28 No. 4 J. Bankr. L. & Prac. NL Art. 6

Norton Journal of Bankruptcy Law and Practice | August 2019

Volume 28, Issue 4

Norton Journal of Bankruptcy Law and Practice

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To Enforce or Not to Enforce: What Test Should Courts Apply When Faced With Arbitration Agreements In Bankruptcy?

I. INTRODUCTION

Given the rising costs of litigation, the use of alternate dispute resolution ("ADR") tools and forums to resolve disputes outside of a courtroom setting has been on the rise in recent years. Today, it is commonplace for commercial agreements to contain mediation and arbitration provisions as alternatives, or other preliminary options available prior to litigation, in the event that a dispute under an agreement arises. The popularity of including ADR provisions stems, in part, from a belief that the use of some form of ADR can be less costly and result in a more expeditious resolution of a dispute rather than formal litigation; at times this may be true, depending on the facts of a particular dispute and the parties involved. Regardless, there are a multitude of options available within the ADR universe, including mediation, med-arb, arb-med, and arbitration to choose from whether contained in an agreement, made available by court rules, or even by agreement of the parties.

While the use of mediation in bankruptcy cases has grown in popularity, arbitration is not often identified or even recognized at times as an option. This may be in part because unlike mediation where the results are "facilitated" by agreement among the parties, in arbitration someone other than the bankruptcy judge determines the dispute, which inherently raises jurisdictional concerns, as well as concerns about the overall goals and integrity of the bankruptcy process. It has long been recognized that considerable deference should be afforded to the Bankruptcy Code's [1] policy favoring the bankruptcy court as the sole forum for resolving all disputes concerning a debtor and its assets, as well as disputes between parties in interest and competing claimholders. The centralization of bankruptcy disputes in one forum (*i.e.* the bankruptcy court) often conflicts with the federal policies and principles underpinning the Federal Arbitration Act ("FAA"), [2] which requires enforcement of arbitration agreements absent rare exception. Thus, there is a question as to whether disputes that would otherwise go to arbitration in the absence of a bankruptcy case may or must be arbitrated in the bankruptcy case if such a case arises prior to the resolution of the dispute.

Since the 1980s and the enactment of the Bankruptcy Code, bankruptcy courts have struggled to resolve the apparent conflict between the Bankruptcy Code's policy favoring a centralized resolution by the bankruptcy court of all disputes arising or related to a bankruptcy estate and the fundamental policy under the FAA requiring deference to arbitration clauses in agreements between the parties. As a result, there are two significant and independent bodies of statutory federal laws (i.e. FAA and Bankruptcy Code) each requiring deference to their respective conflicting objectives. At present, there is no universal agreement among the courts as to how to resolve this conflict; in fact circuit courts are divided in their approaches to the problem.

Given that almost any contract can include an arbitration clause, the types of situations in which arbitration and bankruptcy may intersect is varied. For example, issues can arise where a trustee commences an adversary proceeding or files a motion to compel recovery of money under a contract or to commence a claw-back action for payments made under a contract. These are just a few instances where the counter-party to the contract could seek to enforce an arbitration clause to determine or address the claims brought by a trustee.

An analysis of the opinions of the circuit courts that have ruled on the issue of whether to enforce an otherwise valid arbitration agreement during a bankruptcy case reveals that the majority of courts look at the nature of the rights that give rise to the claims proposed to be arbitrated and whether enforcement of the arbitration agreement will conflict with the purpose and objectives of the Bankruptcy Code.[3] While analysis of the claims almost universally involves a review of whether such claims are core or non-core, such jurisdictional analysis should not control the final determination. As discussed below, the better test is one that looks at whether the claims at issue arise under the Bankruptcy Code and, if so, the impact that arbitration will have on the bankruptcy case and rights of creditors.[4]

II. THE FEDERAL ARBITRATION ACT

a. History

To begin the analysis, we must first consider the overarching arbitration statute, what is now known as the FAA.[5] In enacting the FAA, Congress sought to reverse what was a long history of judicial hostility to arbitration agreements.[6] While this hostility manifested in a variety of litigation contexts, it frequently arose in maritime disputes with the party opposing arbitration arguing that the admiralty courts have exclusive jurisdiction over maritime contracts. In 1924 the United States Supreme Court held in *Red Cross Line v. Atl. Fruit Co.*,[7] that the New York Arbitration Act of 1920 ("NYAA") could serve as a predicate to obtain specific performance of a contract to arbitrate a dispute even where the contract is governed by maritime law as to which any remedy resides in the exclusive jurisdiction of admiralty courts. At around the same time, the American Bar Association developed and proposed the United States Arbitration Act ("USAA"), which was patterned after the NYAA,[8] which, on July 30, 1947, became Title 9 of the United States Code, i.e. the FAA.[9] The text of the FAA provides in relevant part that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*[10]

Thus, the FAA's text reflects the overarching principle that arbitration is a matter of contract and courts must rigorously enforce arbitration agreements according to their terms.[11] Both state and federal courts are bound by the FAA, which was intended to create a:

> [N]ational policy favoring arbitration and withdr[a]w the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.[12]

A review of the FAA's legislative history reveals Congressional intent to reduce congestion in the federal courts as well as the costs and delays associated with protracted litigation.[13] Since its enactment, courts, including the United States Supreme Court, have continued to recognize limitations on the enforceability of arbitration agreements under section 2 of the FAA.

In determining whether a motion to compel arbitration should be granted and bankruptcy proceedings stayed pending the arbitration proceeding, courts apply a multi-step analysis. With respect to the multi-step analysis:

> First, [the court] must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.[14]

In the bankruptcy context, courts often merge the second and third steps in analyzing whether their disputed claims are covered by the arbitration agreement and the extent to which the bankruptcy court may stay arbitration.

b. The "Inherent Conflicts Test"

The test used by courts to evaluate whether Congress intended the FAA's policy favoring arbitration to yield to the dispute centralization policy of a countervailing federal statute was set forth by the Supreme Court in *Shearson/American Express, Inc. v. McMahon.* [15] In that case, the Court enunciated what is commonly known as the "inherent conflicts test." [16] That test is premised on the notion that Congress may enact another statute which is intended to override the FAA either by its plain language or because the underlying purpose of the other federal statute irreconcilably conflicts with the FAA. Under this test, a party opposing enforcement of an arbitration provision must establish that Congress intended to create an exception to the FAA's mandate. [17] Such intent may be deduced in one of three ways: (1) the statute's text; (2) the statute's legislative history; or (3) the existence of an "inherent conflict between arbitration [as required by the arbitration statute] and the [other federal] statute's underlying purposes." [18] The relevant caselaw proscribes that, if Congress intended to make an exception to the FAA of a particular claim, "such intent will be deducible" from the text or legislative history of a particular status or "from an inherent conflict between arbitration and the statute's underlying purpose." [19] Where an irreconcilable conflict is found to exist, a court may deny arbitration. [20]

