Great Atlantic & Pacific Tea Company, while other attorneys from Davis Polk have been involved in Cenveo's bankruptcy.

230. On repeat players in litigation generally, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 15 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (noting that repeat players in litigation may look to maximize their income over the long-run, even at the expense of reduced income in the short-term); *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1453–55 (2017).

judge, whether in the same case or future cases.[231] They also worry that clients will not want to hire an attorney who is known to be out of favor with the judge hearing a case.[232] As a result, judge shopping has a chilling effect on lawyers' behavior.

For example, a judge might make clear that he strongly disfavors the appointment of an examiner. This might be clear from the judge's past opinions or comments from the bench in previous cases or from the judge's comments in the course of a case.[233] If an attorney the proceeds to force the issue by filing an examiner motion, the judge is likely to be peeved at the attorney and might make statements on the record reflecting his displeasure.[234]

This was the case in Purdue Pharma's bankruptcy. Bankruptcy Judge Robert D. Drain already had a reputation of being hostile to the appointment of an examiner.[235] In Loral Space's bankruptcy, Judge Drain refused to appoint an examiner, even when appointment was not discretionary under the Bankruptcy Code, preferring to be reversed on appeal.[236] A willingness to appoint an examiner would make Judge Drain—one of the favorite judges for judge shopping debtors—a much less attractive judge for debtors worried about an independent party poking around their financial affairs.

If Judge Drain's *Loral* opinion were not enough, during a Purdue Pharma hearing he lashed out at an attorney for twenty-five state attorneys general who were opposed to the deal proposed by Purdue:

> The press, who in a number of totally irresponsible articles led people who have truly suffered, because of the opioid crisis, to believe that there is no investigation going on, that this case's purpose is somehow to let the Sacklers [the owners of Purdue] get away with it [by not having to pay for the opioid crisis] and that without the appointment of an examiner there won't be an investigation, is just completely and utterly misguided.
>
> So, for anyone to believe that they should be driven by such trash is just a big mistake. We cannot muzzle the press, but certainly, people should understand that what is being put out as if it was news is completely false and should lead them to decide that they do not want to buy or click on that publication in the future because they cannot trust it to do the basic due diligence that any reporter should do.
>
> So, I don't want to hear some idiot reporter or some bloggist quoted to me again in this case. And you and your client should not be guided by anything of that sort or some misguided law professor who does not take the basic due diligence that you would think he or she would want a first-year

231. *See* Galanter, *supra* note 230, at 15–16.

232. *See supra* Part I.

233. *See* Levitin, *supra* note 2, at 166.

234. *See* Vince Sullivan, *Examiner with Narrow Scope Approved in Purdue Ch. 11*, LAW360 (June 16, 2021), https://www.law360.com/articles/1394599/examiner-with-narrow-scope-approved-in-purdue-ch-11 [https://perma.cc/J7ME-GHGL].

235. *See* Levitin, *supra* note 2, at 166.

236. *In re* Loral Space & Commc'ns Ltd., 313 B.R. 577, 587–88 (Bankr. S.D.N.Y. 2004), *rev'd and remanded sub nom.*, No. 04-civ-8645-RPP, 2004 WL 2979785, at *4 (S.D.N.Y. Dec. 23, 2004).

> law student to do to actually look at the actual transcript and the record in the case before spouting off about the need for an examiner, including completely ignoring the appointment of a corporate monitor, the commitment as part of the injunction to have a full account, and the examinations that are going on.[237]

Perhaps recognizing the futility of the matter, the nonconsenting state attorneys general never filed an examiner motion in *Purdue*.[238]

The repeat player dynamic also discourages attorneys from seeking remedies in the face of inappropriate judicial behavior. Among the remedies available to parties is moving for the district court to "withdraw the reference."[239] Bankruptcy cases are formally filed with the district court and referred to the bankruptcy court under standing orders.[240] The reference can be revoked, however, transferring the case to the district court.[241]

Seeking to withdraw the reference and other remedies, such as disciplinary complaints, are unlikely to be used by bankruptcy attorneys, not only because the odds of success are long, and incur certain costs for clients, but because doing so would be tantamount to professional suicide.[242] A motion to withdraw the reference or the filing of a disciplinary compliant is an indication that a party does not feel that the judge can treat it impartially and fairly, and a judge might well take personal umbrage at such an implication, a dangerous development for an attorney who is likely to appear before the judge again.

*Purdue* again provides an example of this dynamic. Temple Law School Professor Jonathan Lipson, representing pro bono the parent of a teenage opioid overdose victim, moved for the appointment of an examiner for Purdue.[243] Professor Lipson, unlike other attorneys in the case, is not a repeat player and had nothing to lose by angering Judge Drain by making the examiner motion.[244]

237. Omnibus Transcript of Hearing at 56:13–57:16, *In re* Purdue Pharma L.P., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (No. 19-23649 (RDD)), *vacated sub nom.*, 635 B.R. 26 (S.D.N.Y. 2021) *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

238. As it happened, Judge Drain did ultimately appoint an examiner at the very end of the case, but only because he was concerned about negative press. After explaining why he thought an examiner was inappropriate, Judge Drain nevertheless appointed one because: "I am concerned that if I do not appointment an examiner, the next press release will be, 'Court refuses to appoint examiner to determine whether process was fair,' and not add, 'because there was no evidence submitted to show that it wasn't."' Omnibus Transcript of Hearing at 170:24–171:3, *In re* Purdue Pharma L.P., 633 B.R. 53. Yet, even while appointing an examiner, Judge Drain restricted the scope of the examination, imposed a fast timeline on it, limited the examiner to being a single attorney with a budget of just $200,000, making it all but impossible for the examiner to litigate even a single inappropriate privilege claim. *Id.* at 171:4–18.

239. *See* 28 U.S.C § 157(d); FED. R. BANKR. P. 5011(a).

240. *See* 28 U.S.C. § 1334 (vesting original jurisdiction of bankruptcy cases in the district court).

241. 28 U.S.C. § 157(d) (permitting district courts to withdraw the reference to the bankruptcy court); FED. R. BANKR. P. 5011(a) (requiring a motion for withdrawal of the reference to be heard by the district court).

242. *See infra* text accompanying notes 243–51.

243. Motion for Order to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c) at 1, *In re* Purdue Pharma L.P., 633 B.R. 53.

244. *See* Galanter, *supra* note 230, at 15–16.

In his examiner motion, Professor Lipson cited a draft version of this Article regarding this particular point about repeat players being compromised.[245] At the hearing, Judge Drain derided the idea as "just simply a load of hooey."[246] He stated, "[i]t's hard to imagine anything more illogical than that" parties who think they are likely to make future appearances before a judge "don't want to anger the judge."[247]

It is unclear what is illogical about recognizing a basic game theory insight, namely that strategies are different in a multistage game than in a single stage game. As it happened, however, Judge Drain's response proved the very point he was contesting. Judge Drain has stated that "the notion that judges slant their rulings in order to lure future cases to their courts is an offensive fantasy."[248] Judge Drain engaged in "confrontational questioning"[249] and "yelled at Mr. Lipson throughout the approximately five-hour hearing,"[250] lashing out with personal invective against Professor Lipson and declaring that he takes the matter "personally."[251] Given Judge Drain's intemperate reaction to the examiner motion, would any lawyer who might anticipate appearing again before him risk so angering him?

A similar dynamic is at play for the United States Trustee. Attorneys for the United States Trustee know with certainty that they will be back in front of the same judge for numerous cases—not just large chapter 11s, but also myriad consumer cases—and they do not want to anger the judge, lest it affect their other cases.[252]

Because of the concentration of megacases before the same small number of judges, repeat players—the lawyers who represent the major parties in any large bankruptcy case, as well as the United States Trustee, are less likely to make waves. They are less likely to push judges about sloppy reasoning when it is clear how the judge is inclined to rule. Instead, they are more likely to tolerate bad judicial behavior, whether in the form of ethically problematic acts, like substantive ex parte communications by a judge (widely known to be the standard operating procedure of certain judges), intemperate judicial behavior, or indications of judicial bias.

245. Motion for Order to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c) at 17 n.15, *In re* Purdue Pharma L.P., 633 B.R. 53.

246. Transcript of Hearing at 33:10, *In re* Purdue Pharma L.P., 633 B.R. 53.

247. *Id.* at 32:12–19.

248. Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J. (Aug. 13, 2020, 5:30 AM), https://www.wsj.com/articles/companies-lease-offices-in-new-york-suburb-to-pick-bankruptcy-judge-11597311001 [https://perma.cc/VP8X-RCNF].

249. *See* Sullivan, *supra* note 234.

250. Jonathan Randles, *Purdue Pharma Probe Will Examine Board Committee's Independence*, WALL ST. J. (June 16, 2021, 7:18 PM), https://www.wsj.com/articles/purdue-pharma-bankruptcy-probe-will-examine-board-committees-independence-11623885481 [https://perma.cc/MX5E-SVM7].

251. Transcript of Hearing at 28:25, *In re* Purdue Pharma L.P., 633 B.R. 53.

252. In Purdue's bankruptcy, the United States Trustee's position was further complicated by the fact that the United States was one of Purdue's major creditors. Had the United States Trustee filed a motion for an examiner, for example, it could have upset Purdue's negotiations with the Department of Justice. The United States Trustee's Office is part of the Department of Justice, creating a conflict in its watchdog role in the case.

Similarly, repeat player attorneys are unlikely to raise the question of proper venue because of the implied affront to the judge. No judge wants to be told that he was chosen because the debtor thought he was a patsy or perceived that he might have prior inclinations about issues that would arise in the case; a challenge to venue underscores a concern about judicial bias.

The same goes for challenges of conflicts of interest of debtor's counsel. Because everyone understands that debtor's counsel is the key case placer, they know that judges who want big cases must accommodate the major debtor-side law firms.[253] Among other things, this means not pressing them about conflicts of interest that might exist, such as because of pre-bankruptcy work for the private equity owners of the debtor.[254] An attorney who pushes to disqualify debtor's counsel based on conflicts is likely to incur the judge's ire because that attorney risks upsetting the judge's megacase franchise.[255]

Given the repeat player dynamic, bankruptcy attorneys might make arguments less zealously, might not raise issues of bad judicial behavior, or might not raise legitimate issues in the case altogether. The repeat player dynamic means that lawyers will pull their punches. Their willingness to advocate for their clients' interests is affected both by their concern about blowback for their clients in later stages of the same case, as well as the effect on their professional relationship with the judge in subsequent cases.

To be sure, case placers (primarily debtor's counsel, but also the DIP financier and any private equity sponsors) have the luxury of being able to pick the judge, such that if they do not like a judge, it can simply steer cases to other districts.[256] No major bankruptcy firm, however, represents solely debtors. All the major firms that represent debtors also do some creditor-side work, such that they cannot always avoid appearing before a particular judge. The very parties who are most affected by forum shopping are the ones who are least able to complain about it or take action to prevent it. The repeat players are captives of a compromised system.

As for the outsider, nonrepeat players, while they might raise complaints about bad judicial behavior, precisely because they are outsiders, they are unlikely to understand, much less raise, the complicated technical issues that decide case assignments, and the unusual dynamics of bankruptcy appeals are likely to be an unwelcome surprise for them.

Judge shopping, then, harms the entire megacase chapter 11 bankruptcy system. Not only does it create an appearance of impropriety that taints all judicial actions in every shopped case, but it also compromises all of the other parties in the bankruptcy by making them afraid to be forceful advocates for their clients' interests.

While forum shopping has been with bankruptcy for decades, its newest incarnation, judge shopping, is far more pernicious. Judge shopping, facilitated

253. *See supra* Part I.
254. *See supra* Part I.
255. *See* Levitin, *supra* note 2, at 153.
256. *See id.*

by the use and abuse of local court rules, allows debtors not only to pick a district with favorable precedents, but to pick a judge whom the debtor believes will be inclined to side with it on key issues in the case.[257] The ability of debtors to hand-pick their judge has already contributed to a seismic redistribution in venue of large business bankruptcy filings, concentrating filings before just a handful of judges in a few districts, producing a repeat-player dynamic that chills creditor and attorney behavior.[258]

### *C. Approval of Drive-Thru Bankruptcies*

Not only does judge shopping indirectly affect case outcomes by chilling creditor and attorney behavior, it also is directly outcome determinative, as shopped judges have been willing to approve a type of transaction that other judges have not: illegal, "drive-thru" bankruptcies.[259] Bankruptcy law provides that a plan cannot be confirmed sooner than twenty-eight days after the bankruptcy filing, unless the court finds cause to shorten the default statutory timeline.[260] Some judges, however, have been willing to confirm plans faster than twenty-eight days—and even in under twenty-four hours—without finding cause for departing from statutory timelines.[261]

It is generally difficult, if not impossible, to show that judge shopping actually affects outcomes. If a debtor maneuvers its case into a judge's courtroom, it is generally difficult to say that the judge's ruling on any particular matter is because the judge is accommodating the debtor in order to attract more megacase filings or because the judge made a reasonable, good faith determination on an issue that just happens to benefit the debtor.

The phenomenon of drive-thru bankruptcies, however, suggests that judge shopping is affecting case outcomes. The judges who are most sought after by debtors are precisely the ones who are issuing rulings that not only depart from historical and peer practice but are also clearly illegal.[262] While these judges justify their rulings on "no harm, no foul," grounds—no one with an economic stake is objecting to the faster timeline—they do not claim that their decisions actually comport with the law, and there is reason to question whether they are even right about the "no harm, no foul" assumption.[263]

Drive-thru bankruptcies present the strongest available evidence that judge shopping is affecting outcomes. This raises the specter that judge shopping is also affecting outcomes in other, harder-to-detect circumstances and casts a shadow over the integrity of the entire chapter 11 big case bankruptcy system.

