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Bankruptcy Court Jurisdiction

*Paul P. Daley**
*George W. Shuster, Jr.***

I. INTRODUCTION

Every practitioner, whether a business lawyer or a litigator, comes into contact with the Bankruptcy Code and the bankruptcy courts. Business clients are often creditors in the bankruptcy proceedings of other entities, and they may be defendants in preferential or fraudulent transfer actions. Both lawyers who litigate in federal and state courts and lawyers who advise clients on business transactions are likely to encounter situations that require an understanding of bankruptcy court jurisdiction and litigation procedure.

In most ways, bankruptcy court practice is conducted in the same manner as litigation in the federal district courts. However, for constitutional, historical, and practical reasons, bankruptcy court litigants must contend with a number of jurisdictional and procedural concepts not encountered in the federal district courts. For practitioners not familiar with the bankruptcy courts, this article is intended as an introduction to some of these bankruptcy-specific concepts. For bankruptcy court practitioners, this article is intended as a reminder of the background against which our practices are conducted.

This paper will focus on those aspects of bankruptcy court jurisdiction most likely to arise when creditor clients find themselves involved in proceedings not of their choosing. These issues are largely unique to practice under the Bankruptcy Code but may arise in the most common of a client's business relationships.

To begin, there are five key sources of statutes and rules affecting bankruptcy jurisdiction and procedure. Title 28 of the United States Code ("Title 28"), entitled "Judiciary and Judiciary Procedure," establishes and limits the bankruptcy jurisdiction of district courts and bankruptcy courts. Title 11 of the United States Code (the "Bankruptcy Code") establishes courts' substantive bankruptcy powers, some of which affect bankruptcy jurisdiction. The Bankruptcy Rules

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of Civil Procedure promulgated by the Supreme Court under 28 U.S.C. § 2075 (the “Bankruptcy Rules”) dictate the procedure to be followed in bankruptcy cases. The Bankruptcy Rules often incorporate the Federal Rules of Civil Procedure promulgated by the Supreme Court under 28 U.S.C. § 2072 (the “Federal Rules”), which are generally applicable in federal litigation. Finally, each bankruptcy district may have its own Local Rules of Bankruptcy Procedure (the “Local Bankruptcy Rules”), which function to alter or supplement the procedures set forth in the Bankruptcy Rules and the Federal Rules, as well as to establish particular operating procedures for its district.

The sections that follow—“Getting into Bankruptcy Court,” “Litigating in Bankruptcy Court,” and “Getting Out of Bankruptcy Court”—track the most important jurisdictional and procedural issues through Title 28, the Bankruptcy Code, the Federal Rules, and the Bankruptcy Rules. “Getting into Bankruptcy Court” describes the basis for bankruptcy court jurisdiction, the proper venue for bankruptcy court cases and proceedings, the removal of state court actions to bankruptcy court, and the intervention into bankruptcy court actions. “Litigating in Bankruptcy Court” describes the manner in which bankruptcy court proceedings are commenced, the unique forms of discovery available in bankruptcy courts, the procedures for approving settlements in bankruptcy courts, the limits on the bankruptcy courts’ ability to conduct jury trials, the routes and procedures for appeals from decisions of the bankruptcy courts, and the remedies available for contempt in the bankruptcy courts. “Getting Out of Bankruptcy Court” describes three ways that a proceeding may exit the bankruptcy courts: remand to state courts, abstention in favor of other courts, and withdrawal of the reference by the federal district courts. This paper does not include a discussion of the ordinary motion practice that drives a bankruptcy case, as this topic would require an in-depth analysis of the substance of the Bankruptcy Code and would be of less utility to the business lawyer and the non-bankruptcy litigator.

II. GETTING INTO BANKRUPTCY COURT

A. *Jurisdiction*

1. Development of Current Bankruptcy Court Jurisdiction

a. The Bankruptcy Act of 1898

Under the Bankruptcy Act of 1898, as amended in 1938 by the Chandler Act, bankruptcy proceedings were conducted under the jurisdiction of the United States district courts by “referees,” who were

“officers and employees of the district court.”¹ Referees were appointed, reappointed, and removed by the district courts. These referees, later called bankruptcy judges, had limited jurisdiction, and bankruptcy cases were always subject to removal to the district court by the district court judge.²

The Bankruptcy Act distinguished between matters over which the bankruptcy judge could exert jurisdiction (those within the court’s “summary jurisdiction”) and matters related to the bankruptcy over which the bankruptcy court could not exercise jurisdiction (“plenary matters”). To reach this distinction, the Bankruptcy Act first distinguished between controversies at law and in equity, on the one hand, and proceedings under the Bankruptcy Act, on the other hand. While a bankruptcy judge could determine the outcomes of proceedings arising under the Bankruptcy Act, his or her summary jurisdiction over controversies at law or in equity was limited to (1) disputes with respect to property in the actual or constructive possession of the bankruptcy court, and (2) disputes in which the adverse party consented to a trial before a bankruptcy judge.³ The summary jurisdiction of the bankruptcy court stood in contrast to the bankruptcy court’s lack of jurisdiction over plenary matters, which were triable only by the district court or relevant state court. The limitation on the power of the bankruptcy judge to hear and determine controversies such as preferences and fraudulent conveyances (plenary jurisdiction matters) came to be regarded as a major obstacle to the expeditious and efficient administration of bankruptcy cases.

b. The Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978,⁴ was designed, *inter alia*, to eliminate the jurisdictional limitations on the power of bankruptcy judges to determine the outcomes of disputes arising during the administration of bankruptcy proceedings. This goal was accomplished by creating a single bankruptcy forum with power to hear and resolve all disputes and lawsuits relating to the administration of the bankruptcy case.

The Bankruptcy Reform Act did not confer pervasive jurisdiction directly on the bankruptcy judges. Instead, the statute invested the district courts with power over cases and civil proceedings “arising

1. Pub. L. No. 55-541, 30 Stat. 544 (1898) (the “Bankruptcy Act”), §§ 1(8), 22, 33.

2. Bankruptcy Act § 38.

3. Bankruptcy Act §§ 2, 22, 23. *See also* 1 CHAPTER 11 THEORY AND PRACTICE: A GUIDE TO REORGANIZATION § 1:23, at 1-83 (James F. Queenan, Jr., *et al.*, eds., 1999).

4. 11 U.S.C. §§ 101, *et seq.*

under title 11 or arising in or related to cases under title 11.”⁵ The Bankruptcy Reform Act then directed that this jurisdictional power be exercised directly by the bankruptcy court, which was to be an entity separate and independent from the district court.⁶ The broad jurisdictional grant in the Bankruptcy Reform Act was intended to eliminate the pervasive litigation over jurisdiction that occurred under the Bankruptcy Act of 1898 by creating an independent bankruptcy court possessing broad jurisdictional power over all matters related to a bankruptcy case. The new bankruptcy court was to be an adjunct of the district court.

In passing the Bankruptcy Reform Act, Congress created, along with the new bankruptcy court, a new category of federal judge, called a United States Bankruptcy Judge. These judges were granted original and exclusive jurisdiction over bankruptcy cases and original, non-exclusive jurisdiction over civil proceedings “arising under,” “arising in,” or “related to” cases under the Bankruptcy Reform Act, including jurisdiction over all property of the debtor, wherever located.⁷ The bankruptcy judges were vested with the powers of courts of equity, law, and admiralty and were authorized to issue any order, process, or judgment appropriate to carry out the provisions of the new Bankruptcy Reform Act, including the issuance of writs of habeas corpus.⁸ The bankruptcy judges were also expressly empowered to conduct jury trials.⁹ Lastly, the bankruptcy judges were authorized to decline to hear a particular proceeding within the bankruptcy court’s jurisdiction and to exercise this discretion to abstain without review by appeal.¹⁰

The district court retained jurisdiction over proceedings seeking to enjoin an action in another court, certain criminal contempt proceedings, and appeals from the bankruptcy court.¹¹

c. Northern Pipeline Construction v. Marathon Pipeline Company

The system contemplated by the Bankruptcy Reform Act of 1978 never had an opportunity to take root. The system failed on June 28, 1982, when the United States Supreme Court handed down its decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*¹²

5. 28 U.S.C. § 1471(b) (repealed).

6. 11 U.S.C. § 1471(c) (repealed).

7. 28 U.S.C. § 1471 (repealed).

8. 28 U.S.C. §§ 1481 and 2256 (repealed).

9. 28 U.S.C. § 1480 (repealed).

10. 28 U.S.C. § 1471(d) (repealed).

11. 28 U.S.C. §§ 1481 and 1482 (repealed).

12. 458 U.S. 50 (1982).

In a confusing four-justice plurality opinion, the Supreme Court declared that the broad jurisdictional powers granted to the bankruptcy court under the Bankruptcy Reform Act were unconstitutional. The essence of the holding by the Supreme Court was that Congress could not constitutionally imbue Article I adjunct judges with the authority to adjudicate constitutional and state law rights on a final basis, where the adjunct judges were not appointed under or subject to the protections of Article III.¹³

The Supreme Court stayed the effective date of its decision in *Marathon* until October 4, 1982, to allow Congress to revise the statute. Congress failed to act by that date or to meet subsequent extensions, and the district courts had no choice but to reappoint as magistrates the bankruptcy judges whose terms expired and to adopt emergency rules in order to keep the system functioning.

d. The Bankruptcy Amendments and Federal Judgeship Act of 1984

A final resolution of the jurisdictional problems of the bankruptcy system was reached on July 10, 1984, when Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”). That legislation amended 28 U.S.C. § 1334, which was the pre-1978 bankruptcy jurisdiction statute, to provide the district courts with original and exclusive jurisdiction over all cases under title 11 and original but not exclusive jurisdiction over all civil proceedings “arising under title 11, or arising in or related to cases under title 11.” Under 28 U.S.C. § 151, bankruptcy judges were authorized to act as “units” of the district courts, and, under 28 U.S.C. § 157(a), the district courts were empowered to refer to the bankruptcy court all cases under title 11 and all proceedings under, arising in, or related to a case under title 11. Orders have been entered in every judicial district referring such cases and proceedings to the bankruptcy courts. However, the district court remains the “court of bankruptcy” under the BAFJA just as it was under the Bankruptcy Act of 1898.

2. Personal Jurisdiction of the Bankruptcy Courts

The standards for personal jurisdiction in bankruptcy cases are very broad, with some variation from circuit to circuit. Courts generally agree that defendants do not need to have minimum contacts with the forum state, but rather need to have minimum contacts only with the

13. Such protections include appointment for life and protection from salary decrease while in office. See U.S. Const. art. III, § 1.

United States as a whole.¹⁴ Courts often point to Bankruptcy Rule 7004, which provides for nationwide service of process by first-class mail, as the basis for the broad personal jurisdiction of the bankruptcy courts.¹⁵

However, courts disagree on whether due process concerns require courts to make a separate determination of the “fairness” of exerting jurisdiction over a defendant who lacks minimum contacts with a forum. Although a majority of courts has found that the national minimum contacts test alone fulfills the requirements of due process,¹⁶ a minority of courts has held that if the defendant demonstrates a liberty interest in not being compelled to the out-of-state forum, the court must then balance the defendant’s liberty interest against the strength of the policy interest in holding the proceeding in a central forum.¹⁷

In 1996, the Supreme Court, by amending the Bankruptcy Rules, clarified what is required to establish personal jurisdiction over foreign corporations under Bankruptcy Rule 7004(f). Serving a summons on a foreign defendant now clearly suffices to establish personal jurisdiction over that defendant where constitutionally permissible.¹⁸

14. See, e.g., *In re Federal Fountain*, 165 F.3d 600, 601 (8th Cir. 1999) (holding that United States contacts were sufficient to establish jurisdiction because of Bankruptcy Rule 7004(d)); *Brown v. C.D. Smith Drug Co.*, 1999 WL 709992 (D. Del. 1999) (same).

15. See *id.*; *Federal Fountain*, 165 F.3d at 601. Courts have consistently found notice by mail in accordance with Bankruptcy Rule 7004 constitutional. See *id.* (stating that elementary, widely-accepted legal principles provide foundation for proposition that Bankruptcy Rule 7004(d) is constitutional).

16. See, e.g., *Federal Fountain*, 165 F.3d at 601 (noting that nothing in case law suggests that fairness test is required); *In re Celotex Corp.*, 124 F.3d 619, 628-30 (4th Cir. 1997) (stating in dicta that only relevant question is whether defendant possesses sufficient minimum contacts with the U.S.); *Brown*, 1999 WL709992 at *3 (stating that majority of lower courts have concluded that defendant need only have minimum contacts with the U.S., and analogizing situation to circuit court rulings that under non-bankruptcy statutes providing for nationwide service of process, only existence of minimum contacts with U.S. is relevant); *Medical Mutual of Ohio v. de Soto*, 245 F.3d 561, 567-68 (6th Cir. 2001) (holding that showing of minimum contacts with United States fulfills due process personal jurisdiction concerns under ERISA nationwide service of process provision).

17. See *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 945-47 (11th Cir. 1997) (finding in RICO case that due process required both an examination of minimum contacts with U.S. and a comparison of liberty interest of defendant with federal interests, but that defendant had not shown that it would be “severely disadvantaged,” and so no liberty interest was at issue in case); *Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000) (same, but ERISA case); *Glinka v. Abraham and Rose Co. Ltd.*, 199 B.R. 484, 497 (D.Vt. 1996) (stating in dicta that test for bankruptcy personal jurisdiction would involve inquiry into minimum contacts with the U.S. and reasonableness of forum to defendant); *In re Pacques*, 277 B.R. 615, 624 & 628 (E.D. Penn. 2000) (finding no substantial unfairness to foreign defendant sufficient to violate fairness prong of due process test in bankruptcy case).

18. Bankruptcy Rule 7004(f). See also *In re Pintlar*, 133 F.3d 1141, 1144-47 (9th Cir. 1998) (discussing operation of Bankruptcy Rule 7004(f)); *In re Pacques*, 277 B.R. 615, 629-38 (E.D.

In contrast to general federal court diversity jurisdiction, there is no “amount in controversy” requirement to establish bankruptcy jurisdiction.¹⁹ Similarly, a majority of courts has found that the monetary requirement for pursuit of a chapter 13 case under section 109 is an eligibility requirement, not a jurisdictional requirement, so courts whose cases are found ineligible for chapter 13 treatment may retain jurisdiction over the conversion of the case to chapter 7.²⁰

Even if a bankruptcy court would not otherwise have jurisdiction over a particular party or entity, a party may consciously or inadvertently consent to the bankruptcy court’s jurisdiction, most commonly by filing a claim against the debtor.²¹ Additionally, failure to timely object to the bankruptcy court’s personal jurisdiction may result in a waiver of that objection.²²

3. *In Rem* Jurisdiction of the Bankruptcy Courts

Two statutes provide the bankruptcy courts with *in rem* jurisdiction. First, 28 U.S.C. § 1334(e) states:

The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.²³

Second, section 541 of the Bankruptcy Code establishes an estate of the debtor as of the commencement of the bankruptcy case that includes all property and property rights of the debtor as of that date.

Together, section 1334(e) of Title 28 and section 541 of the Bankruptcy Code provide the district courts, and thus the bankruptcy

Penn. 2000) (explaining pre-1996 confusion about personal jurisdiction over foreign corporations and explaining operation of Bankruptcy Rule 7004 generally); *In re North*, 279 B.R. 845, 851-53 (Bankr. D. Ariz. 2002) (holding that the national contacts test is the measure for personal jurisdiction over foreign corporations even if the actual method of service was valid under a different rule of federal procedure). A full discussion of the interrelationship between domestic and foreign bankruptcy proceedings (as controlled by 11 U.S.C. § 304) is beyond the scope of this paper.

19. See *In re Griggs*, 181 B.R. 111 n.6 (Bankr. N.D. Ala. 1994); *Rudd v. Laughlin*, 866 F.2d 1040, 1041-42 (8th Cir. 1989).

20. See *id.* at 113 (noting that Fifth, Eighth and Ninth Circuits find Section 109 requirement to be one establishing eligibility, not jurisdiction); *In re Verdunn*, 210 B.R. 621, 623-24 (Bankr. M.D. Fla. 1997) (acknowledging split among courts).

21. See *Langenkamp v. C.A. Culp*, 498 U.S. 42, 44-45 (1990) (holding that party filing proof of claim submits itself to equity jurisdiction of bankruptcy court, and so waives its right to a jury trial); *In re PNP Holdings Corp.*, 99 F.3d 910 (9th Cir. 1996) (holding that foreign corporation consents to court’s jurisdiction by filing proof of claim).

