

300 B.R. 836, 51 Collier Bankr.Cas.2d 116
(Cite as: 300 B.R. 836)

C

United States District Court,
S.D. New York.
In re TWIN LABORATORIES INC. and Twinlab
Corporation, Debtors.
David Alcantar, et al., Plaintiffs,
v.
Twin Laboratories Inc., et al., Defendants.
No. M-47(JSR).

Nov. 3, 2003.

Chapter 11 debtors moved to transfer to federal court the personal injury actions pending against debtors in various courts throughout country. The District Court, Rakoff, J., held that district court would not abstain from hearing products liability claims asserted against debtor drug manufacturers, for personal injuries allegedly traceable to drug found in dietary supplements manufactured by debtors, in light of strong legislative presumption favoring transfer of such personal injury claims to district court in which bankruptcy case was pending.

So ordered.

West Headnotes

[1] Bankruptcy 51 ↪ 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of
Cases
51k2084.1 k. In general. Most Cited
Cases

Federal Courts 170B ↪ 47.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Ab-

stention Doctrine
170Bk47 Particular Cases and Subjects,
Abstention

170Bk47.5 k. Bankruptcy. Most Cited
Cases

Despite its seemingly mandatory language, bankruptcy statute providing for transfer of personal injury claims against debtor to district court in which bankruptcy case is pending is permissive only, and allows court to abstain from exercising its transfer powers, so as to permit personal injury claims against debtor to be decided in state court. 28 U.S.C.A. §§ 157(b)(5), 1334(c)(1).

[2] Bankruptcy 51 ↪ 2084.1

51 Bankruptcy
51I In General
51I(D) Venue; Personal Jurisdiction
51k2084 Transfer and Consolidation of
Cases
51k2084.1 k. In general. Most Cited
Cases

Federal Courts 170B ↪ 47.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects,
Abstention
170Bk47.5 k. Bankruptcy. Most Cited
Cases
Though district court may abstain from exercising its transfer powers and allow personal injury claims against debtor to be decided in state court, abstention should be the exception, and transfer the rule. 28 U.S.C.A. §§ 157(b)(5), 1334(c)(1).

[3] Federal Courts 170B ↪ 47.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Ab-

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stention Doctrine

170Bk47 Particular Cases and Subjects,
Abstention

170Bk47.5 k. Bankruptcy. Most Cited
Cases

Abstention test must be applied with caution when it comes to personal injury claims against debtor, in light of strong legislative presumption favoring transfer of such claims to district court in which bankruptcy case is pending. 28 U.S.C.A. §§ 157(b)(5), 1334(c)(1).

[4] Federal Courts 170B ¶47.5

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk47 Particular Cases and Subjects,
Abstention

170Bk47.5 k. Bankruptcy. Most Cited
Cases

With respect to personal injury claims against debtor, federal courts, perhaps even more than in other contexts, have virtually unflagging obligation to exercise the jurisdiction given them. 28 U.S.C.A. § 157(b)(5).

[5] Federal Courts 170B ¶47.5

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk47 Particular Cases and Subjects,
Abstention

170Bk47.5 k. Bankruptcy. Most Cited
Cases

Factors that federal court should consider in deciding whether to abstain from hearing claims arising in bankruptcy case are as follows: (1) effect, or lack thereof, on efficient administration of estate; (2) extent to which state law issues predominate; (3) difficulty or unsettled nature of applicable state law; (4) presence of related proceeding commenced in state court or other nonbankruptcy court, (5) juris-

dictional basis, if any, other than debtor's bankruptcy filing; (6) degree of relatedness or remoteness of proceeding to main bankruptcy case; (7) substance, rather than form, of asserted "core" proceeding; (8) feasibility of severing state law claims; (9) burden on court's docket; (10) likelihood that there has been forum-shopping; (11) existence of right to jury trial; and (12) presence in proceeding of nondebtor parties. 28 U.S.C.A. § 1334(c)(1).

