

Does BAPCPA's Small-Dollar Venue Restriction Apply to Preference Actions?

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One of the less-publicized changes to bankruptcy practice brought about as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was an amendment to 28 U.S.C. § 1409, the statute that deals with venue for bankruptcy proceedings. As amended, 28 U.S.C. § 1409(a) and (b) now provides:

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,000 or a consumer debt of less than \$5,000 \$15,000, or a debt (excluding a consumer debt) against a noninsider of less than \$10,000, only in the district court for the district in which the defendant resides.



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The conventional wisdom among most commentators following the enactment of BAPCPA was that this amendment to the venue statute was primarily targeted at limiting so-called abusive preference litigation in business bankruptcy cases commenced in a foreign jurisdiction where the amount at issue was relatively small.¹ More specifically, it appeared that the additional language regarding the recovery of non-insider, non-consumer debts was included to avoid the situation where a business defendant is

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pressured to settle a preference suit solely because the expense inherent in retaining local counsel and litigating its defenses in a foreign jurisdiction exceeded the amount at issue.² The amended venue provision seemed to even the playing field by requiring that a trustee pursue preference actions where the amount at issue was less than \$10,000,³ if at all, only in the home jurisdiction of the defendant. Some of the legislative history behind the BAPCPA revisions to § 1409(b) suggests that this was one of the legislators' goals when amending the statute.⁴

However, in the five years since BAPCPA's enactment, there has been much debate about whether this amend-

argument goes that the venue limitation in § 1409(b) expressly does not apply to proceedings that "arise under" title 11, including preference actions.

Two published opinions have discussed the application of § 1409(b), as revised, to preference actions. Surprisingly, these two courts, after reviewing the statute and the available legislative history, reached contrasting results.

In re Rosenberger: Venue Limitation Does Not Apply



Patrick R. Mohan

In *Moyer v. Bank of America (In re Rosenberger)*,⁵ the issue before the U.S. Bankruptcy Court for the Western District of Michigan was whether, pursuant to § 1409(b), venue was proper in the

district where the bankruptcy case was pending for an action seeking to recover

Code to Code

ment truly accomplished what, it appears, was intended. In fact, there is a strong argument that the venue limitation does not apply to preference actions at all, based on the statute's plain language. Sections 1334(b) and 1409(a) of title 28 recognize three distinct types of bankruptcy proceedings, namely those (1) arising under, (2) arising in a case and (3) related to a case under title 11. Over the years, the phrases "arising under," "arising in" and "related to" have been well-defined in the case law and thus have become specific terms of art.

Section 1409(a) expressly provides that all three such proceedings may generally be commenced in the district court in which the bankruptcy case is pending. However, § 1409(b), located in the very next subsection, limits venue only in "a proceeding arising in or related to" a case under title 11 by its very terms. Accordingly, the

² *Id.*

³ This dollar amount has subsequently been increased to \$11,725. However, this sentence and the entire paragraph is referring to the commentators' consensus and the legislators' intent at the time of the amendment.

⁴ See, e.g., Byron C. Starcher, "Second Thoughts on 'Home-Court Advantage' for Small-Dollar Preference Defendants," 25-Mar Am. Bankr. Inst. J. 10 (2006) (discussing legislative history).

an alleged preferential transfer in the amount of \$5,576.31. The facts of *In re Rosenberger* were simple: The debtor filed a voluntary petition for relief under chapter 7.⁶ Almost a year later, the trustee in the debtor's case filed an adversary proceeding against Bank of America NA seeking to avoid and recover the alleged preferential transfer pursuant to §§ 547(b) and 550(a) of the Code.⁷

Relying on § 1409(b), Bank of America filed a motion to dismiss the complaint for improper venue, arguing that because this particular preference action sought to avoid and recover less than \$10,950, venue was proper only in the "district court for the district where the defendant resides."⁸ Bank of America further argued that it was a resident of Delaware (where its main office was located) and not in Michigan (where the bankruptcy case was pend-

⁵ *Moyer v. Bank of America (In re Rosenberger)*, 400 B.R. 569 (Bankr. W.D. Mich. 2008).

⁶ *Id.* at 571.

⁷ *Id.*

⁸ *Id.*

¹ See, e.g., Charles J. Tabb, "The Brave New World of Bankruptcy Preferences," 13 *ABI L. Rev.* 425, 426 (2005).

continued on page 88

Code to Code: Does Venue Restriction Apply to Preference Actions?

from page 26

ing),⁹ asserting that the complaint must be dismissed for improper venue.¹⁰

The court began its analysis by reviewing the statutory language of § 1409,¹¹ noting that subsection (a) establishes venue in the district court where the bankruptcy case is pending for three distinct types of proceedings: (1) those “arising under title 11,” (2) those “arising in...a case under title 11,” and (3) those “related to a case under title 11.”¹² In contrast, the court noted that “the monetary limitations narrowing venue apply only to proceedings ‘arising in or related to’ the bankruptcy case.”¹³ In crafting the limitations of the venue provision, the court noted that “Congress omitted any reference to a proceeding ‘arising under title 11.’”¹⁴

