THE ENFORCEABILITY OF ARBITRATION CLAUSES IN BANKRUPTCY

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INTRODUCTION

The enforceability of contractual arbitration provisions has been the subject of much controversy in federal bankruptcy cases. Courts have not been in agreement on the standards to apply in determining whether parties should be required to submit a dispute to binding arbitration when the dispute is within the jurisdiction of the bankruptcy court. Given the jurisdictional scheme governing proceedings arising in or relating to a bankruptcy case, and the strong policy in favor of enforcing valid contractual commitments to submit disputes to binding arbitration, it is not surprising that the law in this area has become confusing and unclear.

In general, the administration of the American bankruptcy system benefits from the centralization of dispute resolution in a single forum with uniform rules. One of the goals of Congress in enacting modern bankruptcy laws was the broadening of the subject matter and in personam jurisdiction of federal bankruptcy judges so that they have the power to preside over virtually all disputes that are connected to a bankruptcy case. Although bankruptcy jurisdiction is vested initially in the federal district courts, the complex bankruptcy jurisdictional scheme results in almost all civil proceedings arising in or related to a bankruptcy case being heard by bankruptcy judges.

When enacting the Bankruptcy Reform Act of 1978,[1] which revised both the substantive and jurisdictional aspects of bankruptcy, and again when it enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984,[2] Congress intended that the United States Bankruptcy Court would be a "specialized" judiciary, with knowledge of a technical, complex body of law. "Specialization offers two major advantages: expertise and uniformity."[3] In highly complex areas of law, such as bankruptcy, a specialized court allows recruitment of judges who have a specific background in the particular area of law or who will develop that expertise while on

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[1] Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549–2688, which includes the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and which amended and added various provisions to the Judicial Code, title 28 of the United States Code, governing jurisdiction.

[2] Pub. L. No. 98–353, 98 Stat. 333–92.

[3] Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997).

the bench.[4] As noted by the Court of Appeals for the Second Circuit, one of the core features of the bankruptcy reforms was "to 'allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'"[5]

Does the policy of centralizing disputes in specialized bankruptcy courts, however, prevail when the debtor is contractually committed to resolve such disputes in a binding arbitration process outside the court system? Generally, arbitration clauses are subject to enforcement by federal courts under the provisions of the Arbitration Act.[6] Under the Arbitration Act, courts are obligated to enforce arbitration clauses contained in commercial or maritime contracts. The Supreme Court has repeatedly articulated strong support for the enforcement of arbitration clauses, and has ruled that they cannot be derailed absent a countervailing federal statute that compels a court to decline to enforce the Arbitration Act.[7] As such, when a trustee or debtor in possession is before the bankruptcy court with respect to litigation involving a commercial contract, the Arbitration Act and the bankruptcy jurisdiction statutes may come into conflict. This conflict exists as a result of the apparently inconsistent purposes of two statutory schemes: the centralization of bankruptcy-related dispute resolution in bankruptcy court under the Judicial Code of the United States Code[8] and the ardently pro-arbitration policy of the Arbitration Act.

Federal courts, from bankruptcy courts up through circuit courts of appeals, have wrestled with balancing the contrary objectives of the bankruptcy-related provisions of the Judicial Code and the Arbitration Act since the enactment of the

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[4] *Id.*; *see* Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 110 n. 184 (2005) ("Congress has a long history of creating specialized courts to ease the caseload burden faced by federal courts of jurisdiction, developing judges with specific expertise in complex areas and long-term oversight of agency operations, and increasing efficiency of adjudicating disputes." (citing Harold H. Bluff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 328, 330–31 (1991))); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson From the German Constitutional Court*, 91 VA. L. REV. 1267, 1275–78 (2005) (noting specialized courts create three benefits: easing pressure off those of general jurisdiction to handle excessive caseloads; fulfilling growing need for expertise in complex areas of law; and eliminating nonuniformity).

[5] U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (*In re* U.S. Lines), 197 F.3d 631, 640 (2d Cir. 1999) (quoting Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989 (2d Cir. 1990)) (recognizing inherent disputes between Bankruptcy Code and Arbitration Act that will inevitably arise in bankruptcy proceedings).

[6] 9 U.S.C. §§ 1–307 (2000) [hereinafter Arbitration Act].

[7] *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) ("The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628)); *see also* Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 494 (5th Cir. 2002) ("The [Arbitration Act] directs courts rigorously to enforce agreements to arbitrate . . . ." (citing *Shearson/Am. Express*, 482 U.S. at 226–27)); *cf.* Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1066 (5th Cir. 1997) (citing Hayes & Co. v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149, 1150–51 (1989) (agreeing with Third Circuit that bankruptcy court does not have discretion to stay arbitration proceedings involving derivative, non-core matters)).

[8] The Judicial Code is title 28 of the United States Code.

Bankruptcy Reform Act of 1978, and—to a lesser extent—during the time that the former Bankruptcy Act[9] was in force.

As a result of the numerous approaches and analyses adopted by the various federal courts of appeals, uncertainty and confusion have resulted with respect to the interplay between arbitration and bankruptcy and whether an arbitration clause should be enforced in a particular proceeding in a bankruptcy case. This Article begins by providing an overview of the policies behind the Arbitration Act and the bankruptcy jurisdictional statutes, and frames the conflict as it has been defined by the courts. The Article then describes the test created by the Supreme Court to resolve the conflict between the strong federal policy in favor of enforcement of an arbitration clause and a contradictory federal statute, and then provides an understanding of the theoretical analysis with which courts have approached the resolution of this conflict in the bankruptcy arena. Last, the Article offers a proposal for legislative reform that would create a more uniform and efficient approach to the enforcement of arbitration clauses in bankruptcy consistent with the bankruptcy jurisdictional scheme.

I. THE FEDERAL ARBITRATION ACT

The Arbitration Act, which was enacted in 1925, provides that arbitration clauses contained in written agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] If a party brings suit based upon an agreement which contains an arbitration provision, then the court before which the proceeding was brought "shall . . . stay the trial of the action until such arbitration has been had . . . ."[11] Parties to the contract may, of course, appeal a refusal to stay a proceeding for arbitration, or denial of a petition to compel arbitration.[12]

The Supreme Court has noted that the Arbitration Act allows virtually no leeway when courts are called upon to enforce a valid arbitration clause contained in an enforceable commercial agreement. The Supreme Court has noted that "[b]y its terms, the [Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to

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[9] The Bankruptcy Act of 1898, 30 Stat. 544–66, *repealed by* the Bankruptcy Reform Act of 1978.

[10] 9 U.S.C. § 2 (2000).

[11] *Id.* § 3.

[12] *See id.* § 16(a)(1)(A)–(B) (allowing appeals to be taken from an order refusing stay of any action under 9 U.S.C. § 3 or denying petition to order arbitration to proceed under 9 U.S.C. § 4); *see also Gandy*, 299 F.3d at 494 ("'[A] bankruptcy court's refusal to stay an adversary proceeding pending arbitration, though interlocutory in nature, is nevertheless appealable . . . .'" (quoting *In re* Nat'l Gypsum, 118 F.3d 1056, 1061 (5th Cir. 1997)). *See generally* Gulfstream Aerospoace Corp. v. Mayacamas Corp., 485 U.S. 271, 284–85 (1988) (discussing appealability of orders generally and difficulty of classifying such orders and their appeals as being based in equity or law, and focusing specifically on splits between courts regarding appealability of orders relating to arbitration).

proceed to arbitration on issues as to which an arbitration agreement has been signed."[13]

With its enactment more than eighty years ago, the Arbitration Act reversed years of judicial hostility towards arbitration.[14] Such judicial hostility was premised, in part, on the possibility that an arbitrator could make an unreviewable error of law.[15] The possibility of such errors was heightened because arbitrators in commercial disputes were "frequently men drawn for their business expertise," rather than chosen for their erudition in the law.[16] Courts were additionally "suspicious of the desirability of arbitration and of the competence of arbitral tribunals."[17] The Arbitration Act, however, "plac[es] arbitration agreements 'upon

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[13] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); *see, e.g.*, Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 410–11 (3d Cir. 2004) (citing *Byrd* decision and stressing judicial efficiency should be subordinated to enforcement of private agreements to which parties have entered). *But cf.* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948–49 (1995) (recognizing federal policy favoring arbitration, yet reaffirming fact that reviews of district court decisions should not promote particular substantive results and finding leeway granted arbitrators "does not mean that appellate courts should give *extra* leeway to district courts that uphold arbitrators").

[14] *See* H.R. REP. NO. 96–68, 1, 2 (1924); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) ("The United States Arbitration Act . . . [reversed] centuries of judicial hostility to arbitration agreements . . . ."); S. REP. NO. 536–68 (1924).

[15] Powell v. Dep't of the Navy, No. 00–3079, 2000 WL 1673658, at *3 (Fed. Cir. Nov. 6, 2000) (asserting unreviewability of arbitrator's determinations on appeal); Rogers v. Dep't of Defense Dependents Schools, Germany Region, 814 F.2d 1549, 1554 (Fed. Cir. 1987) (holding arbitrator's decisions "virtually unreviewable on appeal" (citing Hambsch v. Dep't of the Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986))). Ironically, modern courts often list the efficiency afforded by such unappealable decisions among the reasons to favor arbitration. *See* Matteson v. Ryder Sys. Inc., 99 F.3d 108, 113 (3d Cir. 1996) ("[A] more searching judicial review of submissions to an arbitrator would undermine the congressional policy of promoting speedy, efficient, and inexpensive resolution of labor grievances.").

[16] Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28. (2d Cir. 1968) (finding business sense is no replacement for experience of court in solving contractual disputes, while choosing not to pass informal judgment on abilities of arbitrators). The Second Circuit determined that allegations of antitrust violations must be determined by a district court, even when the parties had negotiated an arbitration provision in their agreement. *Id.* at 828. The court cited public policy as its chief concern, and quoted *Wilko v. Swan*, 346 U.S. 427, 445 (1953) (Clark, J., dissenting) in support, as follows: "Adjudication by [business people] may, indeed, provide a business solution of the problem if that is the real desire; but it is surely not a way of assuring the customer that objective and sympathetic consideration of his claim that is envisaged by the Securities Act." *American Safety*, 391 F.2d at 827. *Wilko* was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *See id.* at 484 ("We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.").

[17] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The "hostility" borne by the courts with respect to arbitration clauses was grounded in English common law, which did not enforce agreements to arbitrate future disputes. *See* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (explaining refusal to enforce arbitration agreements came from "the jealousy of the English courts for their own jurisdiction"); Sanders v. Gardner, 7 F. Supp. 2d 151, 157 (E.D.N.Y. 1998) (blaming English common law for America's "long-standing judicial hostility" towards arbitration agreements). However, courts applying common law principles did enforce agreements to arbitrate existing disputes, as well as the decisions resulting from such arbitration. *See* Watkins v. Hudson Coal Co., 151 F.2d 311, 320 (3d Cir. 1945) (dividing questions of legality for judicial review from "the not inconsiderable problem of determining how much each claimant is entitled to" for arbitration); Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 7 (3d Cir. 1943) (concluding the court "should not choke the

the same footing as other contracts.'"[18] As a result, courts have shed their hostility towards arbitration and have acknowledged that "[t]he Arbitration Act has established a strong federal policy favoring arbitration."[19]

Numerous courts have commented on the policy motives behind the passage of the Arbitration Act, often focusing on the "desirability of arbitration as an alternative to the complications of litigation" in view of the delay and expense associated with litigation in a judicial environment.[20] Though efficiency through relieving the calendars of busy federal trial courts of a significant number of commercial disputes and limiting the scope, degree and number of appeals are beneficial consequences of the Arbitration Act, more modern judicial analysis of the legislative history of the Arbitration Act emphasizes that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."[21] As articulated by the Supreme Court, the primary purpose of the Arbitration Act is the enforcement of private contracts,[22] rather than

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arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions").

[18] *McMahon*, 482 U.S. at 226 (1987) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (citations omitted)); *see* EEOC v. Waffle House, Inc., 534 U.S. 279, 293–94 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . . ."); *see also* Nw. Corp. v. Nat'l Union Fire Ins. Co. (*In re* Nw. Corp.), 321 B.R. 120, 124 (Bankr. D. Del. 2005) (summarizing rule prohibiting "states . . . [from] decide[ing] that a contract is fair enough to enforce all of its basic terms . . . but not fair enough to enforce its arbitration clause").

[19] *McMahon*, 482 U.S at 226 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); *see* Selcke v. New England Ins. Co., 995 F.2d 688, 689 (7th Cir. 1993) (noting judicial attitude in favor of arbitration "a selfish attitude, in part, because the courts are heavily burdened these days and arbitration is an alternative to adjudication"); *see also* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (establishing any doubt about scope of arbitrable issues should be resolved in favor of arbitration) (citations omitted). As observed by Judge Walrath of the United States Bankruptcy Court for the District of Delaware, "[c]ourts have upheld [Alternative Dispute Resolution] provisions and, in fact, have applauded their use." *In re* United Cos. Fin. Corp., 241 B.R. 521, 525 (Bankr. D. Del. 1999).

[20] Wilko v. Swan, 346 U.S. 427, 432 (1953) (citing H.R. Rep. No. 96, at 1–2 (1983); S. Rep. No. 536, at 3 (1983)); *see Soler*, 473 U.S. at 649 n.14 (noting "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution") (Stevens, J. dissenting); *see also* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AMER. BANKR. L.J. 55, 63 (1994) (detailing reasons some courts prefer arbitration to litigation including "that it avoids the expense and delay of trial, incorporates the use of expert decisionmakers [sic], enjoys the privacy of a non-public proceeding, eliminates the hostility generated by adversarial processes, and furthers the policy of freedom of contract").

[21] *Byrd*, 470 U.S. at 220 ("[The Arbitration Act] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." (quoting 65 Cong. Rec. 1931 (1924)); *see Hay Group, Inc.*, 360 F.3d at 411 (identifying Congressional intent behind Federal Arbitration Act and rejecting plaintiffs arguments against arbitration for "efficiency considerations" (citing *Byrd*, 470 U.S. at 214)); Graphic Scanning Corp. v. Yampol, 688 F. Supp. 857, 859 (S.D.N.Y. 1988) (rejecting petitioner's arguments arbitration would lead to overlapping efforts "if this arbitration is to be stayed, it must be on some ground other than efficiency or duplication of effort").

