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Crossover Ethics Topic: Strategies and Risks of Bankruptcy as a Response to State Court Litigation

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REMOVAL

When a party to a pending state-court litigation files for bankruptcy, in addition to considering the impact of the automatic stay, litigators should consider whether removing the case to federal court is appropriate.

1. Grounds for Removal

There are two provisions that allow litigants to remove to federal court a pending state-court litigation that has some connection to a bankruptcy case: 28 U.S.C. §§ 1441 and § 1452.[1] Section 1441 allows for the removal of any case in which a federal district court has "original jurisdiction." Although diversity and federal question jurisdiction are common grounds for removal under § 1441, bankruptcy jurisdiction under § 1334 is another basis for removal. *See Things Remembered Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) ("There is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy.").

Section 1452, on the other hand, is limited to situations in which there is bankruptcy jurisdiction under § 1334 and is more commonly used to remove cases that have some connection to a bankruptcy case. Section 1452 provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

Sections 1334(a) and (b) give federal district courts "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11. Most commonly, pending state court actions are removed on the grounds that the case is "related to" a bankruptcy proceeding—*i.e.*, that the outcome of the state court action "could conceivably have any effect on the estate being administered in bankruptcy." *Fietz v. Great W. Savings (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting and adopting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); *see also Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005) ("A bankruptcy court's 'related to' jurisdiction is very broad, including nearly every matter directly or indirectly related to the bankruptcy.").

[1] Unless otherwise specified, all statutory references are to title 28 of the U.S. Code.

Although the presence of related to bankruptcy jurisdiction satisfies the jurisdictional requirements of both §§ 1441 and 1452, there are important differences between the two removal provisions. For example, a plaintiff cannot remove its own case to federal court under § 1441, which only provides for removal by "the defendant or the defendants." Section 1452, by contrast, allows any "party"—including a plaintiff—to remove a claim or cause of action to federal court if there is jurisdiction under § 1334.

The two removal provisions also differ in scope. Section 1441 contemplates the removal of an entire "civil action." Section 1452(a), by contrast, allows a party to remove "any claim or cause of action in a civil action." So § 1452 allows a party to remove only part of a civil action to federal court. The notice of removal, discussed *infra*, determines the scope of the claims or causes of action removed under § 1452.

And, finally, § 1441 applies only to civil actions "brought in State court," whereas § 1452 only references the removal of a "civil action" (while excluding from its scope proceedings "before a United States Tax Court" and civil actions brought "by a governmental unit to enforce such governmental unit's police or regulatory power"). As a result, parties have used § 1452 to remove litigation that is pending in other federal and non-state forums. *See*, *e.g.*, *Quality Tooling Inc. v. United States*, 47 F.3d 1569, 1572 (Fed. Cir. 1995) (action in court of federal claims removed to district court).

2. Procedure for Removal

To remove a case under §§ 1441 or 1452, a defendant (if removing under § 1441) or a party (if removing under § 1452) must file a notice of removal (along with the pleadings) in the federal court where the state court action is pending, not the federal court where the bankruptcy case is pending. 28 U.S.C. §§ 1441(a), 1446(a); 28 U.S.C. § 1452(a); Fed. R. Bankr. P. 9027(a)(1). If the bankruptcy case is pending in a different district than the district to which the case is removed, a removing party may consider filing a motion to transfer venue where the bankruptcy case is pending, particularly if there are certain efficiencies in having the case heard in the same district or by the bankruptcy court overseeing the underlying bankruptcy case. The party seeking removal must also serve the notice of removal on all parties in the underlying action and file the notice with the state or other court, at which point the removal becomes effective. 28 U.S.C. § 1446(d); Fed. R. Bankr. P. 9027(b)-(c).

Courts are split as to whether the notice of removal may be filed directly with the bankruptcy court, given that §§ 1441 and 1452 expressly refer to removal to the "district court." Many courts allow parties to file their notice of removal directly with the bankruptcy court, notwithstanding the term "district court," particularly where the district court has a standing local order under § 157(a) transferring bankruptcy-related proceedings

to the bankruptcy court. *See*, *e.g.*, *Braden Partners, L.P. v. Hometech Med. Servs., Inc.*, No. C-02-5187 EMC, 2003 WL 223423, at *2 (N.D. Cal. Jan. 17, 2003) ("Where local rules provide that all bankruptcy proceedings (including those under 28 U.S.C. § 157(a)) are referred to the Bankruptcy Court, removal applications must be directed to the Bankruptcy Court."). But some courts read §§ 1441 and 1452 narrowly and require that the removal first be made to the district court. *See*, *e.g.*, *Calvary Baptist Temple v. Reliance Trust Co. (In re Calvary Baptist Temple)*, No. 10-04054, 2010 WL 6794159, at *9 (S.D. Ga. Aug. 26, 2010) (holding that removal must first be made to district court but noting that this is the minority position). Where the district court has not entered an order of referral under § 157(a), the notice must be filed with the district court.

3. Timing

The time period within which a party must remove a state-court proceeding under §§ 1441 and 1452 differs considerably. Under § 1441, a defendant must file a notice of removal within 30 days after being served. 28 U.S.C. § 1446(b). By contrast, under Bankruptcy Rule 9027(a)(2), a party seeking to remove a pending pre-petition case under § 1452 must file a notice of removal within the longest of:

> (A) 90 days after the order for relief in the case under the Code,
>
> (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or
>
> (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

Fed. R. Bankr. P. 9027(a)(2).

