NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RAYMOND WILLIAM MADSEN and NILA DAWN MADSEN, Debtors.	BAP No. UT-13-094
STEVE S. CHRISTENSEN and STEVE S. CHRISTENSEN, P.C., Plaintiffs – Appellants, v. RAYMOND WILLIAM MADSEN, Defendant – Appellee.	Bankr. No. 13-80001 Adv. No. 13-02310 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before NUGENT, ROMERO, and SOMERS, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

When a debtor files a bankruptcy case in the district where he lives, it's reasonable to expect any challenge to his discharge to be brought in that district as well. But if the activity upon which the exception to discharge is based took place elsewhere, can the aggrieved creditor proceed in that forum's bankruptcy court instead? The answer depends not only on whether the creditor can serve the debtor anywhere in the United States, but also whether the creditor's forum

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

choice is fair, reasonable, and provides the debtor with due process. Here, the debtor filed his Chapter 7 case in the Western District of Washington where he lives, but the creditor, debtor's ex-wife's lawyer, filed his complaint to except an attorneys fee debt from discharge in the District of Utah bankruptcy court. Concluding that it lacked jurisdiction under 28 U.S.C. § 1334(e) and that venue was improper under 28 U.S.C. § 1408, the Utah bankruptcy court dismissed the complaint. Because neither statute applies to this dispute, we reverse and remand for further proceedings.

I. BACKGROUND

When debtor Raymond Madsen ("Madsen") was married to Linda Beck ("Beck"), they resided in Utah. In August 2002, Beck retained Utah attorney Steve Christensen ("Christensen") to represent her in her divorce from Madsen. She failed to pay a significant portion of her legal fees.[1] In the 2004 divorce decree, the court ordered Madsen to pay Beck both temporary and permanent alimony and awarded Beck a portion of Madsen's retirement account. Christensen continued to represent Beck and successfully appealed parts of the divorce decree to the Utah Court of Appeals. In an effort to collect his outstanding legal fees, Christensen recorded an attorney lien on all money Beck was to receive from Madsen, first in the Salt Lake County Recorder's office and later with the Utah state district court. Christensen gave both Beck and Madsen notice of the lien, which operated to attach, among other funds, the money flowing from Madsen's retirement account to Beck. In his complaint, Christensen claims that while Madsen still lived in Utah, he and Beck conspired to enter into a *sub rosa* direct payment agreement to ensure that Christensen's firm would never recover the legal fees.

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[1] Both Christensen and his professional corporation are appellants, but for simplicity's sake, we refer to them collectively as "Christensen."

Madsen moved to Washington state in December 2010. Christensen sued Madsen for damages arising out of this scheme in Utah state court in February 2012. After Madsen defended Christensen's Utah state court action for more than a year, Madsen filed for Chapter 7 relief in July 2013 in the United States Bankruptcy Court for the Western District of Washington.[2] Madsen scheduled Christensen as a general unsecured creditor holding an unliquidated and disputed claim of about $81,000. The Washington bankruptcy court sent notice of the no asset Chapter 7 case directing that proofs of claim not be filed, and establishing October 28, 2013 as the deadline for filing a nondischargeablity complaint.

Christensen filed this adversary proceeding against Madsen in the United States Bankruptcy Court for the District of Utah on August 8, 2013 ("Complaint").[3] Madsen moved to dismiss Christensen's Complaint on September 30, 2013, claiming that the District of Utah lacked jurisdiction of him and the proceeding and that, in any event, venue was improperly laid in that district ("Motion to Dismiss").[4]

On October 30, 2013, while the Motion to Dismiss was pending in Utah bankruptcy court, the Washington court granted Madsen a discharge after the Chapter 7 trustee filed his report of no distribution. Madsen's bankruptcy case was closed on November 4, 2013.

Not until December 13, 2013 did the Utah bankruptcy court enter an order

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[2] The Chapter 7 petition was filed jointly with Nila Dawn Madsen.

[3] *Complaint for Declaratory Relief ("Complaint"), in* Appellant's App. at 4. The Complaint asks for "declaratory relief" but is more properly regarded as a nondischargeability adversary based on: 1) fraudulent transfer under Utah Code Ann. § 25-6-5(1)(a); 2) intentional avoidance of attorney lien; and 3) intentional interference with economic relations.