22. See *In re I.A. Durbin, Inc.*, 62 B.R. 139, 144 (S.D. Fla. 1986) (by delaying objection until eve of trial, and by joining in counterclaim without stating non-consent to jurisdiction, creditor was found to have consented to jurisdiction of bankruptcy court).

23. This provision replaced and is identical to the former 28 U.S.C. § 1334(d).

courts, with *in rem* jurisdiction over all property of the debtor wherever that property may be situated.²⁴ This *in rem* jurisdiction extends to all property in the actual or constructive possession of the debtor.²⁵ The bankruptcy court loses jurisdiction over the debtor's property only when the property is lawfully transferred out of the estate.²⁶

The *in rem* jurisdiction of the bankruptcy courts generally takes precedence over the jurisdiction of other federal and state courts.²⁷ However, the recent decisions of the Second Circuit in the *NextWave Personal Communications, Inc.* bankruptcy have restricted the ability of the bankruptcy courts to hear cases involving federal regulatory matters where Congress has delegated exclusive authority over such matters to the federal executive branch.²⁸

The doctrinal ground grows vague at the intersection of the bankruptcy courts' *in rem* jurisdiction and their personal jurisdiction. May the debt of a creditor be adjudicated by a bankruptcy court pursuant to its *in rem* jurisdiction over the debtor and its estate even where the bankruptcy court lacks personal jurisdiction over the creditor? The Supreme Court has recently held, based in part on Supreme Court precedent in *California v. Deep Sea Research, Inc.*,²⁹ that the bankruptcy courts' *in rem* jurisdiction may be a sufficient basis for an action by a debtor against a state to discharge the state's claim against the debtor, even where the state alleges that the bankruptcy court

24. See *In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) (noting that under section 1334(e) (formerly 1334(d)), creditors must enforce their rights in the bankruptcy court regardless of the location of the creditor or the property).

25. See *In re Fedpak Systems, Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (stating that bankruptcy court has jurisdiction over property owned by or in the actual or constructive possession of the debtor, but finding that property legitimately sold outside of the estate passed beyond court's jurisdiction).

26. See *id.* at 214.

27. See *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 383-87 (6th Cir. 2002) (explaining in detail extent of bankruptcy court's exclusive and non-exclusive jurisdictions over property and holding that bankruptcy court possessed exclusive jurisdiction over action by Department of Labor to recover business records produced using illegal labor because action did not qualify under police power exception to jurisdiction); *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 303-04 (4th Cir. 2001) (holding that jurisdiction over property belonged in bankruptcy court rather than in court in which receivership proceeding was filed); *In re White*, 851 F.2d 170, 172-74 (6th Cir. 1988) (holding that while bankruptcy stay prevented pursuit of state court divorce proceeding, bankruptcy court did not abuse its discretion by lifting the stay to allow the state court proceeding to continue); *Adams v. S/V "Tenacious"*, 203 B.R. 297, 299 (D. Alaska 1996) (holding that bankruptcy court possessed jurisdiction to decide admiralty claims related to estate property).

28. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000); *In re F.C.C.*, 217 F.3d 125 (2d Cir. 2000), *cert. denied*, 531 U.S. 1029 (2000).

29. 523 U.S. 491 (1998).

lacks personal jurisdiction because of Eleventh Amendment sovereign immunity.³⁰

4. Subject Matter Jurisdiction of the Bankruptcy Courts

a. The Distinction Between Core Proceedings and Non-Core Proceedings

Bankruptcy courts' subject matter jurisdiction is divided into two categories: the courts' extensive jurisdiction over "core" matters, and the courts' more limited jurisdiction over "non-core" matters. Bankruptcy judges have an affirmative duty to determine whether a proceeding is a core or non-core proceeding.³¹

The distinction between core and non-core proceedings is relevant for two main reasons. First, section 157(c)(1) states that the bankruptcy courts may hear "non-core" but "related to" proceedings but may not enter final orders or judgments in such matters—the bankruptcy courts may only submit proposed findings of fact and conclusions of law regarding such proceedings to the district court. The district court judge must then consider the bankruptcy court findings and conclusions, review *de novo* any matter to which a party below has objected, and enter a judgment.³² The parties to a proceeding may, however, consent to the entry of judgment by a bankruptcy judge in a non-core proceeding pursuant to section 157(c)(2).³³ The second reason the distinction is important is that bankruptcy courts may not conduct jury trials in non-core matters. Therefore, if a party possesses a right to a jury trial in a non-core case, the bankruptcy court may not be able to hear that case.³⁴

Initially, commentators and practitioners were concerned that the core/non-core distinction would recreate the summary/plenary jurisdiction battles of the past. In part, such fears have been allayed over time, as bankruptcy courts have generally been found to possess expansive jurisdiction to hear most matters affecting a bankruptcy. Still,

30. See *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

31. 28 U.S.C. § 157(b)(3).

32. Bankruptcy Rule 9033 outlines the procedure for implementing this provision of section 157. Although Bankruptcy Rules 7008(a) and 7012(b) require that complaints, counterclaims, and cross-claims allege whether a proceeding is core or non-core and plead consent or non-consent, the Bankruptcy Rules do not provide a stand-alone process for bringing this jurisdictional issue to the bankruptcy judge's attention so that a formal ruling can be made early in the litigation.

33. The only exception to this rule is for personal injury and wrongful death claims, which are designated as a special category of non-core proceedings and may be tried only by the district court. 28 U.S.C. § 157(b)(5).

34. See *In re Northwestern Institute of Psychiatry*, 268 B.R. 79, 85 (Bankr. E.D. Penn. 2001) (reviewing consequences of case being labeled "non-core" rather than "core").

the distinction between core and non-core matters has resulted in frequent litigation of jurisdictional issues, perhaps because statutory imprecision and the absence of legislative history have produced case law that can be cited to support almost any reasonable position.

b. Core Proceedings

Under 28 U.S.C. § 157(b)(1), the bankruptcy courts have the power to “hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11,” and to enter final orders and judgments as to those matters. Section 157(b)(2) then sets forth a non-exclusive list of core proceedings. This list encompasses almost every conceivable bankruptcy-related subject and could be read to exceed the boundaries of the *Marathon* decision. Therefore, a determination of whether a matter is core or non-core depends not only on the statutory grant of jurisdiction, but also on the limits provided by constitutional doctrine.

Under the list set forth in 28 U.S.C. § 157(b)(2), core proceedings include, but are not limited to:

- matters concerning the administration of the estate;
- allowance or disallowance of claims against the estate or exemptions from the property of the estate, and estimation of claims or interests for the purposes of confirming a plan of reorganization under chapter 11, 12, or 13 of title 11, but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- counterclaims by the estate against persons filing claims against the estate;
- orders in respect to obtaining credit;
- orders to turn over property of the estate;
- proceedings to determine, avoid, or recover preferences;
- motions to terminate, annul, or modify the automatic stay;
- proceedings to determine, avoid, or recover fraudulent conveyances;
- determinations as to the dischargeability of particular debts;
- objections to the discharge;
- determinations of the validity, extent, or priority of liens;
- confirmations of plans;
- orders approving the use or lease of property, including the use of cash collateral;

- orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
- recognition of foreign proceedings and other matters under the new chapter 15.

As discussed above, it is impossible to state with certainty the precise meaning or limit of each of these categories of core matters, which are in any event not exhaustive. The determination of whether a particular matter is a core or non-core proceeding will ultimately depend upon the circumstances of the particular case.

Bearing this difficulty in mind, it is possible to synthesize court decisions into a rough test, in the form of a series of questions to be asked when confronted with the core/non-core issue.

The first question to be asked is whether the proceeding clearly belongs to one of the categories listed in section 157(b). Courts have had an easier time finding that matters are core proceedings when the cases unambiguously fit into one of the section 157(b) categories. Examples of proceedings that clearly meet one of the categories are those involving liens and those involving the turnover of funds of the debtor.³⁵

Whether or not the proceeding is clearly within one of the section 157(b) categories, it should next be asked whether the proceeding “invoke[s] a substantive right provided by title 11” or whether it is “a proceeding that, by its nature, could arise only in the context of a bankruptcy case,” in order to ensure that the constitutional strictures of *Marathon* are met.³⁶ Some courts have expressly noted that, while section 157(b)(3) specifically states that the determination of whether a suit is a core or non-core proceeding should not be made solely on the basis of whether state law (rather than federal bankruptcy law) is

35. See *In re Lionel Corporation*, 29 F.3d 88, 92 (2d Cir. 1994) (stating in case involving mechanics' lien that jurisdiction was “clearly established” under Section 157(b)(2)(G)); *In re Silva*, 185 F.3d 992 (9th Cir. 1999) (stating that the Ninth Circuit has “expressly” held that bankruptcy courts have authority to require the turnover of property of the estate pursuant to Section 157(b)(2)(E)).

36. *Halper v. Halper*, 164 F.3d 830, 836 (3d Cir. 1999) (citing cases and noting that this test has been followed by numerous other circuits, including the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits); *In re Toledo*, 170 F.3d 1340, 1348-49 (11th Cir. 1999) (tracing history of the test back to the Fifth Circuit decision in *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

implicated, many decisions show that the implication of state law is a primary factor in the balance.³⁷

Third, it is helpful to ask whether the proceeding involves property of the estate or otherwise affects the debtor directly. Generally, only proceedings involving or affecting property of the estate are within the core jurisdiction of the bankruptcy court.³⁸ The guiding principle behind this guideline is that a bankruptcy court should not have core jurisdiction over any suit that meets the section 157(b) categories only in a technical sense; its jurisdiction should be limited to matters concerning the debtor and its assets.

Finally, it should be asked whether the defendant has filed a proof of claim in the case related to the dispute at hand. Under section 157(b)(2)(B), when a defendant (even prior to representation by counsel) files a claim, the bankruptcy court obtains jurisdiction to rule on the underlying bases of the claim.³⁹ Thus, the actions of the defendant can allow the bankruptcy court to take jurisdiction in cases in which jurisdiction would otherwise be lacking—a situation commonly referred to as “jurisdiction by ambush.”

While the constitutional and statutory inquiries are useful, specific areas of the law, particularly those that are litigated often, may have their own tests for determining whether a proceeding is core or non-core. For example, the extent to which bankruptcy courts have jurisdiction to interpret the terms of pre- and post-petition contracts has been the subject of a wide disagreement among the circuit courts.⁴⁰

c. Non-Core Proceedings: Pushing the Limits

28 U.S.C. § 157 gives the bankruptcy courts jurisdiction to hear non-core but “related to” proceedings, although the bankruptcy court must send its findings to the district court for entry of a final order or judg-

37. See, e.g., *Toledo*, 170 F.3d at 1350.

38. See *Silva*, 185 F.3d at 994-95 (finding that the Trustee did plead that the account to be turned over was property of the estate with sufficient specificity); *In re Gallucci*, 931 F.2d 738 (11th Cir. 1991) (holding that property to which the debtor became entitled after the commencement of the case was not property of the estate, and so the bankruptcy court did not have jurisdiction to preside over an action to compel a turnover of the property under section 157(b)(2)(E)).

39. See *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1371 (Fed. Cir. 1999) (finding that upon filing by defendant of what amounted to proof of claim in bankruptcy case, bankruptcy court obtained jurisdiction to determine validity and infringement of patents); *In re G.I. Industries*, 204 F.3d 1276, 1279-80 (9th Cir. 2000) (explaining that bankruptcy court obtained jurisdiction to interpret contract when creditor filed proof of claim related to contract in bankruptcy court).

40. For a thorough discussion of the law in this area, especially as it applies to insurance contracts, see *Northwestern*, 268 B.R. at 84-92.

ment unless the parties agree that the bankruptcy court may enter the final order. Thus, “related to” jurisdiction expresses the outer limit of both the district courts’ and the bankruptcy courts’ bankruptcy jurisdiction. The principal case defining that boundary is *Pacor, Inc. v. Higgins*,⁴¹ which held that “related to” jurisdiction exists if:

the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.⁴²

The Supreme Court has approved the reasoning behind the *Pacor* decision without endorsing the specific test used, although the Supreme Court also cautioned that bankruptcy court “related to” jurisdiction is not limitless.⁴³

Most circuit courts have adopted either the *Pacor* test or tests similar to it.⁴⁴ In a few recent cases, though, courts have applied stricter definitions to the question of bankruptcy court non-core jurisdiction.⁴⁵

Given the vagueness of the *Pacor* test, courts must determine on a case-by-case basis whether a particular matter is “related to” a bankruptcy proceeding. Courts have generally found the following factors relevant to the determination of whether a bankruptcy court may exercise non-core jurisdiction over a proceeding: (a) whether the civil proceeding involves property of the estate or a cause of action which is property of the estate; (b) whether the civil proceeding will increase or decrease assets of the estate, or impact administration of the estate; (c) whether the civil proceeding has issues of fact in common with a controversy over which the bankruptcy court clearly has jurisdiction (sometimes placed under the umbrella of “judicial economy”); (d) whether the estate has disclaimed or abandoned its interest in the civil proceeding or the subject matter thereof; (e) whether the debtor is a

41. 743 F.2d 984 (3d Cir. 1984).

42. *Pacor*, 743 F.2d at 994 (emphasis in original).

43. *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) (holding that bankruptcy court had exclusive jurisdiction over determination of whether judgment creditors could execute against debtor’s surety on a supersedeas bond posted by debtor where the judgment that occasioned the bond had become final).

44. *See In re WorldCom, Inc.*, 2003 WL 716243, at *6 (S.D.N.Y. 2003) (noting that similar tests have been adopted in Fifth, Eleventh, Sixth, First, Eighth, Fourth, and Second Circuits). *Compare Fedpak Systems*, 80 F.3d at 213-14 (noting that Seventh Circuit follows more restrictive test that states that a case is “related to a bankruptcy when the dispute affects the amount of property for distribution or the allocation of property among creditors”).

45. *See WorldCom*, 2003 WL 716243 at *6 (discussing and criticizing several recent Third Circuit decisions that have applied tests stricter than the *Pacor* test); *Fedpak Systems*, 80 F.3d at 214 (noting stricter definition of “related to” used in Seventh Circuit).

real party in interest in the civil proceeding; (f) whether the civil proceeding is based upon or seeks to enforce or implement a prior order of another court; (g) whether the civil proceeding was filed in the bankruptcy court for the convenience of non-debtor parties; (h) whether the civil proceeding will have “res judicata” or “collateral estoppel” effect on or create automatic liability on a claim in the bankruptcy case; (i) whether the civil proceeding is “intertwined with the bankruptcy case”; and (j) whether the debtor is using the bankruptcy system merely to gain an advantage in litigation properly belonging to state courts.⁴⁶

Issues regarding the extent of the “related to” jurisdiction of the bankruptcy courts can arise in many contexts. Areas on the fringe of bankruptcy court jurisdiction include disputes between non-debtor third parties, disputes over assets or causes of action that are not property of the estate, and actions to enjoin lawsuits between third parties.⁴⁷ For example, it has been held that the bankruptcy court has subject matter jurisdiction over interpleader actions to determine the proper disposition of funds where recovery by claimants against the funds would reduce claims against the estate, even where the funds are not property of the estate.⁴⁸ Similarly, bankruptcy courts have been held to have jurisdiction over claims by non-debtor plaintiffs against non-debtor defendants, where the non-debtor defendants intend to bring claims for contribution and indemnification against the debtor or where the debtor and the non-debtor defendants share joint insurance.⁴⁹

Actions to enforce or implement prior orders of the bankruptcy court may also be matters “related to” the bankruptcy proceeding and therefore within the court’s jurisdiction.⁵⁰ For example, bankruptcy

46. See *WorldCom*, 2003 WL 716243 at *6-9 (discussing factors (a), (b), (c), and (i) above); *Fedpak Systems*, 80 F.3d at 213-14 (discussing factors (a), (b), and (d) above); *Widewaters Roseland Center v. The TJX Companies, Inc.*, 135 B.R. 204, 207 (N.D.N.Y. 1991) (discussing factors (a), (b), and (i) above); 176-60 *Union Turnpike, Inc. v. Howard Beach Fitness Center, Inc.*, 209 B.R. 307, 314 (S.D.N.Y. 1997) (discussing factor (j) above).

47. See, e.g., *Widewaters Roseland*, 135 B.R. at 207 (stating that actions that involve third parties and that “bind a debtor, involve estate property, or concern the debtor-creditor or inter-creditor relationships are ‘related to’ bankruptcy proceedings”).