This Section explains why debtors value speed in chapter 11 and how and why bankruptcy law imposes procedural speed limits on cases. It then reviews

257. *See* Levitin, *supra* note 2, at 172.
258. *See id.* at 110.
259. *See id.* at 121–25.
260. FED. R. BANKR. P. 2002(b); FED. R. BANKR. P. 9006(c)(1).
261. *See* Levitin, *supra* note 2, at 125.
262. *See id.* at 125.
263. *See infra* Section V.C.

the phenomenon of the "drive-thru" bankruptcy and how it evolved from a first generation of superspeed cases that departed from normal statutory timelines "for cause," as permitted by statute, to a set of cases that departs from normal statutory timelines without justification.

### *1. The Need for Speed*

Confirmation of a chapter 11 plan requires a sufficient vote of creditors and equityholders.[264] Normally, votes on a bankruptcy plan may not be solicited from creditors and equityholders until the court has approved a disclosure statement that contains "adequate information" about the plan.[265] The Bankruptcy Code, however, permits "prepackaged" plans or "prepacks," where creditors' votes are solicited *prior* to the filing of the bankruptcy petition.[266] Notably, while the Bankruptcy Code exempts prepackaged plans from the requirement of court approval of a disclosure statement prior to solicitation of votes, it does not exempt prepackaged plans from any other procedural or substantive requirements.[267]

The primary attraction of using a prepackaged plan is that it enables a much faster chapter 11 process.[268] Speed can be desirable for a number of reasons. In some instances, a long stay in bankruptcy might be detrimental to a debtor's prospects for reorganization. For example, a car manufacturer might seek to speedily exit bankruptcy because it might have difficulty selling vehicles while in bankruptcy, as consumers might be concerned about its ability to honor warranties and provide aftermarket parts.[269] A faster bankruptcy can minimize the adverse effects on a debtor's business.

Speed can also be weaponized, however. The faster a bankruptcy moves, the more difficult it is for opposition to the debtor's plan to organize or for counteroffers to emerge. Indeed, if a bankruptcy moves fast enough, an official committee of unsecured creditors—one of the major checks on the debtor, which can bring challenges to the debtor's pre-bankruptcy transactions as well as to the

264. 11 U.S.C. §§ 1129(a)(8), (a)(10).

265. 11 U.S.C. § 1125(b).

266. 11 U.S.C. § 1125(g). Outside of bankruptcy, a debtor cannot force a change in the payment terms of a bond or loan on an individual bondholder or loan syndicate member without that bondholder or syndicate member's consent because of the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77ppp(b), and contractual provisions replicating the Trust Indenture Act's restrictions. *See* William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1632 n.148 (2018). Bankruptcy, however, trumps both the Trust Indenture Act and contractual provisions, enabling nonconsensual amendment of payment terms of bonds and loans. This enables debtors to use bankruptcy to squeeze hold-out creditors that will not agree to a deal outside of bankruptcy. This is one of the major appeals of prepackaged bankruptcies, which are often used to deal solely with financial debt, leaving trade, tort, and tax obligations unimpaired. Prepackaged bankruptcies also enable debtors to take advantage of bankruptcy's hyper-charged sale power, in which a federal court's order supersedes state law sale restrictions, including the ability to sell assets free-and-clear of interests, including liens. 11 U.S.C. § 363(f).

267. *See infra* Subsection V.C.2.

268. *See* Bratton & Levitin, *supra* note 266, at 1632–33.

269. *See What Happens If My Carmaker Goes Bankrupt?*, NBC NEWS (Dec. 4, 2008, 5:10 PM), https://www.nbcnews.com/id/wbna28058715 [https://perma.cc/UT33-7MAW].

proposed restructuring—may never be formed.[270] Moreover, the judge will have little chance to acquaint himself with the case, much less ask hard questions. A prepackaged plan can be used to ram through a plan before anyone can carefully inspect the restructuring proposal or organize opposition.[271]

A high-speed prepackaged plan can turn a bankruptcy into a "no look" case, which is exactly what some debtors want. Indeed, when a high-speed prepack includes releases of nondebtors, it can readily be abused as a get-out-of-jail-free card for entities like the debtor's private equity owners, who might have looted the debtor, contributing to its bankruptcy.[272] The releases ensure that the owners will never be held responsible for their looting.

Speed is often associated with keeping costs down, but the idea that a faster bankruptcy is a money saver is likely a fallacy because a faster bankruptcy merely shifts *when* expenses are incurred, not whether they are incurred.[273] A restructuring will take substantially the same work to design and paper whether in bankruptcy or outside.[274] The difference is that much of that work is done prior to the bankruptcy filing, not under court supervision.[275] As the United States Trustee has observed in a challenge to a drive-thru case:

> The idea that there may be a saving of expenses, that does not necessarily seem to be accurate. Whatever responses [the debtors] get or whatever negotiations they do with respect to these notices that go out pre-bankruptcy, presumably they'd have the same expense and cost. I mean, what they're avoiding and what they seek to avoid with respect to this particular process is to avoid the jurisdiction of the Court and the oversight of the Court with respect to those activities.[276]

The real impact of prepackaged plans is on the transparency of costs, not their total amount.[277] In bankruptcy, the fees of official committees are paid by the bankruptcy estate,[278] but creditors are likely to negotiate for their own counsels' fees to be covered in a prepackaged plan, such that there is unlikely to be material fee savings. Moreover, in bankruptcy, the court must approve the fees of the debtor's counsel and financial advisors, as well as those of any official

270. *See* Levitin, *supra* note 2, at 122.

271. *See id.*

272. *See id.* at 128–30.

273. Transcript of Hearing at 23:1–9, *In re* FullBeauty Brands Holdings Corp., No. 19-22185-RDD (Bankr. S.D.N.Y. 2019).

274. *See id.*

275. *See* LoPucki, *supra* note 123, at 249.

276. Transcript of Hearing at 23:1–9, *In re* FullBeauty Brands Holdings Corp., No. 19-22185-RDD.

277. *See* Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. CORP. & FIN. L. 141, 169, 178–79 [hereinafter Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*] (hypothesizing and presenting evidence that a prepackaged case does not have lower costs than a regular case, but merely shifts the costs to the pre-bankruptcy period); *see also* Elizabeth Tashjian, Ronald C. Lease & John J. McConnell, *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 155 (1996) (finding that prepackaged cases have lower costs than traditional chapter 11 cases); Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM BANKR. L.J. 509, 516–17 (2000) (criticizing the Tashjian, Lease & McConnell study for considering only the actual costs in bankruptcy, not pre-bankruptcy costs).

278. 11 U.S.C. § 330(a)(1); *id.* § 503(b)(2); *id.* § 1103; *id.* § 1129(a)(9).

committee's professionals.[279] Court approval does not inherently increase fees, however, and could even reduce them if judges were exacting on fee reasonableness.[280] Bankruptcy motion practice and disclosure requirements will add some costs, but they are unlikely to be material to the transaction.[281] As a result, the speed gains from a prepackaged plan are unlikely to affect the amount of costs in a material way.

### *2. Procedural Speed Limits*

While bankruptcy law contemplates prepackaged plans, it still requires prepackaged plans—like all plans—to comply with certain procedural requirements, including minimum timelines for plan confirmation.[282] The Federal Rules of Bankruptcy Procedure require, as a default, that creditors and other parties receive at least twenty-eight days' notice after the filing of a bankruptcy petition of either a deadline to file objections to a disclosure statement or plan a hearing to approve a disclosure statement or confirm a plan.[283] Bankruptcy Rule 2002(b) provides that

> the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement . . . (2) for filing objections and the hearing to consider confirmation of a chapter 9, or chapter 11 plan . . . .[284]

Critically, this rule requires that the notice be given by *the clerk or a person designated by the court*.[285] That means that notice cannot be provided by the debtor before the filing of the bankruptcy petition because the debtor is not the clerk, and there cannot be a court order authorizing another party to give notice

279. 11 U.S.C. § 330(a)(1); *id.* § 1129(a)(4).

280. Historically, there was a "spirit of economy" in bankruptcy that made attorneys reluctant to charge rates for bankruptcy work that were equivalent to what their partners charged for nonbankruptcy work. In particular, there was a long reluctance in bankruptcy to bill $1,000/hour. Nathan Koppel, *Lawyers Gear Up Grand New Fees*, WALL ST. J. (Aug. 22, 2007, 12:01 AM), https://www.wsj.com/articles/SB118775188828405048 [perma.cc/7AY2-VYQP]; Erin Geiger Smith, *See the Bankruptcy Attorneys Breaking the $1,000 Per Hour Barrier*, BUS. INSIDER (Dec. 16, 2009, 7:56 AM), https://www.businessinsider.com/see-the-bankruptcy-attorneys-breaking-the-1000-per-hour-barrier-2009-12 [perma.cc/3KLE-2GAW]. That said, Lynn LoPucki and Joseph Doherty suggest that court approval increases fees because the court, not the debtor controls the fees, and the court's incentive is to approve all fees, at least if it wishes to attract future megacase filings. LYNN M. LOPUCKI & JOSEPH W. DOHERTY, PROFESSIONAL FEES IN CORPORATE BANKRUPTCIES: DATA, ANALYSIS, AND EVALUATION xxi, 191 (2011) (finding that courts award almost 99% of fees applied for in large public company bankruptcies).

281. Sparkle L. Alexander, *The Rule 2019 Battle: When Hedge Funds Collide with the Bankruptcy Code*, 73 BROOK. L. REV. 1411, 1411 (2008).

282. *Id.* at 1453–54.

283. FED. R. BANKR. PROC. 2002(b), 3017(a). Prior to 2009, the notice and hearing timelines were twenty-five days' notice. 11 U.S.C. § 102(1) does not create an exception to the later drafted Federal Rules of Bankruptcy Procedure.

284. FED. R. BANKR. PROC. 2002(b).

285. *Id.*

until the bankruptcy has actually been filed.[286] Accordingly, it is irrelevant that other provisions of bankruptcy law encourage prepackaged cases; the timeline of Rule 2002(b) cannot run prepetition.[287]

Similarly, Bankruptcy Rule 3017(a) again requires at least twenty-eight days' notice after the filing of a disclosure statement that provides details on a proposed chapter 11 plan before a hearing on the adequacy of the information in the disclosure statement:

> [A]fter a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto.[288]

A disclosure statement cannot be filed until a bankruptcy petition is *filed*, rather than served, so the twenty-eight-day clock starts running only post-petition.[289] Further, the court is authorized to confirm the plan only after "notice and hearing as provided in Rule 2002."[290]

Accordingly, a prepackaged plan cannot normally be confirmed in less than twenty-eight days under the Federal Rules of Bankruptcy Procedure. The only exception to this minimum timeline is if the court orders a reduction of the timeline "for cause" under Bankruptcy Rule 9006(c)(1),[291] something that requires a motion and court order.

The twenty-eight-day default timeline in the Bankruptcy Rules ensures that creditors have time to receive and digest the information necessary to evaluate a plan and to organize themselves effectively through an official committee. This policy concern is reflected in other Bankruptcy Rules.[292]

Bankruptcy Rule 3020 provides that an objection to a plan shall be filed and served "within a time fixed by the court."[293] This means that the objection filing deadline must, by definition, be set after the filing of the petition because otherwise the court would have no jurisdiction.[294] While Rule 3020 does not set forth a particular objection deadline date, it precludes any sort of a pre-petition objection deadline, even in a prepackaged case.[295]

Bankruptcy Rule 6003 provides that "[e]xcept to the extent necessary to avoid immediate and irreparable harm, the court shall not, within twenty-one

286. *See id.*
287. *Id.*
288. FED. R. BANKR. PROC. 3017(a).
289. *Id.*
290. FED. R. BANKR. PROC. 3020(b)(2).
291. FED. R. BANKR. PROC. 9006(c)(1).
292. *Id.*
293. FED. R. BANKR. PROC. 3020(b)(1).
294. *Id.*
295. The entire concept of a pre-petition objection deadline is absurd. Why would a creditor bother filing an objection to a judicial proceeding that has not yet commenced and might in fact never commence? Moreover, how is process to be served prior to the commence of a case? And what of parties that become creditors during the window between a pre-petition objection deadline and the filing of the petition? *See generally* FED. R. BANKR. PROC. 3020.

days after the filing of the petition, issue an order granting" a motion to employ a professional person, a motion to use, sell, or lease, or otherwise incur an obligation regarding property of the estate, or a motion to assume or assign an executory contract or unexpired lease.[296] These are key motions in a bankruptcy case that determine who will be the debtor's counsel (with court approved compensation) and what the debtor can do with its various assets. The same "immediate and irreparable harm" standard applies (albeit with a fourteen-day time frame) to motions for obtaining operating financing for the debtor.[297] The policy concern animating these Rules is explained in the Committee Notes to the Rules:

> There can be a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior to the formation of a creditors' committee, and it also can include substantial amounts of materials for the court and parties in interest to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.[298]

Thus, while the Bankruptcy Code permits prepackaged plans, all it permits is the solicitation of votes on those plans to be undertaken pre-petition, exempting the solicitation from the requirement of a court-approved disclosure statement.[299] Nothing in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure allows a prepackaged plan to proceed on a faster timeline than generally permitted in the Bankruptcy Rules, except upon a Rule 9006 motion to shorten time "for cause."[300] In short, it is beyond peradventure that absent a Rule 9006 order, a bankruptcy plan cannot be confirmed in under twenty-eight days, and no published opinion claims otherwise.[301]

### *3. Drive-Thru Bankruptcies*

Despite the clear timetables dictated by the Federal Rules of Bankruptcy Procedure, a handful of judges from just a few courts have approved superspeed, "drive-thru" prepacks with plans confirmed in less than twenty-eight days,[302] and some drive-thru cases have been confirmed in under twenty-four hours.[303]

296. FED. R. BANKR. PROC. 6003.

297. FED. R. BANKR. PROC. 4001(b)(2) (use of cash collateral) and (c)(2) (obtaining new post-petition credit).

298. FED. R. BANKR. PROC. 6003, (committee notes on rules in 2007).

299. *See* Mark E. MacDonald & Daren W. Perkins, *Prepackaged Chapter 11 Plans: The Alternative to "Free Fall" Bankruptcy*, 1 J. BANKR. L. & PRAC. 31, 38–39 (1991).

