

Forum Shopping in Federal Court – the Urban Legend of Divisional Venue



John Baker
jbaker@mwlaw.com
(501) 688.8850



Devin Bates
dbates@mwlaw.com
(501) 688.8864

08/26/2019

Civil litigators in Arkansas commonly contemplate and strategize about venue, especially in the state court system. This has to do, in part, with the myriad of venue statutes out there that can be a trap for the unsuspecting. It also has to do with the seemingly ever-changing “general venue” statute found in Ark. Code Ann. § 16-60-101.

There doesn’t seem to be as much contemplation and strategy about venue for civil actions in the federal court system. Folks commonly file federal cases in the district and division where the defendant resides or where a substantial part of the events or omissions giving rise to the claim occurred. If a fellow from Helena is being sued, it is common to see him sued in the Helena Division of the Eastern District. If a company in Springdale is being sued, it is common to see it sued in the Fayetteville Division of the Western District. Indeed, these sorts of filing decisions seem to make intuitive sense. Perhaps we remember from our law school days good old 28 U.S.C.A. § 1393 that provided, in pertinent part, that “[e]xcept as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.”

The only problem is this: Congress repealed divisional venue in 1988. 28 U.S.C.A. § 1393 has not been the law of the land since the Reagan years. The cold hard truth is that there are no divisional venue requirements for where a civil action must be filed in federal court in either of Arkansas’ districts. Neither the Local Rules nor the General Orders of the Eastern or Western Districts of Arkansas mandate where a civil action must be filed. Thus, litigants are left with the general venue statute. See 28 U.S.C.A. § 1391. The situation is no different for bankruptcy cases, where the venue statute speaks only in terms of districts without mentioning divisions. See 28 U.S.C.A. § 1408.

We are left to ponder why the vestiges of divisional venue have survived to affect where many civil actions are filed? Traditions die hard, I suspect, is one answer. I suspect another answer has something to do with the continued recognition of the historic “divisions” within the Eastern and Western Districts. The divisions within the Eastern and Western Districts were first established by Congress in 1948 and, despite the repeal of 28 U.S.C.A. § 1393, their identities remain codified in federal law at 28 U.S.C.A. § 83. This same statute provides the city where Court for each division “shall be held.” *Id.* These towns are familiar to civil litigators because they often dovetail with the name of their division and where federal courthouses historically have been located (e.g., the Pine Bluff Division, the Texarkana Division, the Harrison Division, etc.). These divisions continue to be cited in the Local Rules (see Rule 77.1) but only in two places: Local Rule 5.5 and 77.1. Yet, neither of these local rules mandates the division in which a civil action must be filed. Again, neither does any General Order in either the Eastern or stern District.

So, why is this divisional venue issue of any importance? First, not all federal judges hear the same percentage of cases in each division; so one can increase or decrease the chances of drawing a particular

judge depending on the division in which one's civil suit is filed. See General Order No. 2017-1, *Plan for Distribution of Cases* (Western District). Second, the division in which one files his or her civil action will determine the counties from which your jury pool will be drawn. Jury venires are typically drawn from the counties within a division, not from the counties within the entire district. See General Order No. 47, *Adoption of Amended Jury Plan* (Western District); Jury Plan of Eastern District adopted July 20, 2012. There can be big differences between the jury venires in different parts of the state. Third, the division in which you file your civil action can affect your expenses and the expenses for the litigants. For instance, if a Saline County practitioner elects to file a civil case in the Hot Springs Division against a Carroll County defendant as opposed to in the Fayetteville Division, bunches of money in travel, overnight accommodations, and potentially even in subpoena mileage calculations might be saved. The difference is stark between trying a case while sleeping in one's own bed each night and trying one while sleeping out of a suitcase in a far-from-ideal hotel room.

Why does Arkansas still have divisions codified on the federal books if divisional venue has been abolished? It is because divisions still have relevance to other aspects of how federal courts conduct their business. For instance, in removal of a case, 28 U.S.C.A. § 1446 requires that a notice of removal of a state court action be filed in "the district and division within which such action is pending." 28 U.S.C.A. § 1404 makes specific mention of divisions and permits a court to transfer any civil action to any other division where it might have been brought "[f]or the convenience of parties and witnesses." Under that statutory section, a court could presumably initiate an intra-district transfer, potentially even *sua sponte*, thus undercutting some of the benefit to be gained by a litigant's choice of division. However, absent amendment to the local rules or entry of a new general order, it seems that Arkansas federal courts could not dismiss a case outright for filing in a particular division, as such power is available only where a case is filed "laying venue in the wrong division." 28 U.S.C.A. § 1406. As the law currently stands, there is no rule, order, or statute expressly making any division "wrong."

In sum, divisions in federal court are not dead, but they certainly are not as important as they used to be. More importantly, federal court divisions should not prevent an attorney's contemplation and strategy about which is the best division for purposes of filing his or her civil action in federal court. Thought should be given to the pros and cons of each division when preparing one's civil action for filing in federal court.