Bankruptcy Court Jurisdiction: Abstention, Removal, and Core/Non-Core Proceedings

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I. Introduction

When Congress enacted the Bankruptcy Reform Act of 1978,1 creating the current
Bankruptcy Code, it included within its provisions an expansive conferral of bankruptcy
jurisdiction on the district and bankruptcy courts. Seeking to eliminate problems resulting from
the prior jurisdictional scheme of summary and plenary jurisdiction, Congress authorized
bankruptcy courts to exercise jurisdiction over virtually all matters that might have to be
resolved in the course of a bankruptcy case. Codified at 28 U.S.C. § 1471, this jurisdictional
 provision conferred on the district courts exclusive jurisdiction over “all cases under title 11”
and nonexclusive jurisdiction over “all civil proceedings arising under title 11 or arising in or
related to cases under title 11.”2 Although this jurisdiction was nominally conferred on the
district courts, the statute directed the bankruptcy court for the district in which a bankruptcy
case was filed to “exercise all of the jurisdiction conferred by this section on the district courts.”3
In order to make this conferral of jurisdiction complete, Congress also enacted a provision
permitting the removal to bankruptcy court of most cases falling within the scope of the
expanded bankruptcy jurisdiction.4

After the Supreme Court held § 1471’s conferral of jurisdiction on the bankruptcy courts
unconstitutional in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,5 Congress
enacted the current bankruptcy jurisdictional provisions. Under 28 U.S.C. § 1334, bankruptcy

2 Id. at § 241(a), 92 Stat. 2549, 2668-69 (originally codified at 28 U.S.C. § 1471 (1982)).
3 Id. (§ 1471(c)).
4 Id. (§ 1478).
jurisdiction is conferred on the district courts in the same broad terms as before, and a removal right remains. The exercise of this jurisdiction, however, is curtailed somewhat by the addition of broadened abstention provisions. In some cases a court exercising bankruptcy jurisdiction must abstain in favor of a state court, and in other cases it is authorized to do so. In response to Marathon, the authority of bankruptcy judges is also reduced in some respects. Instead of directing bankruptcy courts to exercise all of the jurisdiction conferred, Congress in 28 U.S.C. § 157 authorizes district courts to refer “any or all” bankruptcy cases and proceedings to the bankruptcy judges of their district. Once referred, the bankruptcy judges’ authority over a proceeding depends upon whether it is “core” or “non-core.”

This paper addresses selected topics presented by the current bankruptcy jurisdictional scheme. It particularly deals with the tension built into the statutes between, on the one hand, centralizing the resolution of all matters related to a bankruptcy case in the home bankruptcy court and, on the other hand, requiring or allowing the bankruptcy court to defer to the resolution of some matters in other forums.

II. Removal

Section 1452(a) of title 28 authorizes a party to remove “any claim or cause of action in a civil action . . . if [the] district court has jurisdiction of such claim or cause of action under section 1334 of this title.”6 The only exceptions to this removal authority are for “proceeding[s] before the United States Tax Court” and “civil action[s] by a governmental unit to enforce such governmental unit’s police or regulatory power.”7 Congress created this removal right for most

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7 Id.
bankruptcy-connected claims or causes of action as part of the effort to consolidate in the bankruptcy court litigation involving the debtor and the bankruptcy estate. Not only can proceedings be filed directly in a bankruptcy court pursuant to § 1334, but litigation commenced in other forums can also be removed there if it comes within the scope of bankruptcy jurisdiction.

The removal right created by § 1452 differs in scope from the general removal statute, 28 U.S.C. § 1441. Section 1452 allows any party to the civil action to remove, not just the defendant, and it allows the removal of discrete claims or causes of action, rather than just entire civil actions. According to some courts, it also overrides restrictions on removal imposed by other federal statutes. The Second Circuit recently held that § 1452 permits the removal of individual suits brought under § 22(a) of the 1933 Securities Act, despite the latter act’s prohibition of removal.8 Declining to review the district court’s determination that the removed actions were related to the WorldCom bankruptcy, the court of appeals held that removal was permitted under § 1452 because, unlike § 1441, the bankruptcy removal statute does not authorize removal “[e]xcept as otherwise expressly provided by Act of Congress.”9 Instead, its removal authority is subject to only two exceptions (for U.S. Tax Court cases and actions to enforce police or regulatory power), neither of which was applicable in that case. The Second Circuit concluded that §1452 should be broadly interpreted in order to “further Congress’s

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9 368 F.3d at 105 (“[U]nlike the general removal statute, . . . Section 1452(a) contains no exception for federal claims that are expressly nonremovable under an Act of Congress.”). But see id. at 99-100 (citing district court cases reaching the opposite conclusion).
purpose of centralizing bankruptcy litigation in a federal forum.”

Although § 1452 states that removal shall be to the district court, all districts have referred bankruptcy cases and proceedings to their bankruptcy courts pursuant to § 157(a). Accordingly, Bankruptcy Rule 9027 provides for the filing of a notice of removal with the “clerk,” which is defined in Rule 9001 to mean the bankruptcy clerk if one has been appointed. Thus, unless the removed claim relates to a bankruptcy case for which the district court has withdrawn the reference of jurisdiction, removal should be directly to the bankruptcy court.

