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Navigating Today's Environment

The Directors' and Officers' Guide to Restructuring

SECOND EDITION

Michael Eisenband
Consulting Editor
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American Bankruptcy Institute

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Consulting Editor
Michael Eisenband

Advisory Board
Carlin Adrianopoli
Amir Agam
Michael Buenzow
Robert Del Genio
Michael Katzenstein
Steven Simms

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Quinn Emanuel Urquhart & Sullivan, LLP

James C. Tecce, *Partner*

Benjamin I. Finestone, *Partner*

Deborah J. Newman, *Partner*

Susheel Kirpalani, *Chair, Bankruptcy & Restructuring*

Purposes

A litigation trust creates optionality in restructurings by providing a contingent source of recoveries under a Chapter 11 plan for creditors that might be "out of the money" based solely on a company's enterprise value. The litigation trust can take by assignment the debtor in possession's (that is, the estate's) and the direct creditors' causes of action to be prosecuted for the benefit of the holders of litigation trust interests. The proceeds of successfully prosecuted claims are a form of plan consideration beyond cash or equity in the reorganized company that may be consumed by secured or otherwise senior creditors. Litigation trusts also help bring Chapter 11 cases to a conclusion more quickly. Thus, they serve the debtor's primary business goal of reorganizing and leaving the past behind. By employing litigation trusts, companies need not await the final adjudication or settlement of the causes of action (the prosecution of which can take years) to emerge from Chapter 11 protection.[1]

Mechanics

Standing to sue (11 U.S.C. § 1123(b)(3))

Claims may be retained and enforced by the trust pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, which enables a Chapter 11 plan to "provide for (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or (B) the retention and enforcement by the debtor, by the trustee, ***or by a representative of the***

[1] See *In re Acequia, Inc.*, 34 F.3d 800 (9th Cir. 1994) ("[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action. … Thus, the statute as in furtherance of the purpose of preserving all assets of the estate while facilitating confirmation of a plan.").

estate appointed for such purpose, of any such claim or interest …."[2] Trusts can also take, by assignment, individual causes of action (against third parties, not the debtor) that are contributed by creditors directly to the litigation trust whose debt claims are discharged in exchange for litigation trust interests distributed under the plan.[3] The claims of individual creditors may not face the same defenses as claims belonging to the debtor's estate, which are subject to the same defenses when prosecuted by the trustee-assignee that would have been available had the claims been prosecuted by the debtor.[4] However, not all courts exempt individual creditor claims from defenses applicable to estate claims, such as the Bankruptcy Code's safe harbor provisions, or otherwise willingly recognize their assignment to a litigation trust.[5]

Governance

Given the potential importance of litigation to creditor recoveries, creditors are keen to have a say in the management of the litigation trust. These aspects of trust governance include agreements on the selection and appointment of the trustee, the selection and appointment of members of a trust advisory board to supervise the trustee, the litigation trustee's obligation to distribute the proceeds of causes of action (subject to the payment of trust expenses) and the litigation trustee's authority to settle causes of action. Governance terms appear in the plan and litigation trust agreement — a separate, plan-support document typically filed publicly along with other materials necessary for voting on the plan.[6]

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[2] See *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 387 (5th Cir. 2009) ("Section 1123(b)(3) therefore allows a plan to transfer to a trustee of a liquidating trust the authority to enforce an estate's claims …").

[3] See *In re AOG Enter., Inc.*, 569 B.R. 563, 568 (Bankr. S.D.N.Y. 2017) ("The CORE Litigation Trust… brought this proceeding in the Superior Court for the State of California… as assignee of the Debtors' pre-petition secured lenders, alleging that the Defendants induced a breach of contract between the lenders and certain Debtor entities and intentionally interfered with those contracts"); See *In re Physiotherapy Holdings, Inc.*, No. 13-12965(KG), 2017 WL 5054308, at *2 (Bankr. D. Del. Nov. 1, 2017) ("[T]he Plan also created the Litigation Trust. … [T]he claims of the Debtors, Court Square, and the Noteholders (collectively, the 'Contributing Claimants') were transferred to the Litigation Trust, including any avoidance claims. … The Litigation Trust was designated an estate representative authorized to retain and pursue all such causes of action.").