[22] *See EEOC*, 534 U.S. at 293–94 (discussing influence of FAA upon scrutiny by courts so they "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals"); *Soler*, 473 U.S. at 625–26 (justifying "rigorous" enforcement of arbitration agreements by explaining Congress' intent in passing FAA (quoting *Byrd*, 470 U.S. at 221)); *Byrd*, 470 U.S. at 220–21 (explaining "passage of the Act was motivated first and foremost, by a congressional desire to enforce agreements into which parties had entered . . . .").

efficiency in litigation. "The Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, *even where the result would be the possibly inefficient maintenance of separate proceedings in different forums*."[23] The Supreme Court also has noted that an agreement to arbitrate does not constitute the relinquishment of substantive rights; rather, arbitration is a "trad[e of] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[24]

As a result of the strong federal policy in favor of arbitration, when there is doubt as to the enforceability of an arbitration agreement, courts generally tend to resolve any such ambiguity in favor of arbitration. While judicial intervention in a dispute that is subject to an arbitration clause is possible both before an arbitration proceeding (with respect to the enforcement of the arbitration provision)[25] and after an arbitration proceeding (with respect to the enforcement of the decision of the arbitration panel), the judicial deference towards an arbitration panel, as dictated by the Arbitration Act, goes so far as to remove any authority from the courts to intervene during an arbitration proceeding.[26]

As a threshold matter, the court may have to determine whether the parties have agreed to arbitrate the dispute that is before the court. Additionally, a court may be asked to determine whether a party has waived the right to arbitrate, which is the intentional relinquishment of that right.[27] The party attempting to avoid arbitration

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[23] *Byrd*, 470 U.S. at 217 (emphasis added); *see Hay Group, Inc*., 360 F.3d at 410 ("[E]fficiency is not the . . . goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements.").

[24] *Soler*, 473 U.S. at 628.

[25] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967) (holding except where parties otherwise intend, arbitration clauses are "separable from contracts in which they are embedded, and . . . where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud"); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006) (upholding *Prima Paint* decision, a challenge to an agreement as a whole must be presented first to arbitrator); Diaz Contracting, Inc. v. Nanco Contracting Corp. (*In re* Diaz Contracting, Inc.), 817 F.2d 1047, 1051 (3d Cir. 1987) (proclaiming validity of forum selection clauses absent showing of "unreasonableness").

[26] *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 571 (1967) (Brennan, J., concurring) (clarifying courts may decide whether disputes are "arbitrable" but "with that finding the court will have exhausted its function"); Glass v. Kidder Peabody & Co., 114 F.3d 446, 454 (4th Cir. 1997) (limiting district court jurisdiction to "order[ing] the parties to arbitration"); *see also* S. Douglas Kerner, Comment, *Federal Courts Lack the Power to Consolidate Arbitration Proceedings*, 69 WASH. U. L.Q. 349, 355 (1991) (highlighting federal courts' limited ability to intervene since they "lack the authority to consolidate arbitration proceedings" (citing Baesler v. Cont'l Grain Co., 900 F.2d 1193 (8th Cir. 1990))). There is, however, a limited right of intervention, wherein a court may intervene to appoint or replace a member of the arbitral panel pursuant to section 5 of the Arbitration Act. 9 U.S.C. § 5 (2000); *see* Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 464 (8th Cir. 2003) (finding district court authorized "to appoint a replacement arbitrator" where "the agreements are silent" on the issue); Transportacion Maritima Mexicana, S.A. v. Companhia de Navegacao Lloyd Brasileiro, 636 F. Supp. 474, 475 (S.D.N.Y. 1983) (Mem.) ("There is no statutory authority for judicial intervention during the course of arbitration proceedings, with the sole exception of a § 5 petition.").

[27] *See American Safety*, 391 F.2d at 826 (2d Cir. 1968) ("[I]n passing upon a [9 U.S.C.] § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate" (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967))); S & E Motor Hire Corp. v. N.Y. Indemnity Co., 174 N.E. 65, 66 (1930) (reinforcing

bears the burden of demonstrating a clear manifestation of intent by the other party to relinquish the right to arbitration.[28] Once an arbitration process is concluded, courts will almost always enter an order confirming the award rendered by the panel and ordinarily do not review the merits of the decision.[29]

In view of the Arbitration Act's mandate that an arbitration clause be enforced, a party seeking to avoid an arbitration agreement has only two options. The first way to avoid arbitration is to assert and prove that the arbitration clause itself is invalid because it was procured by fraud.[30] The second way is to assert and prove

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precedent "that waiver is an intentional relinquishment of a right, and ordinarily must be predicated upon full knowledge of all the facts upon which the existence of the right depends").

[28] *See* Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 496 (5th Cir. 1986) ("Waiver of arbitration is not a favored finding, and there is a presumption against it."); Marine Transp. Lines, Inc. v. Int'l Org. of Masters, Mates & Pilots, 609 F. Supp. 282, 284 (S.D.N.Y. 1985) (requiring proof "resort to the courts evidences an intent to relinquish the right to arbitration" (citing Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1290 (E.D.N.Y. 1979))); Cedar Surgery Center, L.L.C. v. Bonelli, 96 P.3d 911, 915 (Utah 2004) ("The failure of a party to participate in a law suit does not, standing alone, evince a clear intent by that party to waive its arbitration rights.").

[29] *See* Gilbert Frank Corp. v. Fed. Ins. Co., 520 N.E.2d 512, 513 (N.Y. 1988) (imposing heavy burden on movant "to warrant a court's directing judgment in its favor as a matter of law"); *see also* ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) ("[M]aximum deference is owed to the arbitrator's decision."); Welch v. Hauck, 795 N.Y.S. 2d 789, 792 (App. Div. 2005) (affirming state supreme court finding "plaintiffs established, as a mater of law, that . . . [appellant's] actions effectuated a waiver by his 'intentional relinquishment of a known right'" (citing *Gilbert Frank Corp*., 520 N.E.2d at 514)). In accordance with the federal policy in favor of arbitration, arbitration awards are rarely overturned and the Arbitration Act presumes that an arbitration award will be confirmed. *See* 9 U.S.C. § 9 (2000). An order confirming the award will be entered unless there is a valid basis for vacating, modifying or correcting the award. *Id.* The court may vacate an arbitration award if it were procured by fraud, the arbitrators lacked impartiality or were corrupt, the arbitrators misbehaved so that the rights of a party were prejudiced, or the arbitrators exceeded their powers or executed them without making a final, definite award. *Id.* § 10(a); *see* Dawahare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000) ("Only if a reasonable person would have to conclude that the arbitration panel was partial to a party will we find evident partiality."); *see also* Wachovia Secs., Inc. v. Gangale, 125 F.App'x 671, 674 (6th Cir. 2005) (concluding defendant "had not met any of the listed criteria for vacating an arbitration award"); Trivisonno v. Metro. Life Ins. Co., 39 F.App'x 236, 240 (6th Cir. 2002) (emphasizing "limited role" courts should take in reviewing arbitration awards absent clear statutory circumstances). Judicial review of the overall record is limited, and is made with deference to the arbitrators' interpretation. *See United Steelworkers*, 363 U.S. at 597–99 (rejecting "plenary review by a court of the merits [because it] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final"); *see also* MLB Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (" 'courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'" (quoting *United Steelworkers of Am.*, 363 U.S. at 568 (1960))); United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract.").

[30] *See Prima Paint*, 388 U.S. at 403–04 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."); Germaine Music v. Universal Songs of Polygram, 275 F. Supp. 2d 1288, 1297 (D. Nev. 2003) (rejecting allegation arbitration clause was invalid because of fraud absent allegations "that he was fraudulently induced to agree to the arbitration clause or that the arbitration clause contain[ed] fraudulent statements"); Orcutt, M.D. v. Kettering Radiologists, Inc., 199 F.2d 746, 751 (S.D. Ohio 2002) (denying plaintiff's request for "determination that mandatory arbitration provisions in employment contracts are per se unconscionable" absent "evidence that the arbitration provision in her employment contract was procured by fraud, duress, or mistake or [wa]s otherwise unconscionable").

that despite a valid and acceptable arbitration clause, Congressional intent precludes arbitration on the subject matter of the dispute.[31] While the approach of the courts in resolving the former scenario is clear, the approach of the courts in resolving the latter scenario is not as clear and has generated a great deal of litigation in the bankruptcy arena with regard to the enforceability of an agreement to submit disputes to arbitration.

II. THE BANKRUPTCY JURISDICTION SCHEME

A. Centralization of Dispute Resolution

Specialized tribunals have been part of the American bankruptcy system for more than a century. The National Bankruptcy Act of 1898 ("Former Bankruptcy Act"),[32] which remained in effect until its repeal eighty years later, vested jurisdiction over bankruptcy cases in "courts of bankruptcy," which was defined to include United States district courts.[33] District courts, however, appointed "referees" to preside over bankruptcy cases.[34] When the Federal Rules of Bankruptcy Procedure were first promulgated in 1973, referees were given the title "Bankruptcy Judge."[35]

Despite the creation of specialized bankruptcy tribunals, the jurisdiction of bankruptcy judges under the former Bankruptcy Act was limited to so-called "summary jurisdiction," which means that, in general, they had jurisdiction only over property that was in the actual or constructive possession of the debtor when the bankruptcy petition was filed.[36] The bankruptcy judge also had jurisdiction over

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[31] *See McMahon*, 482 U.S. at 227 ("The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); Mintze v. Am. Gen. Fin. Serv. (*In re* Mintze), 434 F.3d 222, 231 (3d Cir. 2006) (holding court lacked authority to deny enforcement of arbitration clause absent evidence of "congressional intent . . . to preclude waiver of judicial remedies for the statutory rights at issue"); *see also* Note, *Jurisdiction In Bankruptcy Proceedings: A Test Case For Implied Repeal Of The Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2298 (2004) (explaining through legal action "a party may argue that, notwithstanding an otherwise valid and applicable arbitration clause, Congress has expressly or impliedly precluded arbitration of the subject matter of the dispute").

[32] Ch. 541, 30 Stat. 544 (1898).

[33] Former Bankruptcy Act § 1(8); Plymouth Cordage Co. v. Smith, 194 U.S. 311, 312 (1904) (stating bankruptcy law made United States district courts into bankruptcy courts); *In re* Whitener, 105 F. 180, 186 (5th Cir. 1900) (clarifying district court's jurisdiction is "unquestionably bankruptcy jurisdiction").

[34] Former Bankruptcy Act § 34(a); *see* N. Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982) (explaining although bankruptcy proceedings were conducted in front of referees, district court had power to withdraw case from referee); Phar-Mor, Inc. v. Coppers & Lybrand, 22 F.3d 1228, 1234 (3d Cir. 1994) (defining the dual role of referees: deciding disputes and administering bankruptcies).

[35] Fed. R. Bankr. P. § 901(7) (1973) (defining "bankruptcy judge" as the referee of the court of bankruptcy).

[36] *See, e.g.*, Cline v. Kaplan, 323 U.S. 97, 98 (1944) (stating bankruptcy courts have power to adjudicate rights to property contrustructively or actually in possession of court) (citing Thompson v. Magnolia Petroleum, 309 U.S. 478, 481 (1940)); *In re* Tax Serv. Ass'n of Illinois, 305 U.S. 160, 163 (1938) (emphasizing importance of bankruptcy court to "determine whether it has actual or constructive possession

persons who had consented to bankruptcy court jurisdiction.[37] By basing jurisdiction on possession of property or consent, many disputes that arose in, or were related to, bankruptcy cases fell outside the bankruptcy court's jurisdiction and had to be resolved in the district court or in state courts. This splintering of bankruptcy jurisdiction deprived bankruptcy judges of the ability to resolve disputes over significant issues affecting bankruptcy cases.

The former Bankruptcy Act was repealed by the Bankruptcy Reform Act of 1978,[38] which included new provisions of the Judicial Code that elevated the status and powers of bankruptcy judges.[39] Under the 1978 Act, the bankruptcy court became an "adjunct" of the district court, but was given broad jurisdiction over almost every aspect of a bankruptcy case.[40] In particular, section 1471 of title 28 had given to the district courts original, but not exclusive, jurisdiction over all civil proceedings arising under the Bankruptcy Code, or arising in or related to a bankruptcy case.[41] The district court was also given exclusive jurisdiction over all the debtor's property, wherever located. Most significantly, however, is that section 1471(c) provided that bankruptcy judges "shall exercise all of the jurisdiction conferred by this section on the district courts."[42] As noted in the legislative history to the Reform Act, "[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . ."[43] Consistent with this broad grant of jurisdiction, Congress gave bankruptcy courts the power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.[44]

When Congress gave bankruptcy judges such broad jurisdiction, it also gave them fourteen-year terms, rather than life tenure.[45] In 1982, in *Northern Pipeline*

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which is essential to its jurisdiction to proceed"); Weidhorn v. Levy, 253 U.S. 268, 272 (1920) (discussing property not in actual or constructive possession of court's custody).

[37] *See, e.g.*, Katchen v. Landy, 382 U.S. 323, 335 (1966) (implying consent where respondents presented claim to court and "subjected themselves to all the consequences that attach"); Wall v. Cox, 181 U.S. 244, 247 (1901) (lacking jurisdiction when defendants specifically appeared only to protest to court's jurisdiction); Cohen v. Am. Sur. Co. of New York, 84 N.E. 947, 950 (N.Y. 1908) (consenting to jurisdiction of court due to previous related proceedings in front of same court).

[38] Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[39] Section 201(a) of Title II of the Bankruptcy Reform Act of 1978 amended the Judicial Code, title 28, to create the U.S. Bankruptcy Court.

[40] *See* Centrust Sav. Bank v. Love, 131 B.R. 64, 65 (S.D.Tex. 1991) (stating bankruptcy courts are adjuncts of the district courts).

[41] 28 U.S.C. § 1471(b) (1978) (granting district courts original, but not exclusive jurisdiction of title 11 proceedings).

[42] *Id.* § 1471(c).

[43] S. Rep. No. 95-989 (1977).

[44] 11 U.S.C. § 105(a) (2006).

[45] *See Marathon Pipe Line*, 458 U.S. at 60–61 (noting fourteen year term for bankruptcy judges rather than life tenure).

