

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

The Bankruptcy-Removal Statute vs. Statutory Prohibitions on Removal

Written by:

David K. Bowsher

Adams and Reese LLP; Birmingham, Ala.
david.bowsher@arlaw.com

This article raises an ostensibly simple question: Which of two federal statutes addressing the same issue prevails when one is clearly permissive and the other is clearly prohibitive? The express language of the bankruptcy removal statute, 28 U.S.C. § 1452(a), permits a party to remove to federal court any state court claim or cause of action if it is “related to” a pending bankruptcy case. However, the express language of several other federal statutes prohibits the removal of certain state court cases to federal court. Although the rules of statutory construction should dictate which statute trumps the other, not all courts agree on which statute controls.

The Statutes



David K. Bowsher

The general removal statute, 28 U.S.C. § 1441(a), permits a defendant to remove to federal court any state court case over which the federal court would have original jurisdiction, whether based on diversity, federal question or otherwise.¹ Most bankruptcy attorneys are familiar with the bankruptcy-removal statute, which permits any party in a state court case to remove it to federal court if the federal court has jurisdiction under 28 U.S.C. § 1334 because the state court case is “related to” a pending bankruptcy case.²

¹ Section 1441(a) provides, in relevant part, as follows: Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

About the Author

David Bowsher is a partner in the Birmingham, Ala., office of Adams and Reese LLP.

In contrast, most attorneys are probably not familiar with the various federal statutes that prohibit removal of certain causes of action, including (1) § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a) (the ‘33 Act);³ (2) § 1420 of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1719 (the ILSA);⁴ and (3) the general removal prohibition statute, 28 U.S.C. § 1445.⁵

The Conflict

The general removal statute begins with the carve-out “[e]xcept as otherwise expressly provided by Act of

In marked difference, the bankruptcy removal statute does not contain the carve-out “except as otherwise expressly provided by Act of Congress” or any other words to that effect. As a result, the bankruptcy-removal statute is in direct conflict with the ‘33 Act, ILSA and other federal statutes that prohibit removal.

Bankruptcy-Removal Statute vs. ‘33 Act

In *Cal. Pub. Emps.’ Ret. Sys. v. WorldCom Inc.*,⁷ the Second Circuit considered the conflict between the bankruptcy removal statute and § 22(a) of the ‘33 Act, which barred the removal of individual ‘33 Act claims, and concluded that the bankruptcy removal statute controlled.⁸ The *WorldCom* court noted the difference in the text of the general removal statute and bankruptcy-remov-

Feature

Congress.”⁶ Consequently, the ‘33 Act, ILSA and other federal statutes that prohibit removal do not in any way conflict with the general removal statute. Quite the opposite, by its very terms, the general removal statute makes clear that those statutes’ anti-removal provisions trump the removal right provided by the general removal statute.

² Section 1452(a) provides, in relevant part, as follows: “A party may remove any claim or cause of action in a civil action...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.”

³ Section 22(a) provides, in relevant part, as follows: “Except as provided in section 77p(c) of this title, no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”

⁴ Section 1420 provides, in relevant part, as follows: “No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party.”

⁵ The general removal prohibition statute bars removal of certain causes of action against railroads and common carriers, as well as certain causes of action under a state’s workers’ compensation law or under the Violence Against Women Act of 1994.

⁶ 28 U.S.C. § 1441(a).

al statute: the presence of “[e]xcept as otherwise expressly provided by Act of Congress” in the general removal statute and the absence of any such exception in the bankruptcy-removal statute.⁹ The Second Circuit gave significant weight to the bankruptcy-removal statute’s lack of any carve-out language in light of Congress’s demonstrated ability to provide an exception for federal anti-removal statutes if it intended to do so.¹⁰ The *WorldCom* court also declined to find either statute more specific than the other or that more recent but unrelated amendments to the ‘33 Act operated to trump the bankruptcy-removal statute with respect to individual claims.¹¹ Additionally, although it did not base its

⁷ 368 F.3d 86 (2d. Cir. 2004).

⁸ See *id.*, 386 F.3d at 108.

⁹ See *id.* at 102-3.

¹⁰ See *id.* at 103.