[4] See *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.,* 267 F.3d 340, 356 (3rd Cir. 2001) ("[I]n actions brought by the trustee as successor to the debtor's interest under section 541, the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. [Conversely,] [t]he trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor.").

[5] See *In re Tribune Fraudulent Conveyance Litigation*, 946 F.3d 66 (2nd Cir. 2019) (bankruptcy code's defenses to avoidance actions apply to individual creditors' avoidance claims to the same extent); See *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) (bankruptcy trustee lacked standing to sue on claims assigned to it by investors because trustee "had no claim" of its own, and the trustee's prosecution created risk of inconsistent results to actions brought by non-assigning investors); See *Semi-Tech Litig., LLC v. Bankers Tr. Co.*, 272 F. Supp. 2d 319, 324 (S.D.N.Y. 2003) ("[T]here always is a risk, outside the bankruptcy context, that a non-assigning note or debenture holder may sue and obtain results inconsistent with a result obtained by an assignee of an identical claim, but that affords no basis for refusing to allow suit on assigned claims. The Court sees no basis for treating an assignee created by, or assignments made pursuant to, a Chapter 11 plan any differently.").

[6] See *In re Residential Capital LLC, et al.*, Case No. 12-12020 (MG) (Bankr. S.D.N.Y.) [ECF No. 6136] (Liquidating Trust Agreement) p. 31 (§ 6.2) ("[T]he Liquidating Trust Board shall consist of five (5) Liquidating Trustees … set forth on the signature page to this Liquidating Trust Agreement"); p.34 (§ 6.4) ("[T]he Liquidating Trust Board shall be expressly authorized … to investigate, prosecute, settle, liquidate, dispose of, and/or abandon the Liquidating Trust Assets, including rights, Avoidance Actions, other Liquidating Trust Causes of Action or litigation previously held by the Debtors or their Estates"); p. 27 (§ 5.1) ("[T]he Liquidating Trust (i) shall distribute to each Unitholder of record on the next preceding Distribution Record Date … an amount equal to its respective Pro Rata share of the Distributable Cash."); *In re Remington Outdoor Co., Inc., et al.*, Case No. 18-10684 (BLS) (Bankr. D. Del.) [ECF No. 186-3] (Litigation Trust Agreement) p. 2 (§ 1.1)

The Chapter 11 plan and litigation trust agreement may also contain provisions prioritizing the distribution of litigation proceeds. A plan can create different classes of litigation trust interests, (e.g., affording senior creditors "Class A" interests with first priority to proceeds and junior creditors "Class B" interests with second priority to proceeds). What is more, certain creditors may have claims against debtor entities that own causes of action separately from their debtor affiliates. For example, a parent company may have its own creditors and own an estate cause of action that its subsidiaries (and their respective creditors) do not. Yet, the subsidiaries' creditors might be more incentivized to fund a litigation trust (and demand a first-priority to proceeds) because of their structural seniority over parent-company creditors. The litigation trust agreement can be drafted to address these types of intercreditor issues.[7]

Funding

Increasingly, a litigation trust will be endowed with a sufficient "war chest" to prevent defendants from deterring viable claims on account of expensive delay tactics designed to drain the trust's finite resources. If sufficient "seed money" is not provided by the debtor under the reorganization plan, litigation trustees can pursue funding options that include third-party litigation financing for the hourly payment of retained professionals, the retention of professionals on a contingent-fee basis or some hybrid arrangement. In addition, the full extent of litigation costs often is unknown at the time the plan is confirmed. It therefore is not uncommon for the litigation trust agreement to authorize the trustee to secure litigation financing from a third party to fund expenses in exchange for a priority recovery from litigation proceeds.[8] Negotiating these provisions requires a balancing of the need to ensure the trust can faithfully prosecute the causes of action against the risk that recoveries will be diluted by first-priority returns to the litigation funder.

