

REMOVAL AND WITHDRAWAL OF REFERENCE IN WAWB

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Removal and withdrawal of the reference allow litigants to hear their matter in their preferred federal forum when there is a pending bankruptcy proceeding. This article provides a brief overview of the process and policy behind bringing matters into the bankruptcy court through removal and taking matters out through withdrawal of reference.

I. REMOVAL TO BANKRUPTCY COURT

Introduction

Removal of claims permits parties to transfer civil actions pending in a state court forum to the bankruptcy court for the district where the civil action is pending, if the bankruptcy court has subject matter jurisdiction over the claim or cause of action. There are several reasons why a litigant would want to remove a case, including judicial economy, transfer of the matter to a judge already familiar with the case, issues of federal preemption, expedited action that bankruptcy offers, and jurisdictional considerations.

Substantive Rules

Removal can be based on either the general removal statute, 28 U.S.C. § 1441(a), or the bankruptcy removal statute, 28 U.S.C. § 1452(a). Removal under § 1441(a) is harmonized with removal under § 1452(b) in that § 1452 is not the exclusive provision governing removal and remand in bankruptcy.¹

Section 1441 allows any civil action brought in state court to be transferred to a federal court if the district court has original jurisdiction over the claim based on diversity of citizenship or presents a federal question.² Section 1452, however, allows the removal of “any claim or cause of action” in a civil action related to a bankruptcy case from a state court to a federal district court insofar as the bankruptcy court has jurisdiction.”³ The sole exceptions to this are proceedings before the United States Tax Court or a civil action by a government unit to enforce its police or regulatory power.⁴ In other words, § 1452 removal is extremely broad and can be used to transfer most proceedings to the bankruptcy court, and is the mechanism normally utilized to remove actions into bankruptcy court.

¹ *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

² 28 U.S.C. § 1441.

³ 28 U.S.C. § 1452(a); *see also* 28 U.S.C. § 1334(b) (“[D]istrict courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11”); 28 U.S.C. § 157(a) (authorizing district courts to refer cases and proceedings to bankruptcy judges).

⁴ 28 U.S.C. § 1452(a).

Procedural Rules

Fed. R. Bank. P. 9027 set forth the procedure for removal under 28 U.S.C. § 1452(a), as summarized below.

- i. *Filing:* The method for removal includes filing a notice of removal with the bankruptcy court clerk and with the clerk from which the case is being removed. The notice of removal typically contains facts justifying removal, whether it is a core or non-core matter, whether the removing party consents to the bankruptcy court entering final judgment in non-core matters, and copies of all relevant documents from the original court.⁵
- ii. *Time for filing:* If the civil action is pending when a bankruptcy case commences, the notice of removal must be filed within the later of (1) 90 days from the date of the order of relief, (2) 30 days after an order terminating the stay is entered if the claim or cause of action was stayed under § 362, or (3) in a chapter 11 case, 30 days after a trustee qualifies, but no later than 180 days after the order for relief.⁶ If the civil action is asserted postpetition, a party filing a notice of removal must do so within 30 days of receiving the initial pleading or summons, whichever is earlier.⁷
- iii. *Service:* After filing the notice of removal, the party filing the notice must serve a copy on the other parties to the removed claim or cause of action.⁸ Removal becomes effective when the notice is filed and remains effective until it is remanded.⁹
- iv. *Post-removal order/action:* After a claim is removed to bankruptcy court, the court will issue an order directing the parties to file any remaining necessary documents and may take further actions to ensure all proper parties are before the court.¹⁰ Additionally, if a defendant in the removed action has not been served, service has not been completed, or was defective before removal, service may be completed under Part VII of the rules.¹¹

⁵ Fed. R. Bank. P. 9027(a)(1).

⁶ Fed. R. Bank. P. 9027(a)(2).

⁷ Fed. R. Bank. P. 9027(a)(3).

⁸ Fed. R. Bank. P. 9027(b).

⁹ Fed. R. Bank. P. 9027(c).

¹⁰ Fed. R. Bank. P. 9027(e).

¹¹ Fed. R. Bank. P. 9027(f).

In addition to Rule 9027, Local Rules W.D. Wash. Bankr. 9027-1 provides more specific rules for practice in this district, summarized below.

