

Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations

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SHOPPING FOR JUDGES: AN EMPIRICAL ANALYSIS OF VENUE CHOICE IN LARGE CHAPTER 11 REORGANIZATIONS

Theodore Eisenberg
& *Lynn M. LoPucki*†

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INTRODUCTION

For almost two decades, an embarrassing pattern of forum shopping has been developing in the highly visible world of big-case bankruptcy reorganization.¹ Forum shopping—defined here as the act of filing in a court that does not serve the geographical area of the debtor's corporate headquarters—now occurs in more than half of all big-case bankruptcies.

Two jurisdictions have attracted most of the forum shoppers. During the 1980s, when a large portion of the shopping was to New York, the lawyers involved asserted that New York was a natural venue because of its role as the country's financial capital and because so many of the companies, creditors, and professionals involved had their offices there. In the early 1990s, however, when the favored destination shifted abruptly from New York to Delaware, these explanations wore thin. Delaware was then a sleepy, backwater bankruptcy district virtually devoid of bankruptcy professionals or corporate headquarters.

¹ LoPucki and Whitford first reported the pattern in 1991. See 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.

In response to widespread concern² and the “troubling specter of courts competing for big-case bankruptcy business,” the National Bankruptcy Review Commission recommended in the fall of 1997³ that Congress amend the bankruptcy venue statute to prevent forum shoppers from filing in Delaware.⁴ One influential participant in the Commission’s deliberations crystallized the sentiment for change, stating that “the effort to find debtor-friendly courts . . . demeaned the entire system by suggesting that bankruptcy courts were for sale.”⁵ While the Commission deliberated, the Delaware federal court reacted by shifting the assignment of cases from the bankruptcy court to the district court.⁶

This Article reports the results of a comprehensive study of big-case bankruptcy forum shopping from 1980 to 1997. A description of what has occurred helps explain both the causes of Delaware’s rise as the preferred Chapter 11 forum and why embarrassment forced the system to take extraordinary countermeasures. The temporal coincidence of three major changes in Chapter 11 practice obscures those causes: (1) a nationwide increase in the rate of Chapter 11 forum shopping; (2) a national trend toward faster case-processing times; and (3) the rise of “prepackaged” bankruptcy cases in which the necessary majorities of creditors have accepted the reorganization plan before the debtor files the case. Two prior studies partly illuminate the phenomenon of big-case bankruptcy forum shopping,⁷ but each analyzes fewer years of data and accounts for fewer variables than this study.

This Article casts doubt on the two common explanations for forum shoppers’ attraction to Delaware: (1) that Delaware resolves bankruptcy cases more quickly, and (2) that Delaware has developed

² Although written reports on the subject are scarce, there is an undercurrent of complaints that lawyers and judges in the headquarters districts are losing the fees and visibility that accompany these large cases. See, e.g., Kathryn R. Heidt, Business Bankruptcy Committee, Business Law Section, American Bar Association, Report on Bankruptcy Venue 22 (Oct. 15, 1996) (unpublished manuscript, on file with authors).

³ NATIONAL BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 778-79 (1997) [hereinafter COMMISSION REPORT].

⁴ The Commission Report denies that the recommendation is directed against Delaware. See *id.* at 779.

⁵ Minutes of the National Bankruptcy Review Commission Meeting 13 (Feb. 23-24, 1996) [hereinafter Commission Minutes] (statement of Gerald Munitz), reprinted in Delaware State Bar Ass’n, Report of the Delaware State Bar Association to the National Bankruptcy Review Commission in Support of Maintaining Existing Venue Choices (unpublished manuscript, on file with author) [hereinafter Delaware Bar Report].

⁶ See *infra* text accompanying note 55.

⁷ See GORDON BERMANT ET AL., CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES: REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM (1997) (discussing filings in 1994 and 1995); LoPucki & Whitford, *supra* note 1 (discussing filings and confirmations from 1979 to 1988).

expertise in prepackaged cases.⁸ No statistically significant evidence exists that Delaware processes large Chapter 11 cases more quickly than other districts. The faster processing time that Gordon Bermant reported for Delaware, and thus Delaware's seeming comparative efficiency in resolving bankruptcy cases, is almost entirely a consequence of Delaware having a larger proportion of prepackaged cases than other districts.⁹ Moreover, Delaware does not process prepackaged cases significantly faster than other districts. We do find statistically significant evidence that New York processes cases slower than other bankruptcy courts. These findings cast further doubt on the argument that forum shopping targets the most efficient court.

Forum-shopping debtors must believe that the benefits of filing in Delaware outweigh the costs. The Delaware Bankruptcy Court requires that local counsel represent each party, adding an expense that the debtor usually would not incur when filing elsewhere. Because debtors who file in Delaware also incur travel expenses for nonlocal professionals and company personnel, the direct costs of forum shopping to Delaware are not trivial. Forum-shopping debtors must believe that the benefits of filing in Delaware are substantial.

The Chapter 11 forum-shopping phenomenon thus requires deeper analysis. The fact that the pattern of forum shopping abruptly shifted from New York to Delaware suggests that the forces that drive forum shopping transcend Delaware's unproven efficiency. Evidence that debtors disproportionately shop out of certain districts suggests that there is a push as well as a pull to forum shopping. When debtors shop to escape their home fora, the particular destination may be of lesser importance.

Delaware's replacement of New York in 1990 as the forum shopper's destination of choice makes sense only in light of the political context in which it occurred. Changes in New York's judge-assignment mechanisms and a bankruptcy venue decision in Delaware,¹⁰ in combination with Delaware's recognized tradition of providing pro-corporate legal structures,¹¹ may have triggered this shift to Delaware.

⁸ See, e.g., David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 20 (1998) ("Rather than lengthy cases, Delaware is known for its speedy confirmation of reorganization plans."); *id.* at 27 ("Delaware's judges also tend to confirm traditional Chapter 11 cases much more quickly than judges in other districts. Venue shopping in bankruptcy has thus produced a clientele effect, with Delaware attracting firms that seek to reorganize quickly."); *id.* at 28 (stating that "Delaware has successfully addressed the single biggest problem with Chapter 11 in recent years—the inordinate time and expense of the reorganization process").

⁹ See BERMANT ET AL., *supra* note 7, at 39.

¹⁰ See *infra* note 50 and accompanying text.

¹¹ See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 471 (1987) (noting that Delaware has "a dominant position in the market for corporate charters").

Once Delaware gained a reputation as a shopping destination, this reputation probably persisted in part because the state had become a safe choice for bankruptcy lawyers and their clients. Nevertheless, for venue choice to become an issue, there first must exist some dissatisfaction with the home court.

Part I of this Article explains why the legal system regards big-case bankruptcy forum shopping as embarrassing while it tolerates and even encourages other kinds of forum shopping. Part II describes the data and methodology of the study. Part III discusses the pattern of big-case forum shopping, its recent increase in frequency, and its relation to the increasing number of prepackaged cases. Part IV seeks to explain the pattern of forum shopping.

I

WHY FORUM SHOPPING IN CHAPTER 11 CASES EMBARRASSES THE SYSTEM

Though the term “forum shopping” has a pejorative connotation,¹² forum shopping is far from universally condemned. In fact, legislative bodies often provide a plaintiff with a choice of two or more fora, permitting it to file a case in the state or federal court where the cause of action accrued, at the plaintiff’s location, or at the defendant’s location.¹³ One type of forum shopping, however, has received uniform condemnation and likely will lead to disciplinary proceedings against the attorney involved—shopping for judges.¹⁴ Observers seem to agree that judge shopping “breeds disrespect for and threatens the integrity of our judicial system”¹⁵ and undermines the aphorism that “ours is a government of laws, not men.”

¹² See, e.g., George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 666-68 (1993) (describing “anti-forum-shopping” as “the classical position”); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (“As a rule, counsel, judges, and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.”); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (arguing “that forum shopping is disfavored because it reveals an element of manipulability in the legal system that challenges the ideal of law as the embodiment of impartial justice or fairness”).

¹³ Bankruptcy law also gives filers a broad choice of venues. See *infra* note 19.

¹⁴ See, e.g., *No Judge Shopping Allowed*, NAT’L L.J., May 5, 1997, at A8 (attorney paid sanctions of \$7,500 for filing 13 lawsuits, then withdrawing all but one in a case involving Dr. Jack Kevorkian); Randall Samborn, *Chicago Judge Sanctions Firm*, NAT’L L.J., Apr. 18, 1994, at A4 (reporting that a judge sanctioned Mayer, Brown & Platt lawyers for filing five identical complaints in an attempt to draw one of three judges).

¹⁵ *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (upholding sanctions despite the fact that the judge-shopping scheme involved no deceit and violated no rule). In a related and similarly regarded kind of forum shopping, a party files a case in a second court that is not an appeal from the first court but is nevertheless an effort to override the first court’s decision. See, e.g., *Y.J. Sons & Co. v. Anemone, Inc.* (*In re Y.J. Sons & Co.*), 212 B.R. 793,

The principal means of preventing judge shopping within the same judicial panel is random case assignment. Shopping among the judges of different courts is more difficult to control, but holds less potential for embarrassment because the reason for inter-court shopping is ambiguous. The system's defenders plausibly can assert that the pattern of case filing observed demonstrates not judge shopping, but merely shopping for convenience, juries, or law.

These benign explanations, however, are not always available. Convenience cannot explain the forum shopping that this Article explores because this shopping has focused successively on two courts, New York and Delaware, neither of which is convenient to the filers. Nor can a search for friendly juries explain Chapter 11 forum shopping. Juries play no significant role in bankruptcy cases. Differences in law and procedure cannot drive the shopping because the governing law and procedure are federal.¹⁶ Theoretically, every significant aspect of Chapter 11 reorganization is uniform throughout the United States.¹⁷ Significant, persistent differences among bankruptcy courts that would make forum shopping the norm should be impossible.¹⁸ Contrary to these implausible explanations, the persistence of forum shopping demonstrates the importance of judges to litigants and, implicitly, the relative unimportance of law.

This discussion does not imply that bankruptcy judges are less likely to "follow the law" than other judges. Rather, it is easier to demonstrate in the context of bankruptcy that the principal purpose

808 (D.N.J. 1997) (upholding sanctions for "forum shopping" against an attorney who filed a bankruptcy case following a state court decision on the same transaction).

¹⁶ See 11 U.S.C. §§ 1101-74 (1994 & Supp. II 1996).

¹⁷ The U.S. Bankruptcy Code contains most of the substantive law. See *id.* The Federal Rules of Bankruptcy Procedure govern Bankruptcy Court procedure. These rules permit districts to make local bankruptcy rules. See FED. R. BANKR. P. 9029. The local rules, however, must remain consistent with the federal rules and cannot prohibit or limit the use of an extensive set of Federal Official Forms. See *id.* In addition, "[a] local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." *Id.* Local rules generally deal with matters such as admission to practice before the court, the necessary numbers of copies of documents, or the permissible types of transmissions when filing papers.

¹⁸ In his defense of Delaware bankruptcy venue, Professor Skeel argues that bankruptcy law permits local variation. See Skeel, *supra* note 8, at 25. But his examples fail to make his case. His reference to differences in "approaches to hearings or first day orders," *id.*, specifies no legal basis for these differences. His substantive law examples of "the breadth of the preference provisions" and "whether secured creditors have a security interest in rents," *id.*, ignore that (1) even though Delaware law might differ from the law of other states on these points, they are points on which Delaware conflicts rules likely would specify the application of the same law that the conflicts rules of other states would specify, and (2) there has been no suggestion that either of these state-to-state differences has ever prompted anyone to file a bankruptcy case in Delaware. Skeel's examples of approving postpetition financing or granting extensions of exclusivity, see *id.*, involve the interpretation and application of specific provisions of the Bankruptcy Code. The Delaware bankruptcy court would be required to follow federal law on these matters.

of forum shopping is to obtain or avoid the assignment of particular judges than it is to demonstrate the same in other contexts. The business of the bankruptcy courts is narrow and repetitive, allowing strategically minded lawyers to compare more easily the decisions and practices of one judge with those of another. When these lawyers express their preferences through forum shopping, they create the pattern that this Article documents.¹⁹ Strategically minded lawyers would have more difficulty discovering and comparing the views of judges who sit on courts of general jurisdiction and confront a much wider range of issues. These lawyers therefore would be less likely to have the knowledge base necessary to shop for nonbankruptcy judges in different jurisdictions.