300. *See* Levitin, *supra* note 2, at 1100–01.

301. *See id.*

302. Outright disregard of bankruptcy rules by courts would not be unprecedented, however. Lynn LoPucki and Joseph Doherty have shown that bankruptcy courts routinely disregard the rules governing attorneys' fees in large public company bankruptcies. LoPucki & Doherty, *supra* note 158, at 430; Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality Redux*, 85 AM. BANKR. L.J. 35, 38 (2011).

303. *See infra* sources cited notes 307–08.

As of the writing of this Article, there have been twenty-eight chapter 11 cases confirmed in less than twenty-eight days.[304] Eight of those cases predate 2017. All eight of those cases complied with the requisite process for accelerating the timelines in a case.[305] Since 2017, however, there have been twenty cases confirmed in less than twenty-eight days.[306] Only three of those twenty complied with the requisite acceleration procedures.[307] (See Table 1, below.)

TABLE 1: LEGAL COMPLIANCE OF CONFIRMATION TIMELINES OF SUPERSPEED PREPACKAGED CASES[308]

| | Rule 9006 Compliant Confirmations | Rule 9006 Noncompliant Confirmations |
|---|---|---|
| 2006–2016 | 8 | 0 |
| 2017–2022 | 3 | 17 |

Of the seventeen noncompliant high-speed bankruptcies, thirteen went through the courtrooms of just three judges of the nation's 375 bankruptcy judges: Judge Robert D. Drain in White Plains, New York; Judge Marvin Isgur, in Houston, Texas; and Judge David R. Jones in Houston, Texas.[309] (See Figure 6, below.) Judges Drain, Isgur, and Jones also happen to have been the three most notoriously shopped judges in the nation since 2017.[310] The other three judges

304. *See infra* sources cited notes 307–08.

305. *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006); *In re* Jackson Products, Inc., No. 04-40448 (Bankr. E.D. Mo. 2004); *In re* Davis Petroleum Corp., No. 06-20152-rss (Bankr. S.D. Tex. 2006); *In re* JGW HoldCo, LLC, No. 09-11731-CSS (Bankr. D. Del. 2009); *In re* Natural Prods. Grp., LLC, No. 10-10239, 2010 WL 2745983 (Bankr. D. Del. 2010); *In re* Penton Bus. Media Holdings, Inc., No. 10-10689 (AJG) (Bankr. S.D.N.Y. 2010); *In re* Anchor BanCorp Wis., Inc., No. 13-14002 (RDM) (Bankr. W.D. Wisc. 2013); *In re* Southcross Holdings LP, No. 16-20111 (MI) (Bankr. S.D. Tex. 2016).

306. *In re* ROUST Corp., No. 16-23786 (RDD) (Bankr. S.D.N.Y. 2016); *In re* Ameriforge Grp. Inc., No. 17-32660 (DRJ) (Bankr. S.D. Tex 2017); *In re* Glob. A&T Elecs., Ltd., No. 17-23931 (RDD) (Bankr. S.D.N.Y. 2017); *In re* FullBeauty Brands Holdings Corp., No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019); *In re* Arsenal Energy Holdings LLC, No. 19-10226 (BLS) (Bankr. D. Del. 2019); *In re* SunGard Availability Servs. Cap., Inc., No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2019); *In re* Jones Energy, Inc., No. 19-32112 (MI) (Bankr. S.D Tex. 2019); *In re* Deluxe Ent. Servs. Grp., Inc., No. 19-23774 (RDD) (Bankr. S.D.N.Y. 2019); *In re* Anna Holdings, Inc., No. 19-12551 (CSS) (Bankr. D. Del. 2019); *In re* Sheridan Holding Company I, LLC, No. 20-31884 (DRJ) (Bankr. S.D. Tex. 2020); *In re* Mood Media Corp., No. 20-33768 (MI) (Bankr. S.D. Tex. 2020); *In re* UTEX Indus., Inc., 457 B.R. 549 (Bankr. S.D. Tex. 2020); *In re* Guitar Ctr., Inc., No. 20-34656 (Bankr. E.D. Va. 2020); *In re* Belk Corp., No. 21-30630 (MI) (Bankr. S.D. Tex. 2021); *In re* HighPoint Res. Corp., No. 21-10565 (Bankr. D. Del. 2021); *In re* Carlson Travel, Inc., No. 21-90017 (MI) (Bankr. S.D. Tex. 2021); *In re* ORG GC Midco, No. 21-90015 (MI) (Bankr. S.D. Tex. 2021); *In re* Riverbed Tech. Inc., No. 21-11503 (CTG) (Bankr. D. Del. 2021); *In re* SeaDrill New Fin. Ltd., No. 22-90001 (DRJ) (Bankr. S.D. Tex. 2022).

307. *In re* UTEX Indus., Inc., No. 20-34932 (DRJ) (Bankr. S.D. Tex. 2020) (Rule 9006 motion filed); *In re* Guitar Ctr., Inc., No. 20-34656 (KRH) (Bankr. E.D. Va. 2020) (Rule 9006 motion filed); *In re* OSG Group Holdings, Inc., No. 22-10718 (Bankr. D. Del. 2022) (Rule 9006 relief requested).

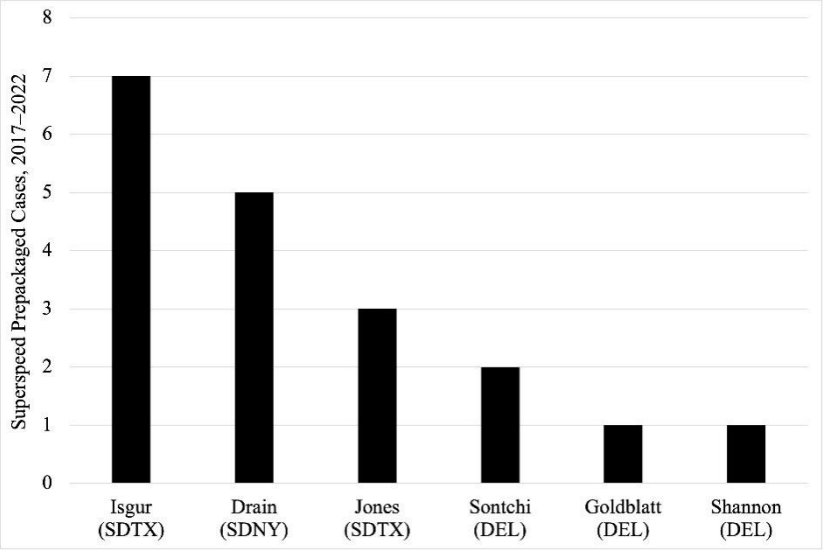
308. Author's analysis, including of filing and confirmation dates from BankruptcyData.com.

309. *In re* Southcross Holdings LP, No. 16-20111 (MI) (Bankr. S.D. Tex. 2016); *In re ROUST Corp.*, No. 16-23786 (RDD); *In re Global A&T Elecs., Ltd.*, No. 17-23931 (RDD); *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD); *In re SunGard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD); *In re Jones Energy, Inc.*, No. 19-32112 (DRJ); *In re Deluxe Ent. Servs. Grp., Inc.*, No. 19-23774 (RDD); *In re Sheridan Holding Co. I, LLC*, No. 20-31884 (DRJ); *In re Mood Media Corp.*, No. 20-33768 (MI); *In re Belk Corp.*, No. 21-30630 (MI); *In re Carlson Travel, Inc.*, No. 21-90017 (MI); *In re SeaDrill New Fin. Ltd.*, No. 22-90001 (DRJ).

310. *See* Figure 5. On September 28, 2021, shortly after confirming Purdue's bankruptcy plan, Judge Drain announced his retirement from the bench, effective as of the end of June 2022. Press Release, U.S. Bankr. Ct. for

who have confirmed noncompliant superspeed cases—Judges Craig Goldblatt, Christopher Sontchi, and Brendan Shannon, all sit in Delaware, the other favored forum-shopping destination.

FIGURE 6: POST-2016 NONCOMPLIANT SUPERSPEED PREPACKAGED CASES BY JUDGE[311]




The fact that most of the noncompliant drive-thru cases have gone through just three judges of the 375 bankruptcy judges nationwide creates a strong inference that judge shopping is affecting the outcomes of cases; almost no other judge has been willing to confirm a case on such an expedited timeline without a finding that there is a bona fide exigency that merits a shorter time frame.[312]

The following Subsections go through the history of drive-thru prepacks. They show how the first generation of drive-thru cases began as a response to truly exigent circumstances in which courts reluctantly engaged in fast plan confirmation, but only after ordering a shortening of the normally required confirmation timeline for cause.[313] The second generation of drive-thru cases—nearly all under Judges Drain, Isgur, and Jones—leveraged those early precedents to approve drive-thru prepacks based on a modicum of pre-petition notice, even absent exigent circumstances, without ever shortening timelines for cause.[314] A close look at the drive-thru bankruptcy of Belk Corp. illustrates how extreme the

the S. Dist. of N.Y., Distinguished Bankruptcy Judge to Retire from Southern District Bench (Sept. 28, 2021), https://www.nysb.uscourts.gov/news/distinguished-bankruptcy-judge-retire-southern-district-bench-1 [https://perma.cc/3PGN-PHWS]. Previously, the Chief Judge of the Bankruptcy Court for the Southern District of New York had issued an order reassigning some large cases that would otherwise have gone to Judge Drain. General Order M-547, (Bankr. S.D.N.Y. Apr. 29, 2020).

311. Author's analysis, including of filing and confirmation dates from BankruptcyData.com.

312. *See infra* Figure 5.

313. *See* discussion *supra* Subsection V.C.4.

314. *See infra* Subsection V.C.5.

practice has become and how limited judicial oversight really is.[315] This history of drive-thru prepacks is an illustration of the downward evolution of chapter 11 in which the extraordinary is steadily normalized.[316]

### *4. The First Generation of Drive-Thru Cases*

The first notable superspeed prepack was in 2006.[317] Georgia school bus manufacturer Blue Bird Body Company filed for bankruptcy in the District of Nevada, bootstrapping into the venue based on having a long-standing Nevada affiliate file for bankruptcy first.[318] Blue Bird filed in Reno, so its case assigned to Judge Gregg W. Zive.[319] While relatively few large chapter 11 cases were ever filed before Judge Zive, a good percentage of those cases were shopped into his courtroom because of the Nevada court's local rule on case assignment that assigned Reno filings to him, guarantying the debtor a particular judge.[320] Blue Bird was represented by Skadden, Arps, Slate, Meagher & Flom LLP, a major debtor-side firm.[321]

Blue Bird entered bankruptcy having been shut down for three weeks and without DIP financing.[322] It desperately needed a quick exit in order to have any chance of survival. Blue Bird needed to exit chapter 11 quickly because its business was mainly selling to government agencies that required evidence that it would be able to perform its contracts and "be around long-term to honor warranties and provide parts and service."[323] Additionally, Blue Bird's business was highly seasonal, with orders placed in the beginning of the year, so if it did not exit bankruptcy quickly, it might not have any orders for the following year.[324] Blue Bird moved orally in court for an order shortening time on a disclosure statement and confirmation hearing, which was granted.[325] In other words, while

315. *See In re* Belk Corp., No. 21-30630 (MI) (Bankr. S.D. Tex. 2021); discussion *infra* Subsection V.C.6.

316. *See infra* Subsection V.C.6.

317. *In re* Jackson Prods., Inc., No. 04-40448-399 (Bankr. E.D. Mo. 2004) is the earliest case I can identify with a confirmation faster than anticipated under Fed. R. Bankr. Proc. 2002(b). That case was filed on January 12, 2004, confirmed sixteen days later on January 28, 2004. It has not received the attention of the Blue Bird case. *Id.*

318. Transcript of Hearing at 19:8–20:8, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 120).

319. *See In re Blue Bird Body Co.*, No. 06-50026-gwz.

320. *See supra* Figure 6 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author). Five of seven megacases heard by Judge Zive were forum shopped.

321. *See supra* Figure 6 (author's calculations based on UCLA-LoPucki Bankruptcy Research Database) (data on file with author).

322. Transcript of Hearing at 12:9–11, 26:5–7, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 120); Transcript of Hearing at 99:3–6, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 68).

323. Disclosure Statement with Respect to Prepackaged Joint Plans of Reorganization of Blue Bird Body Company and Certain Affiliates at 8–9, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 3) [hereinafter Blue Bird Disclosure Statement].

324. *Id.* at 9.

325. Order Shortening Time on Debtors' (1) Application for Order Directing Joint Administration; (2) Motion for Order Confirming Debtors' Consensual Plan of Reorganization and Related Relief; and (3) Motion for Entry of Bridge Order at 2, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 8).

the speed of Blue Bird's case was unusual, it complied with the legal structure that allows for a shortening of timelines for cause.

