

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IN RE:

CLERK’S INSTRUCTIONS REGARDING)
FILING PETITIONS OUT OF)
VENUE)
)

DISTRICT AND DIVISIONAL VENUE

Each year, the Bankruptcy Court for the Northern District of West Virginia accepts and adjudicates cases filed by individuals that reside in a different filing district. Primarily, these cases come from Ohio, Pennsylvania, Maryland, Virginia, and the Southern District of West Virginia. In nearly all instances, these are consumer cases and bankruptcy counsel chooses to file in this District as the most convenient forum. To facilitate the administration of cases filed out of venue, the Bankruptcy Clerk has promulgated the following guidance to assist parties. This guidance is informational only, is based on past practices, and may not reflect the presiding judge’s preferences in future cases.

A. Venue Overview

1. Venue Generally

Venue for federal court cases is set forth in Chapter 87 of Title 28 of the United States Code. The term “venue,” as defined by § 1390(a), “refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject matter jurisdiction of the district courts in general”

The general federal venue statute – for all diversity and federal question subject matter jurisdiction civil cases – is 28 U.S.C. § 1391, which generally provides that venue is proper based on the location of the defendant’s residence, where the events occurred, and if nowhere else, where the defendant is subject to the court’s personal jurisdiction. “In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.” *Leroy v. Great W. United Corp.*, 443 U.S. 173, 194 (1979).

Unlike the general federal civil litigation venue statute that focuses on the physical location of the defendant, a bankruptcy petition is, in nearly all cases, a voluntary undertaking having a body of interested parties without any named defendant. Accordingly, venue for cases under title 11 may be commenced in the district court for the district where the debtor resides. § 1408. In total, there exists five alternative “proper” venue choices under §

1408: the district in which the person or entity: (a) has his or her principal place of business, (b) resides, (c) is domiciled, (d) where the individual's principal assets in the United States are located, or (e) anywhere there is a pending case under title 11 concerning such person's affiliate, general partner, or partnership. These alternatives reflect a forum that is most convenient for the parties in interest to a bankruptcy petition.

2. Venue is Unrelated to Subject Matter Jurisdiction and is a Personal Right that may be Waived

Bankruptcy court subject matter jurisdiction is determined under 28 U.S.C. § 1334. Venue for a bankruptcy petition is determined by § 1408, the venue provision may be waived, and venue is unrelated to subject matter jurisdiction. *E.g., Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1068 (5th Cir. 1986) (“Venue is a privilege personal to a litigant, and, even when venue is laid in a court where it would otherwise be improper, it may be waived by express agreement or by conduct. The venue provisions relating to bankruptcy are no more sacred.”). Like a bankruptcy petition, venue for an adversary proceeding is also a personal right subject to waiver. *E.g., Fed. R. Civ. P. 12(b)(3); (h)(1); Fed. R. Bankr. P. 7012; Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544 (4th Cir. 2006) (improper venue is waived if not timely raised); *2 Moore’s Federal Practice – Civil § 12.32[2]* (Matthew Bender 2015) (“Because a defendant may waive an objection to venue, and may do so merely by failing to object in timely fashion, the district court should not raise venue issues or dismiss for improper venue sua sponte.”).

3. Transfer of Venue

For general civil litigation, venue may be transferred under 28 U.S.C. § 1404. Under § 1404(a), “[f]or 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.”

Unlike venue transfer for general civil litigation, venue transfer for a bankruptcy petition is accomplished under § 1412. That statute provides that a district court may transfer a case or proceeding under title 11 to a district court for another district in the interests of justice or for the convenience of the parties. *See also Fed. R. Bankr. P. 1014(a)(1)* (same). Thus, the transfer does not have to be to a district that would have been proper in the first instance, and the transfer does not have to be by consent of all the parties. *E.g., Thompson v. Greenwood*, 507 F.3d 416, 422 (6th Cir. 2007) (“[A] case that is properly venued in the first instance could be transferred to another district (even one where the case could not originally have been brought) in accordance with § 1412 and Rule 1014(a)(1).”).

5. When Venue is Improper Upon Filing

As a general rule, bankruptcy petitions should be filed in their proper district under 28 U.S.C. § 1408. However, the extent to which a bankruptcy judge may remain silent when

a case is filed in an improper venue – to allow venue by consent – is a matter of judicial discretion. Some judges adhere to a sua sponte transfer of venue rule without allowing an opportunity for waiver of proper venue by consent. *E.g., In re Langston*, 291 B.R. 872, 877 (Bankr. N.D. Ala. 2003) (“The debtors have advanced no argument to persuade this Court that it lacks authority to correct venue that is improper according to statute simply because no objection has been filed.”).