Transferability of trust interests

The ability to transfer litigation trust interests as if they were tradeable securities increases their value as a form of plan consideration.[9] It enables the litigation trust beneficiaries to exit the credit if they have no appetite for the risk and delay associated with litigation. The transferability of trust interests,

("Establishment of Litigation Trust and Appointment of the Litigation Trustee and the Litigation Trust Advisory Board"); p. 9 (§ 3.1) ("[T]he Litigation Trustee shall … at the Direction of the Litigation Trust Advisory Board, … prosecute … and … settle … the Litigation Claims"); p. 9 (§ 3.3) ("The Litigation Trust Advisory Board shall have the absolute right to provide Direction to the Litigation Trustee to prosecute … settle, or take any other action …"); p. 10 (§ 3.5) ("[T]he first $5,000,000 of any aggregate net proceeds of the Litigation Claims shall be allocated [by the Litigation Trustee] on a pro rata basis to the holders of Litigation Trust Class B Interests … and any recoveries in excess of $5,000,000 … shall be shared equally among the holders of Litigation Trust Class A Interests and holders of the Litigation Trust Class B Interests"); *In re Sanchez Energy Corp.*, Case. No 19-34508 (Bankr. S.D. Tex.) [ECF No. 1289] (Order authorizing trustee to pay expenses out of litigation proceeds).

[7] See, *In re Remington Outdoor Co., Inc., et al.*, Case No. 18-10684 (BLS) (Bankr. D. Del.) [ECF No. 186-3] (Litigation Trust Agreement) p. 10 (§ 3.5) ("Where recoveries relate to more than one Litigation Claim, the Litigation Trustee shall classify and allocate recoveries from Litigation Claims. … The holders of Litigation Trust Class B Interests shall receive all recovery amounts from any Litigation Claims that (i) are exclusively related to amounts transferred within applicable statutes of limitations from [parent] ROC to any transferee, or (ii) belong solely to ROC").

[8] See *In re Downey Fin. Corp.*, 499 B.R. 439, 450 (Bankr. D. Del. 2013), *aff'd,* 593 F. App'x 123 (3d Cir. 2015) (recovery of $373,791,733 realized by the litigation trust subject to litigation financing provided by estate creditors); *In re The Colonial BancGroup, Inc.*, Case No. 09-32303-DHW (Bankr. M.D. Ala. 2010) (similar structure in place); *In re Sanchez Energy Corp.*, Case. No 19-34508 (Bankr. S.D. Tex.) [ECF No. 1289] (Order authorizing trustee to pay expenses out of litigation proceeds); *In re SNTL Corp., et al.*, No. 00-14099-GM (Bankr. C.D. Cal. Dec. 20, 2013) (Order Approving Trust Financing).

[9] See *In re Residential Capital LLC, et al.*, Case No. 12-12020 (MG) (Bankr. S.D.N.Y.) [ECF No. 6136-1] (Liquidating Trust Agreement) p. 26 (§ 4.6) ("Units shall be freely negotiable and transferable to the extent provided herein and the provisions of applicable securities laws.").

however, implicates tax and securities laws, which adds complications that may not be appropriate for every trust. The terms of the trust must be consulted to determine their transferability.

Preserving debtors' privileges

Section 1123(b)(3) allows a Chapter 11 debtor to assign its privileges to the litigation trust. Importantly, the litigation trustee can inherit all the protections attendant to any such privileges, including attorney-client and work-product protections relating to the assigned claims the plan appointed the trustee to prosecute. Both the Chapter 11 plan and the confirmation order should specifically include these privileges within the definition of assets transferred to the trust.[10]

Nature of claims

Courts consider a company that has become a Chapter 11 debtor in possession to have assumed a different juridical status post-petition than it held pre-petition.[11] This distinction has several implications, such as the power to assume or reject pre-petition contracts under section 365 of the Bankruptcy Code to which the debtor is a party. Critically, one distinction is the ability of the debtor in possession and the litigation trustee to challenge pre-petition transactions to which the debtor was a party.

Chapter 5 actions

The debtor in possession and, after confirmation, the litigation trustee enjoy what has become known colloquially as "strong arm powers" under chapter 5 of the Bankruptcy Code that can be used to avoid (or undo) certain pre-petition transfers the debtor made to third parties or obligations it incurred pre-petition. Under section 547(b) of the Bankruptcy Code, such a transfer is avoidable as a "preference" if it was (1) made while the debtor was insolvent; (2) made within 90 days of the petition date (or, if the payment was made to an "insider" within 1 year of the petition date); (3) made on account of antecedent debt; and (4) results in the transferee receiving a greater distribution than it would receive in a hypothetical liquidation of the debtor.[12] Section 548 of the Bankruptcy Code provides for the avoidance of transfers of an interest of the debtor in property or any obligation incurred by the debtor within two years of the petition date. Under section 548(a)(1)(A), the litigation trustee may avoid a transfer or an obligation if the transfer was made or if the obligation was incurred with the intent to hinder, delay or defraud creditors. Such claims are known as "actual intent" claims, and they may be proven by establishing certain "badges of fraud."[13] Under