48. See *Richard E. Shaw and Associates, Inc. v. De Sante*, 2001 WL 790239 (S.D. Cal. 2001) (transferring interpleader action brought by party unrelated to the debtor to the bankruptcy court, where recovery by claimants against the fund would relieve the estate of obligations).

49. See *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996) (holding that bankruptcy court had jurisdiction over claims by tens of thousands of potential tort plaintiffs against debtor and non-debtors where non-debtors shared insurance with debtor and would seek contribution and indemnity from debtor).

50. This issue is of particular relevance to the enforcement of Bankruptcy Code section 363 sale orders, which usually purport to sell estate assets “free and clear of all liens, claims, and

courts have been held to have jurisdiction to enforce the provisions of a settlement agreement approved by the bankruptcy court even where those provisions primarily affect third parties.⁵¹ However, judges are generally reluctant to hear matters easily triable in other courts, preferring to spend their time and resources on bankruptcy matters.

5. Jurisdiction After Plan Confirmation or Case Closure

Courts agree that a bankruptcy court retains jurisdiction over a case after the confirmation of a chapter 11 plan of reorganization, but courts have split over whether that jurisdiction extends to matters beyond the implementation of the plan provisions.⁵² A common mechanism for retaining bankruptcy court jurisdiction after the confirmation of a plan is the drafting of expansive jurisdiction-retention language into the text of a plan or a proposed order confirming a plan. However, some courts have limited the availability of this mechanism.⁵³

Courts have split over whether a bankruptcy court has jurisdiction to hear related matters after the closing of a case.⁵⁴ Some courts have

encumbrances” and purport to enjoin any actions against the buyer for claims against the debtor. In a number of cases, a creditor has brought an action against the buyer of estate assets, alleging liabilities originally incurred by the debtor, on the theory of successor liability. The buyer-defendants have sought relief in the bankruptcy court, arguing that the bankruptcy court should enforce the injunction in its section 363 sale order. The bankruptcy court is then required to consider whether it has jurisdiction to enforce the order where the underlying dispute is between two non-debtors and has little or no bearing on the estate. *See, e.g., In re Paris Indus. Corp.*, 132 B.R. 504, 507-08 (D. Me. 1991); *In re Lawrence United Corp.*, 221 B.R. 661, 667 (Bankr. N.D.N.Y. 1998). Courts have in some instances allowed closed bankruptcy cases to be reopened for the purpose of hearing disputes regarding Section 363 sale orders between nondebtors. *See, e.g., In re Searles*, 70 B.R. 266, 274 (D.R.I. 1987); *In re Hicks*, 184 B.R. 954, 962 (Bankr. C.D. Cal. 1995). *But see In re Zerand-Bernal Group, Inc.*, 23 F.3d 159 (7th Cir. 1994).

51. *See In re Wolverine Radio Co.*, 930 F.2d 1132, 1144-45 (6th Cir. 1991) (holding that bankruptcy court possessed jurisdiction to dictate terms under which state agency could rate purchaser of estate property under plan providing that sale was “free and clear of all liens, claims and interests,” but finding against purchaser on the merits).

52. *See In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 288-89 (6th Cir. 2001) (noting disagreement among courts about scope of bankruptcy courts’ post-confirmation jurisdiction); *In re U.S. Brass Corp.*, 301 F.3d 296, 304 (5th Cir. 2002) (stating that the Fifth Circuit follows the “more exacting” theory, which limits bankruptcy courts’ post-confirmation jurisdiction to matters pertaining to the implementation or execution of the plan).

53. *See Local Bankruptcy Rules for the United States Bankruptcy Court for the District of New Hampshire*, LBR 3020-1(a) (containing an exhaustive list of matters for which jurisdiction may be retained post-confirmation).

54. *Compare In re Bass*, 171 F.3d 1016 (5th Cir. 1999) (holding that bankruptcy court has no jurisdiction after the closing of the case under 28 U.S.C. § 1334(b), even if one of the categories of 28 U.S.C. § 157(b)(2) is met), with *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989) (finding exception to general rule that dismissal of a bankruptcy case terminates all adversary proceedings when demanded by fairness and no undue inconvenience involved); *Leon v. Couri*, 1999 WL 1427724 at *3-4 (S.D.N.Y. 1999) (discussing case law supporting existence of jurisdiction after dismissal of bankruptcy case, but declining to exercise jurisdiction).

analogized the non-core jurisdiction of the bankruptcy court to “pendent” or “supplemental” jurisdiction in federal district court under 28 U.S.C. § 1367.⁵⁵ This analogy has provided some bankruptcy courts with a rationale for retaining jurisdiction over adversary proceedings even where the original bankruptcy case has been dismissed, if dismissal of the adversary proceeding would prejudice one of the parties or violate the interest of judicial economy.⁵⁶

Practically speaking, while judges have discretion to hear or not to hear post-confirmation and post-closing matters, they generally prefer to concentrate on ongoing cases and not to become entangled in issues that may be tried in another court. Often bankruptcy judges refer metaphorically to post-bankruptcy debtors as “children” who have “grown up” and must litigate in the “real world,” i.e., non-bankruptcy courts.

6. Section 105 of the Bankruptcy Code As a Basis for Jurisdiction

The traditional equity powers of the bankruptcy court are codified in 11 U.S.C. § 105 (commonly called the “All-Writs Statute”). Section 105 does not broaden the jurisdiction of the bankruptcy court, nor does it authorize the bankruptcy court to create rights not otherwise available under applicable law or to fill gaps in the legislation. Instead, the bankruptcy court’s power under section 105 is limited to enforcing rights under the Bankruptcy Reform Act through the exercise of equitable powers founded primarily in bankruptcy law itself.⁵⁷ Accordingly, attempts to use section 105 to provide relief not supported by the bankruptcy statute have typically failed.⁵⁸

55. See, e.g., *Smith*, 866 F.2d at 580.

56. See *id.* (finding test for retaining of jurisdiction with bankruptcy court after closure of case to be met where fairness and convenience favored retaining jurisdiction); *Leon*, 1999 WL, at * 3-4 (reviewing caselaw and finding that test for retaining of jurisdiction after closure of the underlying bankruptcy case was not met). Cf. n. 54 above (noting disagreement of courts on issue of post-closing jurisdiction).

57. See *In re Metromedia Fiber Network, Inc.*, Docket No. 04-2112-bk, at 12-13 (2d Cir. July 21, 2005); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004); *In re Circle Land and Cattle Corp.*, 213 B.R. 870, 877 (D. Kan. 1997) (stating that “most bankruptcy cases hold that § 105 is not a jurisdictional grant” and finding that bankruptcy court lacked jurisdiction to substantively consolidate debtor with non-debtor); *In re Deltacorp, Inc.*, 111 B.R. 419, 420 (Bankr. S.D.N.Y. 1990) (explaining that section 105 acts as an aid to jurisdiction, not to confer jurisdiction, because it does not create substantive rights that do not otherwise exist). See generally *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-308, 312 (1995) (analyzing limits of section 105 power by examining grant of jurisdiction in section 1334(b), and noting that discussion of jurisdiction was largely applicable to discussion of validity of injunction issued under section 105).

58. See *Circle Land*, 213 B.R. at 876-77 (finding that bankruptcy court had no jurisdiction to apply doctrine of substantive consolidation to consolidate the assets and liabilities of a non-debtor with those of the debtor and criticizing contrary cases for taking jurisdiction over a non-debtor corporation without express statutory authority); *In re Fesco Plastics Corp., Inc.*, 996 F.2d

Some courts have, however, utilized the authority granted in section 105 or other substantive provisions to devise creative solutions to difficult problems.⁵⁹ For example, courts have allowed specific payments to certain creditors, dubbed “critical vendors,” during the course of reorganization proceedings under section 105 in apparent contravention of the policy of equal distribution of assets, when doing so was necessary for the success of the reorganization.⁶⁰ Courts have also cited to 11 U.S.C. § 524(g), a section devoted to asbestos cases, for the proposition that bankruptcy courts have the authority to set up a trust into which future, post-bankruptcy asbestos claims must be channeled.⁶¹

B. Venue in the Bankruptcy Courts

There are two principal forms of bankruptcy venue: venue of cases under 28 U.S.C. § 1408 and venue of proceedings under 28 U.S.C. § 1409.⁶² The term “case” refers to the overall bankruptcy of a debtor, which is commenced by the filing of a voluntary or involuntary bankruptcy petition. The term “proceeding” refers to discrete disputes litigated within the context of a bankruptcy case, commenced by the filing of a motion or a complaint.

152 (7th Cir. 1993) (noting that section 105 power may not be exercised to contravene Bankruptcy Code provision or to achieve result not contemplated by Bankruptcy Code in denying interest on belated distributions to creditors and attorney fees from non-client creditors).

59. Some commentators distinguish between a court’s jurisdiction over a matter and its authority to take certain actions in that matter. However, these concepts often merge in the context of section 105.

60. See *In re Just for Feet, Inc.*, 242 B.R. 821, 824-26 (D. Del. 1999) (stating that Supreme Court has recognized courts’ authority to pay pre-petition claims of critical vendors under the “doctrine of necessity” and authorizing payments); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-79 (Bankr. S.D.N.Y. 1989) (explaining that courts are authorized to pay pre-petition claims where necessary to a reorganization under the doctrine of necessity or the “necessity of payment” rule); *In re Syntee Technologies, Inc.*, 2000 WL 33709667, *2-3 (Bankr. D.S.C. 2000) (same). *But compare In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (curtailing bankruptcy court’s authority under the Bankruptcy Code to authorize payments to pre-petition unsecured creditors under the so-called “critical vendors” application of the doctrine of necessity); *In re Coserv, L.L.C.*, 273 B.R. 487, 491-502 (Bankr. N.D. Tex. 2002) (examining historical development of doctrine of necessity and stating that resort to that doctrine is appropriate “only under the most extraordinary circumstances” in partially granting motion for payment of pre-petition claims).

61. For example, 11 U.S.C. § 524(g) was invoked in the Johns Manville bankruptcy in order to direct anticipated asbestos claims to a channeling trust. For a discussion of this case and the use of § 105 as a basis for jurisdiction generally, see Peter E. Meltzer, *Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties*, 71 AM. BANKR. L.J. 1 (Winter 1997).

62. A third kind exists for cases ancillary to foreign proceedings, but is too rare to merit discussion in this context.

A debtor can commence a case only in the district in which he, she, or it is domiciled, resides, has its principal place of business, or holds its principal assets, in each case for the 180 days preceding the filing or the longer period thereof—or a district where a case of an affiliated debtor is pending. Thus, if the debtor resides in the Southern District of New York for 89 of the 180 days prior to filing, but in the Eastern District of Massachusetts for 91 of the 180 days prior to filing, the Eastern District of Massachusetts would be the appropriate venue.⁶³ Whether a debtor is domiciled in a state is a question often involving the interpretation of state law.⁶⁴

The proper venue for a case is seldom difficult to determine, unless the debtor has its principal place of business in one district, its principal assets in another, and its domicile in a third.⁶⁵ The location of the debtor's "nerve center" may be an important factor in determining proper venue for a manufacturing operation.⁶⁶ The location of the debtor's assets may be a more significant factor in a real estate case.⁶⁷

Some cases are commenced in improbable venues due to the "affiliated debtor" rule. For example, the Eastern Air Lines bankruptcy was adjudicated in the Southern District of New York because one of Eastern's minor affiliates, Ionosphere Clubs, a New York corporation, first filed its bankruptcy petition in that venue. More recently, the chapter 11 cases of Enron and all of its affiliates were filed in the Southern District of New York because an affiliate, a New York corporation, first filed its petition in that venue. This rule clearly permits the "tail to wag the dog" and encourages multi-state conglomerates to consider carefully the venue in which they would like their cases to proceed. Practically, this rule streamlines the bankruptcy process by allowing all affiliates to have their cases heard before a single court.

Many business bankruptcies are filed in Delaware because that is the state of the debtor's business organization. A Delaware corporation with a chief executive office in Massachusetts will have at least

63. An individual debtor may have only one residence, even if he has multiple homes. See *In re Handel*, 253 B.R. 308, 311 (1st Cir. B.A.P. 2000).

64. See *In re Segno Communications, Inc.*, 264 B.R. 501, 508 (Bankr. N.D. Ill. 2001) (holding that dissolved Illinois corporation remained domiciled in Illinois following the effective date of its dissolution, based upon Illinois "winding up" statute).

65. See, e.g. *In re Bell Tower Associates, Ltd.*, 86 B.R. 795 (Bankr. S.D. N.Y. 1988) (venue proper in Texas, where primary physical asset was located and controlled, even though general partner kept records in New York and majority of partners lived in New York).

66. See *In re Peachtree Lane Assocs., Ltd.*, 188 B.R. 815, 830 (N.D. Ill. 1995); *In re Commonwealth Oil Refining Co., Inc.*, 596 F.2d 1239 (5th Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

67. See *In re Bell Tower Assocs., Ltd.*, 86 B.R. at 795. But see *In re Monterey Equities - Hillside*, 73 B.R. 749, 753 (Bankr. N.D. Cal. 1987) (proper venue existed at location of partnership's principal place of business even though primary assets were located in other states).

two choices for the venue of its bankruptcy case, and it may prefer one venue over the other based on substantive differences between First Circuit and Third Circuit law.

Standing to challenge the venue of a bankruptcy case is broadly granted and is possessed by defendants in adversary proceedings brought by debtors.⁶⁸ Parties may waive their rights to challenge venue if they do not raise the issue in a timely manner.⁶⁹ Bankruptcy courts have no discretion to retain cases that have been filed in an improper venue.⁷⁰ However, improper venue often goes unchallenged and those cases remain where they were first filed.

Generally, venue for proceedings related to a bankruptcy case is proper in the district in which the case is pending.⁷¹ A trustee may, however, commence a proceeding to recover a money judgment of less than \$1000, a consumer debt of less than \$15,000, or a non-consumer debt against a non-insider of less than \$10,000, only in the district where the defendant resides.⁷² Additional qualifications to the general rule are set forth at 28 U.S.C. §§ 1409(c) through (e).⁷³

A case or proceeding may be transferred from one district to another either (a) "in the interest of justice" or (b) "for the convenience of the parties."⁷⁴ Under Bankruptcy Rule 1014, such orders may be entered by the bankruptcy court. If more than one petition is filed for the same or affiliated debtors in different districts, the Bankruptcy Rules make clear that a motion for transfer of venue must be filed in the district in which the petition filed first is pending. For removed actions, motions to transfer venue should be heard before motions for remand, and, if venue is transferred, the court in the new venue is the appropriate court to hear the remand action.⁷⁵

There has been some dispute as to whether transfer of venue for adversary proceedings related to bankruptcy cases is governed by 28

68. See *Peachtree Lane*, 188 B.R. at 826.

69. See *In re The Bennett Funding Group, Inc.*, 259 B.R. 243, 248 (N.D.N.Y. 2001); *In the Matter of the Sports Club at Illinois Center*, 132 B.R. 792, 800 (Bankr. N.D. Ga. 1991) (holding challenge filed one week after bankruptcy petitions were filed was timely).

70. See *Peachtree Lane*, 188 B.R. at 831.

71. 28 U.S.C. § 1409(a).

72. 28 U.S.C. § 1409(b).

73. For example, section 1409(d) provides that a bankruptcy trustee may commence an action arising after a bankruptcy filing only in a venue where that action could have been commenced under nonbankruptcy venue provisions. This section has been interpreted as an exception to the "home court presumption" discussed in more detail below. See *In re Eagle-Picher Industries, Inc.*, 162 B.R. 140, 142 (Bankr. S.D. Ohio 1993).

74. 28 U.S.C. § 1412(a)(2). See *In re Vital Link Lodi, Inc.*, 240 B.R. 15, 19 (Bankr. W.D. Mo. 1999).

75. See *In re Santa Clara County Child Care Consortium*, 223 B.R. 40, 49 (1st Cir. B.A.P. 1998).

U.S.C. § 1412, the bankruptcy-specific venue transfer statute, or by 28 U.S.C. § 1404, the venue transfer statute generally applicable to federal cases.⁷⁶ The difference will in most cases be immaterial, because the factors considered under each statute are similar,⁷⁷ but section 1412 may allow more flexibility in venue transfer where the action would not have been properly brought in the new venue but for the pendency of the bankruptcy case in that new venue. In particular, section 1412 carries a judicially-created “home court presumption” that the bankruptcy court in which the debtor’s case is pending is the proper venue for all proceedings related to the case, including state court proceedings removed to federal courts in sister districts.⁷⁸ Although the “home court presumption” is subject to the section 1409(d) exception for postpetition actions, section 1404 effectively places the section 1409(d) limitation on all prepetition and postpetition actions.