II

METHODOLOGY

Documenting and explaining the pattern of forum shopping requires systemic data collection. This Part describes the case selection process, the data sources, and the protocols that assured comparable data across cases.

A. Case Selection

This study includes all Chapter 11 bankruptcy cases²⁰ in the

¹⁹ Bankruptcy courts are specialized, yet they have a volume of cases more than four times that of the district courts. Thus, at any given time, highly similar cases are proceeding in different bankruptcy courts, inviting comparison. Beginning with studies in the 1920s by then Yale Law Professor William O. Douglas, empirically minded legal scholars have made comparisons on numerous occasions, time and again showing wide differences in outcomes from court to court and judge to judge. See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993); LoPucki & Whitford, *supra* note 1, at 34-38; Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 841-47 (1994).

Highly permissive bankruptcy venue rules also contribute to the current difficulties. They permit the filer to choose among (1) the debtor's domicile or residence, which for a corporation is its jurisdiction of incorporation; (2) the debtor's principal place of business; (3) the location of the debtor's principal assets in the United States; or (4) any court in which a bankruptcy case is pending against the debtor's affiliate, general partner, or partnership. See 28 U.S.C. § 1408 (1994).

²⁰ Large, public companies are almost invariably corporate groups that include several entities under common ownership. Rarely do all of the companies in a corporate group file bankruptcy. This study includes every case of sufficient size in which at least one 10-K filing entity filed bankruptcy in a bankruptcy court in the United States.

If the bankruptcy cases of several members of a corporate group were pending before the same court at the same time, and the cases resulted in the confirmation of a single plan of reorganization, the cases together constitute one case for the purposes of this study. Ordinarily, this occurred only when the cases were consolidated, administratively or substantively.

United States by or against companies²¹ that were, at the time of filing, publicly held²² with assets worth at least \$100 million²³ in 1980 dollars.²⁴ This study limits the universe to public companies because of the difficulty in obtaining information about private companies. It limits the universe to companies with assets of \$100 million or more in 1980 dollars for three reasons. First, the dynamics of large and small

²¹ This study uses financial data for the entire corporate group, even in cases in which only part of the group filed for bankruptcy. It does so in part because public companies almost invariably disclose financial information only for groups, not for each entity within a group. Use of the group data, however, is probably appropriate for most purposes. When subsidiaries fail to follow their parents into bankruptcy, it is often only because creditors are not pushing them.

²² The standard for determining whether a company is public or private for the purposes of this study is whether the company is within the category of firms required to file a Form 10-K with the SEC. Generally speaking, firms must file 10-Ks—annual reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1994)—if they have (1) securities listed on a national securities exchange, (2) securities registered under section 12(g) of the Exchange Act, or (3) a registration statement that has become effective under the Securities Act of 1933.

Information on 10-Ks comes from LEXIS (source: SEC Form 10-K). If the company filed 10-Ks for its fiscal years ending immediately prior and immediately subsequent to its bankruptcy filing, this study categorizes it as a public company. If the company did not appear in the LEXIS database (which includes EDGAR) and the case was not on the SEC's "Public Companies" list of bankruptcy filings, we excluded the case from our study. If the company made some filings with the SEC, but did not file 10-Ks for both the year before and the year after filing bankruptcy, we investigated the circumstances. This study includes those companies that had not filed 10-Ks after filing bankruptcy because they were liquidated in the bankruptcy case and those companies that did not file 10-Ks after filing bankruptcy because they went private after filing. This study excludes companies that did not file 10-Ks because they went private shortly before the filing of the bankruptcy case, even if they continued to make filings other than 10-K filings after going private. It further excludes those companies that did not file a 10-K for the three years prior to bankruptcy and did not file a 10-K during bankruptcy.

One effect of this criteria was to exclude from the study most filings in the United States by public companies based outside the United States. Unless those companies sell securities in the United States, they need not file 10-Ks.

²³ This study includes a company if its assets reached this benchmark according to either of two sources: (1) the schedules that the debtor filed in the bankruptcy case, or (2) the last 10-K that the company filed prior to bankruptcy, provided it was for a year ending within the year prior to bankruptcy. This study determines the assets scheduled in the bankruptcy case from several sources. First, in the absence of conflicting information, we accepted the amount on the SEC Public Companies list as correctly reflecting the schedules. For the few cases for which the SEC listed two different numbers, we used the latter of the two. Second, we accepted accounts of the assets at filing that reputable news publications reported. Third, in a few cases we consulted the schedules that the debtor had filed with the court. Regardless of the source, we sought to discover the total scheduled assets of all entities that were part of the corporate group.

²⁴ To adjust dollar amounts to a common scale, 1980 dollars, we used the Consumer Price Index-All Urban Consumers, base period 1982-84. See *Consumer Price Indexes* (last modified Mar. 18, 1999) <<http://stats.bls.gov/cpihome.htm>>. Based on that source, companies with assets equal to or in excess of \$100 million in 1980 and approximately \$190 million in 1996 qualified for inclusion. Of course, the cutoff amount falls between these two numbers for years between 1980 and 1996.

reorganization cases differ sufficiently to require separate study.²⁵ It is unlikely that small firms can shop to New York or Delaware courts as easily or as frequently as large firms. Second, limiting the study to large cases assures a universe of manageable size. Finally, each large case is itself of considerable economic significance.

B. Variable Definitions and Data Sources

This study gathered data from several sources. To insure comparable data across cases, the study employed a set of protocols describing acceptable data sources and defining the data that the study would collect.²⁶

1. *Defining Forum Shopping*

The key variable studied is forum shopping. We define a "forum shop" or "shop" as the filing of a case in a court other than that which serves the location of the debtor's chief executive office.²⁷ We consider filings in non-chief executive office cities to be "shops" because that venue is less convenient for the debtors' executives than the city containing the chief executive office.²⁸

Theoretically, one might define forum shopping with reference to the debtor's place of incorporation or to the location of its principal assets or operations, rather than only the location of its chief executive office.²⁹ The debtor's place of incorporation, however, has no commercial significance.³⁰ Determining the location of the debtor's

²⁵ For a comparative discussion of large and small reorganization cases, see Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 Wis. L. Rev. 729, 749-56. The National Bankruptcy Review Commission since has recommended that Congress reinstate separate procedures for large and small cases. See COMMISSION REPORT, *supra* note 3, at 25-32 (Small Business Proposals).

²⁶ In nearly all instances, research assistants gathered the data, photocopied the original source, and entered the data. In all instances, however, one of us checked the entry against the original source for accuracy and decided whether the source was acceptable. As we encountered ambiguities, we revised the protocols and, when necessary, rechecked the prior entries to ensure that they complied with the revised protocols.

²⁷ Bankruptcy cases may commence in the district of the debtor's "domicile, residence, principal place of business . . . or principal assets," or the district "in which there is pending a case under [the Bankruptcy Code] concerning such person's affiliate." 28 U.S.C. § 1408 (1994).

²⁸ See, e.g., Skeel, *supra* note 8, at 36 (stating that "the managers of a firm have a significant incentive to avoid venues that are inconvenient to the firm's headquarters").

²⁹ See 28 U.S.C. § 1408 (listing possible filing locations).

³⁰ The persons, organizations, and interests that bear the effects of the reorganization have no greater tendency to be located in a place simply because it is the place of incorporation. The state of incorporation for the purpose of this study is the state listed on a company's Form 10-K for the period ending closest to the date of the filing of the bankruptcy petition. This study determined the states of incorporation for other members of the corporate group from an exhibit to the company's 10-K filings or annual reports. It considered a company to be a member of the group for this purpose only if the parent owned at least 50% of the outstanding voting stock. It assumed that the parent owned at

principal assets or operations requires both artificial definitions and data not readily available for most public companies. Further, excluding filings at the location of the debtor's principal assets or operations from the definition of forum shopping likely made little difference. Filings rarely occurred in a city in which the debtor had its principal assets or operations but not its headquarters.³¹

2. *Measuring Case-Processing Time*

To measure case-processing time, we use the time between the bankruptcy filing and the entry of an order confirming the plan or otherwise disposing of the case.³² To investigate other scholars' assertions that faster processing time is the primary factor explaining forum shoppers' attraction to Delaware, one must account for important pre-filing differences between Delaware and non-Delaware filings that affect case-processing time regardless of forum. The principal difference that affects case-processing time is "prepackaging." In a prepackaged case, the debtor proposes the plan and obtains the agreement of creditors before filing the reorganization case.³³ Cases with prepackaged plans, on average, proceed to confirmation more quickly³⁴ and more surely³⁵ than other cases. In accord with general usage, we consider a plan "prepackaged" if prior to filing the petition, the debtor drafted the plan and disclosure statement, distributed them to impaired classes of creditors, and won their acceptance by the majorities necessary for confirmation.³⁶ Unless the court found some fault with the voting thus conducted, no negotiation or voting was necessary during the Chapter 11 case.³⁷ The court could proceed directly to considering the plan for confirmation.

Some debtors negotiated the terms of their plan with key creditors or their representatives prior to bankruptcy, but did not solicit usable votes prior to filing or did not solicit them from all impaired

least 50% if the company appeared in the list of subsidiaries and the list did not contain information to the contrary.

³¹ Most forum shoppers filed in New York or Delaware; debtors rarely had substantial operations in either jurisdiction. See *infra* Part III.A.

³² The filing dates came from a variety of sources including newspapers, bankruptcy services, SEC filings, reported opinions, and court dockets on PACER. Generally, we confirmed the dates by more than one source. If members of the corporate group filed on different days, but the filings were later consolidated, this study used the date of the first filing.

³³ See Delaware Bar Report, *supra* note 5, at 18 n.39.

³⁴ See *infra* Table 1.

³⁵ None of the 41 prepackaged cases in the study resulted in dismissal or conversion to Chapter 7; nine of the 224 nonprepackaged cases for which disposition is known (4%) were dismissed or converted to Chapter 7.

³⁶ See, e.g., Delaware Bar Report, *supra* note 5, at 18 n.39.

³⁷ See 11 U.S.C. § 1126(b) (1994) (providing for the use of votes properly solicited prior to the filing of the Chapter 11 case).

creditor classes. In accord with the general usage of the term, we consider these plans "prenegotiated" rather than prepackaged.³⁸ Probably for public relations purposes, the debtors who filed these plans sometimes characterized them as "prepackaged" to suggest that the cases would proceed quickly or that obtaining the remaining votes constituted a mere technicality.

In the absence of a claim by the debtor, at or prior to filing, that key creditors already had agreed to the terms of a specific plan, we considered the plan "unnegotiated." Of course, the parties negotiated plans after the filing of the petition in many of these "unnegotiated" cases.

3. *Categorizing Case Outcomes*

To explore whether forum affects case outcomes, this study divides case outcomes into five categories: (1) "confirmed" if the court confirmed a plan; (2) "dismissed" if the court dismissed the case without confirmation of a plan; (3) "converted" if the court converted to Chapter 7 for liquidation without confirming a plan; (4) "§ 363 sale" if the debtor sold all or substantially all of the assets during the Chapter 11 case without the prior confirmation of a plan; and (5) "pending" if the court did not confirm any plan and the case remained under Chapter 11 as of August 27, 1998. Courts may have dismissed or converted a case, or even confirmed a plan, after the sale of all or substantially all of the debtor's assets. Any post-sale dispositions of those cases, however, were of little consequence and we ignored them.

