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Is the Applicability of the Small Dollar Venue Limitation to Preference Actions Dying on the SBRA Vine?

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Since its enactment in 2005, the Small Dollar Venue Limitation, codified in 28 U.S.C. § 1409(b), requires that relatively low-dollar-value lawsuits connected to a bankruptcy case must be commenced in the district where the defendant resides, rather than where the bankruptcy case is pending. Courts have been divided over whether the Small Dollar Venue Limitation applies to preference actions.

A growing majority of courts have ruled that the Small Dollar Venue Limitation does not apply to preference actions. These courts have relied on the unambiguous text of § 1409(b), which omits the category of actions *arising under* the Bankruptcy Code that includes preference actions. These courts refuse to "fix" a purported oversight by Congress and rewrite § 1409(b) to remedy Congress's supposed intent to apply the Small Dollar Venue Limitation to preference actions. Conversely, a minority of courts have ruled that the Small Dollar Venue Limitation applies to preference actions, relying on Congress's intent to apply the defense to low-dollar-amount preference actions and surmising that § 1409(b)'s omission of *arising under* actions was simply an oversight. The relatively recent passage of the Small Business Reorganization Act of 2019 (SBRA), which amended § 1409(b) but failed to correct the alleged oversight concerning the applicability of the Small Dollar Venue Limitation to preference actions, has been invoked in support of the majority view.

As one of the busiest bankruptcy courts in the country, the U.S. Bankruptcy Court for the District of Delaware first addressed the applicability of the Small Dollar Venue Limitation to preference actions in 2010 and decided that Congress wanted § 1409(b) to apply to preference actions. This decision was unquestioned in Delaware until June 2021, when another judge for the same court, in *In re Insys Therapeutics Inc.*, reached the opposite conclusion based on a plain reading of § 1409(b).[1] This article reviews the approaches courts have used when considering the applicability of the Small Dollar Venue Limitation, the impact of the SBRA's amendment of § 1409(b), and the growing recent trend of court decisions refusing to apply the Small Dollar Venue Limitation to preference actions.

Proper Venue Under § 1409(a)

Pursuant to § 1409(a), the bankruptcy court in the district where a bankruptcy case is pending is the proper venue for actions (1) *arising under* the Code, (2) *arising in* the bankruptcy case and (3) *related to* the bankruptcy case. *Arising under* jurisdiction pertains to actions premised on substantive, statutory rights created by the Code itself.[2] Such actions cannot be commenced but for the rights the Code grants,[3] including proceedings to avoid and recover preferential transfers.[4]

Arising in jurisdiction pertains to actions under the Code that only occur in bankruptcy cases but are not expressly created by the Code.[5] These actions have no existence outside of a bankruptcy case. Examples include turnover actions, claim objections, proceedings to determine the validity, priority or extent of liens, claims against the estate, and matters involving the enforcement or construction of a bankruptcy court order.[6]

Actions *related to* a bankruptcy case are those that may be pursued outside of the bankruptcy case but may have a conceivable effect on the bankruptcy estate.[7] These proceedings consist of matters whose outcome could potentially alter the debtor's rights, liabilities, options or freedom of action and that impact the handling and administration of a bankruptcy case.[8]

Small Dollar Venue Limitation Under § 1409

Section 1409(b) contains certain limitations to the general venue provisions contained in § 1409(a).

1 *Insys Liquidation Trust v. Haley Techs. Inc. (In re Insys Therapeutics Inc.)*, 2021 WL 3508612 (Bankr. D. Del. June 17, 2021).

2 *Mendelsohn v. Cent. Garden & Pet Co. (In re Petland Discounts Inc.)*, Adv. Pro. No. 20-08088-reg, 2021 WL 1535793, at *3 (Bankr. E.D.N.Y. Jan. 26, 2021); *see also Miller v. Hirn (In re Raymond)*, Adv. No. 09-6177, 2009 WL 6498170, at *1 (Bankr. N.D. Ga. June 17, 2009) ("'Arising under' proceedings are matters invoking a substantive right created by the Bankruptcy Code.").

3 *Petland*, 2021 WL 1535793, at *3.