Construction Co. v. Marathon Pipe Line Co.,[46] the Supreme Court shocked the bankruptcy world by declaring unconstitutional the broad grant of bankruptcy jurisdiction to independent courts composed of judges who did not have life tenure and other protections of Article III of the Constitution.[47] The Court found objectionable the bankruptcy court's power to adjudicate disputes that involved no issues under the bankruptcy law, but which "related to" a bankruptcy case only because one of the parties became a debtor in a bankruptcy case.[48] According to the plurality decision, a non-Article III court could resolve disputes that are core to the debtor-creditor relationship, but the 1978 statute had gone too far.[49] Rather than invalidating the bankruptcy court's jurisdiction only to the extent that it exceeded constitutional limits, the Court declared the bankruptcy court's jurisdiction unconstitutional in its entirety.[50]

In reaction to *Marathon*, in 1984 Congress replaced the unconstitutional jurisdictional provisions of the Judicial Code with new provisions that start by giving the district courts the same broad grant of jurisdiction that it enjoyed under the 1978 Act. The district court has been given exclusive jurisdiction of all bankruptcy cases,[51] as well as original but not exclusive jurisdiction of all civil proceedings arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code.[52] The district court also has been given exclusive jurisdiction over all property of the debtor as of the commencement of the case, as well as property of the estate, regardless of where the property is located.[53] The new provisions reconstituted bankruptcy courts as "units" of the district court, and gives to each district court the authority to refer to bankruptcy judges "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or

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[46] *Id.* at 87 (concluding, by plurality decision, that grant of jurisdiction to bankruptcy courts of all civil proceedings arising under Bankruptcy Code or arising in or related to cases under Bankruptcy Code violates Article III of Constitution).

[47] *Id.* at 87.

[48] *Id.* at 74 (claiming bankruptcy court's power to hear cases "related to" bankruptcy to be a legislative "erosion" of Article III jurisdiction).

[49] *Id.* at 71.

[50] *Id.* at 87.

[51] 28 U.S.C. § 1334(a) (2000) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11."). *See generally* Matter of Brady, Texas, Mun. Gas Corp., 936 F.2d 212, 218 (5th Cir. 1991) (discussing limits on district and bankruptcy courts' jurisdiction pursuant to section 1334(a)).

[52] 28 U.S.C.A. § 1334(b) (2006) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."); *see* Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995) (outlining section 1334(b)'s grant of original but not exclusive jurisdiction over civil proceedings "arising in or related to cases under title 11"); Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 AM. BANKR. L.J. 461, 539 (2002) (reiterating congressional grant of original but not exclusive jurisdiction in civil proceedings arising in or related to the Bankrupcty Code and commenting on its constitutional foundations).

[53] 28 U.S.C.A. § 1334(e) (2006) (granting district court exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"); *see* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) ("Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate.").

related to a case under title 11."[54] The reference of bankruptcy cases and civil proceedings to the bankruptcy courts under section 157(a) is routinely accomplished by a general order of the district court that automatically refers all cases and proceedings within its bankruptcy jurisdiction to the bankruptcy court for its judicial district.[55]

Matters that "arise under" the Bankruptcy Code are those that come before the court by virtue of a provision of the Bankruptcy Code.[56] Matters that "arise in" a case under the Bankruptcy Code are those based on a right created by the Bankruptcy Code and that, by their nature, can only be brought in a case under the Bankruptcy Code.[57] However, matters that are only "related to" do not have their roots in the Bankruptcy Code, and would be brought in an alternative forum were the debtor not before the bankruptcy court.[58] The accepted definition of a "related to" matter is one that "could conceivably have any effect on the estate being administered in bankruptcy."[59] For example, if the debtor in a chapter 11 bankruptcy case commences a breach of contract action against a party to a prebankruptcy contract, that proceeding would be "related to" the bankruptcy case because the outcome would affect the value of the bankruptcy estate and, therefore, would be within the bankruptcy jurisdiction of the district court and may be referred to the bankruptcy court under section 157(a).

Although all proceedings within the district court's broad bankruptcy jurisdiction may be referred to the bankruptcy court, in order to avoid the constitutional deficiencies of the 1978 Reform Act, Congress divided the universe of civil proceedings into "core" and "non-core" proceedings. In general, core proceedings are those that are directly related to a bankruptcy court's central

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[54] 28 U.S.C. § 157(a) (2000); *see* William S. Parkinson, *The Contempt Power Of The Bankruptcy Court Fact Or Fiction: The Debate Continues*, 65 Am. Bankr. L.J. 591, 594–95 (1991) ("Although original and exclusive jurisdiction of cases filed under title 11 and cases arising in and related to a title 11 case is vested with the district court, the district court may refer these matters to the bankruptcy court.").

[55] 28 U.S.C. § 157(a) (2000) (granting district courts authority to refer bankruptcy cases to bankruptcy courts); s*ee* Standing Order of Referral of Cases to Bankruptcy Judges (July 10, 1984, Ward, Acting Chief Judge) ("Pursuant to Section 157(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 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 are referred to the bankruptcy judges for this district."); Alec P. Ostrow, *Constitutionality Of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 92 n.7 (1994) ("All districts have adopted a general order of reference of bankruptcy cases to the bankruptcy judges.").

[56] *See, e.g., In re* Housecraft Indus. USA, Inc., 310 F.3d 64, 70 (2d Cir. 2002) (stating where claims invoke "substantive rights created by bankruptcy law" they "arise under" the Bankrupcty Code); Browning v. Levy, 283 F.3d 761, 772–73 (6th Cir. 2002) ("Such claims [arising under the Bankrupcty Code], referred to as 'core' proceedings, either invoke a substantive right created by federal bankruptcy law or . . . could not exist outside of the bankruptcy.") (citations omitted).

[57] *See* Stoe v. Flaherty, 436 F.3d 209, 218 (3d Cir. 2006) ("[C]laims that 'arise in' a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case.").

[58] *See generally* Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (stating claim may be "related to" bankruptcy even if not against debtor or debtor's property).

[59] *Id.*; s*ee Celotex Corp.*, 514 U.S. at 308 n.6 (recanting Pacor definition of "related to"); Publicker Indus. v. United States (*In re* Cuyahoga Equip. Corp.), 980 F.2d 110, 114–15 (2d Cir. 1992) (finding jurisdiction "related to" the bankruptcy where proceeding would have effect upon distribution of estate).

functions, for example, an objection to a creditor's proof of claim filed in the bankruptcy case, a motion to terminate the automatic stay against creditor collection activities, a motion to reject an executory contract, or an adversary proceeding to determine the dischargeability of a particular debt.[60] A non-exclusive list of core proceedings may be found in section 157(b)(2).[61] If a proceeding is core, the bankruptcy judge may determine the matter by entering an appropriate order or judgment,[62] subject to ordinary appellate review in the district court or bankruptcy appellate panel.[63]

Proceedings that are only "related to" a bankruptcy case, such as a breach of contract action commenced by a trustee in bankruptcy against a third party that does not present any bankruptcy issues, are non-core.[64] These are the types of proceedings that, according to *Marathon*, must be resolved by an Article III life-tenured federal judge or by a non-federal tribunal with jurisdiction over the matter.[65] But under the present jurisdictional scheme, the bankruptcy judge nonetheless may preside over the non-core proceeding.[66] However, unless all parties consent otherwise,[67] the bankruptcy judge may only submit to the district court proposed findings of fact and conclusions of law, and only the district court may enter orders

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[60] *See* Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 528 (1991) ("[Section 157] distinguishes between civil proceedings arising under the Bankruptcy Code, which are deemed 'core' matters, and civil proceedings related to the Bankruptcy Code which are deemed 'non-core' matters. A core proceeding . . . involv[es] a right created by federal bankruptcy law and which would only arise in bankruptcy.").

[61] 11 U.S.C. § 157(b)(2) (2006). Although a determination of a claim filed against the bankruptcy estate usually is a core proceeding, the allowance of a personal injury or wrongful death claim is non-core and the claimant is entitled to a trial by jury in the district court for purposes of distribution in the bankruptcy case. *See id.* §§ 157(b)(2)(B), 157(b)(2)(O), 157(b)(5).

[62] *See* 28 U.S.C.A. § 157(b) (2006) (listing examples of core proceedings which bankruptcy judges may hear and determine); Marshall v. Marshall, 126 S. Ct. 1735, 1737 (2006) (examining bankruptcy court's and district court's application of 28 U.S.C section 157(b) to determine whether claim constituted core proceeding); *In re* Gibbons 46 B.R. 193, 194 (Bankr. E.D. KY. 1984) (indicating Bankruptcy Court has jurisdiction to hear any or all cases under title 11 of the United States Code, except personal injury or wrongful death claims).

[63] *See* 28 U.S.C.A. § 158 (2006) (setting forth comprehensive Bankruptcy appellate procedures). Under limited circumstances, a direct appeal to the court of appeals may be permitted. *See id.* § 158(d)(2) (outlining circumstances where direct appeal is permissible); *In re* McKinney, 457 F.3d 623, 624 (7th Cir. 2006) (making clear rights of appeal do not apply to cases which commenced before effective date of Act.); *In re* Elmendorf, 345 B.R. 486, 505 (Bankr. S.D.N.Y. 2006) (certifying question to appeal pursuant to 28 U.S.C. section 158(d) since there is a split of decisions among bankruptcy courts).

[64] *See In re* Nat'l Century Fin. Enter., 312 B.R. 344, 351 (Bankr. S.D. Ohio 2004) (determining state law disputes arising outside of bankruptcy and disputes not invoking substantive right created by bankruptcy law are not core proceedings).

[65] *See Marathon Pipe Line*, 458 U.S. at 83–84 (finding bankruptcy court's jurisdiction over related proceedings are "unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts").

[66] 28 U.S.C. § 157(c)(1) (2000) (offering opportunity to bankruptcy courts to hear non-core proceedings when proceeding is "otherwise related to a case under title 11").

[67] *See id.* § 157(c)(2) (allowing bankruptcy court "to hear and determine and to enter appropriate orders and judgments" only when all parties consent).

and judgments.[68] If a party objects to the proposed findings and conclusions, the district court must determine the dispute de novo.[69]

Consistent with the policy of centralization of dispute resolution in bankruptcy cases, the Judicial Code provides that a party to a civil action in a state or other nonbankruptcy forum may remove the action to the federal district court in the district where the action is pending if it is within the bankruptcy jurisdiction of the federal court.[70] Once removed, the action is usually referred to the bankruptcy court under section 157(a) pursuant to a standing referral order.[71] If the bankruptcy case is pending in a different judicial district, the action is often transferred to that district and referred to the "home" bankruptcy court.[72] Removal is available to parties whether the action is a core or non-core proceeding, and permits the gathering of all bankruptcy-related civil proceedings into the bankruptcy court.

Centralization of proceedings, both core and non-core, are also aided by the automatic stay under section 362 of the Bankruptcy Code. With certain exceptions, section 362 stays, among other creditor activity, the commencement or continuation of civil proceedings against the debtor or the bankruptcy estate.[73] One of the

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[68] *In re* Lion Capital Group, 63 B.R. 199, 206 (Bankr. S.D.N.Y. 1985) (interpreting section 157 to require district courts to make independent decisions after having benefit of bankruptcy judge's "findings of fact and conclusions of law").

[69] 28 U.S.C. § 157(c)(1) (2000) (requiring parties to object timely and specifically to bankruptcy court's findings); *see Marshall*, 126 S. Ct. at 1743 (citing section 157(c)(1), asserting bankruptcy court "has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court"); Boqdanov v. B&H Foto & Elec., Corp., No. 06-CV-384-JD, 2006 U.S. Dist. LEXIS 83657, at *6 (D. N.H. Nov. 14, 2006) (referring to section 157(c)(1), suggesting district court must review the pre-petition amounts de novo since they are non-core).

[70] 28 U.S.C. § 1452(a) (2000) (excluding removal of "United States Tax Court" proceedings and removals of "civil action[s] by a governmental unit to enforce such governmental unit's police or regulatory power"); *see* Maitland v. Mitchel (*In re* Harris Pine Mills), 44 F.3d 1431, 1435 (9th Cir. 1995) (pointing out, "if the district court's local rules so provide, the removed action will then be referred automatically to the bankruptcy court"); Quality Tooling v. United States, 47 F.3d 1569, 1572 (Fed. Cir. 1995) (concluding 28 U.S.C § 1452 refers to removals from state court and federal court). The district court may remand the action back to the state court or other nonbankruptcy forum on any equitable ground. 28 U.S.C. § 1452(b) (2000); *see* Patterson v. Dean Morris, L.L.P., 448 F.3d 736, 741 (5th Cir. 2006) (granting remand since there were only state law claims involved); Susan Block-Lieb, *The Costs of Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 544 n.65 (1998) (explaining broad construction of "'equitable remand' based on a multi-factored balancing approach").

[71] 28 U.S.C. § 157(a) (2000) ("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.").

[72] *See* 28 U.S.C. § 1412 (2000) (providing district court may transfer a proceeding in the interest of justice or for the convenience of the parties); *In re* Whilden, 67 B.R. 40, 42 (Bankr. M.D. F1a. 1986) (explaining moving party must establish transfer of venue by preponderance of evidence); Bruce H. White and William L. Medford, *Rule 1014(b): A Voluntary Bankruptcy to Get Out of an Involuntary Bankruptcy*, 25-9 ABIJ 38 (Nov. 1, 2006) (listing factors considered to transfer venue of bankruptcy cases).

[73] 11 U.S.C. § 362(a)(1) (2006); *see Celotex Corp.*, 514 U.S. at 302 (remarking judgment creditor was stayed from collecting judgment pursuant to 11 U.S.C. section 362(a)(1) when Colotex filed voluntary bankruptcy petition); Andrew Cosgrove, Note, *Breaking up is Hard to do . . . Especially when Bankruptcy is Involved: a Look at the Unfair Results that Occur When Bankruptcy Intervenes in Domestic Relations Cases*, 14 AM. BANKR. INST. L. REV. 235, 247 (2006) (explaining automatic stay prevents non-debtor spouse to seek divorce or property division proceedings.).

purposes of the automatic stay is to preserve property of the estate by not requiring the trustee or debtor in possession to expend its limited resources and energies defending various actions in a multitude of fora.[74] Unless the bankruptcy court grants relief from the automatic stay, creditors are prohibited from litigating prebankruptcy claims against the debtor outside of the bankruptcy court and will ordinarily prosecute their claims by filing a proof of claim in the bankruptcy case. An objection to the allowance of a claim is a core proceeding typically heard in the bankruptcy court. The bankruptcy court also has the power to estimate contingent and unliquidated claims if the fixing or liquidation of the claim would unduly delay the administration of the case.[75]

B. Centralization of Jurisdiction Not Absolute

The centralization of bankruptcy-related disputes in the bankruptcy court, though pervasive within the jurisdictional scheme, is not absolute. As mentioned above, section 1334(b) of title 28 gives the district court original, *but not exclusive*, jurisdiction over proceedings arising under the Bankruptcy Code, or arising in or related to bankruptcy cases.[76] For example, a trustee in bankruptcy, if she so desires, may commence an action to recover a fraudulent conveyance or a preferential payment in a state court. Similarly, if a creditor sues in a state court to recover on a student loan and the debtor alleges as a defense a discharge in bankruptcy, the state court may resolve the issue of whether the debt was discharged in the bankruptcy case. Even if a party may remove the action to the district court,[77] which will ordinarily refer it to the bankruptcy court, the action may be remanded back to state court based on equitable grounds.[78]

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[74] *See In re* Ronald Perlstein Enters., Inc., 70 B.R. 1005, 1009–10 (Bankr. E.D. Pa. 1987) (denying unsecured creditor relief from automatic stay in order to protect debtor's limited resources and energies); *In re* Stranahan Gear Co., Inc. 67 B.R. 834, 838 (Bankr. E.D. Pa. 1986) (noting automatic stay allows debtor to maintain all proceedings in one forum to prevent disruption of efforts to reorganize).

