

Conference on Large Chapter 11 Cases

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Judicial Conference Committee on the
Administration of the Bankruptcy System
and the Federal Judicial Center
2004

This document is a report of the Subcommittee on Venue-Related Matters of the Judicial Conference Committee on the Administration of the Bankruptcy System. The Federal Judicial Center is publishing the report at the request of the Bankruptcy Committee. The report reflects the sense of the participants in the Conference on Large Chapter 11 Cases; it is not intended to, nor does it, express the position of any individual participant, the Federal Judicial Center, or the Judicial Conference of the United States.

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Introduction

In early 2003, the Judicial Conference Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), with the assistance of the Federal Judicial Center (FJC), held a conference of judges and attorneys with established expertise in large Chapter 11 cases. Judges Dennis Montali (Northern District of California, Bankr.), Marjorie O. Rendell (Third Circuit Court of Appeals), and Wesley W. Steen (Southern District of Texas, Bankr.), each a member of the Bankruptcy Committee and its Subcommittee on Venue-Related Matters, and staff from the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts worked with the FJC to plan the conference. In addition to the planning committee, twenty-seven judges and attorneys participated (see the participant list, page 43; and the planning committee, page 44). Conference sessions were led by participating attorneys and judges and consisted of discussions about the policy and case-management issues related to large Chapter 11 cases.

At its June 2001 meeting, the Bankruptcy Committee had approved a number of recommendations for changing the venue statutes—the most notable recommendation would have prohibited corporate debtors from filing for bankruptcy in a district based solely on the debtor’s state of incorporation or based solely on an earlier filing by a subsidiary in the district. The Committee placed these recommendations on the discussion calendar for the September 2001 meeting of the Judicial Conference of the United States, but later withdrew them. Also at the June 2001 meeting, the Bankruptcy Committee established a Subcommittee on Venue-Related Matters. That Subcommittee subsequently recommended that 28 U.S.C. § 1412 be amended to specifically authorize courts to raise an issue of venue and to transfer a bankruptcy case sua sponte. The Bankruptcy Committee and the Judicial Conference approved this recommendation, which will be forwarded to the Congress at an appropriate time. The Subcommittee also recognized that its deliberations on the issue of venue and related matters of case management could be substantially aided by additional study, which gave rise to the 2003 conference of judges and attorneys.

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The purpose of the 2003 conference was to

- identify the factors that influence the selection of venue for Chapter 11 cases of large companies irrespective of the statute;
- evaluate the effect of venue choice on parties-in-interest and the courts; and
- determine whether legislation or judicial action related to venue was necessary and appropriate.

Recognizing that the debtor's choice of venue may depend greatly on the procedures courts have in place for handling various aspects of large Chapter 11 cases, an additional goal of the conference was to critically examine the effectiveness of such procedures, the variations in them among districts, and, ultimately, whether standard procedures for handling large Chapter 11 cases are needed.

This report summarizes the conference discussions, focusing first on the factors that influence the choice of venue and, second, on the proposals for further action recommended by the Bankruptcy Committee's Subcommittee on Venue-Related Matters. To a large extent, these recommendations are oriented toward expanding the expertise in handling large Chapter 11 matters throughout the bankruptcy bench and helping to establish more effective and standard procedures for large Chapter 11 cases throughout the nation.

This report, published at the request of the Bankruptcy Committee, reflects the sense of the conference participants; it is not intended to, nor does it, express the position of any individual participant, the Federal Judicial Center, or the Judicial Conference of the United States on these matters.

Factors Affecting Choice of Venue

Several interrelated themes emerged from the discussion of factors affecting the choice of venue.

Nature of the Problem

First, conference participants questioned whether the problem with choice of venue is with the venue statutes per se. Participants suggested that the real problem relates to the inappropriate allocation of judges, and also judicial familiarity, inadequate or perceived inadequate, with handling large or complex cases. Part of the solution arguably lies in obtaining additional authorized judgeships for Delaware and continuing to support Delaware's use of visiting judges. Not only does the visiting judge program augment the judicial resources devoted to the Delaware caseload, it also allows judges outside the district to gain additional experience with complex Chapter 11 cases.

Another part of the solution, according to the participants, lies in working to improve the competence of all judges and promoting the predictability of large Chapter 11 procedures in all districts. A major venue driver is avoiding the risk of the case being assigned to a judge who is either unprepared or uncommitted to deal with the exigencies of the case. One attorney compared the choice of venue with the choice of counsel. A large corporate debtor would never select a bankruptcy attorney who had never handled a complex Chapter 11 case. Nor would the debtor's attorney recommend filing in a venue where the debtor was likely to get an inexperienced judge or one believed to be unwilling to accommodate the needs of a complex case. On-the-job training is not acceptable in either instance.

Educational opportunities can augment the competence of judges to handle large Chapter 11 cases, and local rules and case-management orders can enhance the predictability and user-friendliness of a court. Even so, participants reported that attorneys will steer away from a court in which even one judge does not make an effort to learn how to handle complex cases or is disrespectful, unpredictable, biased, and otherwise lacking in judicial demeanor. Too much is at stake to risk the case being assigned to such a judge. Dela-

ware has been at the top of the list for choice of venue in part because its two judges are extremely experienced and highly respected by the bankruptcy bar.

Factors Affecting Choice of Venue May Vary

Second, participants noted that choice of venue is based on a number of factors that shift from case to case. Expanding the expertise on large Chapter 11 matters throughout the bankruptcy bench and establishing more efficient, standardized procedures for handling large Chapter 11 cases throughout the nation would broaden the list of “acceptable” districts. However, the choice of venue will always involve a certain amount of subjectivity. The nature of the debtor’s business, the existence of significant labor issues, the nature of claims (e.g., mass torts or significant personal injury claims), and the potential for creditor hostility or cooperation may influence where the debtor will file. And, as in any other type of case, whether the prevailing substantive law favors the client’s position can also drive the decision, although the advantage of filing in one district versus another may not be marked given the large number of legal issues in a mega-case. An attorney’s experience in a particular court and the treatment the attorney received by a particular judge in other cases may also play a role in the attorney’s recommendation to the debtor.

Should We Concern Ourselves with Venue Choices?

A third underlying theme was inquiring why the court should question a debtor’s choice of venue in a large Chapter 11 case when that choice is based on the debtor’s best judgment of its likelihood of success, and debtor’s counsel, as an advocate, has analyzed which venue will offer the debtor the best chance to reorganize successfully. The response appeared to be that interests other than those of the debtor are involved and the integrity of the system requires the court to examine the debtor’s choice. For example, employees and trade creditors might be disenfranchised when a case is filed outside the district where the debtor is located.

Would Uniformity Be Advantageous?