[4] *Motion to Dismiss*, *in* Appellant's App. at 25. In addition to challenging jurisdiction and venue, Madsen argued Christensen failed to state a claim upon which relief could be granted, and failed to join Beck, an indispensable party to the proceeding. Madsen also asked for sanctions against Christensen.

granting Madsen's motion and dismissing Christensen's Complaint. That order only stated:

> [Christensen] argue[s] that this Court has personal and subject-matter jurisdiction and that venue is proper in the District of Utah. [Madsen] contends that this Court does not have personal jurisdiction pursuant to 28 U.S.C. § 1334(e) and venue is improper under § 1408. The Court agrees with [Madsen].[5]

Christensen timely appealed the bankruptcy court's dismissal order to this Court on December 18, 2013.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[6] Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[7] Here, the Utah bankruptcy court's order dismissed Christensen's nondischargeability adversary proceeding, and therefore it is final for purposes of review.

III. ISSUE ON APPEAL AND STANDARD OF REVIEW

The issue on appeal is whether the Utah bankruptcy court erred in dismissing Christensen's Complaint for lack of personal jurisdiction and improper venue. For purposes of standard of review, decisions by trial courts are traditionally divided into three categories, denominated: 1) questions of law,

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[5] *Order of Dismissal* at 3, *in* Appellants' App. at 79.

[6] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[7] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

which are reviewable *de novo*; 2) questions of fact, which are reviewable for clear error; and, 3) matters of discretion, which are reviewable for abuse of discretion.[8] Because it involves questions regarding jurisdiction and venue, this appeal presents legal issues for review. *De novo* review of legal questions requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[9]

IV. ANALYSIS

Madsen responded to the Complaint Christensen filed in the Utah bankruptcy court with the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012. Among other things, Madsen alleged the Utah bankruptcy court lacked personal jurisdiction, and that venue was improperly laid.[10] Essentially, Madsen argued that 28 U.S.C. § 1334(e) required Christensen to bring his adversary proceeding in the Western District of Washington bankruptcy court, Madsen's bankruptcy's "home court." The Utah bankruptcy court agreed and dismissed the Complaint.

On appeal, Christensen argues two points. First, he contends that the bankruptcy court misapplied 28 U.S.C. § 1334(e) to this proceeding because that statute only confers jurisdiction of the property of the debtor and the estate, not personal jurisdiction.[11] Second, he argues that the bankruptcy court erroneously concluded venue was improper pursuant to 28 U.S.C. § 1408 because that statute applies to bankruptcy cases and not bankruptcy proceedings.[12] We agree and

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[8] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[9] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

[10] *Motion to Dismiss* at 6-8, *in* Appellant's App. at 30-32.

[11] Appellant's Opening Brief at 10.

[12] *Id.* at 13.

reverse and remand the bankruptcy court's order for further consideration of whether the District of Utah has personal jurisdiction of Madsen and, if so, whether venue of this adversary proceeding is proper there.

A. Jurisdiction

1. Section 1334(e) does not apply.

The dispute over personal jurisdiction in this appeal centers on Madsen's misapplication of 28 U.S.C. § 1334(e). Section 1334(e) describes the scope of a district court's jurisdiction over bankruptcy cases and proceedings –

> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction–
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> > (1) *of all the property*, wherever located, *of the debtor* as of the commencement of such case, *and of property of the estate*[.][13]

Section§ 1334(a) grants original and exclusive jurisdiction of all cases under Title 11 to the district courts. Subsection (b) confers "original, but not exclusive" jurisdiction of "all civil proceedings" that arise under or in Title 11 or are related to Title 11 cases on the district courts as well. Subsection (e) buttresses these jurisdictional grants by also giving jurisdiction of the debtor's *property* to the district court in which a bankruptcy case is commenced. But, as Christensen points out, this statute doesn't govern the court's personal jurisdiction over litigants. Rather it is a broad grant of jurisdiction over a debtor's property and the bankruptcy estate, or "*in rem*" jurisdiction.[14] "An action, *in personam*, that seeks to establish personal liability of the debtor on a claim, but which is not specifically targeted to ownership of, or rights in and to, property of the estate

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[13] 28 U.S.C. § 1334(e) (emphasis added).

[14] *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998).

does not fall within [28 U.S.C. § 1334(e)]."[15] Christensen's Complaint initiated an *in personam* action, not one that was *in rem* or specifically targeted to ownership in certain estate property. As a result, the Utah bankruptcy court erred when it concluded that 28 U.S.C. § 1334(e) prevented it from exercising personal jurisdiction over Madsen with respect to Christensen's Complaint.

2. Nationwide service of process provisions like that contained in Bankruptcy Rule 7004 only confer personal jurisdiction that is consistent with due process.