III

DESCRIBING TRENDS IN FORUM SHOPPING, CHAPTER 11 CASE-PROCESSING TIMES, AND PREPACKAGED CASES

No precise description exists of the pattern of forum shopping in big bankruptcy reorganizations. This Article supplies that description and then suggests why the description undermines conventional explanations for Delaware's popularity.

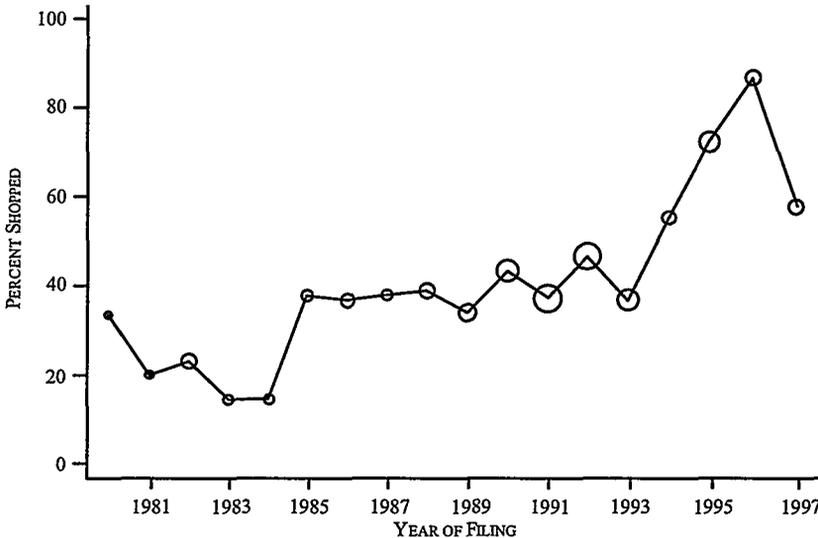
A. The Level and Time Trend of Forum Shopping

By any reasonable measure, the rate at which large corporations file Chapter 11 cases at locations distant from their headquarters is high. One hundred twenty-two of the 284 cases studied (43.0%) were filed in a court located in a jurisdiction different from the jurisdiction where the company maintained its chief executive office at the time of filing.

³⁸ See Delaware Bar Report, *supra* note 5, at 18 n.39.

Forum shopping is not only prevalent, it has been increasing. Figure 1 shows the rate of forum shopping from 1980 to 1997. The center of each circle indicates the rate of forum shopping for the year; the area of each circle indicates the relative number of filings in that year.³⁹

FIGURE 1
RATE OF FORUM SHOPPING OF LARGE CHAPTER 11
REORGANIZATION CASES BY YEAR: 1980-1997



NOTE: The center of each circle indicates the rate of forum shopping for the year; the area of each circle indicates the relative number of filings in the year.

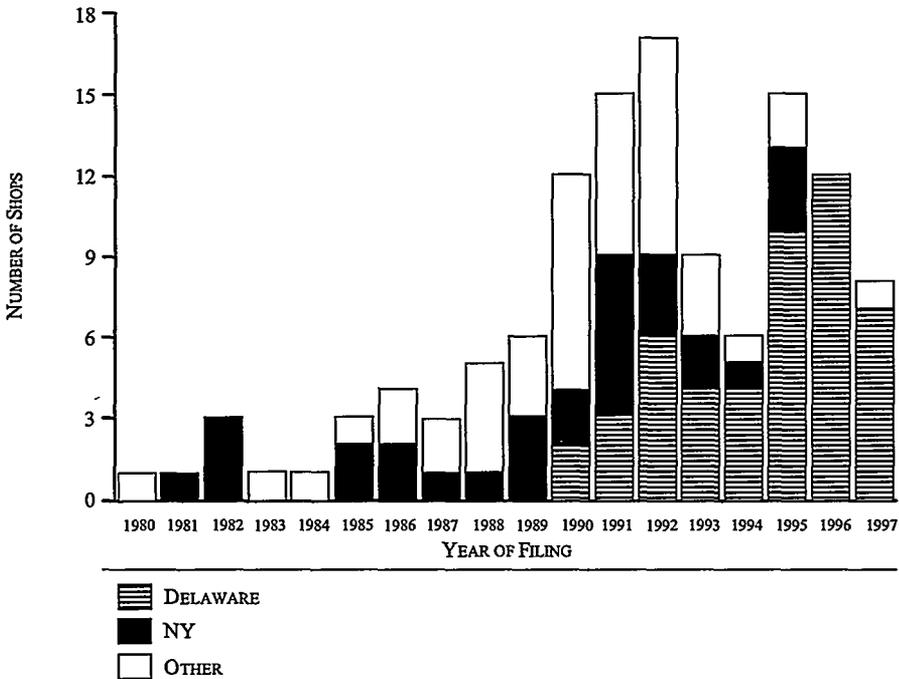
The already low rate of forum shopping declined from 1980 to 1984. The rate jumped in 1985 to about 40% of large Chapter 11 filings and remained at that level through 1993, despite large changes in the number of filings from year to year. From 1994 to 1996, the rate climbed sharply to 86%. The rate fell in 1997, but remains at historically high levels. Forum shopping in large cases has reached the point at which it is the rule rather than the exception.

Strong geographical tendencies exist. Figure 2 divides into three categories the courts to which cases were shopped: Delaware, New York, and all other cities. The historical pattern of forum shopping exhibits three phases. From 1980 to 1989, the cumulative number of shopped cases split almost evenly between New York with thirteen (46.4%) and all other cities with fifteen (53.6%). From 1990 to 1993, the shopped cases split almost evenly between Delaware and New York, with a combined total of twenty-eight cases (52.8%), and all other cities, with twenty-five cases (47.2%). Between Delaware and

³⁹ For example, the greatest number of large Chapter 11 filings occurred in 1991.

New York, Delaware led slightly with fifteen filings to New York's thirteen. In the third phase, from 1994 to the present, Delaware has been the dominant destination for forum shopping with thirty-three cases (82.5%). New York has had four (10.0%), and all other cities have had only three (7.5%). Thus, Delaware currently dominates forum shopping to a degree that New York never has.

FIGURE 2
NUMBER OF LARGE CHAPTER 11 CASES SHOPPED, BY
SELECTED DISTRICTS: 1980-1997

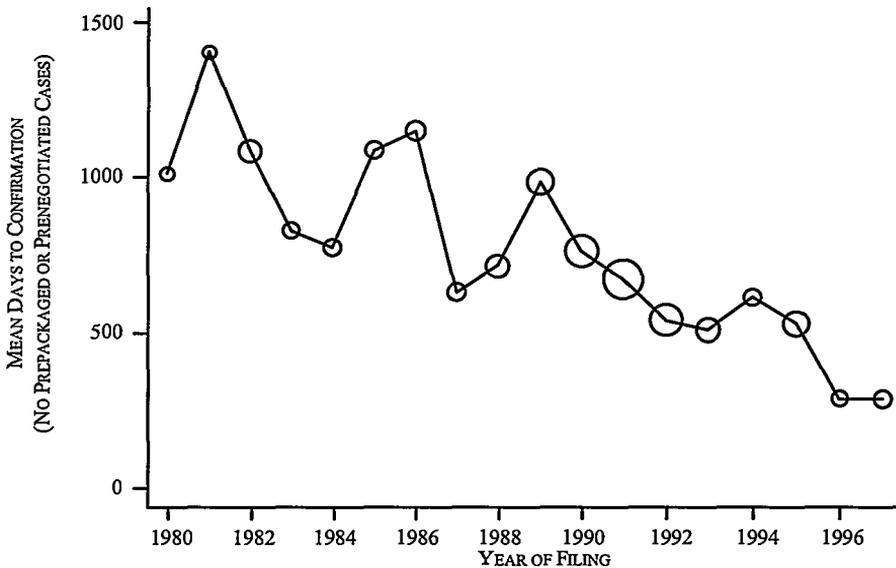


B. Decreasing Case-Processing Times, Increasing Prepackaged Bankruptcies

The increase in forum shopping occurred against a background of changing case-processing times. Because processing time plays a role in explaining forum shopping, it is helpful to describe the processing-time pattern before analyzing forum shopping. This processing-time pattern is itself complicated by increasing use of prepackaged bankruptcies, which reduces case-processing time. Figure 3 shows processing times for unnegotiated bankruptcies, and Figure 4 then describes the increasing use of prepackaged filings.

Figure 3 shows, by year, the mean time to confirmation or sale of assets for all unnegotiated cases.⁴⁰ The trend, especially since 1989, is toward faster case processing.⁴¹ Delaware has a higher proportion of recent filings than other courts. Because recent processing times are faster generally, Delaware might have a faster mean-processing time even if, at any given time, it processed cases at the same pace as other courts.⁴²

FIGURE 3
MEAN TIME TO TERMINATION, LARGE CHAPTER 11 CASES BY
YEAR: 1980-1997



NOTE: The center of each circle indicates the Mean number of days to confirmation; the area of each circle indicates the relative number of filings in the year.

Figure 4 shows the numbers of prepackaged, prenegotiated, and unnegotiated filings in each year from 1980 to 1997. Two debtors filed prepackaged plans in 1986, but the next prepackaged filing did not take place until November 1990. Since 1992, 28.3% (34 of 120) of the filings have been prepackaged. Prenegotiated filings have occurred at lower rates. Prenegotiated plans, like prepackaged plans,

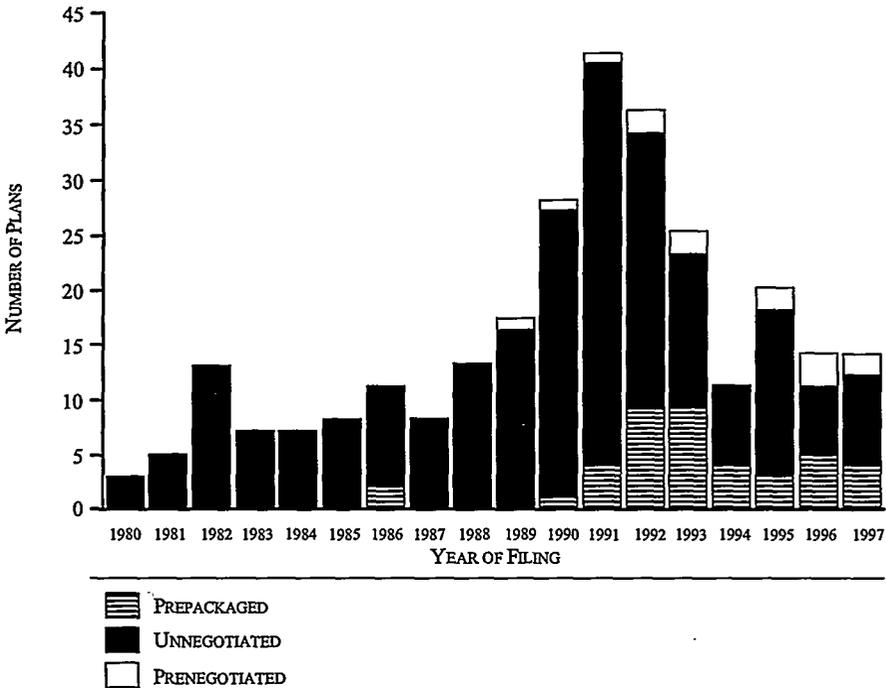
⁴⁰ Section 363 of the Bankruptcy Code authorizes the sale of all or part of a debtor's assets. See 11 U.S.C. § 363(b)(1) (1994). The study treats a sale of substantially all of the assets as the functional equivalent of a reorganization.