One court has held that section 1404 applies only to improperly venued cases, while section 1412 applies to “cases where venue is appropriate in the first instance, but transfer is appropriate ‘in the interest of justice or for the convenience of the parties.’”⁷⁹ The court in *Columbia Western* also held that transfer of the case to a proper venue, not dismissal of the case, was the appropriate remedy under 28 U.S.C. § 1406, which permits either transfer or dismissal.

Opportunity for interlocutory review of venue transfer is quite limited: “It is a well-established rule in this circuit (and generally) that [district court] ‘orders transferring venue are not immediately appealable.’”⁸⁰ Mandamus relief may be available, although its nature is “more circumscribed than review by appeal.”⁸¹

76. See *Searcy v. Knostman*, 155 B.R. 699, 706 (S.D. Miss. 1993) (citing cases on both sides of the issue); *In re Harnischfeger Indus., Inc.*, 246 B.R. 421, 434-35 (Bankr. N.D. Ala. 2000).

77. Some section 1404 factors are as follows: location of counsel, location of books and records, ease of access to proof, where the case can be tried expeditiously and inexpensively, the cost of obtaining attendance of witnesses and other trial expenses, the place of the alleged wrong, the possibility of delay and prejudice if transfer is granted, and the plaintiff’s choice of forum (which is a “very influential” factor). See *Searcy*, 155 B.R. at 707-08. Some section 1412 “interest of justice” factors are as follows: economics of estate administration, presumption in favor of the “home court,” judicial efficiency, ability to receive a fair trial, the state’s interest in having local controversies decided within its borders by those familiar with its laws, enforceability of any judgment rendered, and plaintiff’s choice of forum. See *Harnischfeger*, 246 B.R. at 435-37. Section 1412 “convenience of the parties” factors include the following: location of the plaintiff and defendant, ease of access to necessary proof, availability of subpoena power for unwilling witnesses, and expenses related to obtaining witnesses. See *id.* at 437.

78. See *Harnischfeger*, 246 B.R. at 439.

79. *In re Columbia Western, Inc.*, 183 B.R. 660, 665 (Bankr. D. Mass. 1995).

80. *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002).

81. *Id.*

C. *Removal of State Court Actions to the Bankruptcy Courts*

One method for a suit to enter bankruptcy court is through a removal of that proceeding from the state court where it originated. It should be noted that state court actions generally may not be commenced or continued against a bankruptcy debtor due to the broad "automatic stay" contained in section 362 of the Bankruptcy Code. However, the bankruptcy courts may have concurrent jurisdiction over some state court actions against parties other than the debtor,⁸² state court actions in which the debtor is the plaintiff, and state court actions for which the bankruptcy court has lifted the automatic stay. Bankruptcy courts are likely to hear state court actions over which they have concurrent jurisdiction in the interest of litigating all matters relating to the debtor in a single forum.

The removal of state court actions related to bankruptcy cases is governed by 28 U.S.C. § 1452(a). That section states that, with the exception of proceedings before the United States Tax Court and actions by governmental units to enforce regulatory or police powers, any civil action may be removed to the district court as long as it fits within the jurisdictional parameters of 28 U.S.C. § 1334, in other words, as long as it is least "related to" a bankruptcy case. The procedural requirements for removal, including the time within which a notice of removal must be filed, are governed by Bankruptcy Rule 9027.

Bankruptcy Rule 9027(a)(1) refers to filing the notice of removal "with the clerk for the district and division" in which the removed action is pending. A number of courts have held that in light of the definition of "clerk" in Bankruptcy Rule 9001(3), the reference to the "clerk" in Bankruptcy Rule 9027(a)(1) means the bankruptcy clerk's office, unless the bankruptcy and district court clerks have been merged into one.⁸³ The notice of removal must contain (a) a signed statement of the facts warranting removal and (b) a statement of whether the proceeding upon removal of the claim will be core or non-core and, if non-core, whether the party filing the notice consents to entry of final orders by the bankruptcy judge. Any party that has filed a pleading in connection with the removed action, other than the party filing the notice of removal, must file a statement admitting or denying the allegation in the notice as to whether the proceeding is non-core. If the statement admits that the proceeding is non-core, Bankruptcy Rule 9027(e)(3) requires that the statement provide

82. It remains an open question whether an action against a party other than the debtor could be sufficiently related to a debtor's case to confer jurisdiction on the bankruptcy court, but would not so effect the debtor as to be barred by the automatic stay.

83. See *In re Aztec Indus., Inc.*, 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987).

whether the party consents to the entry of final orders by the bankruptcy judge. Removal is effective upon the filing of a copy of the removal notice with the clerk of the court from which the action is removed and requires no judicial action. A challenge to removal is styled as a motion to remand.⁸⁴

Bankruptcy Rules 9027(a)(2) and (a)(3) contain the deadlines for filing notices of removal where the civil action to be removed was initiated before the commencement of the bankruptcy case (generally ninety days after the bankruptcy filing) and where the civil action to be removed was initiated after the commencement of the bankruptcy case (generally thirty days after receipt of notice of the civil action).

In the nonbankruptcy context, removal of state court actions to federal courts is governed by 28 U.S.C. § 1441. Under that statute, it is clear that the consensual joinder of all defendants is required for removal.⁸⁵ Some courts have held that this rule, often called the “Rule of Unanimity,” also applies to bankruptcy removal under 28 U.S.C. § 1452.⁸⁶ However, other courts have held that neither the section 1452 statute nor its context extends the Rule of Unanimity to bankruptcy removal.⁸⁷

A state court action must be removed to the federal district court in the state where the state court action is pending, and from there it may be referred to the bankruptcy court in that district. In order to transfer a case which has been removed to one federal district to a district (or bankruptcy) court in another federal district, a motion to transfer venue pursuant to 28 U.S.C. § 1412 must be filed with the court to which the proceeding has been removed. Transfer of venue, both generally and in the specific case of removal, is discussed in detail in Section II.B. above.

D. *Intervention in the Bankruptcy Courts*

A party in interest could also enter a bankruptcy court through intervention in a pending action. Intervention in bankruptcy actions may occur either through Bankruptcy Rule 2018(a) (permissive intervention) or through Federal Rule 24 (permissive intervention or inter-

84. See *In re Santa Clara County Child Care Consortium*, 223 B.R. 40, 43 (1st Cir. B.A.P. 1998).

85. See *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257, 1262 (M.D. Ala. 2002).

86. See *Ross v. Thousand Adventures of Iowa, Inc.*, 178 F. Supp. 2d 996 (S.D. Iowa 2001) (stating that this is the majority rule and citing cases on both sides of the issue).

87. See *In re WorldCom Securities Litigation*, 2003 WL 716243 at *18 (S.D.N.Y. 2003); *In re Mid-Atlantic Resources Corp.*, 283 B.R. 176, 183 (S.D. W. Va. 2002) (stating that the Rule of Unanimity does not apply to bankruptcy actions in the Fourth Circuit).

vention as of right). Some confusion has resulted from the overlap in these intervention mechanisms.

1. Bankruptcy Rule 2018 and Bankruptcy Code Section 1109(b)

Bankruptcy Rule 2018(a) provides that the court may grant permissive intervention to any “interested entity,” generally or with regard to any specified matter, “for cause shown.” In making their decisions, courts have cited “whether intervention would result in undue delay or prejudice” and “whether the proposed intervenor’s interests are adequately protected by a party already present in the case” as questions relevant to the Bankruptcy Rule 2018(a) analysis.⁸⁸ These factors are similar to, and presumably derived from, Federal Rule 24(b) and related case law (discussed below).

The remainder of Bankruptcy Rule 2018 provides special rules for intervention by attorneys general of states, the Secretary of the Treasury of the United States, and labor unions. In addition, 28 U.S.C. § 2403 governs intervention by the Attorney General of the United States and the attorneys general of the states in particular circumstances, and section 307 of the Bankruptcy Code permits the United States Trustee to intervene in all bankruptcy proceedings.⁸⁹

As to the issue of standing to intervene as an “interested entity” under Bankruptcy Rule 2018(a), section 1109(b) of the Bankruptcy Code provides as follows:

A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under [chapter 11].

Neither “interested entity” nor “party in interest” is defined by the Bankruptcy Code. “The term ‘party in interest’ is broadly interpreted, but not infinitely expansive.”⁹⁰ In rulings on motions to intervene, courts construe the term “party in interest” to allow intervention where possible.

Because of its breadth, section 1109(b) could be read in conjunction with Bankruptcy Rule 2018(a) to confer an absolute right of intervention on all “parties in interest” in both adversary proceedings and contested matters in chapter 11 cases. However, some courts have held that Bankruptcy Rule 2018(a) and section 1109(b) do not grant an

88. See *Southern Boulevard, Inc. v. Martin Paint Stores*, 207 B.R. 57, 62 (S.D.N.Y. 1997).

89. See *In re Donovan Corp.*, 215 F.3d 929, 930 (9th Cir. 2000).

90. *Southern Boulevard*, 207 B.R. at 61 (holding that subtenant of debtor’s lessee is not a party in interest because it is too remote from the debtor and is analogous to a creditor of a debtor’s creditor).

unlimited right of intervention to all “parties in interests” in adversary proceedings in chapter 11 cases. Instead, these courts have held that the more limited Federal Rule 24 applies to all adversary proceedings and that the constitutional standing requirements must be satisfied in all cases of intervention.⁹¹

2. Federal Rule 24 and Bankruptcy Rule 7024

Federal Rule 24, made applicable in adversary proceedings through Bankruptcy Rule 7024 (and, at the court’s discretion, in contested matters through Bankruptcy Rules 9014 and 7024), provides for both intervention as of right and permissive intervention. Federal Rule 24(a) provides that a party shall be allowed to intervene in a proceeding as of right if either of two conditions are met. Under Federal Rule 24(a)(1), a party has a right to intervene where a federal statute confers on that party an unconditional right to intervene.⁹² Under Federal Rule 24(a)(2), a party has a right to intervene when that party:

claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

Under Federal Rule 24(b), permissive intervention, an intervenor must also meet one of two requirements. First, under Federal Rule 24(b)(1), the court may allow a party to intervene where a federal statute grants that party a conditional right to intervene. Second, under Federal Rule 24(b)(2), the court may allow a party to intervene where that party’s “claim or defense and the main action have questions of law or fact in common.” Federal Rule 24(b)(2) also states that “[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

91. See *Fuel Oil Supply and Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1287 (5th Cir. 1985) (holding that scope of section 1109 is limited by Federal Rule 24); *In re Newcare Health Corp.*, 244 B.R. 167, 170-72 (1st Cir. B.A.P. 2000) (holding that constitutional, prudential standing requirements apply without regard to Section 1109(b) and Bankruptcy Rule 2018(a)); *In re Charter Co.*, 50 B.R. 57, 61 (Bankr. W.D. Tex. 1985) (holding that Bankruptcy Rule 2018 and section 1109 apply only in contested matters and that Bankruptcy Rule 7024 and Federal Rule 24 apply in adversary proceedings).

92. It seems possible, under an argument similar to that raised in the *Newcare* case, that section 1109 of the Bankruptcy Code could satisfy Federal Rule 24(a)(1) or (b)(1). However, under the *Newcare* decision’s rationale, this “bootstrapping” argument would likely fail for the same constitutional reason set forth in that decision.

a. Intervention as of Right

Federal Rule 24(a)(2) sets forth a four-fold test for intervention as of right where no federal statute is involved: intervention will be allowed where (1) the applicant submits a timely motion to intervene; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is inadequately represented by existing parties.⁹³ The requirements of Federal Rule 24(a)(2) are strictly construed in order to preserve the smooth workings of the bankruptcy process.⁹⁴

Factors considered in determining whether a motion to intervene is timely include: (1) the stage of the proceedings; (2) the proffered purpose of the intervention; (3) the length of time preceding the application during which the applicants knew or should have known of their interest in the case; (4) the potential prejudice to the existing parties attributable to the applicant's delay; and (5) the existence of unusual or mitigating circumstances.⁹⁵

Factors considered in determining whether an applicant's interests are inadequately represented by existing parties include the following: (1) whether the interests of the existing parties are such that it will make all of the applicant's arguments duplicative; (2) whether the existing parties are capable and willing to make all such arguments; and (3) whether the applicant would offer a necessary element to the proceedings that the existing parties would neglect.⁹⁶

b. Permissive Intervention

In spite of the fact that intervention as of right under Federal Rule 24(a) is limited, the courts liberally construe Federal Rule 24(b) to allow permissive intervention in a variety of circumstances, where no significant harm results to the proceeding or its litigants.⁹⁷

93. See *In the Matter of Richman*, 104 F.3d 654, 659 (4th Cir. 1997); *In re Bernal*, 223 B.R. 542, 547 (9th Cir. B.A.P. 1998).

94. See *In re George Rodman, Inc.*, 33 B.R. 348, 350 (Bankr. W.D. Okl. 1983) (denying committee intervention where its interests were already represented by trustee); *In re Charter Co.*, 50 B.R. 57, 62-63 (Bankr. W.D. Tex. 1985) (holding that the requirement that interests are not adequately protected should be strictly construed and should be measured at time of expected intervention).

95. See *In re Troutman Enterprises, Inc.*, 286 F.3d 359, 365 (6th Cir. 2002); *Bridge v. Air Quality Technical Services, Inc.*, 194 F.R.D. 3, 8 (D. Me. 1999).

96. See *Bernal*, 223 B.R. at 547.

97. See *United States v. Colvin*, 203 B.R. 930, 941 (N.D. Tex. 1996) ("Permissive intervention is entirely discretionary with the trial court."); *In re Charter Co.*, 50 B.R. 57, 62-63 (Bankr. W.D.

The "no undue delay" requirement for permissive intervention impliedly incorporates the timeliness requirement discussed in greater detail in the Federal Rule 24(a) jurisprudence.⁹⁸

3. Conditions on Intervention

The court has the discretion to condition both mandatory and permissive intervention and to limit the scope of intervention to particular matters or to particular issues.⁹⁹

III. LITIGATING IN BANKRUPTCY COURT

A. *Adversary Proceedings and Contested Matters*

Actions are commenced in the bankruptcy court in one of two classes: adversary proceedings and contested matters. Bankruptcy Rule 7001 contains an exhaustive list of ten categories of adversary proceedings. Actions not within these ten categories are contested matters under Bankruptcy Rule 9014. Practically, pleadings in contested matters are typically filed on the bankruptcy docket, whereas a new and distinct case docket is created for pleadings in adversary proceedings. Captions on pleadings in adversary proceedings contain references to both the main bankruptcy case and the adversary proceeding. Typically, the same judge presiding over the main bankruptcy case will also preside over both contested matters and adversary proceedings related to the main case.

The ten categories of adversary proceedings set forth in Bankruptcy Rule 7001 are, in brief, the following: (1) proceedings to recover money or property; (2) proceedings to determine the validity, priority, or extent of a lien; (3) proceedings to obtain approval for the sale of the interests of both the estate and a co-owner in property; (4) proceedings to object to or revoke a discharge; (5) proceedings to revoke an order confirming a plan or reorganization; (6) proceedings to determine the dischargeability of a debt; (7) proceedings to obtain injunctions or other equitable relief; (8) proceedings to subordinate allowed claims or interests; (9) proceedings to obtain declaratory

Tex. 1985) (holding that discretion under Federal Rule 24(b)(2) should be liberally construed); *In re Public Service Company of New Hampshire*, 88 B.R. 546, 551 (Bankr. D.N.H. 1988).

98. See *Colvin*, 203 B.R. at 941.

99. See *In re Charter Co.*, 50 B.R. 57, 62-63 (Bankr. W.D. Tex. 1985) (holding that court can limit extent of intervention to particular issues); *Southern v. Plumb Tools*, 696 F.2d 1321 (11th Cir. 1983) (holding in non-bankruptcy matter that intervention was conditioned on imposition of state law restrictions on evidence regarding plaintiff's having received worker's compensation payments); *In re Public Service Company of New Hampshire*, 88 B.R. 546, 551 (Bankr. D.N.H. 1988) (allowing New Hampshire Office of the Consumer Advocate to intervene only to advise court on effect of rate setting).

judgments with respect to items (1) through (8); and (10) proceedings to determine causes of action removed under 29 U.S.C. §1452.

