



pending in this district. The Notice of Removal indicates that the defendants are debtors in a bankruptcy case presently pending in the District of Oregon, Case No. 691-62754-R7. The defendants subsequently filed a Motion to Transfer Adversary Proceeding for the purpose of changing venue from this district to the District of Oregon. A hearing was held on October 2, 1991. Stephen R. Randle, Esq. appeared on behalf of the defendants, Leo F. Folsom and Beatrice F. Folsom. No appearance was made on behalf of the plaintiffs, Performance Investment Corporation of Utah, Rodney H. Jensen, and Iris V. Jensen.

At the hearing, the court questioned the propriety of removing the state court action to this court inasmuch as the state action was in the appeal stage, pending in the Utah Court of Appeals. The Notice of Removal indicates that the state action was originally filed in the Fourth Judicial District Court of Utah County, State of Utah, on August 10, 1982;<sup>1</sup> an Amended Judgment was entered in the case on April 2, 1991;<sup>2</sup> and a Notice of Appeal was filed on May 1, 1991. In view of the status of the state court action, this court indicated to counsel for the defendants that the court intended to transmit a report and recommendation to the district court, pursuant to Bankruptcy Rule 9027(e), recommending remand of this ancillary adversary proceeding to the state court. This court has since determined that the 1991

---

<sup>1</sup>The defendants' Notice of Removal, at page 2, states: "The Action was originally filed in the District Court of Utah County, State of Utah on August 10, 1982."

<sup>2</sup>It appears that the Amended Judgment was entered by the state district court on remand from an earlier appeal to the Utah Court of Appeals and that post-judgment motions were and may still be pending.

amendments to Bankruptcy Rule 9027, made effective August 1, 1991, govern this matter inasmuch as the Notice of Removal was filed after the effective date of the amendments. Therefore, in accordance with amended Rule 9027(d), this court makes a final determination that this proceeding be remanded to state court.

### DISCUSSION

28 U.S.C. § 1452 provides for removal of any claim or cause of action in a civil action to the district court for the district where the civil action is pending, if the district court has jurisdiction of the claim or cause of action under 28 U.S.C. § 1334. Under 28 U.S.C. § 1334, the district court has original jurisdiction of all civil proceedings arising under title 11 of the United States Code, or arising in or related to cases under title 11.

28 U.S.C. § 157(a) allows the district court to refer proceedings arising under title 11 or arising in or related to a case under title 11, to the bankruptcy judges for the district. Rule 404 of the District Court Rules of Bankruptcy Practice and Procedure provides that "any and all proceedings arising in or related to a case under Title 11 are referred to the bankruptcy judges for the District of Utah for consideration and resolution consistent with the law."

28 U.S.C. § 1452(b) provides that the court to which an action is removed may remand the action on any equitable ground. Equitable grounds include duplication of judicial resources, uneconomical use of judicial resources, effect of remand on the

administration of the estate, questions of state law better addressed by a state court, comity considerations, prejudice to involuntarily removed parties, lessened possibility of an inconsistent result, and expertise of the court where the action originated. See Allen County Bank & Trust Co. v. Valvmatic Int'l Corp., 51 B.R. 578 (N.D. Ind. 1985); see also Murray v. On-Line Business Systems, Inc. (In re Revco D.S., Inc.), 99 B.R. 768 (N.D. Ohio 1989). Review of the file and pertinent authorities persuades the court that equitable considerations support remand of this proceeding.

Foremost among the reasons necessitating remand is the fact that the state court action is at the appellate level, a final judgment apparently having been entered and an appeal taken. The propriety of removing a state court action that is in the appeal stage was addressed in Success Data Systems, Inc. v. NCR Corp. (In re Success Data Systems, Inc.). 58 B.R. 81 (Bankr. E.D. Pa. 1986). In that case, an action was brought in the Court of Common Pleas of Allegheny County, Pennsylvania. The debtor, a third-party defendant, filed a crossclaim against another third-party defendant, NCR Corporation. NCR moved for a stay of litigation of the debtor's crossclaim on the basis that the debtor's cause of action arose under a contract which provided for the arbitration of disputes under the contract. The county court granted the motion staying that aspect of the litigation. The debtor appealed the decision to the Pennsylvania Superior Court, subsequently filed bankruptcy, and then removed the state action to the bankruptcy court. In granting NCR's motion for remand, the bankruptcy court stated:

The doctrine of law of the case and the principles of comity beckon us not to upset a binding determination made by a state court of competent jurisdiction. Furthermore, a denial of the motion for remand would vest us with the duty of exercising what is tantamount to appellate jurisdiction over the trial judge's decision. We, as well as other courts, have so held.

Id. at 84 (footnote omitted) (citing Smith v. Commercial Banking Corp. (In re Smith), 26 B.R. 569 (Bankr. E.D. Pa. 1983); Hurt v. Cypress Bank, 9 B.R. 749 (Bankr. N.D. Ga. 1981); Tidwell v. Thomas (In re Tidwell), 4 B.R. 100, 102 (Bankr. N.D. Tex. 1980)) ("It is not the function of removal under [bankruptcy removal statute] to afford an alternative to a state court appeal.")). See also Hillyard Farms v. White County Bank, 52 B.R. 1015 (S.D. Ill. 1985) (state court action in which judgment is final is remanded); Green v. Alton Telegraph Printing Co. (In re Alton Telegraph Printing Co.), 16 B.R. 787 (Bankr. S.D. Ill. 1982).

This court agrees with the position taken in Success Data Systems and the cases cited herein. If this proceeding is not remanded, the bankruptcy court would in effect be functioning as an appellate court. Section 1452 ought not be applied to yield this result.

Additional considerations supporting remand of this proceeding include the fact that this action has been in the state courts for almost ten years. Indeed, the appeal presently pending in the Utah Court of Appeals is the second appeal in this action. According to the papers filed with the Notice of Removal, the defendants indicate that in the first appeal, the Utah Court of Appeals remanded the action to the district court for the purpose of amending its judgment on an issue dealing with the amount of

money the parties had respectively contributed for the downpayment on a motel in Provo, Utah. The present appeal specifically asserts that the district court failed to comply with the mandate of the Utah Court of Appeals and erred when amending the judgment. At this posture, it would obviously not be in the interest of justice for the bankruptcy court to step into the shoes of the Utah Court of Appeals or to retain jurisdiction of this proceeding.

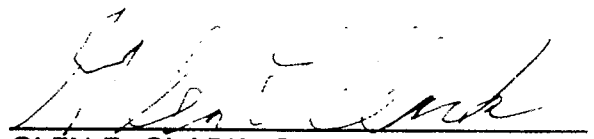
In light of comity considerations, the lengthy background and appellate posture of this action, the unique state law issues raised, addressed, and determined in this action, and the necessarily resultant duplication and uneconomical use of judicial resources if this proceeding is not remanded, this court believes that remand in this instance is wholly proper and equitable.

**ORDER**

Accordingly, on the basis of the foregoing and on the court's own motion, IT IS HEREBY ORDERED that this proceeding is remanded to state court.

Dated this 27 day of November, 1991.

BY THE COURT:

  
\_\_\_\_\_  
GLEN E. CLARK, CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT