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## DEFINING THE CLOSE NEXUS: AN ANALYSIS OF A BANKRUPTCY COURT'S CHAPTER 11 POSTCONFIRMATION JURISDICTION

### INTRODUCTION

Ever since the Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that the 1978 Bankruptcy Code's broad grant of jurisdictional authority was unconstitutional, courts and legislators have struggled with defining the exact scope of a bankruptcy court's jurisdiction.<sup>1</sup> The 1984 Amendments, which changed the 1978 Code's jurisdictional scheme, have withstood judicial scrutiny but have created confusion among the district and circuit courts as to the constitutionally permissible reach of bankruptcy jurisdiction.<sup>2</sup> Because of the lack of clarity provided by Congress and the Supreme Court, the boundaries of a bankruptcy court's jurisdiction are far from settled.<sup>3</sup> This confusion is highlighted in situations involving claims that arise after the bankruptcy court has confirmed a debtor's chapter 11 reorganization plan. In fact, this area of bankruptcy jurisdiction has led commentators to conclude that "[p]ostconfirmation 'related to' jurisdiction is indeed a murky area through which the courts continue to wade."<sup>4</sup> Furthermore, former Chief Judge Robert J. Kressel of the Bankruptcy Court for the District of Minnesota famously stated, "Jurisdiction generally and bankruptcy jurisdiction particularly are among the most misunderstood and misapplied concepts in the law."<sup>5</sup> This Comment addresses the current

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<sup>1</sup> N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982). After the Supreme Court's decision in *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 to delineate the proper jurisdictional authority for bankruptcy courts. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

<sup>2</sup> Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 530-31 (1998); see also Robert J. Keach & Halliday Moncure, *Rule 2004 as a Pre-Litigation Tool in a Post-Twombly/Iqbal World: Part II*, 29 AM. BANKR. INST. J., Nov. 2010, at 28, 28 (noting that this area of jurisprudence is far from settled and the postconfirmation landscape "contain[s] traps for the unwary").

<sup>3</sup> See Keach & Moncure, *supra* note 2, at 28.

<sup>4</sup> David Lander, *The Scope of "Related to Jurisdiction" After Confirmation of a Plan in a Nonindividual Chapter 11 Case*, NORTON BANKR. L. ADVISER, Feb. 2007, at 1, 5.

<sup>5</sup> Harstad v. First Am. Bank (*In re Harstad*), 155 B.R. 500, 505 (Bankr. D. Minn. 1993), *aff'd*, Bankruptcy No. 4-90-869, 1994 WL 526013 (D. Minn. Jan. 20, 1994), *aff'd*, 39 F.3d 898 (8th Cir. 1994).

jurisdictional maze with regard to postconfirmation jurisdiction and proposes recommendations for reform in this area.

Pursuant to 28 U.S.C. § 157(b)(1), “[b]ankruptcy 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.”<sup>6</sup> Furthermore, 28 U.S.C. § 157(b)(2) provides a nonexclusive list of “core” proceedings that includes matters such as orders to turn over property to the estate and proceedings to determine, avoid or recover preferences.<sup>7</sup> With respect to core proceedings, bankruptcy judges can enter final orders, which are subject to traditional appellate review.<sup>8</sup>

In addition to core proceedings, bankruptcy courts can, under 28 U.S.C. § 157(c)(1), hear noncore matters that are “otherwise related to a case under title 11.”<sup>9</sup> In noncore proceedings, bankruptcy judges can hear the matter and make proposed findings of fact and conclusions of law to the district judge, but only the district judge can enter a final order after reviewing the bankruptcy court’s recommendations and reviewing de novo any matters to which any party has objected.<sup>10</sup> In chapter 11 cases, courts traditionally have only analyzed “related to” jurisdiction with respect to claims arising before the confirmation of a reorganization plan.<sup>11</sup> In this context, most circuits have determined that the bankruptcy court can have “related to” jurisdiction when “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.”<sup>12</sup> “Related to” jurisdiction, however, shrinks and is more limited when determining whether the bankruptcy court has jurisdiction over an adversary proceeding brought in bankruptcy courts after the confirmation of a chapter 11 reorganization plan.<sup>13</sup> Attempts to

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<sup>6</sup> 28 U.S.C. § 157(b)(1) (2006).

<sup>7</sup> *Id.* § 157(b)(2).

<sup>8</sup> *Id.* § 157(b)(1). Proceedings “related to a case under title 11” are not covered by the language of 28 U.S.C. § 157(b)(1) because, under *Marathon*, bankruptcy judges cannot constitutionally determine such matters. 1 COLLIER ON BANKRUPTCY ¶ 3.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

<sup>9</sup> 28 U.S.C. § 157(c). “Related to” jurisdiction is considered “the broadest of the potential paths to bankruptcy jurisdiction.” *Binder v. Price Waterhouse & Co. (In re Resorts Int’l, Inc.)*, 372 F.3d 154, 163 (3d Cir. 2004) (citing *Donaldson v. Bernstein*, 104 F.3d 547, 552 (3d Cir. 1997)).

<sup>10</sup> 28 U.S.C. § 157(c)(1).

<sup>11</sup> *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 302–06 (1995) (claim to enforce supersedeas bond against surety); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 986–87 (3d Cir. 1984) (products liability claim).

<sup>12</sup> *Pacor*, 743 F.2d at 994 (emphasis removed); *see also Celotex*, 514 U.S. at 308 (agreeing with the Third Circuit’s views in *Pacor*).

<sup>13</sup> *In re Resorts Int’l*, 372 F.3d at 164.

determine the actual scope of a bankruptcy court's postconfirmation "related to" jurisdiction has led to the application of different tests by the various circuit courts.

To define the scope of a bankruptcy court's postconfirmation "related to" jurisdiction, the Third and Ninth Circuits have adopted a "close nexus" test.<sup>14</sup> Additionally, bankruptcy courts in the Eleventh Circuit have attempted to apply the close nexus test.<sup>15</sup> Moreover, the Fourth Circuit has found the close nexus requirement to be a "logical corollary" of "related to" jurisdiction.<sup>16</sup> Under the close nexus test, a bankruptcy court has jurisdiction over a collateral matter when "there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter."<sup>17</sup> For example, in *In re Florida Development Associates*, the court used the test to determine that a debtor's action against an engineer for defective railings and construction design defects, which were revealed by a hurricane only after the debtor's chapter 11 plan had been confirmed, was within the court's "related to" jurisdiction.<sup>18</sup> The court noted that even though the debtor did not discover the defects until after the plan's confirmation, a close nexus between the cause of action and the debtor's bankruptcy proceeding existed for the following reasons: (1) the debtor was the plaintiff in the adversary case; and (2) because the defects were latent, the causes of action were unknown to the debtor at the time of confirmation.<sup>19</sup> Thus, the close nexus test focuses on the relationship between the collateral causes of action and the bankruptcy proceedings.

Courts in the Second Circuit have also applied the close nexus test but with the additional requirement that the chapter 11 reorganization plan and disclosure statement describe the claims over which the bankruptcy court retains jurisdiction.<sup>20</sup> Under this analysis, the claim must be sufficiently related to the bankruptcy proceeding and expressly considered in the reorganization plan. For example, under this approach a claim for defective design must not

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<sup>14</sup> See *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005); *In re Resorts Int'l*, 372 F.3d at 166–67.

<sup>15</sup> See, e.g., *Fla. Dev. Assocs. v. Knezevich & Assocs., Inc. (In re Fla. Dev. Assocs.)*, No. 04-12033-BKC-AJC, 2009 WL 393870, at \*4–5 (Bankr. S.D. Fla. Feb. 4, 2009).

<sup>16</sup> *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007).

<sup>17</sup> *In re Resorts Int'l*, 372 F.3d at 166–67.

<sup>18</sup> *In re Fla. Dev. Assocs.*, 2009 WL 393870, at \*1–4.

<sup>19</sup> *Id.* at \*4–5.