Under § 1452(a) the district to which a claim or cause of action may be removed is “the district where such civil action is pending.” That district, however, may not be where the underlying bankruptcy case to which the removed claim relates is pending. Since the purpose of the removal is to facilitate a consolidation of litigation in the home bankruptcy court, there is a presumption in favor of transferring a removed case to the district in which the related bankruptcy case is pending. Removal may therefore be a two-step process: first a case is

10 Id. at 103.

11 See, e.g., Blackwell v. Zollino (In re Blackwell), 267 B.R. 724, 727 n.1 (Bankr. W.D. Tex. 2001) (“This district, like all other districts in the United States, has entered a general order which operates as a blanket referral of all matters that the filer indicates are ‘bankruptcy matters’ to the bankruptcy court, such that all such matters are filed directly with the clerk of the bankruptcy court.”) (citation omitted).

12 FED. R. BANKR. P. 9027(a)(1).

13 FED. R. BANKR. P. 9001(3).

14 See 10 ALAN N. RESNICK ET AL., COLLIER ON BANKRUPTCY ¶ 9027.03 (15th ed. rev. 2004).


removed to the local bankruptcy court, and then it is transferred pursuant to 28 U.S.C. § 1412 to the bankruptcy court that is presiding over the related bankruptcy case.\(^{17}\) Courts have identified the following factors as being relevant to whether such a transfer is “in the interest of justice”:

(a) the economic administration of the bankruptcy estate; (b) the presumption in favor of trying cases “related to” a bankruptcy case in the court in which the bankruptcy is pending; (c) judicial efficiency; (d) ability to receive a fair trial; (e) the state’s interest in having local controversies decided within its borders; (f) enforceability of any judgment received; and (g) the plaintiff’s original forum.\(^{18}\)

There is one category of cases that may not have to go through this two-step removal and transfer process. Under 28 U.S.C. § 157(b)(5), the district court where a bankruptcy case is pending is required to determine where “personal injury tort and wrongful death claims” shall be tried. The statute provides that the trial location shall be either “the district court in which the bankruptcy case is pending” or “the district court in the district in which the claim arose.”\(^{19}\) This provision has been interpreted to allow the district court to transfer these types of claims from either other district courts or directly from state courts to the district where the bankruptcy case is pending.\(^{20}\) The statute is unusual in allowing the transferee district to order the transfer and in allowing transfer of state court cases without their first being removed to federal court.


\(^{19}\) 28 U.S.C. § 157(b)(5) (2000). Courts have also held that the district court may abstain and allow the claims to be liquidated in their original forums. See Coker v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.), 950 F. 2d 839, 844 (2d Cir. 1991) (citing other cases).

\(^{20}\) See Coker, 950 F.2d at 848 (reversing New York district court’s decision to abstain from transferring wrongful death actions from Florida state court).
Section 1452 clearly allows removal of cases from state courts, but what if a case is pending in a district court when a related bankruptcy case is filed in that district? May that case be “removed” to the bankruptcy court? While it does not seem logical to talk about removing a case to a “unit” of the district court in which the case is already pending, Rule 9027 gives some suggestion that that may indeed be the proper procedure. It refers to the “state or federal court where the civil action [to be removed] is pending.”21 Courts, however, have generally rejected that view and have held that the district court should be requested to refer the case to the bankruptcy court pursuant to § 157(a).22

Section 1452(b) provides that the court to which a claim or cause of action is removed may remand it “on any equitable ground.”23 Courts disagree over whether this provision is the exclusive source of a bankruptcy court’s authority to decline to exercise jurisdiction over a removed case or whether the abstention provisions of § 1334(c) also apply.24 Insofar as permissive abstention is concerned, the resolution of this question probably makes little practical difference because courts generally consider the same or similar factors under both the remand and the permissive abstention provisions.25 It does make a difference, however, insofar as

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25 See, e.g., EquiMed, Inc. v. Steadfast Ins. Co. (In re EquiMed, Inc.), 254 B.R. 347, 351 (D. Md. 2000) (“Virtually the same if not the identical factors apply for judging the propriety of abstention as have been articulated for deciding the propriety of a remand.”).
mandatory abstention is concerned. If § 1334(c)(2) is held not to apply to removed cases, relinquishment of jurisdiction is left to the bankruptcy court’s discretion for all removed cases, rather than being statutorily mandated if the specified requirements of § 1334(c)(2) are satisfied. The majority view, however, is that the mandatory abstention provision is applicable to removed cases. Because a decision to abstain is a only a decision not to exercise jurisdiction, such a decision in a removed case should also be coupled with a remand order so that the case can proceed in its original forum.

