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Removal of District Court Actions to Bankruptcy Court May Be Improper

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Bankruptcy attorneys sometimes find themselves in the unique position of determining how to effect transfer of a pending federal district court action to bankruptcy court. Some may consider removing the action. Indeed, they may argue that on its face, §1452(a) of Title 28, which authorizes removal of actions related to a bankruptcy case, can be construed to apply to district court actions. A close examination of applicable law, however, renders this interpretation questionable. For instance, because a bankruptcy court technically constitutes a “unit” of a district court, removal of a district court action to bankruptcy court seems to produce the apparent absurdity of removing a case from itself to itself. Additional grounds, implicating the *Marathon* case and the Code’s 1984 amendments, provide even stronger support for denying the right to removal.

This article briefly examines (1) the historical evolution of §1452(a), (2) the arguments in favor of application of §1452(a) to district court actions and (3) the potential weaknesses of these arguments.

History of Bankruptcy Removal

In 1973, the Commission on the Bankruptcy Laws of the United States, established by Congress to recommend changes to the existing Bankruptcy Act, drafted a proposed new bankruptcy law.¹ Included in the proposed new law was a

section expressly authorizing the removal to bankruptcy court of a federal district court action relating to a bankruptcy case.²

Subsection 1478(a) of Title 28, the provision ultimately adopted by Congress, did not, however, contain an explicit reference to district court actions. It provided: “A party may remove any claim or cause of action in a civil action, other than a proceeding before the U.S. Tax Court or a civil action by a government unit to enforce such government unit’s police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.”³

Despite the absence of express authority in this provision, courts applying it permitted removal of district court actions to bankruptcy courts.⁴



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In 1984, Congress, in response to the Supreme Court’s decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and concomitantly, in order to provide district courts with supervisory jurisdiction over bankruptcy cases, amended the jurisdiction provisions of the Bankruptcy Code, including §1478(a). In addition to making certain immaterial changes, it deleted from that provision all references to the term “bankruptcy courts.” Hence, the removal provision, moved to §1452, now provides: “A party may remove any claim or cause of action in a civil action other than a proceeding before the U.S. Tax Court or a civil action by a

governmental unit to enforce such unit’s police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under §1334 of this title.”⁵

In the wake of the enactment of this subsection, disputes have arisen with respect to the issue of whether a district court action can be removed to a bankruptcy court.⁶

Arguments Supporting Removal

First, statutory construction may support removal. For instance, while it prohibits removal from the tax court, §1452(a) does not expressly proscribe removal from the district court.⁷ Further, subpart (a)(1) of Federal Rule of Bankruptcy Procedure 9027, providing the procedural requirements for removal, states: “[A]n application for removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending.”⁸ Likewise, the Advisory Committee Notes to the 1987 Amendments

⁵ 28 U.S.C. §1452(a).

⁶ This article assumes that, despite the deletion of the term “bankruptcy court” from subsection 1452(a), removal to bankruptcy court is not per se prohibited. See, e.g., *Levin v. State of New York Dep’t. of Health (In re Levin)*, 284 B.R. 308, 312 (Bankr. S.D. Fla. 2002) (observing that although subsection 1452(a) speaks of removal to the district court, “the majority of courts faced with bankruptcy removal find the applications for removal may be made in the bankruptcy court” (quoting *In re Boyer*, 108 B.R. 19, 24 (Bankr. N.D.N.Y. 1988))). It assumes also that a party can remove an action only to the district in which it is pending. See, e.g., *U-Haul Int’l. Inc. v. Gross Metal Prods. Inc. (In re Gross Metal Prods. Inc.)*, No. 97-30376DAS, 1997 WL 778756 at *1 (Bankr. E.D. Pa. Dec. 16, 1997) (holding that because “[s]ubsection 1452(a) speaks of removal to the district where the removed matter is pending,” “it seems clear that a removal to a court in a different district is not permissible”). Incidentally, courts have disagreed over the issue of whether district court actions may be removed to district court. Compare *Aurora Parking Co. v. Hide Co.*, No. 90 C 7332, 1991 WL 275047, at *4 n.1 (N.D. Ill. Dec. 17, 1991) (citing treatise for the propositions that “where a bankruptcy case is involved, the district court wears two hats: one *qua* district court; secondly as the court to which 28 U.S.C. §1334(a) and (b) has assigned bankruptcy jurisdiction” and that “[t]he removal petition is the document which transfers a pending piece of litigation from the district court acting in the former capacity to the district court acting in the latter capacity...”) (quoting *Collier on Bankruptcy*, ¶3.02 (15th ed. 1990)); *Gabel v. Engra Inc. (In re Engra Inc.)*, 86 B.R. 890, 896 (S.D. Tex. 1988) (“[W]hen a party files an application for removal, although technically the proceeding is removed to the district court, the reference of proceedings related to a bankruptcy case is invoked, and the proceeding is automatically referred to the bankruptcy court.”), with *Mitchell v. Fukuoka Dai-ichi Hawks Baseball Club (In re Mitchell)*, 206 B.R. 204, 210 (Bankr. C.D. Cal. 1997) (“It violates the plain language of 28 U.S.C. §1452(a) to say that an action can be removed ‘to district court’ when it is already pending in district court, because the words ‘to district court’ by necessity involve the concept of bringing the action to district court from some other forum.”).