<sup>20</sup> *Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.)*, 335 B.R. 66, 73–74 (Bankr. S.D.N.Y. 2005) (citing *Hosp. & Univ. Prop. Damage Claimants v. Johns Manville Corp. (In re Johns Manville Corp.)*, 7 F.3d 32, 34 (2d Cir. 1993)).

only have a connection to the bankruptcy estate, but must also be stated in the reorganization plan.<sup>21</sup>

The Fifth Circuit has adopted a somewhat narrower approach to postconfirmation jurisdiction.<sup>22</sup> In the Fifth Circuit's seminal postconfirmation jurisdiction case, *In re Craig's Stores of Texas, Inc.*, the court indicated that "[a]fter a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist other than for matters pertaining to the implementation or execution of the plan."<sup>23</sup> In applying this test, one bankruptcy court has indicated that it will determine whether it has jurisdiction based on six factors: (1) when the claim arose; (2) whether the confirmation plan provided for the retention of jurisdiction over the claim; (3) whether the plan has been substantially consummated; (4) the nature of the parties involved; (5) whether state law or bankruptcy law applies; and (6) indices of forum shopping.<sup>24</sup> By balancing these factors, a court will be able to determine whether a claim is best brought in bankruptcy court, district court, or state court.

It is important for Congress and the Supreme Court to resolve the circuit split over the scope of postconfirmation "related to" jurisdiction for three reasons. First, there is the need to provide for judicial economy and the efficient resolution of bankruptcy cases. With respect to postconfirmation "related to" jurisdiction, the tests that grant the broadest jurisdictional scope possible—while remaining within constitutional limits—promote the most efficient resolution of a bankruptcy case.<sup>25</sup> The narrower approaches to postconfirmation "related to" jurisdiction increase the costs of administering the case and the length of the case because parties must adjudicate in multiple forums. Second, the current split can lead bankruptcy practitioners to forum shop among circuits by evaluating the amount of jurisdiction over noncore matters a bankruptcy court has postconfirmation. A bankruptcy court with expansive postconfirmation "related to" jurisdiction may be more amiable to a

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<sup>21</sup> The application of this test to the claim in *In re Florida Development Associates* is interesting because the design defects at issue were latent and therefore unknown at the time of plan confirmation. It was not possible for the bankruptcy court to provide in the plan for the retention of jurisdiction over these specific claims. See *In re Fla. Dev. Assocs.*, 2009 WL 393870, at \*1–3.

<sup>22</sup> 6 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKRUPTCY LAW AND PRACTICE* 3D § 114:10, at 114-38 (2008).

<sup>23</sup> *Bank of La. v. Craig's Stores of Tex.* (*In re Craig's Stores of Tex.*), 266 F.3d 388, 390 (5th Cir. 2001).

<sup>24</sup> *Gilbane Bldg. Co. v. Air Sys. Inc.* (*In re Encompass Servs. Corp.*), 337 B.R. 864, 873 (Bankr. S.D. Tex. 2006), *aff'd*, No. H-06-CV-0392, 2006 WL 1207743 (S.D. Tex. May 3, 2006).

<sup>25</sup> Block-Lieb, *supra* note 2, at 541.

debtor than a state court or federal district court would be. Finally, the current jurisdictional scheme's ambiguity leads to uncertainty within the bankruptcy court system and increases the cost of adjudicating bankruptcy matters due to the initial costs of litigating jurisdictional issues.<sup>26</sup>

This Comment analyzes the various areas of bankruptcy court jurisdiction with a specific emphasis on postconfirmation "related to" jurisdiction in chapter 11 cases. Part I of this Comment begins with an overview of the historical evolution of bankruptcy court jurisdiction. The historical changes in the scope of bankruptcy court jurisdiction shed light on Congress's intent in adopting the current jurisdictional scheme. Part II explores the current jurisdictional scheme of United States bankruptcy law. Part III describes the current split in the circuit courts with respect to the various forms of jurisdictional analysis used to determine a bankruptcy court's jurisdiction over proceedings that are brought after the confirmation of a chapter 11 reorganization plan. In Part IV, this Comment argues that the history of the current bankruptcy code and bankruptcy policy goals favor a broad grant of postconfirmation "related to" jurisdiction. In closing, this Comment provides recommendations for courts and legislators to consider in clarifying the scope of postconfirmation "related to" jurisdiction. These recommendations include the Supreme Court granting a writ of certiorari to provide guidance to the lower courts on postconfirmation jurisdiction, a statutory amendment, and the revision of the current jurisdictional scheme to create Article III bankruptcy judges.

## I. HISTORICAL DEVELOPMENT OF BANKRUPTCY COURT JURISDICTION

Jurisdiction is a court's power to decide a case or issue a decree.<sup>27</sup> The jurisdiction of bankruptcy courts and the power of bankruptcy judges have undergone significant changes over time. Historically, changes in the jurisdictional scheme demonstrate movement away from a broad jurisdictional grant to decide all matters relating to the bankruptcy estate, as exemplified by the Supreme Court's ruling in *Marathon* that a statutory grant of expansive jurisdiction was unconstitutional.<sup>28</sup> Both Congress and the federal courts, however, have tried to provide bankruptcy courts with as much jurisdictional authority as possible while still remaining within the parameters of Article III

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<sup>26</sup> See *id.* at 546.

<sup>27</sup> BLACK'S LAW DICTIONARY 867 (8th ed. 2004).

<sup>28</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

of the United States Constitution. This approach tends to promote the efficient resolution of bankruptcy matters without having to create bankruptcy courts akin to Article III federal courts. A bankruptcy court system with jurisdiction as broad as Article III judges is unconstitutional, as the constitutional safeguard of lifetime tenure and unreduced pay would not be in place.

This Section will begin its historical survey of bankruptcy law jurisdiction with the United States' first comprehensive bankruptcy act and its distinction between summary and plenary jurisdiction. Next, this Section will discuss the broad jurisdictional provisions granted to bankruptcy courts under the 1978 Code. Finally, this Section will address the Supreme Court's decision in *Marathon*, which held the 1978 Code's jurisdictional provisions to be unconstitutional.<sup>29</sup> This discussion will address the Emergency Rule put into place after *Marathon* that allowed bankruptcy courts to function until passage of the 1984 Amendments.

#### A. *The 1898 Act*

As a result of the development and opening of the West and large-scale American industrialization, the United States passed its first major and comprehensive bankruptcy act in 1898.<sup>30</sup> The 1898 Act created many of the modern functions of the United States' current bankruptcy system.<sup>31</sup> With respect to the adjudication of bankruptcy proceedings, the 1898 Act delegated certain functions and duties to "bankruptcy referees."<sup>32</sup> Bankruptcy referees were essentially bankruptcy judges. While the referees had broad powers, their acts were subject to revision by the district court, which sat as a "court of bankruptcy" under the 1898 Act.<sup>33</sup> The 1898 Act specifically detailed the powers of the bankruptcy referees, which included the following: "the referee in bankruptcy was an officer to whom the bankruptcy cases were referred by

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<sup>29</sup> *Id.*

<sup>30</sup> David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 174–75 (2000). Although the 1898 Act is considered the basis for our modern bankruptcy system, it is actually the fourth bankruptcy act enacted in the United States. *Id.* The 1898 Act's predecessors include the Bankruptcy Act of 1800, the Bankruptcy Act of 1841, and the Bankruptcy Act of 1867. *Id.* at 170–72. For a review of the United States bankruptcy court's jurisdiction prior to the 1898 Act, see *id.* at 170–74.