Adversary proceedings are governed by Part VII of the Bankruptcy Rules, which incorporate many of the Federal Rules, with some notable exceptions. In general, the Bankruptcy Rules and the Federal Rules together set the procedural guidelines for, inter alia, commencement of adversary proceedings, service of process, service of subsequent pleadings, forms and general rules of pleadings, defenses and objections, counterclaims and cross-claims, third-party practice, pre-trial procedure, necessary and permissive joinder, interpleader, class actions, intervention, substitution of parties, discovery, dismissal, default, summary judgment, stays, injunction, and execution.

Adversary proceedings are commenced by the filing of complaints and are often referred to as "full blown federal lawsuits within the larger bankruptcy case."¹⁰⁰ Although adversary proceedings can result in the same lengthy litigation found outside of bankruptcy, the Bankruptcy Rules attempt to accelerate the pace of adversary proceedings. Service of process is somewhat more flexible in adversary proceedings than in ordinary federal actions, and the discovery period in adversary proceedings, although subject to the same rules as in ordinary federal actions, is often compressed by bankruptcy courts.

Contested matters are defined by negation to include all actions in bankruptcy that are not adversary proceedings.¹⁰¹ Contested matters are commenced by the filing of motions and are generally governed by Part IX of the Bankruptcy Rules. However, Bankruptcy Rule 9014 makes many of the Bankruptcy Rules applicable to adversary proceedings also applicable to contested matters, including rules regarding service, discovery, dismissal, summary judgment, and execution.

Certain borderline actions challenge the distinction between adversary proceedings and contested matters. For example, although relief from the automatic stay is properly sought through a contested matter (see Bankruptcy Rule 4001(a)(1)), reconsideration of a decision to grant relief from the automatic stay could be viewed as an adversary proceeding to obtain a new injunction.¹⁰² Similarly, an action to establish cure amounts for a debtor's assumption of executory contracts,

100. In the Matter of Transamerican Natural Gas Corp., 978 F.2d 1409, 1416 (5th Cir. 1992).

101. The Bankruptcy Rules specify that certain actions shall be commenced as contested matters. These include actions by creditors to obtain relief from stay (see Bankruptcy Rule 4001(a)(1)), actions by debtors-in-possession to use cash collateral (see Bankruptcy Rule 4001(b)(1)), and actions by debtors-in-possession to assume, reject, or assign executory contracts and unexpired leases (see Bankruptcy Rule 6006(a)).

102. See *In re Gledhill*, 76 F.3d 1070, 1077 (10th Cir. 1996) (rejecting this analysis and finding Federal Rule 60(b) action properly commenced by motion).

where the action seeks quasi-equitable relief related to the cure amount, is arguably within the bounds of Bankruptcy Rule 7001(7).¹⁰³

As a result of the overlap in governing rules, the separation of adversary proceedings from contested matters may appear to be a distinction without a difference. However, parties initiating actions in the bankruptcy court often find contested matters more easily initiated and more flexibly pursued.

Indeed, the procedural differences between contested matters and adversary proceedings may have important substantive results. For example, in *In re Iannachino*, the Court of Appeals for the First Circuit held that an application for payment of fees to a debtor's attorneys was properly brought by motion in a contested matter.¹⁰⁴ Had the action been properly brought as an adversary proceeding, compulsory counterclaims for the attorney's malpractice would have been waived, because they had not been asserted in a timely fashion. Instead, since the action was a contested matter, the counterclaims were preserved, without regard to their timeliness.

Still, most courts do not allow the technical differences between contested matters and adversary proceedings to determine the outcome of an action, so long as due process concerns are not implicated.¹⁰⁵ Courts in Massachusetts have generally agreed with this approach.¹⁰⁶ To complicate matters even more, a response or objection to a contested matter (i.e., to a motion) may raise issues properly pursued only by adversary proceeding, although courts may permit the parties to continue under the contested matter rules, especially if no due process concerns exist.

103. See *In re O'Brien Environmental Energy, Inc.*, 188 F.3d 116, 123 (3d Cir. 1999) (rejecting this argument and finding contested matter more appropriate than adversary proceeding).

104. 242 F.3d 36, 42 (1st Cir. 2001).

105. See *In re Orfa Corp. of Philadelphia*, 170 B.R. 257, 275 (E.D. Pa. 1994) (citing *In re Command Services Corp.*, 102 B.R. 905, 908 (Bankr. N.D.N.Y. 1989), for a long string of supporting cases); *In re Munoz*, 287 B.R. 546, 551 (9th Cir. B.A.P. 2002).

106. See *Ralls v. Docktor Pet Centers, Inc.*, 177 B.R. 420, 429 (D. Mass. 1995) (holding that bankruptcy court's decision to treat action for monetary damages and injunctive relief, more properly pursued as an adversary proceeding, as a contested matter was harmless error, because it was not prejudicial to the adverse party); *In re Pagan*, 282 B.R. 735, 741-42 (Bankr. D. Mass. 2002) (holding that untimely adversary proceeding could relate back to timely contested matter, even where action should have been commenced by complaint as an adversary proceeding within the time required). See also *In re Stacy*, 99 B.R. 142 (D. Mass. 1989); *In re Commonwealth Mortgage Co., Inc.*, 45 B.R. 368 (Bankr. D. Mass. 1992). But see *In re Markus*, 313 F.3d 1146, 1151 (9th Cir. 2002) (suggesting that a different result may be appropriate in such relation-back decisions).

B. *Discovery in the Bankruptcy Courts*

1. Discovery in Adversary Proceedings and Contested Matters

As a general matter, discovery conducted after the commencement of an adversary proceeding or contested matter in bankruptcy court is governed by the same rules as discovery in federal district court. Bankruptcy Rules 7026 through 7037 incorporate by reference Federal Rules 26 through 37, without modification. However, the Local Bankruptcy Rules in certain jurisdictions contain modifications to the Bankruptcy Rules regarding discovery.

2. Discovery Outside Adversary Proceedings and Contested Matters

Fact-gathering in bankruptcy is not limited to formal discovery. The Bankruptcy Code and Bankruptcy Rules permit two types of examinations even in the absence of (and in some cases, as noted below, only in the absence of) pending litigation.

First, under 11 U.S.C. § 343, the debtor is required to submit to examination by parties in interest, under oath, at the meeting of creditors held pursuant to section 341(a) of the Bankruptcy Code. This meeting gives creditors an opportunity to question the debtor on a broad array of topics relevant to the bankruptcy. Although section 341 meetings are typically short in duration, there is no limit in the statute on the breadth of questioning nor on the duration of the meeting.¹⁰⁷

Second, Bankruptcy Rule 2004 provides that on motion of any party in interest the court may order the examination of any entity (a “Rule 2004 Examination”). Under Bankruptcy Rule 2004(b), the scope of the examination is limited to the “acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.” In a chapter 11 or chapter 13 bankruptcy case, the examination may also “relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefore, and any other matter relevant to the case or to the formulation of a plan.” As a consequence, “[t]he scope of a Rule 2004 examination is ex-

107. For a discussion of section 343 examinations as compared to Bankruptcy Rule 2004 examinations, see *In re Nixon Electric Supply, Inc.*, 85 B.R. 988 (Bankr. W.D. Tex. 1988). See also *In re Muy Bueno Corp.*, 257 B.R. 843, 850-52 (Bankr. W.D. Tex. 2001).

tremely broad and has often been likened to a lawful 'fishing expedition.'¹⁰⁸

Under Bankruptcy Rule 2004(c), attendance at a Rule 2004 Examination may be compelled by subpoena under Bankruptcy Rule 9016. In addition, Bankruptcy Rule 2005 provides for apprehension of the debtor in another district if necessary to compel attendance at a Rule 2004 Examination. For the purposes of these rules, the Bankruptcy Rule 9001(5) definition of "debtor" includes officers, board members, controlling stockholders, and members of a corporate debtor.

Much of the litigation regarding the use of Rule 2004 Examinations has arisen in the context of adversary proceedings and concerns the conflict between the Federal Rules regarding discovery, as incorporated in Part VII of the Bankruptcy Rules, and Bankruptcy Rule 2004. Courts have noted some of the differences between less restrictive Rule 2004 Examinations and depositions under the Federal Rules. For example, a Bankruptcy Rule 2004 examinee is not automatically entitled to the right to counsel, nor to the right to object to immaterial or improper questions posed, even though the Rule 2004 Examination testimony may be used as evidence in later-filed adversary proceedings.¹⁰⁹ There is no general right of cross-examination in Rule 2004 Examinations, and examinees do not have the right to have the issues to be addressed in the examination set forth prior to the examination.¹¹⁰

One rule that has emerged in some jurisdictions prohibits the use of Rule 2004 Examinations when litigation is already pending on the subject matter of the examination, on the theory that the more protective Federal Rules should then govern.¹¹¹ Other courts, however, have held that the fact that litigation is pending between the parties is not relevant to the decision of the court to allow a Rule 2004 Examination.¹¹²

Despite the apparent breadth of Rule 2004 Examinations, courts have curtailed the information-gathering technique for a number of

108. *In re Lufkin*, 255 B.R. 204, 208 (Bankr. E.D. Tenn. 2000).

109. *See In re McLaren*, 158 B.R. 655, 658 (N.D. Ohio 1992); *In re The Bennett Funding Group*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

110. *See In re Enron Corp.*, 281 B.R. 836, 841 (Bankr. S.D.N.Y. 2002).

111. *See, e.g., In re 2435 Plainfield Avenue, Inc.*, 223 B.R. 440, 456 (Bankr. D.N.J. 1998); *Bennett Funding*, 203 B.R. at 29 (distinguishing between discovery related to the pending litigation and discovery not related to the pending litigation, but holding that the inability to separate the two categories in the instant case mandates compliance with the Federal Rules).

112. *See, e.g., In re International Fibercom, Inc.*, 283 B.R. 290, 293 (Bankr. D. Ariz. 2002); *In re Table Talk, Inc.*, 51 B.R. 143 (Bankr. D. Mass. 1985) (holding, however, that the objecting party may raise relevance and admissibility objections to Rule 2004 Examination testimony at trial, because those objections could not be raised during the examination).

equitable reasons. For example, courts have held that a party seeking a Rule 2004 Examination must demonstrate “good cause” for the examination and that the cost and disruption to the examinee must be outweighed by the benefits to the examiner.¹¹³ “Good cause” requires a showing that the examination is necessary to establish the claims that the examiner may allege or that the denial of the request for the examination would cause the examiner undue hardship or injustice.¹¹⁴ Courts have denied requests for Rule 2004 Examinations by the proponents of competing plans of reorganization that were attempting to gain an unfair advantage in the bankruptcy case.¹¹⁵ Courts have stated that Rule 2004 Examinations may not be used to harass, annoy, embarrass, or oppress the examinee, and that the scope of Rule 2004 Examinations may be limited accordingly.¹¹⁶ In accordance with the “pending litigation” rule, courts have stated that Rule 2004 Examinations cannot be used to obtain information otherwise undiscoverable.¹¹⁷

In addition, where necessary to preventive disruption of the reorganization process, the court may limit the scope of the Rule 2004 Examination.¹¹⁸

To the extent that a deponent or provider of documents subject to a document request under Bankruptcy Rule 2004 would have a privilege or right to avoid testimony under applicable law, such privilege or right will apply in connection with Rule 2004 Examinations.¹¹⁹ Attempts to assert fourth and sixth amendment rights to prevent Rule 2004 Examinations have failed.¹²⁰

Some courts have considered whether Rule 2004 Examination testimony is subject to public access or may be concealed from the public

113. See *In re Express One Int'l, Inc.*, 217 B.R. 215, 217 (Bankr. E.D. Tex. 1998).

114. See *id.*

115. See *In re Duratech Industries, Inc.*, 241 B.R. 283, 290 (E.D.N.Y. 1999), *aff'g* 241 B.R. 291, 296-98 (Bankr. E.D.N.Y. 1999).

116. See *In re Strecker*, 251 B.R. 878, 882-83 (Bankr. D. Colo. 2000).

117. See *Enron*, 281 B.R. at 842. See also *In re Martin*, 208 B.R. 807, 810 (N.D.N.Y. 1997) (denying Rule 2004 Examination request when examiner's potential claims are barred by *res judicata*).

118. See *In re Texaco, Inc.*, 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987) (court limited scope of document request so as to lessen burden on debtor); *In re Public Service Co. of New Hampshire*, 91 B.R. 198 (Bankr. D.N.H. 1988).

119. See *In re Symington*, 209 B.R. 678, 687 (Bankr. D. Md. 1997); *In re Standard Financial Mgmt. Corp.*, 76 B.R. 864, 865 (D. Mass. 1987) (holding that examinee may exert fifth amendment privilege against self-incrimination in Rule 2004 Examination); *In re Walsh Trucking Co., Inc.*, 67 B.R. 863 (Bankr. D.N.J. 1986) (holding that fifth amendment analysis applies). *But see In re Kroh*, 80 B.R. 488, 489 (Bankr. W.D. Mo. 1987) (holding that no accountant/client privilege exists under federal law).

120. See *In re Lufkin*, 255 B.R. 204, 211-12 (Bankr. E.D. Tenn. 2000).

by a protective order. The generally public nature of bankruptcy proceedings, and the multiplicity of parties potentially interested in the testimony, influences this analysis.¹²¹

C. *Settlements in the Bankruptcy Courts*

Settlements are especially favored by bankruptcy courts because of the multiplicity of interests in a bankruptcy case and the inherent difficulty of resolving those interests through litigation alone.¹²² Yet, for these same reasons, a bankruptcy court must review settlements and make specific factual findings to ensure that a compromise of one party's interests does not impermissibly infringe upon the interests of the estate or of an entity that is not a party to the settlement.¹²³

Bankruptcy Rule 9019(a) provides that the court may approve a compromise or settlement. Bankruptcy Rule 2002(a)(3) provides that the moving party must provide parties in interest with twenty days notice of a hearing on the compromise or settlement, unless that time is reduced by the court pursuant to Bankruptcy Rule 9006(c)(1). "The decision to approve a given compromise lies within the discretion of the trial court."¹²⁴ The decision of a bankruptcy court to approve a compromise or settlement is subject to review only for an abuse of discretion.¹²⁵

The touchstone for approval of settlements is whether the settlements are "fair and equitable" and "in the best interests of the estate."¹²⁶ Factors considered in evaluating these general standards are as follows: (1) the probable success of the underlying litigation on the merits; (2) the potential difficulty in collecting on a judgment; (3) the

121. See, e.g., *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 433 (S.D.N.Y. 1993) (holding that public access under section 107 of the Bankruptcy Code applies only to documents filed with the court and not to unfiled Rule 2004 Examination testimony); *Symington*, 209 B.R. at 694 (holding that right to public access outweighs privacy rights of debtor that would be preserved if protective order were entered).

122. There is a minority view that there is no requirement that settlements be approved by the bankruptcy court. See *In re Telephone Communications, Inc.*, 179 B.R. 544, 551 (N.D. Ill. 1994). However, the enforceability at a settlement that has not been approved is questionable at best, which counsels seeking approval.

123. *In re Mavrode*, 205 B.R. 716, 719 (Bankr. D. N.J. 1997) ("Settlements are generally favored in bankruptcy proceedings, in that they provide for an often needed and efficient resolution of the bankruptcy case.").

124. *In re GF Corp.*, 120 B.R. 421, 425 (Bankr. N.D. Ohio 1990).

125. See *In re Emerald Oil Co.*, 807 F.2d 1234, 1239 (5th Cir. 1987).

126. See *In re Armstrong*, 285 B.R. 344 (table), 2002 WL 471332 at *2 (9th Cir. B.A.P. 2002).

complexity and expense of the litigation; and (4) the paramount interest of the creditors.¹²⁷

Courts have alternately phrased the approval of settlements as an economic balance between the value of the claim being compromised and the value of the compromise proposal.¹²⁸ Included in this analysis are the “expenses and burdens associated with sharply contested and dubious claims.”¹²⁹

The Supreme Court in *Anderson* stated that, for a bankruptcy court’s approval of a settlement to be upheld on appeal, the bankruptcy court must have reviewed “all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.”¹³⁰ The bankruptcy court should make findings of fact to support its conclusion and should not rely on “mere allegations” of the settling parties.¹³¹

D. Jury Trials

1. Core Proceedings Versus Non-Core Proceedings

Section 157(e) of title 28 states as follows: “If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specifically designated to exercise such jurisdiction by the district court and the express consent of all parties.” Section 157(e) does not create any jury trial rights; it merely allows a bankruptcy court to conduct a jury trial when a right to the same otherwise exists, subject to certain limitations.¹³²

On its face, the statute permits the bankruptcy court to conduct jury trials over both core and non-core proceedings, provided that all parties consent. However, courts have noted that the appellate structure of bankruptcy procedure may not permit bankruptcy courts to conduct jury trials in non-core proceedings, notwithstanding the consent of the parties.¹³³ The argument is stated as follows: (1) bankruptcy courts cannot enter final judgments in non-core matters pursuant to 28 U.S.C. §157(c); (2) the proposed findings of fact and law of the

127. See *Armstrong*, 285 B.R. 344, 2002 WL 471332 at *3 (citing the Supreme Court’s decision in *Protective Comm. for Indep. Stockholders of TMT Traler Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968)).