Blue Bird entered bankruptcy because the terms of its bank debt required unanimous consent of all of the holders to any restructuring and a single holder that had purchased at a discount in the secondary market refused to consent to the restructuring.[326] In other words, Blue Bird only needed bankruptcy to squeeze the single holdout. Judge Zive recognized that the situation was "truly extraordinary and unique,"[327] and worried that

> I can just see the findings, conclusions and an order in this case being brought before some judge somewhere else being asked to do something on what constitutes probably forty-eight hours' notice, and he's going to try to figure out why in the world that ever happened; And that judge, he could be absolutely right.[328]

Still, Judge Zive was extremely concerned that if he did not approve the plan immediately that it would result in a liquidation and loss of thousands of jobs.[329] Accordingly, recognizing "under the Debtors' exigent circumstances,"[330] he confirmed Blue Bird's plan in just over thirty-two hours,[331] and made the plan immediately effective.[332]

A similar story appears in the seven other few superspeed prepacks that were confirmed through 2016: Jackson Product's sixteen-day bankruptcy in 2004,[333] Davis Petroleum's four-day bankruptcy in 2006,[334] structured settlement company J.G. Wentworth's thirteen-day bankruptcy in 2009,[335] Natural Products Group's twenty-six-day bankruptcy in 2010,[336] Penton Business Media Holding's twenty-three-day bankruptcy in 2010,[337] Anchor BanCorp Wisconsin's eighteen-day bankruptcy in 2013,[338] and Southcross Holdings' two-week bankruptcy in 2016.[339]

326. Blue Bird Disclosure Statement, *supra* note 323, at 8.

327. Transcript of Hearing at 111:6, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 68).

328. *Id.* at 102:6–12.

329. *Id.* at 102:13–18; Transcript of Hearing at 9:19-21, 19:1-2, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 120).

330. Findings of Fact and Conclusions of Law in Support of Order Approving Disclosure Statement and Confirming Plan of Reorganization at 6, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 99).

331. Petition was filed on January 26, 2006, at 10:54 AM, and the plan confirmation order was entered on January 27, 2006, at 7:19 PM. *In re* Blue Bird Body Co., 06-50026-gwz (Bankr. D. Nev. 2006).

332. Transcript of Hearing at 110:12-15, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 68); Interim Order Approving Disclosure Statement and Confirming Plan of Reorganization at 3, *In re* Blue Bird Body Co., No. 06-50026-gwz (Bankr. D. Nev. 2006) (No. 27).

333. *In re* Jackson Products, Inc., No. 04-40448 (Bankr. E.D. Mo. 2004).

334. *In re* Davis Petroleum Corp., No. 06-20152-rss (Bankr. S.D. Tex. 2006).

335. *In re* JGW HoldCo, LLC, No. 09-11731-CSS (Bankr. D. Del. 2009).

336. *In re* Nat. Prods. Grp., LLC, No. 10-10239 (Bankr. D. Del. 2010).

337. *In re* Penton Bus. Media Holdings, Inc., No. 10-10689 (AJG) (Bankr. S.D.N.Y. 2010).

338. *In re* Anchor BanCorp Wis., Inc., No. 13-14003-rdm (Bankr. W.D. Wis. 2013).

339. *In re* Southcross Holdings LP, No. 16-20111 (MI) (Bankr. S.D. Tex. 2016).

In each case, there was a claim of exigency coupled with a court-approved motion to shorten timelines under Rule 9006(c).[340] Thus, in the drive-thru bankruptcies of the 2000s, there was always a claimed exigency and an order shortening notice and hearing timelines.[341] Put another way, whatever their merits, these cases were done by the book. Both characteristics disappeared in the second generation of cases that began around 2017.[342]

### *5. The Second-Generation Drive-Thru Cases*

The second generation of drive-thru cases not only abandoned any pretense of compliance with Rule 9006(c), but many of these cases were marked with extreme and tawdry judge-shopping maneuvers, such as the creation of sham affiliates and use of sham addresses to steer cases into particular judges' courtrooms.[343]

The progenitor of the second generation of drive-thru cases was that of Russian vodka distributor Roust Corporation. On the second to last day of 2016, Roust filed a prepackaged plan in the Bankruptcy Court for the Southern District of New York.[344] Roust was represented by Jay Goffman, the same attorney at Skadden Arps who had led its representation of Blue Bird Body.[345]

Roust had been a Delaware corporation, but the day of its bankruptcy filing its board approved a reincorporation in New York, which did not actually occur for another two months.[346] The address on Roust's petition was 777 Westchester Avenue, Suite 101, White Plains, NY.[347] Based on that Westchester county address, Roust's case was assigned under SDNY's local divisional assignment rule to Judge Robert D. Drain, the only judge sitting in White Plains, New York division of the Bankruptcy Court for the Southern District of New York.[348]

340. *See, e.g.*, Motion for Order (A) Confirming Debtors' Joint Plan of Reorganization; (B) Approving of Agreed Shortened Notice Thereof; (C) Approving of Prepetition Solicitation and Disclosure Statement in Support Thereof; and (D) Granting Related Relief at 3–6, *In re* Davis Petroleum Corp., 06-20152 (Bankr. S.D. Texas 2006) (No. 14); Findings of Fact, Conclusions of Law, and Order Pursuant to 11 U.S.C. §§ 1125, 1126(b), 1129(a) and (b) and Fed. R. Bankr. P. 3016, 3017, 3018, and 3020 Approving Disclosure Statement and Confirming Joint Plan of Reorganization at 6, *In re* Davis Petroleum Corp., No. 06-20152 (Bankr. S.D. Tex. 2006) (No. 51); Transcript of Hearing at 54:17–23 64:1–4, *In re JGW HoldCo, LLC*, No. 09-11731-CSS (suggesting that Rule 9006 is the proper analytical framework); Emergency Motion of Southcross Holdings LP, et al., for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing a Plan and Disclosure Statement Objection Deadline and Related Procedures, (III) Approving the Solicitation Procedures, (IV) Approving the Confirmation Hearing Notice, (V) Directing that a Meeting of Creditors Not Be Convened, and (VI) Shortening the Notice Requirements Related Thereto at 2, 7–10, *In re Southcross Holdings LP*, No. 16-20111 (MI).

341. *See* discussion *supra* Subsection V.C.4.

342. *See* discussion *infra* Subsection V.C.5.

343. *See* discussion *supra* Subsection V.C.3.

344. *In re* ROUST Corp., No. 16-23786 (RDD), at 3–4 (Bankr. S.D.N.Y. 2017).

345. *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re ROUST Corp.*, No. 16-23786-rdd.

346. *Id.* at Annex A; N.Y. State Dep't of State Div. of Corps. Entity Information, Excel Maritime Carriers LLC (Jan. 26, 2021) (on file with author).

347. *In re ROUST Corp.*, No. 16-23786-rdd, at 1 n.1.

348. *Id.*; Bankr. S.D.N.Y. Loc. R. 1073-1.

Curiously, the address on Roust's petition was exactly the same as the address of Excel Maritime Carriers, Ltd. a Liberian shipping company, that Skadden had represented in bankruptcy in 2013.[349] Excel's subsidiary Excel Maritime Carriers, LLC, filed for bankruptcy first and created the venue hook.[350] The subsidiary had been created on December 14, 2012, just 199 days before it filed for bankruptcy.[351]

The address listed on both Roust's and Excel's petitions, 777 Westchester Avenue, Suite 101, White Plains, NY,[352] is a 100 square foot office[353] in a short-term and virtual office facility offered by Regus.[354] The exact same address also shows up on the subsequent petitions of Milwaukee, Wisconsin, based motorcycle parts manufacturer Jason Industries,[355] and, with a different suite number, Stamford, Connecticut based envelope manufacturer Cenveo.[356] It is not clear whether the debtors in any of these cases in fact carried on any business at the rented facility. Notably, the local rule on case assignment specifically provides that a post office box is inadequate to trigger a White Plains case assignment.[357]

In any event, the White Plains address ensured that all of these cases were assigned to Judge Drain. Roust had clearly taken great efforts to get its case before Judge Drain. Why Roust wanted Judge Drain is not clear, but one possibility is that Judge Drain had in an earlier case attempted unsuccessfully to use his contempt power to protect a non-US debtor from overseas collection efforts.[358] Whatever Roust's motivations in picking Judge Drain, it was not to be disappointed.

As with Blue Bird, Roust argued that it required accelerated plan confirmation because of business exigencies. Specifically, Roust claimed that it needed new funding within the month to pay substantial Russian and Polish excise taxes on vodka sales.[359] Roust proposed to do so through a rights offering in

349. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Excel Mar. Carriers, LLC., No. 13-23060-rdd (Bankr. S.D.N.Y. 2013) (No. 1).

350. *Id.*

351. N.Y. State Dep't of State Div. of Corps. Entity Information, Excel Maritime Carriers LLC (Jan. 26, 2021) (on file with author).

352. *In re ROUST Corp.*, No. 16-23786 (RDD), at n.1 (Bankr. S.D.N.Y. 2017).

353. 777 Westchester Ave., Suite 101, SQUAREFOOT, https://bit.ly/3xmL7eF (last visited Nov. 12, 2022) [https://perma.cc/XNA2-TGVX].

354. 777 Westchester Ave., REGUS, https://bit.ly/3xifmn2 (last visited Nov. 12, 2022) [https://perma.cc/58W4-ESFD].

355. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Jason Indus., No. 20-22766-rdd (Bankr. S.D.N.Y. 2020).

356. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Commercial Envelope Manufacturing Co., No. 18-22177-rdd (Bankr. S.D.N.Y. 2018). Petition lists the address as 777 Westchester Address, Suite 111. *Id.*

357. BANKR. S.D.N.Y. LOC. R. 1073-1(a).

358. LOPUCKI, COURTING FAILURE, *supra* note 25, at 189.

359. Declaration of Grant Winterton in Support of Chapter 11 Petitions, First Day Pleadings, and Confirmation of the Joint Prepackaged Chapter 11 Plan of Reorganization of Roust Corporation, et al., at 14, *In re* ROUST Corp., No. 16-23786-rdd (Bankr. S.D.N.Y. 2016); Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 1125, 1126, 1128 and 1129 and Fed. R. Bankr. P. 2002, 3016, 3017, 3018 and 3020 and S.D.N.Y. Bankr. L.R. 3017-1, 3018-1, 3018-2, and 3020-1 (I) For Order (A) Scheduling Combined Hearing on Adequacy of Disclosure Statement and Confirmation of Plan, (B) Approving form and Manner of Notice of Combined Hearing and

bankruptcy, raising funds by selling new equity to its existing creditors.[360] Roust was also worried that because its eastern European creditors were unfamiliar with chapter 11, that they would assume that it meant the end of the company and would not continue to deal with Roust.[361]

Yet whereas the exigency of Blue Bird's situation was not contested, Roust's need for speed was. Both the United States Trustee and the United States of America objected to the plan on the basis of lack of adequate notice, among other things.[362] As the United States Trustee noted, Roust never provided any indication of the amount of its readily anticipatable excise bill, much less why paying it required a bankruptcy filing, and none of Roust's subsidiaries—the entities that actually conducted business in eastern Europe—were in bankruptcy, and Roust claimed that the subsidiaries were financially sound.[363] Additionally, the United States Trustee noted that Roust had reached a restructuring support agreement with its key creditors nearly two months prior to the bankruptcy filing, raising the question of why Roust had not filed earlier.[364]

At the first day hearing in response to the United States Trustee's objection about notice, Judge Drain responded "I mean, Bankruptcy Rule 2002 provides for twenty-eight days' notice. It doesn't say twenty-eight days after the petition date."[365] Judge Drain argued that Rule 2002 is "not tied to the petition date. It's tied to the period of notice, which can be pre-petition."[366]

Judge Drain's interpretation of Rule 2002 cannot be reconciled with the statutory language. By virtue of the Rule requiring that notice be given by the clerk or another party designated by the court, the notice must run post-

Commencement of the Chapter 11 Cases, (C) Establishing Procedures for Objecting To Disclosure Statement and Plan and (D) Directing Deferral of Section 341(A) Meeting Until Confirmation of Plan and (II) for Order (A) Approving Prepetition Solicitation Procedures, (B) Approving Adequacy of Disclosure Statement and (C) Confirming Plan of Reorganization at 11, *In re ROUST Corp.*, No. 16-23786-rdd.

360. Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 1125, 1126, 1128 and 1129 and Fed. R. Bankr. P. 2002, 3016, 3017, 3018 and 3020 and S.D.N.Y. Bankr. L.R. 3017-1, 3018-1, 3018-2, and 3020-1 (I) For Order (A) Scheduling Combined Hearing on Adequacy of Disclosure Statement and Confirmation of Plan, (B) Approving form and Manner of Notice of Combined Hearing and Commencement of the Chapter 11 Cases, (C) Establishing Procedures for Objecting To Disclosure Statement and Plan and (D) Directing Deferral of Section 341(A) Meeting Until Confirmation of Plan and (II) for Order (A) Approving Prepetition Solicitation Procedures, (B) Approving Adequacy of Disclosure Statement and (C) Confirming Plan of Reorganization at 11, *In re ROUST Corp.*, No. 16-23786-rdd.

361. *Id.*

362. Omnibus Objection of the United States Trustee to Confirmation of the Plan and Related Relief at 11, *In re ROUST Corp.*, No. 16-23786-rdd; The United States of America's Objection to the Amended and Restated Joint Prepackaged Plan of Reorganization of Roust Corporation et al. at 2, *In re ROUST Corp.*, No. 16-23786-rdd.