<sup>31</sup> *Id.* at 175. Important features of the 1898 Act include creating the fresh start principle, allowing individuals to claim exemptions to give them a chance to start over, establishing a uniform system of bankruptcy administration, and providing for the recovery of fraudulent transfers. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the district court”; “the referee’s powers were at all times subject to review by the district judge, to whom the referee’s rulings were certified when the party adversely affected was not contented to abide by the referee’s decision”; “the referee had the power to adjudicate debtors as bankrupts, dismiss cases, examine witnesses, declare dividends, examine schedules . . . , give notice of certain proceedings to creditors, and generally to attend to the detail of administration”; and “the referee was appointed by the district judge for a term of two years.”<sup>34</sup>

The 1898 Act also created a bifurcated jurisdictional scheme that distinguished between “summary jurisdiction” and “plenary jurisdiction.”<sup>35</sup> Summary jurisdiction limited the jurisdiction of bankruptcy referees.<sup>36</sup> Bankruptcy courts always had summary jurisdiction with respect to “(1) ‘proceedings in bankruptcy’ and (2) ‘controversies arising in proceedings in bankruptcy.’”<sup>37</sup> “Proceedings in bankruptcy” included “allowing or disallowing claims, allowing or disallowing exemptions, granting or denying discharges, and confirming or denying plans.”<sup>38</sup> With respect to “controversies arising in proceedings in bankruptcy,” this category included “disputes between the bankruptcy estate and adverse, third-party claimants involving rights to money, or property sought to be recovered, or liens and other interests asserted against the bankruptcy estate’s assets.”<sup>39</sup> If the bankruptcy referee determined that summary jurisdiction existed, he could hear and determine the matter and enter a final judgment, subject to review by the district court on a clearly erroneous standard.<sup>40</sup> However, if summary jurisdiction did not exist, the parties had to adjudicate the matters in state court or district court.<sup>41</sup> These proceedings were termed “plenary” suits.<sup>42</sup>

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<sup>34</sup> *Id.* at 175–76. In 1938, Congress passed the Amendatory Act of 1938 (the Chandler Act), which overhauled the 1898 Act. *Id.* at 176. With respect to bankruptcy jurisdiction, the amendments converted the bankruptcy referee into a judicial officer. *Id.* In 1973, “the Supreme Court renamed ‘referees in bankruptcy’ as ‘United States bankruptcy judges’ pursuant to the Bankruptcy Rules under the Rules Enabling Act, 28 U.S.C. § 2705, which also conferred finality on the findings of the bankruptcy judges, unless they were ‘clearly erroneous.’” *Id.* at 176–77.

<sup>35</sup> *Id.* at 187–88.

<sup>36</sup> *Id.* at 187.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 187–88.

<sup>41</sup> *Id.* at 188.

<sup>42</sup> *Id.*



## B. The 1978 Code

Partly in response to the 1898 Act's bifurcated jurisdictional system, Congress enacted the 1978 Code, which eliminated the summary-plenary distinction<sup>43</sup> and significantly changed bankruptcy law, both substantively and procedurally.<sup>44</sup> Congress recognized that the summary-plenary structure led to substantial threshold jurisdictional litigation, thus creating costly delays in many bankruptcy cases.<sup>45</sup> As a result, the 1978 Code replaced the limited jurisdictional scheme of the 1898 Act with a broad jurisdictional grant of original jurisdiction and discretionary abstention powers to bankruptcy courts.<sup>46</sup>

The 1978 Code provided that bankruptcy courts were adjuncts to the district courts.<sup>47</sup> Although district courts were given jurisdiction over bankruptcy proceedings, the bankruptcy judges exercised this jurisdiction exclusively.<sup>48</sup> Under the 1978 Code, the bankruptcy court had broad jurisdiction over bankruptcy matters, having "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or *related to* cases under title 11."<sup>49</sup> Federal district courts also had jurisdiction over bankruptcy matters.<sup>50</sup> The 1978 Code's broad jurisdictional grant aimed to bring within the bankruptcy court's jurisdiction all litigation which the debtor or the estate expected or could reasonably foresee when it filed for bankruptcy.<sup>51</sup> The scope of the bankruptcy court's jurisdiction covered the following: "suits to recover accounts"; "actions to avoid... fraudulent conveyances"; "controversies involving exempt property"; and "causes of

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<sup>43</sup> *Id.*

<sup>44</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

<sup>45</sup> Kennedy & Clift, *supra* note 30, at 188.

<sup>46</sup> *Id.*

<sup>47</sup> Deborah A. Dyson, Note, *Bankruptcy Court Jurisdiction and the Power to Enjoin the IRS*, 70 MINN. L. REV. 1279, 1284 n.16 (1986). The original code provisions providing for this jurisdiction were 28 U.S.C. §§ 151 and 1471. *Id.*

<sup>48</sup> *Id.* The President, under the guidance and consent of the Senate, appointed bankruptcy court judges to office to serve fourteen-year terms. *Marathon Pipe Line*, 458 U.S. at 53.

<sup>49</sup> 28 U.S.C. §§ 1471(b)–(c) (1976 & Supp. IV 1981) (emphasis added) (granting bankruptcy courts "all of the jurisdiction conferred by this section on the district courts"), *invalidated by Marathon Pipe Line*, 458 U.S. 50 (1982); Kennedy & Clift, *supra* note 30, at 178. While the jurisdictional provisions of the 1978 Code were broad, they maintained limitations (e.g., the inability to appoint a receiver or to enjoin another court) on the bankruptcy judge's powers. *Id.* at 179.

<sup>50</sup> See Kennedy & Clift, *supra* note 30, at 178.

<sup>51</sup> *Id.* at 188. For example, the trustee could file a complaint seeking to recover a preference without fear of an objection to jurisdiction. *Id.* The bankruptcy court could then enter a final judgment on the matter, which would be subject to appellate review by the district court under a clearly erroneous standard. *Id.* at 188–89.

action owned by the debtor at the time of the petition for bankruptcy.”<sup>52</sup> Additionally, the bankruptcy courts could hear both state and federal law claims.<sup>53</sup> Furthermore, bankruptcy judges could hold jury trials, issue declaratory judgments, issue writs of habeas corpus, “issue all writs necessary in aid of the bankruptcy court’s expanded jurisdiction,” and “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11.”<sup>54</sup> By providing for an expansive grant of jurisdiction to the bankruptcy courts, Congress intended to minimize the litigation of jurisdictional issues, which drained time, money, and energy from the bankruptcy court system.<sup>55</sup> Thus, Congress realized that forcing parties to litigate jurisdictional issues in bankruptcy cases created a drain on judicial resources.

### C. *The Supreme Court Holds the 1978 Code Unconstitutional*

Despite the 1978 Code’s goal to improve judicial efficiency, the Supreme Court struck down the broad jurisdictional grant in *Marathon Pipe Line*.<sup>56</sup> In *Marathon*, the debtor, Northern Pipeline Construction Co. (Northern), filed a petition for reorganization in the United States Bankruptcy Court for the Northern District of Minnesota.<sup>57</sup> Subsequent to the filing of the petition, Northern filed a suit against Marathon seeking damages for alleged breaches of contract, as well as for alleged misrepresentation, coercion, and duress.<sup>58</sup> In response, Marathon filed a motion to dismiss on the basis that the 1978 Code unconstitutionally conferred Article III judicial power upon bankruptcy judges who lacked life tenure and protection against salary diminution.<sup>59</sup> The bankruptcy judge denied the motion to dismiss.<sup>60</sup> On appeal, however, the district court entered an order granting the motion, holding that “the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges” was

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<sup>52</sup> *Marathon Pipe Line*, 458 U.S. at 54.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 55.

<sup>55</sup> H.R. REP. NO. 95-595, at 43–48 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6004–10 (discussing the problems caused by the limited jurisdiction of the bankruptcy courts).

<sup>56</sup> *Marathon Pipe Line*, 458 U.S. at 87; Kennedy & Clift, *supra* note 30, at 189.

<sup>57</sup> *Marathon Pipe Line*, 458 U.S. at 56.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 56–57. The United States intervened to defend the validity of the Code. *Id.* at 57.