4 *See, e.g., Schroeder v. New Century Holdings Inc. (In re New Century Holdings Inc.)*, 387 B.R. 95, 104 (Bankr. D. Del. 2008); *Bruton v. High Speed Capital LLC (In re Cirino Constr. Co. Inc)*, Adv. No. 20-06077, 2020 WL 2989750, at *2 (Bankr. M.D.N.C. May 22, 2020); *Webster v. Republic Nat'l Distribution Cent. LLC (In re Tadich Grill of Washington DC LLC)*, 598 B.R. 65, 67 (Bankr. D.D.C. 2019).

5 *Petland*, 2021 WL 1535793, at *3.

6 *See, e.g., JCF AFFM Debt Holdings LP v. Affirmative Ins. Holdings Inc. (In re Affirmative Ins. Holdings Inc.)*, 565 B.R. 566, 580 (Bankr. D. Del. 2017); *Moyer v Bank of Am. NA (In re Rosenberger)*, 400 B.R. 569, 573 (Bankr. W.D. Mich. 2008).

7 *Ames Dep't Stores Inc. v. Lumbermens Mut. Cas. Co. (In re Ames Dep't Stores Inc.)*, 542 B.R. 121, 137 (Bankr. S.D.N.Y. 2015).

8 *Affirmative Ins.*, 565 B.R. at 580.

As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress amended § 1409(b) to afford greater protections to defendants in bankruptcy proceedings by limiting venue to the district court where the defendant resides in actions involving nonconsumer debts below a minimum dollar amount asserted by a bankruptcy trustee or debtor in possession.[9] Congress sought to protect these defendants from incurring substantial additional litigation costs by retaining counsel in the district where the bankruptcy case is pending.[10]

The limitations contained in § 1409(b) set a minimum dollar threshold for actions *arising in* or actions *related to* a bankruptcy case. However, § 1409(b) provides no minimum dollar threshold limitation for actions *arising under* the Code. This lack of an explicit reference in § 1409(b) to actions *arising under* the Code has caused a split in authority and division among courts over whether the Small Dollar Venue Limitation applies to preference actions.

A Minority View Applying the Small Dollar Venue Limitation to Preference Actions

Faced with the unambiguous text of § 1409(b) restricting the Small Dollar Venue Limitation to actions *arising in* or *related to* the underlying bankruptcy case, certain courts have looked beyond the text of § 1409(b) to rule that the Small Dollar Venue Limitation also applies to preference actions, even though § 1409(b) omits reference to actions *arising under* the Bankruptcy Code. These courts concluded that Congress could not have intended to exclude "arising under" actions from § 1409(b) when they are included elsewhere in § 1409. These courts sought to "fix" Congress's perceived oversight by reading "arising under" into the text of § 1409(b).[11] The Delaware Bankruptcy Court in *In re Dynamerica Mfg. LLC* expressly held that Congress had inadvertently omitted "arising under" from § 1409(b) and, in view of the legislative history, that Congress had intended to apply the Small Dollar Venue Limitation to preference actions.[12]

Other courts have applied the Small Dollar Venue Limitation to preference actions, holding that actions *arising in* bankruptcy cases implicitly include actions *arising under* the Code. In *In re Nukote Intern. Inc.*, the U.S. Bankruptcy Court for the Middle District of Tennessee criticized the use of a rigid distinction between "arising under" and "arising in," and ruled that there was sufficient overlap between the two types of suits to conclude that the Small Dollar Venue Limitation applies to preference actions.[13]

Still other courts have applied the Small Dollar Venue Limitation to preference actions based on an apparent internal inconsistency contained in § 1409(c). In *In re Little Lake Indus. Inc.*, the Ninth Circuit Bankruptcy Appellate Panel (BAP) noted that the "arising under" language was absent from § 1409(c), which governs proceedings "under section 541 or section 544(b)" (the latter includes state law fraudulent-conveyance actions that would otherwise be categorized as "arising under" actions). If proceedings arising under the Code must be excluded from § 1409(c), then a trustee could not commence any proceeding under § 544(b) in the venue that § 1409(c) clearly intended the trustee to file it in.[14]