[75] 11 U.S.C. § 502(c)(1) (2006); *see In re* Nova Real Estate Inv. Trust, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982) (construing language of 11 U.S.C. section 502(c) to be mandatory and creating an affirmative duty to estimate any unliquidated claims); Sharon Youdelman, *Strategic Bankruptcies: Class Actions, Classification & The Dalkon Shield Cases*, 7 CARDOZO L. REV. 817, 846 (acknowledging purpose of estimation process is to facilitate reorganization plans).

[76] 28 U.S.C.A. § 1334(b) (2006) ("Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.").

[77] *See* 28 U.S.C. § 1452(a) (2000) ("A party may remove any claim of cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."); Mt. McKinley Ins. Co. v. Corning Inc., 399 F.3d 436, 444–45 (2d. Cir. 2005) ("28 U.S.C. § 1452(a) allows a party to remove a pending state proceeding to a district court having bankruptcy jurisdiction."); Cal. Pub. Emples. Ret. Sys. v. Worldcom, Inc., 368 F.3d 86, 107–08 (2d. Cir. 2004) (holding section 1452(a) gives removal jurisdiction to all claims "'related to' a bankruptcy case" except for two exceptions named in statute).

[78] *See* 28 U.S.C. § 1452(b) (2000) ("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."); *Patterson*, 448 F.3d at 742–43 (affirming

If the proceeding is pending in the bankruptcy court, the district court, on its own motion or on motion of any party, may withdraw the reference for cause, in which event it essentially sits as the bankruptcy court with original jurisdiction.[79] The district court may withdraw the reference regarding an entire bankruptcy case, or may withdraw a particular proceeding while leaving the main bankruptcy case in the bankruptcy court.[80] Such reference withdrawal is rare, but nonetheless leaves the power to take jurisdiction away from the bankruptcy court and place it in the hands of the district court, a feature apparently designed to avoid constitutional challenge in the face of *Marathon*. One basis for withdrawing the reference in a proceeding is if a party is entitled to a jury trial and the bankruptcy court has not been specially designated by the district court to preside at jury trials or a party does not consent to the jury trial in the bankruptcy court.[81] In addition, personal injury or wrongful death claimants are always entitled to a jury trial in the district court for purposes of distribution.[82] Moreover, to avoid even the appearance of bias in favor of bankruptcy principles in conflict with other federal policies, on timely request of a party, the district court must withdraw the reference of a proceeding pending in the bankruptcy court if resolution of the proceeding requires consideration of both the

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district court's decision to remand based on section 1452(b)); *Flaherty*, 436 F.3d at 215 ("[A] district court . . . can consider whether there is reason for the suit to proceed in state court. If so, there will be an 'equitable ground' justifying remand under § 1452(b).").

[79] *See* 28 U.S.C. § 157(d) (2000) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown."); Velocita Corp. v. Constr. Mgmt. & Inspection, Inc., 169 F. App'x 712, 716 (3d Cir. 2006) (stating district court can withdraw a reference "for cause shown"); Comdisco Ventures, Inc. v. Federal Ins. Co., No. 04-C-2007, 2004 WL 1375353, at *2 (N.D. Ill. June 18, 2004) (noting district courts can refer cases to bankruptcy judges and can withdraw the reference "for cause shown").

[80] *See* 28 U.S.C. § 157(d) (2000) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section . . . ."); *see also* Glinka v. Federal Plastics Mfg., 310 F.3d 64, 66 n.2 (2d Cir. 2002) (noting district court granted motion to withdraw reference for entire proceeding); Skylark v. Honeywell Int'l, Inc., No. 01-5069-CIV, 2002 WL 32101980, at *1 (S.D. Fla. Jan. 25, 2002) (referring to district court decision in Delaware partially withdrawing a reference).

[81] *See* 28 U.S.C. § 157(e) (2000) ("If the right to a jury trial applies in a proceeding may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties."); Grausz v. Englander, 321 F.3d 467, 475 (4th Cir. 2003) ("[A] case may be tried before a bankruptcy judge and a jury with the authorization of the district court and the consent of the parties . . . . In any event, an adversary proceeding may be transferred to the district court if a jury trial is required."); *see also* Velde v. Reinhardt, No. 06–2289, 2007 U.S. Dist. LEXIS 5543, at *3 (D. Minn. Jan. 25, 2007) (stating defendants did not consent to jury trials in bankruptcy court, so their actions were transferred to district court).

[82] *See* 28 U.S.C. § 157(b)(5) (2000) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose . . . ."); Adams v. Cumberland Farms, No. 95–1736, 1996 WL 228567, at *3 (1st Cir. May 7, 1996) (explaining "the district court is instructed to order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending or in the district in which the claims arose"); *In re* United Mo. Bank, N.A., 901 F.2d 1449, 1454 (8th Cir. 1990) (stating while bankruptcy courts can conduct jury trials in certain situations, "personal injury and wrongful death claims shall be tried in district court" as per 28 U.S.C. § 157(b)(5)).

Bankruptcy Code and other federal laws regulating organizations or activities affecting interstate commerce.[83]

The role of abstention is also significant in understanding the centralization of bankruptcy jurisdiction. With respect to both core and non-core proceedings, the district court, including the bankruptcy court when the case or the proceeding has been referred under section 157(a), has discretion to abstain from hearing a proceeding in the interest of justice, or in the interest of comity with state courts or respect for state law.[84] Though a bankruptcy judge's exercise of discretion with respect to the granting or denial of a motion to abstain is reviewable on appeal to the district court or, where applicable, a bankruptcy appellate panel,[85] it may not be reviewed by the court of appeals or the Supreme Court.[86] The power to abstain from hearing a proceeding commenced in the bankruptcy court manifests congressional intent to allow bankruptcy courts to decide whether a particular core or non-core proceeding should be heard in the specialized, centralized court, or be heard by a nonbankruptcy tribunal.

In contrast to discretionary abstention, the Judicial Code contains a mandatory abstention provision that compels the district court or bankruptcy court to abstain from hearing a non-core proceeding in certain situations. In particular, if a party

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[83] 28 U.S.C. § 157(d) (2000) ("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."); Mirant Corp. v. Potomac Elec. Power Co., 197 F. App'x 285, *available at* No. 05–10038, 2006 U.S. App. LEXIS 18129, at *22 n.16 (5th Cir. 2006) (stating withdrawal to district court is mandatory when any laws besides title 11 have to be interpreted); United States v. Gurley, 434 F.3d 1064, 1067–68 (8th Cir. 2006) (noting while district court can refer bankruptcy cases to bankruptcy courts, when other laws besides title 11 needs to be considered the reference must be withdrawn if either party files a motion).

[84] Discretionary abstention is available in all bankruptcy cases, except for a cross-border case under chapter 15 of the Bankruptcy Code. 28 U.S.C.A. § 1334(c)(1) (2006) ("Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."); *see also* Galtieri v. Galtieri, 172 F. App'x 397, 399 (3d Cir. 2006) (explaining bankruptcy court abstained in favor of state court "on a permissive basis under 28 U.S.C. § 1334(c)(1) from deciding issues related to the state court proceedings"); Goradia v. O'Connor, 174 F. App'x 209, 211 (5th Cir. 2006) (noting on appeal, district court abstained from ruling on adversary proceeding and remanded the case back to state court citing 28 U.S.C. § 1334(c)(1)).

[85] *See* 28 U.S.C. § 158(b)(1) (2000) ("The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council . . . to hear and determine, with the consent of all the parties, appeals . . . ."); 11 U.S.C. § 158(c)(1) (2006) ("[E]ach appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) . . . ."); s*ee also In re* Salem, 465 F.3d 767, 776 (7th Cir. 2006) (referencing holdings from bankruptcy appellate panels for Tenth Circuit and Fifth Circuit).

[86] 28 U.S.C.A. § 1334(d) (2006) ("Any decision to abstain or not to abstain . . . is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court of the United States . . . ."); *see* Foss v. Hall County Child Support Office, 186 Fed App'x 702 (8th Cir. 2006) (dismissing appeal from bankruptcy court's decision to abstain from hearing issues being decided in state court due to lack of jurisdiction); Southmark Corp. v. Coopers & Lybrand, 163 F.3d 925, 929 (5th Cir. 1999) ("For bankruptcy cases commenced after the 1994 amendments to the bankruptcy law, decisions either to abstain or not to abstain are not, with very limited exceptions, reviewable on appeal.").

makes a timely motion for abstention in a proceeding based on a state law claim or cause of action "related to" a bankruptcy case (but not arising under the Bankruptcy Code or arising in a case under the Code), and the proceeding could not have been commenced in federal court in the absence of the bankruptcy case, the district court or bankruptcy court presiding over the matter must abstain from hearing it if an action has been commenced and may be timely adjudicated in the state court.[87] That is, if the only federal jurisdictional basis is that the action is a non-core proceeding related to a bankruptcy case, and it has been commenced and can be timely resolved in state court, the action belongs in state court and the bankruptcy judge would have no discretion to hear the matter. Mandatory abstention is not applicable in core proceedings because such proceedings arise under the Bankruptcy Code or arise in a case under the Bankruptcy Code, rather than merely being related to the bankruptcy case.

C. Extent of Bankruptcy Court Control Over Proceedings: Core verses Non-Core

An examination of the bankruptcy jurisdictional scheme created by Congress in 1984 leads to the conclusion that, with a few rare exceptions,[88] the bankruptcy judge will make the determination as to where a core proceeding will be resolved if any party in the proceeding wishes to have it heard by the bankruptcy judge. Accordingly, in general, the bankruptcy judge is almost always the jurist who determines where a core proceeding will be decided, and that tribunal is almost always the bankruptcy court.

In contrast, the statutory scheme gives a bankruptcy judge less power with respect to a determination of where a non-core proceeding will be decided. First, unless all parties consent, the bankruptcy judge may not enter orders or judgments to resolve the dispute. Second, on request of a party, mandatory abstention deprives the bankruptcy judge of the power to preside over a non-core dispute that is pending and can be timely adjudicated in a state court. It is common, therefore, and anticipated by Congress when it devised the current jurisdictional scheme, for some non-core matters to be decided by federal district courts or state courts, rather than by a bankruptcy court.

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[87] 28 U.S.C.A. § 1334(c)(2) (2006); *see* Lindsey v. O'Brien, Tanski, Tanzer, & Young Health Care Providers, 86 F.3d 482, 497 (6th Cir. 1996) (explaining five elements required for mandatory abstention to apply); *see also* Lowenbraun v. Canary, 453 F.3d 314, 320 (6th Cir. 2006) (applying *Lindsey* test to determine whether mandatory abstention is necessary). An exception to mandatory abstention exists for personal injury and wrongful death claims for the purpose of distribution in the bankruptcy case. A claimant is entitled to have the personal injury or wrongful death claim tried by a jury in the district court. 28 U.S.C.A. § 157(b)(5) (2006); *see supra* note 82.

[88] Those exceptions include when the district court withdraws the reference under 28 U.S.C. § 157(d), or a personal injury or wrongful death claimant is entitled to a jury trial in the district court under 28 U.S.C. § 157(b)(5). *See supra* notes 82–83.

III. JUDICIAL ANALYSIS

It is within the context of the bankruptcy jurisdictional scheme under the Judicial Code that courts have been asked to decide whether a bankruptcy court's jurisdiction over a core or non-core proceeding must give way to a contractually binding arbitration agreement. Courts have repeatedly noted that the Arbitration Act, which takes disputes out of the judicial system, conflicts with the policy and efficiency of centralization of dispute resolution in bankruptcy cases, which is the hallmark of the bankruptcy jurisdictional scheme.[89] "[B]ankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution . . . . [E]ach statute advances clear and unassailable legislative policies and comes well-armed with strong judicial approval."[90] As the two federal statutes are each manifestations of federal policies espoused by Congress, "the issue as to whether or not a bankruptcy court should allow a dispute to be resolved by an arbitration forum to which the parties agreed implicates the clash of two federal statutes."[91]

In early cases decided shortly after the enactment of the 1978 Act, but before the Supreme Court's decision in *Marathon*, several courts had held that bankruptcy courts were not strictly bound by the Arbitration Act. Most notably, the Court of Appeals for the Third Circuit in *In re Zimmerman*, held that the "purposes of the Bankruptcy Reform Act impliedly modify the Arbitration Act."[92] Such early decisions focused simply on whether one statutory scheme trumped another. In *Zimmerman*, a trustee in bankruptcy commenced an adversary proceeding against a defendant for breach of contract and the court of appeals upheld the bankruptcy court's denial of the defendant's application to compel binding arbitration based on a contractual arbitration provision.[93] Additionally, even where courts did not explicitly determine that the policies underlying the Bankruptcy Code are superior

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[89] *See, e.g., U. S. Lines*, 197 F.3d at 641 (stating bankruptcy court has discretion whether or not to enforce an arbitration agreement, so long as it "has properly considered the conflicting policies in accordance with law"); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir. 1989) (interpreting recent Supreme Court decisions to mean that courts must "determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and . . . [courts] should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code"); Bender Shipbuilding and Repair Co. v. H.B. Morgan (*In re* H.B. Morgan), 28 B.R. 3, 5 (B.A.P. 9th Cir. 1983) ("In *Johnson*, the Ninth Circuit affirmed a decision of the district court refusing to enforce an arbitration provision in the bankrupt's collective bargaining agreement." (citing Johnson v. England, 356 F.2d 44 (9th Cir. 1966)).

