

Chap 7..13

Bankruptcy Blotter



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IN THIS ISSUE:

From the Editor.....	1
THE PRUDENT PRACTITIONER: Perceiving the Elephant: “Related to” Bankruptcy Jurisdiction.....	1
Our Most Recent Release.....	6
Update on Version 8.0 CD	6
Chap 7..13 Tips	6
Editing the Client Interview	8

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THE PRUDENT PRACTITIONER

Perceiving the Elephant: “Related to” Bankruptcy Jurisdiction

By Rosemary E. Williams*

John Godfrey Saxe wrote a wonderful poem about six blind scholars who travel to examine an elephant.¹ Each reaches a different conclusion about the nature of the animal based on the part with which they come into contact. The first falls against the elephant’s “broad and sturdy side” and exclaims “God bless me! But the Elephant is very like a wall!” The second feels the tusk and concludes the elephant is like a spear, and so on through a snake (the trunk), a tree (the knee), and a fan (the ear).¹ It’s splendid nonsense, but in the conclusions reached through differing perceptions of a single event, reflects much about the

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From the Editor

District specific chapter 13 repayment plans recently added to Plan 13 now may be edited in an internal word processor. Also take a look at the PDF editor offered in version 8.0. You can now insert notes on the client’s forms for future reference or use the “typewriter” feature to enter text on top of PDF forms prior to filing.

These, and other enhancements, continue to make Chap 7..13 better. To help us in this regard, send suggestions and comments to west.chap7dotdot13@thomsonreuters.com.

Your Chap 7..13 Project Team

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elusive nature of truth—and testimony. When reviewing the differing applications of a settled general rule courts reach on what is and is not within their jurisdiction as “related to” the bankruptcy case, one can empathize with the experiences of the elephant scholars.

After the shock of the Supreme Court’s ruling² in 1982 that the 1978 grant of jurisdiction to the bankruptcy courts was unconstitutional, Congress replaced it with the current work-around found in 28 U.S.C.A. § 1334. This includes a grant of jurisdiction to the federal district courts of “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” By the terms of this statute, criminal actions are excluded by the express grant of jurisdiction only in civil matters.³ Actions assigned to particular state courts are excluded, but the Supreme Court has found an exception based on related-to jurisdiction.

Related-to jurisdiction affects consumer cases in two ways. A debtor in Chapter 13 may have a valuable cause of action based on non-bankruptcy law, the result of which could fund a plan in whole or part, relieving the stress on the debtor’s post-petition earnings. While the Code requires that Chapter 13 debtors make payments in the same amount every month, the revenue generated by a favorable outcome in a non-bankruptcy litigation can pay off a plan early, as well as providing a source for counsel’s fees—but the key factor is time. Removal of a suit to the bankruptcy court for determination may be a much shorter route to recovery than trying to push a matter through over-crowded state courts. However, the defendants will not be eager to travel to the bankruptcy court for the litigation, and may be expected to oppose removal, so that the debtor’s counsel must know how to retain the suit through related-to or arising-under jurisdiction *before* removing it.

Related-to or arising-under jurisdiction can also be used to challenge post-petition charges for attorney’s fees, trustee’s fees, costs, late fees, and all of the other

charges that creditors sometimes assert in a proof of claim. Mortgage creditors are particularly aggressive on fees. A class action to deter overcharging which was retained by a bankruptcy court is included in this article. Such a suit can also generate substantial fees to properly compensate the debtor’s counsel.

If a Chapter 7 debtor brings in a non-bankruptcy lawsuit which has value, the debtor and counsel frequently have to stand by while the trustee settles the suit for a sum which may be far below the value that the debtor and counsel believe it had. Opposing parties in such suits often settle for much less once a trustee takes over litigation. However, the trustee wants to obtain the highest return for creditors possible, so may consider that bringing the suit into bankruptcy court will enhance its value. This benefits the debtor in that more is paid on claims, and in particular claims entitled to priority of payment. In one case described to the author, the return from the litigation brought the debt amount down so much that the debtor was able to convert to a viable Chapter 13.