III. THE INTERSECTION OF THE BANKRUPTCY CODE AND THE FAA

Neither the Bankruptcy Code nor the Bankruptcy Code's legislative history contains any express exception to the FAA. [21] As a result, the vast majority of courts that have evaluated whether to enforce an arbitration clause in a bankruptcy case or proceeding have focused on the third prong of the *McMahon* test: whether there is an inherent conflict between the purposes and policies underpinning the Bankruptcy Code and Congressional policies favoring enforcement of arbitration agreements under the FAA. In holding that bankruptcy courts possess little if any authority to deny the enforcement of arbitration clauses, many post-*McMahon* decisions simply rely on the bankruptcy court's jurisdictional limitations in reaching the conclusion as to the enforceability of arbitration clauses in the bankruptcy context. [22] Specifically, these bankruptcy courts initially examine whether or not the proceeding is "core" or "non-core" for bankruptcy purposes. Where the issue is core, the bankruptcy court considers whether such issue is "inextricably intertwined" with the bankruptcy and, if so, the bankruptcy court may deny arbitration. [23] Where the proceeding is non-core, courts have little to no discretion to deny arbitration. [24]

As set forth below, looking exclusively at whether a particular dispute is core or non-core ignores the most important inquiry advanced by *McMahon*: whether there is an inherent conflict between the purposes and policies of the Bankruptcy Code and enforcement of the parties' contractual rights to pursue arbitration. As discussed below, the core/non-core limitations are jurisdictional and go to the power of a bankruptcy court to enter a final order; however, categorizing matters between core and non-core does not necessarily include matters that could arise under or relate to a bankruptcy case that could conceivably conflict with arbitration.

a. Subject Matter Jurisdiction of Bankruptcy Courts

Section 1334 of title 28 of the United States Code grants, with certain exceptions, the district courts of the United States original and exclusive jurisdiction of all "cases" under title 11. [25] Section 1334(b) provides that the district courts have original, but non-exclusive, jurisdiction over all "civil proceedings arising under title 11, or arising in or related to cases under title 11." [26] Courts have varied in their interpretation of the phrases "arises in", "arises under", and "related to." Generally courts hold that a matter "arises in" a case under title 11 if the matter involves a dispute that is unique to the bankruptcy process, while a matter "arises under" a case under title 11 if title 11 confers the substantive rights at issue in the dispute. Courts have held that a matter is "related to" a case under title 11 if the outcome of the dispute could conceivably have an effect on the administration of the bankruptcy estate. [27] Section 157 of title 28 of the United States Code (the "Judicial Code") provides that district courts may "refer" any or all such "arising in," "arising under," or "related to" cases or proceedings to the bankruptcy judges of their district. [28] All bankruptcy cases and proceedings are automatically referred to the bankruptcy courts by way of standing "orders of reference." [29]

The Judicial Code limits a bankruptcy judge's authority to enter final judgments depending upon the nature of the matter at issue. In bankruptcy, the jurisdiction of the court to determine and enter a final order is divided between concepts of core proceedings and non-core proceedings. Bankruptcy judges may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." [30] A core proceeding involves a claim that invokes substantive rights that have been created by federal bankruptcy law or concern a claim that could only arise in the context of a bankruptcy case, [31] while a non-core proceeding is

a proceeding other than a core proceeding that is otherwise "related to a case under title 11." [32] "Core proceedings include, but are not limited to," the types of matters identified in section 157(b)(2). [33] Core bankruptcy functions include fixing the order of priority of creditor claims, centralizing all disputes in a single forum, and preserving and equitably distributing estate assets. [34]

Although Congress has identified core claims by statute — i.e. those identified in 28 U.S.C. § 157(c)(2), a bankruptcy court may nonetheless lack constitutional authority to enter final judgments. In 2011, the Supreme Court, in *Stern v. Marshall*, held that the bankruptcy court did not have authority as a non-Article III court, to adjudicate and enter final judgment on the estate's counterclaims to a filed proof of claim. [35] In *Stern*, the Supreme Court found that while bankruptcy courts have the statutory authority to enter final judgment on a debtor's counterclaim pursuant to the plain language of section 157(b)(2)(C), bankruptcy courts may not constitutionally enter final orders in non-bankruptcy matters that are based in common law or state law, or that would not necessarily be resolved in the claims allowance process in bankruptcy. A claim, that is statutorily core and which the bankruptcy court would have constitutional authority to enter a final judgment, would include a debtor estate's counterclaim to a creditor's proof of claim that relates to the creditor's claim and is not merely peripheral to the core bankruptcy function of addressing the allowance of a proof of claim. [36] A specific example of such a claim would be an estate's counterclaim that a loan is unenforceable under state law, which, if successful, would result in disallowance of the claim. [37] In contrast, a claim that is statutorily core but which the bankruptcy court lacks constitutional authority to enter a final order (a "*Stern* claim") would be a counterclaim to a proof of claim that seeks damages against the creditor for violation of state law — a claim that could be brought by the trustee outside of bankruptcy and is not necessary to the claims allowance process. [38] Since *Stern*, bankruptcy courts confronted with requests for arbitration of core (non-Stern) claims have held that sending such claims to arbitration "would pose an inherent conflict with the Bankruptcy Code." [39]

b. The Inherent Conflict Between the Bankruptcy Code and the FAA

A bankruptcy case raises several inherent conflicts with the policies and purposes of the FAA. [40] Perhaps the most significant conflict between a bankruptcy case and the FAA is that a bankruptcy case is primarily a collective, multi-party proceeding as contrasted with the two-party dispute that arises in typical non-bankruptcy litigation. In a bankruptcy case, the debtor and its creditors are stakeholders, each vying for its share of the debtor's estate. Thus, even a prepetition contract with a debtor may implicate the rights of the estate's other creditors because the outcome of the dispute over such contract may affect the rights of other estate creditors. Arbitration between the debtor and a counter-party could impact other estate creditors, each of whom are not represented in the arbitration and none of whom consented to arbitration of matters that could impact their rights as creditors. Another important conflict between the policies and purpose of the Bankruptcy Code and the FAA is the Bankruptcy Code's policy governing the centralization of claims against the debtor and assets of the debtor to be addressed and adjudicated in a single forum (e.g. the bankruptcy court) as opposed to uncoordinated, piecemeal litigations in a multitude of courts. Arbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a bankruptcy issue would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the bankruptcy judge assigned to the debtor's bankruptcy case.

c. How Do Courts Reconcile the Conflict Between the FAA and the Bankruptcy Code?

Five years after Congress enacted the Bankruptcy Code, the Third Circuit in *Zimmerman v. Cont'l Airlines, Inc.* was confronted with the first federal case which attempted to reconcile the apparent conflict between the FAA and the Bankruptcy Code. [41] In this case, the court determined that a bankruptcy court should have the power to accept or reject a contractual arbitration provision in its sound discretion. [42] Thereafter, and following the 1984 amendments to the Bankruptcy Code, in *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* the Third Circuit stated that the Supreme Court's "message" for bankruptcy courts is to "enforce such [an arbitration] clause unless that effect would seriously jeopardize the objectives of the Code." [43] In *Hays*, the Third Circuit modified the sound discretion standard previously established by *Zimmerman. Hays* can be read to hold that the 1984 amendments eliminated a bankruptcy court's discretion in enforcing arbitration agreements, although most cases following *Hays* have limited its applicability to non-core adversary proceedings to enforce a claim held by the estate. [44]