- i. *Filing:* Removal is effective when notice of removal is filed with the clerk of court of the bankruptcy court, with the filing fee.¹²
- ii. *Service:* Any motion to remand must be served and filed within 30 days of the notice of removal and noted for hearing in accordance with Local Bankruptcy Rule 9013-1.¹³
- iii. *Post-removal action:* Parties have 30 days from the notice of removal to file a motion for remand, and it must be noted for hearing in accordance with Local Bankruptcy Rule 9013-1.¹⁴ If no motion for remand is filed, parties who did not answer before removal must do so within 21 days of the notice of removal.¹⁵
- iv. *Report of Proceedings:* The removing party must file a report of the proceedings in the court to which the action was removed within 21 days of filing the notice of removal or, if a motion to remand is filed during the 21 days, 14 days after the entry of an order denying the motion to remand.¹⁶

The report must list the operative pleadings, including the complaint, answer, and other pleadings framing the issues to be decided.¹⁷ It must also include any summary judgment or other orders disposing of all or part of the action and any pending unresolved motions that the parties intend to present to this court.¹⁸ Finally, the report must include as exhibits a copy of the docket of the removed action, each identified pleading, and a certificate of service as required by Local Rule W.D. Wash. CR 101(b).¹⁹

¹² Local Rules W.D. Wash. Bankr. 9027-1(a).

¹³ Local Rules W.D. Wash. Bankr. 9027-1(b).

¹⁴ Local Rules W.D. Wash. Bankr. 9027-1(b).

¹⁵ Local Rules W.D. Wash. Bankr. 9027-1(b).

¹⁶ Local Rules W.D. Wash. Bankr. 9027-1(c).

¹⁷ Local Rules W.D. Wash. Bankr. 9027-1(c).

¹⁸ Local Rules W.D. Wash. Bankr. 9027-1(c).

¹⁹ Local Rules W.D. Wash. Bankr. 9027-1(c).

Cases Pending in the District Court

For actions pending in the U.S. District Court of the Western District of Washington, removal is not the proper mechanism of transfer. To remove a case pending in the district court, one must instead file a motion in the district court requesting the court to enforce the referral of the case to the bankruptcy court.²⁰ Referral under such circumstances is under the sole discretion of the district court.²¹

Motions to Remand

A party seeking to return a removed action to the original state court may file a motion to remand. A bankruptcy court can remand a § 1452(a) removal claim or cause of action “on any equitable ground.”²² A remand order based on equitable grounds under § 1452(b) is not reviewable by a court of appeals or the Supreme Court.²³

If a party removes a proceeding under § 1441, remand is governed by § 1447. It provides that a motion to remand can be based on any defect other than a lack of subject matter jurisdiction and must be filed within 30 days after the notice of removal is filed.²⁴ Additionally, an order remanding a case to state court is not reviewable on appeal unless it was removed pursuant to §§ 1442 or 1443.²⁵

II. WITHDRAWAL OF THE REFERENCE

Introduction

A party may seek withdrawal of the reference when it wishes to litigate an issue in federal district court rather than bankruptcy court. Withdrawal of the reference is appropriate when the case or proceeding involves non-core issues of non-bankruptcy law, or equally, when the district court determines that cause exists.²⁶ The relevant substantive statutes governing withdrawal of the reference are 28 U.S.C. § 1334 and 28 U.S.C. § 157(d), and Fed. R. Bank. P. 5011 and Local Rules W.D. Wash. Bankr. 5011-1 govern procedure.

²⁰ See 28 U.S.C. § 157; Local Rules W.D. Wash. Bankr. 9027-1(e).

²¹ Local Rules W.D. Wash. Bankr. 9027-1(e); *see also* Local Rules W.D. Wash. Bankr. 9027-1 Committee Comment.

²² 28 U.S.C. § 1452(b).

²³ 28 U.S.C. § 1452(b); *but see In re Caesars Ent. Operating Co., Inc.*, 588 B.R. 233, 238 (9th Cir. BAP 2018) (stating that a remand order based on equitable grounds under 28 U.S.C. § 1452(b) is reviewable only by a district court or bankruptcy appellate panel).

²⁴ 28 U.S.C. § 1447(c).

²⁵ 28 U.S.C. § 1447(d).

²⁶ 28 U.S.C. § 157(d).