[6] Federal Courts 170B ¶47.5

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(B) Right to Decline Jurisdiction; Abstention Doctrine

170Bk47 Particular Cases and Subjects,
Abstention

170Bk47.5 k. Bankruptcy. Most Cited
Cases

District court would not abstain from hearing products liability claims asserted against debtor drug manufacturers, for personal injuries allegedly traceable to drug found in dietary supplements manufactured by debtors, where only factor favoring abstention was state law nature of claims asserted, and state law claims were neither difficult nor unsettled; abstention was inappropriate, in light of strong legislative presumption favoring transfer of such personal injury claims to district court in which bankruptcy case was pending. 28 U.S.C.A. §§ 157(b)(5), 1334(c)(1).

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OPINION AND ORDER

RAKOFF, District Judge.

Twin Laboratories Inc. and Twinlab Corporation, which are Debtors in consolidated Chapter 11 proceedings before the United States Bankruptcy Court for the Southern District of New York, move in the District Court, pursuant to 28 U.S.C. § 157(b)(5), to transfer to this Court thirty-five personal injury cases pending against Debtors (and therefore presently stayed) in other jurisdictions throughout the country.^{FN1} The lawsuits all relate to injuries allegedly resulting from the ingestion of dietary supplements manufactured by the Debtors, most of which contained ephedra.

FN1. Although no party to the instant motion has asserted that the motion should have been referred to the Bankruptcy Court by virtue of the standing referral order in this District, this Court, in an excess of caution, hereby withdraws any such putative reference of this motion. *Cf. In re Pacific Gas & Electric Company*, 279 B.R. 561 (Bankr.N.D.Cal.2002) (claiming that the Bankruptcy Court has coordinate power to decide such motions). In addition,

the Court hereby withdraws the underlying reference of the Chapter 11 proceedings to the limited extent necessary to avoid any interference with the implementation of this order or of any proceedings arising therefrom. *See* 28 U.S.C. § 157(d) (“The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.”) The Court will work closely with the Bankruptcy Court so that proceedings in the cases hereby ordered transferred—which remain stayed pending further order of this Court—will be coordinated with proceedings in the underlying bankruptcy.

[1] Section 157(b)(5) of Title 28 distinguishes personal injury claims from all other lawsuits related to a bankruptcy by providing, in seemingly mandatory language, that:

The district court *shall order* that personal injury tort and wrongful death claims *shall be tried* in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(emphasis supplied). The Second Circuit has determined, however, that this section must be read in tandem with subsection 1334(c)(1) of the same title, which provides that:

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.

Although the abstention permitted by subsection 1334(c)(1) applies on its face only to “this section” (*i.e.*, to section 1334), the Second Circuit has read subsection 1334(c)(1) “to codify judicial abstention doctrines” of more general applicability, *In re Pan*

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American Corp., 950 F.2d 839, 845 (2d Cir.1991), including applicability to transfers under section 157(b)(5), *see id.* Thus, the Second Circuit, like several other circuits, has held that “[a] motion under section 157(b)(5), therefore, requires an abstention analysis.” *Id.* at 844.^{FN2}

FN2. For this reason, apparently, some of the opponents of the instant motion have styled their opposition as a cross-motion for abstention. Technically, however, no cross-motion is necessary to raise abstention as a ground for denying transfer.

[2][3][4] Nonetheless, in deference to the seemingly mandatory language of § 157(b)(5) and its obvious purpose of giving*841 particular priority to the centralization of bankruptcy-related personal injury claims in a single forum, the Second Circuit has further instructed district courts that, so far as cases falling within the purview of that section are concerned, “[t]ransfer should be the rule, abstention the exception.” *Id.* at 845. Accordingly, even though district courts in deciding whether or not to abstain in a bankruptcy context have frequently invoked a 12-factor test, *see; e.g., In re WorldCom, Inc. Securities Litigation*, 293 B.R. 308, 332 (S.D.N.Y.2003), that test must here be applied with caution, taking account of the strong legislative presumption favoring transfer under § 157(b)(5): for in this context, perhaps even more than elsewhere, federal courts have a “virtually unflagging obligation ... to exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

[5][6] The twelve factors are:

(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 state 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 [on] the 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.

In re WorldCom, Inc. Securities Litigation, 293 B.R. at 332, quoting *In re Masterwear Corp.*, 241 B.R. 511, 520 (Bankr.S.D.N.Y.1999). On their face, some of these factors (*e.g.*, the seventh factor, involving the difference between “core” and “non-core” proceedings) are more directly applicable to other situations than to a proposed transfer under § 157(b)(5). Nevertheless, the Court has carefully considered each of these factors and finds that, of those even arguably applicable to the instant motion, the majority of such factors—such as the first, third, fourth, fifth, eighth, eleventh, and (to a lesser extent) twelfth—favor transfer.

