Offshore Bankruptcies

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I. INTRODUCTION

In 2003, National Warranty Risk Retention Group, a Nebraska-based insurance company, transferred all of its assets to the Cayman Islands and filed for bankruptcy there. In order to enjoin a potential class action lawsuit in the United States, the company then filed an ancillary petition in the U.S. Bankruptcy Court in Nebraska asking the court to grant comity to its Cayman Islands proceeding. The bankruptcy court complied and enjoined the litigation, invoking Section 304 of the U.S. Bankruptcy Code, forcing the U.S. plaintiffs to bring their claims in the Caymans. As a result, despite being based in the United States and conducting no business in the Caymans, Na...
national Warranty had the best of both worlds—it received the powerful protection of U.S. bankruptcy law while it forced those who wanted to file claims against it into the Caymans legal system.

Since National Warranty, Congress has replaced Section 304 with Chapter 15 as part of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. Experts had complained about the ability of companies to conduct the bankruptcies of U.S.-based businesses through offshore havens. According to some, Chapter 15 would put an end to this practice. This new law requires the debtor to have a sufficient nexus with the foreign bankruptcy venue in order to have access to the U.S. Bankruptcy Code's protections. Chapter 15 states that courts must grant assistance to foreign bankruptcies located where the debtor has its "center of main interests" (or COMI) and may grant assistance to proceedings where the debtor carries on "nontransitory economic activity." Some have argued this nexus requirement would put an end to National Warranty type cases. No longer would U.S. debtors be able to conduct their bankruptcies through haven proceedings.

Others have argued that Chapter 15 and its COMI standard would be ineffective at restricting forum shopping. They have argued that

4. In re Nat'l Warranty Ins. Risk Retention Group, 300 B.R. 719 (Bankr. Neb. 2003), aff'd, 384 F.3d 959 (8th Cir. 2004) ("National Warranty has done all of its business in the United States since the day it was created. Until late May 2003, when it transferred approximately $24,000,000 to banks in the Cayman Islands, all of its financial and hard assets were located in the United States, mainly in Lincoln, Nebraska. All of the entities for which it provided insurance, its members, are located in the United States. All of the Vehicle Service Contracts which it administers and for which it has provided insurance to its members, were entered into in the United States and are subject to the laws of the various states.").

5. In re Nat'l Warranty Ins. Risk Retention Group, 384 F.3d at 963.


10. Westbrook, Chapter 15 at Last, supra note 8, at 728 ("[T]he COMI of a company like National Warranty would be clearly located in Nebraska and thus the Caymans liquidation could not be its main proceeding.").

11. Westbrook, A Global Solution to Multinational Default, supra note 8, at 2317.

there is an enormous incentive for debtors to strategically select their bankruptcy forum and Chapter 15's COMI standard would be incapable of restraining debtors from forum shopping.\textsuperscript{13} Because COMI is undefined—and perhaps even incapable of definition—debtors would be able to file for bankruptcy in a foreign jurisdiction and then file an ancillary petition in the United States seeking cooperation with that foreign court. Not only does this give debtors the ability to choose their preferred bankruptcy laws, but it also potentially provides an incentive for some countries to adapt their bankruptcy laws in order to attract large multinational cases—thus promoting a race to the bottom, with the probable competitors in this race being tax haven jurisdictions.\textsuperscript{14}

The study reported in this Article contributes to this debate by focusing on the empirical question of whether Chapter 15 has indeed restricted forum shopping into haven jurisdictions. This question is significant to the evaluation of Chapter 15 for two reasons, both related to the fact that most haven-related companies conduct no business at all in the haven jurisdiction. First, Chapter 15's COMI standard has been predicted to require more of a nexus than mere incorporation. Consequently, very seldom should a court find that a debtor's COMI is in a haven. Second, if Chapter 15 is indeed promoting a race to the bottom regarding bankruptcy laws, havens are likely to be among the winners of this race. While haven jurisdictions have an incentive to pass strong creditor protections in order to make haven-registered companies attractive to investors, they have little incentive to protect employees, trade creditors, and other interests impacted by business failures. Thus, these jurisdictions are likely candidates to adapt their bankruptcy laws to attract multinational corporate debtors.

To measure Chapter 15's impact on haven bankruptcy filings, this study examines every ancillary petition filed during Chapter 15's first three years as well as every Section 304 filing during the three years prior to the change in law. It asks two questions: (1) are debtors, en-

\begin{itemize}
  \item \textsuperscript{13} See Lynn M. LoPucki, \textit{Cooperation in International Bankruptcy: A Post-Universalist Approach}, CORNELL L. REV. 696, 760 (1998–99) (“Courts too easily manipulate vague standards such as the 'center of its interests' or the 'center of gravity' when the future of local businesses, the priorities of local creditors, and millions of dollars in professional fees hang in the balance.”).
  \item \textsuperscript{14} LoPucki, \textit{supra} note 7, at 2237 (“Havens such as the Cayman Islands and Bermuda will be driven by competition to adopt laws that seek to systematically exploit involuntary and insufficiently adjusting creditors, customers, and other stakeholders.”).
\end{itemize}
couraged by the vague COMI test, re-incorporating into haven jurisdic-
tions as part of their bankruptcy planning? and (2) has the number
of cases shopped into havens changed since the enactment of Chapter
15? This Article reports that there is no evidence of debtors re-incor-
porating into haven jurisdictions as part of their bankruptcy planning.
In addition, it reports that since the U.S. Bankruptcy Court for the
Southern District of New York refused to grant comity to a Cayman
Islands bankruptcy in the highly-visible *In re Bear Stearns*
proceed-
ings, the number of haven petitions has dropped dramatically. Only
one was subsequently filed, and that debtor actually had its office and
operations in the havens.

From this data, this Article concludes that Chapter 15 has re-
stricted the ability of debtors to forum shop into haven bankruptcy
courts and then seek cooperation in the United States. It is possible
that debtors will adjust to this new legal regime and find ways to shop
into their preferred venues. As Chapter 15's opponents correctly point
out, the incentives to do this are very high. Although there is no evi-
dence that debtors are moving into havens as part of their bankruptcy
planning, it may still be too early to detect this behavior. And it is
also possible that debtors will be able to obtain U.S. cooperation as
"nonmain" proceedings without the need to prove their COMI is in a
haven jurisdiction. However, the data thus far indicates that courts
have interpreted Chapter 15's COMI test to effectively monitor forum
shopping attempts into haven countries.