In *Hays*, the chapter 11 trustee filed an action against Merrill Lynch in district court for breach of a prepetition contract as well as securities laws and RICO claims. [45] In response, Merrill Lynch sought to stay the action and compel arbitration. The district court, relying on *Zimmerman*, held that it had discretion based on the Bankruptcy Code to decline to enforce a mandatory

arbitration clause. [46] Additionally, the district court reasoned that because neither the chapter 11 trustee nor the creditors the trustee represented signed the arbitration agreement, they should not be bound by its terms. [47] On appeal, however, the Third Circuit disagreed and held that the chapter 11 trustee stands in the shoes of the debtor for purposes of the arbitration agreement and is bound by such agreement to the same extent as the debtor. [48] Further, the Third Circuit, relying on *McMahon*, held that arbitration of non-core claims would not jeopardize the objectives of the Bankruptcy Code. [49]

Under the *Hays* interpretation of the *McMahon* test, the district court lacked authority and discretion to deny enforcement of the arbitration clause absent the trustee meeting its burden of showing that the text, legislative history, or purpose of the Bankruptcy Code conflicts with the enforcement of an arbitration clause in a non-core proceeding. [50] Although *Hays* acknowledges that core matters brought on behalf of creditors might not be subject to arbitration if the Bankruptcy Code specifically provides otherwise, nothing in the text of the Bankruptcy Code suggests that Congress intended arbitration clauses to be unenforceable in non-core proceedings. [51]

Since *Hays*, circuit courts have varied in their approaches to determining whether arbitration clauses should be enforced in bankruptcy.

IV. GENERAL OVERVIEW OF THE CASELAW

As discussed in detail below, the Second and Fourth Circuits hold that the core/non-core determination is essential to the *McMahon* analysis. While the Third, Fifth, Ninth and Eleventh Circuits hold that the core/non-core determination is not dispositive. Although the Sixth Circuit has not yet decided the issue, courts within the Sixth Circuit have applied *McMahon* and looked beyond the jurisdictional core/non-core analysis to determine whether arbitration of claims would interfere with an inherent policy underlying the Bankruptcy Code. [52] Circuit courts that have analyzed the issue agree that bankruptcy courts must enforce an otherwise valid arbitration agreement covering a non-core claim. The divide amongst the circuit courts is over whether and when a bankruptcy court may refuse to enforce an arbitration agreement concerning a core claim.

Federal circuits and bankruptcy courts seem to agree that, in a non-core proceeding, a bankruptcy court does not have discretion to deny enforcement of an arbitration agreement. For example, in *In re Nw. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, [53] the bankruptcy court held that the Montana Arbitration Statute, which served to prevent arbitration of disputes "relating to insurance policies or annuity contracts" and was preempted by the FAA would not prevent the chapter 11 debtor from compelling the insurer to submit a non-core dispute to arbitration. [54] The court determined that Congress enacted the FAA to preclude states from "singling out arbitration provisions" and bankruptcy courts "*do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration." [55]

Several federal circuit courts have reached a similar outcome holding that a bankruptcy court *must* compel arbitration of a non-core proceeding in the absence of a serious conflict with the objectives of the Bankruptcy Code. [56]

a. Second Circuit

In *U.S. Lines,* the Second Circuit was confronted with a plaintiff-debtors' adversary proceeding to determine the rights and obligations of certain insurance companies under the debtors' insurance policies. [57] The insurance company defendants moved to stay the adversary proceeding and compel arbitration. [58]

In reaching its determination that the motion to compel arbitration should be denied, the Second Circuit applied a two-step test. [59] First, the court determined whether the proceeding was core. [60] Second, the court addressed whether the bankruptcy court could enjoin arbitration. [61] Included among the claims asserted against the debtors' estate were more than 18,000 claims filed by employees based on asbestos related injuries sustained while sailing on the debtors' fleets for more than 40 years; the debtors asserted that these claims were covered by certain protection and indemnity insurance policies. [62] The policy language required the debtors to pay first such that the insurers' liability was not triggered until the insured paid the claim of the personal injury victim. [63] In light of the debtors' insolvency, this pay first requirement was difficult, if not impossible, to satisfy. [64] As a result, the debtors required court intervention to determine the rights of the parties under the policies. [65]

The debtors' adversary complaint asserted nine claims for declaratory relief and the tenth claim asserted punitive damages. [66] In analyzing whether these claims were core claims, the Second Circuit noted that core bankruptcy functions include: "fixing the order of priority of creditor claims against a debtor," "placing the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors" and "administering all property in the bankrupt's possession." [67] Although the court recognized that prepetition contracts are not usually considered core proceedings, the debtors' claims against the insurers arising from prepetition insurance contracts were found to be core because of the impact the contracts would have on other core bankruptcy functions. [68] The court observed that indemnity insurance contracts, "particularly where the debtor is faced with substantial liability claims within the coverage of the policy, 'may well be … the most important assets of [i.e., the debtor's] estate.'" [69] The court expressed concern that any arbitration of the disputed issues could result in an inequitable distribution among creditors, thereby directly conflicting with the bankruptcy court's core function of asset allocation among creditors. [70]

The Second Circuit in *U.S. Lines*, recognizing that a determination that a matter is core should not end the inquiry as to whether to stay litigation in favor of arbitration, remarked:

> [C]ore proceedings implicate more pressing bankruptcy concerns, but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration. "Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the [FAA]; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." However, there are circumstances in which a bankruptcy may stay arbitration. [71]

The Second Circuit also recognized in *U.S. Lines* that it is within a bankruptcy court's discretion to decline to compel arbitration when a conflict exists between the Bankruptcy Code which favors centralization of disputes concerning a debtor's estate and the FAA, "which advocates a decentralized approach to dispute resolution." [72] With respect to such exercise of discretion, the inquiry becomes "whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing [the] arbitration clause." [73] In undertaking this inquiry, bankruptcy courts have made a distinction between core and non-core proceedings, and when a proceeding is core, the bankruptcy court must determine whether arbitration "would seriously jeopardize the objectives of the [Bankruptcy] Code" such that there is an inherent conflict between arbitration and the code. [74]

Following *U.S. Lines*, the Second Circuit held that a bankruptcy court has authority to stay a non-core proceeding in favor of arbitration. [75] In *Crysen/Montenay*, the debtor commenced an adversary proceeding against a petroleum company and its parent for breach of contract arising from an oil delivery contract between the parties. After several years of pre-trial motion practice and discovery, the bankruptcy court stayed the action in favor of arbitration. An arbitration panel issued an award denying the debtors' claims and the adversary proceeding was dismissed with prejudice. On appeal to the Second Circuit, the debtor argued, among other things, that the bankruptcy court *lacked the authority* to stay the non-core proceeding in favor of arbitration. The Second Circuit, relying on *U.S. Lines*, held that bankruptcy courts "have the [authority] to stay non-core proceedings in favor of arbitration" and while the "bankruptcy courts generally *do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration, [ ] they certainly have authority to grant such a stay." [76]

Similarly, in *MBNA Am. Bank, N.A. v. Hill*, [77] the U.S. Court of Appeals for the Second Circuit held that the bankruptcy court had abused its discretion in denying a creditor's motion to stay or dismiss an adversary proceeding in order to enforce an arbitration clause. [78] In this case, the chapter 7 debtor had filed an adversary proceeding seeking to determine that the creditor had willfully violated the automatic stay where the creditor wrongfully withdrew money from the debtor's bank account post-petition.