[90] Societe Nacionale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987).

[91] *In re* Spectrum Info. Tech., Inc., 183 B.R. 360, 362 (Bankr. E.D.N.Y. 1995) (quoting *In re* Al-Cam Dev. Corp., 99 B.R. 573, 575–76 (Bankr. S.D.N.Y. 1989)).

[92] Zimmerman v. Cont'l Airlines, Inc., 712 F.2d 55, 56 (3d Cir. 1983) (determining bankruptcy court did not abuse its discretion in refusing to enforce arbitration clause); *see* Braniff Airways, Inc. v. United Air Lines, Inc. (*In re* Braniff Airways, Inc.), 33 B.R. 33, 34 (Bankr. N.D. Tex. 1983) (finding with enactment of Bankruptcy Code, Congress intended Arbitration Act would not apply to bankruptcy matters.).

[93] *Zimmerman*, 712 F.2d at 55 (rejecting defendant's request to stay bankruptcy proceeding and to enforce contract's arbitration clause).

to those championed by the Arbitration Act, there was greater reliance placed on bankruptcy policy and the broad pre-*Marathon* jurisdictional grant given to bankruptcy courts by Congress.[94] These early cases relied upon the broadening of the jurisdictional grant afforded to bankruptcy courts by the Bankruptcy Reform Act of 1978, noting that bankruptcy courts were no longer bound by distinctions between plenary and summary jurisdiction, and were given the powers of courts of equity, law, and admiralty.[95]

However, two significant developments occurred after the enactment of the Bankruptcy Reform Act of 1978 that have changed the way courts have analyzed this issue. First, the bankruptcy jurisdictional scheme was declared unconstitutional in *Marathon* and was replaced by the 1984 amendments to the Judicial Code and, second, the Supreme Court has rendered a landmark decision in *Shearson/American Express, Inc. v. McMahon*,[96] which has provided a new framework for determining when the Arbitration Act will give way to a conflicting federal statute.

In *McMahon*, the Supreme Court articulated the standard for courts to use when evaluating whether Congress intended that a countervailing federal statute would override the Arbitration Act with respect to disputes involving a certain subject matter. In *McMahon*, the Supreme Court determined that arbitration clauses must be enforced when claims under section 10(b) of the Securities Exchange Act and claims under the Racketeer Influenced Corrupt Organizations Act were brought against a securities broker by a customer.[97] The Court noted that:

> The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes.
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[94] *See* Cross Elec. Co. v. John Driggs Co. (*In re* Cross Elec. Co.), 9 B.R. 408, 412 (Bankr. W.D.Va. 1981) (denying motion to dismiss adversary proceeding and enforcing arbitration provision); *see also In re* Double TRL, Inc., 65 B.R. 993, 998 (E.D.N.Y. 1986) (enumerating "continuing force of the bankruptcy process even in the face of arbitration" according to legislative history of new Bankruptcy Code); *In re* F & T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981) (asserting bankruptcy judge's discretion to refuse to compel arbitration concerning bankruptcy matters).

[95] *See In re Cross Elec. Co.*, 9 B.R. at 410 (noting under former Bankruptcy Act, bankruptcy courts were constrained by ability to dispose of matters before them based on summary jurisdiction, and therefore had little choice but to enforce arbitration clauses) (citing Schilling v. Canadian Foreign S.S. Co., 190 F. Supp. 462, 463 (D.C.N.Y. 1961) (stating limits of summary jurisdictional powers of bankruptcy court prior to enactment of Bankruptcy Reform Act of 1978)); *see also In re* Frigitemp Corp., 8 B.R. 284, 288 n.1 (D.C.N.Y. 1981) (applying bankruptcy law pre-existing 1978 Bankruptcy Reform Act concerning plenary jurisdiction within arbitration agreements).

[96] 482 U.S. 220, 220 (1987) (establishing strong federal policy favoring arbitration although it may be overridden by contrary congressional command).

[97] *Id.* at 233 (discussing suitability of arbitration under Exchange Act).

> To defeat application of the Arbitration Act . . . the [party opposing arbitration] must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under [the statute], an intention discernible from the text, history, or purposes of the statute.[98]

In *McMahon*, the Court held that to overcome enforcement of an arbitration agreement because of another federal statute, the party must establish congressional intent to create an exception to the Arbitration Act's mandate.[99] Most importantly, the Court wrote that congressional intent to override the Arbitration Act can be discerned in any one of three ways: (i) the other statute's text; (ii) the other statute's legislative history; and (iii) an inherent conflict between arbitration and the other statute's underlying purposes.[100] As one commentator has noted, in applying the *McMahon* standards, courts have found little guidance either in the text or the legislative history of the Judicial Code provisions relating to bankruptcy jurisdiction; "the inquiry, therefore, has been framed as whether arbitrating the dispute in question would pose an irreconcilable conflict with the Code."[101] In making a determination as to whether an inherent conflict exists, courts have approached the analysis on a case-by-case basis, examining the facts and circumstances of the particular dispute. The end result of such analysis is a wide body of law consisting of divergent decisions issued by various appellate courts.

Following the Bankruptcy Amendments and Federal Judgeship Act of 1984, which was the legislative response to the *Marathon* decision, courts began to recognize that federal bankruptcy jurisdiction is not all encompassing, and—under the guidance afforded by the *McMahon* test—began to re-examine whether Congress intended the Judicial Code and related provisions of the Bankruptcy Code to override the Arbitration Act. When the Court of Appeals for the Third Circuit, which had rendered the opinion in *Zimmerman* in 1983 recognizing a bankruptcy court's broad discretion to deny enforceability of arbitration agreements, applied the *McMahon* test in the post-*Marathon* jurisdictional scheme, the court found that bankruptcy courts have only limited discretion in determining whether to enforce an arbitration clause.[102] In *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[103] the Third Circuit examined Congressional intent in forming the scope of bankruptcy jurisdiction in the 1984 legislation, distinguishing between causes of

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[98] *Id.* at 227.
[99] *McMahon*, 482 U.S. at 223.
[100] *Id.* at 227.
[101] Note, *supra* note 31, at 2299 (demonstrating courts' analysis in deciding whether to deny arbitration).
[102] *See id.* at 2302 (maintaining limited discretion courts have in denying arbitration claims).
[103] 885 F.2d 1149 (3d Cir. 1989) (noting district court's lack of jurisdiction to deny enforcement of arbitration clause); *see* Notes, *supra* note 101, at 2299 (showing significance of *Hays* in establishing scope of bankruptcy court jurisdiction); *see also* Capitol Life Ins. Co. v. Gallager, 839 F. Supp. 767, 769 (D. Colo. 1993) (relying on *Hays* to determine which claims must be subject to arbitration).

action derived from the debtor and those that the Bankruptcy Code created for the benefit of creditors of the estate.

In *Hays*, a chapter 11 trustee commenced an action against a securities broker for claims under various state and federal securities laws, as well as fraudulent conveyance and constructive trust claims under the trustee's powers under section 544(b) of the Bankruptcy Code.[104] The defendant securities broker moved to compel arbitration based on the arbitration provision in the customer agreement signed by the broker and the debtor before the commencement of the bankruptcy case.[105] The district court denied the motion, stating that under the *Zimmerman* decision, it had broad discretion to nullify a mandatory arbitration clause.[106] It also stated that since neither the trustee nor the creditors it had represented signed the agreement, they should not be bound by its arbitration provision.[107] The court of appeals reversed, holding that "the trustee-plaintiff stands in the shoes of the debtor for purposes of the arbitration clause."[108] The court, giving no weight to its decision in *Zimmerman* because it had predated the Supreme Court's decision in *McMahon* and the 1984 amendments to title 28, also distinguished between litigation in which the trustee seeks to enforce a debtor-derivative pre-petition contract claim, which is a non-core matter, and actions created by the Bankruptcy Code for the benefit of creditors, which are core matters.[109]

The court of appeals in *Hays* found no indication in the text or legislative history of the 1984 amendments to the Judicial Code governing bankruptcy jurisdiction that Congress intended to bar arbitration in the non-core context. It also found no irreconcilable conflict between the statutes governing bankruptcy jurisdiction and the Arbitration Act in non-core proceedings, noting that the consolidation impulse—which is very clear in the context of core claims—is not prevalent in the context of non-core claims.[110] Therefore, the court of appeals held

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[104] *Hays*, 885 F.2d at 1149 (alleging federal and state securities violations as well as fraudulent conveyance and constructive trust claims under section 544(b)); *see* 11 U.S.C. § 544(b) (2006) (rendering null and void transfer or obligation voidable as against holder of allowable unsecured claim against estate). Section 544(b) is often used by a trustee to avoid transfers that are fraudulent conveyances under applicable state law. *See id.*; *In re* Harvard Knitwear, Inc., 193 B.R. 389, 392 (Bankr. E.D.N.Y. 1996) (observing section 544(b) permits a trustee to avoid voidable or fraudulent transfers under state law); *In re* Revco D.S., Inc., 118 B.R. 468, 497 (Bankr. N.D. Ohio 1990) (recognizing causes of action for fraudulent conveyance under state law pursuant to section 544(b)). Under section 157(b)(2)(H) of title 28, proceedings to avoid or recover a fraudulent conveyance is a core matter. *See In re* Schurek, 139 B.R. 512, 513 (Bankr. S.D. Cal. 1992) (emphasizing fraudulent conveyance actions to be core matters under section 157); *see also* Halper v. Halper, 164 F.3d 830, 837 (3d Cir. 1999) (declaring fraudulent conveyance to be a core matter for bankruptcy court under section 157).

[105] *Hays*, 885 F.2d at 1151.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 1153.

[109] *Id.* at 1156–57, 1162.

[110] *Id.* at 1157 ("[I]t is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court."); *see* Sacred Heart Hosp. of Norristown v. Indep. Blue Cross (*In re* Sacred Heart Hosp. of Norristown) 181 B.R. 195, 202 (Bankr. E.D. Pa. 1995) (noting *Hays* stated that the

that arbitration of the non-core dispute was mandatory and the court had no discretion to nullify it.

In contrast, the court of appeals in *Hays* held that the trustee's claims under section 544(b) of the Bankruptcy Code, which are created by the Code for the benefit of creditors of the estate and which are core matters, were not subject to the mandatory arbitration clause. The court held that "the trustee's section 544(b) claims are not arbitrable under the arbitration clause because they are not derivative of the debtor and the trustee is accordingly not bound by the Customer Agreement with respect to them."[111]

While *Hays* appears to have addressed the enforceability of arbitration clauses in non-core proceedings, the Court of Appeals for the Fifth Circuit in *In re National Gypsum* addressed the enforceability of an arbitration clause in core proceedings.[112] Relying on *Hays*, the court noted that arbitration of derivative, non-core matters does not conflict with the Bankruptcy Code (and in fact "makes eminent sense" in light of the 1984 amendments to the Bankruptcy Code), however the Fifth Circuit commented that *Hays* did not address specifically whether a bankruptcy court has discretion to enforce an applicable arbitration clause where core bankruptcy issues are involved.[113] The Fifth Circuit expressly rejected a per se rule that the bankruptcy court has discretion to deny enforcement of an agreement to arbitrate in all core proceedings, and instead adopted a standard that questioned whether arbitrating *a particular* core matter would conflict with the Bankruptcy Code.[114]

National Gypsum bifurcated core claims into two categories: claims involving bankruptcy rights, which should remain within the bankruptcy court, and claims involving state law rights, whose arbitration does not inherently conflict with the Code.[115] The court concluded that only core claims arising from the federal rights conferred by the Bankruptcy Code present the type of conflict with the purpose and provisions of the Bankruptcy Code alluded to in *McMahon* to permit bankruptcy courts to use their discretion in deciding whether to allow arbitration.[116]

> We think that, at least where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights

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policy favoring arbitration grew stronger, while, in the wake of *Marathon*, the policy of centralizing disputes involving a debtor had weakened).

[111] *Id.* at 1153. The court of appeals also wrote, reasoning a trustee's claims under section 544(b) of the Bankruptcy Code are asserted on behalf of creditors, that "there is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative from one who was a party to it." *Id.* at 1155.

[112] *In re* Nat'l Gypsum Co., 118 F.3d 1056 (5th Cir. 1997).

[113] *Id.* at 1066.

[114] *Id.* at 1067 ("[N]onenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the code.").

[115] *Id.* at 1066–67.

[116] *In re Nat'l Gypsum Co.*, 118 F.3d at 1069.

> conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.[117]

Applying this standard to the facts in *National Gypsum*, the court of appeals upheld the bankruptcy court's discretion to deny a motion to compel arbitration.[118] The motion was brought in the context of an adversary proceeding brought by successors of a chapter 11 debtor to determine whether an insurance company's collection efforts were barred by the discharge injunction set forth in section 524(a) of the Bankruptcy Code or by the confirmation of the plan of reorganization in National Gypsum's chapter 11 case.[119] The court of appeals was convinced that arbitration of this core proceeding, which was a non-debtor derivative action to enforce asserted rights created by the Bankruptcy Code completely divorced from National Gypsum's rights under prebankruptcy contracts, would be inconsistent with the Bankruptcy Code.[120]

Hays and *National Gypsum* formed the groundwork for the analysis done by other courts on the enforceability of arbitration clauses in bankruptcy. Following *Hays* and *National Gypsum*, other circuit courts—most notably the Second Circuit and the Fourth Circuit—addressed this issue. However, while each court took note of the analysis in *Hays* and *National Gypsum*, each court modified the standard, creating yet another means for determining the level of the bankruptcy court's discretion to deny enforcement of an arbitration clause.