363. Omnibus Objection of the United States Trustee to Confirmation of the Plan and Related Relief at 13–14, *In re* ROUST Corp., No. 16-23786-rdd; *see also* Transcript of Hearing Jan. 6, 2017 at 17:4–11, *In re ROUST Corp.*, No. 16-23786-rdd (noting that the foreign subsidiaries would continue to honor all of their obligations in the ordinary course of business).

364. Omnibus Objection of the United States Trustee to Confirmation of the Plan and Related Relief at 13, *In re* ROUST Corp., No. 16-23786-rdd.

365. Transcript of Hearing Jan. 6, 2017 at 36:11–13, *In re ROUST Corp.*, No. 16-23786-rdd.

366. *Id.* at 37:5–7.

petition.[367] The United States Trustee, however, made no attempt to bring Judge Drain back to the text of Rule 2002, which was never discussed at the hearing.[368]

Judge Drain's interpretation of Rule 2002 was not based on the Rule's text, but on Judge Drain's general recollection of the Rule and his sense that Congress—and the local rules for the Bankruptcy Court for the Southern District of New York—wanted to encourage prepackaged bankruptcies. While Congress certainly took steps to encourage prepackaged bankruptcies, it never authorized them in less than twenty-eight days absent a finding that there was cause to shorten objection and hearing deadlines.[369] Yet Judge Drain seemed to believe that the benefits of a prepack were a key consideration in whether to approve the plan. Citing to *Blue Bird*, *Davis Petroleum*, and *Southcross Holdings*—despite Judge Zive's warning in Blue Bird not to—Judge Drain overruled the United States Trustee's objection.[370] Judge Drain made a classic efficiency over process argument: "If it's a—if it's a kosher prepack, if it's a legitimate prepack, it's really a good thing. It saves a ton of money just on that level."[371]

Notably, there had been no finding in *Blue Bird*, *Davis Petroleum*, or *Southcross Holdings* that notice could run pre-petition. Instead, in all three cases there had been a motion to shorten time under Rule 9006(c). No such motion was ever made in *Roust*.[372] Judge Drain noted that such a notice was unnecessary because notice could, in his view, run prepetition, but he did observe that there were sufficient facts in the record to support such a motion.[373] Judge Drain confirmed Roust's plan twelve days after the bankruptcy filing.[374]

A pair of important factors informing Judge Drain's decision in *Roust* was that there be no objectors other than the United States Trustee[375] and that all of the impaired creditors were sophisticated parties who could stick up for themselves.[376]

The absence of objectors is certainly consistent with creditor support for the plan. But it is also consistent with the chilling effect of judge shopping on creditor behavior: creditors will not bother incurring legal costs to make objections if they believe that the judge will overrule them regardless of the merits. Nearly 10% of both of Roust's classes of impaired creditors did not vote in favor

367. *See* Fed. R. Bankr. P. 2002.

368. Transcript of Hearing Jan. 6, 2017 at 37:2–124, *In re ROUST Corp.*, No. 16-23786-rdd.

369. Fed. R. Bankr. P. 2002(b).

370. Transcript of Hearing Jan. 6, 2017 at 46:24–47:1, 48:12–20, *In re ROUST Corp.*, No. 16-23786-rdd.

371. *Id.* at 44:21–23. *But see* Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, *supra* note 277, at 169 (observing that prepackaged cases do not save money so much as shift the costs from the bankruptcy period to the pre-bankruptcy period).

372. Transcript of Hearing Jan. 6, 2017 at 41:17–23, *In re ROUST Corp.*, No. 16-23786-rdd. at 41:17-23.

373. *Id.* at 48:21–49:6.

374. Findings of Fact, Conclusions of Law and Order (I) Approving (A) the Disclosure Statement Pursuant to Sections 1125 and 1126(c) of the Bankruptcy Code, (B) the Prepetition Solicitation Procedures, And (C) Forms of Ballots, and (II) Confirming the Amended and Restated Joint Prepackaged Chapter 11 Plan of Roust Corporation, et al., *In re ROUST Corp.*, No. 16-23786-rdd.

375. Transcript of Hearing Jan. 6, 2017 at 85:23–25, *In re ROUST Corp.*, No. 16-23786-rdd.

376. *Id.* at 40:2–5, 49:7–15.

of the plan.[377] Moreover, the objection deadline was scheduled prior to the filing of the bankruptcy.[378] Without an actual bankruptcy filing, a creditor might have seen no reason to object, nor would it be clear where to file an objection. Indeed, in a subsequent superspeed prepack before Judge Drain, an objecting creditor did come forward after the objection deadline.[379]

Perhaps more importantly, however, in superspeed prepacks, notices and disclosures are provided only to those classes of creditors that the debtor believes are impaired under its plan.[380] Creditors that are in fact impaired (but not classified as such) and creditors whose legal rights are not impaired, but are still economically affected by the restructuring plan, have a right to object and be heard, but they may never receive adequate and timely information to do so in a drive-thru case. For example, employees, vendors, and retirees might be affected by a plan that is not in fact feasible because it might impose greater risk on them going forward and squander an opportunity to properly right the debtor's financial situation. Drive-thru cases ensure that these parties have no chance to have a voice.

While Skadden pioneered the drive-thru prepack, it was Kirkland that turned it into an art form. Kirkland attorneys were present in *Roust*, representing the ad hoc group of senior secured noteholders.[381] They witnessed Judge Drain's unreceptiveness to the objection raised by the United States Trustee about inadequate notice. Within a year, Kirkland began filing superspeed bankruptcies in Judge Drain's courtroom.[382]

In December 2017, Kirkland filed a prepackaged plan for Singapore-based semiconductor company Global A&T Electronics ("GATE"), which Judge Drain confirmed within three days,[383] over the objection of the United States Trustee.[384] GATE's case ended up before Judge Drain because it listed its address as 11 Martine Avenue, 12th Floor, White Plains, New York.[385] That is in fact the address of a local law firm; GATE does not appear to have ever conducted any business in that location.[386]

Then in February 2019, Kirkland filed a prepackaged plan for Indiana-based plus-sized women's clothing company FullBeauty Brand, which Judge

377. *Id.* at 8:25–9:6.

378. *Id.* at 35:25–36:2, 42:2–3.

379. Transcript of Hearing, Dec. 21, 2017 at 19:2–12, *In re* Glob. A&T Elecs., Ltd., No. 17-23931-rdd (Bankr. S.D.N.Y. 2017).

380. *Cf.* Rasmussen & Thomas, *supra* note 25, at 1390.

381. Transcript of Hearing Jan. 6, 2017 at 57:23–25, *In re ROUST Corp.*, No. 16-23786-rdd.

382. *In re Glob. A&T Elecs., Ltd.*, No. 17-23931 (RDD), at 33 (Exhibit 1).

383. *Id.* at 2–3.

384. Objection of the United States Trustee to Confirmation of the Plan and Related Relief, at 1, *In re Glob. A&T Elecs.*, Ltd., No. 17-23931 (RDD); *see* Transcript of Hearing, Dec. 18, 2017 at 63:4–74:6, *In re Glob. A&T Elecs., Ltd.*, No. 17-23931 (RDD) (declining to decide on adequacy of notice until already scheduled confirmation hearing); Transcript of Hearing, Dec. 21, 2017 at 34:6-40:15, *In re Glob. A&T Elecs., Ltd.*, No. 17-23931 (RDD), (overruling objection).

385. Amended Findings of Fact, Conclusions of Law and Order (I) Approving the Disclosure Statement for the Debtors' Joint Chapter 11 Plan of Reorganization and (II) Confirming the Debtors' Joint Chapter 11 Plan of Reorganization at 31, *In re Glob. A&T Elecs., Ltd.*, No. 17-23931 (RDD).

386. WVE, https://www.wvelaw.com/ (last visited Nov. 12, 2022) [https://perma.cc/67P9-ZSQ9].

Drain confirmed within four days.[387] FullBeauty is a Delaware corporation,[388] but its case ended up before Judge Drain because it listed its address as 50 Main Street, Suite 1000, White Plains, NY.[389] Like 777 Westchester Avenue, 50 Main Street is a White Plains office building offering short-term office space. There is no actual Suite 1000, however, at 50 Main Street. Instead, it is a virtual office space offered by Regus.[390]

In *FullBeauty*, the United States Trustee once again objected unsuccessfully to the speed of the plan and the releases.[391] Notably, however, Judge Drain stated that for a superspeed prepack there is no requirement of exigency or other heightened requirements for confirmation.[392] All that is required is compliance with the notice provisions of the Bankruptcy Rules, which he interpreted as allowing pre-petition notice.[393]

Kirkland took this position and ran with it in its next drive-thru case, cloud services company Sungard Availability Services. Sungard is a Delaware corporation based in Wayne, Pennsylvania.[394] Yet the address on Sungard's petition was 50 Main Street, Suite 1000, exactly the same address as on FullBeauty's petition.[395] That same address or other suites on the tenth floor of the same building show up in no less than ten cases (including *FullBeauty* and *Sungard*) that have been assigned to Judge Drain.[396]

387. *In re* FullBeauty Brands Holdings Corp., No. 19-22185 (RDD), at 2–4 (Bankr. S.D.N.Y. 2019).

388. Declaration of Robert J. Riesbeck, Chief Financial Officer of FullBeauty Brands Holdings Corp., in Support of the Debtors' Chapter 11 Petitions and First Day Motions at 57, *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD).

389. *Id.* at 1 n.1.

390. 50 Main Street, Suite 1000, White Plains, NY 10606, DAVINCI, https://bit.ly/2WyPgzx (last visited Nov. 12, 2022) [https://perma.cc/M735-YN8L]. Suites 1001–1082 are physical suites. Map of facility available at https://bit.ly/3C0Mm7b [https://perma.cc/6GBP-9ELJ].

391. Objection of the United States Trustee to Confirmation of the Plan and Related Relief at 1, *In re FullBeauty Brands Holdings Corp.*, No. 19-22185(RDD); Transcript of Hearing, Feb. 4, 2019 at 21:25–32:15; 54:17–57:16, *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD).

392. Transcript of Hearing, Feb. 4, 2019 at 56:19–21, *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD).

393. *Id.*

394. Amended Order (I) Approving the Disclosure Statement and Confirming the Joint Prepackaged Plan of Reorganization of Sungard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief at 2, *In re* SunGard Availability Servs. Cap., Inc., No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2019); Declaration of Eric Koza, Chief Restructuring Officer at Sungard Availability Services Capital, Inc., (I) in Support of Chapter 11 Petitions and First Day Pleadings and (II) Pursuant to Local Bankruptcy Rule 1007-2 at 29, *In re SunGard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD); Transcript of Hearing, May 2, 2019, at 14:18–21, *In re SunGard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD).

395. Amended Order (I) Approving the Disclosure Statement and Confirming the Joint Prepackaged Plan of Reorganization of Sungard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief at 1 n.1, *In re SunGard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD).

396. *E.g.*, Voluntary Petition at 1, *In re* Binder & Binder – The Nat'l Soc. Sec. Disability Advocs. N.Y. LLC, No. 14-23728-rdd (Bankr. S.D.N.Y. 2014); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Murphy & Durieu, L.P., No. 17-22730-rdd (Bankr. S.D.N.Y. 2017); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re SunGard Availability Servs. Cap., Inc.*, No. 19-22915-rdd; Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Empire Gen HoldCo, LLC,

Unlike prior cases, in *Sungard*, there was no real claim of exigency made. Instead, Sungard merely claimed that it wished to avoid the expenses of an extended chapter 11.[397] Accordingly, Sungard's restructuring support agreement even provided for an alternative confirmation schedule of thirty to seventy-five days post-petition.[398] Again noting the lack of objection from creditors,[399] Judge Drain approved it in less than forty hours over the objection of the United States Trustee.[400]

Then, in October 2019, Judge Drain confirmed another accelerated prepack, that of Deluxe Entertainment Services Group, Inc., again represented by Kirkland.[401] The plan was confirmed in twenty-two days.[402] This time the United States Trustee did not even bother objecting.[403]

Although Kirkland found success with its drive-thru cases in Judge Drain's courtroom, it spread its business around to other jurisdictions, a key move to encouraging judicial competition. In December 2019, Kirkland filed Anna Holdings's drive-thru case in the District of Delaware. The case was confirmed in fifteen days by Judge Christopher Sontchi without any objection from the United States Trustee or any other party in interest.[404]

Delaware has a local bankruptcy rule that provides that no motion will be heard on shortened notice "except by order of the Court, on written motion . . . specifying the exigencies justifying shortened notice."[405] No Rule 9006 motion

No. 19-23006-rdd (Bankr. S.D.N.Y. 2019); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Deluxe (Del.) Can. Holdings Corp., No. 19-23773 (Bankr. S.D.N.Y. 2019); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* 6365 Fourth Ave. Corp., No. 19-23948-rdd (Bankr. S.D.N.Y. 2019); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* 11 Forest Ave. Corp., No. 20-22007 (Bankr. S.D.N.Y. 2020); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Internap Tech. Sols., Inc., No. 20-22393-rdd (Bankr. S.D.N.Y. 2020); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Phone Trends, Inc., No. 20-22475-rdd (Bankr. S.D.N.Y. 2020).

397. Debtors' Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing Plan and Disclosure Statement Objection and Reply Deadlines and Related Procedures, (III) Approving the Solicitation Procedures, (IV) Approving the Combined Hearing Notice, (V) Directing That a Meeting of Creditors Not Be Convened, and (VI) Granting Related Relief at 16, *In re Sungard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD); Objection of the United States Trustee to Confirmation of the Plan and Related Relief at 13, *In re Sungard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD) [hereinafter Sungard UST Objection].