<sup>60</sup> *Id.* at 57.

unconstitutional.<sup>61</sup> Both the United States and Northern appealed the judgment, and the Supreme Court granted certiorari.<sup>62</sup>

In the decision written by Justice Brennan, the Court began by noting that, as an inseparable element of the system of checks and balances to guarantee judicial impartiality, Article III both defines the powers and protects the independence of the judicial branch.<sup>63</sup> The protections provided for Article III judges include the “Good Behaviour” clause, which guarantees that Article III judges shall enjoy life tenure, subject only to removal by impeachment.<sup>64</sup> Additionally, the Compensation Clause of Article III guarantees Article III judges a fixed and irreducible compensation for their services.<sup>65</sup> These protections ensure a “jealously guarded” independent judiciary.<sup>66</sup> After enumerating the Article III protections, the Court found that bankruptcy judges did not enjoy the protections afforded to Article III judges.<sup>67</sup> Bankruptcy judges did not serve for life, subject only to good behavior—they were appointed for fourteen-year terms and could be removed by the judicial council of the circuit in which they served on the grounds of “incompetency, misconduct, neglect of duty, or physical or mental disability.”<sup>68</sup> Furthermore, the Court noted that the salaries of the bankruptcy judges were not “immune from diminution by Congress.”<sup>69</sup>

After noting these principles, the Court turned to the question of whether the 1978 Code violated the Article III command that judicial power must be vested in courts whose judges enjoy Article III safeguards.<sup>70</sup> The appellants argued that even if the Constitution requires bankruptcy-related actions to be adjudicated in an Article III court, the 1978 Code satisfies this requirement, as bankruptcy jurisdiction was vested in the district court and “the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court.”<sup>71</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 58. Article III provides, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

<sup>64</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

<sup>65</sup> *Marathon Pipe Line*, 458 U.S. at 59 (citing United States v. Will, 449 U.S. 200, 217–18 (1980)).

<sup>66</sup> *Id.* at 60.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 61.

<sup>70</sup> *Id.* at 62.

<sup>71</sup> *Id.* at 62–63.

The Court, relying on previous case law, established two principles to evaluate the constitutionality of the jurisdictional scheme. First, when Congress creates a “substantive federal right,” it has broad discretion to prescribe the manner in which the right may be adjudicated.<sup>72</sup> Second, adjuncts can only operate within the jurisdictional scheme in a way that preserves “the essential attributes” of judicial power in an Article III court.<sup>73</sup>

Based on these qualifications, the Court turned to the 1978 Code and determined that the rights adjudicated in the Bankruptcy Act were not created by Congress, but were rather a creation of state law.<sup>74</sup> The Court stated that Northern’s claims for breach of contract and misrepresentation were rooted in state law and were thus “independent of and antecedent to” the bankruptcy petition.<sup>75</sup> Thus, the Court noted that bankruptcy court jurisdiction could not be supported in this situation, even though the 1978 Code vested “all ‘essential attributes’ of the judicial power . . . in the ‘adjunct’ bankruptcy court.”<sup>76</sup> The Court dismissed the appellant’s “adjunct” argument and concluded that “28 U.S.C. § 1471 . . . , as added by § 241(a) . . . [,] impermissibly removed most . . . of ‘the essential attributes of the judicial power’ from the Art[icle] III district court, and . . . vested those attributes in a non-Art[icle] III adjunct.”<sup>77</sup> The Court held that the 1978 Code’s grant of jurisdiction to bankruptcy adjuncts was unconstitutional.<sup>78</sup>

However, the Supreme Court drafted its decision to apply prospectively, staying its final order to allow Congress an opportunity to address the structure of the bankruptcy court system.<sup>79</sup> Congress’s subsequent inaction resulted in the creation of the Emergency Rule, which remained in effect until Congress acted in 1984.<sup>80</sup> The United States Judicial Conference created the Emergency Rule, which was approved by every judicial circuit for adoption by the district courts as a local rule.<sup>81</sup> The Emergency Rule permitted the bankruptcy court

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<sup>72</sup> *Id.* at 80.

<sup>73</sup> *Id.* at 81.

<sup>74</sup> *Id.* at 84.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 84–85.

<sup>77</sup> *Id.* at 87.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; Kennedy & Clift, *supra* note 30, at 189.

<sup>80</sup> Kennedy & Clift, *supra* note 30, at 189–90; see generally Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 19–28 (1985).

<sup>81</sup> Kennedy & Clift, *supra* note 30, at 189.

system to continue without interruption and allowed bankruptcy courts to function as a tribunal.<sup>82</sup> It also allowed bankruptcy courts to hear all bankruptcy cases and civil proceedings covered by 28 U.S.C. § 1471(a)–(b).<sup>83</sup> However, the district court could withdraw the reference later.<sup>84</sup>

Most importantly, the Emergency Rule removed the broad jurisdictional grant and again created a bifurcated jurisdictional system.<sup>85</sup> The Emergency Rule distinguished “related” proceedings from others, defining them as “those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court.”<sup>86</sup> In related proceedings, the bankruptcy judge could only submit proposed findings of fact and conclusions of law along with a proposed order to the district court.<sup>87</sup> However, with respect to non-related proceedings, the bankruptcy judge could both hear and determine the matter and enter a final order.<sup>88</sup>

The preceding historical discussion sets the stage for the current jurisdictional debate on the scope of a bankruptcy court’s jurisdiction. To what extent can the bankruptcy court adjudicate related matters after a reorganization plan is confirmed in chapter 11 cases? It is clear from the 1978 Code that Congress wanted to broaden bankruptcy court jurisdiction to provide for the efficient resolution of bankruptcy cases.<sup>89</sup> However, Congress did not anticipate a bankruptcy court system that would step on the toes of Article III judges. If Congress wanted to craft a bankruptcy system with expansive jurisdiction, it would have to keep in mind the limitations created by not making bankruptcy judges Article III judges. In working through the provisions of today’s Bankruptcy Code, it is important to note that it was Congress’s original intent that bankruptcy courts would complement the federal district courts, with expansive jurisdiction over bankruptcy-related matters.<sup>90</sup>

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<sup>82</sup> *Id.* at 189–90.

<sup>83</sup> *Id.* at 190.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> H.R. REP. NO. 95-595, at 43–48 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6004–10.

<sup>90</sup> *Id.*

## II. THE 1984 AMENDMENTS: 28 U.S.C. §§ 1334 AND 157

While the Supreme Court never ruled on the validity or the constitutionality of the Emergency Rule, it remained in effect for approximately two years.<sup>91</sup> Congress finally responded to *Marathon* with the enactment of the bankruptcy jurisdictional provisions in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).<sup>92</sup> BAFJA set forth the jurisdictional scheme followed by courts today. Collectively, 28 U.S.C. §§ 1334(a), 1334(b), and 157 define the jurisdiction of the bankruptcy courts.

This Section will begin with an analysis of the legislative history of both 28 U.S.C. §§ 1334 and 157 to determine the congressional intent behind the adoption of the modern jurisdictional scheme. Next, this Section will discuss the two types of core bankruptcy jurisdiction: “arising under” and “arising in” jurisdiction. Finally, this Section will discuss noncore “related to” jurisdiction as well as its boundaries. It is important to understand the bankruptcy jurisdictional scheme prior to the confirmation of a chapter 11 plan because the same analysis applies postconfirmation, but the level of scrutiny increases.

### A. Legislative History of 28 U.S.C. §§ 1334 and 157

Congress enacted BAFJA to correct the jurisdictional flaws of the 1978 Code.<sup>93</sup> Under the 1984 Act, 28 U.S.C. § 1334(b) provides that the district courts have “original but not exclusive jurisdiction of all civil proceedings

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<sup>91</sup> Kennedy & Clift, *supra* note 30, at 191.

<sup>92</sup> Block-Lieb, *supra* note 2, at 535–36. In 2005 Congress passed the Bankruptcy Abuse Prevention and Consumer Act of 2005 (BAPCPA). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The impact of BAPCPA on bankruptcy court jurisdiction “appears to be fairly limited.” 1 NORTON, *supra* note 22, § 4:11, at 4-41. “The 2005 Amendments also added a clause to explicitly include foreign proceedings . . . under [c]hapter 15 as core proceedings.” *Id.*; see 28 U.S.C. § 157(b)(2)(P) (2006). Additionally, “BAPCPA added an exception to the bankruptcy court’s authority to exercise discretionary abstention.” 1 NORTON, *supra* note 22, § 4:11, at 4-41; see 28 U.S.C. § 1334(c)(1).

<sup>93</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). “The statute specifically in question in *Marathon*, 28 U.S.C. § 1471 (1982), has been superseded by 28 U.S.C. §§ 157, 1334 ([1985].” Dyson, *supra* note 47, at 1285 n.19. The reason for the 1984 amendments can be summarized by this statement by Orrin G. Hatch:

Title I corrects the constitutional flaw discerned by the Supreme Court in the *Marathon* case, which prohibited bankruptcy judges, who lack life tenure, from deciding certain bankruptcy cases grounded in State law. Under this bill, bankruptcy judges will act as article I adjuncts to Federal district courts in the resolution of core bankruptcy proceedings.