In *In re United States Lines*, the Court of Appeals for the Second Circuit distinguished between core and non-core proceedings with respect to the enforceability of arbitration agreements.[121] However, the court of appeals, in dictum, has left the door open to nullifying arbitration clauses in non-core proceedings. A conflict between the Arbitration Act and the Bankruptcy Code "is *lessened* in non-core proceedings which are *unlikely* to present a conflict sufficient to override by implication the presumption in favor of arbitration."[122] Similarly, the court of appeals rejected the notion that the bankruptcy court has discretion to nullify arbitration clauses in all core proceedings. Also, in contrast to the Fifth Circuit's approach in *National Gypsum*, which bifurcated core claims into two

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[117] *Id.* at 1069.
[118] *Id.* at 1071 (finding arbitration would irreconcilably conflict with Code).
[119] *Id.* at 1071.
[120] *Id.* at 1071.
[121] *In re U.S. Lines Inc.*, 197 F.3d at 636–37 (indicating "whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization.").
[122] *Id.* at 640 (emphasis added).

categories based on whether the claim involved state law rights or bankruptcy law rights, the Second Circuit did not make that distinction and reasoned that the bankruptcy court must "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause."[123] The court of appeals then recognized that "there will be occasions where a dispute involving both the Bankruptcy Code and the Arbitration Act 'presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution.'"[124] Therefore, as to core claims, the court held that a bankruptcy court has discretion to determine arbitrability. As one commentator has noted,"[u]nlike *National Gypsum*, *United States Lines* made no mention of the origin of the claim; rather, the court's opinion suggested that discretion is governed by an assessment of competing policies."[125]

The litigation in *United States Lines* was commenced by a reorganized debtor and a reorganization trust created in the bankruptcy case seeking a declaration of the trust's rights under certain prebankruptcy insurance policies.[126] Although the proceeding was commenced to determine rights under prebankruptcy contracts, the court of appeals concluded that "the impact these contracts have on other core bankruptcy functions nevertheless render the proceedings core . . . . [R]esolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate."[127] The court had found that the declaratory judgment proceedings "are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, . . . the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor."[128] The court also noted that "[t]he need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies, and insurers."[129] Therefore, the court concluded that it was within the bankruptcy court's discretion to refuse to refer these proceedings to arbitration.

Again, the Second Circuit in *United States Lines* did not give the bankruptcy court unfettered discretion to deny a motion to compel arbitration under an arbitration clause merely because it found that the proceeding was core. Consistent with that position, in *MBNA America Bank v. Hill*,[130] the Second Circuit held that, based on the unique facts of that case, a bankruptcy judge had no discretion in the core proceeding to deny enforcement of an arbitration clause contained in a

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[123] *Id.* (quoting Hays and Co. v. Merrill Lynch, 885 F.2d 1149, 1161 (3d Cir. 1999)).
[124] *Id.* (quoting Societe Nationale Algerienne v. Distrigas Corp., 80 B.R. 606, 610 (Bankr. D. Mass. 1987)).
[125] Note, *supra* note 31, at 2303.
[126] *In re U.S. Lines*, 197 F.3d at 634 (explaining plaintiff who brought case and relief sought).
[127] *Id.* at 638.
[128] *Id.* at 641.
[129] *Id.*
[130] 436 F.3d 104 (2d Cir. 2006).

consumer loan agreement.[131] After filing a chapter 7 liquidation petition and receiving a discharge of her debts, the debtor filed an adversary proceeding against the lender as a putative class action on behalf of herself and others similarly situated alleging willful violation of the automatic stay and seeking damages under section 362(h) of the Bankruptcy Code. The bankruptcy court denied the lender's motion to compel arbitration, concluding that the bankruptcy court was the most appropriate forum, and the district court affirmed, finding that compelling arbitration would "seriously jeopardize the objectives of the Bankruptcy Code."[132] Citing *United States Lines*, the court of appeals recognized that:

> Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters. However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Arbitration Act or that arbitration of the claim would "necessarily jeopardize" the objectives of the Bankruptcy Code.[133]

The court of appeals then reversed the lower court decisions and held that the bankruptcy court lacked discretion to deny enforcement of the arbitration clause.

> Although we reach the same conclusion as the lower courts that Hill's section 362(h) claim is a core proceeding, we hold that arbitration of her claim would not seriously jeopardize the objectives of the Bankruptcy Code because (1) Hill's estate has now been fully administered and her debts have been discharged, so she no longer requires protection of the automatic stay and resolution of the claim would have no effect on her bankruptcy estate; (2) as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration; and (3) a stay is not so closely related to an injunction that the bankruptcy court is uniquely able to interpret and enforce its provisions.[134]

In *In re White Mountain*, the Court of Appeals for the Fourth Circuit was faced with the question of whether a mandatory international arbitration provision in a contract was enforceable when a principal of a corporate chapter 11 debtor commenced an adversary proceeding against the debtor and an investor seeking a

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[131] *Id.* at 109.
[132] *Id.* at 107.
[133] *Id.* at 108 (quoting *In re U.S. Lines, Inc.*, 197 F.3d at 640).
[134] *Id.* at 109.

determination as to whether prebankruptcy cash advances to the debtor were loans or equity investments. Clearly, this was a core proceeding.[135] The court resolved this question, as did other courts of appeals, by focusing on the third prong of the *McMahon* test—whether Congressional intent is deducible from an inherent conflict between arbitration and the Bankruptcy Code's underlying propose.[136] The court stated that:

> [T]he very purpose of bankruptcy is to modify the rights of debtors and creditors and Congress intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts. Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights "contingent upon an arbitrator's ruling" rather than the ruling of the bankruptcy judge assigned to hear the debtor's case. Centralization of disputes concerning a debtor's legal obligations is especially critical in chapter 11 cases, like White Mountain's.[137]

The court concluded that the inherent conflict between arbitration and the purposes of the Bankruptcy Code was revealed clearly through *the facts and nature of the claim* in this case.[138]

The court of appeals in *White Mountain* upheld the bankruptcy court's findings that referring the proceeding to an arbitration panel in London would be "inconsistent with the purpose of the bankruptcy laws to centralize disputes about a chapter 11 debtor's legal obligations so that reorganization can proceed efficiently."[139]

> The [bankruptcy] court found that an ongoing arbitration proceeding in London would (1) make it very difficult for the debtor to attract additional funding because of the uncertainty as to whether [the investor's] claim was debt or equity, (2) undermine creditor confidence in the debtor's ability to reorganize, (3) undermine the confidence of other parties doing business with the debtor, and (4) impose additional costs on the estate and divert the attention and time of the debtor's management (even though the debtor was not named party in the arbitration, the proceeding would necessarily involve the debtor's personnel and business records).

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[135] *In re* White Mountain Mining Co., 403 F.3d 164, 169 (4th Cir. 2005).
[136] *Id.*
[137] *Id.* at 169–70.
[138] *Id.* at 170 ("The inherent conflict between arbitration and the purposes of the Bankruptcy Code is revealed clearly in this case, in which both the adversary proceeding and the London arbitration involved the core issue of whether Phillips's advances to the debtor were debt or equity.").
[139] *Id.*

> The bankruptcy court noted that because resolution of the debt-equity issue was critical to the debtor's ability to formulate a plan of reorganization, the court would resolve the adversary proceeding on an expedited basis. Finally, the court found that allowing the adversary proceeding to go forward would "allow all creditors, owners and parties in interest to participate [in centralized proceeding] at a minimum of cost."[140]

Though the holding in *White Mountain*, in which the court upheld the lower court's refusal to submit a core proceeding to arbitration, seems to be consistent with other court of appeals cases discussed above, the Fourth Circuit was not willing to reject a bright-line distinction that would render all core proceedings subject to the bankruptcy judge's discretion to nullify arbitration clauses. Noting that the Second Circuit, in *United States Lines*, wrote that a determination that a proceeding is core does not automatically give the bankruptcy court discretion to nullify an arbitration clause, the Fourth Circuit commented that "[t]here is the counter-argument, however, that the statutory text giving bankruptcy courts core-issue jurisdiction reveals a congressional intent to choose those courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims."[141] In any event, the Fourth Circuit then wrote that "we need not decide today whether the statutory text itself demonstrates congressional intent to override arbitration for core claims because this case may be decided under *McMahon's* third line of analysis . . . ."[142] This statement is revealing in that it demonstrates that the Fourth Circuit, unlike the Second Circuit, would be willing to consider a bright-line rule that the bankruptcy court has discretion to nullify arbitration clauses in all core proceedings, and even sets forth an argument for adopting that principle.

It is not surprising that much ink has been spilled in determining whether a particular proceeding is core or non-core when the enforcement of a mandatory arbitration clause is at issue. Until recently, a common thread running through virtually all appellate decisions on the enforcement of arbitration clauses in bankruptcy is that different standards apply depending on whether the proceeding is core or non-core. As discussed above, courts have differed on what those standards are,[143] but they have agreed generally that a determination of whether the

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[140] *Id.*

[141] *Id.* at 169.

[142] *Id.*

[143] Interestingly, the bankruptcy court in *In re Sacred Heart*, 181 B.R. 195 (Bankr. E.D. Pa. 1995), noted that it "need not decide whether [the] proceeding is core . . . ." *Id.* at 197. The court then stayed an adversary proceeding and sent the case to an arbitral panel, yet retained the matter for periodic status reports as to the progress of the arbitration. *Id.* at 205. There is a minority view that bankruptcy courts do have discretion to determine whether non-core matters should be sent to arbitration, but when it comes to core matters, bankruptcy courts have no discretion and are required to retain jurisdiction, as the Bankruptcy Code impliedly modifies that Arbitration Act. See *In re Guild Music Corp.*, 100 B.R. 624 (Bankr. D.R.I. 1989), where the court stated the following:

proceeding is core or non-core has at least some relevance to the question of whether an arbitration clause must be enforced. However, in a recent and surprising decision of the Court of Appeals for the Third Circuit in *In re Mintze*, in which the court revisited the enforceability of arbitration clauses in bankruptcy, it expressly rejected the notion that there are different standards to be applied depending on whether the proceeding is core or non-core.[144] "The core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement."[145] Apparently, therefore, in the Third Circuit the core/non-core distinction is irrelevant in determining whether a bankruptcy court has discretion to nullify an arbitration clause.

Rather than stating that it has decided to switch its position since it rendered its decision in *Hays* more than sixteen years before, the court of appeals in *Mintze* interpreted *Hays* so as not to be limited to non-core proceedings. The court explained that an interpretation of *Hays* that limits its holding to non-core proceedings is based on the language in that opinion that stated that a court lacks discretion to deny enforcement of an arbitration clause unless the trustee has met its burden of showing that the text, legislative history, or purpose of the Bankruptcy Code conflicts with the enforcement of the arbitration provision "in a case of this kind, that is, *a non-core proceeding brought by a trustee to enforce a claim of the estate in a district court*."[146] Despite this language, the court in *Mintze* rejected that interpretation, saying that the *Hays* decision "did not seek to distinguish between core and non-core proceedings; rather, it sought to distinguish between causes of action derived from the debtor and bankruptcy actions that the Bankruptcy Code created for the benefit of the creditors of the estate."[147]

The Third Circuit in *Mintze* stated that before determining whether the bankruptcy court *abused* its discretion in denying enforcement of an arbitration clause, the court of appeals must determine whether the bankruptcy court even *had* any discretion to exercise.[148] In explaining its ruling in *Hays*, the Third Circuit

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> Where issues to be arbitrated are not exclusively bankruptcy matters, but are otherwise related to the bankruptcy case, such issues may be referred to arbitration, in the sound discretion of the bankruptcy judge. However, where the issues in dispute involve "core" bankruptcy matters, which are the exclusive subject matter of the bankruptcy court, such issues may not be referred to arbitration.

Id. at 628; *see In re* Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 203 (Bankr. S.D.N.Y. 2002) (differentiating between issues that are "procedurally core" or "substantively core"). *But see* U.S. Lines, Inc. v. American Steamship Owners Mutual Prot. & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.) 197 F.3d 631, 640 (N.Y. 1999) ("Even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration.").

[144] Mintze v. Am. Gen. Fin. Serv. (*In re* Mintze), 434 F.3d 222, 223 (3d Cir. 2006) (holding "Bankruptcy Court lacked the authority and the discretion to deny enforcement of the arbitration provision in the contract between Mintze and AGF").

[145] *Id.* at 229.

[146] *Hays*, 885 F.2d at 1156–57 (emphasis added); *see also In re Mintze*, 434 F.3d at 230.

[147] ***In re Mintze*, 434 F.3d at 230.**

[148] *Id.* at 229.

clarified that it held in that case that "whether the *McMahon* standard is met determines whether the court has discretion to deny enforcement of an otherwise applicable arbitration clause."[149] That is, the starting point is *McMahon* and whether the claim at issue is core or non-core is not part of the analysis. Ultimately, the question of whether the bankruptcy court has any discretion at all to deny enforcement of an arbitration clause turns on whether the party opposing arbitration can establish Congressional intent to preclude waiver of judicial remedies for the statutory rights at issue.

In *Mintze*, after a home equity lender filed a proof of claim in a chapter 13 case, the debtor commenced an adversary proceeding alleging that the lender induced her into entering into an illegal and abusive home equity loan that resulted in the lender holding a mortgage lien against her home. She had sought to enforce a prebankruptcy rescission of the mortgage that she had asserted under the Federal Truth in Lending Act,[150] as well as asserting several other claims under state and federal consumer protection laws.[151] The lender moved to compel arbitration based on an arbitration clause in the loan agreement.[152] The bankruptcy court, treating the proceeding as core based on a stipulation of the parties, decided that it should be heard by the bankruptcy court because the outcome of the rescission claim would affect her chapter 13 plan and the distribution of her money to her other creditors.[153] But the court of appeals disagreed with the bankruptcy court's conclusion that the effect of a resolution of the adversary proceeding on the order of priority of claims and on the amount of distributions to other creditors was sufficient to create an inherent conflict between the Bankruptcy Code's underlying purposes and the Arbitration Act required by the Supreme Court's decision in *McMahon*.[154] The court of appeals noted that the statutory claims raised by the debtor in the adversary proceeding are all based on state or federal consumer protection laws, including the Truth in Lending Act, and not on any statutory claims raised under the Bankruptcy Code. "With no bankruptcy issue to be decided by the Bankruptcy Court, we cannot find an inherent conflict between arbitration of *Mintze*'s federal and state consumer protection issues and the underlying purposes of the Bankruptcy Code."[155] Although the Third Circuit posits its analysis as a clarification of the court's ruling in *Hays*, the position now adopted by the Third Circuit appears to be the most pro-arbitration position of any circuit.