The bankruptcy court focused on 28 U.S.C. § 1334(e) without considering "(1) whether the applicable statute potentially confers jurisdiction by authorizing service of process on the defendant [here 11 U.S.C. § 523(a) and Rule 7004] and (2) whether the exercise of jurisdiction comports with due process."[16] Part VII of the Bankruptcy Rules governs Christensen's Complaint.[17] Rules 7003 and 7004 cover commencement of an adversary proceeding, filing of the complaint, and service of process.

Congress has exerted federal control over various aspects of economic relations by enacting comprehensive securities, antitrust, ERISA, and bankruptcy laws. These statutory schemes typically provide for nationwide service of process. In bankruptcy, Rule 7004 specifically permits service of a summons and complaint filed in an adversary proceeding anywhere in the United States:

(d) Nationwide service of process

The summons and complaint and all other process except a subpoena

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[15] *Loudin v. J.P. Morgan Trust Co., N.A.*, 481 B.R. 388, 394 (S.D. W. Va. 2012) (quoting *In re AG Indus., Inc.*, 279 B.R. 534, 539 (Bankr. S.D. Ohio 2002)). *See also Bank United v. Manley*, 273 B.R. 229, 247-48 (N.D. Ala. 2001).

[16] *Peay v. Bellsouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000) (internal quotation marks omitted).

[17] Fed. R. Bank. P. 7001, et seq. Unless otherwise indicated, all future references in text to "Rule" or "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

> may be served anywhere in the United States.
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> . . .
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> (f) Personal jurisdiction
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> *If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons* or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F. R. Civ. P. made applicable by these rules *is effective to establish personal jurisdiction over the person of any defendant* with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.[18]

Many circuit courts of appeal have addressed when the presence of a nationwide service provision like that found in Rule 7004 confers personal jurisdiction on a properly served party. The majority of them have concluded that the critical issue is whether a defendant has sufficient contacts with the United States such that the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice, not whether a defendant has minimum contacts with the state in which a federal district court sits.[19] When there is a nationwide service of process provision, those courts apply a "national contacts" test.

Our Tenth Circuit Court of Appeals has expressed some reservations about the constitutional sufficiency of employing only a national contacts analysis. In *Peay v. Bellsouth Medical Assistance Plan*,[20] an ERISA case, the Tenth Circuit

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[18] Fed. R. Bankr. P. 7004(d)&(f) (emphasis added).

[19] *See, e.g., Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369-70 (3d Cir. 2002) (Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132(e)(2)); *In re Fed. Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (Fed. R. Bankr. P. 7004); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 825-26 (5th Cir. 1996) (ERISA). *See also* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1068.1, Personal Jurisdiction in Federal Question Cases (3d ed. 1998); 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4106, Jurisdiction of the Bankruptcy Courts (3d ed. 1998).

[20] 205 F.3d 1206 (10th Cir. 2000).

rejected the idea that nationwide service of process is the equivalent of nationwide personal jurisdiction so long as a defendant has minimum contacts with the United States as a whole. Instead, the Tenth Circuit maintained that service of process and personal jurisdiction are "distinct concepts that require separate inquiries,"[21] and that "the personal jurisdiction requirement flows from the Due Process Clause of the Fifth Amendment and restricts judicial power in order to protect the individual's liberty interest."[22]

Concluding that due process requires something more than a national contacts test,[23] the *Peay* panel held:

> [I]n a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment "protects individual litigants against the burdens of litigation in an unduly inconvenient forum."[24]

The panel then explained that it is the defendant's burden "to show that the exercise of jurisdiction in the chosen forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'"[25] The Tenth Circuit also enumerated several factors that courts should consider in determining whether the defendant has met his burden of showing the constitutionally significant inconvenience of the chosen forum.[26]

Madsen does not challenge the service of process component of personal

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21 *Id.* at 1209 (citations omitted).

22 *Id.* at 1211 (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

23 *Id.* at 1212.

24 *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331-32 (1976)).

25 *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)).

26 *Id.*

jurisdiction that Christensen invoked here. But on remand, the bankruptcy court should determine whether exercising personal jurisdiction over Madsen comports with due process in light of the Tenth Circuit's decision in *Peay*. *Peay*'s reasoning interpreting ERISA's nationwide service of process provision applies with equal force to Rule 7004's nationwide service and jurisdictional provisions.[27]

B. 28 U.S.C. § 1408 applies to the venue of *cases*, not adversary proceedings; § 1409 applies here.

In his Motion to Dismiss, Madsen also argued, and the bankruptcy court agreed, that pursuant to 28 U.S.C. § 1408, venue for Christensen's Complaint was improperly laid in Utah. However, that section governs venue of bankruptcy cases, not proceedings whose venue is expressly governed by § 1409. Therefore, we must also reverse the bankruptcy court's erroneous venue determination and remand for further consideration of that issue.