130 CONG. REC. 20085 (June 29, 1984) (statement of Sen. Hatch), *reprinted in* 1984 U.S.C.C.A.N. 590, 590.

arising under Title 11, or arising in or related to cases under Title 11.”<sup>94</sup> “Since 28 U.S.C. § 1334(b) was adopted from § 1471(b) of the 1978 Code, the legislative history and judicial interpretations of § 1471(b) are instructive.”<sup>95</sup>

Legislative history indicates that the phrase “arising under title 11 or arising under or related to a case under title 11” was not meant to distinguish between different matters, but to identify collectively a broad range of matters subject to the bankruptcy jurisdiction of federal courts.<sup>96</sup> The Senate Report also states that “[t]he phrase ‘arising under title 11’ will enable the bankruptcy court to hear any matter under which a claim is made under a provision of title 11.”<sup>97</sup> Additionally, Congress intended to grant bankruptcy courts broad power to adjudicate all matters related to the bankruptcy case, with the sole exception being those matters better suited for state court.<sup>98</sup> However, BAFJA fails to define “related to” jurisdiction.<sup>99</sup> Additionally, neither the legislative history nor the text of 28 U.S.C. § 1334 mentions how to analyze bankruptcy court jurisdiction after the confirmation of a chapter 11 plan.

While 28 U.S.C. § 1334(b) provides for the original jurisdiction of the district courts over bankruptcy proceedings, 28 U.S.C. § 157(b) allows a district court to refer any or all of these proceedings to bankruptcy judges.<sup>100</sup> In adopting 28 U.S.C. § 157(b), Congress expressly recognized the Supreme Court’s holding in *Marathon* that bankruptcy judges, as adjuncts, “could only perform narrowly circumscribed nonadjudicatory functions with respect to state-created causes of action.”<sup>101</sup> Congress noted that even where the district court can constitutionally exercise jurisdiction over state-based actions, the bankruptcy court cannot adjudicate such claims.<sup>102</sup> Moreover, core matters do

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<sup>94</sup> 28 U.S.C. § 1334(b).

<sup>95</sup> *Levovitz v. Verrazano Holding Corp. (In re Verrazano Holding Corp.)*, 86 B.R. 755, 761 (Bankr. E.D.N.Y. 1988) (citing *Wood v. Wood (In re Wood)*, 825 F.2d 90, 92 (5th Cir. 1987)).

<sup>96</sup> S. REP. NO. 95-989, at 153–54 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5787, 5940.

<sup>97</sup> *Id.* at 154.

<sup>98</sup> *In re Verrazano Holding*, 86 B.R. at 761. While Congress intended to preserve a broad jurisdictional grant for the district courts under 28 U.S.C. § 1334(b), § 1334(c)(1) “provided the district court with *sua sponte* power to abstain whenever appropriate in the interest of justice, or in the interest of comity with State courts or respect for state law.” *Id.* This jurisdictional scheme is consistent with the constitutional limit to bankruptcy jurisdiction set forth in *Marathon. Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Block-Lieb, *supra* note 2, at 535–36.

<sup>101</sup> 130 CONG. REC. 20090 (June 29, 1984) (statement of Sen. Hatch), *reprinted* in 1984 U.S.C.C.A.N. 576, 604.

<sup>102</sup> *Id.*

not include state-based causes of action.<sup>103</sup> However, the legislative history of 28 U.S.C. § 157 does not indicate the extent of “related to” jurisdiction, nor does it mention a postconfirmation jurisdictional analysis.<sup>104</sup>

*B. Core Bankruptcy Jurisdiction: “Arising In” and “Arising Under”*

While 28 U.S.C. § 157(a) allows district courts to refer cases and proceedings to the bankruptcy courts in that district, every district has enacted a rule that automatically refers bankruptcy cases and proceedings to bankruptcy judges.<sup>105</sup> Under 28 U.S.C. § 157(b)(1), bankruptcy courts adjudicate core proceedings that arise under and arise in a title 11 bankruptcy case.<sup>106</sup> With respect to core proceedings, bankruptcy judges enter final orders subject to traditional appellate review.<sup>107</sup> “Core proceedings are, at most, those that arise in title 11 cases or arise under title 11.”<sup>108</sup>

Section 157(b)(2) of title 28 provides a nonexclusive list of core proceedings.<sup>109</sup> The proceedings contained in 28 U.S.C. § 157(b)(2) can be broken down into five categories: (1) matters of administration; (2) avoidance actions; (3) matters concerning property of the estate; (4) omnibus categories; and (5) cases filed under chapter 15 of the Bankruptcy Code.<sup>110</sup> The first category of core proceedings, matters of administration, includes

- (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 . . . (D) orders in respect to obtaining credit; . . . (G) motions to terminate, annul, or modify the automatic stay; . . . (I) determinations as to the dischargeability of particular debts; (J) objections to discharges; . . . [and] (L) confirmations of plans . . . .<sup>111</sup>

The second category is avoidance actions, which includes the types of proceedings contained in 28 U.S.C. § 157(b)(2)(F) and (H), preferences and

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<sup>103</sup> *Id.*

<sup>104</sup> See 130 CONG. REC. 20080-94, 20206-34 (June 29, 1984).

<sup>105</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[1].

<sup>106</sup> See 28 U.S.C. § 157(b)(1) (2006).

<sup>107</sup> See *id.* After *Marathon Pipe Line*, “related to” proceedings are not covered by 28 U.S.C. § 157(b)(1). 1 COLLIER, *supra* note 8, ¶ 3.02[2].

<sup>108</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[2].

<sup>109</sup> See 28 U.S.C. § 157(b)(2).

<sup>110</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3]; see 28 U.S.C. § 157(b)(2).

<sup>111</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3][a]; see 28 U.S.C. § 157(b)(2).



fraudulent conveyances.<sup>112</sup> The third category of core proceedings, matters concerning property of the estate, includes

(E) orders to turn over property of the estate; (K) determinations of the validity, extent, or priority of liens; (M) orders approving the use or lease of property, including the use of cash collateral; and (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.<sup>113</sup>

The fourth category of core proceedings, omnibus categories, includes the matters set out in 28 U.S.C. § 157(b)(2)(C)—“counterclaims by the estate against persons filing claims against the estate”<sup>114</sup>—and 28 U.S.C. § 157(b)(2)(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.”<sup>115</sup> The final category of core proceedings, cases filed under chapter 15 of the Bankruptcy Code, includes foreign proceedings and other matters under chapter 15 of title 11.<sup>116</sup>

In addition to the categories listed in 28 U.S.C. § 157(b)(2), courts have identified other core proceedings.<sup>117</sup> These include a suit to determine whether there was a violation of the automatic stay,<sup>118</sup> a proceeding under § 510 seeking to subordinate the claim of a creditor,<sup>119</sup> and an action to foreclose a mortgage owned by the estate.<sup>120</sup> The bankruptcy court can always adjudicate core proceedings without concern over the scope of its jurisdiction. Core proceedings focus on the filing of a bankruptcy petition and the ability to create a fresh start for the debtor. However, in a modern bankruptcy case there are increasingly matters not defined as core proceedings that are related to the

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<sup>112</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3][b]; *see* 28 U.S.C. § 157(b)(2).

<sup>113</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3][c] (internal quotation marks omitted); *see* 28 U.S.C. § 157(b)(2).

<sup>114</sup> *But see* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) (holding that Article III of the Constitution does not permit a bankruptcy court to enter final judgment on a state law counterclaim under § 157(b)(2)(C) that is not resolved in the process of ruling on a creditor’s proof of claim).

<sup>115</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3][d]; *see* 28 U.S.C. § 157(b)(2).

<sup>116</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3][e]; *see* 28 U.S.C. § 157(b)(2).

<sup>117</sup> 1 COLLIER, *supra* note 8, ¶ 3.02[3].

<sup>118</sup> Johnson Env’tl. Corp. v. Knight (*In re* Goodman), 991 F.2d 613, 617 (9th Cir. 1993).