Referencing the legislative history behind the BAPCPA amendments, Bank of America argued that Congress’ omission was inadvertent. Alternatively, it argued that preference actions are proceedings that “arise in” a bankruptcy case.¹⁵

The court rejected both arguments. First, the court noted that “[t]hroughout the history of the Bankruptcy Code, Congress has carefully delineated three distinct bases for bankruptcy court jurisdiction and venue.”¹⁶ These three distinct bases (arising in, arising under and related to) were first included in the Bankruptcy Reform Act of 1978 and were reiterated by Congress when it became necessary to amend the jurisdiction sections in response to the Supreme Court’s landmark decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*¹⁷ The court continued:

The venue provisions directly channel the jurisdictional language and provide that the “home” district court is generally the proper venue for a “proceeding arising under title 11, or arising in or related to a case under title 11.” However, in the very next subparagraph of the statute, which identifies matters over which the “home” district court does not have proper venue,

Congress limited the exception only to proceedings “arising in or related to” a case under title 11.¹⁸

The bankruptcy court next found that chapter 5 causes of action, including preferences, “arise under” the Code. The court cited to the legislative history of the statute, which made clear that avoidance actions “arise under” the Code because they are causes of action that are created solely by a Code statutory provision (*i.e.*, 11 U.S.C. § 547(b)).¹⁹ This conclusion was consistent, the court noted, with every court of appeals that has examined the issue.²⁰ Conversely, proceedings that “arise in” a case under title 11 are generally thought to involve administrative-type matters (such as orders to turn over property or lien-priority disputes).²¹

“Given the legislative history and well-established case law holding that avoidance actions are matters [that] ‘arise under’ title 11,” the court held that Congress could not have intended to subject such proceedings to the venue limitations of § 1409(b).²² The court reasoned that Congress’ omission of proceedings which “arise under” title 11 in the venue-limitation statute must have been deliberate, relying on the frequently cited presumption that Congress acts intentionally and purposefully when it uses particular language in one section of a statute but omits it in another.²³ Moreover, the court noted, pre-BAPCPA case law dealing with preference actions²⁴ and leading bankruptcy commentaries seemed to agree on this issue.²⁵

Accordingly, because preference actions are proceedings that “arise under” title 11, and because § 1409(b) on its face applies only to those matters that “arise in” or are “related to” a case under title 11, the court held that the venue limitation does not apply to a preference action. The court denied Bank of America’s motion to dismiss.

In re Dynamerica: Venue Limitation Does Apply

In *Dynamerica Mfg. LLC v. Johnson Oil Co. LLC (In re Dynamerica Manufacturing LLC)*,²⁶ the U.S. Bankruptcy Court for the District of Delaware addressed the similar issue of whether the venue limitation of § 1409(b) applied to a preference action and reached the exact opposite result. The facts of *In re Dynamerica* were also simple: Dynamerica Manufacturing LLC commenced an adversary proceeding against Johnson Oil Co. LLC to avoid and recover a preferential transfer in the amount of \$6,599.85, pursuant to §§ 547 and 550 of the Bankruptcy Code.²⁷ Johnson filed a motion to dismiss the adversary proceeding on the basis of improper venue because the amount of the alleged preferential transfer was less than \$10,950, then the minimum amount necessary to establish venue pursuant to § 1409(b).²⁸

The bankruptcy court acknowledged the debate over § 1409(b) and, more specifically, whether Congress’ omission of the phrase “arising under” from the statute was intentional,²⁹ and recognized the decision made by the *In re Rosenberger* court.³⁰ However, the court indicated that it disagreed with that decision because, among other reasons, its interpretation of the statute was based on pre-BAPCPA case law and was “inconsistent with the statute’s clear legislative history.”³¹

In determining that § 1409(b) applies to preference actions, the court first turned to pre-BAPCPA case law and noted that the purpose of § 1409(b) is to “protect small claim creditor defendants who do not reside in the district where the bankruptcy case is filed from having to defend an adversary proceeding in the ‘home court.’”³² Next, the court reviewed the legislative history behind the original enactment of § 1409(b) back in 1977, which indicated that the statute’s purpose was to “prevent unfairness to distant debtors of the estate, when the cost of defending would be greater than the cost of paying the debt owed.”³³ Finally, the court appeared to

¹⁸ *Id.* (emphasis in original).

¹⁹ *Id.* (citing H.R. Rep. No. 95-595, at 445 (1977), as reprinted in 1978 U.S.C.A.N. 5963, 6401).

²⁰ *Id.* at 572-73 (citing *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2001); *Glinka v. Murad (In re Housecraft Indus. USA Inc.)*, 310 F.3d 64, 70 (2d Cir. 2002); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987)).