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[149] *Id.* at 230.
[150] 15 U.S.C. §§ 1601–1667(f) (2000).
[151] *In re Mintz*, 434 F.3d at 226.
[152] *Id.* at 227.
[153] *Id.*
[154] *Id.* at 231–32
[155] *Id.*

IV. THE NEED FOR REFORM

As discussed above, courts have used varying approaches when applying the principles enunciated by the Supreme Court in *McMahon* to the enforcement of arbitration clauses in proceedings in bankruptcy cases. Most courts,[156] but not all, have distinguished between core and non-core proceedings for the purpose of applying *McMahon*, though they have not adopted per se rules and have focused instead on the particular issues in dispute and factual circumstances to determine on a case-by-case basis whether compulsive arbitration is inconsistent with the underlying policies of the Bankruptcy Code. The case law, especially in core proceedings, has resulted in the lack of predictability and costly and time-consuming litigation. Ironically, litigating disputes over the enforceability of arbitration clauses deprives parties of the primary benefits of arbitration: efficiency, speed, and avoidance of costs associated with litigation in the court system.

The costs and delays resulting from protracted litigation are especially burdensome in proceedings within a federal court's bankruptcy jurisdiction. First, debtors in bankruptcy are usually insolvent and the costs and delays caused by extensive litigation reduce distributions to unsecured creditors and may hamper a debtor's ability to reorganize. Second, for orders and judgments of a bankruptcy court, the Judicial Code offers an additional level of review as of right when compared with other federal proceedings. In core proceedings, except for rare instances when a direct appeal is authorized to the court of appeals, parties may appeal to the district court or, if available in the particular jurisdiction, the bankruptcy appellate panel, and then to the court of appeals.[157] In non-core proceedings, unless all parties consent to a determination by the bankruptcy court, the bankruptcy judge issues proposed findings of fact and conclusions of law that may be reviewed de novo by the district court,[158] whose decision may be appealed to the court of appeals. Accordingly, three tribunals are usually involved in a

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[156] *See In re U.S. Lines, Inc.*, 197 F.3d at 640 (discussing difference between core and non-core proceedings); *In re Nat'l Gypsum Co.*, 118 F.3d at 1064–65 (noting arbitrability of core and non-core proceedings); *see also In re United Cos. Fin. Corp.*, 241 B.R. at 525 (approving debtor's entering into retention agreement with accountant, where agreement contained alternative dispute resolution procedures for non-core matters, court noted that such dispute resolution procedures were applicable only in non-core matters); *In re* Jotan, Inc., 232 B.R. 503, 505–06 (Bankr. M.D. Fla. 1999) ("While there is not a uniform approach to resolving the conflict between enforcing federal bankruptcy and arbitration laws, courts dealing with such issues distinguish between core and non-core matters.").

[157] *See* 28 U.S.C.A. § 158 (2006); Silver Sage Partners Ltd. v. City of Desert Hot Springs (*In re* City of Desert Hot Springs), 339 F.3d 782, 787 (9th Cir. 2003) (finding parties may appeal decisions of bankruptcy court to either the district court or bankruptcy appellate panel); Coyne v. Westinghouse Credit Corp. (*In re* Globe Illumination Co.), 149 B.R. 614, 618 (Bankr. C.D. Cal. 1993) (indicating bankruptcy appellate panel may hear and determine appeals from all districts within Ninth Circuit which have authorized use of bankruptcy appellate panel).

[158] *See* 28 U.S.C. § 157(c) (2000); FED. R. BANKR. P. 9033; Carr v. Mich. Real Estate Ins. Trust (*In re* Mich. Real Estate Ins. Trust), 87 B.R. 447, 453 (E.D. Mich. 1988) (determining since all parties have not consented to entry of judgment by bankruptcy court it will require Court to enter proposed findings of fact and conclusions of law for submission to district judge).

proceeding if all appeals as of right are exhausted. In contrast, other federal lawsuits involve two tribunals, the district court and court of appeals, if all appeals as of right are taken. Moreover, the Arbitration Act provides that a court order refusing a stay in proceedings in which an issue is referable to arbitration may be appealed as of right.[159] Of course, after a decision by the court of appeals, any party may seek review by the Supreme Court.

Therefore, it is inconsistent with the efficiency goals of the Arbitration Act, the provisions of the Judicial Code relating to bankruptcy jurisdiction, and the Bankruptcy Code for courts to use varying, unpredictable, case-by-case approaches, often re-examined on appeal, to determine whether the policies underlying the particular issue in dispute must be arbitrated under the standards enunciated by the Supreme Court in *McMahon.* For these reasons, the question of when an arbitration clause must be enforced in proceedings within the federal court's bankruptcy jurisdiction cries out for a bright-line test and more efficient procedures for resolution of the issue.

V. PROPOSED REFORM

The most effective reform would be a legislative one. Congress should amend the bankruptcy-related provisions of the Judicial Code to (1) provide greater certainty regarding the enforceability of arbitration clauses, and (2) reduce costs and delay by prohibiting extensive appeals. One benefit of legislative reform rather than further judicial development is that a directive from Congress on the enforceability of arbitration clauses in bankruptcy would liberate this issue from the constraints of the standards set forth in *McMahon*. Even if courts, through judicial development, eventually adopt more uniform and clearer tests for determining whether an arbitration clause is enforceable in a bankruptcy-related proceeding under the standards set forth in *McMahon*, thereby reducing uncertainty, courts do not have the power to eliminate or reduce appellate rights. That is for Congress to do.

Legislative amendments regarding the enforcement of arbitration clauses in bankruptcy should be applicable regardless of whether the proceeding is pending in the bankruptcy court or in the district court exercising original bankruptcy jurisdiction. For example, if the district court withdraws the reference of a bankruptcy case, or of one or more proceedings, under section 157(d) of title 28, the enforceability of arbitration agreements should not be affected by such withdrawal.

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[159] 9 U.S.C. §§ 3, 16(a) (2000); *see* Aceros Prefabricados, S.A. v. TradeArbed, Inc., 282 F.3d 92, 97 (2d Cir. 2002) (indicating court had jurisdiction to hear interlocutory appeal pursuant to FAA section 16(a)); *In re* Chung and President Enter. Corp., 943 F.2d 225, 227–28 (2d Cir. 1991) (discussing appealability in arbitrations).

A. Core Proceedings

Congress should adopt a general rule that contractual arbitration clauses are unenforceable in core proceedings, regardless of whether the proceeding involves causes of action derived from the debtor or bankruptcy actions that the Bankruptcy Code has created for the benefit of creditors or the estate. One exception to that rule should be when the court exercises its discretionary abstention power under section 1334(c)(1) to abstain from hearing a core proceeding in the interest of justice. If the court abstains from hearing a core proceeding, a mandatory arbitration provision governing the dispute should be enforceable. If the court finds that arbitration in the particular circumstances is not consistent with the rights of all parties in interest who may be affected by the decision, such as when the procedures governing arbitration would not afford parties in interest the same right to intervene and be heard that they would enjoy if the proceeding remains in the bankruptcy court, the court should not abstain. In any event, discretionary abstention in core proceedings is rare and, therefore, it would be expected that arbitration provisions would be nullified in the vast majority of core proceedings.

To illustrate a situation in which a bankruptcy court may abstain and direct parties to arbitration, suppose that a buyer of goods allegedly breaches a contract of sale, which contains an arbitration provision, by refusing to pay the purchase price. The buyer has alleged that the goods were defective and has caused the buyer significant consequential damages which exceed the unpaid purchase price. The Seller has commenced an arbitration proceeding and the buyer has asserted a counterclaim, and both parties have concluded discovery in the arbitration proceeding. Suppose that the buyer then files a chapter 11 petition, the arbitration proceeding is automatically stayed, the seller files a proof of claim, the buyer files an objection to the allowance of the claim and an adversary proceeding against the seller seeking damages caused by the defective goods. Under section 157(b)(2) of title 28, the allowance or disallowance of a claim against the estate and a counterclaim by the estate against a creditor filing a proof of claim are both core proceedings,[160] which may be determined by the bankruptcy court. Suppose further that the seller requests that the bankruptcy court abstain from hearing the objection and adversary proceeding, and that the automatic stay be lifted, so that the arbitration proceeding may continue until the contractual disputes are resolved by the arbitrators. Under section 1334(c)(1) of title 28, the court, in the interest of justice, may abstain and permit the arbitration to continue. However, the court should not have discretion to abstain, nullify the arbitration provision, and direct the parties to resolve the dispute by resorting to the state court system. Moreover, if the

[160] 28 U.S.C.A. § 157(b)(2)(B), (C) (2006); *see* Raleigh v. Stoecker (*In re* Stoecker), 117 B.R. 342, 346 (N.D. Ill. 1990) (agreeing with Second Circuit's position of granting banktrupcy judges power to hear and determine all cases under title 11 and all core proceedings arising under title 11); FTC v. Evans Prod. Co., 60 B.R. 829, 833 (W.D. Wash. 1986) (noting under 28 U.S.C. § 157(b)(2) core proceedings include allowance or disallowance of claims against the estate).

court believes that it could resolve the dispute in a more efficient and speedier manner, consistent with the goal of efficiency in the administration of the estate, it should deny the motion to abstain and resolve the dispute in the bankruptcy court.

Another exception to the general rule that arbitration provisions should not be enforceable in core proceedings should be when the arbitration provision applicable to the dispute is in a contract that was entered into by the debtor in possession or trustee during the bankruptcy case or, if in a prebankruptcy contract, that was assumed by the debtor in possession or trustee under section 365(a) of the Bankruptcy Code.[161] Because an executory contract may not be assumed in part and rejected in part[162]—the trustee must assume the entire contract or reject the entire contract—an arbitration provision should survive assumption of the contract.[163] Contracts entered into or assumed post-petition should be enforceable as written.

While bankruptcy courts should have the authority to direct the parties to arbitrate certain core matters that fall within the specific categories of exceptions described above, safeguards need to be implemented to ensure the efficiency of the arbitration and to ensure that the arbitration comports with the fundamental requirements of the Bankruptcy Code. These safeguards may be effectuated by providing the bankruptcy court with a continuing role in the matter.[164] Along those

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[161] *See* 11 U.S.C. § 365(a) (2006) (allowing a trustee or debtor in possession to assume or reject executory contracts and unexpired leases, subject to court approval). In determining whether to assume or reject the contract, the trustee or debtor in possession should determine whether assumption or rejection is in the best interest of the estate. *See generally In re* Chateaugay Corp., 10 F.3d 944, 954 (2d Cir. 1993) (discussing debtors' right to reject contracts and leases). Once a trustee decides to reject an executory contract and the court approves such rejection, the non-debtor party may file a proof of claim for damages arising out of the rejection. The determination of the amount of the non-debtor party's claim is governed by section 502 of the Bankruptcy Code. 11 U.S.C. § 502 (2006). A motion seeking approval of rejection or assumption of an executory contract and a determination of the resulting damages are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (B). Therefore, despite the presence of an arbitration clause in a rejected executory contract, such core proceedings should be litigated in the bankruptcy court and not subject to mandatory arbitration.

[162] *See, e.g.*, Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996) ("It is well established that as a general proposition an executory contract must be assumed or rejected in its entirety."); City of Covington v. Covington Landing Ltd. P'ship, 71 F.3d 1221, 1226–27 (6th Cir. 1995) (requiring when debtor assumes lease or contract under section 365 it must assume all benefits and burdens of contract); *In re* Vill. Rathskeller, Inc., 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992) ("[T]he agreement becomes property of the estate in the same shape as it existed prior to bankruptcy, with all of its benefits and burdens.").

[163] It is worth noting that courts have viewed arbitration clauses as severable from the rest of the contract, so that a finding of fraud in the inducement of the contract would not, in and of itself, invalidate the "separate" agreement to arbitrate. *See Prima Paint*, 388 U.S. at 402–03 (noting arbitration clauses are "separable" from contracts where no claim of fraud is directed at arbitration clause itself). However, the severability analysis should not override the bankruptcy principle that an executory contract must be either assumed in its entirety or rejected in its entirety, so that a trustee may not assume the contract without also assuming the agreement to arbitrate any disputes under the contract. *But see* Note, *supra* note 31, at 2314 ("Separability bifurcates the contract into a container contract and an arbitration contract. This principle establishes the arbitration clause as a severable contract whose rejection is independent of the container contract; the executory nature of the contracts are determined separately, and the trustee may reject one, both, or neither of the contracts.") (citation omitted).

[164] *In re* Bicoastal Corp., 111 B.R. 999, 1003 (Bankr. M.D. Fla. 1990) (allowing limited modification of stay to permit arbitration on narrow issue while maintaining jurisdiction over bankruptcy case); *In re* Allen

lines, the bankruptcy court should have the authority to abstain and direct the parties to arbitrate, but also to monitor the arbitration proceeding. For example, the court in *In re Zimmerman*, directed that, in order to ensure the efficiency of the arbitration, counsel for the plaintiffs must file quarterly reports summarizing the status of arbitration proceedings.[165] Moreover, the court reserved the right, on *its own motion* or on the request of any party, to modify its order "in the interests of the proper and efficient administration of the debtor's bankruptcy case and this adversary proceeding and of insuring that determination of the dischargeability of the alleged debts is not unduly delayed."[166] This retention of jurisdiction is a method whereby the bankruptcy court can adhere to the policy of enforcing arbitration agreements while maintaining control over primary functions of the bankruptcy court—swift administration of the bankruptcy estate and the allowance or disallowance of claims.

A general rule rendering contractual arbitration provisions unenforceable in core proceedings is consistent with the Bankruptcy Code and the bankruptcy jurisdictional scheme under the Judicial Code. First, it is consistent with the policy of centralization of dispute resolution in specialized courts with respect to proceedings "arising under" title 11 or "arising in" a case under title 11 (rather than proceedings merely "related to" a bankruptcy case). Second, it is consistent with the policy under the Bankruptcy Code of allowing all parties in interest an opportunity to be heard in the bankruptcy case, a right that may not be recognized in arbitration proceedings.

Moreover, a general rule that nullifies arbitration provisions in core proceedings is consistent with a fundamental principle that agreements to arbitrate must be based on the parties' consent. As discussed above, the primary purpose of the Arbitration Act is the enforcement of private agreements to arbitrate. Consent is the key element of an enforceable contractual arbitration provision. When the claim is not debtor-derived, but is derived under the Bankruptcy Code, such as a proceeding to recover a voidable preference, the trustee in bankruptcy has not consented to arbitration and, therefore, any arbitration provision in the contract should be null and void as against the trustee. When a claim is debtor-derived, the debtor's consent may be imputed to the trustee or debtor in possession,[167] arguably allowing

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& Hein, Inc., 59 B.R. 733, 735 (Bankr. S.D. Cal. 1986) (recognizing, in granting relief to creditor to pursue arbitration against debtor, "the importance of retaining . . . exclusive jurisdiction over determining claims against debtor's estate . . . ."); *In re* Smith Jones, Inc., 17 B.R. 126, 128 (Bankr. D. Minn. 1981) (reserving to court consideration of money awards resulting from arbitration).