The Second Circuit in *Hill* applied the *McMahon* test to analyze the creditor's motion to compel arbitration and ruled that while the debtor's section 362(h) claim was a core proceeding, [79] the court cannot override an arbitration agreement *unless* it finds:

> the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the [FAA] or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code. [80]

The Second Circuit concluded that arbitration of the debtor's core claim would not seriously jeopardize the objectives of the Bankruptcy Code because: (1) the debtor's chapter 7 estate had been fully administered and she had received her discharge; (2) resolution of the debtor's claim against MBNA would not affect an ongoing reorganization (as there was no reorganization and the liquidating case was concluded); (3) MBNA had reimbursed the debtor for the $159.01 it had improperly debited from her account; and (4) because it was a liquidating case, and any damages awarded post-petition would be the debtor's personal property and not property of her estate. [81] In so concluding, the Court reiterated several objectives of the Bankruptcy Code that favor a denial of arbitration, 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. [82]

Unlike the cases where courts have held bankruptcy courts had discretion to refuse to stay proceedings pending arbitration, in *Hill*, the court observed that in those cases "resolution of the arbitrable claims directly implicated matters central to the purposes and policies of the Bankruptcy Code," for instance by interfering with or affecting distribution of assets among creditors. [83] The Second Circuit in *Hill* noted that:

> This determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. The objectives of the Bankruptcy Code relevant to this inquiry include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditor and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." If a severe conflict is found, then the court can properly conclude that, with respect to the particular code provision involved, Congress intended to override the [FAA's] general policy favoring enforcement of arbitration agreements. [84]

Since *Hill* and *Crysen/Montenay*, the Second Circuit decided *Anderson v. Credit One Bank, N.A. (In re Anderson)*, [85] where the court denied arbitration of a discharge injunction violation, finding a specific and inherent conflict between enforcement of the arbitration agreement and enforcement of a bankruptcy discharge. The Second Circuit in *Anderson* noted that "successful discharge of a debt is not merely important to the Bankruptcy Code, it is its principal goal," and enforcement of a discharge "strikes at the heart of the bankruptcy court's unique powers to enforce its own orders." [86]

Courts within the Second Circuit continue to analyze *McMahon* initially based on whether the matter is a core or non-core bankruptcy proceeding, while acknowledging that the inquiry does not end simply because the dispute may involve a core proceeding. [87] Indeed, these courts focus on whether the conflict impinges upon a "substantially core" function of the bankruptcy process. [88]

b. Third Circuit

In *Mintze v. Am. Fin. Servs., Inc. (In re Mintze)*, the Third Circuit was faced with an appeal of an order denying a creditor's motion to compel arbitration of claims asserted by a chapter 13 debtor for rescission of a home equity loan based on Truth In Lending Act and several federal and state consumer protection laws. [89] In *Mintze*, the Third Circuit reversed the bankruptcy court, determining that the debtor's claims were not created by the Bankruptcy Code and because there was no bankruptcy issue to be decided by the bankruptcy court, there was no inherent conflict between arbitration and the debtor's claims and the underlying purposes of the Bankruptcy Code. The Third Circuit pointed to the *McMahon* test and found that the bankruptcy court lacked authority and discretion to deny enforcement of an arbitration clause unless the party opposing arbitration was able to establish a congressional intent to override the FAA's mandate. [90]

The Third Circuit in *Mintze* found that because the debtor failed to raise statutory claims created by the Bankruptcy Code, it would not find "an inherent conflict between arbitration" of the debtor's claims and "the underlying purposes of the Bankruptcy Code." [91] Further, when the *McMahon* standard is met, the court has discretion to deny enforcement of the arbitration clause

and whether the proceeding was core or not was dispositive to the analysis. Since *Mintze* was decided, lower courts in the Third Circuit have applied a similar analysis under *McMahon.* [92]

c. Fourth Circuit

In *Phillips v. Congelton, LLC (In re White Mt. Mining Co., L.L.C.)*, the Fourth Circuit denied a motion to compel arbitration and stay a pending adversary proceeding because the arbitration would have "seriously interfered with the debtor's efforts to reorganize." [93] In so doing, the Fourth Circuit applied the "inherent conflicts test" and held that the inherent conflict was clear because both the adversary proceeding and arbitration involved a core issue — namely, whether the principal's prepetition advances to the debtor were debt or equity. Specifically, the dispute in *White Mt. Mining* related to the prepetition sale of a 50% interest in the debtor's mining company under a sale agreement that contained an arbitration clause. [94] After the sale closed, one of the debtor's owners advanced over $10.6 million of his own money to the company to meet business expenses following operational difficulties relating to the forced shutdown of one of the company's mines. [95] The issue to be decided by the bankruptcy court in the adversary proceeding involved a determination as to whether the funds advanced by the owner prepetition should be characterized and treated as a loan instead of a contribution to capital. [96] The bankruptcy court held that the complaint was a core proceeding under 28 U.S.C. § 157(b)(2)(B) as it sought a determination that the debtor owed the third party money and that the issues were critical to the debtor's ability to formulate a plan of reorganization, as such, the core proceeding trumped the arbitration. [97] The Fourth Circuit agreed with both the bankruptcy court and district court, observing 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 [and] [a]rbitration is inconsistent with centralized decisionmaking 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. [98]

Similarly, in *Moses v. CashCall, Inc.*, [99] a consumer debtor filed an adversary proceeding against a loan company asking the bankruptcy court to declare the loan illegal and void and to obtain damages against the lender for alleged illegal debt collection activities. [100] The lender moved to dismiss the adversary proceeding or to stay the proceeding and compel arbitration pursuant to the loan documents. The Fourth Circuit upheld the district court's denial of arbitration of the debtor's declaratory relief claim as to whether the loan was illegal or void, ruling that the claim was a core proceeding and that arbitrating such claim would substantially interfere with the debtor's plans for reorganization. [101] As for the money damages claim, the Fourth Circuit, by a per curiam decision, held that the district court erred in denying a motion to compel arbitration of the debtor's claim for damages under the North Carolina Debt Collection Act.

However, Circuit Judge Niemeyer dissented from the finding that the non-core claim should have gone to arbitration. Judge Niemeyer observed that the distinction between core and non-core is not necessarily dispositive and that courts may consider the connection between the two claims as well as other factors. Such factors include potential changes to the debtor's ability to pay unsecured creditors in her bankruptcy, delays caused by separate litigation over the legitimacy of the arbitration process, and potential preclusive effects of non-bankruptcy findings on the bankruptcy court. In this regard, Judge Niemeyer stated:

> I believe that splitting Moses' closely related claims and sending Moses' non-core claim to a questionable and perhaps illusory arbitration proceeding would inherently conflict with the purposes of the Bankruptcy Code. [102]