[10] See *In re Remington Outdoor Co., Inc., et al.*, Case No. 18-10684 (BLS) (Bankr. D. Del.) [ECF No. 248-1] (First Amended Joint Prepackaged Chapter 11 Plan of Remington Outdoor Company, Inc. And Its Affiliated Debtors And Debtors In Possession (Technical Modifications)) at p. 3 (¶ 24) (defining "Causes of Action" to include "any … cause of action … power, privilege … of any kind or character whatsoever"); at p. 41 ("In connection with the vesting and transfer of the Litigation Trust Assets, any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications … relating to the Litigation Trust Assets … shall vest in the Litigation Trust"); [ECF No. 248] (Order (A) Approving Solicitation Procedures, (B) Approving Adequacy of Disclosure Statement, And (C) Confirming Plan) at p. 17 (¶ 12) (same).

[11] *C.f., In re Advanced Contacting Solutions, LLC*, 582 B.R. 285, 304 (Bankr. S.D.N.Y. 2018) ("[T]he law distinguishes between the debtor before and after the filing"); *In re Genuity, Inc.*, 323 B.R. 79, 83 (Bankr. S.D.N.Y. 2005) (noting there is no crossover of claims in setoff because "the debtor and the debtor-in-possession are two separate and distinct entities which act in different capacities pre- and post-petition").

[12] See 11 U.S.C. § 547(b) (Certain pre-petition preferences are exempted from avoidance under section 547(c), such as where the transfer was made in exchange for a new value or made in the ordinary course. These exemptions apply to the litigation trustee just as they would to the debtor in possession).

[13] See *In re Tribune Fraudulent Conveyance Litigation*, No. 19-3049-cv (2d Cir. Aug. 20, 2021) ("Courts have inferred intent to defraud from the concealment of facts and false pretenses by the transferor, reservation by [the transferor] of rights in the transferred property, the transferor's absconding with or secreting the proceeds of the transfer immediately after their receipt, the existence of an unconscionable discrepancy between the value of property transferred and the consideration received

section 548(a)(1)(B), the litigation trustee may avoid a transfer or an obligation that was made or incurred for a less than reasonably equivalent value and that rendered the debtor insolvent or unable to pay its debts as they became due or left the debtor with unreasonably small capital. Such claims are known as "constructive fraudulent transfer claims." Unlike actual intent claims, the transferor's intent is not relevant to constructive fraudulent transfer claims. Also, certain transferees may be protected from constructive fraudulent transfer claims by the Bankruptcy Code's "safe harbor" provisions, which generally insulate certain payments made under securities contracts and to or for the benefit of financial participants from challenge.[14]

Section 544 of the Bankruptcy Code enables the litigation trustee to bring avoidance claims under applicable state law. Fraudulent conveyance and transfer statutes in most states are substantively similar to section 548 of the Bankruptcy Code.[15] And, some courts have found that safe harbor provisions do not bar constructive fraudulent transfer claims from being brought under state law.[16] State law claims contain longer look-back periods than the two-year look-back period under the Bankruptcy Code, enabling the litigation trustee to challenge transactions that took place as long as four to six years — or in some cases, even longer — before the petition date. While states do not typically have analogous preference provisions, the Uniform Voidable Transaction Act (and its immediate predecessor) recognize challenges to "insider" preferences.[17]

Common law claims

While state law claims, such as claims for breach of fiduciary duty or unjust enrichment, are not "bankruptcy" claims per se, any and all of the debtor's pre-petition causes of action are automatically made part of the "property of the estate" under section 541 of the Bankruptcy Code and susceptible to assignment to the litigation trust. Depending on the circumstances, typical targets of such claims include the debtors' officers and directors as well as private equity sponsors or entities that might have exercised outsized influence over the debtors (e.g., counterparties to mission critical contracts). Claims against third party advisors or auditors for malpractice or aiding and abetting breach of fiduciary duty also become property of the estate, subject to state law defenses applicable against the debtor.