Finally, establishing national guidelines for managing large Chapter 11 cases was thought critical to the integrity of the system. Recently, the media portrayed a court's movement to establish large Chapter 11 guidelines at a local level as competing against Delaware for Chapter 11 cases and as a statement that Delaware is not providing sufficient oversight of its cases. Both the perception that some courts will do anything to bring cases to their district and the perception that the Delaware court does not provide adequate review are damaging to the system. The goal should be to improve the availability of services for all in every court, in part by offering training to judges throughout the country on procedures and issues in large Chapter 11 cases, and in part by offering standard guidelines that can be modified as necessary to meet the exigencies of individual districts, judges, and cases.

Possible Venue Drivers on the Conference Agenda

The conference agenda included sessions on first-day and other expedited orders, including orders approving the payment of critical vendors and other orders based on the doctrine of necessity, orders authorizing secured borrowing (debtor in possession (DIP) financing agreements), and administrative and case-management orders. It also included sessions on claims, section 363 sales, appointment and payment of attorneys and professionals, and plan confirmation. The following sections present participants' views about how these issues affect choice of venue.

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First-Day and Expedited Orders

An important venue driver is the debtor's access to the court and opportunity to seek specific relief on the first day a case is filed. The court's procedural and substantive handling of first-day orders also affects choice of venue, with answers to the following questions being significant:

1. How important is the requested relief to the success of the case? (For example, critical-vendor and wage motions, while important, were reportedly not usually a make-or-break proposition.)
2. Does a certain venue offer certainty or risk with regard to the desired result?
3. Will the client have an easy time before the judge and will the judge act quickly or slowly?

Procedures addressing notice, timing, and burdens of proof (or lack thereof) factor into how these questions are answered.

The participants specifically discussed three types of first-day or expedited orders: orders approving payment of critical vendors and pre-petition wages, orders authorizing secured borrowing (DIP financing agreements), and case-management orders.

Orders Approving Payment of Critical Vendors and Pre-Petition Wages, and Other Orders Affecting Debtor's Operations

In the early stage of large Chapter 11 cases, courts often approve the payment of pre-petition debt to critical vendors and the payment of pre-petition wages and retention bonuses to key employees. They also commonly enter a myriad of other orders affecting the debtor's operations, such as orders approving the continued use of an existing cash-management system or approving the continuation of pre-petition customer programs. Approval is often based on the "Doctrine of Necessity," which allows a court to authorize the payment of pre-petition debt where necessary for the continued operation of the debtor. The doctrine, however, is not universally accepted nor uni-

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formly applied, and some courts rely on section 105 of the Bankruptcy Code or other authority when approving such first-day orders.

Participants disagreed on the role the court should play in reviewing the debtor's request. Some thought the court should defer to the debtor's business judgment and rely on the creditors' committee to identify problems. Support of the creditors' committee should be sufficient to support approval of the relief requested. Others thought that the court has a responsibility to ensure interested parties have notice and an opportunity to object and must determine that the relief requested is necessary before entering any order granting such extraordinary relief. In addressing first-day motions, a court is often faced with balancing fundamental, but sometimes competing, policies of the Bankruptcy Code: the successful reorganization of the debtor and equitable distribution to creditors.

Most of the conference discussion focused on the payment of pre-petition debt to trade creditors, which was seen as more problematic than the payment of pre-petition wages.¹ Participants agreed that there is often a need to authorize quickly the payment of payroll obligations because employee retention is integral to the debtor's continued operations and, in any event, wages are often priority claims that must be paid at confirmation. Opinion on the payment of pre-petition debt to trade creditors was divided. One view was that a Chapter 11 debtor must be allowed to stabilize its business in the first few days of the reorganization and that payment of critical vendors is integral to that effort. The counterview was that selectively paying creditors has a tremendous preferential effect and contravenes the payment priority established by the Bankruptcy Code.²

1. The approval of retention bonuses pursuant to the "Doctrine of Necessity" has also been criticized as overreaching in some instances, but there was insufficient time to discuss the issue.

2. The Bankruptcy Code is not silent on the payment of pre-petition creditors. Section 549(a) provides that certain unauthorized pre-petition debts paid after filing are avoidable. On the other hand, at least one court has cited 11 U.S.C. § 364(b) as authority for approving a quid pro quo critical-vendor arrangement whereby a debtor obtains credit it otherwise would be unable to get in exchange for payment of pre-petition debt. See *In re Payless Cashways, Inc.*, 268 B.R. 543 (Bankr. W.D. Mo. 2001). Section 364 requires notice, however, so final approval of such an arrangement presumably should not be given in a first-day order. Another view is that because the

First-Day and Expedited Orders

Debtors typically file critical-vendor motions very early in a case. Usually a debtor is not prepared to present evidence showing the necessity of the relief requested or to provide formal notice to all creditors. At the same time, however, critical-vendor orders can significantly change the posture and leverage between the debtor and its creditors—a creditor may find its position eroded before ever having an opportunity to participate. In some cases, critical-vendor payments have reduced trade debt to almost nothing. Creditors who know that the debtor is required to pay for goods or services provided post-petition may nonetheless take advantage of first-day procedures and refuse to trade with the debtor in order to get pre-petition debts paid. Moreover, individuals in management, to protect their personal standing in the industry and their job potential should the debtor fail, may attempt to pay trade creditors.

For these reasons, some participants thought critical-vendor motions should not be heard before notice is given to the creditors' committee or to at least the top twenty creditors and that an evidentiary hearing should be held regarding the necessity of the critical-vendor payments. Otherwise, the court has little means to assess the accuracy of attorney representations and may be unaware of key relationships between debtors and particular creditors. This approach, however, requires significant court time and may not meet the practical exigencies of the typical mega-case. Critical vendors may choose not to trade with a debtor if the process is too cumbersome, and

Bankruptcy Code does not explicitly prohibit courts from authorizing business payments out of the ordinary course, courts are free to authorize such payments where there is evidence of necessity after giving notice. *See* 11 U.S.C. § 363(b) (2000). Finally, section 1171(a) explicitly allows the post-petition payment of specific pre-petition debt in railroad cases.

The Seventh Circuit recently considered a bankruptcy court's authority to enter a first-day order permitting a Chapter 11 debtor to promptly and fully pay all pre-petition claims of critical vendors. *See In re Kmart*, 359 F.3d 866 (7th Cir. 2004) (holding that sections 105(a), 364(b), and 503 of the Bankruptcy Code do not provide support for orders approving the preferential payment of pre-petition debts to critical vendors, and that even assuming that section 363(b)(1) could supply the basis for such an order, preferential payments to a class of creditors are proper only on proof that creditors disfavored by the transfers would be as well off with reorganization as with liquidation and that the critical vendors would have ceased doing business with the debtor).

courts with heavy caseloads may not have the resources to hold an evidentiary hearing within the critical time period.