Therefore, if courts rely on the omission of "arising under" from subsection (b) to reject the applicability of the Small Dollar Venue Limitation to preference actions, subsection (c) would be rendered incoherent — a result that Congress clearly could not have intended. Accordingly, the BAP ruled that a proceeding *arising under* the Code could also be a proceeding arising in a bankruptcy case, and applied the Small Dollar Venue Limitation to preference actions.[15]

Courts Refusing to Apply the Small Dollar Venue Limitation to Preference Actions Based on § 1409(b)

By contrast, a majority of courts have ruled that they lack authority to apply the Small Dollar Venue Limitation to preference actions in light of § 1409(b)'s unambiguous language omitting actions arising under the Bankruptcy Code.[16] These courts concluded that established rules of statutory construction prohibit courts from looking beyond the text of a statute.[17] They rejected arguments that the exclusion of preference actions was a mere oversight by Congress, where § 1409(a) explicitly references actions arising under the Code.[18]

SBRA Fails to "Correct" the Limitation; Consensus Emerges Among the Courts

Conflicting court decisions over the applicability of the Small Dollar Venue Limitation to preference actions prompted the ABI Commission in 2014 to recommend amending § 1409(b) to (1) provide that the Small Dollar Venue Limitation apply to preference actions, and (2) increase the monetary threshold for application of the Small Dollar Venue Limitation from its then-existing amount of $12,475 to $50,000.[19]

In response, Congress only partially amended § 1409(b), as part of the broader SBRA legislation, to increase the minimum dollar amount threshold to $25,000. However, the SBRA *did not* amend § 1409(b) to apply the Small Dollar Venue Limitation to preference actions. This failure to expand the Small Dollar Venue Limitation is notable, because the legislative record suggests that the House Judiciary Committee had understood that § 1409(b) applies to preference actions.[20]

9 The Small Dollar Venue Limitation set an initial $10,000 minimum threshold, subject to adjustment every three years by reference to the Consumer Price Index. The Small Dollar Venue Limitation's minimum dollar threshold was $13,650 when the SBRA was enacted in 2019.

10 *Dynamerica Mfg. LLC v. Johnson Oil Co. LLC (In re Dynamerica Mfg LLC)*, Adv. No. 10-50759 (KG), 2010 WL 1930269 (Bankr. D. Del. May 10, 2010).

11 *Ross v. Buckles (In re Matter of Skyline Manor Inc.)*, Adv. P. 15-8035, 2015 WL 9274105, at *3 (Bankr. D. Neb. Dec. 18, 2015).

12 *Dynamerica*, 2010 WL 1930269, at *3.

13 *N1 Creditors' Trust v. Crown Packaging Corp. (In re Nukote Intern. Inc.)*, 457 B.R. 668, 672 (Bankr. M.D. Tenn. 2011).

14 *Muskin Inc. v. Strippit Inc. (In re Little Lake Indus. Inc.)*, 158 B.R. 478, 483 (B.A.P. 9th Cir. 1993).

15 *Id.* at 484.

16 *See Klein v. ODS Techs. LP (In re J & J Chem. Inc.)*, 596 B.R. 704 (Bankr. D. Idaho 2019); *In re Brown*, Adv. No. 87-0109, 1988 WL 1571404 (Bankr. S.D. Iowa Jan. 8, 1988); *Redmond Gulf City Body & Trailer Works Inc., (In re Sunbridge Cap. Inc.)*, 454 B.R. 166 (Bankr. D. Kan. 2011); *In re Rosenberger*, 400 B.R. at 570; *Skyline Manor*, 2015 WL 9274105; *Straffi v. Gilco World Wide Markets (In re Bamboo Abbott Inc.)*, 458 B.R. 701 (Bankr. D.N.J. 2011); *Ryno v. Wolter (In re Nashmy)*, Adv. No. 07-1068 M, 2007 WL 2305672 (Bankr. D.N.M. Aug. 6, 2007); *Ehrlich v. Am. Express Travel Related Servs. Co. Inc. (In re Guilmette)*, 202 B.R. 9 (Bankr. N.D.N.Y. 1996); *Van Huffel Tube Corp. v. A&G Indus. (Matter of Van Huffel Tube Corp.)*, 71 B.R. 155 (Bankr. N.D. Ohio 1987); *Schwab v. Peddinghaus Corp. (In re Excel Storage Prods. LP)*, 458 B.R. 175 (Bankr. M.D. Pa. 2011).