398. Sungard UST Objection, *supra* note 397, at 13.

399. Transcript of Hearing, May 2, 2019 at 21:14–17, 29:7–8, *In re Sungard Availability Servs. Cap., Inc.*, No. 19-22915 (RDD) ("And the people whose money is at stake certainly were smart enough to raise them if they wanted to." (quoting Judge Drain)).

400. *See id.* at 18:14–35:1.

401. Order (I) Approving the Disclosure Statement For and Confirming the Joint Prepackaged Plan of Reorganization of Deluxe Entertainment Services Group Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief at 7, *In re* Deluxe Ent. Servs. Grp., Inc., No. 19-23774 (RDD) (Bankr. S.D.N.Y. 2019).

402. *In re Deluxe Ent. Servs. Grp., Inc.*, No. 19-23774, at 34, 38 (RDD).

403. Agenda for Hearing to Be Held October 24, 2019, at 10:00 A.M. at 7–8, *In re Deluxe Ent. Servs. Grp., Inc.*, No. 19-23774 (RDD).

404. Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Second Amended Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 2, 51, *In re* Anna Holdings, Inc. (Acosta), No. 19-12551 (Bankr. D. Del. 2019).

405. BANKR. D. DEL. LOC. R. 9006-1(e).

was filed in the case, however. It would appear that the twenty-eight-days' notice requirement was simply ignored, in part because no one objected.[406]

Judge Sontchi, it will be recalled, had previously tangled with Kirkland in *Samson Resources*, costing Delaware numerous large bankruptcy cases before Kirkland returned to filing in Delaware.[407] This time around, Judge Sontchi stayed out of Kirkland's way, and Kirkland kept bringing business to Delaware.

The lack of objection from the United States Trustee in *Anna Holdings* might have been because the United States Trustee had unsuccessfully objected to another Delaware drive-thru case earlier that year. In February 2019, Simpson, Thatcher & Bartlett LLP sought to confirm Arsenal Energy Holdings, LLC's prepackaged plan in just nine days.[408] In that case, the United States Trustee had objected to the timeline not so much because of statutory noncompliance, but because it had concerns about the feasibility of the plan was felt that "there is a risk that a plan will get rushed through that's not fully baked."[409] A nonfeasible plan imposes undue risk on all of the stakeholders in the debtor, irrespective of whether they are "impaired" and thus entitled to vote on a plan.[410]

Judge Brendan Linehan Shannon was clearly troubled by the accelerated timeline proposed by Arsenal Energy and the possibility that it would become the norm or that it would be used in cases with less robust creditor support for the plan.[411] He noted that the timetable required was "presented in the situation where parties have voted [overwhelmingly in favor of the plan]. How do I balance that principled concept of more time is better against people saying, it's my money and this is the result that I'm supportive of? How do I walk that?"[412] In response, the debtor's counsel repeatedly referenced Judge Drain's heterodox oral rulings as authority.[413] Ultimately Judge Shannon decided to overrule the United States Trustee's objection on timing, while preserving the objection as to feasibility for the confirmation hearing.[414] Judge Shannon noted that while "this is an unusual circumstance, as a practice matter, it is compliant with applicable provisions of the Bankruptcy Code."[415] There had been no discussion, however,

406. In 2021, Judge Sontchi confirmed the plan of HighPoint Resources Corp., another Kirkland case, in four days. *In re* HighPoint Res. Corp., No. 21-10565 (Bankr. D. Del. 2021). The United States Trustee objected unsuccessfully. Because the hearing transcripts are not yet available, it is not possible to understand what happened to the objection or Judge Sontchi's reasoning on the issue.

407. *See supra* Section IV.B.

408. Objection of the United States Trustee to (I) the Debtor's Motion for Entry of a Scheduling Order and (II) Approval of the Disclosure Statement and Confirmation of the Debtor's Prepackaged Plan at 2, *In re* Arsenal Energy Holdings LLC, No. 19-10226 (BLS) (Bankr. D. Del. 2019).

409. Transcript of Hearing, Feb. 6, 2019 at 44:14–15, *In re Arsenal Energy Holdings LLC*, No. 19-10226; *see also* Objection of the United States Trustee to (I) the Debtor's Motion for Entry of a Scheduling Order and (II) Approval of the Disclosure Statement and Confirmation of the Debtor's Prepackaged Plan at 1, *In re Arsenal Energy Holdings LLC*, No. 19-10226.

410. *See* Transcript of Hearing, Feb. 6, 2019 at 28:10–15, *In re Arsenal Energy Holdings LLC*, No. 19-10226.

411. *Id.* at 24:24–25:20, 27:14–15.

412. *Id.* at 49:3–6.

413. *Id.* at 26:2–27:1, 52:22–53:6.

414. *Id.* at 53:20–56:2.

415. *Id.* at 54:9–12.

of the actual timeline provisions in the Code anywhere in the hearing.[416] Rules 2002 and 3017 were never so much as mentioned. Arsenal Holding's plan was confirmed as requested, nine days after filing.[417]

Whereas Judge Drain expounded a plainly erroneous legal theory about pre-petition notice counting under Rules 2002 and 3017, and that theory was referenced before Judge Shannon, no such argument even appeared in the post-2016 drive-thru cases in the Bankruptcy Court for the Southern District of Texas before Judges Isgur and Jones.[418] In the bankruptcies of Ameriforge, Jones Energy, Sheridan Holding Company I, Mood Media Corporation—all represented by Kirkland—there was simply no discussion whatsoever in the briefing or at the hearings about the fact that the timetable did not comply with that required by the Bankruptcy Rules.[419] Only in the bankruptcy of UTEX Industries—represented by Weil, Gotshal & Manges, LLP, rather than Kirkland—did the debtor comply with the law and move to shorten time under Rule 9006.[420] In a later

416. *Id.* at 54:12–15.

417. Order (I) Approving (A) The Adequacy of the Disclosure Statement and (B) The Prepetition Solicitation Procedures and (II) Confirming the Pre-Packaged Plan of Reorganization of Arsenal Energy Holdings LLC at 2, 7, *In re* Arsenal Energy Holdings LLC, No. 19-10226.

418. *See* Transcript of Hearing, Dec. 21, 2017 at 37:1–12, *In re* Global A&T Elecs. Ltd., No. 17-23831-rdd (Bankr. S.D.N.Y. 2017).

419. Order Approving the Debtors' Disclosure Statement for, and Confirming, Joint Prepackaged Chapter 11 Plan of Reorganization for Ameriforge Group Inc. and Its Debtor Affiliates at 2–3, *In re* Ameriforge Grp. Inc., No. 17-32660 (DRJ) (Bankr. S.D. Tex. 2017) (approving prepetition solicitation procedures, including twenty-six days' notice of objection deadline); Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Chapter 11 Plan of Reorganization of Jones Energy, Inc. and Its Debtor Affiliates at 30, *In re* Jones Energy, Inc., No. 19-32112 (MI) (Bankr. S.D Tex. 2019); Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Amended Joint Prepackaged Chapter 11 Plan at 24, *In re* Sheridan Holding Co. I, No. 20-31884 (DRJ) (Bankr. S.D. Tex. 2020); Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 25, *In re* Mood Media Corp., No. 20-33768 (MI) (Bankr. S.D. Tex. 2020); Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Prepackaged Chapter 11 Plan at 25, *In re* Belk Corp., No. 21-30630 (MI) (Bankr. S.D. Tex. 2021); Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement Relating To, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 27, *In re* HighPoint Res. Corp., No. 21-10565 (CSS) (Bankr. D. Del. 2021); Order (I) Approving the Debtors' Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Carlson Travel, Inc., and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, (II) Confirming Joint Prepackaged Plan of Reorganization of Carlson Travel, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, and (III) Granting Related Relief at 33, *In re* Carlson Travel, Inc., No. 21-90017 (MI) (Bankr. S.D. Tex. 2021); Findings of Fact, Conclusions of Law, and Order (I) Approving Disclosure Statement and (II) Confirming Amended Prepackaged Chapter 11 Plan of ORG GC Midco, LLC at 13, *In re* ORG GC Midco, LLC, No. 21-90015 (MI) (Bankr. S.D. Tex. 2021); Order (I) Approving the Disclosure Statement For, and Confirming, the Amended Joint Prepackaged Chapter 11 Plan of Reorganization of Riverbed Technology, Inc. and Its Debtor Affiliates, and (II) Granting Related Relief at 12, *In re* Riverbed Tech. Inc., No. 21-11503 (CTG) (Bankr. D. Del. 2021); Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 24, *In re* SeaDrill New Fin. Ltd., No. 22-90001 (DRJ) (Bankr. S.D. Tex. 2022).

420. Emergency Motion of Debtors for Entry of an Order (I) Scheduling Combined Hearing on (A) Adequacy of Disclosure Statement and (B) Confirmation of Prepackaged Plan; (II) Approving Solicitation Procedures and Form and Manner of Notice of Commencement, Combined Hearing, and Objection Deadline; (III) Fixing Deadline to Object to Disclosure Statement and Prepackaged Plan; (IV) Approving Notice and Objection Procedures for the Assumption of Executory Contracted and Unexpired Leases; (V) Conditionally (A) Directing the United States Trustee Not to Convene Section 341 Meeting of Creditors and (B) Waiving Requirement of

representation, however, Weil followed the Kirkland playbook and did not make a Rule 9006 motion.[421]

Despite this plain noncompliance, it was not until the bankruptcy of Belk Department Stores that the United States Trustee's office in Houston even objected to the speed of the drive-thru cases.[422] *Belk* is illustrative of how superspeed prepacks make a mockery of the idea of judicial expertise playing any role in judge shopping.

### *6. Case Study: Belk Department Stores' Bankruptcy*

Belk is a Charlotte, North Carolina department store chain.[423] Belk filed for Bankruptcy in the Southern District of Texas, using its subsidiary Belk Department Stores LP as the venue hook and then bootstrapping in the rest of the firm's entities.[424] Belk Department Stores LP, however, is a North Carolina limited partnership,[425] not a Texas entity, and its principal place of business listed on its petition is in North Carolina.[426] It was previously named Belk Texas LP,[427] however, which suggests that it might have its principal assets in Texas, but on its petition it left blank the space for the location of its principal assets if different from its principal place of business.[428] In short, Belk had no venue basis whatsoever for filing in Houston.

Belk—represented by Kirkland—filed its petition after 5:00 PM Central Time and sought to have its plan confirmed the very next morning.[429] Belk, however, did not move for a reduction of the twenty-eight days' notice deadline under Rule 9006. Instead, as with previous drive-thrus, Belk contended that it had in fact provided twenty-eight days' notice, based on the conceit that the notice clock could start running before its bankruptcy filing.[430] Belk also argued that it needed special treatment because absent a quickie bankruptcy it might have to liquidate because it had "limited to no cash reserves on hand or committed debtor-in-

Filing Statements of Financial Affairs and Schedules of Assets and Liabilities; and (VI) Granting Related Relief at 17–18, *In re* UTEX Indus., Inc., No. 20-34932 (RDJ) (Bankr. S.D. Tex. 2020).

421. Findings of Fact, Conclusions of Law, and Order (I) Approving Disclosure Statement and (II) Confirming Amended Prepackaged Chapter 11 Plan of ORG GC Midco, LLC at 91, *In* re *ORG GC Midco, LLC*, No. 21-90015 (MI) (no Rule 9006 motion filed).

422. Objection of the United States Trustee to Debtors' Emergency Scheduling Motion and Joint Prepackaged Plan of Reorganization at 2, *In re* Belk Inc., No. 21-30630 (Bankr. S.D. Tex. 2021).

423. For an extended analysis of the Belk bankruptcy, see Lynn M. LoPucki, *supra* note 123, at 250.

424. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re Belk, Inc.*, No. 21-30625 (Bankr. S.D. Tex. 2021).

425. N.C. Sec'y of State, Business Registration Search (July 22, 2021) (on file with author); Tex. Sec'y of State, Business Organizations Inquiry (July 22, 2021) (on file with author).

426. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re Belk, Inc.*, No. 21-30625.

427. N.C. Sec'y of State, *supra* note 425, at 1.

428. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re Belk, Inc.*, No. 21-30625.

429. Declaration of William Langley, Chief Financial Officer of Belk, Inc., in Support of Chapter 11 Petitions and First Day Motions at 4, *In re Belk, Inc.*, No. 21-30630.

430. Objection of United States Trustee to Debtors' Emergency Scheduling Motion and Joint Prepackaged Plan of Reorganization at 8, *In re Belk, Inc.*, No. 21-30630 (MI).

possession financing."[431] In other words, Belk pleaded a version of the coercive "[m]elting [i]ce [c]ube" argument: there would be tremendous value destruction unless the court immediately acceded to all of its requests.[432] Given the court's lack of familiarity with the case and reasonable reluctance to precipitously sound the corporate death knell without more information, Belk, like many other debtors, backed the court into a corner.