Other judges will remain silent when a case is filed in an improper venue to ascertain if any party in interest objects. Of course, silence and consent generally do not generate reported decisions. Several cases exist, however, where a bankruptcy judge has exercised discretion to retain a case in an improper venue – even over an objection by a party in interest. *E.g., In re Jordan*, 313 B.R. 242 (Bankr. W.D. Tenn. 2004) (chastising the U.S. Trustee for filing a motion to transfer venue when no creditor or other party in interest objected to venue in the Western District of Tennessee and holding that the case could remain in the district for the convenience of the parties), *rev’d, Thompson v. Greenwood*, 507 F.3d 416, 422 (6th Cir. 2007); *In re Lazaro*, 128 B.R. 168, 170-71 (Bankr. W.D. Texas 1991) (retaining a case filed out of venue over the objection of a party).

According to 2 *Moore’s Federal Practice – Civil* § 12.32[2] (Matthew Bender 2015), “[b]ecause a defendant may waive an objection to venue, and may do so merely by failing to object in timely fashion, the district court should not raise venue issues or dismiss for improper venue sua sponte.” The 1987 Advisory Committee Note to Fed. R. Bankr. P. 1014(a)(2) recognizes that “[i]f a timely motion to dismiss for improper venue is not filed, the right to object to venue is waived.”

For general civil litigation, 28 U.S.C. 1406 requires the district court overseeing a case filed out of venue under § 1391 to “dismiss, or if it be in the interest of justice, transfer such case to any district or division where it could have been brought.” For bankruptcy petitions, there is no provision in the United States Code specifically governing the actions of the district court when the bankruptcy petition is originally filed in a district other than one specified in § 1408. Instead, Federal Rule of Bankruptcy Procedure 1014(a)(2) applies. That Rule states:

(2) Cases filed in Improper District. If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

Significantly, the Rule requires a timely motion by a party in interest or specific court action; thus, the Rule deviates from 28 U.S.C. § 1406, which requires no such motion. Upon objection to venue, many courts deem Fed. R. Bankr. P. 1014(a)(2) to be mandatory:

the original bankruptcy court may not retain the case over a timely filed objection.¹ Other courts view Rule 1014(a)(2) as rulemaking overreach to the extent it was designed to make 28 U.S.C. § 1406 applicable to bankruptcy petitions and require transfer or dismissal of a case filed in an improper venue. *E.g., In re Lazaro*, 128 B.R. 168, 170-71 (Bankr. W.D. Texas 1991) (holding that the court may retain jurisdiction over a case in an improper venue because Fed. R. Bankr. P. 1014(a)(2) “goes considerably beyond the language of the statute which it was designed to implement . . . [and] engrafts onto Section 1412 the remedial provisions of Section 1406 of Title 28, even though the structure of the various venue provisions reflects an apparent congressional intent to devise special rules for venue in bankruptcy cases distinct from the general venue rules applied to general civil litigation filed in federal courts.”).

When venue is originally proper, and a party seeks to transfer venue to any other district (whether originally proper or not), courts have traditionally looked at six factors, listed below. By extension, when a debtor’s attorney is contemplating filing a case in an originally improper venue, the attorney may consider the application of the below factors in weighing whether a party in interest or the presiding judge may object. In other words, if the attorney believes that filing in this District would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness, then, historically, those cases have been adjudicated in this District by consent.

- (1) the proximity of creditors of every kind to the court,
- (2) the proximity of the bankruptcy (debtor) to the court,
- (3) the proximity of the witnesses necessary to the administration of the estate,
- (4) the location of the assets,
- (5) the economic administration of the estate and
- (6) the necessity for ancillary jurisdiction if bankruptcy should result.^[2]

E.g., Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.), 896 F.2d 1384, 1391 (2d Cir. 1990) (“The ‘interest of justice’ component of § 1412 is a broad and flexible standard . . . [i]t contemplates a consideration of whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness.”). *In re Commonwealth Oil Refining Co.*, 596 F.2d 1239, 1247 (5th Cir. 1979) (“[T]he most important consideration is whether the

¹ Although Fed. R. Bankr. P. 1014(a)(2) is written using the permissive “may” language, it has been interpreted as “shall” due to a 1984 change in the United States Code that eliminated 28 U.S.C. § 1477, which specifically allowed a bankruptcy court to retain a case filed in an improper venue for the convenience of the parties. This retention language was not carried over to the new change of venue statute -- § 1412. *See, e.g., In re Berger*, No. 12-72670, 2013 Bankr. LEXIS 2233 (Bankr. E.D. Va. May 31, 2013) (“The rule does not allow for any judicial discretion; if venue is improperly laid in this district then this Court must either transfer or dismiss the case.”).

² In the Northern District of West Virginia, ancillary, or supplemental jurisdiction under 28 U.S.C. § 1367 is not a basis of jurisdiction for the bankruptcy court. *Johnston v. Valley Credit Servs. (In re Johnston)*, No. 05-6288 2007 Bankr. LEXIS 1174 (Bankr. N.D.W. Va. April 12, 2007).

requested transfer would promote the economic and efficient administration of the estate.”); *In re Lakota Canyon Ranch Dev.*, No. 11-03739, LLC, 2011 Bankr. LEXIS 4652 (Bankr. E.D.N.C. June 21, 2011) (applying the factors).