If the case to be removed was filed after the bankruptcy case was commenced, Bankruptcy Rule 9027(a)(3) requires that a party file its notice of removal within the shorter of:

> (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or
>
> (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

Fed. R. Bankr. P. 9027(a)(3).

4. Sanctions

Courts may impose sanctions against parties or their attorneys that remove state-court actions to federal court for the purpose of delaying or hindering the opposing party. *See Scott v. Nat'l Ins. & Asset Protection, Inc. (In re Fisher Fin. & Inv. LLC)*, No. CC-09-1099-RMoPa, 2009 WL 7751432 (9th Cir. B.A.P. Aug. 21, 2009) (upholding sanctions award against party's attorney for removing state-court action where the notice of removal was frivolous and filed for an improper purpose).

REMAND

1. Remand Pursuant to 28 U.S.C. § 1447

Following removal, a motion for remand on any basis other than subject matter jurisdiction may only be brought within 30 days after the filing of the notice of removal. 28 U.S.C. § 1447(c). If there is a defect based on subject matter jurisdiction, the district court must remand the case so long as it is before judgment is entered whether or not a motion is filed. 28 U.S.C. § 1447(c); *see Wisconsin Dep't of Corr. v. Schact*, 524 U.S. 381, 391-93, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (subject matter is determined as to the case overall, not on a claim-by-claim basis).

A. Remand Based on Subject Matter Jurisdiction Issues

The majority view is that if the court has subject matter jurisdiction, the court may not remand the case sua sponte for a procedural defect. *Grote v. Trans World Airlines, Inc.,* 905 F.2d 1307, 1310 (9th Cir. 1990) (majority view); *FDIC v. Loyd*, 955 F.2d 316, 321-22 (5th Cir. 1992) (minority view); *In re Allstate Ins. Co.,* 8 F.3d 219, 233 (5th Cir. 1993) (majority view); *Kelton Arms Condo. Owners Ass'n, Inc. v. Homesteasd Ins. Co.*, 346 F.3d 1190, 1192-93 (9th Cir. 2003) (majority view).

B. Remand Based on Procedural Defect Issues

To remand a case based on a procedural defect, the defect must relate to the removal procedure. *Williams v. AC Spark Plugs Div. of General Motors Corp.*, 985 F.2d 783, 787 (5th Cir. 1993). Examples of procedural defects include when removal is barred by statute (*id.* at 786-88); the removal is tardy (*Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992); and where not all defendants joined in the removal (*Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265-67 (9th Cir. 1999); *but see Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998) (defect cured before entry of judgment impeded remand)).

Courts are split as to whether the defect arising from a defendant being a resident in a forum state in a diversity action is procedural or jurisdictional. 28 U.S.C. § 1441(b)(2); *Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998) (procedural); *American Oil Co. v. McMullin*, 433 F.2d 1091, 1095 (10th Cir. 1970) (procedural); W*RS Motion Picture & Video Library v. Post Modern Edit., Inc.*, 33 F.Supp.2d 876, 878 (C.D. Cal. 1999) (jurisdictional defect that may be overcome).

There is also a split between the Fifth and the Ninth Circuits as to whether the motion to remand filed within the 30 days must raise the procedural defect. The Ninth Circuit believes it does. *Northern Calif. Dist. Council of Laborers v. Pittsburg-Des*

Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995). The Fifth Circuit believes it does not so long as the motion is made within the 30 days. *Bepco, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 470-71 & n.4 (5th Cir. 2012). Taking an affirmative action in federal court prior to making a motion to remand may waive the right to seek remand though the 30 day period has not expired. *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528-29 (8th Cir. 1996).

C. Remand Based on Abstention Grounds

In addition, cases may be remanded by the district court even though it has subject matter jurisdiction based on abstention grounds, but remand is not proper just because a court has a busy docket or because it seems a fair result. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353-57, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344-346, 351, 96 S.Ct. 584, 46 L.Ed 542 (1976). Abstention is only available in special, limited circumstances. *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). Those include where it would interfere with pending state criminal proceedings, certain kinds of state civil proceedings, where the federal constitutional issue may be obviated if a state court is given the opportunity to interpret state law, cases that are duplicative of a pending state proceeding, or that interfere with a state tax collection system, among others. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996).

D. Remand Following Dismissal of Federal Claims

Once federal claims are removed from the case, the court has the inherent power to remand the state law claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351, 354, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1209 n.1 (10th Cir. 2000).

E. Causing Remand by Joining New Parties

After removal, the court may deny joinder or allow joinder of additional parties that destroys subject matter jurisdiction *and* remand the action back to state court. 28 U.S.C. § 1447(e). Procedurally, if a defendant is subsequently joined to an action removed to a district court or a bankruptcy court, the newly added defendant may move to have the case remanded. 28 U.S.C. § 1448; Fed. R. Bankr. P. 9027(f). One court has held though a third party defendant may not seek remand. *H & H Terminals, LC v. R. Ramos Family Trust, LLP*, 634 F.Supp.2d 770, 774-77 (W.D. Tex. 2009).

