2023

When Deciding Whether to Transfer Venue, Bankruptcy Courts will Consider Their Discretion to Retain a Case, as well as the Interests of Justice and Convenience of the Parties

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2023 Volume XV No. 13

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Cite as: *When deciding whether to transfer venue, bankruptcy courts will consider their discretion to retain a case, as well as the interests of justice and convenience of the parties*, 15 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 13 (2023).

INTRODUCTION

When a debtor decides to file a petition for bankruptcy, one decision to make is in what court, or what jurisdiction to file. However, the debtor's choice of where to file is not always indisputable. Once a case is filed in a particular court, any "party in interest" may bring a motion seeking to change the venue of the case to an alternate court.[1] Additionally, a court, on its own motion, may transfer a case to an alternate venue.[2] The three statutory provisions that govern transfers of venue are Bankruptcy Rule 1014 ("Rule 1014"), 28 U.S.C. § 1408 ("Section 1408"), and 28 U.S.C. § 1412 (the substantive equivalent of Rule 1014).

This article primarily discusses Rule 1014, however, it is important to note that Section 1408 provides the criteria for what constitutes proper venue. These considerations include the debtors' and creditors' domicile, residence, principal place of business, and principal assets. However, the statutory interpretation of Rule 1014(a)(2) is what will be focused on in this article.

[1] *See In re* James Wilson Assoc., 965 F.2d 160, 169 (7th Cir. 1992) (A "party in interest" is "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding.").
[2] *See* FED. R. BANKR. P. 1014.

Rule 1014(a)(2) states in pertinent part, "[i]f a petition is filed in an improper district, the court, on timely motion of a party in interest or on its own motion . . . may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or convenience of the parties." The language of this provision poses two issues: (1) What discretion does a bankruptcy court have to retain a case filed in an improper venue; and (2) what constitutes in the interest of justice and convenience to the parties?

The majority of courts have held that a bankruptcy court does not have discretion to retain jurisdiction over an improperly venued case upon a timely-filed objection.[3] Furthermore, when determining what constitutes the interest of justice and convenience of the parties under Rule 1014, courts will consider several practical and equitable factors.[4]

This article explores how courts have interpreted Rule 1014 in a twofold approach. Part I discusses whether a court has the discretion to retain a case even if it was filed in the improper venue. Part II examines what constitutes "in the interest of justice and convenience of the parties" under Rule 1014.

DISCUSSION

I. Majority view that courts do not have discretion to retain cases filed in the improper venue

Rule 1014 states that a bankruptcy court "may dismiss the case or transfer it to any other district . . .."[5] The issue with this provision is its permissive language; particularly the word "may." Debtors and creditors have been left to argue whether this language permits a respective judge to retain a case even if it was filed in an improper venue.

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[3] *See* Thompson v. Greenwood, 507 F.3d 416, 421 (6th Cir. 2007); *see also In* re Wood, No. 22-20054-drd-13, 2022 WL 2885294 at *2 (Bankr. W.D. Mo. May 25, 2022); *but see In re* Lazaro, 128 B.R. 168 (Bankr. W.D. Tex. 1991); *In re* Leonard, 55 B.R. 106, 109 (Bankr. D.C. 1985).
[4] *Id.*
[5] FED. R. BANKR. P. 1014.

The Sixth Circuit, in *Thompson v. Greenwood*, held that a court no longer has authority to retain a case filed in an improper venue.[6] The majority of courts have agreed "that [a] bankruptcy court does not have discretion to retain jurisdiction over an improperly venued case upon a timely-filed objection."[7]

For example, in *Thompson v. Greenwood*, where the United States Trustee's Office for the Northern District of Mississippi moved to transfer a bankruptcy case filed on behalf of two debtors, both of whom resided in the same district but filed in a different district, the Sixth Circuit found that "the use of seemingly permissive language ('may be transferred,' rather than 'must be transferred') could be interpreted as granting the court authority to also retain the case."[8] However, the court also found that the accompanying advisory note was given greater weight, which made clear that "since the repeal of 28 U.S.C. § 1477, which explicitly permitted retention of an improperly venued case, there is no longer any authority for such retention, and only dismissal or transfer of the case is authorized."[9]

In *In re Wood*, a Chapter 13 Trustee filed a motion to transfer, asserting that the debtor's domicile, residence, principal place of business or principal assets were not located in the district in which the case was filed. Granting the Trustee's motion to transfer, the Bankruptcy Court for the Western District of Missouri held that it must comply with the law, and that "it lacks the authority to retain an improperly-venued case."[10] The debtors in *In re Wood*, conceding improper