128. See *In re Turner*, 274 B.R. 675, 681 (Bankr. W.D. Pa. 2002).

129. See *A & A Sign Co. v. Maughan*, 419 F.2d 1152, 1155 (9th Cir. 1969).

130. 390 U.S. at 424.

131. *Id.*

132. See *In re Mid-Atlantic Resources Corp.*, 283 B.R. 176, 192 (S.D. W.Va. 2002).

133. See, e.g., *In the Matter of RDM Sports Group, Inc.*, 260 B.R. 915, 921-22 (Bankr. N.D. Ga. 2001); *In re Blackwell*, 267 B.R. 724, 728-29 (Bankr. W.D. Tex. 2001).

bankruptcy court in non-core matters are subject to de novo review by the district court under the same statute; (3) the findings of fact by a jury cannot be reviewed de novo pursuant to the Seventh Amendment to the Constitution; and (4) 28 U.S.C. §157(e) is therefore in irreconcilable conflict with the Seventh Amendment, which must govern and which must prohibit bankruptcy court jury trials on non-core matters.

The Second Circuit, Third Circuit, and Ninth Circuit have adopted this argument and have prohibited bankruptcy courts from conducting jury trials in non-core matters.¹³⁴ Other courts have held that bankruptcy courts may not conduct jury trials on non-core matters but have not expressly relied on this rationale.¹³⁵ Whatever theory is employed, it is fairly well established that bankruptcy courts may not conduct jury trials in non-core matters.

Prior to the adoption of 28 U.S.C. §157(e) in 1994, it was not well established whether bankruptcy courts could conduct jury trials in core matters. The Fourth, Eighth, Tenth, Sixth, and Seventh Circuits had held that bankruptcy courts could not conduct jury trials in core matters.¹³⁶ The Second Circuit disagreed in *In re Ben Cooper, Inc.*¹³⁷ The Supreme Court denied certiorari in the *Ben Cooper* case and declined to decide the issue in *Granfinanciera, S.A. v. Nordberg*.¹³⁸ However, with the 1994 amendments to the Bankruptcy Code and relevant provisions of title 28, including the addition of section 157(e), it appears clear that a bankruptcy court may conduct jury trials in core matters, provided all parties consent.

2. Jury Trial Demand

Bankruptcy Rule 9015(b) provides that, if the right to a jury trial applies, a timely demand has been filed pursuant to Federal Rule 38, and if the bankruptcy judge has been specially designated to conduct the jury trial, then the parties may consent to have a jury trial conducted by a bankruptcy judge under section 157(e) by jointly or separately filing statements of consent within any applicable time limits specified by local rule.

134. See *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993); *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990); *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990).

135. See, e.g., *In re Envisionet Computer Services, Inc.*, 276 B.R. 1, 3 (D. Me. 2002) (citing *In re Larry's Apartment*, 210 B.R. 469, 472 (D. Ariz. 1997)).

136. See *In re Stansbury Poplar Place, Inc.*, 13 F.3d 122, 127-28 (4th Cir. 1993) (citing *In re United Missouri Bank, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corp.*, 911 F.2d 380, 392 (10th Cir. 1990); *In re Baker & Getty Fin. Servs., Inc.*, 954 F.2d 1169, 1173 (6th Cir. 1992); *In re Girabill Corp.*, 967 F.2d 1152, 1161 (7th Cir. 1992)).

137. 896 F.2d 1394 (2d Cir. 1990).

138. 492 U.S. 33 (1989).

Federal Rule 38(b) provides that any party may demand a trial by jury on any issue triable of right by a jury by (1) serving upon the other parties a demand in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed at the issue, and (2) filing the demand with the court pursuant to Federal Rule 5(d).

As described further below, jury trial waiver is the most prevalent method of disposing of jury trial demands, and one common method of waiver is the failure to file properly a timely jury trial demand.¹³⁹

3. Right to a Jury Trial in Bankruptcy Proceedings

As described above, the bankruptcy court's ability to conduct a jury trial has no bearing on whether a right to a jury trial exists. The analysis of whether a right to a jury exists in bankruptcy actions centers on the Supreme Court's decision in *Granfinanciera*. 492 U.S. at 33. In *Granfinanciera*, the Supreme Court made two levels of distinctions crucial to determining whether a right to a jury trial exists. First, the Supreme Court held that the Seventh Amendment jury trial right applies only to legal and not to equitable proceedings. Second, the Supreme Court held that the right to a jury trial necessarily attaches only to legal proceedings involving private rights, not to legal proceedings involving public rights. The Supreme Court found that a bankruptcy-related fraudulent conveyance action is a legal, not an equitable, proceeding involving private, not public, rights. Courts have determined that the bankruptcy courts are appropriate tribunals for performing the *Granfinanciera* analysis and determining whether the right to a jury trial exists, even if they cannot conduct the jury trial itself.¹⁴⁰

4. Creditor's Waiver of Right to Jury Trial in Bankruptcy Proceedings

Once it is established that a right to a jury trial exists, courts consider whether that right has been waived.

The main thrust of the *Granfinanciera* opinion involves the question of whether a creditor that has not filed a proof of claim against the debtor is entitled to a jury trial. The Supreme Court's conclusion—that such a creditor is entitled to a jury trial—skirted the “negative pregnant” question implied by its holding. However, shortly thereafter, in *Langenkamp v. Culp*,¹⁴¹ the Supreme Court addressed the

139. See, e.g., *In re Big V Holding Corp.*, 2002 WL 1482392, at *5 (D. Del. 2002).

140. See, e.g., *Envisionet*, 276 B.R. at 6.

141. 498 U.S. 42 (1990).

question of whether a creditor that has filed a proof of claim against the debtor is entitled to a jury trial. The Supreme Court's answer—that by filing of a proof of claim a creditor submits itself to the bankruptcy court's equity jurisdiction and thereby waives its right to a jury trial of an otherwise legal action (such as a preference action)—was consistent with the *Granfinanciera* analysis but created a rule of decision all its own.¹⁴²

The decisions in *Langenkamp* and its progeny can be justified on two theories – the “waiver theory” and the “conversion theory.”¹⁴³ The “waiver theory” postulates that a creditor's filing of a claim against the debtor's estate is an affirmative and voluntary act waiving any Seventh Amendment jury trial right. The “conversion theory,” by contrast, postulates that the creditor's claim converts an otherwise unilateral attempt to collect a money judgment from that creditor (which would be a legal action with a corresponding jury trial right) into a reconciliation of cross-claims between debtor and creditor (an equitable function of the bankruptcy court to which no jury trial right attaches). Whichever theory is adopted, the *Granfinanciera* / *Langenkamp* message is the same, that a creditor cannot assert claims against a debtor's estate and certainly preserve any jury trial right it may have if sued by the debtor's estate.

Subsequent cases have addressed the practical complexities surrounding the *Langenkamp* holding. For example, one court has held that, by withdrawing its proof of claim prior to the commencement of an action against it, a creditor may regain a jury trial right previously waived.¹⁴⁴ Other courts have considered the more likely circumstance in which a creditor that has not filed a proof of claim against a debtor files a counterclaim or asserts a setoff right in response to a suit by the debtor or its representatives.¹⁴⁵ Finally, some courts have held that, in a case in which the bankruptcy court cannot hold a jury trial, a jury

142. See *In re Asousa Partnership*, 276 B.R. 55, 67 (Bankr. E.D. Pa. 2002) (holding that creditor that files proof of claim submits to equity jurisdiction of bankruptcy court, for which no jury trial right exists, but only for counterclaims arising from the same or related transactions as the creditor's claim).

143. See *Control Center, L.L.C. v. Lauer*, 288 B.R. 269, 279 (M.D. Fla. 2002) (discussing both theories).

144. See *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995).

145. See *Billing v. Ravin, Greenberg & Zacklin, P.A.*, 22 F.3d 1242, 1253 (3d Cir. 1994) (holding that debtor was not entitled to jury trial on malpractice claim against attorneys because claim was asserted in defense of attorneys' fee application); *In re NDEP Corp.*, 203 B.R. 905, 912 (D. Del. 1996) (holding jury trial right not waived by creditor's filing of permissive counterclaim, where counterclaims do not affect distributions to other creditors); *In re Commercial Financial Services, Inc.*, 255 B.R. 68, 72 (Bankr. N.D. Okla. 2000) (holding that assertion of setoff as defense waives jury trial right).

trial demand without a timely corresponding motion to withdraw the reference of the action to the district court constitutes a waiver of a jury trial right.¹⁴⁶

A helpful summary of the jury trial waiver issue is provided by the decision in *In re Sentry Operating Co. of Texas, Inc.*:

One can reconcile the Supreme Court decisions . . . as follows: if a creditor files a proof of claim in a bankruptcy case, the bankruptcy court should proceed with all dispatch to determine any objections to that claim, notwithstanding the fact that some of the objections to the claims might constitute separate actions at law if the creditor had not filed a proof of claim. The creditor does not have a right to a jury trial with respect to determination of the creditor's claim against the estate or with respect to any objections to the claim The creditor retains a right to a jury trial with respect to any issue that need not be adjudicated as part of the allowance of the claim or objection to the claim.¹⁴⁷

5. Debtor's Waiver of Right to Jury Trial in Bankruptcy Proceedings

In *In re Hallahan*, the Seventh Circuit held that a debtor's filing of a voluntary bankruptcy petition constitutes a full waiver of any jury trial rights the debtor may have in the course of its bankruptcy case.¹⁴⁸ The *Hallahan* decision is based on the "waiver theory," however, and courts that adhere to the "conversion theory" have held otherwise. For example, the court in *In re WSC, Inc.*, held that the debtor's jury trial waiver extends only to actions related to the claims allowance and disallowance process.¹⁴⁹ The debtor's bankruptcy filing does not automatically "convert" all legal and private actions of the debtor into equitable and public actions to which no jury trial right attaches.¹⁵⁰

6. The Consequences of Jury Trial Rights

"In the vast majority of cases, the real reason for demanding a jury trial has less to do with a party's deep and abiding respect for either the jury system or the majesty of Article III of the Constitution and much more to do with either opportunistic delay or forum-shop-

146. See *In re Sand Hills Beef Corp.*, 199 B.R. 740 (D. Colo. 1996); *In re Blackwell*, 279 B.R. 818 (Bankr. W.D. Tex. 2002).

147. 273 B.R. 515, 523 (Bankr. S.D. Tex. 2002).

148. 936 F.2d 1496 (7th Cir. 1991).

149. 286 B.R. 321, 328 (Bankr. M.D. Tenn. 2002),

150. See also *In re Charlotte Commercial Group, Inc.*, 288 B.R. 715, 720 (Bankr. M.D.N.C. 2003) (holding that debtor's bankruptcy filing resulted in waiver of jury trial right for action "patently related" to claims allowance process).

ping.”¹⁵¹ This rather cynical view may, unfortunately, have some moment. In many jury trial right disputes, the consequences intended by the party seeking the jury trial are (a) a finding that a jury trial right exists; and (b) either a finding that the action is a non-core proceeding or a finding that the action is a core proceeding but that the jury trial cannot take place in the bankruptcy court. In this manner, a party can use its jury trial right (in some cases coupled with its non-consent to a bankruptcy court jury trial) to force an action to be moved from the bankruptcy court to the district court.¹⁵²

E. Appeals: 28 U.S.C. §158 and Bankruptcy Rules Part VIII

The provisions regarding appeals from final orders, judgments, decrees, and interlocutory orders (with leave of court) are set forth in 28 U.S.C. § 158, which establishes two types of appeal from the bankruptcy court. The first is to the district court. The second is to a Bankruptcy Appellate Panel consisting of three bankruptcy judges from districts within the circuit (for those circuits that have a bankruptcy appellate panel¹⁵³). Appeals to the Bankruptcy Appellate Panel can be taken only with consent of both parties.

Generally speaking, under Bankruptcy Rule 8013, the “clearly erroneous” standard of review applies to a bankruptcy judge’s factual findings in core proceedings, while the *de novo* standard is applied to legal conclusions.¹⁵⁴

Bankruptcy Rule 8002 provides that a notice of appeal must be filed with the clerk of the bankruptcy court within ten days of the date of entry of the judgment, order, or decree. To conform with Federal Rule of Appellate Procedure 4(a)(2), Bankruptcy Rule 8002(a) was amended, effective August 1, 1991, to state that a notice of appeal filed after the announcement of a decision or order but before entry

151. *In re Blackwell*, 267 B.R. 724, 727-28 (Bankr. W.D. Tex. 2001) (emphasis in original).

152. As will be discussed in Section IV.C. below, this technique may not work as planned if the district court chooses to withdraw the reference of the action only on the eve of trial and only for the purpose of conducting the jury trial itself (rather than immediately after ruling on a withdrawal motion and for all purposes in the action). “Many district courts have held that withdrawal of the reference on the ground that a party is entitled to a jury trial should be deferred until the case is ‘trial ready.’” *In re Northwestern Inst. of Psychiatry, Inc.*, 268 B.R. 79, 84 (Bankr. E.D. Pa. 2001).

153. Currently, the First, Sixth, Eighth, Ninth, and Tenth Circuits have Bankruptcy Appellate Panels (“BAPs”).

154. *See, e.g., In re Daniel-Head and Assocs.*, 819 F.2d 914, 918 (9th Cir. 1987); *In re Phillips*, 804 F.2d 930, 932 (6th Cir. 1986); *In re Ocasio*, 272 B.R. 815, 822 (1st Cir. B.A.P. 2002). Only “persons aggrieved” have standing to appeal from a bankruptcy court order. *See Spenlinhauer v. O’Donnell*, 261 F.3d 113, 117-18 (1st Cir. 2001) (defining “person aggrieved” to mean an appellant whose pecuniary interests are directly and adversely affected by the challenged order).

of the order shall be treated as if filed on the date of entry of the order. Under Bankruptcy Rule 8002(c), the bankruptcy judge may grant a party an extension of up to twenty additional days to file an appeal. The request for additional time must be made before expiration of the original ten days, and the appeal may in no case be filed later than thirty days after entry of the judgment, order, or decree.

Appeals as a matter of right may be taken only upon entry of a final order. The question of what constitutes a final order in a bankruptcy case or proceeding for purposes of appeal has been the subject of much dispute. "The standard for determining 'finality' in the bankruptcy context requires a discrete dispute within the larger bankruptcy proceeding and involves an order that does 'conclusively determine' the outcome of the litigation at least with respect to some 'discrete dispute within the larger case.'"¹⁵⁵ Because of the number of distinct disputes within a single bankruptcy case, "finality" in bankruptcy is more flexible than in other contexts.¹⁵⁶ Final orders may include orders denying claimed exemptions of individual debtors,¹⁵⁷ orders dismissing adversary proceedings (but not those declining to dismiss adversary proceedings),¹⁵⁸ orders denying the discharge of individual debtors,¹⁵⁹ orders dismissing appeals,¹⁶⁰ orders granting relief from stay (but not orders denying relief from stay),¹⁶¹ orders disallowing claims,¹⁶² and default judgments.¹⁶³

The general principle underlying "finality" is that decisions are final when no issues remain to be resolved, so that the only remaining action to be taken is the execution of a judgment.¹⁶⁴ Some issues, such as the determination of whether attorney fees should be awarded to the prevailing party, are collateral to the primary action and do not affect finality.¹⁶⁵ When a district court affirms, reverses, or remands a decision of the bankruptcy court, the district court decision will be

155. *In re Salem Suede, Inc.*, 221 B.R. 586, 595 (D. Mass. 1998).

156. *See id.* *See also* *Bradshaw v. United States*, 283 B.R. 814, 816-17 (1st Cir. B.A.P. 2002); *In re Bank of New England Corp.*, 218 B.R. 643, 647 (1st Cir. B.A.P. 1998).