This Article begins with a brief description of international bank-
ruptcy forum shopping. This initial section discusses the two prin-
cipal models for conducting transnational insolvencies and explains how
forum shopping can be accomplished under each. It then discusses the
problems forum shopping creates, particularly in relation to haven ju-
risdictions. And finally it examines forum shopping from an American
perspective and distinguishes between two general types of forum
shopping: "inbound" and "outbound."

Part III discusses the sections of the U.S. Bankruptcy Code aimed
at dealing with the problem of "outbound" forum shopping, first under
Section 304 and then under Chapter 15. It also outlines the debate
regarding the impact the new law would have on "outbound forum
shopping."

Part IV reviews the development of Chapter 15 by highlighting
three major decisions: *In re Tri-Continental,* *In re SPhinX,* and *In
re Bear Stearns.* Parts V and VI present the data collection method-

15. *In re Bear Stearns High-Grade Structure Credit Strategies Master Fund*, 374
18. 374 B.R. at 124.
ology and the findings concerning the impact the law has had on "outbound" forum shopping: although forum shopping into offshore havens accounted for nearly a third of all filings under Section 304 and Chapter 15, such forum shopping came to an abrupt halt after the court's decision in In re Bear Stearns. Part VII argues that this data signals the end of outbound forum shopping and discusses the importance of this conclusion.

II. BACKGROUND

A. International Bankruptcy Forum Shopping

A debtor company can internationally forum shop its bankruptcy filing when it has the ability to select a country in which to file for bankruptcy protection and, consequently, which country's bankruptcy laws will govern its worldwide assets. To understand how this might be accomplished and why it matters, this section first describes the two principal models for transnational bankruptcy law—territorialism and universalism. It then presents some of the harms created by forum shopping. And finally, it examines forum shopping from an American perspective, differentiating between cases that are shopped into the United States and those that are shopped out of the United States.

Territorialism and universalism describe two approaches for handling cross-border insolvencies. Under territorialism, an insolvent multinational company files for bankruptcy in every country in which its assets are located. Each bankruptcy court then applies its

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19. See infra text accompanying note 27. Although choice of venue and choice of law are two separate questions in theory, in practice courts apply their own bankruptcy laws. Id.

20. Professor Robert K. Rasmussen has offered a third model, contractualism, in Resolving Transnational Insolvencies Through Private Ordering, 98 Mich. L. Rev. 2252 (2000). A discussion of this model, however, is outside the scope of this Article.

21. This Article uses the word "multinational company" to mean a business entity whose place of incorporation, assets, operations, headquarters, and employees are not all in the same country. This includes a company that is incorporated in X and has its assets in Y.

22. John J. Chung, The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law, 17 Duke J. Comp. & Int'l L. 253, 262 (2006–07) ("Territorialism is simply the traditional practice of nations exercising exclusive jurisdiction over assets and parties within their borders: 'It is the default rule in every substantive area of law, including . . . bankruptcy.' It rests upon traditional notions of national sovereignty, which means that the law of the sovereign is imposed on all people and property within its territorial reach. In a transnational bankruptcy conducted under the principles of territorialism, each country decides under its own laws how the debtor's assets within its territory will be treated in the face of creditor claims, without deferring to any foreign proceeding involving the same debtor.").
own local bankruptcy law to the assets within its borders, thus providing a simple rule for both the choice of forum and the choice of law.\textsuperscript{23} Universalism, in contrast, envisions one bankruptcy court applying one law worldwide.\textsuperscript{24} Because there is currently no such international bankruptcy court or law, universalists advocate a more pragmatic approach, known as "modified universalism," that approximates their theoretical ideal.\textsuperscript{25} Under this approach, the multinational debtor files one "main" bankruptcy proceeding in its home country and then files "ancillary" petitions in the other jurisdictions, asking those courts to cooperate with the main proceeding.\textsuperscript{26} While modified universalism technically provides only a choice of forum rule—which proceeding should be considered "main"—it effectively works as a choice of law rule as well because that main proceeding will likely apply its own laws to the proceeding.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Jay Lawrence Westbrook, \textit{Universalism and Choice of Law}, 23 \textit{Penn St. Int'l L. Rev.} 625, 625–26 (2005) ("However, the modern approach is 'universalism.' In its ideal form, universalism envisions a single bankruptcy proceeding in the debtor's 'home country.' A single court would make a unified worldwide distribution to creditors through liquidation or reorganization.").
\item \textsuperscript{25} Id. at 626.
\item \textsuperscript{26} Id. ("Because a pure form of universalism is not immediately achievable, many universalists have adopted 'modified universalism,' in which the courts seek a result in multinational cases as close as possible to a unified worldwide administration and distribution."). See Westbrook, \textit{A Global Solution to Multinational Default}, supra note 8, at 2302 ("[M]odified universalism permits the court to view the default and its resolution (liquidation or reorganization) from a worldwide perspective and to cooperate with other courts to produce results as close to those that would arise from a single proceeding as local law will permit."). See also Hon. Samuel L. Bufford, \textit{Global Venue Controls Are Coming: A Reply to Professor LoPucki}, 79 Am. Bankr. L.J. 105, 112 ("Modified universalism shares the view that there should be a single main case for an international business in its home country, governed for the most part by the laws of the home country. However, modified universalism recognizes that the main case may need support through secondary or ancillary cases in other countries where assets are located or local court support is otherwise needed. A local court, under this view, normally applies domestic law to its proceedings, and it retains the discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors where appropriate.").
\item \textsuperscript{27} See Jay Lawrence Westbrook, \textit{Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum}, 65 Am. Bankr. L.J. 457 (1991) (noting that the choice of law and choice of forum questions are analytically separate, but that the proper functioning of modified universalism requires one set of bankruptcy laws to apply to the bulk of the case). \textit{But see} Edward J. Janger, \textit{Universal Proceduralism}, 32 Brooklyn J. Int'l L. 819, 838–39 (2006–07) (arguing that these two questions need to remain unbundled and that courts can and should apply different bankruptcy laws to the separate issues involved in a multinational insolvency. He argues that the impact of forum shopping could be reduced by harmonizing choice of law rules in such cases stating: "Where choice of law principles are harmonized, choice of forum does not alter the substantive law that applies to a case.").
\end{itemize}
International forum shopping is possible under both territorialism and universalism. In a territorialist system, companies can move their assets before filing for bankruptcy in order to choose which country's laws will apply to those assets.28 These eve-of-bankruptcy transfers would be limited only by the practicability of transferring the assets—a process that would be much easier in a case like National Warranty's in which the company's assets were mostly liquid. In a universalist system forum shopping is possible due to the difficulties inherent in determining which country's bankruptcy courts should be considered the "main" proceeding, and therefore, which country's bankruptcy laws will apply to the debtor's worldwide estate.29