III. Abstention

Although Congress enacted the removal provision in order to make possible the consolidation of all bankruptcy-related litigation in the bankruptcy court, it also enacted abstention provisions in order to maintain a proper balance between the efficient administration of bankruptcy cases and “respect for State court processes.”27 In 1984 when Congress was considering adjustments in the relationship between bankruptcy and district judges in order to comply with Marathon, some members of Congress also expressed concern about the breadth of the conferral of bankruptcy jurisdiction in the 1978 Act. Senator Hatch, for example, argued that an abstention provision was needed because it was unconstitutional to give federal courts authority to hear purely state-law matters just because one of the parties happened to be in bankruptcy.28 Although he did not get as broad an abstention provision as he and Senator Heflin had sought, Congress did add a provision that required courts exercising bankruptcy jurisdiction

26 See, e.g., Christo v. Padgett, 223 F.3d 1324, 1331 (11th Cir. 2000) (stating that the “vast majority of courts” have held that mandatory abstention applies to removed cases, and holding that “§ 1334(c)(2) applies to state law claims that have been removed to federal court under § 1452(a).”).


28 Id. at S6089 (daily ed. May 21, 1984); id. at S8893 (daily ed. June 29, 1984).
to abstain in favor of state court jurisdiction under some circumstances.\textsuperscript{29} It also retained a permissive abstention provision, which now expressly declared the right to abstain “in the interest of comity with State courts or respect for State law,” as well as—just as in the 1978 Act—“in the interest of justice.”\textsuperscript{30} These abstention provisions were intended to provide a safety valve on the broad conferral of bankruptcy jurisdiction in § 1334(b). This authority was to be exercised when, even though bankruptcy jurisdiction exists, consolidation in the bankruptcy court is not needed or other interests outweigh the interest in consolidation.

Because both provisions of § 1334(c) refer to abstention by the district court and because rulings on mandatory abstention were initially not subject to review, there was uncertainty for a while as to whether this authority could be exercised by bankruptcy judges. After the statute was amended in 1990 to allow at least one level of appellate review of all abstention decisions, Rule 5011 was amended to treat abstention motions as contested matters that may be resolved by the bankruptcy judge.\textsuperscript{31}

A. Mandatory Abstention

Section 1334(c)(2) requires the bankruptcy court to abstain if a number of requirements are satisfied. The provision applies if:

- a party to the proceeding makes a timely motion to abstain;
- the proceeding is based on a state law claim or cause of action;
- the proceeding is related to a case under title 11, but does not arise under title 11


\textsuperscript{30} Id. (codified at 28 U.S.C. § 1334(c)(1) (2000)).

\textsuperscript{31} See FED. R. BANKR. P. 5011(b).
or arise in a case under title 11;

• the proceeding is one over which the federal courts would not have jurisdiction in the absence of bankruptcy; and

• the action is commenced and can be adjudicated in a timely manner in state court.\(^{32}\)

The apparent congressional purpose underlying this provision was expressed by Senator DeConcini during debate on the 1984 Amendments. He explained:

There is one set of disputes where abstention may be justified and that is a situation like the one the Supreme Court addressed in the \([M]arantho\) decision . . . . That case involved a claim by a debtor, based on a State law claim, against a defendant who had no other connection to the bankruptcy proceeding. A defendant in that position has good grounds to object to being forced to appear in a Federal court simply because the plaintiff is bankrupt.\(^{33}\)

With respect to the last requirement listed above—the action is commenced and may be timely adjudicated in a state forum—many courts have held that the state court proceeding must already be pending at the time the bankruptcy petition is filed.\(^{34}\) Some other courts, however, have deemed it sufficient that a proceeding could still be commenced in state court and timely adjudicated there.\(^{35}\)

Although a case comes within related-to jurisdiction, if it also comes within diversity or some other type of federal subject matter jurisdiction, mandatory abstention will not apply because of the


\(^{33}\) 130 CONG. REC. S6098 (daily ed. May 21, 1984).


fourth requirement listed above. Furthermore, the mandatory abstention provision is expressly
declared to be inapplicable to the liquidation or estimation of personal injury tort and wrongful death
claims against the estate, even though those proceedings are declared to be non-core.

A court’s determination of whether the action in question can be timely adjudicated in
state court will depend to a large extent on the needs of the particular bankruptcy case and the
circumstances in state court. One bankruptcy judge noted (in the context of ruling on an
abstention motion in a removed case) that the following factors are relevant to this issue:

(1) the backlog of the state court and federal court calendars; (2) status of the
proceeding in state court prior to being removed (i.e., the extent to which
discovery has been completed); (3) status of the proceeding in the bankruptcy
court; (4) complexity of the issues to be resolved; (5) whether the parties consent
to the bankruptcy court entering judgment in the non-core case; (6) whether a jury
demand has been made; (7) whether the underlying bankruptcy case is a
reorganization case or a liquidation case.

In that particular case Judge Stocks determined that the plaintiffs, who had sought mandatory
abstention, had met their burden of showing that all the requirements of § 1334(c)(2) were met.
On the issue of timely adjudication, they had “submitted an affidavit and statistical data
concerning the status of the calendar in [state court] and how quickly the proceeding could be
tried in that court.” The twelve months that it was likely to take there was at least as quick as
the time required in federal court, since a jury trial had been demanded and consent had not been
given for the bankruptcy judge to conduct it.

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inapplicable because the removed action “could have been commenced in federal court based on diversity”).