Substantive Rules

28 U.S.C. § 1334 provides that district courts have original jurisdiction over all cases under Title 11 and original but not exclusive jurisdiction over all civil proceedings arising in, under, and related to a Title 11 case.²⁷ Bankruptcy courts have the statutory authority to issue final orders in cases under Title 11 and all proceedings deemed core under the statute.²⁸

Bankruptcy cases and proceedings filed in district court are referred to the bankruptcy court within the district where the case is filed in accordance with that court's general order.²⁹ However, the bankruptcy court may not be the appropriate forum to handle a case or proceeding. The district court may withdraw a matter referred to the bankruptcy court when it is determined that the resolution of the issues is more appropriate before an Article III court.³⁰ Transferring a referred matter from the bankruptcy court to the district court and withdrawing the reference may be either mandatory or permissive.³¹

Mandatory Withdrawal

Mandatory withdrawal of reference occurs when the district court determines that the resolution of the proceeding requires consideration of both Title 11 and federal non-bankruptcy law.³² The party seeking mandatory withdrawal must show that the relevant non-bankruptcy law requires “substantial and material consideration” by the district court, meaning that the proceeding requires the district court to both apply and interpret the non-bankruptcy law.³³ Mandatory withdrawal is inappropriate if an interpretation of the non-bankruptcy law is not material and significant.³⁴ For example, federal securities, environmental, banking, antitrust, and admiralty laws are non-bankruptcy laws that could justify mandatory withdrawal if raised in a bankruptcy proceeding.

²⁷ 28 U.S.C. § 1334 (a)(b).

²⁸ 28 U.S.C. § 157(b).

²⁹ 28 U.S.C. § 157(a).

³⁰ 28 U.S.C. § 157(d).

³¹ 28 U.S.C. § 157(d).

³² 28 U.S.C. § 157(d).

³³ *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997).

³⁴ *See Chauffers*, 124 F.3d at 1008 n.4 (9th Cir. 1997) (“By contrast, permissive withdrawal does not hinge on the presence of substantial and material questions of federal law”).

Discretionary Withdrawal

A district court may withdraw a reference “for cause shown.”³⁵ The movant bears the burden of proof on a motion to withdraw the reference.³⁶ What constitutes cause is not defined in the statute. Rather, the Ninth Circuit Court of Appeals considers the following factors when deciding whether discretionary withdrawal is warranted: (1) the efficient use of judicial resources, (2) delay and costs to the parties, (3) uniformity of bankruptcy administration, (4) the prevention of forum shopping, and (5) other related factors.³⁷ Unlike mandatory withdrawal where 28 U.S.C. § 157(d) requires a motion of the parties, a district court may move on its own to withdraw the reference should it determine cause exists to do so.³⁸

The presence of a private-right *Stern* claim or the parties demand for a jury trial in district court may justify withdrawing the reference.³⁹ In *Stern v. Marshall*, the Supreme Court held that bankruptcy courts did not have constitutional authority to enter final judgment on a debtor's state-law counterclaim that is not resolved through the claims allowance process, as it was a common law private-right claim and outside the authority of the bankruptcy court.⁴⁰ Later, the Supreme Court clarified that Article III permits bankruptcy courts to adjudicate *Stern* claims with the parties' knowing and voluntary consent.⁴¹ Therefore, the parties may consent to the bankruptcy court's jurisdiction to adjudicate these claims, making withdrawal of the reference unnecessary. Absent consent, however, *Stern* claims must be litigated in an Article III court.

Even should cause for withdrawing the reference exist, a matter may not be withdrawn immediately. Rather, district courts will often allow for pre-trial matters to proceed in the bankruptcy court before granting withdrawal.

Lastly, for non-bankruptcy matters arising under state law, parties are encouraged to seek relief from stay and litigate the matter in the state court rather than move the district court to withdraw the reference and hear matters relating to state law causes of action.

³⁵ 28 U.S.C. § 157(d).

³⁶ See 28 U.S.C. § 157(d); see also *In re Heller Ehrman LLP*, 464 B.R. 348, 351 (N.D. Cal. 2011); *In re The Mortg. Store, Inc.*, 464 B.R. 421, 424 (D. Haw. 2011).

³⁷ *In re Canter*, 299 F.3d 1150, 1154 (9th Cir. 2002).

³⁸ 28 U.S.C. § 157(d).

³⁹ 28 U.S.C. § 157(e).

⁴⁰ *Stern v. Marshall*, 564 U.S. 462, 503 (2011).

⁴¹ *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

Procedural Rules For Withdrawal of Reference

The procedures governing a Motion for Withdrawal of Reference are governed by Rule 5011 of the Federal Rules of Bankruptcy Procedure and Rule 5011-1 of the Local Rules W.D. Wash. Bankr. Both are summarized below.