This ability to forum shop effectively gives debtors the ability to choose their preferred bankruptcy laws. Whether by moving their assets under territorialism or strategically taking advantage of modified universalism's choice of forum rules, debtors can have their chosen bankruptcy law displace the laws of other countries. These laws not only involve the procedures for the distribution of assets, but they also reflect deeper social values and policy choices.30 Thus, forum shopping has both economic and political consequences. Economically, forum shopping threatens to frustrate the expectations of creditors by changing the laws governing default.31 Some creditors will be able to accommodate this risk by adjusting their lending terms, thereby protecting their own interests, but perhaps raising the overall cost of lending.32 Politically, forum shopping makes it possible to circumvent protections for other creditors—especially those that will not be able to protect themselves, which include groups such as employees, judg-

28. John A.E. Pottow, The Myth (and Realities) of Forum Shopping in Transnational Insolvency, 32 Brook. J. Int'l L. 785, 797 (2006-07) ("To 'shop' for favorable bankruptcy law, a decisionmaker would have to shift (or establish) the debtor's COMI under universalism into (or in) the jurisdiction—the self-styled haven—with the attractive law. By contrast, under territorialism, the debtor would need to move (or situate) the assets into (or in) the favored jurisdiction.").
29. Id.
30. See John A.E. Pottow, Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests," 104 Mich. L. Rev. 1899, 1902 (2005-06). See also Chung, supra note 22, at 270 (arguing bankruptcy laws embody and reflect each society's particular choices concerning its attitudes toward money, debt, the relationship between those with property and those without, employers and labor).
31. See Lynn M. LoPucki, Universalism Unravels, 79 Am. Bankr. L.J. 143 (discussing how forum shopping would frustrate creditors' expectations, particularly those of weaker creditor groups).
32. Andrew T. Guzman, International Bankruptcy: In Defense of Universalism, 98 Mich. L. Rev. 2177, 2181 (1999-2000) ("From the perspective of the debtor, however, the choice of regime is important even if all creditors adjust, because a reduction in the costs imposed by the bankruptcy system will reduce the overall cost of lending—leading to a reduction in the cost of capital for debtors.").
ment creditors, tort victims, and trade creditors. Any benefits accrued by forum shopping would likely be at the expense of these groups.

When the forum shop is into a haven jurisdiction, the consequences of forum shopping may be even greater. Haven jurisdictions have an incentive to protect lenders, but they have little incentive to protect employees, trade creditors, tort victims, and judgment creditors. Protecting lenders helps make haven-registered companies attractive to investors. But because haven-registered companies have no local employees, do not have contact with local businesses, and generally have no presence in the haven aside from their corporate books, their lawmakers have little incentive to protect these groups. This makes haven bankruptcy courts particularly attractive to debtors and their lenders. It also makes forum shopping into haven jurisdictions particularly problematic politically, as the haven bankruptcy law would then apply to employees and others worldwide.

B. American Perspective on Forum Shopping

From an American perspective, forum shopping can be divided into two categories—inbound and outbound. Outbound forum shopping involves American-based companies filing for bankruptcy in foreign jurisdictions, as occurred in the National Warranty bankruptcy discussed above. Inbound forum shopping involves a foreign company filing for bankruptcy in the United States. A notorious example was In re Yukos Oil in which the Russian oil giant filed for bankruptcy in Houston, Texas, based on the mere presence of bank account there.

33. Id.
34. LoPucki, supra note 12, at 102–03 ("The losers will be the corporate outsiders who have no means of controlling their debtor's choice of courts: tort victims, employees, suppliers, customers, other stakeholders with small interests, and—as with every strategy game—the less sophisticated players.").
35. Jay Lawrence Westbrook, Locating the Eye of the Financial Storm, 32 BROOK. J. INT'L L. 1019, 1031 (2007) ("One great source of abuse with havens, of course, is that they regulate conduct that has no effect on the regulating jurisdiction or its citizens, so they are free to accept results that no polity would be likely to permit as applies to its own citizens or its own economy.").
36. See Luca Enriques and Martin Gelter, How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law, 81 TUL. L. REV. 577 (2006–07) (using "outbound" and "inbound" to discuss the chartering of companies).
37. In re Yukos Oil Co., 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005) ("The court finds that the funds deposited by Misamore in the Southwest Bank of Texas account prepetition (approximately $480,000) are property of Yukos. The court concludes that Yukos has standing to be a debtor under Section 109(a) of the Bankruptcy Code. The court concludes that it has subject matter jurisdiction with respect to the instant case."). Even though the presence of property made Yukos an eligible debtor, the court dismissed the case on other grounds. Id. at 411.
These categories have a definitional problem in that they rely on being able to identify a company as American-based or foreign-based. Debtors like National Warranty and Yukos Oil easily fit into these definitions. However, other debtors challenge these designations. Perhaps the most famous cross-border insolvency case involved Maxwell Publications, which had significant assets, operations, and creditors in both England and the United States. When Maxwell filed for bankruptcy in both countries, the U.S. Bankruptcy Court struggled to determine whether the "Englishness" of the company suggested that English bankruptcy law should apply to the debtor’s prepetition transactions. As the factual inquiry of the case shows, the definitional underpinnings of "inbound" and "outbound" forum shopping are fuzzy at the margins.

Despite the difficulty of defining the margins of these categories, dividing forum shopping into these two categories is analytically useful because different aspects of the Bankruptcy Code make each type of shopping possible. Inbound forum shopping is possible because of the generous venue requirements of the Bankruptcy Code, as discussed above in reference to In re Yukos. Outbound forum shopping is made possible by Chapter 15 of the Bankruptcy Code (and formerly by its predecessor Section 304), which is discussed in the following section.

