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Recent Decisions Illustrate the Limits of the Post-Confirmation Jurisdiction of the Bankruptcy Court

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Bankruptcy court jurisdiction suddenly has become a hot topic in light of the U.S. Supreme Court's June 2011 opinion in *Stern v. Marshall*. However, *Stern* is not the only issue affecting bankruptcy court jurisdiction.

In four recent opinions, the Delaware Bankruptcy Court has found that it lacked subject matter jurisdiction over post-confirmation adversary proceedings. Last year, in *BWI Liquidating Corp. v City of Rialto (In re BWI Liquidating Corp.)*, Judge Mary F. Walrath held that the court did not have subject matter jurisdiction over a pre-confirmation breach of contract claim brought by a liquidating trust post-confirmation. More recently, in July, Judge Christopher S. Sontchi, in *The Fairchild Liquidating Trust v. New York (In re The Fairchild Corp.)*, similarly held that the court did not have subject matter jurisdiction over a liquidating trust's post-confirmation action alleging a pre-confirmation breach of contract. Both courts held that there was no jurisdiction merely because the claims could have been brought pre-confirmation and the confirmed plans purported to generally preserve the bankruptcy court's jurisdiction.

In the *ACandS Asbestos Settlement Trust v. Hartford Accident and Indemnity Co. (In re ACandS Inc.)* proceeding, in a pair of decisions issued in February (*ACandS I*) and August (*ACandS II*), Judge Judith K. Fitzgerald held that, notwithstanding that a dispute required the interpretation of a provision of a plan document, the proceeding did not have a sufficiently close nexus to the bankruptcy plan or proceedings to create "related to" subject matter jurisdiction. However, in an October opinion in *In re SemCrude L.P.*, Judge Brendan Linehan Shannon held that the court did have "related to" subject matter jurisdiction over a dispute involving interpretation of a plan provision transferring causes of action to a litigation trust because that dispute affected, rather than merely involved, the interpretation of the plan.

All of these decisions interpret the standards for post-confirmation jurisdiction of bankruptcy courts for matters "related to" a case under Title 11 set forth by the 3rd U.S. Circuit Court of Appeals in a 2004 decision, *In re Resorts International Inc.*, and demonstrate the parameters of the bankruptcy court's jurisdiction post-confirmation.

PRE- AND POST-CONFIRMATION JURISDICTION COMPARED

Bankruptcy courts have subject matter jurisdiction over cases arising under Title 11 and civil proceedings arising under Title 11, arising in Title 11 or related to a case under Title 11. A proceeding "arises under Title 11" when Title 11 provides the substantive right invoked by the proceeding. A bankruptcy court has "arising in" jurisdiction when the proceeding, by its nature, could only arise in the context of a bankruptcy case. As articulated by the 3rd Circuit in a 1984 decision, *Pacor Inc. v. Higgins*, Congress intended "related to" jurisdiction to provide bankruptcy courts with the comprehensive jurisdiction to "deal efficiently and expeditiously" with matters connected to the bankruptcy estate. In *Pacor*, the 3rd Circuit set forth the seminal test for determining when "related to" jurisdiction exists pre-confirmation: when the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. In subsequent decisions, the 3rd Circuit, emphasizing "conceivable," has applied the *Pacor* test very broadly. Because the estate ceases to exist post-confirmation, a technical application of the *Pacor* test post-confirmation would result in the bankruptcy court having no jurisdiction over post-confirmation disputes.

However, in *Resorts*, the 3rd Circuit recognized that post-confirmation "related to" jurisdiction of bankruptcy courts exists in limited circumstances when there is a "close nexus" between the civil proceeding and the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction, i.e., when the post-confirmation proceeding affects an integral part of the bankruptcy process. The court in *Resorts* held that a close nexus exists when the post-confirmation proceedings affect the interpretation, implementation, consummation, execution or administration of the plan. In addition, a close nexus may exist when the plan specifically enumerates the cause of action and the bankruptcy court's retention of jurisdiction over such cause of action. Thus, "related to" jurisdiction narrows substantially post-confirmation, ensuring that the bankruptcy court does not retain unending jurisdiction post-confirmation.

CONTRACTUAL DISPUTES POST-CONFIRMATION

The facts in *BWI Liquidating Corp.* and *The Fairchild Corp.* are substantially similar. Post-confirmation, liquidating trusts filed adversary proceedings against municipalities or states based on breaches of pre-petition contracts between the governmental unit and the debtor. In *BWI Liquidating Corp.*, the plaintiff argued that a close nexus between the proceeding and the bankruptcy case existed because the claims asserted in the proceeding arose pre-confirmation, the confirmed plan purported to generally preserve the court's jurisdiction over the claims, any proceeds from the action would benefit the estate, the claims were asserted in a liquidating rather than reorganizing case and the claims were asserted shortly after the effective date of the plan. In addition, the plaintiff argued that federal policy and consistency would be fostered if all actions remained centralized in one court.

Walrath rejected each of these arguments and held that none of those factors were sufficient to confer jurisdiction over the matter post-confirmation under *Resorts*. While noting that a plan's specific description of a cause of action may allow the court to retain "related to" jurisdiction, the court found that the debtor's plan did not describe the claims with sufficient particularity to ensure post-confirmation jurisdiction. Moreover, the mere fact that any proceeds from claims would increase creditor recoveries or the fact that the claims belong to a liquidation trust, rather than a reorganized entity, is not sufficient to create a close nexus. Sontchi reasoned and ruled similarly in *Fairchild*.