The proper venue for bankruptcy cases, i.e., where a debtor should file his petition for relief, is controlled by 28 U.S.C. § 1408. 28 U.S.C. § 1408(1) provides in pertinent part that:

> *a case under title 11* may be commenced in the district court for the district–
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> (1) in which the *domicile*, *residence*, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district[.][28]

Madsen properly filed his Chapter 7 petition in the bankruptcy court for the Western District of Washington where he had lived for several years.

The venue of proceedings that "arise under" the Bankruptcy Code is

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[27] *See Travelers Cas. & Sur. Co. v. Desselle (In re Fries)*, 378 B.R. 304 (Bankr. D. Kan. 2007) for application of *Peay* in bankruptcy context.

[28] 28 U.S.C. § 1408(1) (emphasis added).

governed by 28 U.S.C. § 1409 which provides in pertinent part:

> (a) Except as otherwise provided in subsections (b) and (d), *a proceeding arising under title 11* or arising in or related to a case under title 11 *may be commenced in the district court in which such case is pending*[.][29]

Christensen's Complaint to except Madsen's debt from discharge is based solely on 11 U.S.C. § 523(a) and therefore "arises under" Title 11.

Christensen relies on Congress's use of the permissive "may" to argue that a complaint need not necessarily be brought in the district in which the debtor's bankruptcy case is filed–the "home court." At least one court has held that filing in the home court is not mandatory and home court venue can be waived.[30] But there is also some consensus that the home court is the presumptive venue. Another bankruptcy court has held that Rule 5005(a)(1) requires all matters and proceedings filed in a case to be brought in the home court.[31]

If, on remand, the Utah bankruptcy court decides that it has personal jurisdiction of Madsen, it should then consider whether venue lies in the District of Utah, considering 28 U.S.C. § 1409(a). The court should also note that in

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[29] 28 U.S.C. § 1409(a) (emphasis added). Subsections (b) and (d) of § 1409 apply to cases brought by a bankruptcy trustee and do not apply here. Subsection (c) also pertains to proceedings commenced by a trustee and is inapplicable, as is subsection (e), which pertains to proceedings based on a claim arising after the commencement of the bankruptcy case.

[30] *See Bank United v. Manley*, 273 B.R. 229, 245 (N.D. Ala. 2001) (28 U.S.C. § 1406(b) provides that "nothing in this chapter [chapter 87 of Judicial Code] shall impair jurisdiction when party doesn't timely object to venue). *See also* 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4106, Jurisdiction of the Bankruptcy Courts (3d ed. 1998).

[31] *In re Fields*, 55 B.R. 294, 295 (Bankr. D.D.C. 1985) (stay relief motion must be brought in home court). Rule 5005(a)(1) provides in pertinent part:

> (1) Place of Filing. The lists, schedules, statements, proofs of claim or interest, *complaints*, motions, applications, objections and other papers required to be filed by these rules, *except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending*[.]

Fed. R. Bankr. P. 5005(a)(1) (emphasis added).

Christensen's response to Madsen's Motion to Dismiss, he requested that the proceeding be transferred to the Western District of Washington bankruptcy court as 28 U.S.C. § 1412 allows.[32]

Even though Madsen's bankruptcy case was closed in the Western District of Washington before the Utah bankruptcy court ruled on his Motion to Dismiss, the Tenth Circuit has held there is no explicit requirement that the main bankruptcy case be open for a court to act in a civil proceeding brought under § 1334(b),[33] and that jurisdiction can be maintained over proceedings when their purpose is not negated by termination of the underlying bankruptcy case.[34] That is certainly the case here. Transfer of this proceeding back to the home court may be the most expeditious alternative available.

V. CONCLUSION

We REVERSE AND REMAND the bankruptcy court's order dismissing Christensen's Complaint for further consideration of whether the District of Utah had personal jurisdiction over Madsen and whether venue was proper there, consistent with the views expressed in this Opinion.

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[32] *Memorandum in Opposition to Motion to Dismiss and Motion for Sanctions* at 8, *in* Appellant's App. at 59. 28 U.S.C. § 1412, "Change of venue," provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

[33] *Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1084 (10th Cir. 2009).

[34] *Id.* at 1083; *see also In re Brown*, 371 B.R. 486, 494 (Bankr. N.D. Okla. 2007) (citing *In re 5900 Assocs., Inc.*, 468 F.3d 326, 330 (6th Cir. 2006)).