In ruling on first-day critical-vendor motions, courts must balance the value of keeping a business operating (and preserving jobs) against the possibility of negatively affecting the interests of parties without notice. One alternative is limiting the breadth and finality of the initial critical-vendor order and issuing a final order once notice has been given and an evidentiary hearing held. For example, some critical-vendor orders contain monetary caps and language indicating their interim nature, leaving issues to be finally decided at a subsequent evidentiary hearing.

Some courts have entered first-day orders granting the debtor discretion to pay critical vendors without specifically identifying them. This permits a debtor to retain leverage in its negotiations with both critical and non-critical vendors, but requires the court to rely on the debtor's business judgment. As noted earlier, however, there is a risk that individuals in management, based on their own interests, could acquiesce to creditor demands. A number of participants therefore strongly disagreed with this approach, stressing that the court has a responsibility to determine that a vendor is in fact critical and that any requested extraordinary relief is in fact necessary to the debtor's continued operations.

Orders Authorizing Secured Borrowing (Debtor in Possession Financing Agreements)

Participants did not immediately identify debtor in possession (DIP) financing as an issue that drove choice of venue. After further discussion, however, they concluded that because a lender can influence choice of venue, a court's willingness to approve certain financing provisions can be a factor. Some courts will approve financing agreements containing provisions that roll a lender's pre-petition debt into its post-petition debt or grant pre-petition debt cross-collateralization protection, whereas other courts will not. The issue of institutional fees can also be a factor. Moreover, participants agreed that courts with clear and predictable procedures and policies on DIP financing are preferred.

Rollup and cross-collateralization provisions

One view was that rollup and cross-collateralization provisions may be necessary to secure uninterrupted financing necessary to a debtor's continued operations. If a court refuses to approve protection that an existing lender demands and new lenders refuse to prime the existing lender, a debtor can be left without funds to operate. In some instances, acquiescing to a rollup provision may benefit the estate by allowing the debtor to continue to operate without disruption and to negotiate better financing terms than it could with a substitute lender. Further, the proposed financing agreement may prove to be the exit facility that ensures a successful reorganization. Some believe this analysis should be left to the business judgment of the debtor.

The opposing view was that these provisions should not be approved because they can transform pre-petition unsecured claims into secured or administrative claims, undermining fundamental policies of the Bankruptcy Code.³ Such provisions also foreclose options that may be favorable to other creditors, such as the engagement of a new post-petition lender. In any event, it is questionable whether an existing lender, unsure of its security, would refuse to finance without these provisions. The debtor's continued operations may be the best way for the existing lender to preserve the value of its collateral and to eventually get paid. Therefore, courts arguably should require a showing of necessity before approving such provisions.

A creditors' committee usually has time to review the proposed financing agreement between the first-day hearing and the final

3. Rollup provisions can affect more than just the secured status of pre- and post-petition debt. The Bankruptcy Code gives the post-petition lender administrative claim status, and rollup provisions can elevate pre-petition debt to administrative expense status. Lenders are then in a position to assert super-priority claims against preference actions. Additionally, rollup provisions can put lenders in an arguably too-strong position at confirmation. The Bankruptcy Code gives the post-petition lender a veto over the plan by giving administrative status to new funds extended to the debtor after the filing. The purpose underlying this Code provision may be undermined by a rollup provision that effectively gives the lender's pre-petition claim the same status as its post-petition claim. A lender's strategy in demanding a rollup provision may be to undermine a debtor's ability to negotiate a plan. Some courts have addressed this possibility by limiting rollups to provide lenders a post-petition lien for pre-petition debt, but no administrative claim.

hearing on the agreement, therefore the committee has the opportunity to object to an agreement's approval when warranted. Although rollup and cross-collateralization provisions are not frequently approved on the first day, lenders may press for resolution of the issue at that time. For example, a lender with letters of credit coming due in the interim between the first-day hearing and the final hearing on the financing agreement will likely ask that the debt be rolled into the post-petition loan and cross-collateralized in the first-day order. Moreover, lenders are increasingly insisting that aggressive provisions be approved on the first day rather than in the final order to avoid the provisions being challenged. In some cases, pre-petition lenders have sought overreaching provisions, such as provisions that significantly reduce the time allowed to challenge the validity of the lender's pre-petition lien or provisions that grant new liens on receivables or the proceeds of avoidance actions to secure pre-petition debt.

DIP financing agreements often provide a look-back period, from ninety days to as much as six months, for the purpose of allowing parties in interest to determine whether the lien is valid and the valuation accurate. If the court determines that the lender is not over-collateralized, a rollup provision can then be undone. At least one judge gives liberal extensions to the look-back period to allow full investigation of the validity of the lien and the value of the collateral. Participants disagreed on the complexity of unwinding a rollup provision. One view was that the unwinding is merely an accounting exercise whereby once the lender is determined to be under-secured, the debt above the value of its security is simply treated like other unsecured claims. The other view was that unwinding the transaction may be difficult.

Loan fees

Courts have allowed millions of dollars in institutional loan fees in recent mega-cases. If significant institutional fees are allowed in a first-day order, the second hearing will likely prove irrelevant because it no longer makes economic sense to consider a substitute lender. On objection, courts scrutinize the fees and often defer consideration until the final evidentiary hearing or when additional funds are actually advanced. However, interested parties may not have notice and an opportunity to object early enough to be of benefit.

First-Day and Expedited Orders

Most participants agreed that a new lender deserves the fee it would earn in lending outside of the bankruptcy context, but the fee awarded to an existing lender in an interim order is suspect. Typically, the additional amount of new money is small, but the fee is paid on the entire amount of the loan, both pre- and post-petition. Participants thought that sometimes a substantial fee to an existing lender could be justified by the nature of a debtor's business. For example, the high institutional fees in the Enron case (No. 01-16034, S.D.N.Y. Bankr., filed Dec. 2, 2001) were justified by the debtor's immediate need for access to credit to continue its trading business, even though the debtor probably would not draw on that credit.

Procedures for the approval of financing

A number of courts have established guidelines for approval of secured financing that identify certain loan provisions, such as a lien on avoidance actions, that will not be approved on a first-day or interim basis. Attorneys reported that such guidelines help set limits for aggressive clients, thereby avoiding the inclusion of "abusive" provisions in proposed financing agreements in the first instance. Some guidelines also require explicit notice that certain provisions are contained in the agreements under consideration; these provisions should be highlighted in the filed documents. Such guidelines appear to improve the process without risking the debtor's ability to obtain financing, as long as flexibility to deal with unique situations is maintained.

Conference participants thought the time pressure on judges to review complicated transactions and the power of first-day orders to alter priorities and affect the leverage of parties warranted these requirements. Judges often receive complicated loan agreements on the first day before becoming familiar with the debtor's business and must try to determine what is at issue. The judge's fundamental job is to provide due process, and this is difficult to do without adequate information and time to review the proposed agreement. Moreover, creditors and other parties in interest should have accessible information about proposed DIP financing so that they can determine whether or not to object.