F. Appealing the Remand Order

By statute, an order remanding the case back to state court is not reviewable on

appeal unless it is a civil or criminal action involving federal officers or agencies, or civil rights cases removed by defendants. 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 126-29, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995); *cf. Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (abstention based remands are immediately appealable). Nonetheless, notwithstanding the court characterizing its remand based on lack of subject matter jurisdiction, the appellate court may look behind the characterization to see if it is colorable. *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 233-34, 127 S.Ct. 2411, 168 L.Ed. 2d 112 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641-42, 126 S.Ct. 2145, 165 L.Ed.2d 92 (2006) (appellate court may look beyond the district court's label). Most appellate courts will review the record to determine the basis for the remand and an explicit reference to section 1447 or to lack of subject matter jurisdiction in the order is not sufficient to bar review. *Reddam v. KPMG LLP*, 457 F.3d 1054, 1058-59 (9th Cir. 2006). In the Ninth Circuit, this "colorable review" extends to non-jurisdictional defects as the basis for the remand order. *Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 937-38 (9th Cir. 2010). In the Fifth Circuit, however, only a clear, affirmative statement of another basis for remand other than lack of subject matter jurisdiction opens up the inquiry. *Certain Underwriters at Lloyd's v. Warrantech*, 461 F.3d 568, 572-73 (5th Cir. 2006). Pre-remand substantive orders that have preclusive effect are reviewable though. *Waco v. United States Fid. & Guara. Co.*, 293 U.S. 140, 142-44, 55 S.Ct. 6, 79 L.Ed. 244 (1934). And certain courts will review the remand order as part of a collateral award of attorney's fees. *Dahl v. Rosenfeld*, 316 F.3d 1074, 1078-79 (9th Cir. 2003).

Remands based on non-statutory grounds are reviewable, such as those based on abstention grounds outside of the bankruptcy context (*see Quackenbush, supra*) and for declining to exercise supplemental jurisdiction, among other grounds. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 129 S.Ct. 1862, 173 L.Ed.2d 843 (2009).

Reconsideration of the remand order is similarly prohibited. *See Seedman v. United States Dist. Ct.*, 837 F.2d 413, 414 (9th Cir. 1988); *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 279, n. 3 (9th Cir. 1984). The federal court may, nonetheless, correct an error before the remand order is certified to the state court. *Bucy v. Nevada Constr. Co.*, 125 F.2d 213, 217-18 (9th Cir. 1942).

Remands not based on procedural defects or lack of subject matter jurisdiction may be reconsidered. *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 313 (2d Cir. 2005). Courts are split on whether reconsideration in such instances continue after a certified copy of the remand order has been sent to the state court up until the time the appeal period expires. *Compare Thomas v. LTV Corp.*, 39 F.3d 611, 615-16 (5th Cir. 1994) (reconsideration permitted until appeal deadline) *and In re Digicon Marine, Inc.*, 966 F.2d 158, 160-61 (5th

Cir. 1992) (reconsideration permitted after certification) *with Seedman, supra*, 837 F.2d at 414 (9th Cir. 1988) (suggesting no reconsideration after certification). Remand orders issued by magistrate judges are subject to de novo review. *First Union Mortgage Corp. v. Smith*, 229 F.3d 992, 995-97 (11th Cir. 2000).

The refusal to remand a case is not a final order and may not be reviewed until judgment is entered. *Leffal v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 n.1 (5th Cir. 1994); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 547-550 (5th Cir. 1981); *Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1076 (10th Cir. 1999). If the order denying the remand motion is certified, it may be reviewed by interlocutory appeal. *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97 (9th Cir. 1979). Denial of a remand motion may also be immediately appealed if joined with the appeal of an order that is subject to immediate appeal, such as the grant of an injunction. *Takeda v. Northwestern Nat'l Life Ins. Co.*, 764 F.2d 815, 818 (9th Cir. 1985); *PCI Transp., Inc. v. Forth Worth & Western R. Co.*, 418 F.3d 535, 539-40 (5th Cir. 2005). Appellate review may also be sought by writ of mandamus, which is an extraordinary remedy available only in extreme situations. *Seedman, supra*, 837 F.2d at 414 (9th Cir. 1988). A court of appeal may also permit an immediate appeal if the party seeking remand files an application within 10 days after entry of the order denying remand. 28 U.S.C. § 1292(b).

Denial of remand is subject to de novo review. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995). If the remand order isn't immediately appealed, the propriety of removal jurisdiction will be determined as of the date the judgment is entered. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702-704, 92 S.Ct. 1344, 31 L.Ed. 2d 612 (1972). This gives the defendant time to cure the defect. *See Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 74 n.11, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996); *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 773-774 (9th Cir. 1986). A remand order based on abstention grounds is also subject to de novo review. *Privitera v. Cal. Bd. of Med. Quality Assurance*, 926 F.2d 890, 895 (9th Cir. 1991). A remand of state law claims after refusing to exercise supplemental jurisdiction is reviewed for an abuse of discretion. *Esab Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 393 (4th Cir. 2012).

G. Fees and Costs

A remand order may include the payment of costs and actual expenses, including attorney fees, incurred due to the removal. 28 U.S.C. § 1447(c). If the remand is based on a non-statutory ground, the prevailing party is not entitled to fees and costs. *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 555 (9th Cir. 1991). The fees may be awarded even if the prevailing party has not paid them or will not incur them because the matter was taken on a contingency or pro bono basis. *Gotro v. R & B Realty Group*, 69 F.3d 1485, 1486-88 (9th Cir. 1995). Courts must conduct a reasonableness