III. THE BANKRUPTCY CODE AND CROSS-BORDER INSOLVENCIES

Since its enactment in 1978, the United States Bankruptcy Code has endorsed a universalist-type treatment of cross-border insolvencies by encouraging cooperation with foreign bankruptcy courts. As originally enacted, the Bankruptcy Code’s Section 304 provided a procedure for foreign debtors to seek cooperation with U.S. bankruptcy courts. Congress then replaced Section 304 with Chapter 15 in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection


40. For example, the laws governing granting comity to foreign proceedings make outbound forum shopping possible, found in 11 U.S.C. §§ 1517, 1519, 1520, & 1521 (2006), while inbound shopping is made possible by the broad definition of who is an eligible "debtor," found in 11 U.S.C. § 109(a) (2006).
Chapter 15 is similar to Section 304 in terms of the procedural structure for seeking cooperation with a U.S. bankruptcy court. When a foreign company files for bankruptcy abroad, it can then file a petition in a U.S. bankruptcy court requesting comity. Instead of having to open a plenary bankruptcy to protect its U.S.-based assets under either Chapter 7 or 11, the debtor or its foreign representative can file an ancillary petition requesting the court to cooperate with the foreign proceeding. This ancillary proceeding is designed to be less costly and time-consuming than a full bankruptcy proceeding. If the court determines cooperation is appropriate, then it may take certain actions such as granting certain protections to the debtor’s U.S.-based assets, assisting the foreign representative in collecting U.S. assets, or turning the assets over to the foreign court for distribution.

Chapter 15 is also similar to Section 304 in that they both contain territorialist elements—what might be termed “territorialist overrides.” While both systems encourage international cooperation, they contain provisions that override this commitment to cooperation and allow the U.S. court to refuse to defer to the foreign proceeding. Chapter 15’s territorialist override is found in its public policy exception, which allows the court to refuse to cooperate with any foreign proceeding if cooperation would result in consequences that violate

42. 11 U.S.C. § 1501 (2006) (“The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency . . . .”).
43. 11 U.S.C.A. § 101(24) (West 2004 & Supp. 2009) (“The term ‘foreign representative’ means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.”).
44. Westbrook, A Global Solution to Multinational Default, supra note 8, at 2300 (“An ancillary proceeding is designed primarily to aid the ‘main’ proceeding in the debtor’s home country. It does not contemplate a full administration and distribution of the debtor’s local assets. Instead, as discussed infra, the court in the ancillary proceeding might issue injunctions against creditor lawsuits and seizures and provide a foreign administrator with assistance in gaining information about local assets.”).
fundamental U.S. policies. While some have argued that this public policy exception could potentially swallow the rule, the debate concerning Chapter 15 has mainly focused on its “COMI” standard.

Chapter 15’s main difference from Section 304 is that it makes cooperation with the foreign proceeding mandatory if the debtor has its COMI in the foreign jurisdiction. Section 304 made cooperation discretionary and provided courts with a series of considerations to determine when comity was appropriate. This discretionary system had been criticized for producing inconsistent results and for being both over- and under-cooperative. One of Section 304’s guidelines that contributed to these inconsistent results was the requirement that the distribution of proceedings in the foreign bankruptcy be “substantially in accordance” with what the creditors would receive in a U.S. bankruptcy. This factor, in essence, applied a “no harm, no foul” approach: if the local U.S. creditors’ recovery in the foreign proceeding did not substantially differ from what they would have received in a U.S. proceeding, then the court could grant comity to that proceeding. Courts and commentators differed, however, on what it meant for the foreign proceeding to differ substantially from U.S. law. Some interpreted this as requiring there to be no difference in outcomes. Others argued that the standard should be more tolerant of outcome differences.

Chapter 15 replaced these discretionary standards with a rule mandating cooperation if the foreign proceeding is filed where the debtor has its COMI. Cooperation remains discretionary if the foreign proceeding is not in the debtor’s COMI, but rather in a jurisdiction.

47. 11 U.S.C. § 1506 (2006) (“Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”).
48. Chung, supra note 22, at 260–61 (“As with the old § 304, the new Chapter 15 will likely generate debate regarding the extent to which it promotes or achieves the goals of universalism. The battleground for this debate will likely be § 1506, the public policy exception.”).
50. See infra text accompanying notes 74–78.
51. See infra text accompanying notes 74–78.
52. See Charles D. Booth, Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts, 66 Am. Bankr. L.J. 135, 171–72 (1992) (“In enacting § 304, Congress demonstrated ‘a desire for greater international cooperation in transnational insolvencies.’ Nevertheless, judicial reaction has been mixed—the courts have interpreted § 304 inconsistently and have sometimes failed to follow the legislative intent that produced it.”).
53. See Westbrook, supra note 27, at 472 (arguing for a liberal interpretation of “substantially in accordance”).
54. See Lopucki, supra note 12, at 84 (criticizing the liberal interpretation of “substantially in accordance”).
tion where the debtor has an "establishment"—defined as a place where the debtor carries on nontransitory economic activity.\textsuperscript{56} Instead of looking for outcome differences between the foreign bankruptcy law and the U.S. Bankruptcy Code, Chapter 15's approach examines the debtor's contacts with the foreign jurisdiction.

It has been argued this move away from Section 304's discretionary standards would have several benefits. According to Professor Jay Westbrook, one of the drafters of the Model Law, it would produce more consistent results by making cooperation mandatory;\textsuperscript{57} it would be more tolerant of outcome differences overall;\textsuperscript{58} and it would restrict outbound forum shopping.\textsuperscript{59}

Professor Westbrook further predicted that Chapter 15's COMI standard would deny cooperation to bankruptcy cases in offshore havens.\textsuperscript{60} As a result, National Warranty-type debtors would be unable to receive the protections of the U.S. Bankruptcy Code if they chose to file for bankruptcy in a haven jurisdiction.\textsuperscript{61}

