

**Memorandum Summarizing Procedures With
Respect To Removal Of Bankruptcy-Related State
Court Actions To The United States District Court
And United States Bankruptcy Court In Maryland**

Prepared by:

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and

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MEMORANDUM

SUBJECT: Handling of Matters Involving Removal of Bankruptcy-Related State Court Actions to the United States District Court/United States Bankruptcy Court.

Introduction

This Memorandum is intended to be a useful guide to the procedures and practice involved in the removal of bankruptcy-related claims and actions to the United States District Court and United States Bankruptcy Court in Maryland. It is, however, not intended to be an exhaustive treatment of the subject and should not be used as a substitute for attorneys doing their own research and reviewing carefully all applicable statutes, rules and case law.

Background

Congress vested all original jurisdiction over bankruptcy cases in the United States District Court. 28 U.S.C. §1334(a). Congress further provided that the District Court could refer all cases in bankruptcy and any and all related proceedings arising under, in, or related to cases in bankruptcy, to the Bankruptcy Court. 28 U.S.C. §157(a). The United States District Court for the District of Maryland has referred all cases under the Bankruptcy Code and all proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code to the United States Bankruptcy Court. Rule 402, Rules of the United States District Court (Maryland) (hereinafter referred to as “District Court Local Rule”). Accordingly, until and unless the reference of jurisdiction to the Bankruptcy Court is withdrawn by an Order of the District Court, all jurisdiction over bankruptcy matters resides with the Bankruptcy Court.

District Court Local Rule 405.1 provides that until and unless reference to the Bankruptcy Court is withdrawn by an Order of the District Court, all papers and pleadings in or related to a bankruptcy case or proceeding shall be filed with the Clerk in the Bankruptcy Court.¹

Removal Of Cases From State Court

28 U.S.C. §1452(a) provides as follows:

- (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a

¹ 28 U.S.C. §156(e) provides: (e) In a judicial district where a bankruptcy clerk has been appointed pursuant to subsection (b), the bankruptcy clerk shall be the official custodian of the records and dockets of the bankruptcy court.

civil action by a governmental unit to enforce such governmental 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 section 1334 of this title.

As the title to 28 U.S.C. §1452 itself indicates ("Removal of Claims related to bankruptcy cases"), matters that can be removed include claims "related to" a bankruptcy case within the meaning of 28 U.S.C. §1334(b).

In addition to 28 U.S.C. §1452(a), any civil action brought in a state court may also be subject to removal pursuant to 28 U.S.C. §1441(a), if applicable.² See Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995). 28 U.S.C. §1441(a) provides as follows:

- (a) Generally. – Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

With respect to removal under 28 U.S.C. § 1441(a), section 1441(c) should also be kept in mind.³ 28 U.S.C. § 1441(c) provides as follows:

- (c) Joinder of Federal law claims and State law claims. – (1) If a civil action includes –
 - (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
 - (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

² It should be noted that, as a practical matter, 28 U.S.C. §1441(a) may be of more limited applicability because of, inter alia, §1446(b)'s potentially more stringent time period for effecting removal and the limitation that only defendants can seek removal under §1441(a) and the additional requirement in § 1446(b)(2) that all defendants properly joined and served must join in or consent to the removal of the action.

³ 28 U.S.C. § 1441(c) was added effective January 6, 2012, as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011.

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

Where the basis for removal includes claims related to bankruptcy cases, or federal questions concerning title 11 of the United States Code (the “Bankruptcy Code”), if the underlying court case sought to be removed (the “Bankruptcy Related Removed Case”) is pending in Maryland, the removal pleadings should be filed in the United States Bankruptcy Court for the District of Maryland, whether the bankruptcy case is pending in the United States Bankruptcy Court for the District of Maryland or in a bankruptcy court located in another state.

Whether the underlying bankruptcy case is pending in Maryland or a bankruptcy court in another state, the removal papers should be filed in the division (Baltimore or Greenbelt) of the United States Bankruptcy Court for the District of Maryland covering the county in Maryland where the Bankruptcy Related Removed Case is pending. See Rule 9027(a)(1), Federal Rules of Bankruptcy Procedure (hereinafter referred to as “Bankruptcy Rule ___”); 28 U.S.C. §1446(a); and Local Bankruptcy Rule 5001-2(e).⁴

Removal Procedures

As set forth in both Bankruptcy Rule 9027(a) and 28 U.S.C. §1446(a), the basic pleading to remove a case is a Notice of Removal. Neither a motion nor a court order is required to effect removal of a court action; removal is accomplished by filing a notice of removal with the clerk of the bankruptcy court and a copy of such notice with the clerk of the court from which the case is being removed.

