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IN THIS ISSUE

This article is intended to offer guidance when a party to litigation files for bankruptcy. In particular, it focuses on the jurisdictional strategies of removing a bankruptcy-related case to federal court or utilizing abstention principles to keep a case out of bankruptcy court.

Using Bankruptcy to Your Client's Advantage

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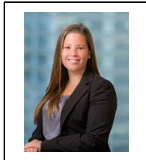

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Among litigators, there seems to be a unanimous discomfort when the B-word comes up: bankruptcy. Few things are more disruptive to litigation than one of the parties filing for bankruptcy. Often without warning, a petition under the Bankruptcy Code could be filed by an opposing party, a co-defendant, or even your own client.

The most obvious hindrance to litigation is that bankruptcy places an automatic stay on any claims or proceedings against the party who has filed for bankruptcy. 11 U.S.C. § 362. However, if a lawsuit involving your client is halted by a bankruptcy petition, it is possible to use that time to your advantage. With knowledge of just a few basic rules, you can overcome your fear of all things bankruptcy and pick the forum most favorable for your client.

For starters, bankruptcy may give your client an opportunity to remove its case to federal court, which often applies more favorable standards of review for defendants on dispositive motions. Federal courts have original and exclusive jurisdiction over all bankruptcy proceedings. Additionally, the rules give federal courts jurisdiction over any civil proceedings that are "related to" a bankruptcy case. 28 U.S.C. § 1334(b).

Federal courts have adopted an expansive definition of a bankruptcy-related proceeding under section 1334(b), usually defining it as "whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583 (6th Cir. 1990) (quoting *In re Pacor, Inc.*, 743 F.2d 984, 994 (3d. Cir. 1984)). Therefore, any case that may affect how much money a bankruptcy debtor has could be removed. An action is also related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action, or if the action in any way impacts the handling or administration of the bankrupt estate. *Id.*

Scholars have noted that with this generous definition, "almost any proceeding in which the debtor is a party or in which the property rights or interests of the debtor will be directly or indirectly affected will have to be deemed to be 'related to' the debtor's title 11 case." Michael H. Reed, Barbara H. Sagar & Gail P. Granoff, *Subject Matter Jurisdiction, Abstention and Removal under the New Federal Bankruptcy Law*, 56 Am. Bankr. L.J. 121, 132 (1982). The Supreme Court of the United States confirmed that "Congress intended to grant comprehensive jurisdiction to the bankruptcy court so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). However, because it is claim-by-claim, you may be able to remove certain claims affected by the bankruptcy but not the entire lawsuit.

It is important to note, however, that bankruptcy-related proceedings do not usually go to federal district court. Instead, most districts have a local rule that bankruptcy-related proceedings are automatically referred to the bankruptcy court for that district. 28 U.S.C. § 157(a). This may make the allure of federal court less appealing to defendants. Particularly because removing a case to federal court may cause your lawsuit to move from the

venue where it has been litigated for many years to a forum where it can easily get lost amidst the complications of a bankruptcy proceeding. On top of that, bankruptcy judges may not have the experience necessary to handle a complex litigation matter. Although federal court is often the preference of defendants, state court may start feeling like a comparative safe haven.
However, unlike the more commonly-used removal statute (28 U.S.C. § 1441), removal of bankruptcy-related proceedings is not a right reserved only for defendants. Rather, any "party" can remove a proceeding that is related to a bankruptcy estate under § 1452. This means you may find yourself in the reversed-role of filing a motion to remand your case back to state court. If this is the case, there are several abstention doctrines that can be utilized to keep a case related to a bankruptcy in state court.

First is abstention under 28 U.S.C. § 1334(c). This states that within 30 days of removal, a party may file a motion to remand the claim back to state court. Abstention principles demand that the federal court should remand the action if the only basis for federal jurisdiction is the connection to the bankruptcy proceeding, and the action can be "timely adjudicated" in state court. 28 U.S.C. § 1334(c).

Likewise, 28 U.S.C. § 1452(b) permits a federal court to remand a bankruptcy-related case back to state court "on any equitable grounds." Relevant equitable considerations for remand include:

(1) forum non conveniens,
(2) a holding that if removal resulted in the bifurcation of a civil action, the entire matter should be tried in the same court,
(3) a finding that the state court is better able to respond to questions involving state law,
(4) the expertise of the particular court,
(5) duplication of judicial resources and uneconomical use in two forums,
(6) prejudice to the involuntarily removed parties,
(7) comity considerations, and
(8) a lessened possibility of an inconsistent result.

Lastly, abstention under § 305 of the Bankruptcy Code permits an expansive avenue of abstention, permitting a bankruptcy court to dismiss a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension" 11 U.S.C. § 305. The legislative history to § 305 suggests that the draftsmen intended to encourage out of court compositions or arrangements which might be more economical and efficient and better serve the interests of the debtor and the majority of its creditors.

When an unexpected or unanticipated bankruptcy halts the progress of your litigation, think of it as an opportunity rather than an inconvenience. If you have been looking for a chance to remove your case to federal court, this could be it. But if you prefer to keep your case in the forum where it is already in progress, there are plenty of abstention principles that you can use. Do not be afraid of bankruptcy – it can sometimes be used to turn the tide in your client's favor.

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