inquiry in awarding the fees. *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1131-35 (10th Cir. 2001). Fees may only be awarded when the removing party lacked an objectively reasonable basis for seeking removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). In the Ninth Circuit, "objective reasonableness" is based on the clarity of the law on the issue when the notice of removal was filed. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065-67 (9th Cir. 2008). Fees may be imposed upon defendants added after the removal. *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997). The court retains jurisdiction after the remand to award fees and costs. *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000). Fee awards are subject to appellate review and the standard of review is an abuse of discretion standard. *Huffman, supra*, 262 F.3d at 1131-35 (10th Cir. 2001); *Rutledge*, 201 F.3d 1212 (9th Cir. 2000), *as modified*, 208 F.3d 1170 (9th Cir. 2000); *Amer. Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 541 (5th Cir. 2012). The underlying legal principles are reviewed de novo, however. *Huffman*, 262 F.3d at 1131-35. There is no authority to award fees to the party resisting the remand, however. *Circle Indus. USA, Inc. v. Parke Constr. Group, Inc.*, 183 F.3d 105, 108-109 (2d Cir. 1999). District courts are divided on whether the fees can be charged against opposing counsel. *See In re Crescent City Estates, LLC*, 588 F.3d 822, 825-31 (4th Cir. 2009) (collecting cases). Attorneys may be reprimanded for wrongful removal by way of sanctions under Rule 11, 28 U.S.C. § 1927, or the court's inherent powers. *Id.*

2. Remand Pursuant to 28 U.S.C. § 1452

Claims that are removed to federal court because they are related to bankruptcy cases may be remanded on any equitable ground and the decision to remand is not reviewable on appeal. 28 U.S.C. § 1452(b). Equitable grounds include mandatory and discretionary abstention. *See infra*, Abstention. Mandatory abstention should automatically result in remand, however, in a unique twist, the Ninth Circuit holds that mandatory abstention does not apply to removed cases because no parallel state court proceeding exists. *Security Farms v. Int'l Bhd of Teamsters*, 124 F.3d 999, 1010 (9th Cir. 1997); *In re Lazar*, 237 F.3d 967, 981-82 (9th Cir. 2001). Other circuit courts tend to disagree. *E.g., Southmark Corp. v. Coopers & Lybrand (Matter of Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999).

Such claims may also be remanded pursuant to 28 U.S.C. section 1452(a) for two exceptions to the types of cases that may be removed: (1) civil actions before the U.S. tax court; and (2) a civil action to enforce a governmental unit's police or regulatory power. Cases that primarily seek to protect the government's pecuniary interest do not fall within this exception. *Cf. City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1123-1127 (9th Cir. 2006) (action for restitution of ratepayer funds was brought under police or regulatory power).

Following the dismissal of a bankruptcy case, the court has discretion to remand or retain "related claims." *Carraher v. Morgan Elec. Inc.*, 971 F.3d 327 (9th Cir. 1992).

A. Timeline

Before bankruptcy courts, motions for remand are governed by Rule 9014. Fed. R. Bankr. P. 9027(d). Though Rule 9027 does not explicitly contain a deadline for filing a remand motion, one circuit court ruled that failing to seek remand through an express statutory exception embedded in 28 U.S.C. section 1452(a) was a procedural defect subject to the 30 day deadline of imposed by 28 U.S.C. section 1447(c). *Orange County Water Dist. v. Unocal Corp*., 584 F.3d 43, 49-51 (2d Cir. 2009). Further, in the Ninth Circuit, the existence of removal jurisdiction may be challenged under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014). There is also 14 day deadline for filing a statement following removal as to whether a party consents to the entry of final orders or judgment by the bankruptcy court. Fed. R. Bankr. P. 9027(e)(3). In addition, taking an affirmative action in federal court prior to making a motion to remand may waive the right to seek remand. *Koehnen, supra*, 89 F.3d at 528-29.

B. Burden of Proof and Evidence

The defendant bears the burden of proof regarding grounds necessary to support the removal. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549-550 (5th Cir. 1981); *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992). Post-removal amendments to the complaint are disregarded in the analysis. *Deutsch v. Turner Corp.*, 324 F.3d 692, 718-19 & n.22 (9th Cir. 2003). Aside from the complaint and the notice of removal, courts may also consider subsequent affidavits that clarify or correct allegations. *Willingham v. Morgan*, 395 U.S. 402, 408 n.3, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002). A wide range of evidence may be permissible. *See Pretka v. Kolter City Plaza II, Inc.,* 608 F.3 744, 755 (11th Cir. 2010). In the Ninth Circuit, a court should treat a remand motion like a motion under Rule 12(b)(1), (6). *Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014). Fraudulent joinder allegations challenging a lack of diversity jurisdiction may be tested using a summary judgment procedure. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311-12 (5th Cir. 2002).

C. Appeals

Orders granting or denying remand based on equitable factors are not reviewable on appeal. 28 U.S.C. § 1452(b); *Browning v. Navarro*, 743 F.2d 1069, 1076-78 (5th Cir. 1984). Orders denying remand based on lack of subject matter jurisdiction are reviewable though. *City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1121 (9th Cir.

2006). The propriety of the removal may also be reviewed on appeal. *Id.; see Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.),* 124 F.3d 619, 625 (4th Cir.1997) ("The language of § 1452(b) expressly precludes appellate review of a district court's refusal to remand a properly removed action on equitable grounds. However, the plain language of § 1452(b) *presumes* that removal under § 1452(a) was proper.").

3. Futility Doctrine

In lieu of remand, in the Ninth and Fifth Circuits, remand may be denied and dismissal entered if remand would be futile and the state court would just dismiss the case as well. *Deutsch v. Turner Corp.*, 324 F.3d 692, 718-19 and n.22 (9th Cir. 2003); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990). The Tenth Circuit would likely not follow this futility exception to remand. *See Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1226 (10th Cir. 2012).