Altogether, facing a Code which is confrontational and punitive toward consumer debtors, a debtor that has a viable action for recovery prior to, or after, the petition date can find a powerful tool in removal of a pending suit, or initiation of post-petition litigation based on non-bankruptcy law. The debtor must, however, be able to support an argument for retention based on related-to jurisdiction. If the potential litigation arises after the petition is filed, the debtor may be able to sustain litigation based on non-bankruptcy causes of action based on arising-under arguments.

The United States Supreme Court⁴ showed the basis for arising-under and related-to jurisdiction in finding that the general exception by which federal jurisdiction defers to probate courts is not absolute. The Court noted that federal jurisdiction gives way to state courts in:

- i. probate or annulment of a will;
- ii. administration of a decedent’s estate; and

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- iii. disposition of property that is in the custody of the state probate court.

In the case before the Court, a widow brought an action in her Chapter 11 case to recover damages for her stepson's allegedly tortious interference with her expectancy of an inheritance or gift from her deceased husband. Notwithstanding the general exception for probate matters, the Court held that the probate exception did *not* bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

The Court went on to hold that the ruling of a Texas probate court that the state court had exclusive jurisdiction over all of the widow's claims against the stepson could not deprive the federal district court of jurisdiction over the widow's suit, as no state could reserve to its probate courts the exclusive right to adjudicate a transitory tort. Having so held, the Court commented tersely that the "jurisdiction of the federal courts, having existed from the beginning of the federal government, cannot be impaired by subsequent state legislation creating courts of probate."

There are two lines of judicial thought which support retention of non-bankruptcy litigation as "related to" the bankruptcy case. Both require an on-going administration, but focus on differing aspects of that administration.

Effect on the estate test

The genesis for most contemporary decisions on "related to" jurisdiction in bankruptcy cases was handed down by the United States Supreme Court in the *Celotex* Chapter 11 case. After winning an appeal of a decision against the debtor, the judgment creditors commenced an execution action against a surety to enforce payment under a supersedeas bond posted by the debtor against loss of the appeal. The Court held that whether the judgment creditors were entitled to immediate execution on the bond against the debtor's surety was at least a question "related to" the debtor's bankruptcy case, because execution would result in a claim against the estate, and that claim was within the bankruptcy court's jurisdiction.

In the *Celotex* decision, the Supreme Court cited with approval the test for related-to jurisdiction, as first stated by the Court of Appeals for the Third Circuit:⁵

"The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could*

conceivably have any effect on the estate being administered in bankruptcy.... Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."⁶

Recognizing the implied connection between the administration of the estate and related-to jurisdiction, the Bankruptcy Appellate Panel for the Eighth Circuit opined that the type and stage of the underlying bankruptcy proceeding impacts directly on the bankruptcy court's "related to" jurisdiction. Therefore, the BAP noted that jurisdiction may extend more broadly in context of the Chapter 11 reorganization than in a Chapter 7 liquidation,⁷ being especially narrow after issuance of the order of discharge.⁸

The Court of Appeals for the Ninth Circuit⁹ restated the test in holding that proceedings "related to" the bankruptcy case for jurisdictional purposes include:

- (1) causes of action owned by the debtor which become property of the estate, and
- (2) suits between third parties which have an effect on the bankruptcy estate.

The suit before the Ninth Circuit was an inverse condemnation suit against a county brought by landowners who subsequently sought Chapter 11 relief. The judgment awarding the debtors damages, fees and prejudgment interest was entered by the district court, but the matter was heard on a bench trial in the bankruptcy court. The Court affirmed, saying that the suit and its determination were within related-to jurisdiction.