39 Id. at * 9.
B. Permissive Abstention

Unlike the provision for mandatory abstention, the permissive (or discretionary) abstention provision applies to all types of proceedings, core as well as non-core.\textsuperscript{40} Section 1334(c)(1) authorizes abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law.”\textsuperscript{41} Noting the provision’s “three admittedly nebulous criteria to determine whether abstention is appropriate,” the Second Circuit has explained that “this provision was intended to codify judicial abstention doctrines, particularly with respect to cases like \textit{Thompson v. Magnolia Petroleum Co.}.”\textsuperscript{42} In \textit{Magnolia Petroleum} the Supreme Court ordered the district court presiding over a railroad bankruptcy to abstain in favor of state-court adjudication involving a difficult and unsettled issue of state law. Accordingly, the uncertainty surrounding an issue of state law has been an important factor to courts deciding whether to abstain under § 1334(c)(1).\textsuperscript{43} Even so, as the Seventh Circuit has admonished, bankruptcy courts should not be quick to abstain. “[F]ederal courts generally should exercise their jurisdiction if properly conferred[;] . . . abstention is the exception rather than the rule.”\textsuperscript{44}

Courts, including the Seventh and Ninth Circuits, have cited the following factors as

\begin{itemize}
  \item \textsuperscript{40} See 28 U.S.C. § 1334(c)(1) (2000) (authorizing a district court to abstain “from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11”).
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} Coker v. Pan Am. World Airways, Inc. (\textit{In re} Pan Am. Corp.), 950 F.2d 839, 845 (2d Cir. 1991) (citing \textit{Magnolia Petroleum}, 309 U.S. 478 (1940)).
  \item \textsuperscript{43} \textit{See, e.g., In re} Chicago, Milwaukee, St. Paul & Pac. R.R., 6 F.3d 1184, 1189 (7th Cir. 1993) (“[B]ecause section 1334(c)(1) is concerned with comity and respect for state law, whether a case involves unsettled issues of state law is always significant.”); \textit{id.} at 1189 n.8 (“If a state law issue is not unsettled, or if there is no state authority directly on point, then the bankruptcy court is qualified to resolve the issue, and there is no need to refer it to a state court.”).
  \item \textsuperscript{44} \textit{Id.} at 1189.
\end{itemize}
being relevant to the decision whether to abstain under § 1334(c)(1):

(1) the effect or lack thereof on the efficient administration of the estate if a Court orders abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable 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 of [the bankruptcy court’s] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.45

Although § 1334(c)(1) applies to proceedings arising under title 11 and those arising in a case under title 11, bankruptcy courts are much more likely to abstain in related-to or non-core proceedings than in core proceedings. That is because of the first two factors listed above. Abstention as to a core proceeding will often have an adverse effect on the efficient administration of the estate, and if the proceeding is one that arises under the Bankruptcy Code, federal not state law will predominate. In those situations, the interest in comity and respect for state courts will generally not outweigh the interest in an efficient and centralized administration of the estate by the bankruptcy court.46

IV. Enforcement of Arbitration Agreements

In addition to a bankruptcy court’s authority or mandate to abstain, it may also be required, or have discretion, to stay a proceeding within its jurisdiction because the parties prior to bankruptcy entered into an arbitration agreement applicable to that proceeding. A determination of when a bankruptcy judge should refrain from exercising jurisdiction over a core

45 Id.; see also Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990).

46 See, e.g., Canzano v. Ragosa (In re Colaruso), 382 F.3d 51, 57 (1st Cir. 2004) (affirming bankruptcy court’s denial of abstention in action requiring determination of validity and scope of prior order of the bankruptcy
or non-core proceeding in order to enforce the terms of an arbitration agreement requires careful consideration of the congressional mandate favoring arbitration along with the policy concerns underlying the bankruptcy jurisdictional provisions.

**A. Federal Arbitration Act and McMahon**

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."47 The statute requires any court of the United States to stay the trial of an action before it, upon the request of a party, if the court determines that an issue involved in the action is arbitrable under such an agreement.48 And if parties refuse to arbitrate, federal courts are authorized to order them "to proceed to arbitration in accordance with the terms of the agreement."49

The Supreme Court in *Shearson/American Express, Inc. v. McMahon* characterized the FAA as "establish[ing] a ‘federal policy favoring arbitration.’"50 The Court explained that the FAA "was intended to ‘revers[e] centuries of judicial hostility to arbitration agreements.’"51 Thus it mandates the judicial enforcement of arbitration agreements unless grounds such as fraud

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48 *Id.* at § 3.

49 *Id.* at § 4.


51 *Id.* at 225 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974)).
or excessive economic power exist, which would permit the revocation of any contract.  

The Court in *McMahon* recognized that, as a statutory command, the FAA is subject to being overridden by a contrary federal statute. A party who seeks to avoid arbitration on that basis, however, must “show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” Such a showing of congressional intent must be based on the overriding statute’s text or legislative history or “from an inherent conflict between arbitration and the statute’s underlying purposes.”