ABSTENTION

> "Abstention" is a judicially created doctrine to resolve conflicts between Federal and state court and is based on comity with state courts. *See* 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §§ 4241-55 (2d ed. 1988). However, abstention in the context of bankruptcy cases is statutory, *see* 28 U.S.C. § 1334(c), and has been extended to administrative and Federal forums. *See Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.)*, 935 F.2d 1071 (9th Cir. 1991) (district court did not abuse its discretion by abstaining to local administrative proceedings to resolve issues in adversary proceeding); *In re T.D.M.A. Inc.*, 66 B.R. 992, 995 (Bankr. E.D. Pa. 1986) ("the statement that '[n]othing . . . prevents a district court in the interests of justice' from abstaining . . . probably applies to reference to federal as well as state forums").

Limitations Upon The Exercise of Bankruptcy Jurisdiction, *available at* https://www.justice.gov/jm/civil-resource-manual-187-limitations-upon-exercise-bankruptcy-jurisdiction. Abstention analysis must be divided into two sections: mandatory abstention and discretionary abstention. On appeal, courts review orders regarding mandatory abstention *de novo*, and courts review orders regarding discretionary abstention for abuse of discretion. *In re GACN, Inc.*, 555 B.R. 684, 692 (9th Cir. BAP 2016).

Mandatory Abstention

When a party files a timely motion requesting mandatory abstention, the court must grant abstention if certain factors are met. In considering a mandatory abstention motion, the court will consider whether the following seven factors are present:

(1) A timely motion;

(2) A purely state law question;

(3) A non-core proceeding;

(4) A lack of independent federal jurisdiction absent the petition under Title 11;

(5) That an action is commenced in a state court;

(6) The state court action may be timely adjudicated; and

(7) A state forum of appropriate jurisdiction exists.

28 U.S.C. § 1334 (c)(2); *see also In re GACN, Inc.,* 555 B.R. 684, 695 (9th Cir. BAP 2016) (*citing In re General Carriers Corp.*, 258 B.R. at 189).

28 U.S.C. § 1334 (c)(2) provides that:

> (2) Upon timely motion of a party in a **proceeding based upon a State law claim or State law cause of actio**n, related to a case under title 11 but **not arising under title 11** or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the **district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction**.

28 U.S.C. § 1334 (c)(2) (emphasis added).

The policy for mandatory abstention is to give state law claimants a right to have claims heard in state court. *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986). Thus, if there is no action that could timely be adjudicated in a state forum of appropriate jurisdiction, there can be no mandatory abstention. *In re Sundquist*, 576 B.R. 858, 874 (E.D. Cal. 2017). The court considers the urgency of resolving the dispute for bankruptcy purposes when considering whether the state court action could be timely adjudicated. *In re GACN, Inc.,* 555 B.R. 684, 699 (9th Cir. BAP 2016)

Discretionary or Permissive Abstention

In considering the court's ability to abstain from hearing a claim in its sole discretion, the court will consider twelve (12) factors. The following twelve (12) factors are also listed in *In re GACN, Inc.*:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficulty or unsettled nature of the applicable law;

(4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden of [the bankruptcy court's] docket;

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

In re GACN, Inc., 555 B.R. 684, 695 (9th Cir. BAP 2016) (*citing In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990)).

28 U.S.C. § 1334 (c)(1) provides that:

> (1) Except with respect to a case under chapter 15 of title 11 [11 USCS §§ 1501 et seq.], **nothing in this section prevents a district court <u>in the interest of justice</u>, or <u>in the interest of comity with State courts or respect for State law</u>, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.**

28 U.S.C. § 1334 (c)(1) (emphasis added). Courts place great emphasis on whether the underlying action concerns predominately state law. *See Citigroup, Inc. v. Pac. Inv. Mgmt. Co. (In re Enron Corp.)*, 296 B.R. 505, 509 (C.D. Cal. 2003) (*citing In re United Container LLC*, 284 B.R. 162 (Bankr. S.D. Fla. 2002)) ("These considerations can be summed up in this principle: 'when a state court proceeding **sounds in state law** and **bears a limited connection to a debtor's bankruptcy case, abstention is particularly compelling**'") (emphasis added).

<u>Core Proceeding</u>

An important determination for the court, whether analyzing a motion for mandatory abstention or considering discretionary abstention, is whether the underlying claim is a core proceeding. *See In re GACN, Inc.,* 555 B.R. 684, 693 (9th Cir. BAP 2016); *see also* factor (3) of mandatory abstention and factor (7) of discretionary abstention.

Core bankruptcy proceedings include: (1) claims included in the list of specific types of core proceedings in 28 USC § 157(b)(2); (2) matters concerning the administration of the estate; and (3) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims. *In re GACN, Inc.*, 555 B.R. 684, 693 (9th Cir. BAP 2016). However, "state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are [noncore] proceedings . . . even if they arguably fit within the literal wording of the two catch-all provisions, sections § 157(b)(2)(A) and (O)." *Piombo Corp. v. Castlerock Props. (In re Castlerock Props.)*, 781 F. 2d 159, 162 (9th Cir. 1986).