157. *In the Matter of Orso*, 283 B.R. 686, 690 (5th Cir. 2002).

158. *In re Franchesi*, 43 Fed. Appx. 87, 89 (9th Cir. 2002). *But see In re Vlasek*, 2003 WL 1858154, *4 (7th Cir. 2003).

159. *In re Roberts*, 279 B.R. 396, 399 (1st Cir. B.A.P. 2000).

160. *In re Kujawa*, 323 F.3d 628, 630 (8th Cir. 2003).

161. *In re Henriquez*, 261 B.R. 67, 69-70 (1st Cir. B.A.P. 2001).

162. *Greer v. O'Dell*, 305 F.3d 1297, 1302 (11th Cir. 2002).

163. *In re Warner*, 247 B.R. 24, 25 (1st Cir. B.A.P. 2000).

164. *See In re Atlas*, 210 F.3d 1305, 1307 (11th Cir. 2000).

165. *See id.*

final unless the district court directs the bankruptcy court to take further actions that are more than ministerial in nature.¹⁶⁶

Several courts have strictly construed the requirement of Federal Rule 54, as incorporated in Rule 9021(a), that all final orders and judgments must be set forth in a separate document, and these courts have dismissed appeals for lack of jurisdiction where no such separate document is in the record on appeal.¹⁶⁷

Parties may not, as of right, take appeal from non-final orders, but a court may allow such "interlocutory" appeals in its discretion. "The decision to grant leave to file an interlocutory appeal from the bankruptcy court lies within the discretion of the district court."¹⁶⁸ Normally, a party seeking leave to file an interlocutory appeal will file a separate motion with the district court along with the notice of appeal. "Where no such motion is filed, however, Bankruptcy Rule 8003 allows a court to treat a notice of appeal as a motion for leave to appeal."¹⁶⁹ In addition, 28 U.S.C. § 158(d)(2) provides for immediate appeals to circuit courts on appeal, upon agreement of the parties or upon the court's own motion, under limited circumstances, including questions of law without controlling court of appeals or Supreme Court precedent, questions of law requiring resolution of conflicting decisions, and instances where immediate appeals may materially advance the progress of the cases at issue. One or more parties may request that the lower court certify an immediate appeal, but there is a sixty-day withdraw for such a request.¹⁷⁰

F. *Motions to Reconsider*

Prior to commencing an appeal, the prospective appellant should consider moving the bankruptcy court for reconsideration of the order under Bankruptcy Rule 9024. Bankruptcy Rule 9024 incorporates Federal Rule 60, with certain limitations (e.g., removing the one-year time limit for filing motions to reconsider orders disallowing bankruptcy claims). Some courts have stated that it is a well-settled principle of the "law of the case" doctrine that motions to reconsider may be granted only where there is (a) "an intervening change of controlling law," (b) "the availability of new evidence," or (c) "the need to

166. See *In re Pransky*, 318 F.3d 536, 540-41 (3d Cir. 2003); *In re Lundell*, 223 F.3d 1035, 1038 (9th Cir. 2000).

167. See, e.g., *Matter of Moralez*, 553 F.2d 1192 (9th Cir. 1977), *rev'd* on other grounds, 618 F.2d 76 (9th Cir. 1980) (citing *U.S. v. Indrelunas*, 411 U.S. 216 (1973)).

168. *Monahan v. Massachusetts Dept. of Revenue*, 215 B.R. 287, 288 (D. Mass. 1997) (citing 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(b)).

169. *Id.*

170. 28 U.S.C. § 158(d)(2)(B) and (E).

correct a clear error or prevent a manifest injustice.”¹⁷¹ These factors comport with Federal Rule 60’s six grounds for relief from a judgment or order:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The “mistake,” “inadvertence,” and “excusable neglect”¹⁷² standards have been interpreted rather broadly by some courts.¹⁷³

Motions to reconsider generally may not be used to relitigate a matter that a party failed to litigate adequately at the first hearing.¹⁷⁴ Motions for reconsideration are appropriate in cases such as those in which a court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the court, or has made an error not of reasoning but of apprehension.¹⁷⁵ Motions to reconsider may be denied solely because a movant fails to cite any adequate basis for reconsideration.¹⁷⁶

Most important to the filing of a motion to reconsider is its timeliness. Although Bankruptcy Rule 9024 and Federal Rule 60 contain some limitations regarding the periods of time in which motions for reconsideration may be filed, some Local Bankruptcy Rules significantly cut back these periods. For example, Federal Rule 60 contains a general one-year time period, and Bankruptcy Rule 9024 contains several exceptions to that period, but Local Bankruptcy Rule 9023-1 in the Northern District of Georgia prohibits the filing of motions for reconsideration following ten days after the contested order is entered.

171. Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003); Ameritrust Company, N.A. v. C.K. White, 1996 WL 132998 (N.D. Ga. 1996). See also 18B CHARLES WRIGHT, ET AL., FED. PRACTICE AND PROC. § 4478 (2d ed. 2002).

172. The leading decision regarding “excusable neglect” is the Supreme Court’s opinion in *Pioneer Investment Services Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993).

173. See, e.g., *In re USN Communications, Inc.*, 288 B.R. 391, 396 (Bankr. D. Del. 2003).

174. See *In re Beckett*, 1999 WL 33588546 (Bankr. S.D. Ga. 1999).

175. See *In re Stotler and Co.*, 1991 WL 268051 (N.D. Ill. 1991).

176. See *In re Giordano*, 202 F.3d 277 (Table), 1999 WL 1054726 (9th Cir. 1999).

G. *Duties of Counsel and Parties in Interest in Bankruptcy*

1. Contempt

Although once a subject of some dispute, the overwhelming majority of courts now uphold the bankruptcy court's contempt power based on the equitable powers granted to the bankruptcy court under 11 U.S.C. § 105 and the consistency of civil contempt power with the bankruptcy court's other powers, such as the power to issue injunctions, enforce settlements, sanction attorneys and impose sanctions for abuse of process.¹⁷⁷ Bankruptcy Rule 9020 describes the procedure for contempt proceedings for both actions committed in the presence of the bankruptcy judge and actions committed outside the presence of the bankruptcy judge.

The civil contempt power is considered to be consistent with the congressional goal of speed and efficiency within the bankruptcy court system. Civil contempt may be used against both corporate entities and individuals.¹⁷⁸ However, 11 U.S.C. § 362(k) provides that an "individual injured by any willful violation of a stay" is entitled to damages and, in appropriate cases, punitive damages (emphasis added). This section does not make reference to corporations; nevertheless, many of the authorities cited above provide such relief to corporations under Bankruptcy Code Section 105.¹⁷⁹

A less settled question is whether the bankruptcy court possesses criminal contempt powers. While some courts have held that a bankruptcy court may recommend to the district court its findings and conclusions with respect to a criminal contempt proceeding,¹⁸⁰ other

177. Some courts have distinguished the inherent powers to remedy violation of orders, which powers are available to all courts, from statutory powers of contempt, as under section 105. See *In re Just Brakes Corporate Systems, Inc.*, 108 F.3d 881, 885 (8th Cir. 1997); *In re Jove Engineering, Inc.*, 92 F.3d 1539, 1553-54 (11th Cir. 1996).

178. See, e.g., *In re Skinner*, 917 F.2d 444 (10th Cir. 1990) (finding corporate creditor in violation of stay and subject to monetary damages); *In re Haddad*, 68 B.R. 944 (Bankr. D. Mass. 1987) (finding individual debtor in contempt for failing to comply with bankruptcy court order and voiding debtor's exemption); *In re Walters*, 868 F.2d 665 (4th Cir. 1989) (finding contempt where debtor's attorney refused to return fees upon court order); *Matter of Lemco Gypsum, Inc.*, 95 B.R. 860 (Bankr. S.D. Ga. 1989) (ordering corporation and individual in control of such corporation to pay money damages); *In re McNeil*, 128 B.R. 603 (Bankr. E.D. Pa. 1991) (ordering corporation to pay money damages and attorneys' fees); *In re Johns-Manville Corp.*, 26 B.R. 919 (Bankr. S.D.N.Y. 1983) (finding individual creditor and her attorneys in contempt for violation of stay).

179. See *In re Spookyworld, Inc.*, 346 F.3d 1 (1st Cir. 2003) (holding that "individual" does not include corporation for purposes of Section 362(k) (formerly Section 362(h)).

180. See *Midwest Properties No. Two v. Big Hill Investment Co.*, 93 B.R. 357 (N.D. Tex. 1988); *In re Crabtree*, 47 B.R. 150 (Bankr. E.D. Tenn. 1985),

courts have affirmatively held that the bankruptcy court does not have jurisdiction to preside over a criminal contempt proceeding.¹⁸¹

2. Counsel's Liability for Excessive Costs Under 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, a court may require any attorney who multiplies the proceedings in any case unreasonably and vexatiously to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred as a result of such conduct. The majority of courts have held that the bankruptcy court has the authority to award sanctions under section 1927.¹⁸²

3. Sanctions under Bankruptcy Rule 9011

Bankruptcy Rule 9011 adopts the provisions of Rule 11 of the Federal Rules.¹⁸³ Bankruptcy Rule 9011(a) requires the signing of pleadings, and Bankruptcy Rule 9011(b) provides that such signature is equivalent to a certification by the signatory that the information therein is not being presented for an improper purpose, and that the allegations and defenses are warranted and supported, to the best of the signatory's knowledge. Bankruptcy Rule 9011(c) contains the procedure for imposing sanctions for the violation of these provisions, and Bankruptcy Rule 9011(d) exempts from these bankruptcy sanctions conduct in discovery, which is instead governed by the Federal Rules.

Often contested matters and adversary proceedings are settled prior to a hearing or pretrial conference, and stipulations of settlement or agreed orders are filed with the bankruptcy court. However, attorneys should take note of the local practice governing whether they are required to attend hearings in which settlements or agreements have been reached. Some bankruptcy courts may impose sanctions on an attorney for failing to attend a scheduled hearing, even if attendance is a mere formality in light of the settlement or agreement.

181. See, e.g., *In re Finney*, 167 B.R. 820, 823-24 (E.D. Va. 1994); *Matter of Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990).

182. See e.g., *In re TCI Limited*, 769 F.2d 441 (7th Cir. 1985); *In re Chissom*, 68 B.R. 471, 473 (9th Cir. B.A.P. 1986), *aff'd*, 847 F.2d 597 (9th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988); *In re Outlaw*, 66 B.R. 413, 418 (Bankr. E.D.N.C. 1986); *In re Interstate Steel Setters, Inc.*, 65 B.R. 312 (Bankr. N.D. Ill. 1986). *But see In re Arkansas Communities, Inc.*, 827 F.2d 1219 (8th Cir. 1987).

183. See, e.g., *In re Gioioso*, 979 F.2d 956 (3d Cir. 1992); *In re Graham*, 981 F.2d 1135 (10th Cir. 1992); *Cinema Service Corp. v. Edbee Corp.*, 774 F.2d 584, 585 (3d Cir. 1985).

IV. GETTING OUT OF BANKRUPTCY COURT

A. *Remand to State Courts*

State court actions removed to bankruptcy courts do not necessarily remain in the bankruptcy courts. Removed actions may travel back to the state courts from which they came pursuant to mandatory and discretionary abstention (discussed in Section IV.B. below)¹⁸⁴ or pursuant to equitable remand.

The equitable remand of removed actions is governed by 28 U.S.C. § 1452(b), which states that a removed action may be remanded “on any equitable ground.” While “any equitable ground” is obviously a broad standard for determining whether remand is appropriate, the Courts have attempted to define the scope of the standard by identifying as many as fourteen relevant factors:

1. the effect or lack thereof on the efficient administration of the estate;
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 related proceedings commenced in state court or otherwise;
5. the court’s 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 the 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 the bankruptcy court involves forum shopping by one of the parties;
11. the existence of a right to trial by jury;
12. the presence in the proceeding of nondebtor parties;
13. comity; and
14. the possibility of prejudice to other parties in the action.¹⁸⁵

184. As discussed in more detail in Section IV.B., there is a difference of opinion as to whether the abstention doctrine can technically apply to removed actions. However, courts generally agree that “discretionary abstention” and “equitable remand” are concepts based on the same principles, evaluating the same factors, and reaching the same results.

185. See *Renaissance Cosmetics, Inc. v. Development Specialists Inc.*, 277 B.R. 5, 14 (S.D.N.Y. 2002); *Broyles v. U.S. Gypsum Co.*, 266 B.R. 778, 785 (E.D. Tex. 2001); *Blanton v. IMN Financial Corp.*, 260 B.R. 257, 265 (M.D.N.C. 2001); *Santa Clara*, 223 B.R. at 46.

At least one court has held that a removed action must be remanded if it would be subject to mandatory abstention by the bankruptcy court under 28 U.S.C. § 1334(c)(2).¹⁸⁶ As noted above, the technical relationship of abstention to remand is confusing, although the principles and results are often the same. For example, the lack of jurisdiction is at times cited as grounds for remand, although it is unclear whether this presumably mandatory “lack of jurisdiction remand” is actually remand, abstention, or simply a finding that removal never effectively occurred.¹⁸⁷

Like its sister statute 28 U.S.C. § 1447(d), which governs removal of state actions to federal courts generally, 28 U.S.C. § 1452(b) provides that “[a]n order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court . . .” Prior to the 1990 amendments to the Bankruptcy Rules, a bankruptcy court’s role in remanding actions was limited to filing a report and making a recommendation regarding remand to the district court. Currently, a bankruptcy court may enter an order of remand, but the district court may review that order and make the final, unappealable determination regarding remand.

B. *Abstention*

Another way that an action may avoid determination in the bankruptcy court is by application of an abstention doctrine. In bankruptcy, a court’s ability to abstain from hearing an action may be derived from several sources: section 305 of the Bankruptcy Code, section 505 of the Bankruptcy Code, 28 U.S.C. § 1334(c), and non-statutory doctrines arising from federal jurisprudence generally.

1. Section 305 Abstention

The court may abstain from hearing the entire bankruptcy case under section 305 of the Bankruptcy Code if (a) it is in the best interests of creditors and the debtor or (b) a petition under chapter 11 for recognition of a foreign proceeding has been granted and the purposes of chapter 15 would be best served by suspension or dismissal.¹⁸⁸ Section 305(a)(1) abstention on “best interest” grounds is a

186. *In re Pacor, Inc.*, 72 B.R. 927, 931 (Bankr. E.D. Pa. 1987), *aff’d*, 86 B.R. 808 (E.D. Pa. 1988).

187. *See, e.g., Retirement Systems of Alabama*, 209 F. Supp. at 1259. *See also Santa Clara*, 223 B.R. at 49.

188. *See In re Paper I Partners, L.P.*, 283 B.R. 661, 678-80 (Bankr. S.D.N.Y. 2002) (labeling section 305 abstention “extraordinary relief”). *See also In re Globo Comunicacoes e Par-*

truly rare occurrence that might apply, for example, if two identical bankruptcy cases were filed for the same debtor in two different districts (the domestic analog of an abstention in favor of chapter 15 under section 305(b)).

2. Section 505 Abstention

Section 505 of the Bankruptcy Code permits the bankruptcy court to make certain findings with respect to the tax liability of the debtor (such as the amount or legality of a tax not previously determined) and prohibits the bankruptcy court from making other findings with respect to tax refunds and tax matters previously determined. Courts have construed section 505's permissive language to allow the bankruptcy court to abstain from all tax matters, if the bankruptcy court determines in its discretionary authority that abstention is appropriate.¹⁸⁹ The Second Circuit has cited the following factors relevant to the section 505 abstention analysis: (1) the complexity of the tax issue; (2) the need to administer the bankruptcy case in an expeditious fashion; (3) the burden on the bankruptcy court's docket; (4) the length of time necessary to conduct the hearing and render a decision thereafter; (5) the asset and liability structure of the debtor; and (6) the potential prejudice to the debtor, the taxing authority, and creditors.¹⁹⁰ The Fifth Circuit has focused on whether the bankruptcy issues will predominate and whether the Bankruptcy Code's objectives will potentially be impaired.¹⁹¹ A decision from the District of Massachusetts has considered the six factors cited by the Second Circuit.¹⁹²

3. Abstention Under 28 U.S.C. § 1334

Abstention from matters arising in connection with bankruptcy proceedings (i.e., adversary proceedings and contested matters) is governed by 28 U.S.C. § 1334(c). Under section 1334(c)(1), the district court may decline to exercise bankruptcy jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law" (except cases under chapter 15, where the court's jurisdiction is specifically designed to be exercised in coordination with a foreign court). However, if the elements of section 1334(c)(2) are

ticipacoes S.A. ("Globopar"), 317 B.R. 235 (S.D.N.Y. 204) (addressing section 305(a)(1) abstention).