How are the trial-level courts applying these holdings to cases before them? A bankruptcy court in Pennsylvania held that a class action suit for remedies for usury, and to set aside an arbitration agreement as unconscionable, was within related-to jurisdiction.¹⁰ The District Court for New Jersey¹¹ took up a motion to remand, or in the alternative, to abstain from three separate, but related, lawsuits originally venued in a state court that specialized in addressing disputes over corporate governance. The remand/abstention request required that the Court determine jurisdiction. After reciting the related-to test first stated by the Third Circuit Court of Appeals, the District Court noted that, while the proceeding need not be against the debtor or

the debtor's property, the mere fact that there might be common issues of fact between the civil proceeding and a dispute involving the bankruptcy estate did not bring the matter within the bankruptcy court's jurisdiction. Rather, there had to be "some nexus between the 'related' civil proceeding and the title case." The Court found that the outcome of the suits could affect at least \$6 million of assets in the bankruptcy estate, and the use of the liquid assets of the debtor entity. As a result, the "Court held that all three actions were within the bankruptcy court's related-to jurisdiction.

Even class actions can be within a bankruptcy court's jurisdiction. The Bankruptcy Court for the Southern District of Texas¹² considered an adversary proceeding brought by Chapter 13 debtors on behalf of themselves and other similarly situated Chapter 13 debtors seeking a declaratory judgment that an over-secured mortgage lender had charged and collected, or attempted to collect, attorney's fees and costs during the bankruptcy cases without judicial approval, and in disregard of applicable bankruptcy statutes. The lender moved for dismissal for lack of subject matter jurisdiction. The Court held that it could exercise subject matter jurisdiction over these class claims as related to bankruptcy cases in its judicial district. The debtors' complaint invoked substantive rights that "were created by Bankruptcy Code and that could have no existence outside bankruptcy." Thus adjudication of these claims came within the court's jurisdiction, regardless of whether the mortgage property that secured lender's claim was included in property of the estate or had been exempted by the debtors. While the requirement that a cause of action must have some conceivable impact on the debtor's estate is necessary "in order to curtail seemingly unlimited breadth of bankruptcy court's 'related to' jurisdiction," no such safeguards are required with respect to "core" proceeding brought to enforce rights arising solely from the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

"Arising in" and judicial efficiency

There is a second basis, not yet endorsed by the Supreme Court but apparent in case law, for finding related-to jurisdiction: judicial efficiency. The Court of Appeals for the Fifth Circuit¹³ recently illustrated the courts' increasing willingness to find "arising in" jurisdiction in a bankruptcy court where doing so promotes lower costs and judicial efficiency. A creditor brought a proceeding seeking a determination that a debt was nondischargeable—a traditional function

of the bankruptcy courts, and a core proceeding. However, the creditor also wanted the bankruptcy court to issue a money judgment against the debtor to liquidate the obligation.

The Court of Appeals agreed that determining that a debt is nondischargeable is plainly a "core proceeding" governed by a specific provision of the Bankruptcy Code,¹⁴ over which the bankruptcy court has jurisdiction, but the rendition of a monetary judgment in favor of the creditor on that debt is not itself a core proceeding.¹⁵ Against this statutory framework, the Court held that the bankruptcy court, in addition to declaring the debt nondischargeable, had the jurisdiction to liquidate the debt and enter a monetary judgment against the debtor. The Court reasoned that, although the rendition of a money judgment was not a core proceeding, "there would be no judicial efficiency" in requiring the beneficiary of a nondischargeability judgment to pursue a separate lawsuit in order to secure a money judgment against the debtor.