With respect to removal pursuant to 28 U.S.C. §1452, Bankruptcy Rule 9027(a)(1) provides as follows:

(1) *Where filed; form and content.* A notice of removal shall be filed with the clerk for the district and division within which is

⁴ If the underlying bankruptcy case is pending in Maryland before a Bankruptcy Judge in a division other than the division in which the notice of removal and other initial removal pleadings are filed, the removed case and any motions related thereto may be assigned or transferred to the Bankruptcy Judge handling the underlying bankruptcy case in Maryland. The cover sheet filed with the clerk’s office at the time of filing the notice of removal should indicate the underlying Maryland bankruptcy case as a related case.

located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.⁵

As set forth in the foregoing Rule, the notice of removal must contain a statement of the facts which entitle the party filing the notice to remove the matter. Those facts should include sufficient facts to establish a jurisdictional basis for removal, with reference to the statutes conferring jurisdiction (e.g., 28 U.S.C. §1452 and 28 U.S.C. §1334.) Also included in the facts should be a reference to the underlying bankruptcy case to which the removed action relates, including the case name and number and the court in which such bankruptcy case is pending. As further set forth in Bankruptcy Rule 9027(a)(1), the notice must state whether the removed matter is core or non-core and, if it is non-core, whether the party removing the matter consents to entry of final orders or judgment by the bankruptcy judge.

Another requirement set forth in Bankruptcy Rule 9027(a)(1) is that the notice of removal be accompanied by a copy of all process and pleadings in the removed action. The bankruptcy court will enter an order after the filing of the notice of removal directing that copies of all process and pleadings not already filed with the bankruptcy court be filed within 21 days, and the order will set a status conference before the court at which a pretrial schedule and trial date will be discussed.

Promptly after filing the notice of removal, a copy of the notice must be served by the party filing the notice on all other parties to the removed claim or cause of action. Bankruptcy Rule 9027(b). All other pleadings filed in the removed action should also be served on all other parties. In addition, promptly after filing the notice of removal, a copy of the notice must be filed by the removing party with the clerk of the court from which the claim or cause of action was removed. Bankruptcy Rule 9027(c). The Rule further states that removal is effected on filing of a copy of the notice of removal with the clerk of the court from which the claim or cause of action is removed, and that parties to the removed action shall proceed no

⁵ As noted above, in accordance with District Court Local Rule 405.1 and 28 U.S.C. § 156(e), the notice of removal of a Bankruptcy Related Removed Case is to be filed and maintained in the clerk's office of the bankruptcy court.

further in that court unless and until the claim or cause of action is remanded. Bankruptcy Rule 9027(c).

With respect to removal pursuant to 28 U.S.C. §1441(a), 28 U.S.C. §1446 sets forth procedures very similar to those contained in Bankruptcy Rule 9027.

28 U.S.C. §§1446(a) and (d) provide as follows:

(a) Generally. – A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.⁶

(d) Notice to adverse parties and State court. – Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Time For Filing Notice of Removal

With respect to removals pursuant to 28 U.S.C. §1452, Bankruptcy Rules 9027(a)(2) and (3) govern the time in which a notice of removal must be filed in order to be timely. The rules distinguish between the time for seeking removal if the underlying court action sought to be removed is already pending when the bankruptcy case is thereafter commenced (Bankruptcy Rule 9027(a)(2)) and when the underlying court action sought to be removed is filed after the bankruptcy case has already been commenced (Bankruptcy Rule 9027(a)(3)).

Bankruptcy Rule 9027(a) provides, in pertinent part, as follows:

(2) *Time for Filing; Civil Action Initiated For Commencement of the Case Under The Code.* If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90

⁶ See footnote 5.

days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under §362 of the Code, or (C) 30 days after a trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief.

- (3) *Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code.* If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

With respect to removals pursuant to 28 U.S.C. §1441(a), the time in which a notice of removal must be filed in order to be timely is set forth in 28 U.S.C. §1446(b).

28 U.S.C. §1446(b) provides as follows:

(b) Requirements; generally. – (1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served

defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Motion To Remand

A party seeking to oppose removal of a claim or cause of action pursuant to 28 U.S.C. §1452(a) may file a motion to remand in the bankruptcy court.⁷ As provided in Bankruptcy Rule 9027(d), a motion to remand will be governed by Bankruptcy Rule 9014 and must be served on the parties to the removed claim or cause of action.