Administrative and Case-Management Orders

Participants said that whether a court is user-friendly influences a debtor's choice of venue. Attorneys prefer courts that are accessible and have clear and predictable procedures, but are nonetheless flexible when warranted. A court's use of administrative and case-management orders may play a role in creating the desired transparency and accessibility.

In large reorganizations, case-management orders can relieve some of the pressure on chambers and give the numerous participants predictable procedures. Case-management orders often address such issues as communication with chambers, noticing procedures, and the scheduling of hearings. For example, some large-case orders have scheduled omnibus hearing days for all matters in the case. Courts have found this approach valuable in controlling the docket, particularly if attorneys are realistic in scheduling motions and their estimates of time requirements.⁴

Although a case-management order can be beneficial, it can also unduly increase complexity if counsel must consult the order—in addition to chamber's procedures, local bankruptcy rules, national bankruptcy rules, and the relevant statute—to determine appropriate procedure. This is particularly true if the various sources of authority are in conflict. The dual goals of predictability and accessibility may be better served by using local rules to set forth general procedures for large reorganizations and using case-management orders to set out case-specific details related to those procedures (e.g., on which day of the month an omnibus hearing will be set).

Participants thought a model case-management order addressing procedural issues that routinely arise in mega-cases might be helpful to judges, although they did not enumerate what specific issues it should cover. Courts should retain the discretion, however, to tailor the order to local practice and the needs of the case, and to determine

4. Implementation of the case management/electronic case filing (CM/ECF) system has also allowed changes in case management that make scheduling and other procedural matters in large Chapter 11 cases easier for both judges and practitioners. A case-management order can direct that scheduling changes (e.g., adjournments) will be posted on the court's Web site. Parties then have immediate access to procedural developments in the case.

First-Day and Expedited Orders

whether a case-management order should be used at all. Participants disagreed with the suggestion that 11 U.S.C. § 105(d) be amended to require that a judge file a case-management order.

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Claims

Conference participants did not identify any claims-related matters as major factors in the choice of venue, but reported that several claims-related matters do command the court's attention in large Chapter 11 cases.⁵

Omnibus Objections to Claims

In some cases, debtors file objections covering hundreds of claims, making it difficult for the court to ensure that claimants are properly noticed, to determine which objections are unopposed and which have generated a response, and to resolve the objections. The task is compounded because not all responses are filed with the court—some are just sent to the debtors or the creditors' committees. The participants agreed that courts need to help balance the competing goals of efficiently resolving claims and ensuring that claimants receive due process. Otherwise, debtors could misuse omnibus objections, perhaps intentionally, to strip claims from unsecured creditors who do not respond.

Delaware Bankruptcy Local Rule 3007-1 regarding omnibus objections contains several provisions to help ensure such objections are used responsibly. First, the rule deems all objections to be substantive unless they are based on one of five nonsubstantive grounds (duplicative, amended, or superceded; late-filed; filed in the wrong case; filed without necessary supporting documentation; filed by a shareholder based on ownership of stocks). Second, it requires that each omnibus objection be filed as either substantive or nonsubstantive and that the title of the objection clearly state this information (e.g., first omnibus, duplicate claims). It also sets out the information to be contained in supporting exhibits and the form in which the information is to be presented, which helps identify which claims are being objected to and on what basis. Third, the rule states that for substantive objections, the exhibit must include claim-specific declarations giving suffi-

5. Because of time constraints, the group did not discuss claims trading.

cient detail as to why claims should be disallowed and covering all substantive grounds for the objection. The rule goes one step further to provide examples of “sufficient detail.” It also limits the number of claims that can be included in a substantive omnibus objection to 150 and the number of omnibus substantive objections to two per month, unless the court orders otherwise.

Even in the absence of an omnibus objection, a pivotal question is how much due diligence should be required of the debtor before filing an objection. To help minimize baseless substantive objections, the court can require that objections be made with specificity and that a corporate officer review claims with the claims agent and submit an affidavit with any substantive objection.

Preference Actions

In some jurisdictions, debtors are allowed to name hundreds of unrelated parties in one adversary proceeding to recover preferential transfers. Conference participants agreed that this practice was improper because of a lack of commonality among defendants and reported that the practice is disallowed in Delaware.

The group also reiterated the National Bankruptcy Review Commission’s proposal to increase the monetary amounts in 28 U.S.C. § 1409(b). Currently, the cost to defend a preference action often may be greater than the alleged preference amount, which may encourage the debtor to strategically file such actions.

Claims Agents

Pursuant to 28 U.S.C. § 156(c), the court may delegate various document-maintenance tasks to an outside agent paid by the estate. Under section 156(e), however, the clerk of court remains the official custodian of the court’s records and dockets. The conference participants identified several considerations to ensure the security and integrity of the records when a claims agent is used.

First, *A Guide to the Judicial Management of Bankruptcy Mega-Cases* (Federal Judicial Center 1992) sets out operational guidelines and orders regarding the use of claims agents—these guidelines need to be updated to account for electronic case filing. Judges can tailor

Claims

this information to the needs of specific cases and should clearly communicate expectations to the agents and parties.

Second, the notice period for the appointment of a claims agent should provide sufficient time for the parties and clerk's office to determine whether the agent is competent to handle the instant case and to identify whether the agent has any conflicts of interests. At the same time, if the notice period is too long, the 11 U.S.C. § 341 notice will be mailed before the claims agent is appointed and claims will start coming to the court. This may lead to errors in the claims resolution process and burden the clerk's office with unnecessary work. Appointment on ten days' notice might properly balance the competing interests, particularly if the court maintains a list of agents already vetted for their general competency.

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Section 363 Sales

Participants agreed that a court's willingness to approve an 11 U.S.C. § 363 sale of all assets outside of a plan of reorganization may affect the choice of venue for some debtors. Other possible venue drivers for a debtor planning to sell significant assets outside of the plan include a court's willingness to approve breakup fees and its flexibility regarding sale procedures. Tension exists between the need for procedural flexibility to maximize the value of the estate and the need for predictability to ensure fairness and the integrity of the system.

Sale of All Assets Outside the Plan

Chapter 11 has become a mechanism for controlling the liquidation process to maximize value. Participants discussed the threshold issue of whether a sale of substantially all of the debtor's assets outside of a plan is a legitimate use of Chapter 11.

Some thought that a section 363 sale of all assets is not an appropriate use of Chapter 11 if it only benefits a secured creditor claiming a lien on all assets. The Seventh Circuit U.S. trustee takes the position, consistent with this point of view, that a trustee has no right to administer a Chapter 11 case unless a dividend can be paid to unsecured creditors, and therefore a section 363 sale outside the plan should be approved only when such a dividend is available. Some participants thought that a section 363 sale of substantially all assets is sometimes appropriate, even if the case is to be dismissed after the sale is complete, and that the facts and circumstances of a case are important in determining the appropriateness of a section 363 sale. The debt structure of the company, the benefits of the sale to employees and others, and the identity of those who are participating in and supporting the sale may inform whether a sale should be approved. This point of view is consistent with the Second Circuit's holding in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), which requires a judge to expressly find evidence of a good business reason for approval of a section 363(b) request.

