

Chrysler in New York: A case of venue inevitability?

Michigan Attorney General Mike Cox made an attempt in late April to sell the Detroit venue as the only obvious choice for a Big Three filing. A filing outside the state of Michigan seems “bizarre,” he wrote in his letters to GM and Chrysler. “More importantly, such a filing would inconvenience and unfairly impact the vast majority of your creditors who are located in Michigan. The costs for many of these creditors to participate in a New York or Delaware bankruptcy is overwhelming and would undoubtedly lead to unjust results.”

He ended his letter with: “I am confident that you, as the leader of one of Michigan’s most beloved institutions, would want to avoid that potential outcome.”

But if anyone truly thought that Chrysler would file its bankruptcy petition in the Eastern District of Michigan, it wasn’t Detroit-area insolvency professionals. Among them, there is a feeling of inevitability about venue. Big cases get filed in Delaware and New York, period.

“At this point, we’re well aware that the big cases don’t get filed here,” said Van Conway, president of Conway MacKenzie Inc. in Detroit. “Kmart didn’t file here, despite being based in Detroit, and I don’t think anyone in the insolvency profession realistically thought that Chrysler would file here, or that GM will file here.”

Statistics back them up. Of the 45 bankruptcy cases filed in 2009 listed in UCLA Law Professor Lynn LoPucki’s Bankruptcy Research Database (<http://lopucki.law.ucla.edu>), 11 of them were filed at their headquarters — that’s a 74 percent shop rate.

Detroit prepares

Despite the statistics, the Detroit court was taking steps to prepare for the possibility. In December, the court entered an administrative order “to secure the just, speedy, and efficient administration of cases filed in this Court.” The order, which applies to “very large, complex case[s] of national significance,” provides that such cases will be assigned by the chief judge to a specific bankruptcy judge, and will not be subject to the court’s blind draw system, thereby sending a message to counsel that their case would be placed in the most capable hands.

As for the court’s judges, they had been preparing their entire careers for a Big Three filing. The fact that no other district in the country could possibly match Detroit’s knowledge of the automotive industry had to be an important consideration in selecting venue, even if it was far from the only consideration, Conway said. “The auto industry is unique to itself and, in my view, it’s far more complicated than any other industry. Outside of Detroit, you take the risk that the judge is

not well-versed in things unique to the industry, like the tier system, just-in-time inventory and dedicated suppliers. For instance, if you’re United Airlines, and you get fuel from a certain vendor, you can always get fuel from another vendor. That’s just not the case in the automotive industry. Those sorts of things are second nature to the Detroit judges.”

But even among big supplier cases, Detroit was not always the venue of choice. While Collins & Aikman and Plastech Engineered Products filed their cases in Detroit, Delphi Corp., Tower Automotive, and Dana Holdings Co. filed in New York.

But New York wins

As Conway noted, knowledge of the industry was but one consideration, and theories abound about why New York ultimately won out over Detroit.

Professor LoPucki believes that management wanted to avoid a Detroit court that was just too wound up in, well, Detroit. As Judge Steven Rhodes was quoted as saying in a *Time* article: “There is no district in this country that has a greater stake in the outcome of a General Motors case than the Eastern District of Michigan.” According to LoPucki, that was precisely why management wanted to avoid Detroit.

“The really big problem with filing in Detroit is that the employees and the suppliers are there,” LoPucki said. “The courtroom would be packed with people interested in the case, and perhaps picketers would line up outside the courthouse. You’d also have far more media attention than the case will receive in New York.”

Some Detroit professionals viewed the venue decision as one driven by one consideration: where the client would get the best result, and that meant selecting a venue that would most expeditiously approve the 363 sale. After all, the stakes are enormous, as Ronald E. Kolka, CFO of Chrysler warned in an affidavit filed with the court. “Chrysler is seeking approval from this Court to consummate the *only* sale transaction that preserves this company as a going concern and averts a liquidation of historic proportions,” [emphasis added].

That said, it wasn’t so long ago that Lehman’s assets were sold in New York in the blink of an eye.

“A major reason, if not the major reason, for Chrysler’s filing in New York was the success that Lehman had in obtaining court approval in a multi-billion dollar sale of assets on an extremely expedited basis,” said David Golin, a Chicago-based partner in Arnstein & Lehr’s Bankruptcy & Creditors’ Rights practice. “As in Lehman, Chrysler, with the support of the government, is asking the court to approve a sale of substantially all of its operating assets on the basis

Venue choice: Largest public company filings in 2009

Of the 17 largest bankruptcy filings in 2009 (excluding those companies headquartered outside of the United States), only three debtors chose to file in the location of their corporate headquarters. Seven filed in New York; five filed in Delaware. One debtor, headquartered in New Mexico, filed in Maryland; and the remaining debtor, headquartered in Atlanta, filed its case in the Western District of Texas.