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[6] *Thompson*, 507 F.3d at 421.
[7] *See In re Wood*, WL 2885294, at *2; *see generally In re* Sorrells, 218 B.R. 580, 587 (B.A.P. 10th Cir. 1998); *In re* McDonald, 219 B.R. 804, 807 (Bankr. W.D. Tenn. 1998); *In re* Dees, No. 19-40286-KKS, 2019 WL 9406122, at *5 (Bankr. N.D. Fla. October 4, 2019); *In re* Skelton, No. 18-50355-WLH, 2018 WL 1054099, at *3 (Bankr. N.D. Ga. February 23, 2018); *but see In re Leonard*, 55 B.R. at 109 ("[i]t would make no sense to permit a transfer to any other district, i.e., one in which venue might be improper, and not to permit retention in an improper venue. It would be anomalous to conclude that a debtor is prohibited from starting out in an improper venue when the case could be transferred to an improper venue.")
[8] *Thompson*, 507 F.3d at 421.
[9] *Id.*
[10] *In re Wood*, 2022 WL 2885294 at *3.

venue, argued that despite filing in a district that was not consistent with their domicile, residence, or principal place of business or assets, it would have been a "significant burden on all the parties" because they are situated closer to the court they filed in.[11] Acknowledging this burden, the court still found these equitable considerations "not relevant given the Court's lack of discretion."[12]

A minority of courts have disagreed with the majority view that bankruptcy courts do not have discretion to retain an improperly-venued case. For example, in *In re Lazaro*, the Bankruptcy Court in the Western District of Texas denied the Internal Revenue Service's motion to transfer a Chapter 11 case to the District of New Mexico, holding that it could retain a case filed in the improper venue.[13] The Lazaro court held that "[w]hile the advisory committee note to [Rule 1014] says that this statute 'authorizes only the transfer of a case,' the statute itself says that the court 'may transfer a case . . . in the interest of justice or for the convenience of the parties."[14] The court further held that "this permissive language allows a district court *not* to transfer a case if the interest of justice or the convenience of the parties so dictates."[15]

While bankruptcy courts differ on whether they have the discretion to retain a case filed in the improper venue, it is apparent that most courts view that they have no such discretion and must transfer an improperly-venued case.

II. Bankruptcy Courts will Consider Several Factors to Determine What Constitutes the "Interest of Justice and Convenience of the Parties"

[11] *Id.*
[12] *Id.*
[13] 128 B.R. 168, 169 (Bankr. W.D. Tex. 1991).
[14] *Id.*
[15] *Id.* at 171 (citing *In re* Boeckman, 54 B.R. 110, 111 (Bankr. D. S.D. 1985) (which examined 28 U.S.C. § 1412, which is essentially the same exact language as Rule 1014)).

If a bankruptcy court determines that they are not barred from retaining a case, the next issue is whether doing so will further the interest of justice and convenience to the parties.[16] In *In re Bensalz Productions*, the debtor filed for bankruptcy in the Southern District of Florida despite having no creditors in Florida, one undisputed creditor in New York, and litigation with its only other creditor pending in New York. To determine whether transfer was in the interest of justice and convenience of the parties, the court looked to the following factors:

(a) The proximity of creditors of every kind to the Court;
(b) The proximity of the debtors to the Court;
(c) The proximity of the witnesses necessary to the administration of the estate;
(d) The location of assets;
(e) The economic administration of the estate; and
(f) The necessity for ancillary administration if bankruptcy should result.[17]

When applying the first factor (proximity of creditors), the court in *In re Bensalz* wrote that "[f]iling in this district created significant geographic distance between Bensalz and its handful of creditors. Three creditors hired local counsel to represent their interest in [the district filed in]. This was decidedly inconvenient and expensive, so much so that [one of the other creditors] declined to follow suit."[18] This factor carried substantial weight in determining that transfer was equitable. The court also gave much greater weight to this first factor than the others, categorizing the other factors as "largely inapplicable," and "mostly neutral."[19] However, the court made other considerations outside the factors above. The court acknowledged that there were other considerations that might make Florida an attractive venue for Bensalz's bankruptcy case including Florida's shorter reachback period for fraudulent transfer litigation, however, the