⁴¹ Bermant and Flynn suggest that the trend toward faster processing of Chapter 11 cases extends beyond cases involving large, public companies. See Gordon Bermant & Ed Flynn, *Outcomes of Chapter 11 Cases: U.S. Trustee Database Sheds New Light on Old Questions*, AM. BANKR. INST. J., Feb. 1998, at 8, 32 (reporting a decline in the time interval from filing to confirmation for Chapter 11 cases of all sizes nationwide).

⁴² See *infra* Part IV.B.

are a recent phenomenon that began at about the same time that bankruptcy filings shifted to Delaware.

FIGURE 4
NUMBER OF LARGE CHAPTER 11 CASES BY YEAR: 1980-1997



Prepackaged and prenegotiated cases exhibited higher forum-shopping rates than unnegotiated cases. Among the fifty-eight prepackaged or prenegotiated cases in the study, thirty-three filings occurred in bankruptcy courts that did not serve the cities of the debtors' chief executive offices—a forum-shopping rate of 56.9%. Among the 226 other cases, eighty-nine (39.4%) were filed in a court other than that serving the city in which the corporation's chief executive office was located. The difference in shop rates between unnegotiated and other cases is significant at the .018 level.⁴³

⁴³ By convention, the hypothesis tested is called the "null hypothesis." See GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, *STATISTICAL METHODS* § 5.1 (8th ed. 1989). The reported significance level is the probability of rejecting the null hypothesis when it is true. That is, the significance levels provide an inverse measure of the likelihood that the difference in shopping rates between unnegotiated and other cases shows a real relation rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the difference if the tested hypothesis (i.e., that no difference exists) were true. See *id.* § 5.2, at 65. By arbitrary convention, results that are significant at or below the .05 level are described as statistically significant. See, e.g., *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* § A.2, at 196-97 (Stephen E. Fienberg

All but two of the prepackaged filings in the study, however, were filed during or after 1990,⁴⁴ when the overall rate of forum shopping was considerably higher than during the earlier period. This circumstance raises the possibility that shopping rates among prepackaged cases appear high only because shopping rates were high at the time of those filings. In fact, the rate of forum shopping for prepackaged cases has remained higher than the rate for nonprepackaged cases during the period since 1991. From 1991 to 1997, forum shopping occurred in thirty-one of fifty-two prepackaged or prenegotiated cases (59.6%), while shopping occurred in only fifty-one of 111 unnegotiated cases (45.9%). Thus, after 1990 the unnegotiated case-shopping rate was lower than the prepackaged and prenegotiated case-shopping rate. The difference, however, is significant only at the .131 level.⁴⁵ For this period, consequently, one cannot reject the hypothesis that prepackaged or prenegotiated cases are no more likely to be shopped than other cases.

Figure 5 explores the relation between the rise in prepackaged cases and the rise in forum shopping. It shows the changes over time in the forum-shopping rates for prepackaged and prenegotiated cases and for unnegotiated cases. The figure charts filings beginning with 1991 because only a few prepackaged filings occurred prior to 1991. The figure shows that the rate of forum shopping has increased for both kinds of cases over time. That is, the rates of shopping were higher from 1995 to 1997 than from 1991 to 1993. The principal difference in the movement of the two rates occurred in 1994 when the rate for prepackaged or prenegotiated cases rose sharply while the rate for unnegotiated cases fell. The overall similarity in the magnitude and direction of movement of the two rates suggests that similar causes drive both rates.

IV

EXPLAINING FORUM-SHOPPING TRENDS

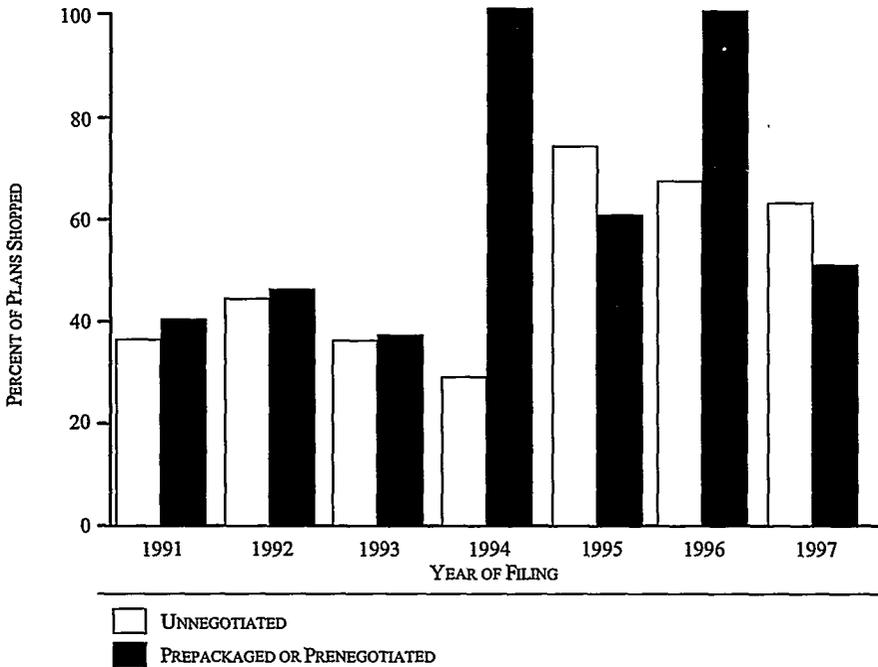
Several trends in large Chapter 11 cases—the increase in forum shopping, the increase in Delaware filings, the reduction in case-processing times, and the increase in prepackaged bankruptcy filings—have coincided. The coincidence of these trends makes it difficult to identify separate causes for Delaware's ascension as the forum of choice. Some scholars have attempted to explain the shift to Delaware as a response to what they perceive as Delaware's greater effi-

ed., 1989). The significance level reported in the text is based on Fisher's exact test. For a discussion of the benefits of Fisher's exact test over a chi-squared significance test, see ALAN AGRESTI, ANALYSIS OF ORDINAL CATEGORICAL DATA 11 (1984).

⁴⁴ See *supra* Figure 4.

⁴⁵ This is based on Fisher's exact test. See AGRESTI, *supra* note 43.

FIGURE 5
RATE OF FORUM SHOPPING OF LARGE CHAPTER 11 CASES BY
PREPACKAGED STATUS: 1980-1997



ciency in handling prepackaged bankruptcies or large Chapter 11 cases in general.⁴⁶ The true story is in some ways simpler and in other ways more complex.

Delaware may not have attracted forum shoppers so much as the changing situation in New York repelled them. Once forum-shopping debtors began filing in Delaware, more followed. Something about Delaware attracts forum shoppers, but identifying that something is not easy. In contrast to explanations of the Delaware Bar and some academics, this study finds no robust evidence in the pattern of filings or processing times that suggests Delaware offers a more efficient forum for resolving large Chapter 11 cases, whether or not they are prepackaged.

A. The Shift from New York to Delaware

Figure 2 shows that New York was the principal destination for big-case forum shopping through the 1980s. Two events in 1988 ap-

⁴⁶ See, e.g., Skeel, *supra* note 8, at 28 (stating that "Delaware has successfully addressed the single biggest problem with Chapter 11 in recent years—the inordinate time and expense of the reorganization process"); Robert K. Rasmussen & Randall S. Thomas, *Improving Corporate Bankruptcy Law Through Venue Reform* 23-26 (1997) (unpublished manuscript, on file with author).

pear to have contributed to the shift to Delaware. Despite the existence of a random draw in the bankruptcy clerk's office, large New York bankruptcy reorganizations in the early 1980s tended to gravitate to Bankruptcy Judge Burton R. Lifland.⁴⁷ Debtors may have viewed an assignment to Judge Lifland as desirable both because he had more experience than any other judge in bankruptcy reorganizations of large, public companies and because he had a reputation for being pro-debtor and pro-reorganization.⁴⁸ In January 1988, the New York court changed its random assignment system so that the Administrative Office of the United States Courts in Washington would generate the random element.⁴⁹

In that same year, Judge Helen S. Balick, the only bankruptcy judge in the District of Delaware, ruled that a corporation's "residence or domicile" for venue purposes was at its place of incorporation.⁵⁰ The decision might have encouraged large, corporate debtors to file

⁴⁷ LoPucki and Whitford's data show that Judge Lifland adjudicated seven of the 13 New York cases in their study. See LoPucki & Whitford, *supra* note 1, at 31 n.66. Our investigation shows that he in fact signed the confirmation orders in eight of the 13. The number of judges in the New York bankruptcy court at the time of the draw of these cases averaged between four and five. This number derives from the judges' terms in office, as furnished to us by the Administrative Office of the U.S. Courts. The probability of one judge drawing seven or more of 13 cases in a random draw among five judges is about .007. The probability of one judge drawing eight or more of 13 cases in a random draw among five judges is about .001. The probabilities of such concentrations of cases (seven of 13 or eight of 13) occurring in a random draw among four judges are about .024 and .006, respectively. From 1980 through 1987, Judge Lifland adjudicated nine of 18 large cases. The probability of such a draw among five judges is about .004. The probability of such a draw among four judges is about .019. The probabilities would be larger if one tests the hypothesis that any judge, not just Judge Lifland, would have drawn so many cases.

Recusals, variation in the number of active judges, and the need to account for reassigned cases make these calculations inappropriate for questioning the randomness of initial case assignments. The important point for the purposes of this Article is that the cases tended to gravitate to one judge and that this circumstance was probably widely known among the big-case bankruptcy lawyers. See Amy Dockser, *Chief Judge, Veteran of Big Cases, Gets Airline's Chapter 11 Petition*, WALL ST. J., Mar. 10, 1989, at A10.

⁴⁸ See Lawrence A. Weiss & Karen H. Wruck, *Information Problems, Conflicts of Interest, and Asset Stripping: Chapter 11's Failure in the Case of Eastern Airlines*, 48 J. FIN. ECON. 55, 62 (1998); see also Seth Lubove, *A Bankrupt's Best Friend*, FORBES, Apr. 1, 1991, at 99, 102 (charging that "Lifland's pro-debtor reputation is so widespread that companies which want to stiff their creditors are known to 'forum shop' to get their cases before him"). The Manhattan office of the bankruptcy court reportedly implemented a computerized random assignment system "to avoid any appearance of impropriety." Dockser, *supra* note 47 (quoting a New York bankruptcy court clerk).

⁴⁹ See Dockser, *supra* note 47.

⁵⁰ See *In re Ocean Properties of Del., Inc.*, 95 B.R. 304, 305 (Bankr. D. Del. 1988). Judge Balick's decision in *Ocean Properties* rested on earlier authority. See *In re Hudson River Navigation Corp.*, 59 F.2d 971, 973 (2d Cir. 1932) ("This bankrupt, being a Delaware corporation, had its residence and domicile in that state."); see also *In re Hudik-Ross Co.*, 198 F. Supp. 695, 698 (S.D.N.Y. 1961) (rejecting an application to transfer away from the state of domicile), *aff'd*, *Hackensack Plumbing Supply Co. v. S.O.S. Sheet Metal Co. (In re S.O.S. Sheet Metal Co.)*, 297 F.2d 32 (2d Cir. 1961). That authority, however, was under earlier statutes.

in Delaware. Since early in the twentieth century, Delaware had established itself as the jurisdiction of choice for the incorporation of large, public companies.⁵¹ Delaware won that status initially by routinizing the process of incorporation. It continued its dominance by adopting corporate laws that favor corporate promoters and management and by providing a competent, experienced judiciary to oversee the application of these laws. Thus, providing amenable legal structures for large, public companies already had become one of Delaware's largest industries. Eighty-nine percent of the large, public companies that filed for bankruptcy reorganization from 1980 to 1997 were incorporated or had a subsidiary that was incorporated in Delaware.⁵² Judge Balick's ruling confirmed that Delaware was a proper venue for all these companies. Under a contrary ruling, Delaware would have been a proper venue for fewer than 1% of them.⁵³

The shift to Delaware as the preferred destination for big-case forum shopping began in the last two months of 1990 with the filing of the *United Merchants & Manufacturers* and *Continental Airlines* cases.⁵⁴ The proportion of large, public bankruptcy filings that involved forum shopping remained stable at about 40% through 1993, but Delaware's proportion of filings grew swiftly during that period. From 1994 to 1996, the proportion of cases involving forum shopping increased sharply, and Delaware assumed dominance. In 1996, twelve of fourteen large, public companies that filed for bankruptcy reorganization (85.7%) did so in Delaware.