¹¹ See *id.* at 101-6.

decision on this ground, the *WorldCom* court noted the important policy reasons for consolidating in federal court all judicial activity “related to” a pending bankruptcy case.¹²

When it considered the issue a year earlier in *Carpenters Pension Trust for S. Cal. v. Ebberts*,¹³ the district court reached the same conclusion: The bankruptcy-removal statute controlled over the anti-removal provision of the ’33 Act.¹⁴ Although the *Ebberts* court did not focus on the absence of “[e]xcept as otherwise expressly provided by Act of Congress” in the bankruptcy-removal statute, the rest of its analysis closely matched that of the *WorldCom* court. The *Ebberts* court noted that the bankruptcy-removal statute was enacted long after the anti-removal provision of the ’33 Act and that the recent ’33 Act amendments were unrelated to the anti-removal provisions as applied to individual claims. It also rejected the argument that either statute was more specific than the other.¹⁵

In contrast to *WorldCom* and *Ebberts*, two Southern district courts held that the ’33 Act’s prohibition on removal trumps the bankruptcy-removal statute in *Tenn. Consol. Ret. Sys. v. Citigroup Inc.*¹⁶ and *City of Birmingham Ret. & Relief Fund v. Citigroup Inc.*¹⁷ The *Tennessee* court stated that the more specific statute should control over the generally worded one, regardless of which statute was enacted first.¹⁸ Without clearly stating how the bankruptcy removal statute was more general than the ’33 Act’s prohibition on removal, the *Tennessee* court nevertheless concluded that the ’33 Act’s prohibition on removal was more specific.¹⁹ The *Tennessee* court also found persuasive what another court had described as the underlying policy reasons for the 1998 amendments to the ’33 Act: to protect “the special interests of states in the context of securities litigation.”²⁰ The *Birmingham* court substantially adopted the *Tennessee* court’s analysis.²¹

Bankruptcy-Removal Statute vs. ILSA

Noting that “[t]he tension between the two provisions is palpable,” the *Alcan Investments LLC v. C-D Jones*

& Co. Inc.²² district court directly addressed the issue of whether removal under the bankruptcy-removal statute is barred by ILSA’s prohibition against removal.²³ The *Alcan* court observed that although a number of other courts have grappled with the issue of whether the bankruptcy removal statute is trumped by the ’33 Act’s removal prohibitions, the “precise question [related to ILSA’s removal prohibition] apparently has never been answered.”²⁴

The *Alcan* court began its discussion of the issues by reviewing the analyses of the *Birmingham* and *Tennessee* courts, which ruled that the ’33 Act’s removal prohibition trumps the bankruptcy removal statute, and of the *WorldCom* court, which reached the opposite conclusion.²⁵ After stating those courts’ holdings, the *Alcan* court stated that it “considers them all but adopts the reasoning of none.”²⁶

As the *WorldCom* court did in part,²⁷ the *Alcan* court modeled its analysis on *Radzanower v. Touche Ross & Co.*,²⁸ in which the Supreme Court held that “a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more general spectrum.”²⁹ In contrast to the *WorldCom* court, the *Alcan* court held that, as applied to the conflict between the bankruptcy-removal statute and the ILSA removal prohibition, the *Radzanower* analysis indicated that the ILSA’s removal prohibition should control and that the case should be remanded.³⁰

The *Alcan* court noted that ILSA’s removal prohibition was enacted before the bankruptcy-removal statute and asserted—without much explanation or analysis—that ILSA’s removal prohibition was more “narrow, precise and specific,” while the bankruptcy-removal statute “cover[ed] a more generalized spectrum.”³¹ Accordingly, the *Alcan* court concluded that the case’s removal under the bankruptcy removal statute was proper only if “it can be fairly concluded that [§ 1452(a)] operated as a *pro tanto* repeal of [§ 1719].”³² The *Alcan* court then explained its view that the bankruptcy-removal statute could not

be interpreted as a repeal of the ILSA’s removal prohibition, rejecting the defendant’s reliance on *WorldCom* and indicating that the defendant had not adequately shown that the two statutes were “in irreconcilable conflict.”³³ Having concluded that the ILSA’s removal prohibition was more specific and was not in “irreconcilable conflict” with the bankruptcy-removal statute, the *Alcan* court held that the removal of the case was improper and remanded the case.³⁴