Others have argued that Chapter 15's COMI rule would be incapable of providing any of these benefits.\textsuperscript{62} They have argued that any universalist system is bound to create unpredictability and promote forum shopping—and that the COMI rule is simply too malleable to act as an effective check on forum shopping.\textsuperscript{63} Professor Lynn LoPucki has led the argument against universalism in general and

\begin{itemize}
\item \textsuperscript{56} 11 U.S.C. § 1502(2) (2006).
\item \textsuperscript{57} Westbrook, \textit{supra} note 35, at 1024 ("A central point of the Model Law was meant to be adoption of a structure less amorphous than comity.").
\item \textsuperscript{58} Westbrook, \textit{supra} note 27, at 473 ("Section 304(c) demonstrates that Congress has utterly failed to come to grips with the problem of outcome differences.").
\item \textsuperscript{59} Westbrook, \textit{supra} notes 10 & 11 (arguing that the COMI rule would put an end to haven proceedings). \textit{See also} Pottow, \textit{supra} note 28 (arguing that the COMI standard provides a robust rule to prevent forum shopping).
\item \textsuperscript{60} \textit{See} Westbrook, \textit{A Global Solution to Multinational Default}, \textit{supra} note 8, at 2317 ("A naked incorporation in a sun-drenched bank haven would fall easily before proof of the actual center of the business, while a multiply-centered business incorporated under the law of any of its centers would be easily 'centered' for bankruptcy purposes.").
\item \textsuperscript{61} \textit{See} Westbrook, \textit{Chapter 15 at Last}, \textit{supra} note 8, at 728 ("[T]he COMI of a company like National Warranty would be clearly located in Nebraska and thus the Caymans liquidation could not be its main proceeding.").
\item \textsuperscript{62} \textit{See} Chung, \textit{supra} note 12, at 125; Chung, \textit{supra} note 22, at 301 (arguing that Chapter 15's COMI standard reflects a naivété about the financial incentives to forum shop); LoPucki, \textit{supra} note 13, at 760 ("Courts too easily manipulate vague standards such as the 'center of its interests' or the 'center of gravity' when the future of local businesses, the priorities of local creditors, and millions of dollars in professional fees hang in the balance."); Frederick Tung, \textit{Is International Bankruptcy Possible?}, 23 Mich. J. Int'l L. 31 (2001) (applying game theory and analogizing the decision to cooperate as a sort of prisoner's dilemma, arguing that that COMI standard will allow countries to "defect").
\item \textsuperscript{63} \textit{See} LoPucki, \textit{supra} note 13, at 760.
\end{itemize}
Chapter 15 in particular.\textsuperscript{64} The thrust of his argument against modified universalism is that it gives debtors the ability to forum shop for their preferred bankruptcy laws, and then, through ancillary proceedings, to have that chosen bankruptcy law apply worldwide.\textsuperscript{65}

Professor LoPucki's specific argument against Chapter 15 focuses on the effectiveness of the COMI standard.\textsuperscript{66} He has argued that to the extent that a legal rule could restrict debtors from forum shopping, the rule would have to be a clear rule that is not subject to manipulation.\textsuperscript{67} A strict interpretation of Section 304 might qualify as such a rule: no cooperation unless the outcome of the bankruptcy would be identical under the foreign law and the U.S. Bankruptcy Code.\textsuperscript{68} He has argued that the COMI rule, in contrast, is too vague to be effective.\textsuperscript{69} Although this new rule has been hailed as being more objective and predictable, he argues that it is too discretionary because it is impossible to determine the COMI of a multinational company.\textsuperscript{70} He points out, first, that the statute does not define COMI, instead providing only a rebuttable presumption that a debtor's COMI is where it is incorporated.\textsuperscript{71} Second, he argues that it would be impossible to actually define COMI, as a company may have most of its assets in one country, its headquarters in another, and be incorpo-

\textsuperscript{64} See LoPucki, supra note 12, at 79–80 ("Under the banner of 'universalism,' the professionals seek to give a single court effective worldwide jurisdiction over each multinational company's bankruptcy case. Alone, that would be an improvement in the system. But to put a single court in control of a case requires some method for selecting that court. So far the universalists have proposed no method that is likely to work. If they are allowed to implement their current proposal, it will trigger an international bankruptcy court competition far more destructive than the domestic competition in the United States.").

\textsuperscript{65} Id. at 89–90 ("All the case placer need do to forum shop in a universalist system is make a plausible argument that the chosen court is at the 'centre of [the debtor's] main interests.' . . . The plausible argument can be based on the presence in the chosen country of any of these four attributes: (1) incorporation (registered office), (2) headquarters, (3) administrative employees and operations, and (4) assets. Each of these attributes has, at various times and places, been considered the most appropriate basis on which to fix the location of a multinational company.").

\textsuperscript{66} Id. at 81 ("In thinking that the home country standard will be sufficient to control international forum shopping, the universalists have underestimated the incentives for such shopping, the strategic nature of international bankruptcy practice, and the pressures on courts and countries to each win at least a share of the world's multibillion-dollar bankruptcy industry for themselves.").

\textsuperscript{67} LoPucki, supra note 13, at 760.

\textsuperscript{68} See e.g., LoPucki, supra note 12, at 84 ("Read literally, § 304 clearly limits authority to surrender U.S. assets to situations in which the foreign court will distribute them in substantially the same way a U.S. court would. But the universalists, many of whom were themselves bankruptcy judges, chose not to read § 304 as written.").

\textsuperscript{69} LoPucki, supra note 13, at 760.

\textsuperscript{70} LoPucki, supra note 12, at 89–90.

rated in yet another.\(^{72}\) And third, he fears that even if the courts or legislature were to adopt a definition, debtors would likely be able to adapt their corporate structure to manipulate this definition.\(^{73}\)

LoPucki has argued that this inability to locate a country's true COMI threatens to result in either over- or under-cooperation.\(^{74}\) Over-cooperation may result as debtors will be able to make a plausible claim that their COMI is in the country of their choosing, and courts will have no means to refute their claims.\(^{75}\) Under-cooperation may result from bankruptcy courts competing with one another to be the "main" proceeding. That is, courts will be biased towards finding their own jurisdiction to be the debtors' COMI and, therefore, will bend the COMI standard to effect this outcome.\(^{76}\) Courts may seek to hold on to cases involving local creditors, or courts may actively seek to attract the large multinational bankruptcies in order to capture their high legal fees.\(^{77}\) Although there is an inherent tension in these predictions\(^{78}\)—one points to feared outcome of too much cooperation and the other to not enough—the bottom line is LoPucki believes a discretionary standard is incapable of producing results that are just right.

Professor Pottow has countered these criticisms of the COMI standard by asserting that the standard is sufficiently defined to allow courts to make a determination while sufficiently vague as to prevent debtors from manipulating it.\(^{79}\) His insight is that predictability is a

\(^{72}\) LoPucki, supra note 7, at 2226–27.