⁵¹ See *supra* note 11 and accompanying text.

⁵² Of the 279 10-K filing corporations in this study, 184 (65.9%) were incorporated in Delaware. Of the remaining 95 corporations, 45 had Delaware corporations in their corporate group, 29 did not, and this study had incomplete information on the remaining 21. Thus, of the 258 companies for which data were available, at least 229 (88.8%) were incorporated in Delaware or had Delaware corporations in their corporate group.

Having a Delaware corporation in the group is significant because a corporation is eligible to file in a district in which there is pending a case concerning the corporation's affiliate. See 28 U.S.C. § 1408(2) (1994). Using this provision, bankruptcy lawyers have developed the strategy of first filing the case of an eligible subsidiary in the district, and then, based on the proper venue thus obtained, filing the case of the parent in the same district. Examples of the use of this strategy include *Eastern Airlines*, *LTV*, and *Wickes Corporation*. The Eastern Airlines Group filed cases numbered 89B 10448 and 10449 (BRL) on March 8, 1989, and the LTV group filed cases numbered 86B 11270 through 86B 11334 (BRL) on July 17, 1989, both in the Southern District of New York, Manhattan Division. The Wickes Companies filed cases numbered LA-82-06657WL through 663WL, 06665WL, 06933WL through 06935WL, and 07139WL through 07144WL on April 24, 1982 in the Central District of California, Los Angeles Division.

⁵³ Only two of 284 companies in this study (0.7%) were headquartered in Delaware; probably no additional companies in this study had their principal assets in Delaware.

⁵⁴ The United Merchants and Manufacturers group filed cases numbered 90-827 to 90-829 on November 2, 1990, and Continental Airlines group filed cases numbered 90-932 to 90-984 on December 3, 1990, both in the District of Delaware.

The clearest evidence that forum shopping into Delaware had reached disturbing levels came from Chief Judge Joseph J. Farnan, Jr. of the Delaware District Court. Effective February 3, 1997, Chief Judge Farnan took the unprecedented step of withdrawing the automatic reference of Delaware bankruptcy cases to the bankruptcy court and personally taking over the assignment of Chapter 11 case filings in Delaware.⁵⁵ The only reason he gave for doing so—that “a significant increase in the number of bankruptcy cases has occurred and that it is appropriate and necessary that judges of the district court participate in the handling of such cases”⁵⁶—was factually incorrect. The number of Chapter 11 filings in Delaware actually had decreased from 242 in 1995 to 209 in 1996,⁵⁷ the dockets were moving rapidly, and the bankruptcy judges had not asked for any assistance.⁵⁸ More likely, Judge Farnan’s purpose was to reduce concerns regarding the significant shift of forum shopping to Delaware.⁵⁹

Judge Farnan’s order immediately interrupted the filing of big public cases for more than five months—not just in Delaware but throughout the entire United States. With the exception of a case filed in Dallas four days after the effective date, no large, public company filed for bankruptcy reorganization from the effective date of Judge Farnan’s order until July 7 of that year.⁶⁰ When filing resumed, the proportion of cases involving Delaware forum shopping fell to 50%.⁶¹ In October 1997, the National Bankruptcy Review Commission finalized its tentative recommendation to eliminate venue at the

⁵⁵ See Order Regarding Referral of Title 11 Proceedings to the United States Bankruptcy Judges for this District (Jan. 23, 1997), reprinted in BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Feb. 4, 1997, at A1, A8.

⁵⁶ *Id.*

⁵⁷ See NEW GENERATION RESEARCH, INC., THE 1997 BANKRUPTCY YEARBOOK & ALMANAC 17, 21 (Christopher M. McHugh ed., 7th ed. (1997)).

⁵⁸ Chief Bankruptcy Judge Helen Balick announced her resignation shortly after Judge Farnan’s order. See *Judge Balick to Retire*, BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Nov. 18, 1997, at A1. She stated that it was for health reasons and not in response to Judge Farnan’s order. See *Morris and Judge Balick Respond to Professors’ Forum Shopping Study*, BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, May 12, 1998, at A3, A4; see also *Professor LoPucki Responds to Clerk of Court Cecelia Morris and Judge Balick*, BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Nov. 17, 1998, at A3 (responding, point by point, to the May 12, 1998 article).

⁵⁹ See Skeel, *supra* note 8, at 34 (suggesting that Judge Farnan “cleverly preempted federal legislation by, in effect, saying ‘we get the message’”). An alternative explanation is that Delaware was at risk at that time of losing one of its district judgeships. Judge Farnan may have seen the bankruptcy caseload as a possible justification for retaining this judgeship.

⁶⁰ See Lynn M. LoPucki, Bankruptcy Research Database (last modified 1998) (on file with authors).

⁶¹ From July 1997 to December 1997, 10 large, public companies filed for bankruptcy reorganization in the United States. Five of those cases forum shopped into Delaware. See *id.*

debtor's place of incorporation.⁶² The Commission, incredibly, assured its readers that the recommendation "is not directed at the bankruptcy courts in the Southern District of New York, those in Delaware, or in any other specific bankruptcy venue."⁶³

The Delaware State Bar Association challenges the existence of a massive shift of forum shopping to Delaware. The *Report of the Delaware State Bar Association to the National Bankruptcy Review Commission in Support of Maintaining Existing Venue Choices* notes that about 80% of companies incorporated in Delaware file Chapter 11 proceedings in non-Delaware venues⁶⁴—arguably an 80% rate of forum shopping out of Delaware. This argument makes sense only if one accepts the premise that incorporation in a state is a sufficiently significant tie to make the state an expected bankruptcy venue from which one should measure forum shopping. We attach no such significance to place of incorporation. Instead, we measure forum shopping from the location of the company's headquarters. Filing outside the district or city of headquarters generally indicates that company executives are willing to incur extra trouble and expense.⁶⁵ No such implication attaches to filing away from the company's place of incorporation.⁶⁶

B. Delaware's Comparative Speed in Processing Cases

The argument that Delaware more efficiently processes large bankruptcies rests heavily on its allegedly faster case-processing time.⁶⁷ Differences in case-processing times do influence forum choice.⁶⁸ If

⁶² See COMMISSION REPORT, *supra* note 3, at 35 (recommending section 3.1.5, which would amend "28 U.S.C. § 1408(1) . . . to prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where that district is located").

⁶³ *Id.* at 779.

⁶⁴ See Delaware Bar Report, *supra* note 5, at 19.

⁶⁵ See Skeel, *supra* note 8, at 36; *infra* notes 99-100 and accompanying text.

⁶⁶ The Delaware Bar's Report, however, does highlight an interesting contrast between forum shoppers who file in Delaware and shoppers who file in New York. Companies not incorporated in Delaware rarely file in that state. Only three of 50 cases in Delaware (6%) were filed by debtors not incorporated in that state. In contrast, 47 of 55 cases in New York (85%) were filed by debtors not incorporated in that state. More significantly, the Form 10-Ks that 12 of those 55 debtors (22%) filed show no basis for venue in New York. That is, the debtor is incorporated outside New York, has its headquarters outside New York, and does not list New York as one of the places where any member of its group owns property. Three additional debtors that otherwise would be includable with the 12 did not provide complete lists of states in which they owned property. It is unclear whether any of the three owned property in New York at the time they filed. It appears that cases are more likely to be improperly venued in New York.

⁶⁷ See *supra* note 46 and accompanying text.

⁶⁸ See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1147-48 (1992) (explaining that litigants seek faster processing time when choosing between judge and jury trials).

efficiency attracts debtors, then the shift of forum shopping to Delaware indicates convenience shopping rather than judge shopping.

LoPucki and Whitford have noted that some debtors seek speedy reorganizations.⁶⁹ The direct expenses of reorganization are significant and depend in part on case-processing time.⁷⁰ The indirect expenses of reorganization—the damage it does to relations with customers, suppliers, employees, and others—are probably also a function of the time that Chapter 11 proceedings remain pending. In general, a quicker reorganization is a less expensive reorganization. If Delaware offers reliably faster reorganization, this speed could explain its attractiveness to debtors and creditors.

To explore the relation between case-processing time and forum, we compare processing times in New York, Delaware, and other locales. Because processing times are generally shorter after 1989 than from 1980 to 1988, and because the Delaware court processed only one case from 1980 to 1988, we limit our comparison to filings after 1989.⁷¹

Table 1 shows the number of days that elapsed between the filing and confirmation for unnegotiated and prepackaged cases filed after 1989.⁷² The table omits prenegotiated cases because the number of these cases is too small to generate a meaningful comparison. The data show meaningful differences in processing time between Delaware and New York. The mean unnegotiated case took 510 days in

⁶⁹ See Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 147 (1990) (discussing companies that pressed to emerge from reorganization to preserve tax attributes); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 749 n.256 (1993) (describing companies that pressed to emerge from reorganization so that they could begin making acquisitions).

⁷⁰ The only empirical study to address the relation between time and cost deals with ordinary Chapter 7 cases rather than large Chapter 11 cases. See Robert M. Lawless & Stephen P. Ferris, *Professional Fees and Other Direct Costs in Chapter 7 Business Liquidations*, 75 WASH. U. L.Q. 1207, 1230-31 (1997) (reporting that time in bankruptcy is a significant determinant of administrative costs). For evidence about reorganization costs, see Brian L. Betker, *The Administrative Costs of Debt Restructurings: Some Recent Evidence*, FIN. MGMT., Winter 1997, at 56.

⁷¹ Table 1 excludes cases pending at the time of this writing. As of this time, all cases that debtors filed in 1994 and earlier have reached disposition. Three cases that debtors filed in 1995 remain pending. The Bradlees group filed cases numbered 95 B 42777-42784 (BRL) on June 23, 1995, and Caldor Corporation filed case number 95 B 44080 (JLG) on September 18, 1995, both in the Southern District of New York, Manhattan Division. Dow Corning Corporation filed case number 95 20512 on May 15, 1995 in the Eastern District of Michigan, Bay City Division. Three cases remain pending from 1996, all of which are in Delaware. We more formally account for the pending status of cases by using censored-normal regression in Table 2.

⁷² Table 1 includes cases leading to a sale of substantially all of a debtor's assets under § 363, treating the sale date as the equivalent of a confirmation date, and excludes transferred cases.

Delaware and 765 days in New York. The difference in means is significant at the .053 level.⁷³ Their medians also differ: New York cases have a median elapsed time of 582 days, and Delaware cases have a median elapsed time of 463 days. This difference is significant at the .096 level.⁷⁴

Table 1 also shows that processing times in Delaware are somewhat faster than processing times in all districts other than New York, but that the differences are not statistically significant in either the means or the medians. Statistically, one cannot reject the hypothesis that there is no difference between elapsed times in Delaware and non-New York districts. We explore processing-time differences more rigorously in Table 2, using regression analysis.

TABLE 1
DAYS ELAPSED BETWEEN FILING AND TERMINATION OF LARGE
CHAPTER 11 CASES: CASES FILED AFTER 1989

	Del.	N.Y.	All other locales	Significance of differences among:		
				Del. & N.Y.	Del. & all other	N.Y. & all other
UNNEGOTIATED CASES						
Number of unnegotiated cases	17	24	76			
Unnegotiated case mean days	510	765	620	.053	.230	.172
Unnegotiated case median days	463	582	535	.096	.185	.289
PREPACKAGED CASES						
Number of prepackaged cases	19	3	17			
Prepackaged case mean days	52	55	59	.786	.397	.858
Prepackaged case median days	38	42	46	.632	.254	.710

NOTE: Prenegotiated cases are omitted because the number of these cases is too small to generate a meaningful comparison.