<sup>119</sup> Bank of New Richmond v. Prod. Credit Ass’n of River Falls, Wis. (*In re* Osborne), 42 B.R. 988, 993 (W.D. Wis. 1984).

<sup>120</sup> Craig v. McCarty Ranch Trust (*In re* Cassidy Land & Cattle Co.), 836 F.2d 1130, 1133 (8th Cir. 1988).

debtor's fresh start and the orderly payment of creditors. It is with respect to these noncore matters that clarity is needed.

### C. Noncore "Related to" Bankruptcy Jurisdiction

Bankruptcy courts can also "hear and determine" noncore proceedings that are "related to" the bankruptcy case, but only if all parties consent.<sup>121</sup> With consent, the power of the bankruptcy court to hear and determine "related to" proceedings is subject only to traditional appellate review.<sup>122</sup> Absent consent, 28 U.S.C. § 157(c)(1) limits the power of a bankruptcy court to enter final judgment on a noncore related proceeding.<sup>123</sup> Section 157(c)(1) permits the bankruptcy judge to hear the proceeding and make proposed findings of fact and conclusions of law to the district judge, but requires the district judge to enter the final order in the proceeding after reviewing the bankruptcy court's recommendations de novo.<sup>124</sup> In authorizing "related to" jurisdiction, Congress was silent on the scope of a bankruptcy court's authority.<sup>125</sup> However, the Supreme Court explained in *Celotex Corp. v. Edwards* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts to deal efficiently and expeditiously with all matters connected with the bankruptcy estate."<sup>126</sup>

Courts have interpreted the limits of "related to" jurisdiction differently. The next Section analyzes the "conceivable effects" test, introduced in *Pacor, Inc. v. Higgins*, to determine whether a matter is "related to" the bankruptcy case. Next, this Section addresses the Supreme Court's approval of the conceivable effects test, introduced in *Celotex Corp. v. Edwards*.

#### 1. *Pacor, Inc. v. Higgins*

The seminal case for defining "related to" jurisdiction is *Pacor, Inc. v. Higgins*.<sup>127</sup> In *Pacor*, the plaintiffs, John and Louise Higgins, brought a products liability claim in Pennsylvania state court against the defendant,

<sup>121</sup> See 28 U.S.C. § 157(c)(2).

<sup>122</sup> See Block-Lieb, *supra* note 2, at 536. Although the statute does not define "consent," the Federal Rules of Bankruptcy require parties to state expressly in their pleadings whether they consent to bankruptcy court jurisdiction. *Id.* "Courts are still divided as to whether this consent can be implied from the parties' conduct." *Id.* at 537.

<sup>123</sup> 1 COLLIER, *supra* note 8, ¶ 3.03[2].

<sup>124</sup> *Id.*

<sup>125</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

<sup>126</sup> *Id.* at 308 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); see also H.R. REP. NO. 95-595, at 43-48 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6004-10.

<sup>127</sup> See *Pacor*, 743 F.2d at 994.

Pacor, related to asbestos use.<sup>128</sup> The plaintiffs sought damages allegedly caused by Mr. Higgins's work-related exposure to asbestos that had been supplied by Pacor.<sup>129</sup> In response, Pacor filed a third-party complaint against Johns-Manville, the original manufacturer of the asbestos.<sup>130</sup> In concert with these proceedings, Johns-Manville filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York.<sup>131</sup> After Johns-Manville's bankruptcy petition, Pacor filed a petition for removal in the Bankruptcy Court for the Eastern District of Pennsylvania, seeking to remove the products liability case to federal bankruptcy court.<sup>132</sup> Simultaneously, Pacor moved the Bankruptcy Court for the Eastern District of Pennsylvania to transfer the case to the Southern District of New York to be consolidated with the rest of the Johns-Manville case.<sup>133</sup> The District Court for the Eastern District of Pennsylvania determined that the bankruptcy court lacked jurisdiction under 28 U.S.C. § 1471(b) because the original products liability suit between Higgins and Pacor was not "related to" the Manville bankruptcy proceeding.<sup>134</sup>

On appeal, the Third Circuit determined that the products liability action was not "related to" the Manville bankruptcy case.<sup>135</sup> In doing so, the court stated, "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.*"<sup>136</sup> This standard was adopted by referencing prior bankruptcy court decisions.<sup>137</sup> The court further noted that a proceeding need not be against the debtor or the debtor's property to be within the realm of "related to" jurisdiction.<sup>138</sup> Moreover, "an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either

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<sup>128</sup> *Id.* at 986.

<sup>129</sup> *Id.*; see also 1 NORTON, *supra* note 22, § 4:126, at 4-432.

<sup>130</sup> *Pacor*, 743 F.2d at 986.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 995.

<sup>136</sup> *Id.* at 994.

<sup>137</sup> See *id.* (citing *Hall v. Jet Television Rental, Inc. (In re Hall)*, 30 B.R. 799, 802 (M.D. Tenn. 1983); *Crown Cent. Petroleum Corp. v. Wechter (In re Gen. Oil Distribs., Inc.)*, 21 B.R. 888, 892 n.13 (Bankr. E.D.N.Y. 1982); *Mazur v. U.S. Air Duct Corp. (In re U.S. Air Duct Corp.)*, 8 B.R. 848, 851 (Bankr. N.D.N.Y. 1981)).

<sup>138</sup> *Id.*

positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.”<sup>139</sup>

Based on this standard, the court concluded that there was no “related to” jurisdiction because the outcome of the Higgins-Pacor products liability action would have no effect on the bankruptcy estate.<sup>140</sup> The court noted that even if the dispute was resolved in favor of Higgins, the debtor remained entitled to relitigate any issue in a subsequent third-party claim by Pacor.<sup>141</sup> Therefore, there could be no effect on the bankruptcy estate until the Pacor-Manville action was adjudicated.<sup>142</sup> The dispositive fact in this case was that “any judgment received by the plaintiff, Higgins, could not itself result in even a contingent claim against Manville, because Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.”<sup>143</sup> Therefore, the matter was not within the statutory reach of “related to” jurisdiction.<sup>144</sup>

## 2. Celotex Corp. v. Edwards

In *Celotex Corp. v. Edwards*, the Supreme Court expressly adopted the “related to” jurisdictional definition articulated by the Third Circuit in *Pacor*.<sup>145</sup> Prior to the filing of a bankruptcy petition by Celotex, the plaintiffs

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<sup>139</sup> *Id.* However, the court noted that the mere fact that there may be a common nucleus of facts between the civil proceeding and the bankruptcy case does not bring the matter within the scope of 28 U.S.C. § 1471(b). *Id.*

<sup>140</sup> *Id.* at 995 (noting that resolution of the *Pacor* action only created the potential for a third-party claim against the debtor). Additionally, because the debtor was not a party to the *Pacor* case it could not be bound by res judicata or collateral estoppel. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 996.

<sup>145</sup> See 1 NORTON, *supra* note 22, § 4:126, at 4-432. In adopting *Pacor*, the Supreme Court noted that “[t]he First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation.” See *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *Robinson v. Mich. Consol. Gas Co.*, 918 F.2d 579, 584 (6th Cir. 1990); *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990); *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788, 788 & n.19 (11th Cir. 1990); *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987); *Dogpatch Props. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir. 1987); *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986). However, the Supreme Court indicated that the Second and Seventh Circuits had adopted different “related to” jurisdictional tests. See *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989); *Elscont, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) (indicating that there is “related to” jurisdiction over a dispute only when it affects the amount of property available for distribution to the creditors); *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2nd Cir. 1983) (holding that “related to” jurisdiction is limited to actions that could affect the distribution of property from the estate being administered). “But whatever test is used, these cases make clear that bankruptcy courts have no

filed suit against the company in the United States District Court for the Northern District of Texas alleging asbestos-related injuries.<sup>146</sup> The district court entered a \$281,026 judgment in favor of Celotex.<sup>147</sup> In order to prevent execution of the judgment pending appeal, Celotex posted a supersedeas bond.<sup>148</sup> Subsequently the Court of Appeals for the Fifth Circuit affirmed the district court order, thus entering a final judgment against Celotex.<sup>149</sup>