⁷ *Gabel v. Engra Inc. (In re Engra Inc.)*, 86 B.R. 890, 896 (S.D. Tex. 1988) (“Congress considered removal inappropriate from one federal court, namely the U.S. Tax Court, which suggests that removal from other federal courts is not improper.”).

⁸ *Id.* at 896 n. 6 (quoting Fed. R. Bankr. P. 9027(a) (emphasis added)).

¹ Gibson, Elizabeth S., “Removal of Claims Related to Bankruptcy Cases: What Is a ‘Claim or Cause of Action?’” 34 U.C.L.A. L. Rev. 1, 6-7 (1986).

² *Id.* at 11-12, n.49 (“Any civil action brought before or after the date of a petition under this Act in a state or federal district court involving a controversy or matter of which the bankruptcy courts have original jurisdiction...may be removed by the plaintiff or defendant to the bankruptcy court for the territory within which such action is pending.” (quoting Bankruptcy Act of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. 137, Part II, 93rd Cong., 1st Sess. 30, 33 (1973)).

³ 28 U.S.C. §1478(a).

⁴ See, e.g., *Stamm v. Rapco Foam Inc.*, 21 B.R. 715, 725 (Bankr. W.D. Pa. 1982) (granting petition for removal of action filed in U.S. District Court for Western District of Pennsylvania); *Griffith v. Realty Execs. Inc.*, 6 B.R. 753, 755 (Bankr. D. N.M. 1980) (exercising jurisdiction over case removed from U.S. District Court for the District of New Mexico).

to that rule provide that “§1452 of Title 28, with certain exceptions, provides for removal of claims or causes of action in civil actions pending in state or federal court when the claim or cause of action is within the jurisdiction conferred by 28 U.S.C. §1334.”⁹

Second, if it had intended to disallow removal of district court actions, Congress could easily have incorporated language to that effect. Indeed, as shown above, an early version of the applicable removal provision explicitly referred to district court actions.

Third, §1441, the general removal provision, specifically limits removal to cases pending in state court.¹⁰ In contrast, §1452, on its face, does not limit removal to state court cases.¹¹

Fourth, the alteration in language, from §1478(a) to §1452(a), arguably constitutes only an attempt to comply with *Marathon* rather than an attempt to foreclose removal from federal district court to bankruptcy court.¹²

Fifth, because the term “district court” in the 1984 Act can be interpreted to mean “bankruptcy court” when read in light of the referral provisions of 28 U.S.C. §157, authorizing district courts to refer bankruptcy cases to bankruptcy courts, the replacement of the term “bankruptcy court” with the expression “district court” in 28 U.S.C.A. §1452 arguably effected no substantive change.¹³

Finally, perhaps efficiency and pragmatism mandate removal from a district court. “The advantage of removal is that the case moves to bankruptcy court within a few days of the filing for removal under [Rule] 9027.”¹⁴ Meanwhile, “[t]he disadvantage of filing a motion to refer or to implement referral in the district court is that [the] district judges are overburdened, primarily by their criminal cases, which are under intense time constraints and which do not permit the assignment of the priority to bankruptcy-related cases that the bankruptcy litigants might like.”¹⁵ Moreover, one must recognize the danger of “spending more time arguing about where to try a case than in trying the case.”¹⁶ “From the point of view of getting our work done,” one court has concluded, “it seems more important that we decide where the case should be handled

than whether it is laid before us as a removal or referral.”¹⁷

Potential Weaknesses of Arguments

As courts have determined, these arguments can be opposed, if not discredited. First, a textual interpretation of §1452(a) does not necessarily support removal. In fact, the language in §1452(a), referring to “a civil action other than a proceeding before the U.S. Tax Court,” may logically establish that only cases from federal courts other than district court can be removed.¹⁸