Table 1's statistics for prepackaged cases in its last three rows show little evidence for the argument that Delaware more quickly processes prepackaged cases. The nineteen post-1989 Delaware prepackaged cases had a mean elapsed time of fifty-two days, in comparison to fifty-nine days for the seventeen filings in locales other than Delaware or New York. The difference in medians between these two groups is eight days. The other differences across venues are also small for prepackaged cases, and none are statistically significant.⁷⁵

⁷³ The significance level in the text is based on a t-test of the logarithm of elapsed days. See *supra* note 43.

⁷⁴ This significance level is based on a Mann-Whitney test. See H.B. Mann & D.R. Whitney, *On a Test of Whether One of Two Random Variables Is Stochastically Larger Than the Other*, 18 ANNALS MATHEMATICAL STAT. 50 (1947).

⁷⁵ Table 1 does not include renegotiated cases. Fifty percent (7 of 14) of renegotiated filings were in Delaware, and after 1989, the figure is 56% (5 of 9). Because

Differences in districts' case-processing times could result from differences in the kinds of cases in each district, rather than from differences in procedural efficiency. To investigate this possibility, we model processing time as a function of case characteristics that might correlate with elapsed time. These characteristics include firm size, which we measured by assets (log), whether the case was voluntary or involuntary, and the year of filing.⁷⁶

Table 2 presents the results of regression models controlling for these characteristics. The dependent variable in all models is days to confirmation (log). Dummy variables for New York and Delaware filings are the explanatory variables of primary interest. The combination of all other districts serves as the reference category for these two dummy variables. Table 2 reports unnegotiated cases separately from prepackaged cases. For unnegotiated cases, Table 2 reports ordinary least squares ("OLS"), censored-normal, and median regression models. The median regression model estimates coefficients for presence of the dependent variable in the fastest half of case-processing times. A negative coefficient in this model corresponds to greater presence in the faster half of case-processing times. The OLS and median regression models include only cases that terminated. The censored-normal regression model includes pending cases and accounts for their pending status. This technique is preferable for these data because it avoids the bias that results from excluding pending cases.⁷⁷

In all models of unnegotiated cases, the sign of the Delaware dummy variable is negative, which means that Delaware filings correlate with faster case-processing times. The coefficient, however, is always statistically insignificant. In the censored-normal regression model that includes the largest sample, the Delaware coefficient is far from significant ($p = .290$). Additionally, even this model's coefficient of $-.144$ may overstate any Delaware effect. If Delaware attracts masses of cases from other districts because of processing speed, it should have a faster median processing time. The median regression model,

prenegotiated cases proceed much more quickly than unnegotiated cases and because they are a much larger percentage of Delaware filings than of other districts' filings, one should account for them separately and not include them with unnegotiated cases. The relevant comparison is how quickly different courts process similar cases.

⁷⁶ We also have run models that include variables for the number of corporations filing a consolidated proceeding and the number of states in which a filing corporation operates. These variables might provide added measures of complexity that could affect processing time. Models that included these variables, however, did not improve on the models in Table 2.

⁷⁷ See G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS §§ 6.1-16 (Econometric Soc'y Pub. No. 3, 1983). For the median regression model, standard errors are calculated using bootstrap resampling with 200 replications. See generally BRADLEY EFRON & ROBERT J. TIBSHIRANI, AN INTRODUCTION TO THE BOOTSTRAP (1993) (discussing the statistical methodology of the bootstrap). For the OLS model, significance levels are based on robust standard errors.

TABLE 2
REGRESSION MODELS OF CASE-PROCESSING TIME:
LARGE CHAPTER 11 CASES
(Dependent variable is days (log) to confirmation or sale)

	Unnegotiated cases			Prepackaged cases	
	Censored normal	OLS	Median regression	OLS	OLS
Delaware filing	-.144	-.175	-.049	-.197	-.194
New York filing	.235*	.223*	.264**	-.474*	-.103
Assets (log)	.193***	.189***	.162**	-.055	.054
Year of filing	-.041**	-.050***	-.051***	.008	.026
Voluntary filing	.185	.153	.118	—	—
Constant	87.500***	104.592***	107.147***	-11.679	-49.093
<i>n</i>	198	188	188	33	40
Adjusted or pseudo R ²	.152	.278	.174	.000	.000

* $p < .05$ ** $p < .01$ *** $p < .001$

NOTE: The first prepackaged case model includes the number of related corporations filing and the number of states in which the firms operate. Coefficients for these variables are not reported here. One or both of these variables is missing in seven cases. Hence the second prepackaged case model has more observations (40) than the first model has (33). Negative coefficients on the "Delaware filing" and "New York filing" dummy variables correspond with faster case processing times than the reference category, which consists of all cases filed in districts other than New York or Delaware.

however, yields a coefficient for Delaware of only -.049, which is essentially zero and utterly insignificant ($p = .776$). Together, these models provide no basis for rejecting the hypothesis that Delaware does not differ from other states in case-processing time.⁷⁸

In all models of unnegotiated cases, the sign of the New York dummy variable is positive, indicating that New York filings correlate with slower case-processing times. This value is statistically significant. Differences between the Delaware and New York dummy variables are

⁷⁸ One must be cautious about interpreting the statistical insignificance of the difference between Delaware and non-Delaware case-processing rates. The power of a statistical test is the likelihood of detecting an effect of a specified size at a specified significance level. If a test is not very powerful, the likelihood of detecting the effect is small. Perfectly executed studies may fail to reveal socially important differences "simply because the sample sizes are too small to give the procedure enough power to detect the effect." STANTON A. GLANTZ, *PRIMER OF BIostatISTICS* 178 (4th ed. 1997). It is important to consider a statistical test's power when one claims that no significant effect has been detected.

A power calculation requires specifying what change in the observed case-processing time would be socially meaningful. The mean difference between Delaware and other districts reported in Table 1, 110 days, is not trivial. Having a high probability of detecting a statistically significant difference of this size between Delaware and other states, however, requires a much larger population of cases than is available. Thus, one should not take a failure to detect a significant difference as firm evidence that no such difference exists. On the other hand, the sample is sufficiently large to yield statistically significant results for firm size ("assets" in Table 2) and time trend ("year of filing" in Table 2) and New York. These results suggest that the failure to detect a significant effect for Delaware did not completely result from sample size.

also statistically significant. The models of prepackaged cases show little of interest beyond Table 1's summary statistics.

The results of the unnegotiated case models in Table 2 contain other plausible results. The results confirm the trend in case disposition time. As Figure 3 suggests, the "year of filing" coefficient is negative and significant in all unnegotiated case models, indicating that case-processing times have been decreasing. In addition, the "assets" coefficient is positive and significant in all models of unnegotiated cases, indicating that larger firms take longer to reorganize.

The multivariate analysis thus confirms the simpler analysis in Table 1. Delaware cases terminate more quickly than cases in other states, but the effect is not statistically significant except in comparison to New York. When case size and the trend toward faster processing times across all districts are taken into account, this analysis also suggests that New York has slower than normal processing times.

In its report to the National Bankruptcy Review Commission, the Delaware Bar argues that the legal issues involved in cases, rather than the forum in which the filings occur, frequently determine case duration.⁷⁹ As its primary example, the Delaware Bar notes that "asbestos and mass tort cases have taken many years to resolve not only in New York, but in Florida, Illinois, and Virginia as well."⁸⁰ It concludes that "there is no rational basis for concluding that cases will be shorter if they cannot be filed in the Southern District of New York."⁸¹ The data from our study indicate that part of the Delaware Bar's factual premise is correct. The eight cases in this study involving asbestos or other mass torts averaged 4.2 years in duration,⁸² considerably longer than the 1.7 year average for all of the cases in the study. The Delaware Bar's conclusion, however, does not follow. New York had fifty-five of the 284 cases in this study (19.4%), but only one of the eight asbestos/mass tort cases (12.5%).⁸³ If this study excluded the asbestos/mass tort cases, New York would appear even slower in relation to other courts.

C. Delaware's Expertise in Prepackaged Bankruptcies

Since 1990, when debtors began filing prepackaged cases in significant numbers, Delaware has received a disproportionate share of these cases. Nineteen of the forty-nine filings in Delaware (38.8%)

⁷⁹ See Delaware Bar Report, *supra* note 5, at 11 n.23.

⁸⁰ *Id.*

⁸¹ *Id.* at 12.

⁸² This study includes the *Dow Corning* case, which currently is pending in Bay City. For the purpose of the 4.2 year figure in the text, we treat that case as if it concluded in March 1998.

⁸³ That case, *Manville*, took 4.3 years, slightly above the average for asbestos/mass tort cases in the study.

were prepackaged, while only twenty of the 140 cases in other districts (14.3%) were prepackaged. This difference is significant beyond the .001 level.⁸⁴ Bermant noted the "heavy concentration of prepackaged cases in Delaware," concluding that it "appears to have developed from a specialization within the local bar and case-management practices by the court that get the cases off to a fast start."⁸⁵ Other commentators echo Bermant's conclusion that Delaware's concentration of prepackaged cases indicates that its court has better, more efficient case processing.⁸⁶

1. *The Relation Between Delaware's Rise and Its Treatment of Prepackaged Cases*

Figure 6 casts doubt on the proposition that Delaware first developed its special expertise in prepackaged cases. It shows that Delaware's large bankruptcy reorganizations in 1990 and 1991 were not prepackaged and that Delaware did not receive a prepackaged case until 1992. Thus, Delaware first established its reputation with traditional cases in 1990 and 1991 and only later attracted a disproportionate share of the increasing number of prepackaged cases.⁸⁷ Moreover, Delaware did not pioneer the use of prepackaged cases. Debtors had filed prepackaged cases in other districts in 1986, 1990, and 1991.⁸⁸

2. *Delaware as the Efficient Chapter 11 Forum*

Regardless of the timing of Delaware's rise as a shopping venue, Rasmussen and Thomas, along with Skeel, suggest that allowing continued shopping to Delaware will maximize social welfare.⁸⁹ The Delaware Bankruptcy Court, they argue, has developed expertise in handling prepackaged bankruptcies that "allows the managers (with the cooperation of the majority of creditors) to implement a value-increasing plan of reorganization quickly and without holdout

⁸⁴ This significance level is based on Fisher's exact test. *See supra* note 43.

⁸⁵ BERMANT ET AL., *supra* note 7, at 61.

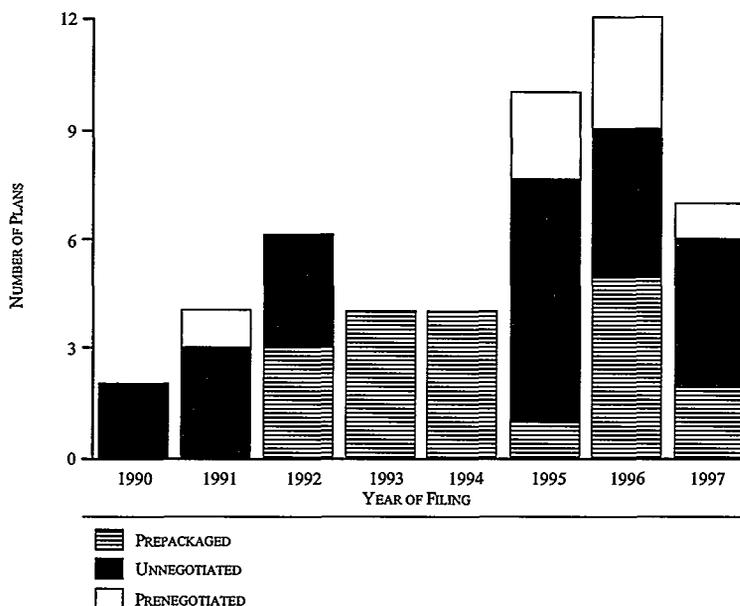
⁸⁶ *See Rasmussen & Thomas, supra* note 46, at 26 (describing the Delaware Court as specializing in prepackaged bankruptcy, and concluding that "[w]hile Delaware may have captured the attention of the bankruptcy bar through its handling of prepackaged bankruptcies, it is now the venue of choice for traditional bankruptcies as well").