189. See *In re New Haven Projects Ltd. Liability Co.*, 225 F.3d 283, 288 (2d Cir. 2000); In the Matter of Luongo, 259 B.R. 323, 330 (5th Cir. 2001).

190. See *New Haven Projects*, 225 F.3d. at 289.

191. See *Luongo*, 259 B.R. at 332.

192. See *In re St. John's Nursing Home, Inc.*, 169 B.R. 795, 804 (D. Mass. 1994).

present, abstention is mandatory. The procedures governing motions for abstention are set forth in Bankruptcy Rule 5011. Section 1334(d) provides that decisions to abstain or not to abstain under section 1334(c)(1) and decisions to abstain under section 1334(c)(2) are not reviewable by courts of appeals or by the Supreme Court. Decisions not to abstain under section 1334(c)(2) are not subject to this limitation, and all abstention decisions of the bankruptcy court may be reviewed by the district court.

a. “Discretionary” or “Permissive” Abstention

Under 28 U.S.C. § 1334(c)(1), the district court may exercise “discretionary” or “permissive” abstention as to any proceeding regardless of whether it falls within the bankruptcy court’s “core” or “related to” jurisdiction. While the statute defines permissive abstention quite broadly, most decisions have given a narrow construction to the terms “interest of justice,” “interest of comity with state courts,” and “respect of state law.”

Many courts have developed lists of factors for evaluating motions to abstain under section 1334(c)(1).¹⁹³ Courts agree that these factors are the same as or similar to the factors considered when analyzing whether equitable remand is appropriate.¹⁹⁴ A list of fourteen of these factors is set forth in Section IV.A. above.

b. Mandatory Abstention

Unlike discretionary abstention, mandatory abstention under section 1334(c)(2) applies only if the proceeding is a non-core proceeding.¹⁹⁵ The five-prong test for determining whether mandatory abstention is appropriate for non-core matters is well-settled:

1. a timely motion is made;
2. the proceeding is based upon a state law claim or state law cause of action;
3. the proceeding is related to a case under title 11;
4. the action could not have been commenced in a federal court absent jurisdiction under 28 U.S.C. § 1334; and
5. an action is commenced and can be timely adjudicated in a state forum of appropriate jurisdiction.¹⁹⁶

193. See, e.g., *In re Valley Media, Inc.*, 289 B.R. 27, 29-30 (Bankr. D. Del. 2003).

194. See *Renaissance Cosmetics*, 277 B.R. at 18; *Broyles*, 266 B.R. at 785; *Blanton*, 260 B.R. at 265.

195. See *Broyles*, 266 B.R. at 782.

196. See *Renaissance Cosmetics*, 277 B.R. at 12; *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 285 B.R. 460, 475 (D. Or. 2002); *Broyles*, 266 B.R. at 782-83; *Blanton*, 260 B.R. at 263; *In re Boughton*, 60 B.R. 373, 375 (N.D. Ill. 1986).

If any one factor is missing, mandatory abstention is inappropriate.

As to the fifth prong, courts have considered a number of factors in determining whether an action can be “timely adjudicated” in the state courts: (1) the backlog of the state court and the federal court calendar; (2) the status of the proceeding in state court prior to being removed; (3) the status of the bankruptcy case; (4) the 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 jury demand has been made; and (7) whether the underlying bankruptcy case is a reorganization or a liquidation case.¹⁹⁷

There is a split among Courts of Appeal as to whether the mandatory abstention doctrine applies at all to cases removed from state court. One argument is that once removed, no action exists in the state court, and abstention would be tantamount to dismissal, a result potentially disastrous to the rights of the parties.¹⁹⁸ Other courts have held the opposite, finding re-commencement of the state court action satisfactory for the purposes of section 1334(c).¹⁹⁹

4. Other Types of Abstention

Two other, non-statutory types of abstention may also apply to bankruptcy proceedings: the *Rooker-Feldman* doctrine and the *Burford* doctrine. The *Rooker-Feldman* and *Burford* abstention doctrines are fairly rare in the bankruptcy context but do apply from time to time in cases where a final state court judgment or a preeminent state policy would be disrupted by an inconsistent federal court decision.

Under the *Rooker-Feldman* doctrine, which is applicable to both bankruptcy courts and district courts, “lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment.”²⁰⁰ The *Rooker-Feldman* doctrine extends to cases that are “inextricably intertwined” with a state court determination.²⁰¹ However, if a state court judgment is void *ab initio*, as judgments in viola-

197. See *In re United Container LLC*, 284 B.R. 162, 174-75 (Bankr. S.D. Fla. 2002).

198. See *In re Lazar*, 237 F.3d 967, 981-82 (9th Cir. 2001); *McDowell Welding*, 285 B.R. at 475.

199. See *Christo v. Padgett*, 223 F.3d 1324, 1331 (11th Cir. 2000); *Covanta Onondaga Ltd. v. Onondaga Cty. Resource Recovery Agency*, 281 B.R. 809, 816 (N.D.N.Y. 2002).

200. *In re Salem*, 290 B.R. 479, 482 (S.D.N.Y. 2003) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998)). See also *In re Middlesex Power Equipment & Marine, Inc.*, 292 F.3d 61, 66 (1st Cir. 2002).

201. See *Salem*, 290 B.R. at 482-83.

tion of the Bankruptcy Code's automatic stay may be,²⁰² then the *Rooker-Feldman* doctrine will not apply.

The *Burford* doctrine provides that "abstention is appropriate in two circumstances: (1) cases involving difficult questions or state law bearing on policy problems of substantial public import whose importance transcends the result in the case; and (2) where federal adjudication of the case would disrupt state efforts to establish a coherent policy with respect to matters of substantial public importance."²⁰³

C. *Withdrawal of the Reference*

As discussed above,²⁰⁴ Congress has granted the federal district courts original but not exclusive jurisdiction over bankruptcy matters and empowered federal district courts to refer such matters to the bankruptcy courts:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.²⁰⁵

As a general matter, the federal district courts have adopted standing orders referring bankruptcy matters to the bankruptcy courts under 28 U.S.C. §157(a).²⁰⁶ In other words, referral of bankruptcy matters to the bankruptcy courts is generally automatic and routine, and no case-by-case determination is made when such matters are referred. However, Congress also permitted the federal district courts to revoke a referral to the bankruptcy courts:

202. There has traditionally been a split of authority as to whether acts done in violation of the automatic stay (and injunctions generally) are void *ab initio* or merely voidable upon order of the court. See, e.g., *Eastern Refractories Co. Inc. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998); *In re Comp petrol Acquisition Partnership, L.P.*, 176 B.R. 723, 729 (citing *In re Ward*, 837 F.2d 124, 126 (3d Cir. 1988)). If a state court judgment was void upon entry under the "void *ab initio*" rule, then the *Rooker-Feldman* doctrine cannot be available to preserve the effect of the judgment. However, if a state court judgment is merely voidable upon a subsequent ruling of a bankruptcy court that the judgment violated the automatic stay, then the *Rooker-Feldman* doctrine may be available—because the judgment is in effect when the *Rooker-Feldman* doctrine is applied.

203. *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 589 (5th Cir. 1998). However, the *Burford* doctrine applies "only where the relief being sought is equitable or otherwise discretionary." *Gross v. Weingarten*, 217 F.3d 208, 223 (4th Cir. 2000) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996)).

204. See Section II.A.1.d. above.

205. 28 U.S.C. §157(a).

206. At times, such as the recent period when the functionalities of the overburdened Delaware bankruptcy courts was at issue, district courts may revoke their standing orders and consider the reference of bankruptcy cases and proceedings *ad hoc*.

The district court may withdraw, in whole or in part,²⁰⁷ any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.²⁰⁸

Pursuant to these statutes and the federal district court standing orders, the established rule is that "cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" are first heard before the bankruptcy court, unless the federal district court invokes a mandatory or discretionary withdrawal of the reference with respect to a particular case of proceeding.

It is wrong to confuse withdrawal of the reference with abstention. By withdrawing the reference, the federal district court substitutes itself for the bankruptcy court as the tribunal presiding over the case or proceeding. The case or proceeding is not itself affected, however, and is adjudicated much as if it had remained in the bankruptcy court. By abstaining, on the other hand, a bankruptcy court or federal district court refrains from hearing a case or proceeding, normally because there is another court in which similar issues are pending. Abstention stops the progress of a bankruptcy case or proceeding altogether; withdrawal of the reference simply moves a bankruptcy case or proceeding from the bankruptcy court to the federal district court.

1. Mandatory Withdrawal of the Reference

The second sentence of section 157(d) requires the district court to withdraw the reference if "laws of the United States regulating organizations or activities affecting interstate commerce" other than bankruptcy laws must be resolved in the case or proceeding. This standard, in its broadest application, could prevent bankruptcy courts from presiding over a wide range of actions and "eviscerate much of the work of the bankruptcy courts."²⁰⁹ Initially, practitioners and scholars feared that this provision would bring back a version of the summary/plenary jurisdiction litigation that has troubled the bankruptcy courts

207. See *Abondolo v. GGR Holbrook Medford, Inc.*, 285 B.R. 101 (E.D.N.Y. 2002) (withdrawing reference only as to specific issues, as opposed to withdrawing reference as to an entire case or proceeding).

208. 28 U.S.C. §157(d).

209. In the Matter of *Vicars Insurance Agency, Inc.*, 96 F.3d 949, 953 (7th Cir. 1996) (quoting *In re Adelphi Institute, Inc.*, 112 B.R. 534, 536 (S.D.N.Y. 1990)).

prior to the enactment of the Bankruptcy Code. However, courts have interpreted the mandatory withdrawal provision narrowly.²¹⁰

The “substantial and material consideration” test has been widely adopted as the central inquiry in the mandatory withdrawal analysis. In *In re Camden Ordnance Mfg. Co. of Arkansas, Inc.*, the court incorporated this standard into a three-part mandatory withdrawal test: (1) the person seeking withdrawal must be a party to the proceeding; (2) the motion to withdraw the reference must be timely filed; and (3) the resolution of the proceeding must require substantial and material consideration of non-bankruptcy federal law.²¹¹

Courts have generally held that the “simple application of well settled law” does not trigger the “substantial and material consideration” standard, which is more akin to “complex interpretation.”²¹² The speculative or hypothetical existence of non-bankruptcy issues will not permit mandatory withdrawal.²¹³

The timeliness requirement for mandatory withdrawal has also been stressed.²¹⁴

2. Permissive Withdrawal of the Reference

Permissive withdrawal of the reference “for cause shown” is within the discretion of the district courts.²¹⁵ Courts have considered a number of overlapping factors in deciding whether to withdraw the reference under the first sentence of section 157(d), including the following: (1) judicial economy; (2) uniform bankruptcy administration; (3) reduction of forum shopping; (4) economical use of debtors’ and creditors’ resources; (5) expediting the bankruptcy process; (6) the presence of a jury demand; (7) whether the claim is core or non-

210. See *In re White Motor Corp.*, 42 B.R. 693, 703-06 (N.D. Ohio 1984) (holding that motions for mandatory withdrawal should be granted only if the proceedings cannot be resolved without “substantial and material consideration” of non-bankruptcy federal commercial law).

211. 245 B.R. 794, 805-60 (E.D. Pa. 2000),

212. See *Camden Ordnance*, 245 B.R. at 806. See also *Vicars Insurance*, 96 F.3d at 954 (“We therefore hold that as far as non-title 11 issues are presented, mandatory withdrawal is required only when those issues require the interpretation, as opposed to the mere application, of the non-title 11 statute, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law. The legal questions involved need not be of ‘cosmic proportions’ [citation omitted], but must involve more than mere application of existing law to new facts.”).

213. See *id.*

214. See *In re Stavriotis*, 111 B.R. 154 (N.D. Ill. 1990) (holding that a motion for withdrawal failed to meet the “threshold requirement” of timeliness because the motion should have been filed “as soon as possible” after learning that federal law would be implicated).

215. See *Security Farms v. International Brotherhood of Teamsters, Chauffers, Warehouseman & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997).

core; (8) whether the action is within the expertise of the bankruptcy court; and (9) other related factors.²¹⁶

Two of the more important factors are the presence of a jury demand and whether the claim is core or non-core, because of the restrictions on the ability of a bankruptcy court to conduct jury trials and to make final determinations in non-core matters. If the district court will be required to hear the case at some point in any event (whether under its original jurisdiction or an appellate *de novo* review), withdrawal of the reference upon the motion of a party is more likely, on the grounds of judicial efficiency.²¹⁷

3. Procedure for Withdrawing the Reference

Although motions for withdrawal of the reference are properly heard by district courts under Bankruptcy Rule 5011(a), district courts may remand to the bankruptcy court for determination of specific permissive withdrawal factors, such as whether the action is core or non-core and whether a jury trial right exists.²¹⁸

While a motion for withdrawal is pending, a bankruptcy court may stay the proceedings in the bankruptcy court, in whole or in part, although the legal and practical hurdles to obtain this relief are substantial. Courts have considered factors under Bankruptcy Rule 5011(c) that are akin to the factors considered by courts responding to requests for preliminary injunctions: (1) the likelihood that the withdrawal motion will succeed on the merits; (2) whether the movant under Bankruptcy Rule 5011(c) will be irreparably harmed if the stay is denied; (3) whether the other parties will be substantially harmed by the stay; and (4) whether the public interest will be served by granting the stay.²¹⁹ In addition, as noted in Section III.D.6. above, motions to withdraw the reference on the grounds of a jury trial de-

216. See, e.g., *In re Simmons*, 200 F.3d 738, 742 (11th Cir. 2000); *Security Farms*, 124 F.3d at 1008; *In re Burger Boys, Inc.*, 94 F.3d 755, 762 (2d Cir. 1996); *In re Orion Pictures Corp.*, 4 F.3d 1094, 1101 (2d Cir. 1993); *Mulone v. Norwest Financial California, Inc.*, 245 B.R. 389, 400 (E.D. Cal. 2000) (finding class action more appropriately heard by district court, which was more familiar with class proceedings).

217. See *Security Farms*, 124 F.3d at 1008; *Burger Boys*, 94 F.3d at 762; *Orion*, 4 F.3d at 1101; *In re Lawrence Group, Inc.*, 285 B.R. 784, 788 (N.D.N.Y. 2002). A recent example of permissive withdrawal of the reference is the withdrawal from the Delaware bankruptcy court of several mass tort asbestos bankruptcy cases (such as *W.R. Grace* and *Federal-Mogul*) to a single federal district court in order to achieve judicial economy and consistent judgments in cases with similar facts and legal issues.

218. See *In re Envisionet Computer Services Inc.*, 276 B.R. 1, 7 (D. Me. 2002).

219. See *In re Northwestern Inst. of Psychiatry, Inc.*, 268 B.R. 79, 83 (Bankr. E.D. Pa. 2001).

mand are often not granted until the case is "trial ready," rendering a Bankruptcy Rule 5011(c) stay inappropriate and impractical.²²⁰

V. CONCLUSION

Bankruptcy court jurisdiction adds a layer of complexity to federal court litigation that can be important to the clients of business lawyers and litigators alike. The Bankruptcy Code itself defers to applicable state law in many respects, and the Supreme Court has limited the authority that federal district courts may confer upon bankruptcy courts. These factors make bankruptcy practice especially sensitive to the world outside the bankruptcy courts. However, one of the principles of the Bankruptcy Code is the centralization of all disputes affecting the debtor into a single forum. There is therefore a constant tension created by the pressure urging disputes to be cast away from the bankruptcy courts and the pressure urging disputes to be drawn into the bankruptcy courts, between the exercise and non-exercise of bankruptcy court jurisdiction.

At the same time, bankruptcy court practice involves a number of rules and customs aiming toward a method of dispute resolution that is speedier and more inclusive of all affected parties than ordinary federal court litigation. Conscientious regard for these rules and customs is essential to the effective representation of clients in bankruptcy court.

In sum, bankruptcy court practice provides abundant opportunities for attorneys to seek advantages for their clients with respect to whether, where, when, and how an action will be heard. Through an understanding of the issues discussed above, a practitioner should be able to identify and investigate some of the more important issues affecting a client's interests under the Bankruptcy Code.

220. See *Northwestern Psychiatry*, 268 B.R. at 84.