Possibility of Circuit Split

In light of the varied outcomes of cases addressing conflicts between the bankruptcy-removal statute and statutes with anti-removal provisions, it would appear that a circuit split could be developing. The Second Circuit and the District Court for the Central District of California (in the Ninth Circuit) found that the bankruptcy-removal statute controls over statutes with removal prohibitions, and the U.S. District Courts for the Middle District of Tennessee (in the Sixth Circuit) and the Northern and Southern Districts of Alabama (in the Eleventh Circuit) found statutes with prohibitions on removal to control over the bankruptcy-removal statute. However, it is relatively unlikely that this circuit split will ever actually develop, because it is unlikely that another case will reach a court of appeals given the statutes involved. After providing a right to remove cases related to a pending bankruptcy, 28 U.S.C. § 1452 goes on to limit parties’ ability to appeal a court’s decision on a motion to remand:

The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.³⁵

Similarly, the general removal statute is followed by another statute that limits the ability to appeal a court’s decision to remand a case:

An order remanding a case to the State court from which it

¹² See *id.* at 96-97.

¹³ 299 B.R. 610 (C.D. Cal. 2003).

¹⁴ See *id.* at 615.

¹⁵ See *id.* at 614-15.

¹⁶ 2003 U.S. Dist. LEXIS 10266 (M.D. Tenn. May 9, 2003).

¹⁷ 2003 U.S. Dist. LEXIS 14066 (N.D. Ala. Aug. 12, 2003).

¹⁸ See *Tenn.*, 2003 U.S. Dist. LEXIS 10266, at *8.

¹⁹ See *id.* at *10.

²⁰ See *id.* at *9-10 (quoting *Ret. Sys. of Ala. v. Merrill Lynch & Co.*, 209 F.Supp.2d 1257, 1269 (M.D. Ala. 2002)).

²¹ See *Birmingham*, 2003 U.S. Dist. LEXIS 14066, at *7-9.

²² 2009 U.S. Dist. LEXIS 76482, at *8 (S.D. Ala. Aug. 27, 2009). The author represented one of the defendants in this case.

²³ See *id.* at *8.

²⁴ *Id.* at *9.

²⁵ See *id.* at *10-24.

²⁶ *Id.* at *10.

²⁷ See *WorldCom*, 386 F.3d at 101-4.

²⁸ 426 U.S. 148 (1976).

²⁹ *Id.* at 152; see *Alcan*, 2009 U.S. Dist. LEXIS 76482, at *13-24.

³⁰ See *Alcan*, 2009 U.S. Dist. LEXIS 76482, at *24.

³¹ *Id.* at *17.

³² *Id.* at *17-18 (quoting *Radzanower*, 426 U.S. at 154).

³³ *Id.* at *19 (quoting *Radzanower*, 426 U.S. at 155).

³⁴ See *id.* at *24.

³⁵ 28 U.S.C. § 1452(b).

was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.³⁶

On its face, § 1447(d) would appear to bar the appeal of any remand order, and, if that were not clear enough or somehow were not applicable to bankruptcy removals, appeal of a remand order based on equitable grounds is also barred by § 1452(b). Additionally, § 1452(b) bars the appeal of an order denying a motion to remand that is based on equitable grounds. Between the two, these statutes would appear to permit the appeal of only a narrow subset of remand decisions on bankruptcy removals: an order denying a motion to remand for nonequitable reasons. Accordingly, no court of appeals will be able consider the conflict between the bankruptcy-removal statute and the anti-removal provisions in other statutes unless there is an appeal of a district court order denying remand for nonequitable reasons, and such an order is not particularly likely.

Conclusion

Notwithstanding the *Alcan* court's assertion to the contrary, the bankruptcy-removal statute would appear to be in direct and irreconcilable conflict with the removal prohibitions in the '33 Act, ILSA and other federal statutes. Perhaps predictably, courts considering this conflict have reached different conclusions about which statute controls. However, given the restrictions on appealing decisions on remand motions, a true circuit split—with dueling opinions from different appellate courts—is quite unlikely, which reduces the likelihood that the Supreme Court would ever grant *certiorari* on this issue and resolve the conflict once and for all. In the meantime, bankruptcy practitioners should take care in removing cases that may involve one of the statutes with an anti-removal provision. ■

Reprinted with permission from the ABI Journal, Vol. XXX, No. 3, April 2011.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 13,000 members, representing all facets of the insolvency field. For more information, visit ABI World at www.abiworld.org.

³⁶ 28 U.S.C. § 1447(d).