⁸⁷ It is possible that Delaware developed its reputation in prepackaged cases that are too small for inclusion in this study.

⁸⁸ In 1986, Oxoco, Inc. filed in Houston, Texas and Crystal Oil filed in Shreveport, Louisiana. Southland filed in Dallas in 1990. In 1991, JPS Textile Group filed in New York, Trump Taj Mahal filed in Camden, New Jersey, Edgell Communications/New Century filed in Cleveland, Ohio, and Speciality Equipment filed in Rockford, Illinois.

⁸⁹ *See Skeel, supra* note 8, at 21-29 (noting the desirable effects of Delaware corporate law); Rasmussen & Thomas, *supra* note 46, at 23-26.

FIGURE 6
USE OF PREPACKAGED CASES IN DELAWARE: 1990-1997



problems from rent-seeking dissenting creditors.”⁹⁰ Perceiving that Delaware cases are faster and assuming that prepackaged bankruptcies benefit both debtors and their creditors, Rasmussen and Thomas conclude that disabling Delaware from specializing in prepackaged bankruptcies without permitting any other court to assume a similarly dominant position would cause “a decrease in social welfare.”⁹¹ Although one cannot evaluate Skeel’s or Rasmussen and Thomas’s social welfare claim directly,⁹² two key factual assumptions are questionable.

First, these commentators assume that the Delaware Bankruptcy Court handles prepackaged cases more quickly and with greater certainty of outcome than other courts. The data, however, provide thin support for their assumption. Of the forty-one prepackaged cases in our study, nineteen proceeded in Delaware, and the other twenty-two proceeded in eighteen different cities. Courts confirmed plans in all forty-one cases; thus there was no difference in this measure of success. Table 1 shows that the average number of days in Chapter 11 was fifty-two for the Delaware prepackaged cases and fifty-nine for cases in other cities. The median time in Chapter 11 was thirty-eight

⁹⁰ Rasmussen & Thomas, *supra* note 46, at 23; see also Skeel, *supra* note 8, at 31-33 (discussing Delaware’s judicial expertise in bankruptcy).

⁹¹ Rasmussen & Thomas, *supra* note 46, at 25-26.

⁹² For some difficulties that attend ultimate social welfare claims about the reorganization process, see Theodore Eisenberg, *Baseline Problems in Assessing Chapter 11*, 43 U. TORONTO L.J. 633, 655-56 (1993).

days in Delaware and forty-six days in other cities. Neither of these differences approaches statistical significance, either in the univariate analysis in Table 1 or in the multivariate analysis in Table 2. Although Delaware processed cases more quickly than courts in other cities, the time difference is small enough to qualify as immaterial. Indeed, after controlling for year of filing and case size, the large negative sign on the New York dummy variable in Table 2's first prepackaged case model suggests that prepackaged cases may even proceed more quickly in New York than in Delaware.

Second, Rasmussen and Thomas assume that confirming a prepackaged plan is *always* in the interests of both the debtor and its creditors.⁹³ This assumption is also questionable. Disclosures to the voters may not have been adequate or accurate; proper voting procedures may not have been followed; a plan may contain provisions that violate public policy. A bankruptcy court that fails to consider these objections may betray not just the dissenting creditors but the majority as well. Delaware is not efficient if it attracts prepackaged reorganization cases by assuring a confirmation so quick that dissenting creditors or United States Trustees cannot participate effectively. Again, the larger point is that one must understand the reasons for forum shopping to determine whether it improves or impairs the bankruptcy system.

Other commentators argue that forum shoppers select Delaware because its bankruptcy court has adopted better case-processing procedures and more efficient methods of administration.⁹⁴ Frequently cited Delaware procedures include "[o]mnibus hearing dates" scheduled months in advance so out-of-town lawyers can plan their travel,⁹⁵ procedures for scheduling emergency hearings,⁹⁶ remote access to case information and dockets through what may be the most complete and best functioning PACER site in the nation,⁹⁷ and controversial procedures by which local counsel for a debtor who has not yet filed

⁹³ Bermant declined to make this assumption. See BERMANT ET AL., *supra* note 7, at 40 ("We have presented evidence that prepackaged [cases] are confirmed more quickly, but cannot comment on any negative outcomes that may have accrued to these debtors, their creditors, or other parties-in-interest.").

⁹⁴ See, e.g., D.J. Baker, *Reflections on Delaware Bankruptcy Practice: Thoughts of an Immigrant*, DEL. LAW., Fall 1997, at 14, 16 (describing the Delaware Bankruptcy Court as "user friendly" and quoting an out-of-state practitioner as saying that "[o]n a procedural basis, everything in Delaware is designed for the convenience of all of the parties and participants, including both debtors and creditors" (internal quotation marks omitted)).

⁹⁵ Mark D. Collins, *Why Delaware?*, DEL. LAW., Fall 1997, at 38, 40.

⁹⁶ See *id.*

⁹⁷ PACER is a system that the Administrative Office of the U.S. Courts operates in conjunction with local bankruptcy courts. PACER makes case, party, and docket information available on-line to subscribers. The statement in the text derives from the authors' experience in using dozens of bankruptcy courts' PACER sites over a period of two years.

in Delaware can have the case assigned to a judge and schedule first-day hearings for the prescheduled filing date.⁹⁸

Although these conveniences undoubtedly make a lawyer's job easier, it is hard to believe that they could counterbalance the expense of traveling to Delaware and the required retention, in every case, of local counsel.⁹⁹ Preliminary results from a separate survey of debtor's counsel in the study's cases indicate that debtors retain both remote and local counsel in nearly every Delaware case but only in a small minority of New York cases.¹⁰⁰ The decision to file in Delaware rather than New York is, for all practical purposes, the decision to incur the expense of another law firm's fee.¹⁰¹

D. More Complete Explanations of Forum Shopping

For the reasons described above, we doubt that Delaware's efficiency or expertise drove Chapter 11 debtors to file in Delaware. Other considerations cast further doubt on this explanation.

1. *The Inadequacy of Processing-Speed Explanations of Forum Shopping*

Table 2's statistical analysis suggests that New York is significantly slower than other districts in processing unnegotiated cases. This result undermines the conclusion that faster case-processing times in Delaware prove Delaware's greater efficiency. The underlying premise—that fast is efficient—would suggest that New York's case process-

⁹⁸ See BERMANT ET AL., *supra* note 7, at 40-41.

⁹⁹ The local rules of the United States Bankruptcy Court for the District of Delaware provide that the U.S. District Court Rules for the District of Delaware apply in bankruptcy proceedings except when they are inconsistent with bankruptcy legislation. See D. DEL. BANKR. CT. LR Order #9 (1999). The U.S. District Court Rules for the District of Delaware provide that local counsel is required. See D. DEL. LR 83.5(d) (1999) (providing that "[a]n attorney not admitted to practice by the Supreme Court of Delaware may not be admitted *pro hac vice* . . . unless associated with an attorney who is a member of the [Delaware District Court] Bar . . . and . . . maintains an office in the District of Delaware . . .").

¹⁰⁰ Debtors proceeding in Delaware retained both local and remote counsel in 56 of the 58 cases (97%). In the other two cases, the debtors retained the firm of Skadden, Arps, Slate, Meagher & Flom, which has a Delaware office. Even in those two cases, however, the estate bore the expense of lawyers in the New York and Delaware offices of Skadden, Arps. By contrast, debtors proceeding in New York retained local counsel in only two of 54 cases (4%). In 50 of the 54 New York cases, only a single law firm represented the debtor. Generally, the likelihood that debtors would retain local counsel in a city was inversely correlated to the number of filings in the cities. That is, debtors seldom retained local counsel in cities that had high filing rates (and presumably a sizeable bankruptcy bar). Delaware's combination of a high filing rate and a high rate of retention of local counsel is anomalous.

¹⁰¹ The estate of the debtor pays the fees of local counsel for the debtor. See 11 U.S.C. § 330(a)(1) (1994). If the estate is insolvent, the creditors in some large cases may bear the impact of the fee. If debtors are incurring additional expense to file in Delaware only because they externalize that expense, however, their choice to file in Delaware no longer demonstrates the efficiency of Delaware's bankruptcy process.

ing was inefficient during the period when New York was the venue of choice. To endorse forum shoppers' successive choices of both New York and Delaware as efficient, one must conclude that slow case processing was efficient until 1990, but became inefficient by 1994. Although one can imagine the possibility of such a cataclysmic shift in what constitutes efficiency,¹⁰² such a shift seems improbable.

A more plausible explanation for the shift is a change in the perception—probably around 1988—that filings in New York had an excellent chance of being assigned to Judge Lifland. This judge-oriented explanation is consistent with Delaware's rise because the rise occurred when only one bankruptcy judge served in Delaware. One could no longer be so confident in the chances of assignment to Judge Lifland in New York, but one could be sure of assignment to Judge Balick in Delaware. Given the pattern of case assignments in New York, one would expect the shift in perception regarding New York case assignments to have occurred at about the same time as the shift in forum shopping to Delaware.

This judge-oriented explanation also is consistent with the system's embarrassed reactions to the forum shopping.¹⁰³ It is unlikely that such drastic measures and reform proposals would have resulted if observers believed that New York and then Delaware were preferred simply because they were more efficient.

2. *Flight from Source Districts as an Explanation*

Explanations of the forum-shopping pattern tend to focus solely on the characteristics of the selected court while ignoring the characteristics of the rejected courts. But forum shopping does not result solely from the attractiveness of the destination court. Forum shopping always involves a choice among courts. The home forum usually has the advantage of physical proximity to the debtor's senior management. Debtors from other jurisdictions will not go to the trouble of filing in Delaware or New York unless these districts provide benefits the home districts lack.

To explore the source-district side of the forum-shopping equation, we examine the rate of shopping from each jurisdiction that contained the chief executive office of six or more of the debtors in the study. The first column of Table 3 lists those jurisdictions. The second column shows the number of cases in which the debtor's head-

¹⁰² For example, one might hypothesize that aside from expenses of administration, slow case processing is more efficient than fast case processing. Prior to the shift from New York to Delaware, expenses of administration were too low to offset New York's advantage; but a sudden, sharp increase in expenses of administration made fast case processing with lower expenses of administration competitive. The authors are unaware of any evidence to support such a hypothesis.

¹⁰³ See *supra* notes 47-49, 55-63 and accompanying text.

quarters was within the geographical territory of that court.¹⁰⁴ The third column shows the number of cases that shopped out of the city, and the fourth column converts that number to a percentage. The fifth column shows the significance level of the difference between the shopping rate for that city and the shopping rate for the combination of all other cities. The sixth column indicates the significance level when one excludes New York from the comparison group. The fifth and sixth columns indicate the likelihood that so great a difference between the rate of shopping from the particular city and the rate of shopping from all cities would occur by chance in samples of the sizes observed.¹⁰⁵ The table includes tests with and without New York because of New York's large number of cases and because of its extreme rate of case retention. This additional testing assures that the observed effects are not simply a consequence of New York's inclusion.

The note to Table 3 reports the significance of the intercity differences as a whole. With and without New York, significant city-level effects exist. Table 3 suggests that most cities with six or more potential large Chapter 11 filings have extreme shopping rates. Either a surprisingly large percentage of cases leave or a surprisingly large number stay. Only Chicago has a rate that approximates the average rate for all cities. Table 3's results suggest that characteristics of the home courts, rather than simply the attractiveness of Delaware or New York, have affected the level of forum-shopping rates.