In another example of this pursuit of efficiency where a non-core proceeding is connected to a core matter, the District Court for Connecticut held that the rule that bankruptcy jurisdiction does not extend to disputes over diminution in value of an estate's stock holdings in a wholly owned subsidiary did not apply to proceedings involving subsidiaries which were alter egos of the debtor.¹⁶ Likewise, the "arising in" provision of the Code's grant of jurisdiction gives the bankruptcy courts jurisdiction over any request for sanctions for any abusive filing, whether by plaintiff or defendant, to extent that federal law provides for sanctions.¹⁷

In general, proceedings which can only arise in the context of a bankruptcy proceeding, such as a secured creditor's objection to Chapter 13 plan confirmation are "core proceedings" and within the bankruptcy court's jurisdiction,¹⁸ but if other matters are entwined with that core action, "arising in" jurisdiction, combined with judicial efficiency, can bring the non-core case inside the bankruptcy court's jurisdiction. But the bankruptcy court's core jurisdiction can work against inclusion of non-bankruptcy litigation. When a debtor brought an action under the federal Fair Debt Collection Practices Act, the question arose of whether the litigation should be withdrawn from the bankruptcy court to the district court. The District Court for the Middle District of Alabama¹⁹ exercised its discretion to withdraw the reference to the bankruptcy court because the FDCPA claims, while arising under federal law, were made in

the bankruptcy court which “has no special expertise” in determining these types of claims. The District Court concluded⁵⁶ that it was “not a more efficient use of judicial, and the parties’, resources” to try the FDCPA claims in the bankruptcy court.

So what does a prudent practitioner do when dealing with the issue of related-to or arising under jurisdiction? These questions are common in remand or abstention matters, but can arise anything there is a possibility of non-core litigation. The prudent practitioner will consider the holdings mentioned above and shape the argument for or against jurisdiction by showing these facts:

1. If the practitioner is a proponent of related-to jurisdiction, the practitioner can emphasize a strong connection between the non-core proceeding and pending litigation (such as the liquidation of the nondischargeable debt mentioned above), or with the administration of the estate (plan enforcement or determination of a claim).
2. If the practitioner is opposing related-to jurisdiction, the stage of the related litigation is important. The more advanced the case is in the non-bankruptcy court, the more likely that an argument of judicial efficiency is to prevail. Use discovery to ask the opposition to describe any nexus with the administration.
3. Consider carefully where the non-bankruptcy litigation might fit into the administration of the bankruptcy case. If the purpose is only to liquidate the amount of a claim, there is little to no impact on administration; in fact, re-starting the non-bankruptcy litigation in federal court could impose a substantial delay in that administration. Again, use discovery to explore the opposition’s stance on this.
4. Where the question is arising-under jurisdiction, the practitioner must look at how advanced the litigation is in the non-bankruptcy court. The more non-bankruptcy judicial time that has been put into the case, the more likely it is to be remanded.
5. Where arising-under jurisdiction is possible, and where the non-bankruptcy case involves determination of the same fact issues as the core proceeding, judicial economy can be presented to sustain joinder of the two actions in bankruptcy court.
6. Some debtors have been driven into bankruptcy by the cost and time delay in getting a non-

bankruptcy matter to trial. The proponent of arising-under jurisdiction can contrast the cost and use of judicial time with that of the generally efficient bankruptcy courts.