Lower courts in the Fourth Circuit have since followed the *White Mt. Mining* and *CashCall* cases but have disagreed as to whether a constitutionally core claim by its nature inherently conflicts with the purposes of the Bankruptcy Code requiring denial of arbitration. [103]

d. Fifth Circuit

In *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, [104] the Fifth Circuit applied a two-part test to determine whether claims should be subject to arbitration. The first part required the court to apply *McMahon* in order to determine the source of rights that would be subject to arbitration if the clauses were enforced. Critical to this determination is whether the issues arose from the debtor's prepetition rights or from the Bankruptcy Code. The second part required the court to consider issue specific policy considerations and whether there is an inherent conflict between the FAA and the Bankruptcy Code. [105] The court denied the motion to compel arbitration holding that arbitration of a core bankruptcy proceeding brought to enforce a discharge injunction under a confirmed plan would be inconsistent with the Bankruptcy Code. [106] The facts of *Nat'l Gypsum* involved a debtor's adversary complaint against liability insurance carriers for declaratory relief that the insurers' actions to recover certain pre-confirmation debts were violative of the debtor's confirmed chapter 11 plan and discharge injunction. The Fifth Circuit in *Nat'l Gypsum* affirmed the lower courts' denial of a motion to compel arbitration. Notably, the Fifth Circuit in so ruling refused to rely exclusively on the "core" nature of the dispute and find an inherent conflict "based solely on the jurisdictional nature of a bankruptcy proceeding." [107] Thus, in *Nat'l Gypsum*, although the issue arose in a core proceeding concerning matters central to a confirmed plan of reorganization, that fact was not dispositive to the analysis. [108] The Fifth Circuit explains:

> 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 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. [109]

Since *Nat'l Gypsum*, at least one bankruptcy court in the Fifth Circuit has deviated in its application of *McMahon* and initially focused on the core/non-core determination. [110]

e. Ninth Circuit

In *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)* the Ninth Circuit held that regardless of core or non-core determination, the *McMahon* standard must be met. [111] The Ninth Circuit also noted that in core proceedings, the bankruptcy court may decline to enforce an otherwise applicable arbitration provision if arbitration would conflict with the underlying purposes of the Bankruptcy Code. The court in *Thorpe* denied a motion to compel arbitration and held that arbitration of discharge injunction violations would conflict with congressional intent. [112] The Ninth Circuit followed *Mintze* (3d Cir.), *White Mt. Mining* (4th Cir.), and *Nat'l Gypsum* (5th Cir.) in concluding that the "core/non-core distinction, though relevant, is not alone dispositive" and "even in a core proceeding, the *McMahon* standard must be met." [113] In *Thorpe*, the claim arose from a prepetition settlement but was found to be a core claim that would have an effect on the channeling injunction under the plan and rights of other creditors, therefore directly affecting the administration of the estate.

In *Ackerman v. Eber (In re Eber)*, [114] the Ninth Circuit affirmed, on appeal, an order of the district court affirming the bankruptcy court's denial of creditors' attempt to seek to arbitrate non-dischargeability claims. In denying the creditors' motion to compel arbitration, the court held that allowing arbitration of non-dischargeability claims under section 523 of the Bankruptcy Code would have conflicted with the underlying purposes of the Bankruptcy Code. The creditor had attempted to support its request for arbitration by designating the claims as breach of contract non-core claims that were not created by the Bankruptcy Code.

In *Eber*, the Ninth Circuit recognized the attempt by the plaintiff creditor to separate the adversary claims into separate matters of liability, damages, and dischargeability. Utilizing the framework outline in *McMahon*, the court instead agreed with the district court's finding that "allowing an arbitrator to decide issues that are so closely intertwined with dischargeability would 'conflict with the underlying purpose of the Bankruptcy Code.'" [115] The district court had recognized that allowing an arbitrator to establish "liability on causes of action based on fraud pursuant to 11 U.S.C.A. § 523(a)(2), breach of fiduciary duty pursuant to 11 U.S.C.A. § 523(a)(4), and intentional acts based on § 523(a)(6), is tantamount to establishing non-dischargeability." [116] The Court held that it "must consider the Bankruptcy Code's objectives, including centralization of disputes concerning a debtor's legal obligations, and protection of debtors and creditors from piecemeal litigation." [117] The Court noted that "when a

bankruptcy court considers conflicting policies as the bankruptcy court did here, we acknowledge its exercise of discretion and defer to its determinations that arbitration will jeopardize a core bankruptcy proceeding." [118]

Since *Thorpe* and *Eber*, lower courts in the Ninth Circuit have followed their analyses that the core/non-core distinction is not dispositive, and they have applied the *McMahon* review. [119]

f. Eleventh Circuit

In *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc.* (*In re Elec. Mach. Enters.*), [120] the Eleventh Circuit held that the dispute was non-core as it did not involve a "right created by federal bankruptcy law" and is not "a proceeding that would arise only in bankruptcy." [121] Because the claim was only related to the bankruptcy, it was non-core and subject to arbitration. The Eleventh Circuit, in reaching its ruling, noted that even if the issue was core, the lower courts did not undertake an "inherent conflicts" analysis. [122] The facts of *Whiting-Turner* involved a debtor-subcontractor's proceeding to compel a general contractor to turnover monies allegedly due and owed to the debtor-subcontractor. [123] Because the claim could have been brought irrespective of whether the debtor-subcontractor filed for bankruptcy, the Eleventh Circuit held that the claim did not "involve the traditional purpose of the bankruptcy court — modifying the rights of creditors who make claims against the bankruptcy debtors' estate." [124] Lower courts in the Eleventh Circuit have followed *Whiting-Turner*'s approach to the *McMahon* analysis. [125]

CONCLUSION

Based on a review of the circuit and lower court decisions addressing the enforceability of arbitration agreements in the bankruptcy context, no bright line test emerges. When faced with a motion to compel arbitration, a bankruptcy court must perform a two-step inquiry. First, the court must determine whether it has discretion to refuse arbitration. Second, even if the bankruptcy court determines it does have such discretion, it must determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing the arbitration clause. In resolving this question, the bankruptcy courts must first examine whether the proceeding involves provisions of the Bankruptcy Code that so inherently conflict with arbitral resolution that those provisions manifest Congressional intent to grant the bankruptcy courts discretion to refuse arbitration. Courts have made a distinction between core and non-core proceedings in favor of arbitration; however, as recognized by the majority of circuits, the core/ non-core analysis should not be dispositive of the analysis. Simply because a dispute involves a core proceeding does not mean that the bankruptcy court should deny a request to proceed to arbitration. Rather, the conflict must impinge upon a "substantially core" function of the bankruptcy process. Thus, even where it is determined to be a core proceeding, the bankruptcy court may enforce an arbitration agreement where the relevant provisions of the Bankruptcy Code do not inherently conflict with the FAA or where would arbitration of such proceedings would not jeopardize the objectives of the Bankruptcy Code. [126]

Footnotes

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1 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code").

2 9 U.S.C. §§ 1 to 16, 201 to 208, 301-307.

3 See, e.g., MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 108, Bankr. L. Rep. (CCH) P 80445 (2d Cir. 2006) (In order to determine whether to enforce an arbitration agreement, the bankruptcy court must engage in a "particularized inquiry into the nature of the claim and the facts of the specific bankruptcy" keeping in mind the objectives of the Bankruptcy 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'") (citations omitted).

4 See, e.g., In re Mintze, 434 F.3d 222 (3d Cir. 2006); Matter of National Gypsum Co., 118 F.3d 1056, 31 Bankr. Ct. Dec. (CRR) 237, 38 Collier Bankr. Cas. 2d (MB) 722 (5th Cir. 1997); In re Thorpe Insulation Co., 671 F.3d 1011, 55 Bankr. Ct. Dec. (CRR) 277, Bankr. L. Rep. (CCH) P 82174 (9th Cir. 2012); In re Electric Machinery Enterprises, Inc., 479 F.3d 791, 47 Bankr. Ct. Dec. (CRR) 234 (11th Cir. 2007).