The relationship between case-processing times and shopping rates for particular cities is relevant to the claim that forum shoppers seek greater efficiency by filing in jurisdictions with faster case-processing times. If Skeel, Rasmussen, and Thomas are correct in stating that speedy case-processing times attract forum shoppers to Delaware, then home courts that process cases the slowest should have the highest rates of debtors seeking other venues. Once again, however, the data belie a processing-time explanation: slow case-processing times do not correlate with high outbound shopping rates. In Table 3, for example, three of the five cities with outbound shopping rates below 50%—Houston, New York, and Phoenix—have case-processing times that are slower than the national median, whether one includes the shopped-out cases in the calculation or considers only the non-shopped cases. Furthermore, Dallas, the city with the largest number

¹⁰⁴ For this purpose, we treated each city in which cases are heard as a "court." Many federal districts contain more than one court city.

¹⁰⁵ To illustrate, the .023 significance level for shopping out of Bridgeport indicates that a difference in shopping rates as large as that observed between Bridgeport cases and non-Bridgeport cases would be a chance occurrence about 2% of the time if eight cases were drawn randomly from the non-Bridgeport cases. That is, a difference of this magnitude would occur in only about one of 50 draws. See *supra* note 43.

TABLE 3
FORUM SHOPPING BY SOURCE CITY

Source city	Number of cases	Number shopping out	Percent shopping out	Significance level of city's shopping rate	
				Compared to other cities	Compared to all cities excluding N.Y.
Bridgeport	8	7	88%	.023	.027
Santa Ana	6	5	83%	.088	.100
Boston	10	7	70%	.105	.195
Newark	10	6	60%	.336	.521
Dallas	24	14	58%	.133	.283
Chicago	10	5	50%	.749	.999
Houston	12	4	33%	.564	.391
Los Angeles	19	5	26%	.154	.093
Denver	10	2	20%	.196	.111
Phoenix	6	1	17%	.242	.240
New York	28	3	11%	.000	—
All other	141	63	45%		

NOTE: The significance of the shopping-out rate differences across all cities with six or more cases is less than .001. The significance across all such cities excluding New York equals .016.

of outbound-shopped cases, has processing times that undermine the processing-speed explanation. Twelve of the fourteen cases forum-shopped from Dallas went to New York or Delaware even though Dallas's median and mean processing times (496 and 516 days, respectively) are either faster than, or not noticeably different from, the processing times in New York and Delaware that Table 1 reports.¹⁰⁶ Regression analysis confirms that case-processing times are not significantly lower in shopped cases.¹⁰⁷

The data do not allow complete analysis of the source-district factors. Both repulsion and attraction, however, are at work. Reform that fails to account for both of these features will fail to address important causes of forum shopping.

E. Transfer's Inadequacy as a Venue Correction Mechanism

The court to which a case is shopped has discretion to transfer the case to a more appropriate venue "in the interest of justice or for the convenience of the parties."¹⁰⁸ The Delaware Bar Association has argued that transfer effectively counters shopping into Delaware.¹⁰⁹

¹⁰⁶ The Dallas median and mean processing times, like those in Table 1, are based on unnegotiated, completed cases that were not transferred.

¹⁰⁷ We modeled case-processing time, in part, as a function of whether a case had been shopped.

¹⁰⁸ 28 U.S.C. § 1412 (1994).

¹⁰⁹ See Delaware Bar Report, *supra* note 5, at 17 & n.38.

The data, however, do not support its argument. Transfer is rare in voluntary cases,¹¹⁰ though common in involuntary cases. As Table 4 shows, courts transferred only five voluntary cases.¹¹¹ Two of the transfers were from Delaware and the other three were from Los Angeles, Atlanta, and Pittsburgh.¹¹² In comparison, Table 4 shows that courts transferred eight involuntary cases. Three transfers were from New York, the other five were from Denver, Newark, Dallas, Houston, and San Antonio.¹¹³ Thus, venue changes occurred in only about 5% of the cases that debtors shopped, but in 62% of the cases that creditors shopped. This difference is statistically significant beyond the .00001 level. These findings regarding voluntary and involuntary transfer are consistent with those of LoPucki and Whitford.¹¹⁴

A low transfer rate may result from few requests for transfer, a low rate of granting transfer requests, or a combination of the two. The Delaware Bar Association reports that Delaware's bankruptcy court granted eighteen of twenty-seven transfer motions from 1988 to 1996,¹¹⁵ suggesting that a low rate of requests for transfer is the dominant cause.

LoPucki and Whitford speculated that the low rate of requests for transfer had resulted from a combination of factors.¹¹⁶ Because creditors' committees are appointed in the forum court, are comprised of creditors willing to serve at that location, and are likely to retain coun-

¹¹⁰ Transfer is rare in the mass of civil litigation as well. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511 (1995) (quoting a study that indicates that transfers occurred in "slightly more than 1%" of civil cases). There is no suggestion, however, that forum shopping occurs in the mass of civil litigation with anywhere near the frequency in which it occurs in large, public bankruptcy reorganization.

¹¹¹ The failure of courts to transfer voluntary cases is nowhere more evident than in New York. Debtors filing in New York, which covers Manhattan and the Bronx, seldom have their operations there. Under our protocols, the case would be "shopped" only if the company's headquarters were outside New York. Only three of the 26 voluntary cases shopped to New York were incorporated there. Thus, for most of the 23 cases not transferred, there was no substantial basis for venue in New York.

¹¹² Not all of the transfers were "corrections" of forum shopping according to the definitions employed in this study. For example, the Pittsburgh court transferred the *Wheeling Pittsburgh* case to Erie, Pennsylvania even though the debtor's headquarters was in Pittsburgh.

¹¹³ Again, transfer does not always mean correction according to our definitions. For example, the Denver court transferred the *Daisy Systems* case to San Jose even though the debtor's headquarters was in Denver at the time of filing.

¹¹⁴ Among the 37 voluntary cases that LoPucki and Whitford studied, only two transfer motions were made and both were denied. Interestingly, they attributed the difference between transfer rates in voluntary and involuntary cases to the fact that debtors actively seek transfer and that involuntary cases do not "grow roots" in the period before the court can hear a venue motion. See LoPucki & Whitford, *supra* note 1, at 26 (internal quotation marks omitted).

¹¹⁵ See Delaware Bar Report, *supra* note 5, at 17.

¹¹⁶ See LoPucki & Whitford, *supra* note 1, at 24-26.

TABLE 4
TRANSFERS OF SHOPPED CASES

Court	Voluntary cases			Involuntary cases		
	Shops into this court	Cases transferred	Transfer rate	Shops into this court	Cases transferred	Transfer rate
Wilmington	47	2	4%	1	0	0%
New York	26	0	0%	4	3	75%
All other cities	34	3	8%	8	5	63%
Total—All courts	107	5	5%	13	8	62%

sel at that location, creditors' committees are unlikely to seek venue correction.¹¹⁷ Rarely are other parties sufficiently interested to move for transfer.¹¹⁸ One possible reform would create incentives and opportunities to challenge venue on a case-by-case basis. For such a scheme to work in voluntary cases, however, it would have to work quickly. The first few days of a large Chapter 11 case are hectic, as thousands of parties seek representation in the initial forum and as the court considers emergency motions on a variety of matters. Thus, any transfer after that period may be counterproductive.¹¹⁹ That venue correction proceeds reasonably well in involuntary cases does not suggest an easy solution to the problem of correction in voluntary cases. Involuntary cases do not grow roots nearly so quickly because the court does not appoint committees and the reorganization process does not begin until the court rules on the merits of the petition. This characteristic of involuntary cases typically allows the court a few months in which to address the issue of venue—months that are not available in voluntary cases. In addition, the debtor often has the incentive to resist the creditors' choice of an inconvenient forum.

CONCLUSION

The data establish New York as the primary destination for forum shoppers in the 1980s. Around 1990, the destination shifted abruptly to Delaware. The benign reasons offered for forum shopping—efficiency and convenience—do not find support in the data. Efficiency based arguments fail to explain New York's initial popularity because New York is a slow case-processing district. Moreover, there is no evi-

¹¹⁷ See *id.* at 24.

¹¹⁸ For an illustration of the effect of creditor incentives on reorganization confirmation rates, see Theodore Eisenberg & Shoichi Tagashira, *Should We Abolish Chapter 11? The Evidence from Japan*, 23 J. LEGAL STUD. 111, 137 (1994) (showing large creditors are more likely to oppose confirmation).

¹¹⁹ See, e.g., *In re Vienna Park Properties*, 128 B.R. 373, 377 (Bankr. S.D.N.Y. 1991) (denying the transfer of a Chapter 11 case filed in what was admittedly the wrong venue because the court had "gained such a familiarity with, and insight into, this case, that a transfer of venue would only thwart the efficient administration of the case and work an injustice in the case and to all parties involved").

dence that cases shopped conclude significantly faster than cases filed in the debtors' home districts. Efficiency explanations remain unproven as a basis for Delaware's current popularity.

Convenience, the principal reason why many legislatures give plaintiffs a choice of venue, is also not a plausible explanation for Chapter 11 forum shopping. In every debtor-initiated case involving forum shopping, the debtor's executives decided to file in a city other than their home city. The abrupt shift in the principal destination of forum shopping from New York to Delaware also undermines a convenience-based explanation. Prior to the shift, some had argued that forum shoppers filed in New York for the convenience of prominent New York lawyers who would have been the debtor's choice of counsel regardless of venue. Given that those same lawyers are now riding the Metroliner from New York to Wilmington, the convenience argument seems implausible.

Explanations of the forum-shopping pattern as a form of judge shopping, on the other hand, are consistent with New York's and Delaware's popularity. The message of this forum-shopping pattern is troubling. Although bankruptcy law and procedure are uniform throughout the United States, the perception that case processing is different across cities induces forum shopping. Thus, the system's worst fears about the reasons for shopping are likely correct: debtors shopped to New York and now shop to Delaware in large part to secure particular judges or to avoid judges in their home districts.

Forum shopping of big-case bankruptcies has become a political issue. In June 1996, the Federal Judicial Council's Committee on the Administration of the Bankruptcy System commissioned the Federal Judicial Center to study forum shopping. In its 1997 report to Congress, the National Bankruptcy Review Commission¹²⁰ recommended venue reform that effectively would close the Delaware Bankruptcy Court to large, publicly held companies.¹²¹

Closing Delaware, the most visible manifestation of the nonuniformity that breeds forum shopping, would provide the system with a fig leaf. It arguably would reduce the aggregate level of forum shopping because no other district has proven to be as attractive as Delaware and no other district has so many large companies with a connection that would plausibly make the district an appropriate place to file. But this study's findings that Chapter 11 forum shopping is in significant part driven by judge shopping and by source-district

¹²⁰ Congress established the Commission in 1994 to report about issues and problems relating to the Bankruptcy Code. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602-603, 108 Stat. 4106, 4147.

¹²¹ See *supra* notes 2-4 and accompanying text.

conditions suggest that, even without Delaware, forum shopping would continue.

To the extent that forum shopping responds to problems with home fora, reducing the level of shopping may exacerbate those problems. Assume, for example, that one or more judges in a district enter unduly restrictive first-day orders,¹²² making it difficult to reorganize in the district. If debtors' lawyers respond by filing their cases in another district, the problem largely dissipates. If a solution to forum shopping does not address the underlying problem, some businesses will fail unnecessarily. The larger point is that curtailing forum shopping will not produce uniformity; it will leave debtor-friendly courts and creditor-friendly courts each free to process cases in their own biased fashion.

¹²² First-day orders include orders necessary to allow the Chapter 11 debtor to continue routine operations. *See, e.g.*, 4 WILLIAM L. NORTON, JR., *NORTON BANKRUPTIC LAW AND PRACTICE* § 85:6 (2d ed. 1993).