[16] See *In re* Bensalz Productions, LLC, No. 21-21018-MAM, 2022 WL 1617690 (Bankr. S.D. Fla. May 19, 2022).
[17] *Id.* at *8 (quoting *In re* Townsend, 84 B.R. 764, 767 (Bankr. N.D. Fla. 1988)); *see also In re* Commonwealth Oil Refining Co., Inc., 596 F.2d 1239 (5th Cir. 1979) (when considering economic administration of the estate, the court held that a corporation's management location is sufficient indicia); *In re* Geis, 66 B.R. 563 (Bankr. N.D. Ga. 1986); *In re* Perdido Bay Country Club Estates, 19 B.R. 1015 (Bankr. S.D. Fla. 1982).
[18] *In re Bensalz Productions, LLC*, 2022 WL 1617690 at *9.
[19] *Id.*

court still found transfer to be in the interest of justice and convenience of the parties and transferred the case to the Southern District of New York.[20]

Another example of these factors being applied is in *In re Townsend*.[21] There, a debtor filed a petition in the Northern District of Florida, claiming that they "have not resided within the district . . . but venue will be based on convenience of the parties," the court applied both proximity and economic administration.[22] In applying proximity, the court wrote that there was only a difference of 15 miles between the disputed venues.[23] Additionally, "most of the creditors are also located in [the alternate district], the debtor's counsel has offices in the alternate district, the debtors had not listed any creditors in the filed district, and "there is no evidence or argument that the availability of witnesses will be a problem if this case is transferred to [the alternate district]."[24] In applying the economic administration of the case, the debtors urged the court that because of the court's familiarity with the facts of the case (because of a previous petition filed in this court), it is "'more knowledgeable and more able to make determinations in this matter, ...' which will presumably bring the case to a more expeditious conclusion and 'enhance the interest of justice.'"[25] The court rejected the debtor's argument, holding that because the difference in convenience was only minimal, and because venue was improper under 28 U.S.C. § 1408, "[t]his court will not tolerate blatant attempts to circumvent the venue provisions of Title 28 in the future."[26]

[20] *Id.* at *10.
[21] 84 B.R. at 767.
[22] *Id.* at 765.
[23] *Id.* at 767.
[24] *Id.*
[25] *Id.*
[26] *Id.*

In re Commonwealth Oil Refining Co., Inc., ("*CORCO*") is "[t]he seminal circuit court case on the issue of whether to transfer venue of a bankruptcy case under . . . [Rule 1014].[27] "The Fifth Circuit's decision in *CORCO* is the only circuit decision directly on point, and the guidelines set forth in the *CORCO* decision are cited in virtually every opinion . . . [courts] review concerning the transfer of a bankruptcy case in its entirety."[28] In *CORCO*, "the Fifth Circuit examined whether to transfer venue to Puerto Rico of an oil refining company debtor and eleven subsidiaries that filed a Chapter 11 petition for reorganization in San Antonio, Texas."[29]

> The Fifth Circuit concluded that the bankruptcy court did not abuse its discretion in retaining the bankruptcy case. In examining the factors delineated by the bankruptcy court, the Fifth Circuit determined that the proximity of debtors (and stockholders) favored San Antonio; that the location of management and witnesses weighed in favor of San Antonio, but that the Debtor's assets and original books and records were in Puerto Rico. The court placed little emphasis on the location of the assets and discounted the consideration concerning ancillary administration.[30]

The Fifth Circuit also addressed the "interest of justice" prong. "In so considering, the court retained venue in the location best suited to solve the financial problems of the debtor and to be the least disruptive to the operations of the debtor.[31]

CONCLUSION

The majority of bankruptcy courts have concluded that despite the permissive language of Rule 1014, judges do not have discretion to retain a case filed in the improper venue under 28 U.S.C. § 1408. However, the next "equitable hurdle to venue" is whether retaining a bankruptcy case is in the interest of justice and convenience of the parties. In making this determination,

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[27] 596 F.2d 1239 (5th Cir. 1979); *see In re* Enron Corp., et al., Debtors., 274 B.R. 327, 344 (S.D.N.Y. 2002).
[28] *See In re Enron Corp*, 274 B.R. at 344.
[29] *Id*.
[30] *Id*.
[31] *Id*.

courts consider several factors including the proximity of creditors, debtors and witness to the court, as well as the location of assets, the economic administration of the estate, and the necessity for ancillary administration if bankruptcy should result.

If a court follows the majority view, then it is recommended that venue be proper under 28 U.S.C. § 1408 when filing a petition, and that if there is more than one venue, that it be the venue in the interests of justice and convenient to the interested parties. However, if a court follows the minority view, then it is recommended that a party seeking to keep a case in a particular venue have strong equitable grounds that show cause for why it filed in a particular district.