Core proceedings include, but are not limited to:

A. matters concerning the administration of the estate;

B. allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 [11 USC §§ 1101, *et seq*., 1201, *et seq*. or 1301, *et seq*.] but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

C. counterclaims by the estate against persons filing claims against the estate;

D. orders in respect to obtaining credit;

E. orders to turn over property of the estate;

F. proceedings to determine, avoid, or recover preferences;

G. motions to terminate, annul, or modify the automatic stay;

H. proceedings to determine, avoid, or recover fraudulent conveyances;

I. determinations as to the dischargeability of particular debts;

J. objections to discharge;

K. determinations of the validity, extent, or priority of liens;

L. confirmations of plans;

M. orders approving the use or lease of property, including the use of cash collateral;

N. orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

O. other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

P. recognition of foreign proceedings and other matters under chapter 15 of title 11 [11 USCS §§ 1501 et seq.].

28 U.S.C. § 157 (b)(2).

Arising In Jurisdiction

Both mandatory and discretionary abstention consider whether the underlying issue is one that is "arising under title 11" or "arising in" a case under title 11. A proceeding "arises under" title 11 if it involves a cause of action "created or determined by a statutory provision of title 11." *Krasnoff v. Marshack (In re Gen. Carriers Corp.)*, 258 B.R. 181, 184 (9th Cir. BAP 2001) (*citing Harris Pine Mills*, 44 F.3d at 1435). Therefore, a claim that could exist independently of the bankruptcy case does not "arise in" a case under title 11 and is not a core proceeding. *In re GACN, Inc.*, 555 B.R. 684, 697 (9th Cir. BAP 2016) (*citing In re Ray*, 624 F.3d 1124, 1133 (9th Cir. 2010)).

Timeliness

There is no hard and fast rule for when a motion to abstain must be filed in order to be considered timely. Indeed, neither the statute nor the Federal Bankruptcy Rules provide a specific time period within which an application for abstention must be made.

Courts will consider the reason for delay in its consideration of whether a motion is timely. *In re World Solar Corp*., 81 B.R. 603, 606-07 (Bankr. S.D. Cal. 1988). Courts are more likely to find the motion to be timely if it is filed early in the case to prevent waste of judicial resources. *In re Marshland Dev., Inc*., 129 B.R. 626, 632 n.15 (Bankr. N.D. Cal. 1991) ("A motion for abstention should be made early in the case, so as to prevent the waste of judicial resources").

Courts have determined that a motion to remand or abstain was timely when it was filed within one month after the case was removed from the state court (*Bally Total Fitness Corp. v. Contra Costa Retail Ctr*., 384 B.R. 566, 570 (Bankr. N.D. Cal. 2008)

("less than a month later"); *Bowen Corp. v. Sec. Pac. Bank Idaho, F.S.B*., 150 B.R. 777, 782 (Bankr. D. Idaho 1993) ("Six days after removal of the case from state court is timely")), and as far out as six months after the case was removed. *In re World Solar Corp*., 81 B.R. at 606-07. In *In re World Solar Corp*., the court determined that the motion was timely because it was delayed as a result of settlement negotiations between the parties. *Id*. A motion for abstention that was filed eight months after the commencement of the case was, however, determined by the bankruptcy court in the Northern District of California to be untimely. *In re Marshland Dev., Inc*., 129 B.R. 626 at 632. *But see Gonzales Constr. Co. v. Fulfer (in Re Fulfer)*, 159 B.R. 921, 923 (Bankr. D. Idaho 1993) (in considering whether a motion to abstain filed four months after removal was timely, noting that "at least one court has held a remand motion timely that was filed eight months after the action was removed from state court") (*citing Robinson v. Michigan Consolidated Gas Co., Inc.,* 918 F.2d 579, 584 (6th Cir. 1990)).

Additional Issues

There is a circuit split regarding whether abstention analysis should be conducted when a case is removed from state court to bankruptcy court. *See* Joseph Cavender, 71 U. Chi. L. Rev. 289 On the Need to Conduct Abstention Analysis at 293-94 (Winter 2004) ("Several district courts in the Second Circuit, as well as a few in other circuits, have also considered the question and have come to the same conclusion as the Ninth Circuit, holding that abstention analysis should not be performed in removed cases"). Many of the cases are collected in In *re Adelphia Communications Corp*., 285 B.R. 127, 141–42 (Bankr. S.D. N.Y. 2002). **Other than the Ninth Circuit**, all the courts of appeals that have addressed the issue whether mandatory abstention under § 1334(c)(2) is not applicable if the action has been removed to the bankruptcy forum (for lack of a pending state-court action) have held that mandatory abstention *does* apply and must be ordered if the other statutory factors are present. *See Mt. McKinley Ins. Co. v. Corning, Inc*., 399 F.3d 436 (2nd Cir. 2005).

RESEARCH NOTES:

28 U.S.C. § 1334

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district 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.

(c)

(1) Except with respect to a case under chapter 15 of title 11 [11 USCS §§ 1501 et seq.], **nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.**

(2) Upon timely motion of a party in a **proceeding based upon a State law claim or State law cause of actio**n, related to a case under title 11 but **not arising under title 11** or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the **district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction**.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title [28 USCS § 158(d), 1291, or 1292] or by the Supreme Court of the United States under section 1254 of this title [28 USCS § 1254]. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code [11 USCS § 327], or rules relating to disclosure requirements under section 327 [11 USCS § 327].

Cases:

In re Ray, 624 F.3d 1124, 1133 (9th Cir. 2010).

In re GACN, Inc., 555 B.R. 684 (9th Cir. BAP 2016).

In re Harris, 590 F.3d 730 (9th Cir. 2009)

In re Harris Pines Mills, 44 F.3d 1431 (9th Cir. 1995)

In re Castlerock Props., 781 F.2d 159 (9th Cir. 1986)

Security Farms v International Brotherhood of Teamsters. 124 F3d 999 (9th Cir. 1997)

Joseph Cavender, 71 U. Chi. L. Rev. 289 On the Need to Conduct Abstention Analysis at 293-94 (Winter 2004) ("Several district courts in the Second Circuit, as well as a few in other circuits, have also considered the question and have come to the same conclusion as the Ninth Circuit, holding that abstention analysis should not be performed in removed cases.").