5 9 U.S.C. §§ 1 to 16.

6 See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 Fair Empl. Prac. Cas. (BNA) 266, 17 I.E.R. Cas. (BNA) 545, 79 Empl. Prac. Dec. (CCH) P 40401, 143 Lab. Cas. (CCH) P 10939 (2001).

7 Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 109, 44 S. Ct. 274, 68 L. Ed. 582, 1924 A.M.C. 418 (1924).

8 See Mette H. Kurth, An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide, 43 UCLA L. Rev. 999, 1004–06 (1996) (discussing the early history of arbitration and the enactment of the FAA).

9 9 U.S.C.A. §§ 1 to 16; see Southland Corp. v. Keating, 465 U.S. 1, 25, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (positing that the FAA was enacted through Congress' power to establish and control the jurisdiction of the federal courts); see also Government of Virgin Islands v. United Indus. Workers, N.A., 40 V.I. 489, 169 F.3d 172, 175, 160 L.R.R.M. (BNA) 2533, 137 Lab. Cas. (CCH) P 10369 (3d Cir. 1999). Compare e.g., Alexandra Anne Hui, Equitable Estoppel and the Compulsion of Arbitration, 60 Vand. L. Rev. 711, 716 (2007) (holding the FAA was enacted using the commerce clause); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405, 87 S. Ct. 1801, 18 L. Ed. 2d 1270, 1969 A.M.C. 222 (1967).

10 9 U.S.C. § 2 (emphasis added).

11 American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417, 163 Lab. Cas. (CCH) P 10607, 2013-1 Trade Cas. (CCH) ¶ 78432 (2013).

12 465 U.S. at 10.

13 H.R. Rep. No. 96, 69th Cong., 1st Sess. 2 (1926).

14 In re Bethlehem Steel Corp., 390 B.R. 784, 789, 50 Bankr. Ct. Dec. (CRR) 75 (Bankr. S.D. N.Y. 2008) (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 75–6, 13 I.E.R. Cas. (BNA) 1025 (2d Cir. 1998) (abrogated on other grounds by, Katz v. Cellco Partnership, 794 F.3d 341 (2d Cir. 2015)); see also In re Koper, 516 B.R. 707, 717 (Bankr. E.D. N.Y. 2014).

15 See, e.g., 482 U.S. 220 (1987).

16 482 U.S. at 226.

17 482 U.S. at 226.

18 482 U.S. at 227.

19 482 U.S. at 227.

20 482 U.S. at 226–27 (recognizing that "the Arbitration Act's mandate may be overridden by contrary congressional command" arising from the statutory text "or from an inherent conflict between arbitration and the statute's underlying purpose.").

21 In re Eber, 687 F.3d 1123, 1129, 56 Bankr. Ct. Dec. (CRR) 190, 67 Collier Bankr. Cas. 2d (MB) 1744, Bankr. L. Rep. (CCH) P 82296 (9th Cir. 2012) (holding that "[t]his Circuit and sister circuits applying the McMahon factors to the Bankruptcy Code have found no evidence in the text of the Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA

in the Bankruptcy Code."); see also 671 F.3d at 1020 ("Neither the text nor the legislative history of the Bankruptcy Code reflects a congressional intent to preclude arbitration in the bankruptcy setting."); see 479 F.3d at 796; see 434 F.3d at 231.

22 See, e.g., In re U.S. Lines, Inc., 197 F.3d 631, 640–41, 35 Bankr. Ct. Dec. (CRR) 187, 2000 A.M.C. 784 (2d Cir. 1999); 671 F.3d at 1021; 434 F.3d at 229; In re White Mountain Mining Co., L.L.C., 403 F.3d 164, 168, 44 Bankr. Ct. Dec. (CRR) 134, Bankr. L. Rep. (CCH) P 80278 (4th Cir. 2005); 118 F.3d at 1066–67.

23 See, e.g., 671 F.3d at 1022.

24 See, e.g., Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1156, 19 Bankr. Ct. Dec. (CRR) 1344, Bankr. L. Rep. (CCH) P 73091, Fed. Sec. L. Rep. (CCH) P 94568 (3d Cir. 1989).

25 Martin E. Beeler, Recent Developments In Bankruptcy Jurisdiction, Norton Annual Survey of Bankruptcy Law 987, 987 (2018 Ed.) (citing 28 U.S.C. § 1334(a)).

26 See Martin E. Beeler, Recent Developments In Bankruptcy Jurisdiction, Norton Annual Survey of Bankruptcy Law 987, 987 (2018 Ed.) (citing 28 U.S.C. §§ 1334(a) and (b)); see also 1 Collier on Bankruptcy ¶ 3.01[2] (Alan N. Resnick & Henry J. Sommer eds. 16th ed. rev. 2019) (a "case" refers to the main bankruptcy case and a "proceeding" refers to controversies, adversary proceedings, contested matters, suits, actions or disputes that occur within the case).

27 See, e.g., In re Valley Health System, 471 B.R. 555, 563 (B.A.P. 9th Cir. 2012), rev'd on other grounds and remanded, 584 Fed. Appx. 477 (9th Cir. 2014).

28 Martin E. Beeler, Recent Developments In Bankruptcy Jurisdiction, Norton Annual Survey of Bankruptcy Law 987, 987–88 (2018 Ed.) (citing 28 U.S.C.A. § 157(a)).

29 See, e.g., Amended Standing Order of Reference M-431 (S.D.N.Y. January 31, 2012) (Preska, C.J.) ("Pursuant to 28 U.S.C.A. Section 157(a) 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.").

30 28 U.S.C.A. § 157(b)(1).

31 28 U.S.C.A. § 157.

32 28 U.S.C.A. §§ 157(a) and (b) (As it relates to core proceedings in bankruptcy, the Bankruptcy Code provides that: "(a) 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; (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.").

33 28 U.S.C. § 157(b)(2) (stating "Core proceedings include, but are not limited to: (A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; (C) counterclaims by the estate against persons filing claims against the estate; (D) orders in respect to obtaining credit; (E) orders to turn over property of the estate; (F) proceedings to determine, avoid, or recover preferences;(G) motions to terminate, annul, or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances; (I) determinations as to the dischargeability of particular debts; (J) objections to discharges; (K) determinations of the validity, extent, or priority of liens; (L) confirmations of plans; (M) orders approving the use or lease of property, including the use of cash collateral; (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and (P) recognition of foreign proceedings and other matters under Chapter 15 of title 11.").

34 See 197 F.3d at 637; In re Johns-Manville Corp., 837 F.2d 89, 91, 17 Bankr. Ct. Dec. (CRR) 293, 18 Collier Bankr. Cas. 2d (MB) 316, Bankr. L. Rep. (CCH) P 72180 (2d Cir. 1988); In re Salander-O'Reilly Galleries, LLC, 475 B.R. 9, 30–31 (S.D. N.Y. 2012).

35 564 U.S. 462, 499 (2011) ("Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.") (emphasis in original).

36 See In re Taylor, 594 B.R. 643, 651–53 (Bankr. E.D. Va. 2018); Moses v. CashCall, Inc., 781 F.3d 63, 71, Bankr. L. Rep. (CCH) P 82792 (4th Cir. 2015).