Immediately following this decision, Celotex filed a voluntary petition for relief in the United States Bankruptcy Court for the Middle District of Florida.<sup>150</sup> As a result, the automatic stay prevented both the continuation and commencement of proceedings against Celotex.<sup>151</sup> A few days after the commencement of the bankruptcy case, the bankruptcy court issued an injunction under § 105 to “augment the protection afforded by the automatic stay.”<sup>152</sup> Section 105 allowed the court to issue an injunction to stay all proceedings even though the matter was on appeal and a supersedeas bond had been posted.<sup>153</sup>

On appeal, the Edwards’ argued that the bankruptcy court lacked “related to” jurisdiction to issue the § 105 injunction.<sup>154</sup> The Court agreed with the Third Circuit’s conceivable effects analysis in *Pacor*, finding that bankruptcy court jurisdiction should be broad in order to efficiently resolve all matters related to the bankruptcy estate.<sup>155</sup> Furthermore, the court noted that even though Congress provided no definition for “related to,” it “must be read to give . . . bankruptcy courts . . . jurisdiction over more than simply proceedings involving the property of the debtor or the estate.”<sup>156</sup> Based on this standard, the Court held that the matter of execution on the supersedeas bond was “at least ‘related to’ the Celotex bankruptcy.”<sup>157</sup> In holding that the bankruptcy court had “related to” jurisdiction, the Supreme Court specifically noted the

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jurisdiction over proceedings that have no effect on the estate of the debtor.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995).

<sup>146</sup> *Celotex*, 514 U.S. at 302.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 303.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 307.

<sup>155</sup> *Id.* at 308.

<sup>156</sup> *Id.* However, the Court noted that “related to” jurisdiction is not limitless. *Id.*

<sup>157</sup> *Id.* at 310.

bankruptcy court's finding that allowing judgment creditors to execute immediately on the bond would have a "direct and substantial adverse effect on Celotex's ability to undergo a successful organization."<sup>158</sup>

The conceivable effects test for noncore "related to" jurisdiction is a clear indication of the courts' attempt to provide expansive jurisdiction for the bankruptcy courts, while remaining within the constitutional restraints of a non-Article III system. To be sure, the Supreme Court in *Celotex*, citing the legislative history of the 1984 Amendments, noted that the goal of the Code was to provide for an efficient resolution of bankruptcy cases. Thus, while the Supreme Court expressly held unconstitutional a system where the bankruptcy courts over-reached into Article III areas, it nonetheless recognized the need for a broad jurisdictional grant. This clear intent should provide guidance not only as to the limits in noncore matters prior to confirmation, but to all other questions of bankruptcy court jurisdiction. Accordingly, a bankruptcy court's postconfirmation jurisdiction should be as broad as possible while still respecting the constitutional limits.

### III. CIRCUIT SPLIT: DEFINING THE LIMITS OF POSTCONFIRMATION "RELATED TO" JURISDICTION

The preceding discussion of the current jurisdictional scheme has focused solely on the preconfirmation jurisdictional analysis in a chapter 11 bankruptcy. However, it is also possible for bankruptcy courts to have such "related to" jurisdiction over postconfirmation matters.<sup>159</sup> Theoretically, the jurisdictional analysis changes after plan confirmation because, unless the plan provides otherwise, there is no longer any estate or any debtor.<sup>160</sup> Courts have

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<sup>158</sup> *Id.* The court also indicated that a bankruptcy court may have broader powers in a chapter 11 reorganization as opposed to a chapter 7 liquidation. *Id.*

<sup>159</sup> See 1 NORTON, *supra* note 22, § 4:126, at 4-434. Postconfirmation jurisdiction is assumed by statute and rule: Section 1142(b) authorizes the bankruptcy court to "direct the debtor and any other necessary party . . . to perform any other act . . . that is necessary for the consummation of the plan," and Federal Rule of Bankruptcy Procedure 3020(d) provides, "Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 166 n.10 (3d Cir. 2004); FED. R. BANKR. P. 3020(d). However, 28 U.S.C. § 1334 remains the source of this jurisdiction. *In re Resorts Int'l*, 372 F.3d at 161.

<sup>160</sup> 1 NORTON, *supra* note 22, § 4:126, at 4-447; see also *Penthouse Media Grp. v. Guccione (In re Gen. Media Inc.)*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) (noting that while 28 U.S.C. § 1334 does not expressly limit the bankruptcy court's jurisdiction over postconfirmation jurisdiction, all courts that have addressed the matter have determined that after confirmation a bankruptcy court's jurisdiction shrinks). Commentators have viewed the "related to" postconfirmation jurisdiction of bankruptcy courts in two conflicting ways. First, some commentators take the position that after confirmation no newly instituted adversary proceeding for which

struggled to define the “ambit of related to jurisdiction,” resulting in a circuit split on the issue.<sup>161</sup>

As stated above, the seminal test for determining preconfirmation “related to” jurisdiction is found in the Third Circuit’s *Pacor* rule. However, the courts recognize that the *Pacor* analysis for “related to” jurisdiction is inappropriate postconfirmation, because the jurisdictional authority is narrower due to the fact that there is no longer an estate or a debtor in bankruptcy.<sup>162</sup>

This Section presents and discusses the three competing postconfirmation “related to” jurisdictional analyses articulated by the circuit courts in the following order: 1) the close nexus test; 2) the factor analysis test; 3) and the close nexus test with the requirement of retention. The discussion will focus on the change that occurs in the “related to” analysis when determining jurisdiction after confirmation of a chapter 11 plan.

#### A. *The Close Nexus Test*

The most widely adopted test for defining postconfirmation “related to” jurisdiction is the close nexus test. This test has been expressly adopted by the Third and Ninth Circuits and applied by courts in the Fourth Circuit.<sup>163</sup> Under the close nexus test, a bankruptcy court will retain jurisdiction over the collateral matter when “there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction.”<sup>164</sup> This Section addresses the Third Circuit’s decision in *In re Resorts International*, the case that created the close nexus test.<sup>165</sup> Next this Section addresses the Eleventh Circuit’s use of the test in *In re Florida Development Associates*, holding that a postconfirmation state law claim for defective construction was within the

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there is not core jurisdiction can be within the jurisdiction of the bankruptcy court. See Rhett G. Campbell, *Issues in Litigation: Postconfirmation Jurisdiction*, 1 J. BANKR. L. & PRAC. 94, 97 (1991). This view takes the approach that shortly after confirmation, there is no longer an estate, and thus there is no longer a basis for “related to” or “arising under” jurisdiction under 28 U.S.C. § 1334. *Id.* Second, some commentators see little change to the broad preconfirmation “related to” jurisdiction after plan confirmation. See Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. REV. 621, 743 (1993). However, the courts have not seen it this way. See *id.* at 743.

<sup>161</sup> 6 NORTON, *supra* note 22, § 114:10, at 114-33.

<sup>162</sup> 1 *id.* § 4:126, at 4-436.

<sup>163</sup> 6 *id.* § 114:10, at 114-40.

<sup>164</sup> *In re Resorts Int’l*, 372 F.3d at 166-67.

<sup>165</sup> See *id.*

bankruptcy court's jurisdiction.<sup>166</sup> This Section closes by discussing two Ninth Circuit cases, *In re Pegasus Gold Corporation*<sup>167</sup> and *In re Wilshire Courtyard*,<sup>168</sup> which exemplify that Circuit's use of the close nexus test. Each of these cases employs the broadest analysis of postconfirmation "related to" jurisdiction, allowing the bankruptcy court to adjudicate more matters than would be possible under the other two tests.