Clearly, the timing of a section 363 sale is also important to its appropriateness. Approval of a section 363 sale immediately after a

case is filed is problematic because of the lack of opportunity for review and objection, but this concern is no longer present later in the case. If time is of the essence, a fast prepackaged bankruptcy (confirmation in twenty days) may be preferable because of the protections that confirmation affords, including the filing of a plan and disclosure statement and a vote of creditors with an interest in the outcome.

Breakup fees

Breakup fees are intended to compensate a lead bidder for transaction costs, incurred in the sale process, that are lost if the sale is not approved. A court's position on breakup fees can be a consideration in venue choice, particularly if the court will not approve breakup fees under any circumstances.

Some people contend that breakup fees are necessary to attract a lead bidder to start the bidding process, while others argue that such fees discourage bidding by other interested purchasers. Certain courts do not or only reluctantly approve breakup fees. For example, Arizona bankruptcy judges refuse to approve breakup fees, taking the position that bidders have already factored the expense and risk involved in a discounted bid. Participants reported that some debtors have avoided filing in Detroit because one bankruptcy judge there also refuses to approve breakup fees.

A large breakup fee can sometimes unduly reward the unsuccessful bidder. Conference participants said this problem could be solved in one of several ways. The court could apply the probate concept of a minimum overbid to limit the amount of the breakup fee—as long as a breakup fee is less than the minimum overbid, there is no risk of loss to the estate. Or the court could require that the breakup fee be reduced as the bidding increases with the lead bidder losing the fee altogether if bidding goes high enough. Most judges who approve breakup fees already require that the fee be based on some reasonable estimate of out-of-pocket expenses. Some courts also have other requirements or criteria for approval of breakup fees, such as the existence of a signed sales agreement. Attorneys emphasized that flexibility in applying such requirements remains important.

Private sale or public auction

In determining the appropriate method of sale, there is tension between the need for flexibility to maximize value for the estate and the desire for predictability and due process. Participants did not agree on whether a thorough pre- or post-petition marketing effort is sufficient for approval of a private sale or whether courts should require an in-court auction procedure to ensure the highest and best bid. Some contend that pre-petition sale efforts sometimes overlook serious bidders, whose participation at an in-court auction can produce higher bids. Interested buyers, not willing to bid on distressed assets outside of bankruptcy, often come forward when the bankruptcy case is filed because a sale of assets in bankruptcy, free and clear of liens, can offer a buyer more value. Moreover, the integrity of the bankruptcy system and public confidence in it require a public sale. Others contend that buyers are more likely to give their highest bid at the outset (and not require breakup fees) if confident that a sale will be private.

Currently, however, most bidders expect that there will be an auction, formal or informal, before the court will approve a sale. Judges at the conference disagreed as to whether the court should entertain a higher walk-in bid at a hearing on a private sale. An interested buyer who enters into an agreement, subject to court approval, does not anticipate an auction, but the sale agreement must nevertheless be approved at a public hearing and interested parties can object to it. Arguably, a breakup fee is warranted if a court will entertain such walk-in bids.

The use of a sealed bid auction can sometimes yield the highest return for the estate in cases where there is widespread interest in the debtor's assets. Because the highest bid is sometimes subject to additional contingencies and because the high bidder does not always have the ability to close, the highest bid is not always the best offer.

Bidding procedures

In response to the concern that practitioners overuse alleged "emergencies" to persuade the court to dispense with thorough bidding procedures, participants suggested that courts should establish standard bidding procedures that include requirements such as deposits. In Nevada, for example, bidders are required to post earnest money, although the court is permitted to consider previously unqualified

bids. Notice of the requirement goes out with the notice of the sale and its procedure. The prequalification of bids also can minimize the participation of sham bidders. One practitioner indicated that the most efficient way to complete a sale is to present the court with an agreed order establishing bidding procedures, and therefore counsel should encourage the debtor to negotiate agreed bidding procedures with the creditors' committee and the secured lender.

With complex sales, practitioners often prefer out-of-court auctions, but some judges at the conference reported problems in determining whether bidding procedures were followed outside the courtroom. One attorney stressed the importance of putting bidders on notice that bidding procedures are flexible and can be changed when it is in the estate's best interests. Other participants, however, questioned whether the court could provide proper supervision if procedures are changed during the course of the bidding process. Taking transcripts of out-of-court auctions may facilitate appropriate oversight. Some participants also expressed concern over the sequestration of bidders in out-of-court auctions. While sequestration may diminish the opportunity for improper collusion and produce higher prices in some cases, it may also encourage parties to make questionable representations and impair the integrity of the process. The possibility of insider involvement also makes out-of-court bidding procedures problematic.

Participants thought sales to insiders must be scrutinized closely. Although participants agreed that a sale should not be approved or should be voided if insider wrongdoing has occurred, most also agreed that an insider sale can go forward provided stringent procedures are met. One judge suggested the insider must be divorced from the debtor before negotiations commence, sale terms must be approved by independent persons, and an auction must be held.

Transfer Tax Exception Under 11 U.S.C. § 1146(c)

Participants considered whether the transfer tax exception of section 1146(c) can be applied in the context of a section 363 sale that goes forward before confirmation; the Third and Fourth Circuits have

Section 363 Sales

ruled that it cannot.⁶ One judge at the conference suggested that, at a minimum, an escrow to provide payment of the transfer tax to the taxing authority should be required in the event a plan is not confirmed.

Sale of Assets Not Determined To Be Property of the Estate

Participants disagreed as to whether the court should approve a section 363 sale without determining the nature of the estate's interest—whether the estate holds an ownership interest in the property or just a leasehold interest. One position is that the court can allow the sale to go through and then allow interested parties to fight over the proceeds. The counter position is that the court must determine the nature of the interest, because that determines the proper procedure to be followed—a sale or an assumption and assignment—and, in any event, not deciding this issue early may create problems.

6. See *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243 (3d Cir. 2003) (real estate transfers made prior to confirmation do not qualify for tax exemption under statutory provision prohibiting a stamp or similar tax on transfers under a confirmed plan); *In re NVR, LP*, 189 F.3d 442 (4th Cir. 1999) (Chapter 11 debtor's preconfirmation transfers of real estate did not fall within the scope of the statutory provision prohibiting a stamp or similar tax on transfers under a confirmed plan, even though a plan was eventually confirmed).