37 See 781 F.3d at 71.

38 See 781 F.3d at 71.

39 See, e.g., 781 F.3d 63; 594 B.R. 643; In re Kiskaden, 571 B.R. 226 (Bankr. E.D. Ky. 2017); In re Erwin, 2018 WL 1614160 (Bankr. E.D. N.C. 2018); In re Brier Creek Corporate Center Associates Ltd. Partnership, 2013 WL 492461 (Bankr. E.D. N.C. 2013), supplemented, 2013 WL 753821 (Bankr. E.D. N.C. 2013) (directing claims that were not "constitutionally core" to arbitration and denying motion to compel arbitration as to those claims were held to be core).

40 See, e.g., 436 F.3d at 108; 197 F.3d at 631.

41 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 464 U.S. 1038 (1984), and modified by 885 F.2d 1149 (3d Cir. 1989).

42 712 F.2d at 59–60.

43 885 F.2d at 1161.

44 See, e.g., In re Gandy, 299 F.3d 489, 48 Collier Bankr. Cas. 2d (MB) 895, Bankr. L. Rep. (CCH) P 78709 (5th Cir. 2002) ("[I]t is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings …"); 118 F.3d at 1066 ("With respect to derivative, noncore matters … Hays makes eminent sense [and] … has been universally accepted."); In re Crysen/Montenay Energy Co., 226 F.3d 160, 166 (2d Cir. 2000) ("The Third Circuit's Hays decision — holding that district courts must stay non-core proceedings in favor of arbitration — is generally accepted.").

45 885 F.2d at 1150.

46 885 F.2d at 1155.

47 885 F.2d at 1152.

48 885 F.2d at 1153.

49 885 F.2d at 1156–57.

50 885 F.2d at 1156.

51 885 F.2d at 1157.

52 See, e.g., In re No Place Like Home, Inc., 559 B.R. 863, 875, 63 Bankr. Ct. Dec. (CRR) 91 (Bankr. W.D. Tenn. 2016) (court permitted arbitration of FLSA claims where it found "the claims at issue arise strictly out of the FLSA and contract law [and] [t]here is no underlying bankruptcy issue to be determined and, therefore, there can be no inherent conflict between the FAA and the Bankruptcy Code"); 571 B.R. 226 (holding that the court lacked discretion to deny enforcement of arbitration of claims that are statutorily but not constitutionally core); Trinity Communs., LLC v. Momentum Telecomms., Inc. (In re Trinity Communs.), Case No. 09-13154, Adversary Proceeding No. 11-1101, 2012 Bankr. LEXIS 1070, at *36 (Bankr. E.D. Tenn. Mar. 13, 2012) (in analyzing whether claims based on prepetition service agreement should be arbitrated, court held that the core/non-core determination not dispositive and McMahon "inherent conflict" test controls).

53 Northwestern Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 321 B.R. 120, 128 (Bankr. D. Del. 2005).

54 See 321 B.R. at 128; see also AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) P 10368 (2011) (holding that FAA will supersede conflicting state law that prohibits arbitration of particular type of claim, and further holding that FAA preempts California's judicial rule finding certain class arbitration waiver unconscionable).

55 321 B.R. at 123 (citations and internal quotation marks omitted) (emphasis in original).

56 See, e.g., 299 F.3d at 495 (declining to stay proceeding for arbitration "whose underlying nature derives exclusively from the provisions of the Bankruptcy Code" but acknowledging that a bankruptcy court "has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings under 28 U.S.C. § 157(b)"); 226 F.3d at 166 (holding that bankruptcy courts generally "*do not* have discretion to *decline* to stay *non-core* proceedings in favor of arbitration, and they certainly have authority to grant such a stay.") (emphasis in original).

57 197 F.3d at 637.

58 See 197 F.3d at 637.

59 See 197 F.3d at 636.

60 See 197 F.3d at 636.
61 See 197 F.3d at 636.
62 197 F.3d at 636.
63 See 197 F.3d at 639.
64 See 197 F.3d at 639.
65 See 197 F.3d at 639.
66 See 197 F.3d at 636.
67 See 197 F.3d at 637 (citations and internal quotation marks omitted).
68 See 197 F.3d at 638.
69 197 F.3d at 638.
70 See 197 F.3d at 639.
71 197 F.3d at 640 (internal citations omitted).
72 197 F.3d at 638.
73 197 F.3d at 638 (citations and internal quotation marks omitted).
74 197 F.3d at 640–41 (citations and internal quotation marks omitted).
75 See 226 F.3d at 166.
76 226 F.3d at 166 (emphasis in original).
77 436 F.3d at 107.
78 436 F.3d at 110–11.
79 436 F.3d at 108.
80 436 F.3d at 108.
81 436 F.3d at 109.
82 436 F.3d at 108 (citation and internal quotation marks omitted).
83 436 F.3d at 110.
84 436 F.3d at 108.
85 In re Anderson, 884 F.3d 382, 389–90, 65 Bankr. Ct. Dec. (CRR) 101, Bankr. L. Rep. (CCH) P 83222 (2d Cir. 2018), cert. denied, 139 S. Ct. 144, 202 L. Ed. 2d 35 (2018).
86 884 F.3d at 386.
87 See In re Cardali, 2010 WL 4791801, at *7 (Bankr. S.D. N.Y. 2010) (in assessing whether any federal statutory claims raised were intended by Congress to be arbitrable courts must weigh Congressional policy in favor of arbitration against important federal interests embodied in the Bankruptcy Code and "[i]n weighing this clash, the courts have focused first on whether the matter in question is a core or non-core bankruptcy proceeding"); In re MF Global Holdings Ltd., 571 B.R. 80, 92 (Bankr. S.D. N.Y. 2017), leave to appeal denied, 296 F. Supp. 3d 662, 64 Bankr. Ct. Dec. (CRR) 227 (S.D. N.Y. 2017) (in analyzing whether Congress intended to exclude a particular dispute from arbitration "courts have focused first on whether the matter is a core or non-core bankruptcy proceeding."); 516 B.R. 707, 718 (to determine whether claims are nonarbitrable, "[a]s a starting point, courts look to see if the dispute implicates a core or non-core proceeding under the Bankruptcy Code."); In re Homaidan, 587 B.R. 428, 435 (Bankr. E.D. N.Y. 2018) ("One key piece of the picture in determining whether Mr. Homaidan's claims should be referred to arbitration is the scope and boundary between core and non-core proceedings.").
88 See In re Hostess Brands, Inc., 68 Collier Bankr. Cas. 2d (MB) 1839, 2013 WL 82914, at *3 (Bankr. S.D. N.Y. 2013).
89 434 F.3d at 222.
90 434 F.3d at 231.
91 434 F.3d at 231–32.
92 See, e.g., Cote v. Fresh & Easy, LLC (In re Fresh & Easy, LLC), Case No. 15-12220 (BLS), Adv. Pro. No. 15-51906 (BLS), Related to Adv. Doc. Nos. 1, 25, 26, 27, 28, 35, 38, and 39 (Bankr. Del. June 2, 2016) ("In deciding whether arbitrating the Claims inherently conflicts with the Bankruptcy Code such that the Court may exercise discretion to deny enforcement of an arbitration clause, *Mintze* teaches that the threshold inquiry is whether the claims sought to be arbitrated were created by the Bankruptcy Code.").
93 403 F.3d at 166.
94 403 F.3d at 166.