Federal Rules on Withdrawal of Reference (Fed. R. Bank. P. 5011)

- i. *Hearing:* A motion to withdraw a case or proceeding shall be heard by a district court judge in the district where the matter was filed.⁴²
- ii. *Effect of the filing:* Filing a motion for withdrawal will not stay the administration of the case or any proceeding before the bankruptcy court. However, the bankruptcy judge may stay proceedings pending disposition of the motion on such terms and conditions as are proper.⁴³
- iii. *Motion for a stay of proceedings in bankruptcy court:* A motion for a stay of proceedings in the bankruptcy court or relief thereof shall ordinarily be presented first to the bankruptcy judge. If such a motion is filed in the district court, the party seeking the stay or relief shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district court shall be on such terms and conditions as the judge deems proper.⁴⁴

Local Rules on Withdrawal of Reference (Local Rules W.D. Wash. Bankr. 5011-1)

- i. *Filing and Service:* The motion must be designated in the caption as “Motion for Withdrawal if Reference,”⁴⁵ and all pleadings relating to the motion for withdrawal are to be filed with the clerk of the bankruptcy court.⁴⁶ The motion must be filed and served promptly after the basis for withdrawal first arises.⁴⁷ Responses must be filed and served no later than 14 days after service of the

⁴² Fed. R. Bank. P. 5011(a).

⁴³ Fed. R. Bank. P. 5011(c).

⁴⁴ Fed. R. Bank. P. 5011(c).

⁴⁵ Local Rules W.D. Wash. Bankr. 5011-1(a).

⁴⁶ Local Rules W.D. Wash. Bankr. 5011-1(b); *see also* Local Rules W.D. Wash. LCR 7(b).

⁴⁷ Local Rules W.D. Wash. Bankr. 5011-1(b).

motion, and any reply is due no later than 21 days after the filing of the motion.⁴⁸

- ii. *Judicial recommendation from bankruptcy judge:* While the district court has the discretion to decide whether to withdraw the reference, the bankruptcy judge may issue a judicial recommendation.⁴⁹ Generally speaking, the recommendation can include the following: (1) a statement concerning whether to withdraw the reference, (2) insight on the nature and status of the case, (3) a statement regarding whether there is need for an expedited resolution, and in some instances (4) a statement that the district court should delay withdrawal until after resolution of peripheral matters able to be handed by the bankruptcy court. The pleadings are then transferred to the district court after 28 days, or after all pleadings and a judicial recommendation have been filed, whichever is earlier.⁵⁰ Any further documents pertaining to the motion must be filed with the clerk of the district court.⁵¹
- iii. *Proceedings in district court:* The motion is assigned to a district court judge.⁵² Unless otherwise ordered by the district court, the court will decide a motion for withdrawal of reference without a hearing.⁵³ Parties requesting oral argument on the motion may indicate their intention to do so by including “ORAL ARGUMENT REQUESTED” in the caption of their motion or responsive pleading.⁵⁴ The district court has sole discretion to grant or deny the motion in whole or part and may make such orders as it deems appropriate for the orderly disposition of the case or proceeding.⁵⁵

III. CONCLUSION

Removal and withdrawal of the reference allow litigants to have their matter heard in the proper forum. As is referenced throughout this article, the local rules play a substantial role in dictating how the removal and withdrawal procedures operate,

⁴⁸ Local Rules W.D. Wash. Bankr. 5011-1(b).

⁴⁹ Local Rules W.D. Wash. Bankr. 5011-1(b).

⁵⁰ Local Rules W.D. Wash. Bankr. 5011-1(b).

⁵¹ Local Rules W.D. Wash. Bankr. 5011-1(b).

⁵² Local Rules W.D. Wash. Bankr. 5011-1(c).

⁵³ Local Rules W.D. Wash. Bankr. 5011-1(c).

⁵⁴ Local Rules W.D. Wash. Bankr. 5011-1(d).

⁵⁵ Local Rules W.D. Wash. Bankr. 5011-1(d).

and practitioners are encouraged to review the local rules in their respective jurisdiction before proceeding. Considering the jurisdictional intricacies of many complex bankruptcy matters, removal and withdrawal provide valuable litigation tools to practitioners by allowing them to advocate for their clients in a separate forum from where their matter is currently.