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Appointment and Payment of Attorneys and Professionals

Certain issues related to the appointment and payment of attorneys and professionals may affect a debtor's choice of venue. Possible venue drivers include whether a court approves national rates for counsel and how the court handles the payment of financial advisors. Participants also discussed methods courts employ for retention and payment of ordinary course professionals, the review of fee applications, and controlling fees in bankruptcy. A court's efficient review, approval, and management of fees may enhance its image as a user-friendly venue where a large corporate debtor can effectively reorganize.⁷

National Versus Local Fee Rates

Whether a court will approve fees at national rates may influence where a case is filed. Many courts approve higher rates for out-of-town counsel and some conference participants reported having no problem getting their typical rates approved. However, some courts only approve fees at the local rates and attorneys will avoid filing in those districts, all else being equal. In response to courts' differing treatment of fee rates, some law firms have developed two sets of rates—national and local—and charge according to the court's location. One attorney reported that he applied for retention on specific terms under 11 U.S.C. § 328(a) rather than under section 327(a) if he was unsure what rate the court would approve.

Participants observed that courts should consider the nature of a case in determining whether national counsel (and therefore a national rate) is required. Bankruptcy judges who have handled mega-cases recognized the benefit of attorney expertise in a complex case, and while local counsel can be of assistance, mega-cases require experienced counsel.

7. The group raised but did not discuss variations among the districts in 11 U.S.C. § 327(a) conflicts standards.

Payment of Financial Advisors

Some courts allow financial advisors (including investment bankers) to be paid a flat monthly fee, whereas other courts require financial advisors to submit time records. This difference in approach may affect choice of venue because of the significant influence investment bankers often have over debtors.

The use of financial advisors in Chapter 11 cases is a relatively recent phenomenon, only seen within the last fifteen years, so their role is not clearly defined. The absence of a written work product or other overt indication of a financial advisor's work raises the question of whether an advisor's retention has value to the estate. Accordingly, many U.S. trustees contend that financial advisors should keep time records, and some courts (e.g., Delaware) require advisors to submit time records for review by the U.S. trustee. In any event, without such records, financial advisors may be unable to justify any success fee. To demonstrate what they have done to deserve a success fee, they must be able to present evidence of the work done and its value.

Controlling Fees in Bankruptcy Cases

Participants discussed the high attorney fees awarded in recent bankruptcy cases and considered whether the system was failing to control fees appropriately.

Participants thought several aspects of the bankruptcy system may make it difficult to contain fees. Objecting to fees can be problematic in the context of the ongoing negotiations of bankruptcy because lawyers need to remain on good terms for the benefit of their respective clients; the lawyers cannot afford to risk alienation from the process by objecting to a key player's fees. Moreover, although corporations ordinarily scrutinize legal fees charged even in routine transactions, corporate debtors may be less likely to quibble over hourly rates or object to the fees of their bankruptcy lawyers because of debtors' heavy reliance on the lawyers' guidance. Because fees are paid from estate funds, parties may not perceive an economic incentive to challenge or control attorney fees.

For these reasons, participants highlighted the need for an objective third party to review fee applications and for the court to manage the fee process so that lawyers are required to justify the work that is

Appointment and Payment of Attorneys and Professionals

done. In addition, the debtor's management and the creditors' committee have important roles in deciding what legal services are necessary and in containing costs.

Lodestar versus value billing

Participants questioned whether the "lodestar" method (hours multiplied by rate) of calculating fee awards is the best method to use in the bankruptcy context. Some practitioners pointed out that real estate brokers, financial advisors, and contingent-fee lawyers are not required to report hours or to use lodestar methods in order to get paid in Chapter 11 cases, but no consensus was reached on an alternative substitute system. The lodestar approach arguably rewards inefficiency because firms have no incentive to limit the number of attorneys assigned to the case or the number of hours that are worked.

One suggested alternative was a sliding scale similar to that for trustees under section 326 of the Bankruptcy Code. Section 326(a) allows reasonable compensation for trustee services not to exceed a percentage of the amount disbursed or turned over in the case—the percentage allowed varies depending on the amount dispersed.

One attorney championed value billing as another alternative, asserting that the relevant inquiry for each significant task performed by the lawyers is not how much time it took but rather how much the estate is paying compared to what value the estate is receiving. Many firms already categorize fees by task so it would be just one more step to calculate the overall cost of significant tasks (e.g., a total for the disclosure statement, a total for the plan of reorganization). Even if lodestar billing is used, fee applications that list the total fees incurred for each significant task would assist in their review.

Reasonableness of hourly rates and overall fees

Participants discussed whether hourly rates and overall fees in bankruptcy cases were unduly inflated. One participant observed that although current hourly rates and fees may be perceived as excessive in the political world, they are accepted as fair value in the financial world where it is customary to pay a specified percentage of any transaction to a financial institution. In concurring, another participant noted that 11 U.S.C. § 330(a)(3)(E) requires courts to consider whether compensation is reasonable based on customary compensa-

tion paid outside of bankruptcy. Some participants thought the public perception of the fees as inappropriately high was problematic, even if they were objectively justified, and suggested that the fee-review process should lead to both the reality and the perception that the fees awarded by the court are reasonable and necessary.⁸

Review of Fee Applications

Participants considered the burden of reviewing lengthy and detailed fee applications in large cases, with the implicit assumption that courts will consider interim fee applications as the case progresses. Some courts allow counsel to submit monthly or quarterly fee applications for approval and payment, subject to a final review. This review process strains courts, especially courts with a significant number of mega-cases. A judge handling a mega-case can be quickly overwhelmed if a procedure to handle fee applications is not established as soon as is practicable. Although the award of fees is ultimately the judge's responsibility, effective review of fee requests requires interested parties to inform the court whether the data supporting a fee application indicate that the compensation sought is reasonable and appropriate.

8. Press reports of attorneys' fees in bankruptcy may include legal fees that cannot be attributed to the bankruptcy case itself. For example, a significant amount of fees approved in a Chapter 11 case, such as fees for Securities Exchange Commission filings or real estate transactions, would be incurred in the debtor's ordinary course of business absent the bankruptcy. One practitioner suggested that although the total amount of legal fees in a large Chapter 11 case may seem high, it is a small fraction of the money involved (e.g., 6% of assets, or less than the sales commission on a suburban house). Professor Elizabeth Warren contends that Chapter 11 is actually cheaper than many of its alternatives, such as the automatic sale of debtor companies, because there is only one creditors' committee negotiating on behalf of a multitude of creditors. Newspaper accounts of Chapter 11 cases may not include this type of information and thus may unduly perpetuate the perception of excessive fees. For a fuller exposition of this issue, see 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.* 509–52 (arguing on both analytical and empirical grounds that the costs of Chapter 11 are comparable to the costs of other significant corporate transactions).

Appointment and Payment of Attorneys and Professionals

Participants noted that in some districts the U.S. trustee takes an active role in reviewing fee applications. The Executive Office of the United States Trustee (EOUST) is developing software that identifies duplicate entries and otherwise assists in review of fee applications. Arguably, the U.S. trustee can do only what a fee examiner would do—ensure that the description of work is accurate and expenses are documented and compare what other firms are charging for similar work in other cases. The U.S. trustee cannot delve into the substantive issue of whether an attorney should have performed a given task.