[165] 341 B.R. 77, 81 (Bankr. N.D. Ga. 2006) (ordering plaintiff's counsel to file quarterly summaries about arbitration proceedings).

[166] *Id.* at 82.

[167] *See Hays*, 885 F.2d at 1155 (providing "trustee [is] . . . bound by the arbitration clauses signed by the debtor . . . ."); *In re* Winstar Commc'ns, Inc., 335 B.R. 556, 566–67 (Bankr. D. Del. 2005) (noting trustee cannot ignore forum chosen by debtor); *In re* FRG, 115 B.R. 72, 75 (Bankr. E.D. Pa. 1990) (indicating approval of requiring trustees asserting claims of debtor to accept forum agreed to by debtor).

arbitration to proceed despite the change in parties.[168] However, even when the claim is debtor-derived, other parties in interest in the case, including other creditors, were not parties to the original arbitration agreement but have an interest in the outcome of the dispute.

A fundamental feature of the bankruptcy system is the creditor-versus-creditor competition for allocations of the estate.[169] Recognizing the status of creditors and the unique interplay between the different rights and priorities among secured and unsecured creditors,[170] Congress designed the Code to protect the rights of creditors in the bankruptcy case, such as by requiring the United States trustee to appoint an official committee of unsecured creditors to act as a representative of the unsecured

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[168] There is an argument, however, that because the trustee acts on behalf of the creditors, without the consent of the debtor, the trustee is not necessarily bound by the arbitration agreement. *See E.E.O.C.*, 534 U.S. at 294 (refusing to bind third party whose claim was based on wrongdoing by employer against employee—who entered into arbitration agreement—because third party was statutorily permitted, in public interest, to pursue claim against wishes of signatory employee); *see also* Allegaert v. Perot, 548 F.2d 432, 436 (2d Cir. 1977), *cert. denied*, 432 U.S. 910 (1977) (acknowledging trustees acting on behalf of creditors should not be compelled to arbitrate); *In re* APF Co., 264 B.R. 344, 363 (Bankr. D. Del. 2001) (asserting claims brought by trustee on behalf of creditors are not subject to mandatory arbitration).

[169] This creditor-versus-creditor competition was explained by Jaime Byrnes in Note, *supra* note 31, at 2307:

> It is a fundamental tenet of arbitration that the parties consent to be bound by the tribunal's award. Under the present bankruptcy system, however, it is quite possible that a creditor who has never previously entered an arbitration agreement—who perhaps even assiduously avoided any contract of adhesion containing such a provision—will nonetheless find his recovery contingent upon an arbitrator's ruling. While creditor A may have avoided entering an arbitration agreement, it is quite possible that creditor B made such an arrangement. If creditor B is permitted to compel arbitration, the value of his claim will be determined in arbitration. The estate is then distributed pro rata among the creditors; thus, the larger B's recovery, the smaller the recovery of A. This effect is magnified by the priority system in bankruptcy: if B is a priority claimant while A is a general unsecured creditor, then B is allowed the full value of his claim before a single dollar is paid to A. Thus, bankruptcy's system of relative distribution necessarily converts a series of bilateral contractual relations into a multilateral relationship. As the Bankruptcy Code creates and then divides the pool of debtor assets, the creditor-versus-debtor conflict is converted—viewed from a realist perspective—into a creditor-versus-creditor competition.

Id. (citations omitted). When the estate is solvent, the competition also involves the holders of equity interests. *See In re* DN Assocs., 144 B.R. 195, 200 (Bankr. D. Me. 1992), *aff'd.*, 160 B.R. 20 (D. Me. 1993), *aff'd.*, 3 F.3d 512 (1st Cir. 1993) (endorsing solvent debtor's attempt to balance interests of creditors and equity holders in reorganization plan); Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. REV. 581, 603, 612–13 (1993) (observing solvent debtors must consider interests of creditors and equity holders); Robert J. Keach, *Solvent Debtors and Myths of Good Faith and Fiduciary Duty*, 23 AM. BANKR. INST. J. 36, 37 (2005) (discussing solvent debtor's ability to meet interests of creditors and equity holders).

[170] *See, e.g.*, 11 U.S.C. § 510 (2006) (exploring subordination of claims and interests); *id.* § 507 (2006) (discussing priorities of different creditors); Joseph Mullin, *Bridging the Gap: Defining the Debtor's Status During the Involuntary Gap Period*, 61 U. CHI. L. REV. 1091, 1097–98 (1994) (explaining priority hierarchy in section 507).

creditor body.[171] In chapter 11 cases, Congress has expressly stated that a creditors' committee, individual creditor, and other enumerated entities are "parties in interest" and that they "may raise and may appear and be heard on any issue" in the chapter 11 case.[172] In view of these rights, a rule that would mandate enforcement of arbitration provisions in prebankruptcy contracts may implicate the rights of creditors and other parties in interest who have not consented to arbitration, without any assurance that the procedural and substantive rights of parties in interest granted by the Bankruptcy Code will be accorded deference by the arbitrator. As stated by Jaime Byrnes, "[T]here is no guarantee that the substantive and procedural rights granted by the Code will be accorded deference within the arbitral regime; the right of the parties to select the applicable law and procedure, free of the legal restraints of the adjudicatory process, is one of the benefits of arbitration."[173]

Therefore, arbitration provisions should be nullified in core proceedings unless the court, in the interest of justice and satisfied that the rights of other parties in interest who wish to be heard will not be adversely affected, determines that it should abstain and permit the matter to proceed in arbitration.

B. Non-Core Matters

As discussed above, most courts dealing with the issue have held that arbitration clauses in prebankruptcy contracts are generally enforceable in non-core proceedings. In contrast to core proceedings, there usually is no rationale basis for nullifying arbitration agreements in connection with non-core proceedings. Non-core matters involve nonbankruptcy issues which, in all likelihood, would be litigated elsewhere but for the nexus to the bankruptcy case created by the debtor's bankruptcy filing. Causes of action that are prosecuted by a bankruptcy trustee or debtor in possession in non-core proceedings are derivative of the debtor and are not based on rights created by the Bankruptcy Code. In the absence of consent by the parties, bankruptcy courts lack authority to determine non-core proceedings. The Judicial Code *requires* district courts and, therefore, bankruptcy courts, to abstain from hearing non-core proceedings pending in state court if they can be

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[171] *See* 11 U.S.C. § 1102 (2006) (providing trustee must appoint committee of creditors); *id.* § 1103 (2006) (recognizing powers of committee of creditors); Byrnes, *supra* note 171, at 2307 (remarking one way bankruptcy system protects creditors is creditor committees). The United States trustee also may appoint a committee of equity security holders. 11 U.S.C. § 1102 (2006) (acknowledging trustee may, when appropriate, appoint committee of equity security holders instead of creditors); *id.* § 1103 (2006) (determining powers of committee of equity security holders); *see* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 448 (1995) (noting Bankruptcy Code established committees of creditors and equity security holders as way of supervising debtors).

[172] 11 U.S.C. § 1109(b) (2006); *see* Iridium India Telecom Ltd. v. Motorola, Inc., 165 Fed. App'x 878, 879 (2d Cir. 2005) ("[A] party in interest under 11 U.S.C. § 1109(b) has an unconditional right to intervene in an adversary proceeding under [Fed. R. Civ. P.] 24(a)(1) and need not make a separate showing under [Fed. R. Civ. P.] 24(a)(2)."); *In re* Caldor Corp., 303 F.3d 161, 169 (2d Cir. 2002) (holding section 1109(b) conveys right to be heard on issues arising in adversary proceedings).

[173] Byrnes, *supra* note 171, at 2308.

timely adjudicated in the state forum and there is no nonbankruptcy basis for federal jurisdiction.

However, bankruptcy courts should have limited discretion to nullify contractual arbitration clauses in non-core proceedings when arbitration will interfere with the rights that non-consenting parties in interest may have to raise and be heard on the issues involved in the arbitration. That will be a rare event because it is uncommon for parties in interest in the bankruptcy case to request intervention in a non-core proceeding. In addition, bankruptcy courts should have discretion to nullify an agreement to arbitrate if, under the facts of the particular proceeding, it is in the best interest of the estate to do so, such as when sending the matter to arbitration would unduly delay the administration of the bankruptcy case.

C. Limitations on Appellate Rights

Whether the proceeding is core or non-core, the exercise of discretion by the bankruptcy court regarding the enforcement of arbitration clauses in prebankruptcy contracts should be subject to limitations on appellate review. In particular, decisions to enforce or to nullify an arbitration clause should not be reviewable on appeal or otherwise by the court of appeals or the Supreme Court. For example, if a bankruptcy court determines that it is in the best interest of the estate for the court to abstain and to permit arbitration to proceed in a core proceeding, the decision should be appealable to the district court or bankruptcy appellate panel on an abuse-of-discretion standard, but the decision of the district court or bankruptcy appellate panel should be final and non-appealable. Removing all other levels of appellate review serves to further the efficient administration of the estate and reduce the costs associated with extended litigation over the court's exercise of discretion regarding the enforcement of arbitration provisions.

The proposed limitations on appeals parallels similar limitations found in other contexts in bankruptcy cases and proceedings. Section 1334(d) of title 28 provides that a decision to abstain or not to abstain from hearing a proceeding under section 1334(c), other than a decision not to abstain when abstention is mandatory under section 1334(c)(2),[174] is not reviewable by appeal or otherwise by the court of

[174] 28 U.S.C.A. § 1334(d) (2006) (stating subsection (d) does not apply to "decision not to abstain in a proceeding described in subsection (c)(2)"); *Stoe*, 436 F.3d at 212 (3d Cir. 2006) (finding section 1334(d) explicitly allows review of decisions not to abstain under subsection (c)(2)); Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 CUMB. L. REV. 1037, 1097 (1996–1997) (allowing, under 1334(d), review of denial of abstention under 1334(c)(2)). Section 1334(c)(2) of title 28 requires district courts to abstain from hearing state law claims that are merely related to a case under title 11 of the United States Code. 28 U.S.C.A. § 1334(c)(2) (2006); *see In re* Howe, 913 F.2d 1138, 1142 (5th Cir. 1990) ("In other words, a district court must abstain from hearing a non-core, related matter if the action can be timely adjudicated in state court."); *In re* Burgess, 51 B.R. 300, 302 (Bankr. Ohio 1985) (holding court must abstain from hearing proceeding because matter does not arise under chapter 11 or arise in chapter 11 case). This mandatory abstention requirement is limited to "non-core" proceedings. 28 U.S.C.A. § 1334(c)(2) (2006). That reading comports with 28 U.S.C. § 157, which gives bankruptcy judges authority to enter judgments in all core proceedings arising under title 11, or arising in a

appeals or the Supreme Court.[175] Similarly, section 305(c) of the Bankruptcy Code provides that an order dismissing a bankruptcy case or suspending all proceedings in a bankruptcy case under section 305(a), or a decision to refrain from so dismissing or suspending, is not reviewable by appeal or otherwise by the court of appeals or the Supreme Court.[176] In addition, section 1452(b) of title 28 provides that an order to remand an action that has been removed to the district court based on the court's bankruptcy jurisdiction is not reviewable by appeal or otherwise by the court of appeals or by the Supreme Court.[177] In all of these areas, Congress has decided that the need for efficiency and speed in bankruptcy cases outweighs the importance of appellate review beyond the district court or bankruptcy appellate panel level.

CONCLUSION

Bankruptcy is more than a substantive body of law adjusting the debtor-creditor relationship. It is also a body of complex jurisdictional and procedural rules focused on the process pursuant to which debtor rehabilitation and distributions to creditors may be realized. A common theme running through the Bankruptcy Code and bankruptcy-related provisions of the Judicial Code is one of efficiency and the desirability of centralizing dispute resolution in specialized bankruptcy courts. Another area of the law that is focused on process and efficiency, though also based on the enforcement of contractual rights, is the law governing the arbitration of disputes. It is a goal of both bankruptcy process and arbitration to provide quick, efficient, cost-effective methods for resolving disputes.

Ironically, disputes over the enforceability of arbitration clauses in bankruptcy have resulted in extensive, time-consuming, and expensive court litigation. The high standard set by the Supreme Court in the *McMahon* case for determining when mandatory enforcement of arbitration agreements under the Arbitration Act is

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case under title 11, but only allows them to make proposed findings in a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. *Id.* § 157(b)(1), (c)(1). The language of section 157(b)(1) apparently equates core proceedings with the categories of "arising under" and "arising in" proceedings. *Id.* § 157(b)(1). Section 157(c)(1) correspondingly implies that a proceeding "related to" a case under title 11 is non-core. *Id.* § 157(c)(1). The wording of section 157 obviously parallels the phrases used in section 1334(c)(2) and reinforces the conclusion that mandatory abstention applies only to non-core proceedings. *Id.* § 1334(c)(2).

[175] 28 U.S.C.A. § 1334(d) (2006) (indicating abstention decisions are not appealable).

[176] 11 U.S.C. § 305(c) (2006) (reporting dismissal and suspension decisions issued under subsection (a) are not appealable); *In re* Spade, 255 B.R. 329, 331 (Bankr. D. Colo. 2000) (acknowledging dismissal orders by bankruptcy courts are not reviewable beyond district courts); *In re* Nationwide Roofing & Sheet Metal, Inc., 130 B.R. 768, 777 (Bankr. S.D. Ohio 1991) (explaining limits on ability to appeal dismissal and suspension decisions under section 305(c)).

[177] 28 U.S.C. § 1452(b) (2000) (providing remand decisions issued under this subsection are not reviewable); City & County of San Francisco v. PG & E Corp., 433 F.3d 1115, 1121 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 208 (2006) (observing section 1452's bar on reviewing remand orders properly issued by district courts); *In re* Cathedral of Incarnation in Diocese of Long Island, 90 F.3d 28, 31–32 (2d Cir. 1996) (recognizing review of district court's remand decision not reviewable under section 1452(b)).

inapplicable because of another federal statutory scheme is difficult to apply, as well as difficult to meet. Courts have not been in agreement on how to apply *McMahon* in the context of bankruptcy cases.

Congress should act to provide clear rules on the enforceability of arbitration clauses in bankruptcy and to prohibit appeals from orders either enforcing or nullifying arbitration clauses beyond the district court or bankruptcy appellate panel level.