²¹ *Id.* at 573 (citing *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006); *Valley Historic Ltd. P’ship v. Bank of New York*, 486 F.3d 831, 835 (4th Cir. 2007); *Continental Nat’l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999)).

²² *Id.*

²³ *Id.* (citations omitted).

²⁴ See, e.g., *Van Huffel Tube Corp. v. A & G Indus. (In re Van Huffel Tube Corp.)*, 71 B.R. 155 (Bankr. N.D. Ohio 1987); *Ehrlich v. Am. Express Travel Related Servs. Co. Inc. (In re Guilmette)*, 202 B.R. 9 (Bankr. N.D.N.Y. 1996).

²⁵ See, e.g., 4 *Collier on Bankruptcy* ¶ 4.02[2][b] (15th ed., rev. 2008); 4 *Norton Bankruptcy Law and Practice* 3d, § 66:41 (3d ed. rev. 2008).

²⁶ *Dynamerica Mfg. LLC v. Johnson Oil Co. LLC (In re Dynamerica Mfg. LLC)*, 2010 WL 1930269 (Bankr. Del. May 10, 2010).

²⁷ *Id.*

²⁸ *Id.* at *2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting *Muskin Inc. v. Strippit Inc. (In re Little Lake Industries Inc.)*, 158 B.R. 478, 480 (9th Cir. B.A.P. 1993)).

³³ *Id.* at *2-3 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 446 (1977)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 571-72.

¹³ *Id.* at 572 (emphasis in original).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (citing *Muskin Inc. v. Strippit Inc. (In re Little Lake Indus.)*, 158 B.R. 478 (9th Cir. B.A.P. 1993)).

¹⁷ *Id.*

¹⁸ *Id.* (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

have relied heavily on a report submitted by ABI to the National Bankruptcy Review Committee, concluding that, among other things, “one of the considerations in amending Section 1409(b) was to [a]mend the venue rules to protect defendants from having to defend in a distant forum, at least when the amount in controversy is below a stated amount.”³⁴ In the court’s view, the amended venue provision was intended to provide greater protection to preference defendants by enabling them to choose litigation or settlement “without the coercion of having to defend in a distant forum.”³⁵

Based on the “legislative intent expressed in the legislative history,” the court concluded that the venue provisions of § 1409(b) apply to preference actions and hold true despite the absence of the “arising under” language in § 1409(b).³⁶ The court concluded that any such absence was “unintentional” because “[r]equiring creditors to incur the substantial costs for small avoidance actions is unreasonable and contrary to Congressional intent, as it pressures creditors to settle in order to save costs regardless of the merits of any potential

defense.”³⁷ Accordingly, the court granted Johnson’s motion to dismiss.³⁸

Conclusion

Although the *Dynamerica* court relied heavily on legislative history in reaching its conclusion, it failed to discuss and address the importance of the three distinct bases for bankruptcy court jurisdiction and venue (*i.e.*, arising in, arising under and related to) in its opinion. As noted by the *In re Rosenberger* court, such terms are well-established terms of art in bankruptcy law. The fact that Congress has consistently failed to include the phrase “arising under” to the provisions of § 1409(b), after having had multiple opportunities to do so, suggests that such an omission should be viewed as deliberate, not unintentional.³⁹

However, the *Dynamerica* court is not alone in its interpretation of § 1409(b), and many experts have long felt that preference actions are subject to the venue limitation. For example, the House of Representatives proposed an amendment to the statute in 1999 that would have required that a proceeding “to recover...a nonconsumer debt against

a noninsider of less than \$10,000” be brought in the judicial district where the defendant resides.⁴⁰ The House report accompanying the proposed legislation expressly stated that the intent of the amendment was to raise the floor on a “preferential-transfer action.”⁴¹ Additionally, prior to the enactment of BAPCPA, the final report of the National Bankruptcy Review Commission recommended amending § 1409(b) “to require that a preference recovery action against a noninsider seeking less than \$10,000 must be brought in the bankruptcy court in the district where the creditor has its principal place of business.”⁴²

In any event, the *In re Rosenberger* and *In re Dynamerica* opinions provide dueling interpretations of § 1409(b) and the statute’s application to preference actions. Until this split is resolved either by the appellate courts or through an amendment to the statute, practitioners representing both preference plaintiffs and defendants should consider these opinions when dealing with a preference complaint seeking to avoid and recover amounts less than \$11,725. ■

³⁴ *Id.* at *3 (quoting Tabb, *supra*, n.2).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., Starcher, *supra*, n.5.

⁴⁰ *Id.* (citing H.R. Rep. No. 106-123, at 139-40 (1999)).

⁴¹ *Id.*

⁴² *Id.* See also National Bankruptcy Review Commission, *Bankruptcy: The Next 20 Years*, 799-800 (1997).