Debtor	Headquarters	Venue
Chrysler LLC	Auburn Hills, Mich. (E.D. Mich.)	S.D.N.Y.
Thornburg Mortgage Inc.	Santa Fe, N.M. (D.N.M.)	D. Md.
General Growth Properties Inc.	Chicago (N.D. Ill.)	S.D.N.Y.
Lyondell Chemical Co.	Houston (S.D. Texas)	S.D.N.Y.
Charter Communications Inc.	St Louis (E.D. Mo.)	S.D.N.Y.
Smurfit-Stone Container Corp.	Chicago (N.D. Ill.)	D. Del.
Aleris International Inc.	Beechwood, Ohio (N.D. Ohio)	D. Del.
Spancion Inc.	Sunnyvale, Calif. (N.D. Calif.)	D. Del.
Chemtura Corp.	Middlebury, Conn. (D. Conn.)	S.D.N.Y.
Masonite Corp.	Tampa, Fla. (M.D. Fla.)	D. Del.
Source Interlink Companies Inc.	Bonita Springs, Fla. (M.D. Fla.)	D. Del.
Spectrum Brands Inc.	Atlanta (N.D. Ga.)	W.D. Texas
Trump Entertainment Resorts Inc.	Atlantic City, N.J. (D. N.J.)	D.N.J.
BearingPoint Inc.	McLean, Va. (E.D. Va.)	S.D.N.Y.
Idearc Inc.	Dallas/FortWorth Airport, Texas (N.D. Texas)	N.D. Texas
Silver State Bancorp	Henderson, Nev. (D. Nev.)	D. Nev.
Tronox Inc.	Oklahoma City (W. D. Okla.)	S.D.N.Y.

Source for list of debtors only: *BankruptcyData.Com. New Generation Research Inc. (617) 573-9550.*

that such relief is necessary to avoid catastrophic harm to our nation's economy. And this time, creditors are even being given more than 24 hours notice."

That's not to say that anyone, given the pressures of the day, truly believes that the sale would be stalled in *any* venue. That leaves some to believe that the reasoning had less to do with the New York court's past decisions than it had to do with convenience, expediency and cost — and the fact that giant companies tend to select Wall Street firms for their counsel. New York lawyers know the New York courts, they don't have to get on a plane to fly to the New York court, and frankly, they know the other New York lawyers. Further, New York court staff, judges, and U.S. Trustees are well-versed in how to expeditiously handle the big cases and the circus that goes with them, said Jim McTevia, managing partner of Detroit-area McTevia & Associates. "Does that mean justice is better served? Does that mean it would move faster in New York than it would in Detroit? I don't think so," he said.

McTevia, who subscribes to LoPucki's theories on venue shopping, nevertheless said that if he were the CEO of a major corporation, he would likely hire someone like Harvey Miller, who would advise him that his hourly rate was the same regardless of whether he filed in New York or flew to Detroit for hearings. Based on that alone, McTevia would want the case filed in New York.

And Detroit loses

Michelle Krebs, the Detroit-based editor of Edmunds' AutoObserver.com, said it's difficult to gauge the Detroit community's response to the venue decision. "There's just so much pain here. It's impossible to separate out the impact of any one bit of bad news," she said.

All the same, Detroit would have benefited from the influx of lawyers, advisors and journalists, all of whom would sleep in the city's hotels, dine at the city's restaurants, and drop off their suits at the city's dry cleaners. The business would have been welcomed in a metropolitan area with an unemployment rate of 14 percent, and a state with the nation's highest unemployment rate — 11.6 percent.

Cities shouldn't hold out hope that legislation will keep mega-cases at home, however. "This is one situation where the U.S. government is probably very happy that the bankruptcy courts are competing for cases, because they are the beneficiaries of the competition. No matter where this case was filed, the sale would be approved, even though it is questionable on the law.

"If you look at the big picture, what they're doing is keeping GM and Chrysler in business — however temporarily it may be — through the bottom of this financial crisis. And that's keeping a lot of people in work. I think this is what lawyers mean when they talk about hard cases making bad law." ■