Further, timing provides an explanation for the apparent inconsistency between §1452(a) and Rule 9027(a).¹⁹ While Rule 9027 was adopted in 1983, §1452(a) was enacted in 1984.²⁰ Because courts, as noted above, construed §1478(a) to authorize direct removal to a bankruptcy court, the retention of the language in Rule 9027(a)(1) constitutes an apparent oversight.²¹ Also, the term “federal court” in Rule 9027(a)(1) can be construed to refer to only those federal courts, such as those described in the preceding paragraph, from which removal is actually permitted under §1452(a). Finally, insofar as a judicially promulgated rule is inconsistent with a statute, the statute controls.²² Hence, Rule 9027(a)(1) must be read so as not to conflict with §1452(a).²³

Second, if it had intended to allow removal of district court actions, Congress could just as easily have employed language reflecting this intent. In addition, resorting to legislative history is necessary only where a statute is ambiguous.²⁴ Here, the current removal provision does not appear to contain an ambiguity warranting an examination of its legislative history. Thus, consideration of legislative history, and in particular, proposed early versions of the bankruptcy removal provision, is likely inappropriate.

Third, both §1441 and §1452(a) are located in a chapter entitled “Removal of Cases from State Courts.”²⁵ Therefore, the absence of reference to “state court” in

§1452 does not necessarily mean, *a fortiori*, that removal of a district court action is proper.

Fourth, allowing removal from district court to bankruptcy court ignores the power accorded to district courts, in connection with the 1984 amendments, to retain all bankruptcy cases; hence, it creates a “significant gap” in that power, thereby actually causing violation of, rather than compliance with, *Marathon*.²⁶

Reference to subpart (c) of Rule 9027 reinforces this argument. That subpart provides that “[t]he parties shall proceed no further in that court [from which the action is removed] unless and until the claim or cause of action is remanded.”²⁷ Application of this subpart in the context of district court action removal would likewise interfere with the district court’s jurisdiction and ability to withdraw the reference.

Fifth, equating the term “bankruptcy court” with the term “district court” ignores the exchange of these terms in the removal provision in the 1984 amendments. More importantly, construing the term “district court” to mean or encompass “bankruptcy court” appears to yield an absurdity. Under such a construction, removal of a district court action to bankruptcy court would, in essence, effect removal of the action from the district court to itself.²⁸ Also, such an interpretation would appear to contravene Rule 9027(a)(3), referring to removal of “a claim or cause of action...asserted in another court.”²⁹

Case law addressing removal of Securities Investor Protection Act matters may provide support for this argument. In *Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers Inc.)*, 4 F.3d 1556 (10th Cir. 1993), the Tenth Circuit held that 15 U.S.C. §78eee(b)(4), authorizing removal of SIPA cases to “the court of the United States in the same judicial district having jurisdiction over cases under Title 11,” does not require removal of such cases to district courts. It reasoned that, because district courts already have exclusive jurisdiction over such cases, removal to such courts would lead to an absurd result: requiring district courts to

⁹ *Id.*
¹⁰ *Id.* at 896 (citing §1141).

¹¹ *Id.* at 896.

¹² *Id.*

¹³ *Philadelphia Gold Corp. v. Fauzio (In re Philadelphia Gold Corp.)*, 56 B.R. 87, 89-90 (Bankr. E.D. Pa. 1985). See, also, *MATV-Cable Satellite Inc. v. Phoenix Leasing Inc.*, 159 B.R. 56, 59 (Bankr. S.D. Fla. 1993) (“It can be argued that the term ‘district court’ may be read as ‘bankruptcy court,’ since the latter is a unit of the former pursuant to 28 U.S.C. §151.”).

¹⁴ *MATV*, 159 B.R. at 60.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Mitchell v. Fukuoka Dai-ichi Hawks Baseball Club (In re Mitchell)*, 206 B.R. 204, 211 (Bankr. C.D. Cal. 1997). See, also, *Centrust Savs. Bank v. Love*, 131 B.R. 64, 66-67 (S.D. Tex. 1991) (“The word ‘federal’ is included to allow removal from courts of the United States other than the U.S. District Court, like the local courts of the District of Columbia or the territorial courts of Guam.”).

¹⁹ *Sharp Elec. Corp. v. Deutsche Fin. Servs. Corp.*, 222 B.R. 259, 263 (Bankr. D. Md. 1998).