95 403 F.3d at 166–67.
96 403 F.3d at 167.
97 403 F.3d at 164.
98 403 F.3d at 169 (citations and internal quotation marks omitted).
99 781 F.3d at 66.
100 781 F.3d at 66.
101 781 F.3d at 66–67.
102 781 F.3d at 73.
103 See, e.g., 594 B.R. at 651 (debtor's claim to disallow creditor claim under section 502 and class claim for creditor's alleged violation of Virginia consumer finance law were found to be constitutionally core claims and "referring those core claims to arbitration would inherently conflict with the purposes of the Bankruptcy Code"); In re TP, Inc., 479 B.R. 373, 382 (Bankr. E.D. N.C. 2012) (statutorily core "counterclaims" held to be constitutionally non-core and referred to arbitration); but see In re Barker, 510 B.R. 771, 778 (Bankr. W.D. N.C. 2014) ("Even if a matter is constitutionally core, a bankruptcy court possesses broad discretion to grant a motion to compel arbitration if there is a written agreement to arbitrate and if doing so would be helpful to the court and would assist the bankruptcy court in exercising its bankruptcy jurisdiction").
104 118 F.3d at 1065.
105 118 F.3d at 1069.
106 118 F.3d at 1071.
107 118 F.3d at 1067.
108 118 F.3d at 1067–68.
109 118 F.3d at 1069.
110 See, e.g., In re Cain, 585 B.R. 127, 134–35 (Bankr. S.D. Miss. 2018) (where the court found it did not have discretion to refuse to compel arbitration of non-core matter involving determination as to whether a creditor was liable to the chapter 13 debtor under the Truth In Lending Act); In re Griffin, 585 B.R. 794, 803 (Bankr. S.D. Miss. 2018) (where debtor's claims "do not depend on provisions in the Bankruptcy Code for their existence [but] [r]ather, they are 'non-core' or 'related' proceedings that would not be in this court but for the filing of the [Bankruptcy Case] … the court does not have discretion to refuse to compel arbitration.") (citations omitted).
111 671 F.3d at 1024.
112 671 F.3d at 1023–24.
113 671 F.3d at 1021.
114 687 F.3d at 1123.
115 687 F.3d at 1130–31 (quoting 671 F.3d at 1021).
116 687 F.3d at 1127.
117 687 F.3d at 1131.
118 687 F.3d at 1022–23 (citing 436 F.3d at 107).
119 See, e.g., Envisage Development Partners, LLC v. Patch of Land Lending, LLC, 64 Bankr. Ct. Dec. (CRR) 196, 2017 WL 4551575 (N.D. Cal. 2017) (in enforcing the parties' arbitration agreement as to isolated prepetition matters independent of the bankruptcy, the court observed that "[a]lthough centralization of disputes is a recognized purpose of the Bankruptcy Code, it does not alone justify overriding the FAA, or the parties' contractual agreement to arbitrate their pre-petition, non-core claims."); In re Banks, 549 B.R. 257 (Bankr. D. Or. 2016) (court directed arbitration of stay violations where chapter 13 debtor plan was confirmed, all estate property revested in the debtor personally and there is non-ongoing estate administration in her bankruptcy case).
120 479 F.3d at 791.
121 479 F.3d at 798.
122 479 F.3d at 798–99.
123 479 F.3d at 793–94.
124 479 F.3d at 798.
125 See, e.g., In re Walker, 551 B.R. 679 (Bankr. M.D. Ga. 2016) (denying motion to compel arbitration of automatic stay violations by observing that a stay violation strikes the entire bankruptcy system while

arbitration is a matter of contract and stating that "to require arbitration of a stay violation does not serve the core purpose of the FAA and run roughshod over the consideration that influence bankruptcy courts not to enforce similar prepetition contractual provisions."); Culverhouse Inc. v. Saturn Transp. Sys. (In re Culverhouse Inc.), Case No. 03-12288-WRS, Adv. Pro. No. 04-1015-WRS, 2004 Bankr. LEXIS 2225, at *11 (Bankr M.D. Ala. Sep. 23, 2004) (denying arbitration of debtor's counterclaim to creditor administrative expense claim "[a]s it is not practical to separate the conflicting claims and as the allowance of an administrative claim has a dramatic impact upon the Chapter 11 Plan confirmation process, the determination of this matter by way of arbitration would squarely conflict with the purpose and operation of the Bankruptcy Code"); In re Bateman, 585 B.R. 618, 629–630 (Bankr. M.D. Fla. 2018) (finding that "arbitration of a contempt proceeding for violation of the discharge injunction inherently conflicts with the Bankruptcy Code and undermines the bankruptcy court's authority to enforce its orders and exercise its powers of contempt."); In re Dixon, 428 B.R. 911 (Bankr. N.D. Ga. 2010) (court lacked discretion to decline to enforce the arbitration agreement as to debtor's Truth In Lending Act claims against creditor).

126 We would be remiss in concluding this article without mentioning the four recent U.S. Supreme Court decisions from the 2018–2019 term addressing arbitration under the FAA. While these cases arose in non-bankruptcy contexts, and generally are beyond the scope of this article, in each case, the Supreme Court reinforces judicial sentiment and deference toward respecting arbitration agreements and limiting the court's involvement under the FAA. See Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) P 11091 (2018) (holding that the language of a competing statute must be "clear and manifest" before a court can disregard an arbitration agreement, resolving a potential conflict between the FAA and the NLRA in favor of the FAA); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 203 L. Ed. 2d 636, 2019 I.E.R. Cas. (BNA) 378178, 103 Empl. Prac. Dec. (CCH) P 46261 (2019) (holding that under "the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration."); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 202 L. Ed. 2d 536, 2019 Wage & Hour Cas. 2d (BNA) 12890, 169 Lab. Cas. (CCH) P 36680, 2019 A.M.C. 1 (2019) (addressing the question of whether the court or the arbitrator should determine a threshold issue of arbitrability of a dispute under the FAA and held that the responsibility falls to the court to render this determination); Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 528, 202 L. Ed. 2d 480, 169 Lab. Cas. (CCH) P 11141, 2019-1 Trade Cas. (CCH) ¶ 80627 (2019) (holding that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract," and finding a claimed "wholly groundless exception" to be inconsistent with the statutory text of the FAA and existing court precedent).

While these cases do not specifically address the intersection of bankruptcy and the FAA, these decisions may impact future bankruptcy court analysis and decision making when faced with a motion to compel arbitration. For example, in *Schein*, the Supreme Court held that courts may not override a contract that delegates to arbitrators the question of whether a claim must be arbitrated or litigated, even if the arbitration request is "wholly groundless". See 139 S. Ct. at 529. While *Schein* did not involve a competing statute, it is unclear whether a bankruptcy court confronted with enforcement of an arbitration agreement that provides for the arbitrator to decide arbitrability and the issue involves a claim arising under the Bankruptcy Code *must* refer the matter to arbitration. Suffice it to say, the bankruptcy-arbitration landscape may change based on these recent decisions and the tension between strict enforcement of arbitration agreements and the court's discretion is not so clearly resolved.

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