In addition to motions to remand based upon lack of subject matter jurisdiction, the bankruptcy court may remand a claim or cause of action “on any equitable ground.” 28 U.S.C. §1452(b).^{8 9}

An order pursuant to §1452(b) remanding a claim or cause of action, or a decision pursuant to §1452(b) not to remand, is not reviewable by appeal or otherwise by the United States Court of Appeals for the Fourth Circuit or the United States Supreme Court. 28 U.S.C. §1452(b). Such an order may, however, be reviewed on appeal by the United States District Court.

Pursuant to 28 U.S.C. §1447(c), a motion to remand a case removed from State court pursuant to 28 U.S.C. §1441(a) on the basis of any defect other than lack of subject matter jurisdiction must be filed within 30 days after the filing of the

⁷ To be safe, a party seeking remand should file its motion to remand within 30 days after the date of filing of the notice of removal. A motion to remand on the basis of lack of subject matter jurisdiction does not have a 30-day time limitation. See 28 U.S.C. §1447(c); Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 n.3 (1995). A number of courts have concluded that the 30-day time limitation in §1447(c) does not apply to motions to remand where the removal was brought pursuant to 28 U.S.C. §1452(a). See In re Hotel Mt. Lassen, Inc., 207 B.R. 935 (Bankr. E.D. Cal. 1997); In re Ciclon Negro, Inc., 260 B.R. 832 (Bankr. S.D. Tex. 2001); Unico Holdings, Inc. v. Nutramax Products, Inc., 264 B.R. 779 (Bankr. S.D. Fla. 2001); In re Refco, Inc., 354 B.R. 515, 519-520 (8th Cir. BAP 2006); In re New 118th LLC, 396 B.R. 885, 893 n.7 (Bankr. S.D.N.Y. 2008).

⁸ To the extent that federal jurisdiction is asserted under 28 U.S.C. § 1334, the court may be required to abstain or abstain on a discretionary basis, and remand the action. See 28 U.S.C. §1334(c).

⁹ Any party may file in the bankruptcy court a motion requesting that the district court withdraw the reference of jurisdiction from the bankruptcy court. See 28 U.S.C. §157(d). After a response is filed, or expiration of the time for response (14 days plus 3 days if the motion is served by mail), the clerk of the bankruptcy court will transmit the motion and any response to the district court for decision.

notice of removal. In addition, §1447(c) also provides that an order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. §1447(c) provides as follows:

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

With respect to removals pursuant to 28 U.S.C. §1441(a), §1447(d) provides that an order remanding a case to state court is not reviewable on appeal or otherwise. Note that this provision, unlike §1452(b), does not mention a decision not to remand a case. See Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-28 (1995).

Removal Procedures with Respect to Personal Injury Tort and Wrongful Death Claims

A party removing a personal injury tort or wrongful death claim which must be tried in the district court pursuant to 28 U.S.C. § 157(b)(5) should file the appropriate removal pleadings and papers as described above with the clerk of the bankruptcy court. As provided in District Court Local Rule 405.3.d, the party filing the removal pleadings shall add to the caption of such pleadings, beneath the bankruptcy number, a notation designating the pleading as a "SECTION 157(b)(5) MATTER." In addition to the bankruptcy court cover sheet which should be filed with the removal pleadings, a completed district court civil cover sheet should also be submitted with respect to personal injury tort and wrongful death claims. Upon the filing of removal pleadings and papers with respect to a personal injury tort or wrongful death claim, the clerk in the bankruptcy court will transfer the proceeding to the district court. See District Court Local Rule 405.3.d. Thereafter, with respect to subsequent pleadings in a removed personal injury tort or wrongful death proceeding, such pleadings should be filed in the district court, unless such court orders otherwise.

Motion To Transfer Venue

A party removing a claim, a cause of action or a case may desire to seek to transfer venue from the District of Maryland to another federal district court. This may be particularly true in a case where the underlying bankruptcy case which is the basis for removal of the Bankruptcy Related Removed Case is pending in a bankruptcy court outside of Maryland. A motion to transfer venue may be brought under 28 U.S.C. §1412 and/or §1404(a).

28 U.S.C. §1412 provides as follows:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. §1404(a) provides as follows:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

Additionally, Bankruptcy Rule 7087 provides:

On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. §1412, except as provided in Rule 7019(2).

A motion to transfer venue should be filed with the clerk of the bankruptcy court. Except with respect to cases to be tried in the district court pursuant to 28 U.S.C. §157(b)(5), unless the reference to the bankruptcy court has been withdrawn, the bankruptcy court will determine the motion to transfer venue. Pursuant to District Court Local Rule 405.4, all motions concerning venue in personal injury tort and wrongful death cases (28 U.S.C. §157(b)(5)) shall be determined by the District Court.