Citigroup, Inc. v. Pac. Inv. Mgmt. Co. (In re Enron Corp.), 296 B.R. 505, 508 (C.D. Cal. 2003)

- Bankruptcy courts have broad discretion to remand cases over which they otherwise have jurisdiction on any equitable ground. 28 U.S.C. § 1452(b). *Id.* at 508.
- These considerations can be summed up in this principle: "when a state court proceeding **sounds in state law** and **bears a limited connection to a debtor's bankruptcy case, abstention is particularly compelling.**" *Id.* at 509 (*citing In re United Container LLC*, 284 B.R. 162 (Bankr. S.D. Fla. 2002)) (emphasis added).

The chapter 7 trustee moved the bankruptcy court to abstain from hearing an action against the former trustee which had been recently filed in state court but had not been removed to bankruptcy court. The bankruptcy court determined that the claim was a core matter, and exercised its discretion to deny the motion. Finding that the bankruptcy court lacked jurisdiction, we now VACATE the order.

Krasnoff v. Marshack (In re Gen. Carriers Corp.), 258 B.R. 181, 184 (B.A.P. 9th Cir. 2001)

- "The bankruptcy court has original and exclusive jurisdiction over all cases under title 11, 28 U.S.C. § 1334(a), and original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11, 28 U.S.C. § 1334(b). 28 U.S.C. § 157(a). Proceedings "arise under" title 11 if they involve a cause of action created or determined by a statutory provision of title 11. Harris Pine Mills, 44 F.3d at 1435 (citing In re Wood, 825 F.2d 90, 96-97 (5th Cir. 1987)).

- "The mandatory abstention provision, 28 U.S.C. § 1334(c)(2), indicates "a clear congressional policy . . . to give state law claimants a right to have claims heard in state court." *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986)."

- Mandatory abstention requires seven elements: (1) a timely motion; (2) a purely state law question; (3) a non-core proceeding § 157(c)(1); (4) a lack of independent federal jurisdiction absent the petition under Title 11; (5) that an action is

commenced in a state court; (6) the state court action may be timely adjudicated; (7) a state forum of appropriate jurisdiction exists. *Id.* at 189.

- "Abstention provisions implicate the question whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction in the first instance. The act of abstaining presumes that proper jurisdiction otherwise exists." *In re S.G. Phillips Constructors, Inc*., 45 F.3d 702, 708 (2nd Cir. 1995). [**20] The abstention rules, both mandatory and discretionary, clearly require "a proceeding" in order for the bankruptcy court to abstain."

- The court determined the motion for abstention was premature because neither trustee removed the state court action to bankruptcy court. *Id.* at 190.

In re Sundquist, 576 B.R. 858 (E.D. Cal. 2017)

- Mandatory abstention can only occur with respect to a "related to" claim under state law. *Id.* at 874.

- Because in this case, there was no action commenced that could be timely adjudicated in a state forum of appropriate jurisdiction, there could be no mandatory abstention. *Id.*

- The matter before the court in this case was a cause of action for wrongful foreclosure based on a bankruptcy automatic stay violation. *Id.*

- The court noted that permissive abstention would be "potentially available", but stated none of the factors of § 1334 (c)(1) would be served by abstaining from hearing what amounted to an end-run around a bankruptcy court's § 329(b) order. *Id.*

In re GACN, Inc., 555 B.R. 684 (9th Cir. BAP 2016).

- Insurer appealed bankruptcy court's order denying the insurer's motion for mandatory or permissive abstention. *Id.* at 688.

- The issue for the court was whether the debtor's declaratory relief action was a core bankruptcy proceeding. *Id.* at 688.

- The court vacated and remanded the bankruptcy court's decision to deny the insurer's request for both mandatory and discretionary abstention. *Id.* at 688.

- The debtor brought an adversary proceeding against the insurer in bankruptcy court seeking a judicial determination of the parties' rights and liabilities arising from the debtor's post-petition negotiation of conditional settlement; and the insurer's rejection of debtor's request for approval of the settlement. *Id.* at 689.

- The bankruptcy court found on the insurer's abstention motion that four of the seven requirements for mandatory abstention were met. *Id.* at 689.

- However, the bankruptcy court held mandatory abstention did not apply because three prerequisites were not met. *Id.*

- The bankruptcy court also denied the request for discretionary abstention, after considering all twelve of the factors bankruptcy courts generally consider in deciding a discretionary abstention request. *Id.* at 689.

- The court will review de novo orders regarding mandatory abstention, and will review for an abuse of process orders regarding discretionary abstention. *Id.* at 692.

- Core bankruptcy proceedings include: (1) claims included in the list of specific types of core proceedings in 28 USC § 157(b)(2); (2) matters concerning the administration of the estate; and (3) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims. *Id*. at 693.

- "Whether an action is a core or a noncore proceeding is a factor to be considered in making both mandatory and permissive abstention rulings." *Id.* at 693.

- "[M]andatory abstention requires: (1) A timely motion; (2) a purely state law question; (3) a non-core proceeding § 157(c)(1); (4) lack of independent federal jurisdiction absent the petition under title 11; (5) that an action is commenced in a state court; (6) the state court action may be timely adjudicated; (7) a state forum of

appropriate jurisdiction exists." *Id*. at 695 (*citing In re General Carriers Corp.*, 258 B.R. at 189).