\(^{73}\) LoPucki, supra note 12, at 98 ("However universalists define a multinational's home country, the multinational can change it."). For a discussion of how this phenomenon has occurred in Europe, see Adam Gallagher and Riaz K. Janjuah, European Insolvency Regulation: German Court Blesses Change of COMI to Bolster Cross-border Group Restructurings, 25 A.B.I. JOURNAL 30 (Sept. 2008) (citing Schefenacker and Deutsche Nickel cases as examples of German holding companies that migrated to the United Kingdom in order to use a company voluntary arrangement in order to restructure).

\(^{74}\) See Pottow, supra note 28 (discussing the inherent tension between these predictions).

\(^{75}\) LoPucki, supra note 12, at 89–90 (describing how a debtor might plausibly claim its COMI to be in more than one country).

\(^{76}\) LoPucki, supra note 7, at 2236–37 ("The benefit to the forum nation will be in the economic activity [international forum shopping] brings to that nation. . . . Havens such as the Cayman Islands and Bermuda will be driven by competition to adopt laws that seek to systematically exploit involuntary and insufficiently adjusting creditors, customers, and other stakeholders."). See also Pottow, supra note 28, at 1918–19 (discussing the "pride" of courts in wanting to apply their own bankruptcy rules).

\(^{77}\) LoPucki, supra note 13, at 760.

\(^{78}\) See Pottow, supra note 28.

\(^{79}\) Id. at 790 ("This relationship between predictability and forum shopping means that earlier territorialist criticism of the imperfections of universalism's choice of law rules may actually, and perhaps ironically, be praise for a certain flexibility that may inhibit forum shopping.").
prerequisite to forum shopping; therefore, bright line rules are most vulnerable to forum shopping.\textsuperscript{80} He argues that, because the COMI standard is not a bright line rule, instead relying on some judicial discretion, courts will be able to apply Chapter 15 in order to prevent forum shopping.\textsuperscript{81}

This debate regarding Chapter 15 has also played out in front of courts interpreting the COMI standard. This Article summarizes three important cases interpreting Chapter 15's COMI standard. These three cases all involve companies that were incorporated in offshore jurisdictions, did business in the United States, filed for bankruptcy in those offshore jurisdictions, and then filed Chapter 15 petitions seeking recognition of their foreign proceedings.

IV. CASES

\textbf{A. Tri-Continental}

The first such case was \textit{In re Tri-Continental Exchange, Ltd.}\textsuperscript{82} in the Eastern District of California. The debtors were a group of offshore insurance companies that sold fraudulent insurance policies in the United States before filing for bankruptcy in the Caribbean islands of St. Vincent and the Grenadines.\textsuperscript{83} They then sought foreign main recognition in the United States by filing a Chapter 15 petition in the Eastern District of California.\textsuperscript{84}

American judgment creditors opposed this petition as it would enjoin their efforts to collect on their judgments.\textsuperscript{85} They argued that the debtors' COMI was actually in the United States because this is where the fraud took place.\textsuperscript{86} However, the court overruled these objections, finding that the debtor's COMI was really in the Caribbean.\textsuperscript{87} The court found the COMI determination to be the equivalent of determining a company's "principal place of business" in United States law.\textsuperscript{88} Since the debtors were registered in St. Vincent and "conducted regular business operations" there, this was sufficient to establish their COMI as being in St. Vincent. It therefore granted foreign main recognition to those proceedings.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} 349 B.R. 627 (Bankr. E.D. Cal. 2006).
\item \textsuperscript{83} \textit{Id.} at 629.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 631.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.} at 640.
\item \textsuperscript{88} \textit{Id.} at 634.
\item \textsuperscript{89} \textit{Id.} at 629.
\end{itemize}
B. *SPhinX*

The second major case involved a group of hedge funds that filed a Chapter 15 petition in New York seeking foreign main recognition for their Cayman Islands liquidation. The funds were placed into bankruptcy twice in the Cayman Islands, with Chapter 15 petitions filed in New York both times.

The first time, the shareholders placed the funds into bankruptcy in an effort to enjoin the enforcement of a settlement agreement in a related bankruptcy case, *In re Refco*. That settlement agreement pertained to an avoidance action brought by Refco's trustee to recover approximately $312 million that the company had paid to the funds in the ninety days prior to bankruptcy. A group of shareholders who disapproved of the settlement placed the funds into liquidation in the Caymans and then filed a Chapter 15 petition, seeking foreign main recognition which, they argued, would enjoin the settlement agreement. Judge Drain, presiding over both *Refco* and the Chapter 15 petition, declared that even a successful Chapter 15 petition would not enjoin the settlement agreement. Shortly thereafter, the *SPhinX* representatives withdrew their Chapter 15 petition and the Caymans liquidation was put on hold.

A month later the funds were again placed into winding up proceedings, this time by the directors. The funds' representative subsequently filed a motion for a temporary restraining order enjoining the appellate litigation concerning the settlement agreement. Chief Bankruptcy Judge Bernstein denied this motion, describing the motion as an "end run" around the *Refco* bankruptcy court's order and the district court's scheduling order in the appellate litigation. The trustee and committee of unsecured creditors in *Refco* filed a motion characterizing the Chapter 15 petition as a "last-ditch effort" to frustrate the *Refco* settlement. They argued that the Caymans proceed-

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92. *id.*
94. *Id.*
95. *Id.* at 110.
96. *Id.* at 111.
97. *Id.*
98. *Id.*
ings did not qualify as foreign main recognition because the funds were a "textbook example of a 'letterbox company.'"100

The bankruptcy court agreed with this characterization of the Chapter 15 petition and said that, but for the petition's improper purpose, the court would have granted foreign main recognition.101 Even though the court noted facts refuting the debtors' assertion that their COMI was in the Caymans—as "exempted companies" the funds were actually prohibited from engaging in business activity in the Caymans by Cayman law,102 the only assets in the Cayman Islands were its corporate books,103 the operations were conducted by a Delaware corporation,104 none of the funds' directors lived in the Caymans,105 and no board meetings were ever held there—the court placed greater weight on Chapter 15's purpose of promoting comity.107 It held applying the recognition requirements strictly would subvert Chapter 15's purpose of promoting cooperation.108