1. The entire poem is found at http://www.noogenesis.com/pineapple/blind_men_elephant.html. The original story has been attributed to Sufis, Jainists, Hindus or Buddhists.
2. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).
3. In cases of suspected bankruptcy fraud, or other criminal act described in 18 U.S.C.A. §§ 152 and 153, the court can refer the matter to the United States Attorney, or the United States Trustee, for investigation, but may not hear the merits beyond that necessary to determine whether to refer the issue.
4. Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735 (U.S.,2006).
5. Pacor, Inc. v. Higgins, 743 F.2d 984 (1984).
6. Adopted in *In re Winstar Communications, Inc.*, 554 F.3d 382 (C.A.3.Del.,2009); *In re Morrison*, 555 F.3d 473 (C.A.5.Tex.,2009); *McGuire v. U.S.*, 550 F.3d 903 (C.A.9.Ariz.,2008); *In re Trusted Net Media Holdings, LLC*, 550 F.3d 1035 (C.A.11.Ga.,2008); *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831 (C.A.4.Va.,2007); *In re Lacy, Slip Copy*, 2008 WL 5351732 (C.A.10 (Colo.),2008) (not stating, but applying test in finding prepetition attorney’s fees and upholding award of sanctions for attempt to circumvent plan fell within “ambit of plan enforcement”); *Robinson v. Michigan Consol. Gas Co. Inc.*, 918 F.2d 579 (C.A.6 (Mich.),1990), and *In re Gardner*, 913 F.2d 1515 (C.A.10 1983). The Court of Appeals for the First Circuit adopted this text in *In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir.,1991), but the case was overruled on other grounds (route of appeal) by *Conn.Nat’l Bank v. Germain*, 503 U.S. 249 (1992), and re-endorsed as to the jurisdiction issue in *In re Northwood Properties, LLC*, 509 F.3d 15 (C.A.1.(Mass.),2007). And see *In re Farmland Industries, Inc.*, 378 B.R. 829 (BAP8.Mo.,2007) and *In re Thickstun Bros. Equipment Co., Inc.*, 344 B.R. 515 (BAP6.Ohio,2006) applying the same test.
7. *In re Farmland Industries, Inc.*, 378 B.R. 829 (BAP8.Mo.,2007).
8. *In re Russell*, 378 B.R. 735 (Bankr.E.D.N.Y.,2007) (outcome of debtor’s defamation claim against creditor would not affect bankruptcy estate, given that debtor had received discharge and estate had been fully administered, such that any damages received would inure solely to debtor’s benefit, and therefore claim did not fall within bankruptcy court’s “related to” jurisdiction)
9. *In re Excel Innovations, Inc.*, 502 F.3d 1086 (C.A.9,2007).
10. *In re Frascella Enterprises, Inc.*, 349 B.R. 421 (Bankr. E.D. Pa. 2006)
11. *Thomason Auto Group, LLC v. China America Co-op. Automotive, Inc.*, 2009 WL 512195 (D.N.J. 2009)
12. *In re Wilborn*, 401 B.R. 872 (Bankr. S.D. Tex. 2009)
13. *In re Morrison*, 555 F.3d 473 (5th Cir. 2009)
14. *Accord*, *In re Holmes*, 393 B.R. 95 (Bankr.M.D.N.C.,2008).
15. 28 U.S.C.A. § 157 describes as “core” proceedings matters over which a bankruptcy court has clear jurisdiction. A good example is an adversary proceeding in which a creditor objects to receipt by the debtor of an order of discharge of a particular debt (including a tax obligation). *In re Kohl*, 397 B.R. 840 (Bankr.N.D.Ohio.,2008). Litigation often arises over that jurisdiction when a matter is not a core proceeding. See *In re High Tech Packaging, Inc.*, 397 B.R. 369 (Bankr.N.D.Ohio.,2008) (motion for approval of proposed compromise of claims included in property of the estate is core matter, in which bankruptcy court has jurisdiction)

to enter final orders and judgments. And see Fed R Bankr Pro 9019. And see *In re Spokane Raceway Park, Inc.*, 392 B.R. 451 (Bankr.E.D.Wash.,2008) (proceedings that are “related to” bankruptcy case, for purposes of bankruptcy jurisdiction, include (1) causes of action owned by debtor which become property of the bankruptcy estate, and (2) suits between third parties which have an effect on the bankruptcy estate); *In re Smith*, 389 B.R. 902 (Bankr.D.Nev.,2008) (proceeding to liquidate libel claim against bankrupt newspaper columnist and for determination that alleged debt was nondischargeable for columnist’s “willful and malicious injury” within bankruptcy jurisdiction through core jurisdiction over dischargeability claim, and non-core, “related to” jurisdiction over creditor’s request to liquidate alleged debt); *In re Final Analysis, Inc.*, 389 B.R. 449 (Bankr.D.Md.,2008) (practice of law before bankruptcy court is a matter that arises in or is related to case under Bankruptcy Code; therefore bankruptcy court has subject matter jurisdiction to determine whether a party in a bankruptcy proceeding practiced law without authorization).