17 *See, e.g., Sunbridge Cap.*, 454 B.R. at 174 ("[T]he established rules of statutory construction would preclude the Court from diverting from the plain language" of subsection (b)).

18 *See J & J Chem.*, 596 B.R. at 712 (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 533 (2004)).

19 Michelle M. Harner, Reporter, "Final Report of the ABI Commission to Study the Reform of Chapter 11" (2014), *available at* commission.abi.org/final-report (last visited Aug. 30, 2021).

20 H.R. Rep. No. 116-171, at 4, 8 (2019).

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Some courts have invoked Congress's failure to fully address the ABI Commission's recommendations through the SBRA legislation as a reason to conclude that the Small Dollar Venue Limitation does not apply to preference actions. For example, the U.S. Bankruptcy Court for the Middle District of North Carolina observed that "Congress had the perfect opportunity to fix the mistake and resolve the judicial schism with the [SBRA].... The fact that Congress did not amend the plain language of [§ 1409(b)] to include 'arising under' leads to the conclusion that the omission of 'arising under' was intentional."[21] Other courts, including those in Illinois and New York (twice) and, more recently, the *Insys Therapeutics* court in Delaware, have issued post-SBRA rulings strictly construing § 1409 in holding that the Small Dollar Venue Limitation does not apply to preference actions.[22]

In *Insys Therapuetics*, the liquidating trustee commenced an adversary proceeding to avoid and recover preferential and/or fraudulent transfers totaling approximately $11,000 that the defendant had received. The defendant moved to dismiss the complaint based on improper venue under § 1409(b) and heavily relied on the 2010 decision in *Dynamerica* applying the Small Dollar Venue Limitation to preference actions. The defendant asserted that interpreting § 1409(b) to include actions *arising under* the Code is consistent with Congress's intent to protect defendants in small-dollar cases. However, the *Insys Therapeutics* court rejected the defendant's arguments, ruling that consideration of congressional intent and legislative history is necessary "[o]nly when statutory text is ambiguous."[23] The court found no reason to conclude that Congress had inadvertently omitted preference actions from the Small Dollar Venue Limitation, because § 1409(b)'s clear language excludes actions arising under the Code.

Curiously, the *Insys Therapeutics* court never addressed or even referenced the 2010 decision in *Dynamerica*, even though the defendant's motion to dismiss premised its arguments on that earlier Delaware opinion. While a ruling by one bankruptcy court judge in a district is not binding upon other judges in that district, there remains a presumption that the earlier decision will be followed by other judges in the district.[24]

Conclusion

It appears more likely that courts will continue to coalesce around the majority view that the Small Dollar Venue Limitation does not apply to preference actions in light of Congress's failure to include *arising under* actions in the recently amended § 1409(b). That said, prudent defendants in preference cases should continue to raise the Small Dollar Venue Limitation in jurisdictions where there is no binding precedent on the issue. Just as the *Insys Therapeutics* decision upended more than 10 years of precedent established by the *Dynamerica* decision, a debtor or trustee might be subject to the risk that a court will reject the "plain meaning" analysis and adopt the contrary view that the omission of "arising under" in § 1409(b) was a mere oversight by Congress in ruling that the Small Dollar Venue Limitation applies to preference actions. abi

21 *Cirino Constr.*, 2020 WL 2989750, at *3.

22 *See Richardson v. Cellco P'ship (In re Munson)*, 627 B.R. 507 (Bankr. C.D. Ill. 2021); *Novak, Tr. for Est. of OnlineAutoParts.com LLC v. Parts Auth. LLC*, 20-CV-2948, 2020 WL 4034897 (E.D.N.Y. July 16, 2020); *Petland*, 2021 WL 1525793; *Insys Theraputics*, 2021 WL 3508612.

23 *Insys Theraputics*, 2021 WL 3508612, at *2.

24 *Threadgill v. Armstrong World Indus. Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991); *In re Mays*, 256 B.R. 555, 559 (Bankr. D.N.J. 2000) (applying *Threadgill* to bankruptcy courts).