The court determined that the foreign proceedings should be recognized in some capacity, as main or nonmain.109 The liquidation proceedings in the Caymans were already underway, such Cayman Islands liquidations had been considered appropriate under the Section 304 caselaw, and the foreign representatives had filed the proper paperwork.110 Furthermore, and perhaps most importantly, the court indicated that the creditors consented to having the liquidation occur in the Cayman Islands.111 Not even the objecting Refco creditors had questioned the ability of the Caymans court to do a proper job—their only complaint was that the Caymans proceeding should not impact the Refco bankruptcy. The court saw this consent from the parties as essential, stating that "the interests of the debtor's estate, creditors and other parties, absent evidence that they support a 'primary' proceeding for an improper purpose, should generally be a significant and perhaps deciding factor."112
The SPhinX liquidators appealed this decision to the district court\textsuperscript{113} where Judge Sweet upheld the decision. He found that the bankruptcy court properly applied Chapter 15's flexibility: "Overall, it was appropriate for the Bankruptcy Court to consider the factors it considered, to retain its flexibility, and to reach a pragmatic resolution supported by the facts found. No authority has been cited to the contrary."\textsuperscript{114}

C. Bear Stearns

The Bear Stearns case contained facts very similar to the SPhinX case—the debtors were New York hedge funds incorporated in the Cayman Islands as exempted companies.\textsuperscript{115} Also like SPhinX, the funds were placed into liquidation in the Cayman Islands and the liquidators then filed a Chapter 15 petition in New York seeking foreign main recognition. However, the court's analysis differed greatly from the SPhinX decision. Even though the debtors in Bear Stearns were not trying to enjoin any ongoing U.S. proceedings and there were no objecting parties,\textsuperscript{116} the court did not place any weight on the creditors' consent or the debtor’s purpose in filing for bankruptcy. In fact, the court specifically noted its departure from the SPhinX decision in this regard: "To the extent that non objection would make the recognition process a rubber stamp exercise, this Court disagrees with the dicta in the SPhinX decision."\textsuperscript{117}

Instead of focusing on the presence of objections, the court followed the Tri-Continental decision in examining the debtors’ contacts with the Cayman Islands. Even though the funds were registered in the Caymans, the court listed several factors rebutting the COMI presumption, including:

- there are no employees or managers in the Cayman Islands, the investment manager for the Funds is located in New York, the Administrator that runs the back-office operations of the Funds is in the United States along with the Funds’ books and records and prior to the commencement of the Foreign Proceeding, all of the Funds’ liquid assets were located in United States.\textsuperscript{118}

This evidence was sufficient to rebut the presumption and to actually establish the COMI within the United States.\textsuperscript{119} This made the for-

\textsuperscript{114} Id. at 19.
\textsuperscript{116} Id. at 129.
\textsuperscript{117} Id. at 130.
\textsuperscript{118} Id.
\textsuperscript{119} Id. ("As noted, each of the Funds’ real seat and therefore their COMI is the United States, the place where the Funds conduct the administration of their interests on a regular basis and is therefore ascertainable by third parties . . .

eign proceedings ineligible for foreign main recognition. In addition, the evidence indicated that the debtors lacked an "establishment" in the Cayman Islands in order to qualify for foreign nonmain recognition. Consequently, the court denied recognition altogether to the Cayman Islands liquidation.

The case was appealed, and again went to Judge Sweet. Whereas the SPhinX appeal only raised the issue of the denial of foreign main recognition—the bankruptcy court's order granting nonmain recognition was not appealed—the Bear Stearns appeal raised the issues of both foreign main and nonmain recognition. Reviewing the facts on a "clearly erroneous" standard, the district court upheld the findings that the funds had neither their COMI nor an "establishment" in the Caymans.

V. METHODOLOGY

The data for this Article includes all Chapter 15 filings under the law's first three years, as well as all the Section 304 filings in the three years preceding the change in law. The data includes only business cases. And when there were administratively consolidated petitions, they include only the lead cases.

For each case, the location of the foreign proceeding was determined from the debtor's petition. Each case was also coded for the presence of objecting parties, objections to the COMI determination, and objections based on the public policy exception to recognition. Information regarding the debtors, including their “home,” and, more specifically, is located in this district where principal interests, assets and management are located.

120. Id.
121. Id. at 131.
122. Id. at 132.
124. Id. at 327.
125. Id. at 338–39.
126. This includes Section 304 petitions filed between October 17, 2002 and October 17, 2005 when Chapter 15 took effect. It also includes Chapter 15 filings between October 17, 2005 to October 17, 2008. Petitions were found by running reports by district on PACER (Public Access to Court Electronic Records, www.pacer.gov). For 14 districts it was not possible to run reports for Section 304 filings. For those districts, I contacted the court clerks who either sent me the docket numbers or else told me there had been no Section 304 filings. Only two districts did not respond. For two other districts, Southern District of Florida and Eastern District of Michigan, the Section 304 dockets were available but the underlying filings were not.
127. Objecting party was coded as "yes" if there was any form of objection made, including limited objections and any sort of response from a creditor.
129. “Home” included where the debtor listed its company as based.
industry,130 and date of incorporation were taken from their petitions. If the debtor's country of incorporation was in an offshore haven,131 they were coded as haven countries.

VI. FINDINGS

An analysis of the ancillary petitions filed in the last three years under Section 304 and first three years under Chapter 15 shows that the new law has resulted in a decrease in forum shopping into haven jurisdictions. There is no evidence that debtors moved into haven jurisdictions in order to manipulate Chapter 15's COMI test. And while Chapter 15 did not result in an immediate decrease in filings from haven countries, there has been a significant drop off in filings since the Bear Stearns decision in August of 2007. Thus, Chapter 15 has indeed restricted outbound forum shopping into haven districts, but it took nearly two years of caselaw development before it had this impact.

A. Re-Incorporation as Bankruptcy Planning

The enactment itself of Chapter 15 did not significantly alter the ancillary bankruptcy practice. The number of ancillary petitions filed in the first three years under the new law was almost exactly the same as under Section 304. And just as under Section 304, the Chapter 15 ancillary petitions sought comity for foreign proceedings principally from the United Kingdom and Canada, with the Cayman Islands as the third most common jurisdiction accounting for roughly 10% of all petitions. And filings from haven jurisdictions overall comprised about 20% of all the ancillary petitions.132 This 20% involved fourteen petitions seeking cooperation under Chapter 15.

Nothing in the court records indicates that any of these companies actually re-incorporated into the havens on the eve of bankruptcy. Additionally, according to the debtors' ancillary petitions, only three of these fourteen companies had registered in the havens within three years of filing for bankruptcy. It is highly unlikely that the other eleven companies' registration would have been part of a bankruptcy planning strategy. Of the three that did register in the havens within three years of filing, two were hedge funds that ran into trouble with

130. "Industry" was coded as one of the following author-created categories: bank, holding company, insurance, investment, manufacturing, telecommunications, energy, software, airline, construction, or other. These categories were my own categories and are not formal industry codes. Information regarding the industry was based on the debtors' petitions.