- "With respect to permissive abstention, the bankruptcy court pointed out that courts consider the following twelve factors: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties." *Id.* (*citing In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990)).

- A lawsuit that could exist independently of the bankruptcy case does not "arise in" a case under title 11 and is not a "core proceeding." *Id.* at 697, (*citing In re Ray*, 624 F.3d 1124, 1133 (9th Cir. 2010)).

- The court held the debtor's lawsuit was NOT a core proceeding because the underlying dispute concerned the parties' rights and liabilities under a prepetition insurance contract, which was entered into pursuant to state law. *Id.* at 698.

- "This abstention element [whether purely a state law question] requires bankruptcy courts to look at the parties' claims for relief in order to ascertain whether state law or federal law governs those claims." *Id.* at 698

- "As In re World Solar Corp. indicated, the greater the urgency in resolving the dispute for bankruptcy purposes, the less of a delay in the state court the bankruptcy court should allow for before determining that the state court cannot timely adjudicate the dispute." *Id.* at 799.

- The court remanded the insurer's request for mandatory abstention so the bankruptcy court could factor into its timeliness consideration the district court review process for non-core matters. *Id.* at 700.

- The court determined the bankruptcy court abused its discretion in denying the insurer's request for discretionary abstention because of the bankruptcy court's error in concluding the action was a core proceeding and in determining the bankruptcy issues predominated over state law issues. *Id.* at 700.

Faculty

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Cody J. Jess is a shareholder at Moyes, Sellers & Hendricks Ltd. in Phoenix, where his practice focuses on complex commercial litigation, commercial bankruptcy, creditors' rights and business law. Mr. Jess represents businesses, individuals, shareholders, members, officers and directors in complex commercial disputes, including prosecuting and defending breach-of-contract, fraud, business tort, business divorce, employment and intellectual property claims to finality in state, federal, bankruptcy and appellate courts, arbitrations and mediations. As part of his insolvency practice, Mr. Jess prosecutes and defends receiverships, advises on prejudgment remedies, conducts post-judgment enforcement and collection, and represents both debtors and secured and unsecured creditors in chapters 7, 11 and 15 and subchapter V. He conducts all manner of bankruptcy litigation, including prosecuting and defending preference actions, fraudulent-transfer claims, challenges to bankruptcy filings, discharge, plan confirmation, cash collateral, financing and acquisitions. He also serves as general outside counsel to businesses ranging from startups to well-established companies with annual revenues of upwards of $100 million, and he counsels his business clients on matters ranging from secured transactions to restrictive covenant agreements. Mr. Jess has been listed in *Super Lawyers* since 2012, and is listed in *The Best Lawyers in America* for 2021. He is a member of the State Bar of Arizona's Bankruptcy and Trial Practice sections and ABI, and he is a barrister in the Arizona Bankruptcy American Inn of Court. He also provides *pro bono* assistance to low-income persons and families through Community Legal Services' Volunteer Lawyers Program. Mr. Jess received his B.I.S. *summa cum laude* in political science and justice studies from Arizona State University and his J.D. also from Arizona State University, where he was a 2006 Willard H. Pedrick Scholar at the Sandra Day O'Connor College of Law.

Hon. Mike K. Nakagawa is a U.S. Bankruptcy Judge in the District of Nevada in Las Vegas, appointed in September 2006. He served as the Chief Bankruptcy Judge from October 2008-September 2015. Prior to his appointment to the bench, Judge Nakagawa practiced in Sacramento primarily in the area of bankruptcy and business law. Before relocating to Nevada, he was an adjunct professor at both McGeorge School of Law and Lincoln Law School, where he taught bankruptcy law and reorganizations. He also was a member of the Sacramento County Civil Service Commission, which is responsible for administering the personnel system for the county. Judge Nakagawa teaches bank-

ruptcy law, advanced bankruptcy law and remedies at the Boyd School of Law at the University of Nevada, Las Vegas. He has been a presenter at numerous continuing legal education programs for the National Conference of Bankruptcy Judges, ABI, the Norton Institutes on Bankruptcy Law, the California Bankruptcy Forum and other organizations. Judge Nakagawa received his B.A. from the University of the Pacific in Stockton, Calif., and his J.D. from the law school at the University of California at Davis, following which he clerked for the Chief Judge of the U.S. District Court for the Eastern District of California.

Nathaniel J. Palmer is a partner at Reid Collins & Tsai LLP in Dallas, where he represents plaintiffs and defendants in high-stakes, complex commercial litigation, and regularly appears in federal and state courts across the nation in cases involving financial fraud, securities matters, professional/fiduciary liability, and cross-border financial litigation. He developed the legal theories that led to a $287.5 million judgment against Credit Suisse, which the Dallas Court of Appeals recently affirmed. Mr. Palmer has experience handling cross-border matters, having worked on cases such as *Stanford International Bank*, *Suntech Power Holdings*, *American Pegasus SPC* and *Stewardship Credit Arbitrage Fund*. *Benchmark Litigation* recently named him in its 40 & Under Hot List, and for the last three years, *Texas Monthly* has named him a "Rising Star" in its Super Lawyers edition. Mr. Palmer received his B.A. *magna cum laude* from Wheaton College in Illinois and his J.D. with highest honors from the University of Texas School of Law, where he was a member of the *Texas Law Review*, named vice chancellor of the 2008 class and elected to the Order of the Coif.