*McMahon* held that neither the Securities Exchange Act of 1934 nor the RICO statute barred enforcement of predispute arbitration agreements. The FAA’s mandate therefore controlled, and the district court was required to enforce the parties’ agreement to arbitrate. The Court reached this conclusion with respect to the Exchange Act claim despite the congressional conferral of exclusive subject matter jurisdiction on the district courts over actions brought to enforce the provisions of that act. The Court concluded that the jurisdictional provision was subject to waiver by the parties.

### B. Application to Bankruptcy Proceedings

Since the Supreme Court’s strict enforcement of the FAA in *McMahon* and other cases, lower courts have had to apply the Court’s analysis to a variety of other contexts that arguably present a conflict between the FAA and another federal statute. Among these contexts is

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52 *Id.* at 226.

53 *Id.* at 227.

54 *Id.*

55 *Id.* at 238, 242.

56 *Id.* at 228.
bankruptcy. Here courts have had to grapple with a number of questions: When must a bankruptcy court stay a proceeding before it in order to enforce an arbitration agreement entered into by the debtor and another party prior to bankruptcy? Does it matter whether the proceeding is core or non-core? Is the trustee or debtor in possession bound by the debtor’s pre-bankruptcy agreement? The Third and the Fifth Circuits have issued influential opinions that have provided some guidance to courts in answering these questions.

In 1989 the Third Circuit held in *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* that “the Bankruptcy Code . . . does not conflict with the Arbitration Act so as to permit a district court to deny enforcement of an arbitration clause in a non-core adversary proceeding brought by the trustee . . .”\(^{57}\) In that case, a chapter 11 trustee brought suit in district court asserting securities law, fraud, RICO, and § 544(b) fraudulent transfer claims against the debtor’s former stockbroker. The defendant requested the district court to compel arbitration of the trustee’s claims pursuant to an arbitration agreement it had entered into with the debtor and to stay the action before it. The district denied the motion, and the defendant appealed.

In determining whether the district court was required to enforce the arbitration agreement, the Third Circuit addressed two separate issues: first, whether the trustee was bound by the arbitration agreement, and, second, whether the Bankruptcy Code gave the district court discretion to decline to enforce the agreement. On the first question, the court of appeals concluded that “the trustee is bound to arbitrate all of its claims that are derived from the rights of the debtor under section 541.”\(^{58}\) The court saw no reason to treat arbitration agreements

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\(^{57}\) 885 F.2d 1149, 1150 (3d Cir. 1989).

\(^{58}\) Id. at 1154.
differently from other contracts, and it reasoned that “the trustee stands in the shoes of the
debtor.” 59 As for the trustee’s fraudulent transfer claims under § 544(b), however, the court held
that the trustee was not bound by the arbitration agreement. 60 These were creditor claims that
the Bankruptcy Code allowed the trustee to assert on the creditors’ behalf. Since the basis for
ordering arbitration is contractual, the court said that “there is no justification for binding
creditors to an arbitration clause with respect to claims that are not derivative from one who was
a party to it.” 61

Following the analysis of McMahon, the Third Circuit then considered whether the
Bankruptcy Code overrode the FAA and gave the district court discretion not to enforce the
arbitration clause with respect to the debtor-derived claims. Quickly concluding that there was
nothing in the text or the legislative history of the Bankruptcy Code to indicate that arbitration
clauses were unenforceable in non-core adversary proceedings, 62 the court of appeals then
considered whether the purposes underlying the Bankruptcy Code were inconsistent with the
command of the FAA. The court found no such conflict in the context of this case. It rejected
the trustee’s argument that arbitration was inconsistent with the bankruptcy policy of
consolidating litigation in the bankruptcy court, noting that the conferral of jurisdiction in
§ 1334(b) is non-exclusive, that abstention is authorized by § 1334(c), and that non-core matters
could be heard by the bankruptcy court and then reviewed de novo by the district court. 63 Thus,

59 Id. (internal quotation omitted).

60 Id. at 1155.

61 Id.

62 Id. at 1157.

63 Id. at 1157-58.
the court concluded, “Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court.”

The Third Circuit’s *Hays* decision concerning a non-core proceeding was followed several years later by the Fifth Circuit’s *National Gypsum* decision, which dealt with enforcement of an arbitration agreement in a core proceeding. In this context the Fifth Circuit held that

> at least where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.

The court further held that the bankruptcy court had not abused its discretion in declining to order arbitration of a proceeding brought to determine whether a creditor’s collection efforts violated the discharge injunction or terms of the confirmed plan. Enforcement of the arbitration agreement here would be inconsistent with the Bankruptcy Code, the court of appeal concluded.

In reaching its conclusion that enforcement of the arbitration agreement was not required, the *National Gypsum* court noted its agreement with *Hays* “[w]ith respect to derivative, non-core

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64 *Id.* at 1157.

65 Ins. Co. of North Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re Nat’l Gypsum Co.*), 118 F.3d 1056 (5th Cir. 1997).

66 *Id.* at 1069.