131. The following countries were coded as offshore havens: Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Isle of Man, Jersey, Nevis, and St. Vincent and the Grenadines.

132. See Figure 1.
the subprime mortgage crisis. The third was an insurance company that was forced to close for failure to meet regulatory requirements. With these three companies, there is no evidence that they moved into a tax haven in order to file for bankruptcy. In fact, it appears that they were, like most haven-registered companies, financial institutions that were attracted to the havens for tax or regulatory purposes, not for the bankruptcy laws.

B. Number of Haven Petitions

As noted above, the number of ancillary petitions emanating from haven proceedings did not change immediately upon the enactment of Chapter 15. Nor did the new law affect the treatment of these initial haven petitions. Petitions from havens and non-havens were routinely granted. The Tri-Continental decision, which first interpreted the COMI standard, did not impact haven filings even though it applied a strict reading of the statute. It was not until the Bear Stearns opinion that a court denied an ancillary petition. Since that court issued its order denying recognition to the Cayman Islands insolvency

133. These two were In re Basis Yield Alpha (Master), 381 B.R. 37 (Bankr. S.D.N.Y. 2008) and In re Bear Stearns High-Grade Credit Strategies Master Fund, Inc., 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

proceedings, there has been only one other haven petition filed.\textsuperscript{135} And that case was not a clear forum shop, as the debtor had a presence in Bermuda, with the Chief Financial Officer and other key employees operating out of their local office.\textsuperscript{136}

\textbf{FIGURE 2: COMPARISON OF NUMBER OF FILINGS FROM HAVEN AND NON-HAVEN COUNTRIES PRE- AND POST-BEAR STEARNS DECISION}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{comparison.png}
\end{figure}

\section*{C. Analysis}

From this data, this paper concludes that the \textit{Bear Stearns} opinion marked the true effective date of Chapter 15. Chapter 15 had been on the books for nearly two years, and there had been two previous major cases decided under Chapter 15. But by denying recognition to the

\begin{itemize}
\item 135. See Figure 2.
\item 136. Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Application for Order to Show Cause With Temporary Restraining Order, and Preliminary Injunction, \textit{In Re John C. McKenna, as Liquidator of BluePoint Re Limited}, No. 08-13169 (Bankr. S.D.N.Y. filed August 13, 2008), available at https://ecf.nysb.uscourts.gov/. According to the petition, the debtor insurance company had extensive assets in the United States but its Chief Financial Officer and other key employees operated out of Bermuda. The company was a wholly owned subsidiary of Wachovia Corporation. It "principally reinsured financial guarantees of public finance and asset-back debt obligations insured by monoline financial guaranty companies." \textit{Id.}
\end{itemize}
Caymans proceeding, *Bear Stearns* has thus far had the results Professor Westbrook predicted Chapter 15 would bring about.\(^{137}\) Even though the decision in that case has been controversial, its holding has made a significant impact on ancillary bankruptcy practice.

It is important to note that this data covers only the first three years under Chapter 15. And just as it took courts some time to adjust to the new law, it may also take debtors some time to adjust their practices. As the critics of Chapter 15, and universalism in general, correctly point out, debtors have a very strong incentive to forum shop their cases. And it is possible that the coming years will reveal new tactics that will allow debtors to forum shop into their preferred venues. For one thing, it is possible that it is too early, from the data reported here, to detect re-incorporations into havens in order to satisfy the COMI test. It is also possible that debtors may be able to receive cooperation by seeking "nonmain" recognition. Hedge funds like *Bear Stearns* and *SPhinX* may adjust their practices—indeed, the haven jurisdictions may assist them in so doing\(^{138}\)—in order to satisfy the "establishment" definition for nonmain recognition.

Furthermore, it is possible that haven-registered debtors have found a way to still conduct their bankruptcies in haven countries without needing to file an ancillary petition. Perhaps haven-registered financial institutions have been able to avoid the necessity of seeking comity in the United States by transferring their assets to the haven prior to filing bankruptcy—a transfer which may be easy for companies with highly-liquid assets like National Warranty. All of the haven-registered companies in this sample were financial institutions of some kind, whose assets are likely more easily transferable than would be a manufacturing company's. Alternatively, it may be possible that the financial crisis has made seeking comity in the United States unnecessary. For offshore hedge funds selling asset-backed securities, it may not be worth seeking the transfer of such assets because they have become so difficult to value.

These explanations are certainly plausible and the data cannot refute them, but they do not undermine the impact of Chapter 15. While

\(^{137}\) The fact that the decision was filed in the Southern District of New York also likely increased the impact of this case as more than 50% of the Chapter 15 petitions were filed in this district. This may also partially explain Tri-Continental's lack of impact, as it was only one of two petitions filed in the Eastern District of California. See Pottow, *supra* note 28, at 812 n.111 ("Perhaps a cynic might explain Tri-Continental as a consequence of the Eastern District of California being a sleepy backwater unattuned to (or unable to compete meaningfully in) the heady world of jurisdictional competition.").

debtors may have found a way to forum shop into haven jurisdictions, they then cannot benefit from the protection of U.S. bankruptcy law. This denial of cooperation is the impact of Chapter 15. Chapter 15 determines when comity with a foreign bankruptcy proceeding is appropriate. It does not seek to limit the ability of companies to transfer assets. And in serving this role as gatekeeper to U.S. bankruptcy law, Chapter 15 has served its purpose.

VII. CONCLUSION

After several years of debate concerning the impact, if any, Chapter 15 would have on cross-border bankruptcies, the study reported in this Article provides evidence that the change in law has made a major impact on outbound forum shopping. Through Chapter 15, courts have denied the protection of the U.S. Bankruptcy Code to companies that forum shop their bankruptcies into haven jurisdictions. Petitions seeking comity with haven proceedings—which had accounted for roughly 20% of all ancillary petitions—have since come to a near halt. By strictly following Chapter 15’s COMI standard and denying recognition to the Cayman Islands liquidation, In re Bear Stearns changed the practice of ancillary bankruptcies in the United States. While National Warranty-type companies are still capable of transferring their assets to a haven jurisdiction to liquidate, they are no longer able to then receive the protections of the U.S. Bankruptcy Code.