B. Venue by Consent: Form of the Request

1. District Venue

- a. No motion by the debtor to file out of venue is required when a debtor files a bankruptcy petition in the Bankruptcy Court for the Northern District of West Virginia. The Notice of Bankruptcy Case, Meeting of Creditors & Deadlines, mailed to all creditors on the mailing matrix by the Clerk’s Office, contains the name of the Court, the Debtor’s case number, and the address of the debtor. The local form also includes a deadline for creditors to file an objection to district venue. The applicable deadline is 21 days following the date first set for the meeting of creditors.
- b. Contemporaneous with the filing of the petition, a debtor may elect to file a motion to file the petition out of venue. No such motion is required by the court or Clerk’s Office. If a debtor does file such a motion, the debtor must serve the motion on the mailing matrix, and include a notice with the motion that the applicable objection period is 21 days from the date first set for the § 341 meeting of creditors.

2. Divisional Venue

- a. The Bankruptcy Clerk’s Office runs an automated program overnight that assigns the chapter trustee and judge to the case and issues the notice of the meeting of creditors. Once the notice of the meeting of creditors is entered, the bankruptcy court is unlikely to consider and grant a motion to change divisional venue as doing so would require a resetting of the meeting of creditors, the issuance of a second notice, and the resetting of the objection to discharge / exception to discharge dates. After the meeting of creditors is held, however, the Clerk’s Office or the court may schedule hearings in a division different from the division of origin for the convenience of the court and/or the parties.
- b. A debtor wishing to transfer divisional venue may file a motion to transfer divisional venue with the petition. When doing so, the debtor should call the Clerk’s Office so that the automated program that issues the notice of the meeting of creditors may be turned off for the case. The court may consider the motion ex parte.

- c. When filing a case, an attorney for the debtor may choose the divisional venue of choice through their software provider, or, in manual case filing in CM/ECF, by choosing “out of country” as the debtor’s county of residence, which, in CM/ECF version 5.1, will allow the attorney to pick the divisional venue of choice. The county of residence will be corrected by the Clerk’s Office when the case is quality checked.
- d. The sole Chapter 13 trustee for this District has stated to the Clerk’s Office that she has no preference regarding the divisional venue of a Chapter 13 case. On inquiry to the primary Chapter 7 trustees for this District, the trustees stated to the Clerk’s Office that they had no objection to debtor’s counsel occasionally choosing a divisional venue other than that of the debtor’s residence. Because there is only one bankruptcy judge for this District, no danger exists of “judge shopping.”
- e. Divisional Venue for cases originating outside of the Northern District of West Virginia, depending on the county of origin, are sometimes automatically assigned a division in the CM/ECF System, and other times the division is manually set by the Clerk’s Office.

Automatically Assigned via CM/ECF:

Allegany MD	Martinsburg
Cecil, MD	Martinsburg
Frederick, MD	Martinsburg
Garrett, MD	Martinsburg
Montgomery, MD	Martinsburg
Washington, MD	Martinsburg
Ashland, OH	Wheeling
Belmont, OH	Wheeling
Carroll, OH	Wheeling
Columbiana, OH	Wheeling
Cuyahoga, OH	Wheeling
Harrison, OH	Wheeling
Jefferson, OH	Wheeling
Monroe, OH	Wheeling
Trumbull, OH	Wheeling
Tuscarawas, OH	Wheeling
Washington, OH	Wheeling
Beaver, PA	Wheeling
Washington, PA	Wheeling
Cumberland, PA	Martinsburg
Franklin, PA	Martinsburg

Fulton, PA	Martinsburg
Frederick, VA	Martinsburg

Manually Assigned by Clerk's Office:

All other counties (for cases opened manually, the divisional assignment for the meeting of creditors will most likely be the division chosen by the attorney in CM).

b. Objection to Venue

1. District Venue

- a. Parties in interest have 21 days from the date first set for the § 341 meeting to file a motion and proposed order to transfer district venue with the Clerk. This deadline is set forth in the Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines. On the filing of a motion to transfer venue filed by a party in interest, the Clerk will generally issue a 21-day notice of time to object to the debtor, the debtor's attorney, the case trustee (if any), and the United States trustee.
- b. When a debtor files amended schedules, the debtor is obligated to serve the Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines on the newly added creditor.

c. Transferring Venue to a Different District

1. Should the Court grant a motion to transfer a case to a different district venue, pending matters will generally not be considered by this court. Pending matters will be the responsibility of the court of transfer.
2. The Clerk will transfer the case via CM/ECF to the recipient court. So long as the case is still open in this District, parties may continue to file documents in the case. Once the Clerk transfers the case to the recipient district, the case in this District is closed, and all further filings should be made in the recipient court. The order closing the case in this District should contain the new case number in the recipient court.

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