Procedure After Removal

With respect to removals pursuant to 28 U.S.C. §1452(a), Bankruptcy Rule 9027(e) sets forth certain procedures applicable after a claim or cause of action is

removed. After removal the court may issue all necessary orders and process to bring before it all proper parties. Bankruptcy Rule 9027(e)(1). See also District Court Local Rule 405.3.d. If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of the Bankruptcy Rules. Any defendant upon whom process is served after removal may seek to remand the case. Bankruptcy Rule 9027(f).

Any party filing a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, must file a statement admitting or denying any allegation in the notice of removal asserting that the proceeding is core or non-core. If such statement asserts that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. Such statement shall be signed pursuant to Bankruptcy Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. A copy of such statement shall be mailed to every other party to the removed claim or cause of action. Bankruptcy Rule 9027(e)(3).

If a right to trial by jury exists and is properly asserted, the parties must also file a statement consenting or withholding consent to the jury trial being conducted by the bankruptcy judge. Bankruptcy Rule 9015(b).¹⁰ The statement must be filed before the conclusion of the initial pretrial conference. Local Bankruptcy Rule 9015-1.

Pursuant to Bankruptcy Rule 9027(g), the rules provided in Part VII of the Bankruptcy Rules apply to a removed claim or cause of action and shall govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present other available defenses or objections within 21 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 21 days following the service of summons on such initial pleading, or within 7 days following the filing of the notice of removal, whichever period is longest. Bankruptcy Rule 9027(g).

If the court from which the claim or cause of action has been removed fails to deliver certified copies to a party requesting such copies when a proper request has been made accompanied by payment or tender of the lawful fees required in

¹⁰ The district court may designate the bankruptcy judges of the district to conduct jury trials pursuant to 28 U.S.C. § 157(e), assuming that the parties consent thereto.

connection therewith, the court to which the claim or cause of action has been removed may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if such certified copies had been filed. Bankruptcy Rule 9027(h).

Pursuant to Bankruptcy Rule 9027(i), all injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court to which the claim or cause of action is removed. In addition, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall continue to hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. Bankruptcy Rule 9027(i).

With respect to removals pursuant to 28 U.S.C. §1441(a), similar procedures are set forth in 28 U.S.C. §§1448, 1449 and 1450.

Case Numbers And Captions

If the underlying bankruptcy case to which the Bankruptcy Related Removed Case relates is pending in Maryland, the Notice of Removal and any accompanying pleadings should have a caption with a dual reference to first, the underlying bankruptcy case and second, to the parties to the adversary proceeding being removed. An example would be as follows:

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF MARYLAND
 (_____ Division)

| | | |
|-----------------------|---|--------------------------------|
| In re: | * | |
| ABC CORP., | * | Bankruptcy Case No. 00-0-0000 |
| | | (Chapter 11) |
| Debtor. | * | |
| * * * * * * | * | * * * * * |
| JOHN DOE, | * | |
| Plaintiff | * | Adversary Proceeding No. _____ |
| v. | * | |
| ABC CORP., XYZ CORP., | * | |
| et al. | * | |
| Defendants | * | |
| * * * * * * | * | * * * * * |

Similarly, if the underlying bankruptcy case is pending outside of the District of Maryland, the Notice of Removal and any accompanying pleadings should also have a caption with a dual reference to first, the underlying bankruptcy case (notwithstanding that it is pending out of state) and second, to the parties to the adversary proceeding being removed. In the caption, next to the name of the underlying bankruptcy case and underneath the case number, a parenthetical should be added indicating the court in which the underlying bankruptcy case is pending. An example would be as follows:

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF MARYLAND
 (_____ Division)

| | | |
|------------|---|---|
| In re: | * | |
| ABC CORP., | * | Bankruptcy Case No. 00-0-0000 |
| Debtor. | * | (United States Bankruptcy Court for the _____ District of _____, _____ Division) (Chapter 11) |
| | * | |

* * * * *

| | | |
|-----------------------|---|--------------------------------|
| JOHN DOE, | * | |
| Plaintiff, | * | |
| v. | * | Adversary Proceeding No. _____ |
| ABC CORP., XYZ CORP., | * | |
| et al. | * | |
| Defendants. | * | |

* * * * *

As noted above, details concerning the underlying bankruptcy case to which the Notice of Removal relates should also be set forth in the text of the Notice.