Claim objections

Most plans provide that, as a "party in interest," the litigation trustee has standing to object to claims filed against the estate.[18] Objections may challenge claim amounts or classification of filed claims, among other issues. The plan and related confirmation order typically set a deadline for any such objections to be filed. These objections can

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therefor, the oppressed debtor's creation of a closely-held corporation to receive the transfer of his property, as well as the oppressed debtor's transfer of property while insolvent.").

[14] Section 546 of the Bankruptcy Code contains certain safe harbors for transfers or obligations that would otherwise be considered avoidable as constructive fraudulent transfers. These safe harbors apply to claims brought by the litigation trustee just as they would if they were brought by the debtor in possession.

[15] Section 544 of the Bankruptcy Code allows the debtor in possession or litigation trustee to stand in the shoes of an existing unsecured creditor to bring state fraudulent conveyance claims.

[16] See *In re Physiotherapy Holdings, Inc.*, (D. Del. Dec. 21, 2017) ("Nor is the Court convinced that a substantial ground for difference of opinion exists, as the Bankruptcy Court's preemption analysis followed well-established Third Circuit and Supreme Court law") (citing *PAH Litig. Trust v. Water St. Healthcare Partners L.P., et al. (In re Physiotherapy Holdings, Inc.)*, 2016 WL 3611831 (Bankr. D. Del. June 20, 2016) and *In re Lyondell Chemical Co.*, 503 B.R. 348, 373 (S.D.N.Y. 2014)).

[17] See *In re Musicland Holding Corp.*, 462 B.R. 66, 72 (Bankr. S.D.N.Y. 2011) ("UFTA § 5(b), condemns insider preferences by an insolvent debtor.").

[18] See 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.").

be logged independently as a "contested matter" or joined with affirmative claims in an adversary proceeding brought by the litigation trustee.[19]

Considerations when bringing suit

There are several considerations that have special significance to the ultimate decision to bring suit. These include satisfying any applicable statutes of limitation, identifying potential claims through Rule 2004 discovery and choosing a venue.

Timing & tolling (11 U.S.C. §§ 108(a) and 546(a))

The Bankruptcy Code gives the debtor in possession the benefit of additional tolling for statutes of limitation that have not expired as of the petition date. Specifically, section 108(a) provides that "[i]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of … the end of such period … or two years after the order for relief." Section 108(a) preserves claims for which a statute of limitations has not expired for two years during a bankruptcy case. The two-year limitation period prescribed in section 546(a) of the Bankruptcy Code operates independently, requiring that claims under sections 544 (state law avoidance claims), 547 (preferences) and 548 (fraudulent transfers) of the Bankruptcy Code must be brought within two years of the petition date.[20] And debtors should be careful in understanding the impact of closing the Chapter 11 cases under section 350 of the Bankruptcy Code on that deadline.[21]

Post-confirmation rule 2004 examinations

Bankruptcy Rule 2004 states that "[o]n motion of any party in interest, the court may order the examination of any entity."[22] The examination can concern the acts, conduct or property of the debtor; the liabilities and financial condition of the debtor; or any matter which may affect the administration of the debtor's estate. Rule 2004 discovery can be propounded by the debtor in possession on third parties, by third parties on the debtor or even by third parties on other third parties in certain circumstances. Rule 2004 is a valuable tool because it helps unearth potential causes of action that may be unknown to the litigation trustee. Yet, the litigation trustee's ability to invoke Rule 2004 after a Chapter 11 plan is confirmed is not certain. Courts have declined relief post-confirmation, finding in some circumstances that it may give the litigation trustee an unfair advantage.[23]

[19] See Fed. R. Bankr. P. 3007 (b) ("A party in interest shall not include a demand for relief of the kind specified in Rule 7001 in an objection to the allowance of a claim, but may include such a claim in an adversary proceeding").

[20] *In re Maxway Corp.*, 27 F.3d 980, 983-84 (4th Cir. 1994) ("[B]y its terms, § 546(a) applies both to trustees and debtors in possession, requiring both to commence an action within the specified time periods.").