Conversely, only the second factor—the predominance of state law issues over bankruptcy issues—clearly favors abstention. But after extensive oral argument on this point (and on related considerations of state policy), *see transcript 10/17/03*, the Court is satisfied that none of the state law issues here involved are difficult, unsettled, or unfamiliar to a federal court that, thanks to diversity jurisdiction, has its share of state-law personal injury cases. Nor, in any event, can the predominance of state law issues be given decisive effect in analyzing transfer under § 157(b)(5), for the very subject matter of that section—personal injury claims—is almost always governed by state law, and yet Congress, in enacting § 157(b)(5), singled out such claims as the very ones it wanted transferred. Thus, application

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of *842 the 12-factor test strongly favors granting the instant motion.

The Court has also considered the other issues raised by opponents of the motion but finds them wholly lacking in merit.^{FN3} Accordingly, the Debtors' motion to transfer is granted, and opponents' motions for abstention are denied.^{FN4} Counsel for the Debtors is hereby directed to take whatever steps are necessary, in coordination with counsel for the parties in the respective actions being transferred, to (a) effect such transfers as quickly as possible, and (b) coordinate with the Clerk of the Court of the Southern District of New York so that all the transferred cases will be marked as related, assigned to the undersigned, and, in addition to retaining individual captions, ultimately be given a common caption of "In re Twinlabs Personal Injury Cases," with a corresponding civil docket number.

FN3. Brief mention should perhaps be made of the creative efforts made by counsel for the plaintiffs in *Lugene Parsley et al. v. Metabolife Int'l, Inc., et al.*, Dkt. No. 03-L-537 (St. Clair County, Illinois) to avoid federal jurisdiction. The proposed class in that action consists of "[a]ll persons in the State of Illinois who purchased ephedra products from [Twinlabs and the two other companies]," Parsley Complaint ¶ 17. The gravamen of the complaint is that Twinlabs and the other defendants manufactured ephedra-based products that posed a serious risk of physical injury and that defendants "failed to adequately and sufficiently warn of serious side effects that were associated with the rise of their ephedra-based products including, but not limited to, cardiac complications, stroke, seizure, elevated blood pressure, tachycardia, heart palpitations, irregular heartbeats, dizziness, and/or severe headache," *id.* at ¶ 15. Yet (in seeming derogation of class counsel's fiduciary duties to the class) the complaint not only attempts to avoid di-

versity jurisdiction by "explicitly disclaim[ing] damages in excess of \$74,999.99 ... for each Class Member," *id.* at ¶ 11, but also attempts to avoid transfer under § 157(b)(5) by purporting to expressly exclude "all claims for personal injury or wrongful death," *id.* at ¶ 17. Yet the first five counts of the six-count complaint are the standard product liability tort claims for a defective drug, to wit, strict liability in manufacturing and labeling, negligence, and breach of express and implied warranties, and seek unspecified damages for the unspecified "harm" directly and proximately caused by ephedra's alleged side-effects and the failure to warn of same. Despite being challenged by Debtors, nowhere in their motion papers do counsel for the *Parsley* plaintiffs identify what such "harm" consists of other than personal injuries and the risk thereof. While a plaintiff may be "master of his complaint" in some contexts, palpably specious "artful pleading" of the kind presented by *Parsley* cannot serve to overcome (or leave to state courts to effectuate) the very strong federal policy of § 157(b)(5) favoring transfer to federal court of personal injury actions related to a bankruptcy.

FN4. Although § 157(b)(5) permits transfer either to the district court in which the bankruptcy case is pending or to the district court in the district in which the claim arose, neither side here argues for the latter alternative, since the claims arose in numerous districts. Thus, in this case, the purposes of § 157(b)(5) can only be achieved by transfer to this Court.

Once transfer is completed, Debtors' counsel should promptly advise the Court in writing, so that the Court can convene a status conference and coordinate with the Bankruptcy Court as to further pro-

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ceedings in these cases. Until then, all the cases affected by this order remain stayed.

SO ORDERED.

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