Of course, this supposed urgency was a situation of Belk's own making: Belk had negotiated a pre-petition restructuring support agreement ("RSA") that *could* be terminated by creditors if there was not near immediate plan confirmation.[433] Belk alleged that such termination could result in "the loss of approximately 17,000 jobs [and] the closing of 291 stores."[434] There was no evidence, however, that creditors would in fact have sought a liquidation if Belk did not emerge from bankruptcy within twenty-four hours. Indeed, it is hard to believe that they would have done so, because their recoveries would surely have been worse from a liquidation (which would not have happened instantaneously) than from a slightly slower restructuring. Belk, as with many debtors, was in a mutually assured destruction situation with its creditors, who stood to lose if they did not finance a reorganization, but instead faced a value-destructive liquidation of a chain of department stores.[435]

Belk noted that because its plan had been accepted by almost all creditors, "a stop in chapter 11 for anything more than twenty-four hours will serve not one stakeholder's interest."[436] In other words, because supposedly virtually all of Belk's impaired creditors agreed to the plan, other creditors' procedural rights were irrelevant. That conceit, which appears in many drive-thru cases, undercuts the fundamental design of bankruptcy, which is that individual creditors' contractual and property rights can be altered, but only through a system that gives them substantial procedural protections that extend beyond a creditor vote.[437]

With its hurry-up tactics, Belk was asking the court to sign off in a single day on some 682 pages of motions and proposed orders and supporting briefing:

- An 111-page order approving a 267-page disclosure statement for a fifty-nine-page plan, supported by a seventy-one-page brief
- An Emergency Motion for Joint Administration (nineteen pages)

431. Debtors' Emergency Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing Plan and Disclosure Statement Objection Deadlines and Related Procedures, (III) Approving The Solicitation Procedures, (IV) Approving the Confirmation Hearing Notice, and (V) Waiving The Requirements that the U.S. Trustee Convene a Meeting of Creditors and the Debtors File Schedules and SOFAs at 3, *In re Belk, Inc.*, No. 21-30630 (MI) [hereinafter Belk Emergency Motion]; Declaration of William Langley, Chief Financial Officer of Belk, Inc. in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Belk, Inc., and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code at 3, *In re Belk, Inc.*, No. 21-30630 (MI).

432. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 874–83 (2014).

433. Belk Emergency Motion, *supra* note 431, at 3.

434. *Id.*

435. *See id.*

436. *Id.*

437. *See id.*

- An Emergency Motion for Authorization of Maintenance of Customer Programs (twenty-two pages)
- An Emergency Motion for Redaction of Personal Information (twelve pages)
- An Emergency Motion for Approval of Cash Management Systems (forty-seven pages)
- An Emergency Motion for Retaining a Claims and Noticing Agent (seventy-four pages)[438]

To merely read all this material (which excludes a range of other filings in the case) within twenty-four hours would require the court to read approximately half a page of often dense legal text every minute nonstop for the full twenty-four hours. Judge Marvin Isgur confirmed Belk's plan in less than seventeen hours, most of which were overnight.[439]

No one, of course, actually expects a bankruptcy court to ever read every page of every document filed with the court. Such a system is simply not workable given the resources available to courts, the realities of judicial caseloads, and the speed with which motions need to be addressed. Courts instead rely on parties acting in good faith, on key terms being highlighted, and on objections being raised to alert the court to issues. The court is likely to look closely at motions and proposed orders only when there is a dispute that flags the issue for the court's attention, and Belk—like other drive-thru cases—emphasized the near unanimous support from the creditors whose votes it had actually solicited.[440]

This points to the fundamental problem with a quickie bankruptcy: it precludes creditors' ability to raise objections, so the court will never take a close look (or any look) at the motions and proposed orders. Hurry-up tactics deny creditors and other parties in interest the opportunity to review the pleadings and submit formal objections to the court.

While Belk did disclose the general terms of its plan to creditors in advance, it did not disclose the form of the orders it was requesting (where particular language can matter to parties) until it filed its petition, and parts of what it disclosed

438. Belk Emergency Motion, *supra* note 431, at 1; Debtors' Emergency Motion For Entry of An Order Directing Joint Administration of Related Chapter 11 Cases at 1, *In re Belk, Inc.*, No. 21-30630; Debtors' Emergency Motion For Entry of An Order (I) Authorizing the Debtors To Maintain & Administer Their Customer Programs and (II) Granting Related Relief at 1, *In re Belk, Inc.*, No. 21-30630 (MI); Debtors' Emergency Motion For Entry of An Order (I) Authorizing Debtors To Redact Certain Personal Identification Information, and (II) Granting Related Relief at 1, *In re Belk, Inc.*, No. 21-30630 (MI); Debtors' Emergency Motion For Entry of An Order (I) Authorizing the Debtors To (A) Continue To Operate Their Cash Management System, (B) Maintain Existing Bank Accounts, (C) Continue To Perform Intercompany Transactions, and (D) Maintain Existing Business Forms, and (II) Granting Related Relief at 1, *In re Belk, Inc.*, No. 21-30630 (MI); Debtors' Emergency Application For Entry of An Order Authorizing the Employment and Retention of Prime Clerk LLC as Claims, Noticing, and Solicitation Agent at 1, *In re Belk, Inc.*, No. 21-30630 (MI).

439. *See, e.g.*, Douglas M. Foley & Sarah B. Boehm, *Usain "Belk"—The Fastest Prepack Alive?*, MCGUIREWOODS (Mar. 5, 2021), https://www.mcguirewoods.com/client-resources/Alerts/2021/3/usain-belk-the-fastest-prepack-alive [https://perma.cc/W2XL-5S5Z].

440. Belk Emergency Motion, *supra* note 431, at 2.

were impossible for even an experienced attorney to understand.[441] For example, Belk's plan included a supposedly consensual nondebtor release. As the United States Trustee noted in an objection to the bankruptcy's speed, "the nearly full-page, one-paragraph, single-spaced release starts with a 630-word sentence with 92 commas and five parentheticals. It is, simply put, unintelligible."[442]

The United States Trustee objected to the plan based on its timeline, as well as the releases and exculpation provisions it contained.[443] In particular, the release purported to bind all holders of claims against Belk who did not opt-out or object by the objection deadline.[444] The objection deadline was at 4:00 PM on February 23, 2021,[445] just shortly *before* Belk filed its bankruptcy petition. In other words, creditors would have had to take the time and expense to file an objection to a bankruptcy plan or take steps to opt-out of the release before they were sure a plan would ever actually get filed. As the United States Trustee noted in another superspeed prepack case: "[t]he actual filing . . . of a Chapter 11 case has the effect of concentrating the minds of the creditors and they are more likely to pay close attention to what the debtors are up to once a case has been filed."[446]

Left unaddressed was another potentially serious problem: while the plan purported to leave a number of classes of claims unimpaired—and thus without a right to vote or even a requirement of receiving the disclosure statement[447]—those classes of claims were covered by the release of nondebtor parties, which arguably did render them impaired by changing their legal rights.[448] Thus, the plan arguably did not even have the requisite creditor vote for confirmation.[449]

Belk resolved the United States Trustee's objection with the United States Trustee's agreement to the entry by Judge Isgur of a "Due Process Preservation

441. *Id.*

442. Objection of the United States Trustee to Debtors' Emergency Scheduling Motion and Joint Prepackaged Plan of Reorganization at 3, *In re* Belk Inc., No. 21-30630 (Bankr. S.D. Tex. 2021).

443. *Id.* at 7–12.

444. Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications) at §§ I.A.133 (definition of "Releasing Party"), VIII.D ("Releases by Holders of Claims and Interests"), *In re Belk, Inc.*, No. 21-30630 (MI).

445. Belk Emergency Motion, *supra* note 431, at 4.

446. Transcript of Hearing at 65:6-10, *In re* Global A&T Elecs., Ltd., No. 17–23931 (RDD) (Bankr. S.D.N.Y. 2017).

447. 11 U.S.C. § 1129(a)(8).

448. Courts are divided on whether there is deemed consent to a release by a nonvoting creditor, which includes creditors whose votes were not solicited on the grounds that they were unimpaired. *Cf. In re* Indianapolis Downs, LLC, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (stating that release binds nonvoting creditors); U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co., 426 B.R. 114, 144 (Bankr. D. Del. 2010); *In re* DBSD N. Am., Inc., 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009); *In re* Calpine Corp., No. 05-60200, 2007 Bankr. LEXIS 4390, at *26 (Bankr. S.D.N.Y. 2007), *aff'd*, 2010 U.S. Dist. LEXIS 33253 (S.D.N.Y. Mar. 24, 2010), *rev'd in part*, 634 F.3d 79 (2d Cir. 2011); *In re* SunEdison, Inc., 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017) (stating that release does not bind nonvoting creditors); *In re* Chassix Holdings, 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015); *In re* Genco Shipping & Trading Ltd., 513 B.R. 233, 269–71 (Bankr. S.D.N.Y. 2014); *In re* Wash. Mut., Inc., 442 B.R. 314, 355 (Bankr. D. Del. 2011); *In re* Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999); *In re* Digit. Impact, Inc., 223 B.R. 1, 14–15 (Bankr. N.D. Okla. 1998).

449. Judge Isgur expressed awareness of this very problem in his first drive-thru case. Transcript of Hearing at 7, *In re* Southcross Holdings LP, No. 16-20111 (Bankr. S.D. Tex. 2016). Unlike *Belk*, *Southcross* complied with Rule 9006.

Order,"[450] similar to what he had previously done in *Southcross Holdings*.[451] The order gave creditors five weeks to opt out of the plan's nondebtor releases.[452] Of course, a creditor that did not opt out of the release could still be impaired, so the question of whether the requisite creditor vote was met remained but was never addressed.[453]

The Due Process Preservation Order also promised that no prejudice would be imposed based on estoppel or equitable mootness for any objections that could demonstrate a deprivation of due process rights.[454] This resolution, however, meant that a creditor that sought to vindicate its rights would have to first demonstrate that the quick bankruptcy deprived it of due process and then must also prevail on the merits of its claim.[455] In other words, Belk created an additional hurdle for any creditor that seeks to challenge the bankruptcy outside of the twenty-four-hour window given, which is precisely the point of hurry-up tactics.

Moreover, it is hard to imagine that even if a creditor were to emerge with a meritorious objection to the releases that the bankruptcy court would actually unwind confirmation of the plan, not least because a plan's confirmation may be revoked solely for fraud.[456] At most, Judge Isgur could modify parts of his confirmation order, but there was no way to challenge the fundamental deal.

The effect of the Due Process Preservation Order was to deprive creditors of statutory due process rights and instead impose a burden of proof on them that their due process has been violated.[457] Additionally, there will never be an opportunity for any party to raise concerns about the debtor's failure to prosecute potential causes of action because of conflicts of interest or seek an examiner or other governance oversight measures.[458] And, perhaps most critically, the resolution still ensured that there would never be an Official Creditors Committee organized in the case that might scrutinize Belk's pre-petition transactions, particularly with its private equity sponsor Sycamore.[459]

The twenty-eight days' notice requirement in Rules 2002 and 3017 is as simple and black letter of a rule as one can find.[460] It does not invite exception

450. Due Process Preservation Order at 3, *In re* Belk, Inc., No. 21-30630 (MI) (Bankr. S.D. Tex. 2021) (No. 62).

451. Transcript of Hearing Mar. 29, 2016, at 7:10–15, 12:22–13:7, *In re* Southcross Holdings LP, No. 16-20111 (Bankr. S.D. Tex. 2016) (No. 114) (providing that parties that had not received due process would be given an opportunity to argue that they should note be bound by the pre-petition vote and that the court could hold a supplemental "mini confirmation" hearing regarding any objection of a creditor who had not received adequate notice).

452. Due Process Preservation Order at 3, *In re Belk, Inc.*, No. 21-30630 (MI). Judge Isgur, of course, had no authority to bind the district court to his exception of his orders from the equitable mootness doctrine on appeal.

453. *Id.*

454. *Id.*

455. See id.

456. 11 U.S.C. § 1144.

457. Due Process Preservation Order at 3, *In re Belk, Inc.*, No. 21-30630 (MI).

458. *See id.*

459. *See id.* at 2; Order Approving the Debtors' Disclosure Statement for, and Confirming the Debtors' Joint Prepackaged Chapter 11 Plan at 4, 6, *In re Belk, Inc.*, No. 21-30630 (MI).

460. 11 U.S.C § 2002; *id.* § 3017.

based on exigent circumstances or convenience other than through a judicial order under Rule 9006(c) to shorten time. Belk's settlement with the United States Trustee allowed Judge Isgur to avoid issuing a ruling directly about Rules 2002 and 3017, but his confirmation order found compliance with Rule 3017.[461] At no point, however, did he invoke his authority under Rule 9006(c) to shorten deadlines. In short, Judge Isgur confirmed a plan through a process that was in direct contravention of Rules 2002 and 3017 based on the debtor's representations of self-created exigency and the improvised work-around of the Due Process Preservation Order.[462] The primacy of the deal trumped a clear statutory directive.

Drive-thru bankruptcies are undoubtedly convenient for debtors, but no matter the level of creditor support they are fundamentally incompatible with due process, and that is the whole point of them: hurry-up tactics to ram through a deal before anyone can organize to raise objections or ask uncomfortable questions.

It's not clear that any party was actually harmed by inadequate notice in *Belk*, but even if not, cases like *Belk* are systemically harmful. The rule of law does not have a "no harm, no foul" exception built into it, not least because sometimes harms are not readily observable. Parties that are negatively affected by noncompliance with procedural requirements might never appear before a court.

Cases like *Belk* are indicative of and contribute to a big case chapter 11 culture in which the deal is superior to the law. As Judge Jones observed in response to the United States Trustee's objection to the speed of SeaDrill New Finance Limited's 2022 twenty-four-hour case, "[t]he system actually benefits from getting this [deal] done."[463] Judge Jones had not a word to say about the merits of the United States Trustee's legal argument, but merely noted that "I just don't see who . . . would benefit from any additional time."[464] It is not clear what systemic benefit Judge Jones was referring to. It is hard to see how the bankruptcy system possibly benefits from casual disregard of law when convenient. The only parties who benefit from a superspeed case are the parties that want the benefits of bankruptcy without transparency and scrutiny that are part of the policy package—and the judges who want to keep attracting megacases to their courtrooms.

Too often in big chapter 11 cases, the law will be stretched, or even disregarded in order to accommodate the deal that the debtor is proposing, and such accommodation is how courts like the Southern District of Texas attract future chapter 11 filings. Judge shopping has combined with competition for cases to undermine the integrity of the chapter 11 process.

461. Order Approving the Debtors' Disclosure Statement for, and Confirming the Debtors' Joint Prepackaged Chapter 11 Plan at 4, 6, *In re Belk, Inc.*, No. 21-30630 (MI).

462. *See id.* at 25–26.

463. Audio of Hearing, Jan. 12, 2022 at 36:30, *In re* SeaDrill New Fin. Ltd., No. 22-90001 (S.D. Tex. 2022).

464. *Id.* at 32:40.

## VI. DRIVE-THRU CASES AND THE JUDICIAL EXPERTISE FALLACY

The primary counterargument to concerns about forum shopping and judge shopping is that it is involves debtors seeking out judges not for their pliability, but for their expertise.[465] The implication of this argument is that judge shopping should be tolerated, if not encouraged, because it produces the best outcomes by getting the most cases in front of the best judges.

There is some evidence that judicial experience is associated with a greater likelihood of successful reorganization.[466] Nevertheless, the expertise argument for forum shopping can be readily rejected. First, bankruptcy judgeships are merit appointments by the courts of appeals in consultation with the local bar.[467] They are not political appointments. This means that the bankruptcy bench has an extraordinarily high level of expertise across the board. Many judges were well established practitioners before going on the bench.[468] To be sure, judges still vary in skill, temperament, and style, but there are many districts that boast all-around outstanding benches.

Second, when debtor's counsel or other case placers pick a judge, they are doing so in their self-interest.[469] They do not want a great judge. They want a judge who will be great for them. Whatever skill and expertise a judge has is simply beside the point. What a debtor is seeking is a litigation advantage, which means the debtor wants a judge who will readily accede to all to its requests, and that requires a judge who wants to attract megacases to his courtroom.[470]

Relatedly, case placers are not seeking some sort of generic "predictability," such that they can calibrate contractual negotiations to a legal baseline. The predictability they seek is predictability of favorable law and favorable outcomes.[471] If the law is crystal clear in a district, but unfavorable, debtors will file elsewhere. Thus, a debtor with labor relations problems will avoid Delaware, and a debtor that wants to have nonconsensual third-party releases in its plan will avoid Houston because of unfavorable circuit-level case law in those jurisdictions.[472]

465. *See e.g.*, David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS (Jan. 12, 2022), https://www.brookings.edu/research/the-populist-backlash-in-chapter-11/ [https://perma.cc/ND8B-8C8W] ("[S]ubstantial empirical evidence suggests that debtors that file for bankruptcy in Delaware file there because of the expertise of Delaware's bankruptcy judges."); Casey & Macey, *supra* note 25, at 111–14; Ayotte & Skeel, *supra* note 25, at 437–62; Cole, *supra* note 25, at 1850–58; David A. Skeel, *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 309–15 (2001); Rasmussen & Thomas, *supra* note 25, at 1357–63; Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 25, at 31–33.

466. Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 990–92 (2015).

467. *See* 28 U.S.C § 152.

468. Rasmussen & Thomas, *supra* note 25, at 1385.

469. *See* discussion *supra* Subsection V.A.

470. *See* discussion *supra* Subsection V.A.

471. *See* discussion *supra* Subsection V.A.

472. *See In re* Moran, 413 B.R. 168, 190–91 (Bankr. D. Del. 2009); *In re* Trump Ent. Resorts, Inc., 534 B.R. 93, 105–06 (Bankr. D. Del. 2015); *In re* Cont'l Airlines, 125 F.3d 120, 138 (3d Cir. 1997); *In re* Cypresswood Land Partners, I, 409 B.R. 396, 441 (Bankr. S.D. Tex. 2009); *In re* Pac. Lumber Co., 584 F.3d 229, 253 (5th Cir. 2009); Matter of Ultra Petroleum Corp., No. 21-20049, 2022 WL 989389 at *4 (5th Cir. Apr. 1, 2022).

The drive-thru bankruptcy phenomenon underscores that judge shopping has nothing to do with judicial expertise. There is no possibility for a judge to exercise any skill or expertise in a case that proceeds at such a frenetic pace.[473] It is impossible for the judge to even undertake a cursory review of all of the pleadings in such a case. The judge can ask some questions, but ultimately, there is no opportunity for a judge to do anything but get out of the way and rubber stamp the case.

So, why would a judge want to rubberstamp such a case? The judges who do so surely believe that they are just furthering reorganizational efficiency through the use of prepackaged plans.[474] These judges also likely do not see it as their duty to raise objections that parties themselves do not raise. They also surely believe in the no harm, no foul principle: if there are no objectors with actual economic interests in the case (as opposed to the United States Trustee) then procedural timeliness are a burdensome formality that can be disregarded because the judge stands by ready to hear any creditor that actually comes forward with an objection: due process is available for all those who ask.[475]

Yet, approving an illegal superspeed case also sends an unmistakable signal to the bar: the judge is willing to compete for cases. If a judge will sign off on a superspeed case, the judge is likely to accede to most of the debtor's other major requests. A judge who wants to keep attracting megacases to his courtroom cannot say no to the debtor's request for fast confirmation, even if it is patently illegal. Not surprisingly, not a single judge who has approved a superspeed case has engaged with the unambiguous statutory language of the Bankruptcy Rules, because to do so would box the judge in. Indeed, the use of ersatz measures like "Due Process Preservation Orders" underscores that approval of drive-thru cases is not being done by the book.

And in case judges are hesitant to approve such illegal plans, debtors are not above reminding judges that they can always take their cases elsewhere. For example, in its motion for plan confirmation, SeaDrill New Finance Ltd. underscored to Judge David R. Jones that it had considered alternatives including "schemes of arrangement in Bermuda and the United Kingdom" before opting to file in Houston as the cheapest route.[476] The implicit message: if you do not approve this case, future cases will go to other jurisdictions. For the handful of judges who want to attract megacases—and the bar knows well who they are—there is no choice but to approve superspeed prepacks.

473. *See supra* text accompanying notes 270–71.

474. *See* Rasmussen & Thomas, *supra* note 25, at 1387.

475. S*ee supra* text accompanying note 267.

476. Debtors' Emergency Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing Plan and Disclosure Statement Objection Deadline and Related Procedures, (III) Approving The Solicitation Procedures, (IV) Approving the Confirmation Hearing Notice, (V) Authorizing the Debtors to Redact Certain Personal Identification Information and (VI) Waiving the Requirements that the U.S. Trustee Convene a Meeting of Creditors and the Debtors File Schedules and SOFAs at 3, *In re* SeaDrill New Fin. Ltd., No. 22-90001 (DRJ) (Bankr. S.D. Tex. 2022) (No. 4).

## VII. FIXING JUDGE SHOPPING

Venue reform has been a perennial issue in bankruptcy. Bipartisan legislation addressing the district shopping problem has recently been introduced in Congress.[477] Previous legislative attempts to reform the venue system have failed over the past few decades,[478] not least because of the historic opposition of the Delaware (and sometimes New York) congressional delegations. Even though Delaware's market share has fallen, it still lands a large number of megacases,[479] virtually none of which would be filed in Delaware under any reformed venue system. Accordingly, the presidency of Joseph R. Biden of Delaware also likely dooms venue reform for the near future.

This does not mean, however, that reforms are impossible. While the ultimate fix of bankruptcy forum shopping requires amendment of the venue statute, it is possible to fix the local case assignment rules without legislation. This represents a second-best outcome approach.

Bankruptcy courts can themselves address this problem by adopting random intra-district judge assignment rules for all chapter 11 cases excluding those under the subchapter V (small business reorganizations). This means jettisoning complex case assignment rules and intra-district division case assignment rules for chapter 11s that do not involve small businesses or individuals. The Eastern District of Virginia and the Southern District of New York have, subsequent to the circulation of a draft version of this Article, taken up this invitation and changed to random case assignment,[480] and in one case the District Court for the Eastern District of Virginia required random reassignment of a case on remand.[481]

Yet it is obvious that some districts, such as the Bankruptcy Court for the Southern District of Texas, are unlikely to accede to this approach, as their very goal is to attract business.[482] Indeed, the changes in the Eastern District of Virginia and the Southern District of New York are likely to have the immediate effect of pushing more cases to file in the Southern District of Texas and Delaware. Accordingly, a better approach would be for the Judicial Conference of the United States to promulgate a Federal Rule of Bankruptcy Procedure requiring such random case assignment within a district.

To be sure, such reforms would not solve all problems. There would still be districts with one or two judges, and judges can be conflicted out of cases for various reasons.[483] But those districts with just a couple judges are unlikely to be districts that would compete for megacases. Those tend to be less populated

477. Bankruptcy Venue Reform Act of 2020, S.5032, 116th Cong. (2020); Bankruptcy Venue Reform Act of 2019, H.R. 4421, 116th Cong. (2019).

478. *See, e.g.*, LOPUCKI, COURTING FAILURE, *supra* note 25, at 123.

479. *See id.* at 124.

480. General Order M-581, (Bankr. S.D.N.Y. Nov. 30, 2021); Standing Order 21-21, (Bankr. E.D.Va. Nov. 30, 2021).

481. Patterson v. Mahwah Bergen Retail Grp., 636 B.R. 641, 703 (E.D. Va. 2022).

482. *See* Casey & Macey, *supra* note 25, at 108.

483. *See supra* text accompanying note 150.

districts, and the judges from those districts are much less likely to come from the megacase bar themselves.[484]

This is not a guaranty of the end of judge shopping, but rather of a return to the pre-2016 arrangement, where Delaware dominated. While not ideal, it is certainly better than the current situation of judge shopping, as in Delaware there is only a 12.5% chance of landing any particular judge, compared with what had been the 50% or 100% chance in Houston or Richmond or White Plains.[485] More importantly, to the extent that Delaware does not face the aggressive competition from Houston, Richmond, and White Plains, the Delaware bench will not face the pressure to match the questionable rulings and practices that these other districts have adopted to attract cases.

Whatever benefits might exist from a system that assigns all complex cases in a district to a particular judge or set of judges, the system faces the possibility of collapse from its own success. If too many debtors file in the district in order to take advantage of the ability to pick the judge, either the judge or judges assigned the complex cases will end up overworked[486] or they will increasingly defer to the debtor's motions and become rubber stamps that let the debtor run the case, as in *Belk*.[487]

Likewise, the best argument for assigning cases within a district to particular divisions is that it reduces burdens on and costs for the debtor firm and its attorneys of having to travel to an inconvenient location within the district.[488] There is no question that this could be burdensome in some larger judicial districts. But the debtor firm itself rarely needs to make court appearances, and even in the largest districts the travel is not so burdensome, particularly given the possibility of virtual hearings. All non-individual, non-subchapter V cases—basically all larger business chapter 11 filings—should be randomly assigned, rather than directed to particular judges.

484. *See supra* text accompanying notes 151–53.

485. *See supra* text accompanying notes 174–75.

486. *In re* LTL Mgmt. LLC, No. 21-30589, 2021 Bankr. LEXIS 3173, at *20 (Bankr. D.N.J. Nov. 16, 2021) (transferring venue in part based on the court's own caseload).

487. Joseph Doherty and Lynn LoPucki have identified judicial experience as an important factor in reorganization success. LoPucki & Doherty, *supra* note 466, at 990–92. Likewise, Benjamin Iverson, Joshua Madsen, Wei Wang, and Qiping Xi present evidence that cases before inexperienced judges take longer to emerge and result in lower recoveries for creditors and lower returns on assets post-bankruptcy, but their study is premised on the flawed assumption that cases are in fact randomly assigned to judges. *See generally* Benjamin Iverson, Joshua Madsen, Wei Wang & Qiping Xi, *Financial Costs of Judicial Inexperience: Evidence from Corporate Bankruptcies* (Working Paper, 2020), https://ssrn.com/abstract=3084318 [https://perma.cc/KN24-LFH3]. The importance of experience suggests that random assignment may not be optimal. It is impossible, however, to always assign large cases to experienced judges, as there will no opportunity for rookies to gain experience. Appointment to the bankruptcy bench—a nonpartisan process undertaken by each Circuit Court of Appeals, 28 U.S.C. § 152(a)(1)—should serve as the screen to ensure judicial quality.

488. *See supra* text accompanying note 77.

## VIII. CONCLUSION

Forum shopping has long presented a challenge to the chapter 11 process because it has enabled judicial competition to attract large cases, and that competition has set off a race-to-the-bottom. The use and abuse of bankruptcy courts' local rules to facilitate judge shopping has hyper-charged the ills of forum shopping. By concentrating the majority of large bankruptcy cases before just a few judges, judge shopping has created a repeat-player dynamic that discourages vigorous advocacy and encourages attorneys to stay in those judges' good graces with an eye toward their next representation.

Not only does judge shopping create an appearance of impropriety and bias in cases, but it appears to affect case outcomes, as the noncompliant "drive-thru" cases that run roughshod over due process have been approved almost exclusively by the three most notoriously shopped judges. While wholesale venue reform remains desirable, the worst excesses of judge shopping can and should be addressed by the courts themselves as an essential step to upholding the integrity and impartiality of the chapter 11 system.