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Application of the Bankruptcy Code to Mineral Rights in Space (/full-blog/2014/03/application-of-bankruptcy- code-to.html)

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By: Brad Butler, Notes Editor

In 2010, entrepreneurs Peter Diamandis and Eric Anderson founded Arkyd Astronautics,

[i] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn1)

which they later renamed Planetary Resources, with the intention of developing the technology to extract natural resources from asteroids.

[ii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn2)

Recent estimates suggest that an average 98-foot asteroid could yield as much as \$50 billion worth of platinum.

[iii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn3)

Clearly, this could prove to be extremely lucrative, and the venture has caught the attention of several prominent investors such as filmmaker James Cameron, real estate developer Ross Perot, Jr., and Google co-founders Larry Page and Eric Schmidt.

[iv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn4)

However, these space-mining missions are extremely capital-intensive and would cost several hundred million dollars each.

[v] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn5)

In light of the high costs, debt financing will likely be required.

[vi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn6)

Unfortunately, creditors will not provide financing until there is a system in place that efficiently provides security for their debt and effectively ensures payment on that debt. In the United States, we have the bankruptcy system. However, it is unclear whether the Bankruptcy Code applies extraterritorially to assets located in space.

To answer this question, we must determine whether Congress intended for the Code to apply outside the United States. In *E.E.O.C. v. Arabian American Oil Company*, the Supreme Court of the United States held that Title VII of the Civil Rights Act of 1964 did not apply to the conduct of an American employer abroad.

[vii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn7)

The Court stated that Congress must clearly express an intention for the statute to apply abroad to rebut the presumption against extraterritoriality, and Title VII simply did not do so.

[viii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn8)

However, the clear expression of intent is not a "clear statement rule" and a court should look to the statute in its entirety.

[ix] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn9)

Furthermore, when a provision of a statute does provide for some extraterritorial application, then the presumption against extraterritoriality is rebutted for that provision alone.

[x] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn10)

In the case of the Bankruptcy Code, it is clear that Congress provided no clear statement, but Congress did show a clear intention to apply the Code abroad. The grant of jurisdiction to the bankruptcy court extends to all property owned by the debtor wherever located.

[xi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn11)

The "wherever located" language is also incorporated into the definition of property included in the bankruptcy estate.

[xii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn12)

Therefore, Congress clearly intended for the court to have jurisdiction over the property of the estate, but a grant of jurisdiction does give rise to substantive rights.

Courts routinely apply the jurisdiction of the Bankruptcy Code and look to local law when determining property rights. In *Butner v. United States*, the Supreme Court held that the Code did not articulate the priority of the secured creditors, so the Court looked to the local law of North Carolina.

[xiii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn13)

In this case, the asteroids would certainly be the property of the company under the common law principle of *ferae naturae*

[xiv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn14)

and the bankruptcy court would clearly have jurisdiction over the property. However, the problem then arises as to which law to apply. Here, the local law would be the governing law in space.

The major treaty that has served as the basis for all modern space law is the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty" or "OST"), in which Article VI provides for the possibility for private entities to conduct business in space and possibly own property.

[xv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn15)

However, the OST does not discuss how the property rights are determined.

[xvi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn16)

Another treaty, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies ("Moon Treaty") states that natural resources in space are considered "the common heritage of all mankind."

[xvii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn17)

Fortunately, the Moon Treaty has only 14 signatories, none of which are space-capable nations.

[xviii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn18)

So, there is some ambiguity as to what the law actually provides. Under the OST, there is no clear answer as to whether a private company may own an asteroid, how long it could own the asteroid, or who actually owns the resources extracted upon return to Earth.

[xix] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn19)

Under the Moon Treaty, either everyone or no one owns all property and natural resources in space.

[xx] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn20)

So, it is unclear whether the company would even have the right to sell the natural resources once it brings them back to Earth. If they cannot be sold, then they have no value and would not benefit the bankruptcy estate. Creditors will not lend money to a company that cannot monetize its assets and provide the potential for repayment of the loan extended by the creditor. Therefore, Congress must pass legislation that providing a mechanism for determining property rights and the effects of those rights, or all interested parties must amend the OST. Until either of these two things is done, there is no rational basis for creditors to lend money to private companies seeking to engage in space mining or exploration and modern innovation will be further deterred.

[i] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

John Cook, NASA vet and X Prize creator at the helm of secretive space robot startup Arkyd, GeekWire (July 8, 2011, 10:48 PM),

<http://www.geekwire.com/2011/nasa-veteran-emerges-helm-arkyd-stealthy-space-travel-startup/>
(<http://www.geekwire.com/2011/nasa-veteran-emerges-helm-arkyd-stealthy-space-travel-startup/>)

[ii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Matthew Sparkes, Planetary Resources unveils cosmic plan 'to boldly go' and mine asteroids for gold and platinum, The Telegraph (April 24, 2012, 8:40 PM),

<http://www.telegraph.co.uk/finance/newsbysector/industry/mining/9222766/Planetary-Resources-unveils-cosmic-plan-to-boldly-go-and-mine-asteroids-for-gold-and-platinum.html>
(<http://www.telegraph.co.uk/finance/newsbysector/industry/mining/9222766/Planetary-Resources-unveils-cosmic-plan-to-boldly-go-and-mine-asteroids-for-gold-and-platinum.html>)

[iii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Id.

[iv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

We're on to Something, Planetary Resources,

<http://www.planetaryresources.com/team/> (<http://www.planetaryresources.com/team/>)

(last visited Mar. 25, 2014).

[v] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Sparkes, *supra* note 2, at 1.

[vi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Id.

[vii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

E.E.O.C. v. Arabian American Oil Company, 499 U.S. 244, 249 (1991).

[viii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Id.

[ix] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247, 261 (2010).

[x] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455-56 (2007).

[xi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

28 U.S.C. § 1334(e)(1).

[xii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

11 U.S.C. § 541(a).

[xiii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Butner v. United States, 440 U.S. 48, 55 (1979).

[xiv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

See Pierson v. Post, 3 Cai. R. 175, 176 (N.Y. Sup. Ct. 1805).

[xv] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Rand Simberg, Property Rights in Space, *The New Atlantis* (Fall 2012), pages 20-31,

<http://www.thenewatlantis.com/publications/property-rights-in-space>

(<http://www.thenewatlantis.com/publications/property-rights-in-space>)

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[xvi] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

See *id.*

[xvii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Id.

[xviii] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

Id.

[xix] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref)

See id.

[xx] (https://www.blogger.com/blogger.g?blogID=8202935745006855383#_cdnref)

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