16. *Navon v. Mariculture Products Ltd.*, 395 B.R. 818 (D.Conn.,2008).
17. *In re Akl*, 397 B.R. 546 (Bankr.D.D.C.,2008) citing 28 U.S.C.A. §§ 157(b), 1334(b).
18. *In re Prevo*, 393 B.R. 464 (Bankr.S.D.Tex.Houston.Div.,2008).
19. *In re Travis*, Slip Copy, 2009 WL 532363 (M.D.Ala.,2009)

Our Most Recent Release

Chap 7..13 Version 7.96, which was released on March 15, 2009, contains several new or revised local forms, updated IRS expense data for the means test, compatibility with CM/ECF Version 3.3, and fixes for form printing issues.

Update on Version 8.0 CD

The latest CD, Version 8.0 has now been released for shipment in late April, 2009. It should arrive in your office in the first week of May. We very much appreciate your patience, and we think it will have been worth the wait.

This version will include over 65 updated chapter 13 Plans, as well as a PDF editor for official forms, local forms AND chapter 13 Plans that will allow simple modifications of forms in order to comply with any court requirements as well as insertion of notes for future reference. While many of the existing chapter 13 plans can be edited with the PDF editor, the NEW chapter 13 plans also allow you to directly edit the text of the documents with an internal word processor. The legacy chapter 13 plans will gradually be converted into this new format for your convenience.

Chap 7..13 Tips

Having Trouble Balancing a Chapter 13 Plan?

1. If you are having problems balancing your chapter 13 plan, the Chap7...13 software has a powerful tool to assist you in balancing the plan. On the right hand side of the Plan 13 Payout Overview window, just below the “Calculate” button, you’ll find the button titled “Suggestions.” By clicking this button, you’ll bring up the Suggestions report that shows details why the plan is not in balance, including:
 - how much money is needed,
 - in what month of the plan there are insufficient or excess funds, and
 - which classes caused the plan to be out-of-balance.

This report also alerts you when the following questionable payment amounts are made to a single creditor:

- **Total payouts greater than \$10,000**—Typically occurs when the mortgage is paid in the plan. This allows you the opportunity to change the mortgage claim to a direct payment method depending on the local practice and specific plan.
 - **Monthly Payout in any month greater than \$1,000**—Could indicate that some of the information was entered incorrectly.
 - **Monthly payments = 0**—Typically indicates that some of the fixed payments are missing
2. Assuming you are not able to balance the plan (if you can calculate but are interested in the details, go to the next paragraph), in the Plan 13 Payout Overview window enter \$10,000/month (or per week if you prefer) just to get the plan to have excess funds. Click on Calculate.

The plan should now be balanced so you can click on Print to go to the Print Reports window, and now double click on Detailed Repayment Schedule. This will allow you to see all payments to all creditors inside of the plan so you can take further action in Plan 13 to make the plan work for your client.

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Editing the Client Interview

Did you know that the Client Interview accessed through the Utilities pull-down is a Protected Document? This is not because you, our customers, are not “supposed to” edit the document. Rather: 1) we didn’t think you’d want your customers to edit any text, and 2) the grey fields nicely highlight all of the information the client should be completing.

The client is unable to make any changes to the document and may only edit those fields (grey boxes) that begin on Page 9 of the Client Interview (Version 8.0). Please edit this Client Interview document in the Chap7..13 Bankruptcy Software by following these instructions:

In Microsoft 2007:

Choose the Review tab which is the middle tab on the top of the screen. Next go to the far right to the box that says “Protect Document” and click on it. From the scroll down menu, choose “Restrict Formatting and Editing” and click on it. then move your eyes to the bottom of the right side panel to a button that says “stop Protection” and click on it. Now you are able to edit the Client Intervue

In Microsoft 2003:

Select the word “Tool” at the top of the screen. Next select “Options” and you will see a number of tabs available. Choose the “Security” tab then unprotect the document.



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