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Texas justice hopes to revive venue debate in scathing opinion

By [Kelsey Butler](#) Updated 04:30 PM, Sep-15-2015 ET

A strongly worded opinion from a Texas judge has once again reignited a long-standing debate on where debtors should file their bankruptcy petitions.

In a recent opinion springing from the case of a golf club owner, Judge Russell F. Nelms of the U.S. Bankruptcy Court for the Northern District of Texas in Fort Worth cried out against the common practice of filing Chapter 11 cases in New York and Delaware.

"The modern trend in large bankruptcy cases--which this is not--is to stand the proximity of creditors factor on its head when it comes to the debtor's decision of where to file," he wrote in the Aug. 3 opinion for Fort Worth's [Crosby National Golf Club LLC](#). (Its case was transferred on July 2 to the Southern District of California, where its San Diego golf club is located.)

"Although one of the goals of bankruptcy is to facilitate creditor participation, many debtors now file for bankruptcy in locations that are certain to minimize it," he continued. "Two Fort Worth companies are prime examples of this trend. [RadioShack Corp.](#), which is .76 miles from this court, filed for bankruptcy in Delaware, as did Quicksilver Resources [Inc.], which is .12 miles from this court." (Calls to RadioShack, now known as RS Legacy Corp., and Quicksilver were not returned.)

Nelms assailed the oft-repeated argument made for filings in the popular courts--that of convenience.

"The first answer to this argument is a question: 'More convenient for whom?' If the answer is the lender, the next question is: 'Why are the desires and convenience of a lender who voluntarily chose to do business with a Fort Worth-based company the be-all and end-all of venue determination?' And, of course, the convenience argument loses all credibility when a Fort Worth-based company with a New York-based lender files for bankruptcy in Delaware. The suggestion that it would be more convenient for those parties to meet and attend hearings in Wilmington, [Del.], is laughable."

[Edward S. Weisfelner](#), the head of [Brown Rudnick LLP](#)'s bankruptcy and corporate restructuring practice group, said the venue debate is hardly new.

"This whole debate about venue and the steering of cases to Delaware and New York is a perennial concern," he said. "It's been going on for decades."

Weisfelner said one of the principal reasons for filing in those popular venues is, in fact, the convenience of the parties involved. "Whether we like it or not, most of the higher-powered reorganization professionals are located in the Northeast corridor," he said.

Aside from the professionals, he commented, many of the creditors, large bondholders, hedge funds and distressed-debt investors also are located in the New York area, he said, adding that a lot of the "heavy-duty negotiations are going to be centered" somewhere near the First State or Empire State.

[Edward Phillips](#), a partner in the bankruptcy and restructuring group of accounting and consulting firm

EisnerAmper LLP, added that companies are permitted to file where they are organized, which may explain their tendency to flock to the Northeast.

"A great many companies are organized in Delaware, and a number of companies have a New York presence, so it makes those two venues very popular," **Phillips** said.

When asked if he felt there was a perception of a lack of sophistication of judges outside of New York or Delaware--something that Nelms highlighted in his opinion--Phillips said: "Judge Nelms picked up on a popular theme. Perception is not always reality. However, there is clearly a comfort factor with the Southern District of New York and Delaware."

Jeffrey A. Krieger, a partner at **Greenberg Glusker Fields Claman & Machtinger LLP**, said, "I think the perception among debtors' counsel and secured creditors' counsel is often that those courts in New York or Delaware are very experienced in these big business cases and they are used to handling these big business cases." He countered, however, that though the perception exists, it doesn't speak to the readiness of other venues.

"One, there are different judges of different experience [levels] through the country, wherever you go," he said. "But there are plenty of sophisticated judges outside of large cities." He highlighted the case of the **City of Detroit, Michigan**, which proceeded through a Michigan court. It was "one of the most complicated cases we've seen recently, and the judge there did a tremendous job."

One of the main reasons that New York and Delaware are selected as venues time and again is because they have been so popular in the past, keeping the cycle going.

Weisfelner noted there are many factors that go into deciding where a debtor will file. One is finding a jurisdiction where a company can "predict the outcome of legal debate."

He added, "Because New York and Delaware have a huge history of case law, it's often [easier] to figure out what result they're going to get in New York or Delaware."

Ted Gavin, a managing director and founding partner at bankruptcy and restructuring consulting firm **GavinSolmonese LLC**, also highlighted that often a venue decision comes down to which circuits are more favorable to a particular issue, ranging from intellectual property to the treatment of collective bargaining agreements.

"A lot of these things have nothing to do with the bankruptcy court, but they have to do with case law that has been decided by the appellate courts," he said. "Venue is a tool in the restructuring tool box, and you use every tool in the box to save jobs and restructure a company."

He added, "At the end of the day, you look at the court and make sure there is a large enough bench in terms of support staff and structure [to handle the case], as well as the sophistication of parties involved," when deciding on venue.

Gavin said there definitely is a "uniform level of baseline competence" for bankruptcy judges since they are drawn from practicing attorneys, but he did note judges "will be informed by the cases they've practiced."

This may mean that judges in locales where a certain issue rarely surfaces may not have much experience tackling a particular matter. This often scares key stakeholders in a case, who crave predictability, Gavin noted.

Gavin said in addition to the consideration of the size of the bench--"Will the judge have the time to read all the pleadings?"--there also is the question of whether the support staff in the court will be able to handle the volume of work in the case.

"In a bankruptcy case, especially in the beginning, there is a lot of stuff to do, and things move quickly by necessity," he said.

In his opinion, though, Nelms faulted large debtors that file their cases "with little or no thought given to whether small or medium-sized creditors can appear and be heard in those cases."

He wrote, "One might ask why we should care where a case is filed as long as the case is successful. The answer lies in the definition of 'successful.' Even in 'successful' cases hard-working people lose jobs, have their retirement cut or have their claims significantly compromised."

He later added: "There is value in witnessing the messiness and frequent tedium of court proceedings. There is value in hearing someone argue why you are right and why you are wrong. There is value in watching a judge wrestle with uncomfortable issues that affect your livelihood. There is value in knowing that even though our judicial system is not perfect, those who serve it work hard to achieve what is fair, just and right under the law."

"No employee at [RadioShack's] corporate headquarters took off from work early and walked the few short blocks to this court to observe any proceedings in that bankruptcy case. And that's a shame, not necessarily because the result would have been different, but because that employee might have felt a little better about the result and the system after seeing the sausage being made."

Choosing a venue far from a company's headquarters, Krieger said, "definitely makes it more difficult for smaller creditors to participate and that has an impact on the case."

He added, "It directly impacts the smaller guy who thinks it may not be worth traveling to New York or Delaware or hiring counsel in these locations."

Gavin, however, said, "I think it's a fallacy [that small and midsize creditors] are left out of the process."

What's more, he said those parties "rarely participate in the [bankruptcy] process in a meaningful way"—employees and small vendors aren't usually trekking to bankruptcy court to argue on behalf of their positions; instead, they hire counsel to represent them.

Weisfelner concurred. "I think that argument does have a sympathetic ring to it, but by the same token all [unsecured] creditors are supposed to be represented by the official committee of unsecured creditors. It's a rare circumstance where a trade creditor or an employee is going to make the trek down [to bankruptcy court]."

He added that it's unfortunate when smaller creditors can't participate, but bankruptcy is all about hard choices.

"It's a balancing act," Weisfelner said. "Do you take the whole circus and fly everybody down to Texas so that a handful of Texas employees can watch the sausage being made?"

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