67 *Id.* at 1071.
matters.” Indeed, it stated that the *Hays* analysis had been “universally accepted.” But, it noted, the Third Circuit had not dealt with arbitration of a core proceeding. The court then rejected the argument that arbitration of core proceedings is “inherently irreconcilable with the Bankruptcy Code.” Instead, whether or not an arbitration agreement should be enforced turns on “the underlying nature of the proceeding,” including whether it arises under the Bankruptcy Code and whether arbitration would conflict with purposes of the Code. “[T]he importance of the federal bankruptcy forum provided by the Code is at its zenith,” said the court, when “a core proceeding involves adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims.”

Following the lead of *Hays* and *National Gypsum*, court have generally enforced arbitration agreements in non-core proceedings. These proceedings are usually brought by a trustee or debtor in possession to enforce the debtor’s pre-petition claims, or they involve non-debtor parties. The Second Circuit stated that “the presumption in favor of arbitration generally will trump the lesser interest of bankruptcy courts in adjudicating non-core proceedings that could otherwise be arbitrated. . . . [B]ankruptcy courts generally do not have discretion to decline enforcement.”

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68 *Id.* at 1066 (stating that *Hays* “makes eminent sense”).

69 *Id.*

70 *Id.* at 1067 (“[W]e refuse to find such an inherent conflict based solely on the jurisdictional nature of a bankruptcy proceeding.”).

71 *Id.*

72 *Id.* at 1068.

to stay non-core proceedings in favor of arbitration, and they certainly have authority to grant such a stay.”74

In the case of core proceedings, however, courts have generally agreed with National Gypsum that bankruptcy courts have discretion to decline to enforce an arbitration agreement when doing so would seriously jeopardize the objectives of the Bankruptcy Code.75 Typically such a conflict is found when the proceeding involves rights created by the Bankruptcy Code or involves the enforcement of the bankruptcy court’s orders.76 Alternatively, it could be argued that when a representative of the estate is suing on rights created by the Bankruptcy Code, it is not bound by an agreement to arbitrate that the debtor previously entered into since its rights are not derived from the debtor. An arbitration clause cannot be enforced against a party who neither agreed to that provision nor stepped into the shoes of someone who did.77

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74 Crysen/Montenay, 226 F.3d at 166.


V. Exercise of Jurisdiction Over Proceedings to be Tried in the District Court

Despite the broad scope of bankruptcy subject matter jurisdiction, the discussion above shows that not all of the litigation connected to a bankruptcy case will be resolved in the bankruptcy court. As to some proceedings the court may abstain in order to allow resolution in state court, and as to others the court may enforce agreements to have the disputes resolved by arbitration. Congress’s decision following the Marathon decision not to make bankruptcy judges Article III judges, but instead to limit their authority over some matters, also means that some proceedings left for resolution in the federal courts will not be finally decided by the bankruptcy judge. They will have to be determined by the district court.78 Because the core/non-core jurisdictional scheme is familiar to the attendees of this conference, I will not dwell on its contours. Instead, the focus of this section is on the extent to which a bankruptcy judge may exercise jurisdiction over matters that have to be tried in the district court.

The types of proceedings being considered primarily fall into two categories: (1) those in which a jury trial will have to be conducted by a district judge, and (2) the liquidation or estimation of personal injury tort or wrongful death claims. The first category consists of proceedings in which there is a right to a jury trial that a party has properly demanded, but which the bankruptcy judge may not conduct. That inability could result either from the fact that all parties to the proceeding did not consent to a jury trial in the bankruptcy court79 or to the entry of final judgment by the bankruptcy judge,80 or from the fact that the bankruptcy judges in that


79 See id. at § 157(e) (requiring the “express consent of all the parties” for a bankruptcy judge to conduct a jury trial).

80 See id. at § 157(c)(2) (authorizing a bankruptcy judge to “hear and determine” a non-core
district have not been authorized to conduct jury trials.\textsuperscript{81} The second category (which might also involve a jury trial) results from the requirement of § 157(b)(5) that the trial of personal injury tort and wrongful death claims be in the district court.\textsuperscript{82}

The procedure followed for these types of proceedings varies from district to district. In some districts, once a bankruptcy judge determines that a matter must be tried in the district court, the reference is withdrawn, and the district judge handles the case from there. Rule 9015-2 of the local rules for the Bankruptcy Court for the Northern District of California provides an example. That rule provides that if all parties to a proceeding in which there is a right to a jury trial have not filed a written consent to have that trial conducted by the bankruptcy judge, the bankruptcy judge will certify that fact to the district judge. The rule then provides that “[u]pon such certification, reference of the proceeding shall be automatically withdrawn, and the proceeding assigned to a Judge of the District Court.”\textsuperscript{83} The rule also specifies a similar procedure when the bankruptcy judge “determines that a claim is a personal injury tort or wrongful death claim requiring trial by a District Court Judge.”\textsuperscript{84}

In other districts the procedure is not spelled out in a local rule. Nevertheless, judicial opinions indicate that the practice followed in those districts, at least in some cases, is to allow proceedings that must be tried in the district court to remain before the bankruptcy judge until proceeding and “to enter appropriate order and judgments” “with the consent of all the parties”).

\textsuperscript{81} See id. at § 157(e) (requiring a bankruptcy judge in order to conduct jury trial to be “specifically designated to exercise such jurisdiction by the district court”).