It is worth noting, however, that in a 2010 decision, *ConocoPhillips Co. v. SemGroup L.P. (In re SemCrude L.P.)*, Shannon determined that the general rule that a court's jurisdiction over a dispute is determined at the time the proceeding is filed and that jurisdiction is not "lost" by subsequent developments applies with equal force to the issue of pre- versus post-confirmation jurisdiction. Thus, the court held that it had "related to" subject matter jurisdiction under the *Pacor* test over proceedings commenced prior to confirmation even though the proceedings would be adjudicated post-confirmation. These three decisions make clear that the time of commencement of a proceeding in relation to confirmation can have a significant impact on the existence of the bankruptcy court's subject matter jurisdiction.

POST-CONFIRMATION DISPUTES INVOLVING PLAN AND PLAN DOCUMENT PROVISIONS

In *ACandS I*, personal injury and asbestos litigation trusts and committees filed a complaint seeking a declaratory judgment relating to confidentiality provisions in trust distribution procedures approved pursuant to the confirmation order and injunctive relief barring the defendants from seeking discovery from the plaintiff trusts and committees based on provisions of trust distribution procedures. The Delaware Bankruptcy Court presided over the bankruptcy cases and confirmed the plans that created the litigation trusts and established the trust distribution procedures. The discovery sought to be enjoined related to actions pending in several different jurisdictions and subpoenas issued from those jurisdictions. The plaintiff litigation trusts initiated the adversary proceeding before the Delaware Bankruptcy Court to have a uniformly applicable principle regarding their obligations to comply with discovery requests.

Fitzgerald dismissed the adversary proceeding (except with respect to certain plaintiffs whose claims were later dismissed in *ACandS II*), holding that the proceeding did not affect the interpretation of the plan. Instead, the dispute required the determination of the scope of subpoenas issued by other courts regarding proceedings pending before those courts. Fitzgerald held that the courts in which the underlying actions were pending were best suited to resolve those discovery disputes, including any confidentiality concerns of any party to those suits. The mere fact that the dispute might require interpretation of confidentiality provisions in trust distribution procedures did not establish a close nexus to the bankruptcy cases to confer "related to" jurisdiction.

In *ACandS I*, the court scheduled further proceedings to consider whether the confidentiality provisions in the trust distribution procedures for certain of the plaintiffs were forum-selection clauses and which of the insurer defendants could be bound by those provisions. However, in *ACandS II*, the court held that it lacked subject matter jurisdiction to resolve even those issues. The court noted that resolution of those issues would require nothing more than interpretation of a contractual provision (even though the provision was incorporated in a confirmed plan), and the outcome of the discovery dispute would have no effect on the debtor, the debtor's estate or the implementation of the plan. In reaching the determination that it lacked subject matter jurisdiction, the court focused on the 3rd Circuit's language in *Resorts* and distinguished disputes that require interpretation of the plan from those that would "affect interpretation, implementation, consummation, execution, or administration of the confirmed plan." That a dispute requires interpretation of

a plan or plan document provision cannot be sufficient to establish subject matter jurisdiction because retention of jurisdiction provisions in nearly every plan would then seemingly create endless jurisdiction, which the 3rd Circuit clarified in *Resorts* was not possible.

An October opinion, *In re SemCrude L.P.*, provides an example of when the bankruptcy court will have post-confirmation jurisdiction over disputes involving the interpretation of the plan. In *SemCrude*, Shannon held that the court had jurisdiction post-confirmation over a motion to enjoin a state court action as derivative of claims belonging to a litigation trust when the motion required the bankruptcy court to determine whether claims were transferred pursuant to the plan. Limited partners of the debtors commenced an action in Oklahoma state court against the debtors' former CEO and former auditor seeking damages for fraud, misrepresentation, breach of fiduciary duty and other related offenses. The former CEO filed a motion with the bankruptcy court to enjoin the state court action on the grounds that the causes of action brought by the limited partners were derivative of claims brought by the litigation trust formed pursuant to the debtors' plan of reorganization.

Shannon found that the motion to enjoin affected the interpretation and administration of the plan because the motion required the court to determine whether the plan transferred the claims brought in the state court action to the litigation trust. In addition, the court held that the motion affected the implementation of the plan because it sought an injunction to carry out the plan's provisions and would affect the state court's ability to enter orders inconsistent with the plan. As a result, the court concluded that the motion to enjoin affected "integral aspect[s] of the bankruptcy process" and was therefore within the bankruptcy court's post-confirmation "related to" jurisdiction. In contrast to the disputes in *ACandS I* and *II*, the dispute in *SemCrude* affected the interpretation, implementation and administration of the plan rather than merely requiring interpretation of a provision contained in a plan document.

'CLOSE NEXUS' TEST APPLIED NARROWLY

These recent decisions of the Delaware Bankruptcy Court interpret and apply narrowly the *Resorts* "close nexus" test for post-confirmation "related to" jurisdiction. While the bankruptcy court's pre-confirmation "related to" jurisdiction broadly covers any actions that could conceivably affect the estate, thus permitting the centralization of litigation involving the debtor and its estate, these recent cases demonstrate that post-confirmation the bankruptcy court will not be nearly so available to resolve disputes not closely tied to the bankruptcy proceedings.

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