Fee examiners

Participants discussed the value of appointing a fee examiner to relieve a busy court of the burden of reviewing detailed fee applications. Several judges maintained that they had appointed fee examiners with mixed results. Examiners do not do much more than the U.S. trustee, reviewing the cost of line items but not determining whether work was necessary or not. Moreover, fee examiners may feel compelled to find something wrong in order to justify their appointment.

Budget committees

A number of participants recommended the use of a budget committee, in lieu of an examiner, to contain costs. Dow Corning, a corporate debtor facing significant asbestos litigation, used this approach successfully. Such committees are usually comprised of mostly business people, with a U.S. trustee representative and one or two representatives from the creditors' committee. A budget committee can be given a mandate to control fees and to consider whether a proposed course of action would be cost effective. The committee can do a great deal of work behind the scenes to pare down fee applications before they are submitted to the court, making it easier for the judge to review them. The process arguably works because business people ask whether proposed tasks will create value, and parties in interest reportedly support the process because their money is at stake and they know it.

The budget committee can require that task codes, uniform for every professional, be used so that the cost of case activities are clear and expenses for like activities can be compared. (The EOUST is reportedly developing such a set of codes.) The committee can review

the budget by task and project monthly costs based on proposed tasks to be done. It can establish some tolerance for divergence (e.g., within 10% of the budget) and require justification if monthly legal fees are a certain percentage over budget (e.g., 2%–3%). The committee can also review fee applications and can file objections, or if it has no objections, file a report to that effect with the court.

It may be difficult to find people willing to serve on a budget or fee committee because the work required, even if limited to reviewing fee applications, is significant, and members are only compensated for expenses. One participant suggested that service on a creditors' committee be conditioned on willingness to serve on the budget committee, but others felt that parties will participate on the budget committee because they consider the money at stake to be their own.

District court appointed monitor

Another suggested surrogate for a fee examiner or budget committee is a district court appointed monitor, as in *In re WorldCom* (No. 02-13533, S.D.N.Y. Bankr., filed July 21, 2002).

Retention of Ordinary Course Professionals

Prior to filing a Chapter 11 bankruptcy case, a large corporation may have a score of law firms across the country handling routine legal work (e.g., real estate, tax). Some courts allow these ordinary course professionals to be paid in the ordinary course of business as long as their fees are within a specified amount. This is a common practice in Delaware and is acceptable to the local U.S. trustee office. In Delaware, a law firm that represented a Chapter 11 debtor pre-petition and wants to continue to do so must file a retention application and show disinterestedness. If the court approves retention, the firm can continue to work for the estate, but does not have to file a fee application as long as the fees are less than \$50,000 per month. This procedure permits the debtor's business operations to continue undisturbed.

The Bankruptcy Code does not explicitly provide for this procedure, and courts that use it often reference section 105. It may be a practical necessity for a court handling a large case. Ordinary course professionals retained pursuant to section 327(a) must file fee appli-

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cations, which would significantly increase the number of applications the court must review. It may not be feasible for a court to review fee applications for every professional doing the routine work that a large corporation requires on a daily basis, such as negotiating leases or other contracts.⁹

Another view, however, is that for the court to maintain adequate scrutiny over fees, every professional should go through the formal retention procedure under section 327, and if a debtor wants to hire an attorney on a flat monthly fee or other similar payment arrangement, the professional can indicate this in the fee application.

9. One conference participant reported that some courts approve retention of ordinary course professionals pursuant to section 327(b), which seems to refer to in-house counsel. Section 327(e) may be a better fit for this situation than section 327(b), although this section was not referenced during the conference.

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Plan Confirmation

Participants identified several confirmation issues that may play a role in the venue decision, including a court's treatment of third-party releases, assessment of feasibility, and willingness to extend exclusivity.

Third-Party Releases

Most participants agreed that a court's willingness to confirm a plan of reorganization containing third-party releases can drive a venue decision, and cases are often filed in jurisdictions where a plan containing a third-party release might be confirmed.

Several circuits have ruled that bankruptcy courts have no power to grant releases to anyone other than the debtor. In other jurisdictions, however, courts have approved nonconsensual releases in exceptional circumstances. For example, courts approved third-party releases in *In re A.H. Robins Co., Inc.*, 880 F.2d 694, 702 (4th Cir. 1989), *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988), and *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). The courts in each of those cases determined that consideration was given in exchange for the releases and that the releases were critical to the reorganization. In some jurisdictions, courts will also approve third-party releases with the consent of creditors. In determining how a creditor's consent to a release is determined, courts may deem a vote for a plan to be consent to the release or require parties to check a box opting in or opting out of the release. Plans sometimes provide that failure to vote is deemed acceptance of the plan and therefore consent to the release, but not all courts allow such provisions.

Participants also discussed whether inclusion of prohibited releases in a plan of reorganization compromises the integrity of the bankruptcy system and whether judges should take a more active role in determining whether a plan with release provisions should be confirmed. One judge indicated that, absent consent, a release provision should be stricken unless there is proof of exceptional circumstances to justify it.

Plan Feasibility

Most conference participants agreed that the feasibility standard a court applies and the extent of financial projections it requires may be factors in choice of venue. They did not agree, however, on what time period should be covered by financial projections. One attorney commented that projections should mirror the duration of the plan, while another indicated that projections beyond one to two years are too speculative.

Some participants questioned Professor Lynn LoPucki's criticism¹⁰ that courts are not adequately assessing feasibility. Feasibility is often not at issue because a debtor and its creditors have high-paid financial professionals who agree that the plan is feasible. Several judges, however, stressed that the court has an obligation to make certain determinations even in the absence of an objection (e.g., good faith, best interests, and feasibility). See *In re Perez*, 30 F.3d 1209 (9th Cir. 1994). However, a judge must determine feasibility based on the evidence before the court. This raises the issue of whether the feasibility assessment advocated by Professor LoPucki may require the appointment of an independent financial expert, distinct from those employed by the debtor and creditors' committees. One judge suggested that perhaps a court-appointed financial expert could dispense with the need for the others. Many participants disagree with this approach, contending that it infringes on the adversarial process. They also argue that committees are statutorily authorized to hire financial advisors and need such advisors for more than assessing feasibility or testifying at confirmation. The appropriateness of a court-appointed financial examiner was also questioned, given that the rules do not authorize the appointment of a special master in bankruptcy.

10. Lynn M. LoPucki & Joseph W. Doherty, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 Vand. L. Rev. 231 (2001); Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Reorganizations Failing?*, 55 Vand. L. Rev. 1933 (2002).