[21] See *5 Collier On Bankruptcy* ¶ 546.02[2][b] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[I]f a case is closed and then reopened under Section 350(b) of the Bankruptcy Code, it is not clear … whether the closure of the case will operate to bar avoidance actions" that are otherwise timely; noting "[i]n light of this ambiguity, courts have interpreted the word 'closed' in section 546(a)(2) to mean 'properly and finally' closed, [where a] case is not properly or finally closed unless all assets, including avoidance actions, are administered."); *In re Kopp*, 383 B.R. 179, 186 (Bankr. D. Kan. 2008) ("[T]he trustees in these case were allowed to proceed with avoidance actions even when the actions were not commenced until after the cases had been closed then reopened."); *In re Mullen*, 337 B.R. 744, 749 (Bankr. D. N.H. 2006) ("section 546(a) bars the resurrection of … an [avoidance] action or proceeding in the event that the case is reopened.").

[22] Fed. R Bankr. P. 2004.

[23] See *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 627-29 (Bankr. D. Del. 2016) (plan created two litigation trusts, one with estate claims (the "Corporate Trust") and one with individual creditor claims (the "Lender Trust"); Rule 2004 motion granted with respect to the first trust's claims and

Venue

The choice of forum presents a critical question. The Bankruptcy Court may provide a more strategic and practical forum given its familiarity with the Chapter 11 cases. However, a state court may be a better alternative depending on the claims asserted and the need for a jury trial.[24] Courts usually defer to a plaintiff's choice of forum, and that deference should apply to the litigation trustee.[25]

Filing in state court

While claims under the Bankruptcy Code, like preference claims under section 547, may not be available in state court, there are state law analogs for fraudulent transfer claims and in limited states, "insider" preference claims. Also, a defendant may try to move a state court action to federal court, specifically the United States District Court in the jurisdiction where the litigation trustee brought the action. (If the state court action is brought in the same state where the bankruptcy is pending, the case will likely be referred automatically by the United States District Court to the Bankruptcy Court). After removal, however, the Bankruptcy Court may decide to abstain from hearing the trust's claims. Under 28 U.S.C. § 1334(c)(2), a Bankruptcy Court must abstain from hearing certain types of cases that are "related to" a bankruptcy case, but not "arising under" the Bankruptcy Code or "arising in a case" under the Bankruptcy Code, if there is a case pending in state court that can be timely adjudicated. Non-core proceedings concerning the allowance or disallowance of claims, however, cannot be dismissed by a Bankruptcy Court on mandatory abstention grounds.[26] Furthermore, under 28 U.S.C. § 1334(c)(1), a Bankruptcy Court can permissively abstain even from disputes involving the Bankruptcy Court's "core" jurisdiction. Upon abstention, pursuant to 28 U.S.C. § 1452(b), the court may remand an action that was previously removed from state court back to state court "on any equitable ground."

Filing in bankruptcy court

There may be jurisdictional impediments to the litigation trust pursuing claims in the Bankruptcy Court, particularly after confirmation, subjecting the lawsuit to dismissal for lack of subject matter (or federal question) jurisdiction. Congress authorized Bankruptcy Courts to enter orders and judgments in "core proceedings," which includes all bankruptcy cases, all civil proceedings arising under the Bankruptcy Code (e.g., claims under chapter 5 of the Bankruptcy Code) and all civil proceedings

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denied with respect to the second trust's claims because "Rule 2004 was not intended to provide private litigants [i.e., the Consenting Lenders] with a strategic advantage in fishing for potential private litigation;" noting "the granting of the Trustee's request for Rule 2004 examinations with respect to the Corporate Trust effectively provides the Trustee with the information sought in both of his capacities."). See also *In re Daisytek, Inc.*, 323 B.R. 180 (N.D. Tex. 2005) (vacating Bankruptcy Court order allowing a post-confirmation creditors' trust to take a Rule 2004 examination).

[24] Parties can consent to a trial by jury before the Bankruptcy Court. Without that consent, however, a jury trial demand may result in the matter being withdrawn to the United States District Court. See 28 U.S.C. § 157(e) ("If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all parties").