²⁰ *Id.*

²¹ *Id.*; *Helena Chem. Co. v. Manley*, 47 B.R. 72, 74 (Bankr. N.D. Miss. 1985) (determining that “[s]ince [§1478(a)] has now been repealed, the overall thrust of Rule 9027 has become unworkable” and “[t]his rule, along with numerous others, will have to be redrafted so that it will properly interface with the new bankruptcy court structure and the bankruptcy amendments”).

²² *Sharp*, 222 B.R. at 264.

²³ *Id.*

²⁴ See, e.g., *Patterson v. Shumate*, 504 U.S. 753, 761 (1992).

²⁵ See, e.g., *Centrust*, 131 B.R. at 67 (emphasis added); *Safeco Ins. Co. of America v. Mahaney (In re Watson-Mahaney Inc.)*, 70 B.R. 578, 581 (Bankr. N.D. Ill. 1987).

²⁶ See, e.g., *Thomas Steel Corp. v. Bethlehem Rebar Indus. Inc.*, 101 B.R. 16, 19-20 (Bankr. N.D. Ill. 1989). See, also, *Centrust*, 131 B.R. at 67 (noting that “[b]ecause bankruptcy courts are units of the district court, the district court is responsible for the administration of the bankruptcy courts,” and hence, “[r]emoval...directly to bankruptcy court would give the parties, and not this court, the say on the allocation of cases to bankruptcy”); *Sharp*, 222 B.R. at 264 (noting that “[t]he introduction of removal as a second option would subvert the discretionary nature of the district court’s reference of its bankruptcy jurisdiction”).

²⁷ Fed. R. Bankr. P. 9027(c).

²⁸ See, e.g., *Engra*, 86 B.R. at 896 (conceding that “[s]ince a party must remove ‘to the district court for the district where such civil action is pending,’ if a party removed an action from federal district court to bankruptcy court the removed proceeding would appear to end up where it started”); *Cornell & Co. Inc. v. Southeastern Pennsylvania Transp. Auth. (In re Cornell & Co. Inc.)*, 203 B.R. 585, 586 (Bankr. E.D. Pa. 1997) (“Literally, §1452, as applied to the remand of a [district court] action, would nonsensically effect a removal to the [district court] itself.”).

²⁹ Fed. R. Bankr. P. 9027(a)(3).

remove SIPA cases to themselves.³⁰ Incidentally, the court held also that removal of SIPA cases to bankruptcy court is permissible. Such holding is inapposite for the purposes of this article, however. For instance, the court noted that Congress had expressly intended that §78eee(b)(4) authorize removal to bankruptcy courts.³¹ No such intent can be found with respect to §1452(a).

Finally, if the need or desire to avoid time and expense in litigating jurisdiction questions were the sole or primary factor in the determination of jurisdiction, no court would likely ever transfer jurisdiction to the appropriate forum, or even address such questions. Insofar as it is a factor, judicial economy seems to require denial of removal. "If indeed a civil action in the district court belongs before the district court rather than the bankruptcy court, it defies any sense of judicial economy to allow a party to remove the action as a matter of right to the bankruptcy court and to impose the burden of moving for withdrawal of reference on the other parties."³² Therefore, in this instance, the burden should be placed on the party seeking to effect transfer of the district court action. Courts have adopted this reasoning; of those denying application of §1452(a) to district court actions, most have concluded that the proper procedure for transfer of a lawsuit pending in district court to bankruptcy court in the same district is a motion to refer, pursuant to §157(a) of Title 28, the lawsuit to bankruptcy court.³³

Conclusion

Although arguments supporting removal of district court actions can be made, a party seeking to effect transfer of a matter from federal district court to its local bankruptcy court should, for the reasons cited above, move to refer, rather than remove, the matter. ■

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³⁰ *Turner*, 4 F.3d at 1564.

³¹ *Id.* at 1564-65.

³² *Sharp*, 222 B.R. at 264.

³³ See, e.g., *EEOC v. Shelbyville Mixing Ctr. Inc. (In re Shelbyville Mixing Ctr. Inc.)*, 288 B.R. 765, 768 (Bankr. E.D. Ky. 2002); *Sharp*, 222 B.R. at 264; *Mitchell*, 206 B.R. at 210; *Thomas Steel*, 101 B.R. at 22; *Helena*, 47 B.R. at 75; *Bancohio Nat'l. Bank v. Long (In re Long)*, 43 B.R. 692, 697 (Bankr. N.D. Ohio 1984).