Exclusivity

A debtor has an exclusive right to file a plan of reorganization for the first 120 days of the case; the court may either increase or decrease the amount of time for cause. Participants did not agree on whether exclusivity issues drive venue decisions. Some believe that debtors may avoid a jurisdiction that develops a reputation for refusing to extend exclusivity, while others believe that a competing plan can help to move a case forward because the debtor is forced to negotiate with the creditor who sponsors it. Most participants thought it too restrictive to prohibit discussion of alternative plans until the exclusivity period is terminated.

Participants considered several questions related to exclusivity:

1. Do complex cases require extended exclusivity?
2. Does extended exclusivity promote equitable and efficient resolution of cases?
3. What factors should be considered in extending or extinguishing exclusivity?
4. Should a judge extinguish exclusivity selectively, as to only this or that committee?

The 1994 amendment granting an appeal of right as to interlocutory decisions on exclusivity was intended to address the concern that continued exclusivity extended the length of cases. Arguably, however, exclusivity sometimes assists in controlling expenses and moving the case forward, and competing plans sometimes delay real negotiations. If creditors know exclusivity is going to be terminated on a certain date, they may refuse to negotiate. On the other hand, a debtor should not be allowed to prolong indefinitely a stagnant case. In attempting to balance the interests at stake, some courts leave exclusivity in place until a party in interest presents an alternative plan with significant support while others require the debtor to demonstrate progress toward reorganization before extending exclusivity.

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Proposals for Action

In light of the conference discussion, the Subcommittee on Venue-Related Matters recommends that the following actions be taken to help ensure all bankruptcy judges are prepared to handle complex Chapter 11 cases and that effective, reasonably standard procedures are established in all courts.

1. Revise FJC's *A Guide to the Judicial Management of Bankruptcy Mega-Cases* and Hold Educational Seminars

The FJC should update *A Guide to the Judicial Management of Bankruptcy Mega-Cases* (Federal Judicial Center 1992) and make it available online. The Center should consider establishing an advisory group of judges and attorneys to assist with this project and should work closely with the Subcommittee on Venue-Related Matters. (The FJC has agreed to do this.)

The updated publication should provide guidance on a wide range of topics, including the following: (1) motions based on the doctrine of necessity; (2) DIP financing; (3) case-management orders; (4) appointment and oversight of the claims agent, claims processing, and objections to claims; (5) sales; and (6) appointment and compensation of professionals. The online guide should also include model orders, which could be downloaded and adapted for a particular case. Courts, for example, could require attorneys to use the model orders and highlight any changes made to them. The guidelines and model orders should reflect the variety of local rules and practices across the country and, as appropriate, present alternative provisions to meet the needs of a particular district or case. Other material of use to the court, such as a "term sheet" of financial and other terms particular to mega-cases, could also be posted online.

The Subcommittee on Venue-Related Matters and the FJC should monitor whether and when future updates to the guide are needed, with a means for obtaining input from judges and attorneys. Small group sessions, with both judges and practitioners participating, could be held on a periodic basis to help expose judges and attorneys to emerging problems related to large Chapter 11 cases, to identify needed improvements to the system, and to correct misperceptions

about how matters are being handled by attorneys and judges in different districts. Such sessions could be held at, or in conjunction with, FJC continuing education seminars for bankruptcy judges.

2. Resource List of Judges

The Federal Judicial Center or Administrative Office should develop a resource list of judges who have experience with large Chapter 11 cases and who have agreed to consult with other judges who have been assigned a large Chapter 11 case perhaps for the first time. Although bankruptcy judges already regularly consult with one another, an established panel might encourage more communication.

3. Rules and Procedures Related to First-Day Orders

The Bankruptcy Committee and the Advisory Committee on Bankruptcy Rules should study the effectiveness of the rules regarding first-day orders, including post-petition financing and the use of cash collateral. With respect to the latter, debtors should be required to provide the court with a plain-English material term sheet for any cash collateral or financing agreement it asks the court to approve. This would allow the court to evaluate more reliably the impact of complex financing arrangements and to rule more expeditiously. The court could thereafter revisit any material disparity between the term sheet and the order. (Finance attorneys often provide summary sheets to the debtor's counsel and the same summary sheets could be passed along to the court.)¹¹

The two bankruptcy committees should also study the procedures for reviewing first-day orders and study whether the current practice of entering interim orders for later review by the court is effective.

11. Such a rule provision might read as follows: "The proponent of any financing or cash collateral agreement who requests interim or expedited relief on less than fifteen days' notice must attach to the motion a short summary or term sheet setting forth the critical structure of the proposed financing arrangement. Notwithstanding any contrary provision in any related order, a bankruptcy judge may order appropriate relief if a material discrepancy is discovered between the explanation in the summary and the language of the order or documentation approving the financing or cash collateral arrangement."

Proposals for Action

4. Official Forms

The Bankruptcy Committee and the Bankruptcy Rules Committee should reevaluate the role of Official Forms and whether the rules should require their use. The rule requiring the use of Official Forms is largely ignored in very large Chapter 11 cases with respect to disclosure-statement notices, confirmation-hearing notices, and plan-confirmation orders. Updated and more realistic orders might play an important role in standardization of practice.

5. Omnibus Objections to Claims

The Bankruptcy Committee and the Bankruptcy Rules Committee should study whether the rules should be modified to address explicitly the use of omnibus objections to claims.

6. Review of Venue Decisions

The Bankruptcy Committee should continue to consider whether the procedure for reviewing venue decisions needs to be modified. An interlocutory appeal of a venue decision would likely prove futile because of the time involved. The case has to proceed, and once it moves forward it is difficult to disentangle. A workable alternative might be to provide for a motion to reconsider without a change in the burden of proof.

7. Additional Judicial Resources and Sua Sponte Venue Rulings

Finally, recognizing the great burden on the judges in Delaware caused by the overwhelming caseload, the Bankruptcy Committee should reiterate its support for additional judicial resources in Delaware and its recommendation that 28 U.S.C. § 1412 be amended to explicitly authorize a bankruptcy judge to consider venue sua sponte. Federal Rule of Bankruptcy Procedure 1014 currently provides that venue can be transferred on motion of a party-in-interest. Case law in some jurisdictions has interpreted this rule to limit judicial action absent such a motion. Other jurisdictions have supported the notion of sua sponte transfer, either relying on section 105 of the Bankruptcy Code or the interaction of various statutory provisions. The recom-

Conference on Large Chapter 11 Cases

mended statutory change would eliminate this conflict in case law. The Rules Committee might consider the option of amending the rule as well. The Judicial Conference has approved the recommendation to amend 28 U.S.C. § 1412 and the recommendation to establish four additional judgeships in Delaware.

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The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Education Division plans and produces educational programs, services, and resources for judges and for nonjudicial court personnel, such as those in clerk's offices and probation and pretrial services offices. Its products include travel-based and in-court programs that participants attend in person, Web-based programs and publications, television programs broadcast by satellite, and manuals, monographs, and other print publications.

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The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

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