\textsuperscript{82} See id. at § 157(b)(5).

\textsuperscript{83} Local Rule 9015-2 (Bankr. N.D. Cal.).

\textsuperscript{84} Id. (“Upon such certification, the reference of the claim shall be automatically withdrawn, and the claim assigned to a Judge of the District Court . . . .”).
they are ready for trial. This procedure allows the bankruptcy judge to have “the responsibility for supervising discovery, conducting pre-trial conferences, and other matters short of the jury selection and trial.” It also allows the bankruptcy judge to disallow a claim or grant summary judgment, thus rendering a trial in the district court unnecessary. In districts following this practice, district judges will generally decline to withdraw the reference of a proceeding from the bankruptcy court until all pretrial proceedings have been completed.

The advantage of this procedure is that it allows to the greatest extent possible under § 157 an efficient resolution of all bankruptcy-related matters in the bankruptcy court. The bankruptcy court may have already gained familiarity with some of the issues presented and, as one district judge concluded in a recent case, may be “in a superior position to manage what are likely to be complex pretrial proceedings.” In the end a trial in the district court may not be necessary because the proceeding will be resolved on pre-trial motions. Even if a trial is necessary, resolution is likely to be achieved more quickly in the district court if the case arrives

85 See, e.g., Enron Power Marketing, Inc. v. Virginia Elec. & Power Co. (In re Enron Corp.), 318 B.R. 273, 275-76 (S.D.N.Y. 2004) (declining to withdraw the reference “at this early stage of the adversary proceeding” even if the bankruptcy court concludes that there is a right to a jury trial, and noting that withdrawal will not have to be decided until the case becomes ready for trial); EquiMed, Inc. v. Steadfast Ins. Co. (In re EquiMed, Inc.), 254 B.R. 347, 351 (D. Md. 2000) (denying motion for withdrawal of the reference so that the bankruptcy court can preside over pretrial proceedings prior to jury trial); In re UAL Corp., 310 B.R. 373, 381 n.8 (Bankr. N.D. Ill. 2004) (“It is the practice of the District Court for the Northern District of Illinois to allow personal injury tort claims to remain before the bankruptcy court until and unless a trial is required.”).


87 See, e.g., UAL, 310 B.R. at 381 (stating that § 157(b)(5) only “requires transfer of a claim objection for trial” and thus it allows a bankruptcy judge to “determin[e] that such a claim is legally unenforceable”).

88 Enron, 318 B.R. at 275; see also id. at 276 (concluding that “retaining the reference of this case to the Bankruptcy Court until the case is trial-ready would further the interests of judicial economy”).
all ready for trial. 89

The Bankruptcy Court for the Northern District of Georgia goes one step further by adopting the practice just described for all cases in which a jury trial will have to take place in the district court. Local Rule 9015-3 provides that if all parties do not consent to a jury trial in the bankruptcy court, the bankruptcy judge will transfer the adversary proceeding to the district court when the case is ready for trial. Prior to that point, “the Bankruptcy Judge shall rule on all discovery motions, other pretrial motions, and summary judgment motions, as provided by law, and the pretrial order shall be entered by the Bankruptcy Judge.” 90 Specifying this practice by local rule promotes a consistent practice in the district and alerts all parties to the procedure that is followed, thereby discouraging the filing of unnecessary motions with the district court to withdraw the reference. It should not preclude, however, such a motion in a given case if there is some reason that an earlier transfer to the district court would promote an efficient resolution of the case. 91

VI. Post-Confirmation Jurisdiction

A jurisdictional issue that has caused considerable uncertainty and a variety of opinions is the extent of a bankruptcy court’s jurisdiction following the confirmation of a chapter 11 plan.

89 See UAL, 310 B.R. at 381 (stating that allowing the bankruptcy court to exercise pretrial jurisdiction over personal injury claims “advances the efficient resolution of claims and avoids placing unnecessary bankruptcy burdens on the district court”).

90 Local Rule 9015-3(a) (Bankr. N.D. Ga.); see also Hays v. Equitex, Inc. (In re RDM Sports Group, Inc.), 260 B.R. 915, 925-26 (Bankr. N.D. Ga. 2001) (noting the procedure of the local rule “whereby the bankruptcy court presides over all matters until such time as a case is ready for trial, at which point the proceedings is referred to the district court”).

91 See, e.g., Travelers Ins. Co. v. Goldberg, 135 B.R. 788, 792-93(D. Md. 1992) (stating that in some cases allowing bankruptcy court to conduct pre-trial matters would be a “futile detour, requiring substantial duplication of judicial effort”).
In memorable language years ago, the Second Circuit articulated the concern that some courts still have about the continuation of bankruptcy jurisdiction after confirmation has been achieved:

We have had occasion before to deplore the tendency of District Courts to keep reorganized concerns in tutelage indefinitely by orders purporting to retain jurisdiction for a variety of purposes . . . . Since the purpose of reorganization is clearly to rehabilitate business and start off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility.  

More recently the Seventh Circuit has stated it this way: “The [reorganized] firm is . . . without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens.”