[25] See *In re Lyondell Chem. Co.*, 543 B.R. 428, 457-58 (Bankr. S.D.N.Y. 2016) (claims brought by trustee under Chapter 11 plan had bona fide connection to bankruptcy court); *In re Bernard Madoff Inv. Sec., LLC*, 525 B.R. 871, 890 (Bankr. S.D.N.Y. 2015) (noting Trustee's choice of forum was entitled to "substantial deference"; "[h]e sued in his 'home court' where the BLMIS SIPA proceeding is pending [and] where he was appointed …"). See *In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.*, 580 B.R. 64, 75–76, 85–86 (Bankr. S.D.N.Y. 2018) (finding forum shopping and declining to defer to foreign representatives' choice of forum when debtors commenced cases for purpose of facilitating avoidance actions); *Seidel v. Ritter (In re Kinbrace Corp.)*, 2017 WL 1380524, at *5 (Bankr. S.D.N.Y. Apr. 17, 2017) (even with "lesser deference" afforded to chapter 7 trustee prosecuting Liberian corporation's claims, the court still "assume[d] that [trustee's forum choice] weighs in favor of retaining litigation in this Court").

[26] See 28 U.S.C. § 157(b)(4).

"arising in" bankruptcy cases (e.g., DIP financing and confirmation disputes). "Core" proceedings do not include other civil proceedings that are merely "related to" bankruptcy cases — meaning they do not arise in bankruptcy or "but for" the bankruptcy, but their outcome may have a conceivable impact on the bankruptcy estates, such as by increasing creditor distributions.[27] Moreover, while no federal statute limits the Bankruptcy Court's jurisdiction post-confirmation, courts have concluded otherwise.[28]

It is possible that a defendant will request the United States District Court to "withdraw the reference" that was given to the Bankruptcy Court. A United States District Court controls the bankruptcy system within its district and, under 28 U.S.C. § 157(d), may withdraw in whole or in part matters that have been referred to the Bankruptcy Court by it, for good cause shown, either on motion of a party or sua sponte.[29] The power to withdraw extends to both core and non-core matters. While typically discretionary, under certain circumstances, the United States District Court must withdraw the reference (e.g., when the matter's resolution requires the Bankruptcy Court to engage in significant interpretation, not just simple application, of federal non-bankruptcy law, such as regulatory law against a debtor under a federal environmental protection statute).

Finally, steps can be taken to best preserve the Bankruptcy Court's jurisdiction after it confirms the Chapter 11 plan. The plan proponent must ensure that the Chapter 11 plan and confirmation order specifically provide for the retention of Bankruptcy Court jurisdiction over all of the claims that the litigation trustee might wish to pursue in Bankruptcy Court.[30] Similarly, complaints that bring bankruptcy claims along with state law claims and join any claim objections under section 502 to the adversary complaint pursuant to Bankruptcy Rule 3007(b) arguably have more of a connection to the Bankruptcy Court than those suits resting entirely on state law.

[27] In certain cases, even where the claim is defined by 28 U.S.C. § 157 as "core," a court may not consider it Constitutionally "core" if it does not relate to the bankruptcy claims reconciliation process. In that instance, the Bankruptcy Court may not be able to enter a "final" order, and its factual findings may be subject to de novo review by the District Court. See *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 35, 134 S. Ct. 2165, 2172, 189 L. Ed. 2d 83 (2014) ("[S]ome claims labeled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b)."); *Stern v. Marshall*, 564 U.S. 462 (2011) (bankruptcy judge could not enter final judgment on state law counterclaims that were not resolved in the process of ruling on a creditor's proof of claim; the counterclaim was considered non-core despite falling under statutory definition of "core").

[28] See *N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2nd Cir. 1944) ("Since the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility."); *In re Gen. Media, Inc.*, 335 B.R. 66, 73–74 (Bankr. S.D.N.Y. 2005) (the party invoking post-confirmation jurisdiction must show that a matter has a "close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of the confirmed plan or incorporated litigation trust agreement … [And,] the plan must provide for the retention of jurisdiction over the dispute.").

[29] A Chapter 11 case technically is filed in the United States District Court. Most district courts, however, have orders automatically referring all bankruptcy matters to the Bankruptcy Court. See United States Southern District of New York Amended Standing Order of Reference M-431. Note that while motions to withdraw the reference are technically filed with the pertinent District Court, certain jurisdictions have ordered that such motions be referred to the Bankruptcy Court for the issuance of report and recommendation to the District Court. See *In re Memorial Production Partners, LP*, Civil Action No. H-18-411 (S.D. Tex. Sept. 20, 2018) (adopting in full the Bankruptcy Court's report and recommendation that the reference not be withdrawn).

[30] Of course, a "court cannot write its own jurisdictional ticket." See *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994).

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