The fact that there are limits to a bankruptcy court’s post-confirmation jurisdiction, however, does not mean that jurisdiction ceases to exist when the plan is confirmed. The source of the court’s jurisdiction does not change upon confirmation. Sections 1334 and 157 of title 28 remain the basis for the exercise of bankruptcy jurisdiction by district and bankruptcy courts. Thus, even after confirmation of a chapter 11 plan, a bankruptcy court can exercise jurisdiction over any civil proceedings arising under title 11 or any civil proceedings arising in or related to the bankruptcy case.

Although the statutory source of bankruptcy jurisdiction remains the same, the fact of


93 Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991).


95 See 8 COLLIER ON BANKRUPTCY, supra note 14, at ¶ 1142.04[1].

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plan confirmation affects the scope of that jurisdiction. The Third Circuit, for example, has explained that the post-confirmation context of a dispute may affect the determination of whether it falls within related-to jurisdiction, because “bankruptcy court jurisdiction ‘must be confined within appropriate limits and [not be permitted to] extend indefinitely . . . .’”96 The court held, however, that “though the scope of bankruptcy jurisdiction diminishes with plan confirmation, bankruptcy court jurisdiction does not disappear entirely.”97 Instead, because the bankruptcy estate ceases to exist upon confirmation, the inquiry concerning whether related-to jurisdiction extends to a post-confirmation proceeding shifts from one focused on the proceeding’s impact on the estate to an examination of “whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.”98 The Third Circuit explained that “[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite nexus.”99

The Ninth Circuit recently adopted the Third Circuit’s nexus test for post-confirmation related-to jurisdiction “because [the test] recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility, which can be especially important in cases with continuing trusts.”100 Other courts, however, have defined post-confirmation jurisdiction more narrowly. The Fifth Circuit has held that “[a]fter a debtor’s reorganization plan has been


97 Id. at 165.

98 Id. at 166-67.

99 Id. at 167.

100 Montana v. Goldin (In re Pegasus Gold Corp.), No. 03-15958, 2005 WL 53427, at *3 (9th Cir. 2005).
confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.” Still other courts have applied a seemingly broader standard that considers whether the proceeding could conceivably affect the implementation or consummation of the confirmed plan.

Courts sometimes cite substantive provisions of the Bankruptcy Code as the source of their post-confirmation jurisdiction. Those provisions, however, are more properly viewed as confirming the existence of, rather than conferring, post-confirmation jurisdiction, since the statutes actually conferring bankruptcy jurisdiction on the federal courts are those set forth in title 28 of the U.S. Code. Bankruptcy Code provisions giving the court authority to take action following the confirmation of a chapter 11 plan demonstrate a congressional intent that jurisdiction under § 1334 not cease upon plan confirmation. Moreover, to the extent that any of these provisions of the Bankruptcy Code give rise to a post-confirmation claim, the resulting proceeding is one that “arises under title 11” and thus one that the court can hear pursuant to § 1334(b).

Because only Congress can confer jurisdiction on the federal courts, neither the parties

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101 Craig’s Stores of Tex., Inc. v. Bank of La. (In re Craig’s Stores of Tex., Inc.), 266 F.3d 388, 390 (5th Cir. 2001). The following year a Fifth Circuit opinion noted with respect to Craig’s Stores that the court’s “authority to engraft limitations on § 1334 is subject to debate.” U.S. Brass Corp. v. Travelers Ins. Co. (In re U.S. Brass Corp.), 301 F.3d 296, 304 n.25 (5th Cir. 2002).


103 See, e.g., Resorts Int’l, 372 F.3d at 165 (“Although § 1142(b) assumes that post-confirmation jurisdiction exists for disputes concerning the consummation of a confirmed plan, 28 U.S.C. § 1334 remains the source of this jurisdiction.”).


105 See In re Walker, 198 B.R. 476, 482 (Bankr. E.D. Va. 1996) (“Bankruptcy Court jurisdiction continues for proceedings ‘arising under’ Title 11 even though the estate has been closed.”).
themselves or the court can create post-confirmation jurisdiction through the terms of a chapter 11 plan or confirmation order. Provisions retaining jurisdiction may be useful in clarifying the existence of jurisdiction provided by § 1334, but they may not extend the scope of post-confirmation jurisdiction beyond the statutory grant. Logically, the absence of such retention provisions should not negate the jurisdiction that Congress has conferred, but some courts have held that a retention of jurisdiction provision in a plan is required for the exercise of post-confirmation jurisdiction.

Despite conflicting decisions about the precise scope of post-confirmation jurisdiction, ample authority exists supporting the exercise of jurisdiction over proceedings requiring the interpretation of a confirmed plan of reorganization or seeking to implement its provisions, seeking post-confirmation conversion or dismissal of a bankruptcy case or the revocation of confirmation, or seeking enforcement of an order of the court. On the other hand, courts have generally been reluctant to exercise post-confirmation jurisdiction over proceedings involving the corporate affairs of a reorganized debtor. Moreover, even if a court finds that it

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110 See, e.g., United States v. Mourad, 289 F.3d 174, 180 (1st Cir. 2002).

has post-confirmation jurisdiction, it may conclude that abstention is appropriate.  

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