### 1. *Third Circuit: In re Resorts International*

In 2004, the Third Circuit derived from its preconfirmation *Pacor* test a postconfirmation close nexus test in *In re Resorts International*.<sup>169</sup> In *Resorts International*, the bankruptcy court confirmed a chapter 11 reorganization plan for the debtor, a gaming and entertainment provider.<sup>170</sup> As a part of the plan, the debtor created a litigation trust for the benefit of certain creditors.<sup>171</sup> The litigation trust agreement contained provisions that required that an independent accounting firm audit the books of the trust.<sup>172</sup> After confirmation of the plan, the trustee hired Price Waterhouse & Co. to provide auditing and tax related services regarding the trust.<sup>173</sup>

Approximately seven years after the confirmation of the plan, the trustee filed an adversary proceeding against Price Waterhouse & Co., alleging that it had committed professional malpractice by making several errors in its accounting and tax advice.<sup>174</sup> The bankruptcy court dismissed the proceeding for lack of subject matter jurisdiction claiming that the matter was a "post-confirmation dispute between two non-debtors involving state law claims that did not affect the 'administration of the estate, property of the estate, or liquidation of assets of the estate.'"<sup>175</sup> The district court reversed, holding that the court retained jurisdiction because the trust represented a partial continuation of the bankruptcy estate.<sup>176</sup>

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<sup>166</sup> See Fla. Dev. Assocs. v. Knezevich & Assocs., Inc. (*In re Fla. Dev. Assocs.*), No. 04-12033-BKC-AJC, 2009 WL 393870, at \*1 (Bankr. S.D. Fla. Feb. 04, 2009).

<sup>167</sup> *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189 (9th Cir. 2005).

<sup>168</sup> *In re Wilshire Courtyard*, 437 B.R. 380 (Bankr. C.D. Cal. 2010).

<sup>169</sup> *In re Resorts Int'l*, 372 F.3d at 166-67.

<sup>170</sup> *Id.* at 157.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 158.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 159.

<sup>176</sup> *Id.* at 159-60.



The Third Circuit reversed, concluding that there was no “related to” jurisdiction over the malpractice disputes and stating that the claims “cannot find a home in the [b]ankruptcy [c]ourt.”<sup>177</sup> In determining that the bankruptcy court lacked jurisdiction, the court addressed the test set forth in *Pacor*, explaining that while it had generally been applied to preconfirmation matters, jurisdiction over postconfirmation matters was possible if there was a sufficient connection to the bankruptcy.<sup>178</sup> Despite the fact that the debtor’s estate no longer existed, the Third Circuit determined that the bankruptcy court could have postconfirmation “related to” jurisdiction and that “the essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction.”<sup>179</sup> Under this test, the court stated that “[a]t the post-confirmation stage, the claim must affect an integral aspect of the bankruptcy process—there must be a close nexus to the bankruptcy plan or proceeding.”<sup>180</sup> Furthermore, the court noted that matters affecting the “interpretation, implementation, consummation, execution, or administration” of the confirmed plan usually have a close nexus to the bankruptcy case.<sup>181</sup>

The Third Circuit held that the malpractice claims at issue were outside the postconfirmation jurisdiction of the bankruptcy court.<sup>182</sup> The court determined that the resolution of the malpractice claims did not interfere with the implementation of the reorganization plan and would only affect the former creditors of the litigation trust.<sup>183</sup> Since the decision in *In re Resorts International*, courts in the Third Circuit have consistently applied the close nexus test.<sup>184</sup>

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<sup>177</sup> *Id.* at 171. The court addressed the fact that the liquidation trust agreement expressly provided that the bankruptcy court retained jurisdiction over any dispute involving the trust. The court determined that “[w]here a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.” *Id.* at 161 (citing *In re Cont’l Airlines, Inc.*, 236 B.R. 318, 323 (Bankr. D. Del. 1999), *aff’d*, 2000 WL 1425751 (D. Del. Sept. 12, 2000), *aff’d*, 279 F.3d 226 (3rd Cir. 2002)).

<sup>178</sup> *In re Resorts Int’l*, 372 F.3d at 164.

<sup>179</sup> *Id.* at 166–67.

<sup>180</sup> *Id.* at 167.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 169.

<sup>183</sup> *Id.*

<sup>184</sup> See *Jazz Photo Corp. v. Dreier LLP*, No. Civ. A. 05-5198DRD, 2005 WL 3542468, at \*5–6 (D.N.J. Dec. 23, 2005); *Harrow v. Street (In re Fruehauf Trailer Corp.)*, 369 B.R. 817, 821–28 (Bankr. D. Del. 2007); *Geruschat v. Ernst & Young, LLP (In re Earned Capital Corp.)*, 331 B.R. 208, 218 (Bankr. W.D. Pa. 2005).

## 2. *Eleventh Circuit: In re Florida Development Associates*

The Eleventh Circuit reinforced the Third Circuit's close nexus test by adopting it in *In re Florida Development Associates*. In applying the standard set forth in *In re Resorts International*, the Bankruptcy Court for the Southern District of Florida in *In re Florida Development Associates* held that it had postconfirmation jurisdiction over claims by the debtor.<sup>185</sup> Here, the debtor was the owner and developer of a condominium project and alleged that the defendants had defectively constructed and inspected balconies.<sup>186</sup> The debtors alleged that prior to filing for bankruptcy protection they had paid the defendant over \$250,000 for a defective construction project despite an original cost estimate of \$35,000.<sup>187</sup> Therefore, even though the bankruptcy plan had been confirmed, the debtor in the original bankruptcy action sought to recover damages in bankruptcy court.

The court determined that the only possible source of jurisdictional authority over the complaint would be based on "related to" jurisdiction.<sup>188</sup> Yet this case differed from *In re Resorts International* in some important aspects critical to the court's analysis of postconfirmation "related to" jurisdiction. Unlike *In re Resorts International*, where the debtor was not a party to the malpractice action, here the debtor was the plaintiff.<sup>189</sup> Additionally, whereas in *In re Resorts International* each cause of action arose postconfirmation, here each cause of action arose prepetition and preconfirmation.<sup>190</sup> The court further found that the chapter 11 plan of reorganization in this case specifically reserved the debtor's right to bring claims against the defendant.<sup>191</sup>

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<sup>185</sup> Fla. Dev. Assocs. v. Knezevich & Assocs., Inc. (*In re Fla. Dev. Assocs.*), No. 04-12033-BKC-AJC, 2009 WL 393870, at \*5 (Bankr. S.D. Fla. Feb. 4, 2009).

<sup>186</sup> *Id.* at \*1.

<sup>187</sup> *Id.* at \*2.

<sup>188</sup> *Id.* at \*3.

<sup>189</sup> *Id.* at \*5.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* The court further concluded that the chapter 11 plan's express language reserving the debtor's right to bring "Claims against Professionals Including Construction Professional Engineers and Architects" supported the bankruptcy court's jurisdiction. *Id.* However, it is entirely possible that the court misapplied its own holding in *In re Resorts International*, as the court there stated that "where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization." *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 161 (3d Cir. 2004).

Consequently, the court concluded that defendant's motion to dismiss for lack of subject matter jurisdiction was meritless.<sup>192</sup>

By distinguishing the matter from *In re Resorts International*, the court determined that the bankruptcy court had "related to" jurisdiction over a state law claim by the debtor that arose from preconfirmation activity. This was true even though the claim was brought in bankruptcy court after the plan had been confirmed. The decision in *In re Florida Development Associates* demonstrated a court's willingness to grant broad adjudicatory power to the bankruptcy courts, even going so far as to envelop a state law claim brought postconfirmation.

### 3. *Ninth Circuit: In re Pegasus Gold Corp.*

The Ninth Circuit in *In re Pegasus Gold Corporation* expressly adopted the Third Circuit's close nexus test for postconfirmation jurisdiction.<sup>193</sup> The debtors in *Pegasus* operated two mines in Montana, and the State of Montana and its Department of Environmental Quality had filed several proofs of claim against the debtors.<sup>194</sup> The debtors and the state negotiated an agreement known as the Zortman Agreement, which created a plan for settlement of the debts between the debtors and the State and required the debtors to form Reclamation Services Corporation (RSC), an entity dedicated to reclamation work.<sup>195</sup> Just a few days later, the bankruptcy court confirmed the debtors' plan of reorganization, including the Zortman Agreement, which required "the debtors to contribute up to \$1 million in equity capital for RSC."<sup>196</sup>

After plan confirmation, Montana and RSC entered into an agreement providing for the reclamation work, which included that any dispute between Montana and RSC be submitted to arbitration or litigation in Montana state court.<sup>197</sup> Disputes arose almost immediately.<sup>198</sup> Montana hired a new company

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<sup>192</sup> *In re Fla. Dev. Assocs.*, 2009 WL 393870, at \*1-3. Though the circuit court found that the bankruptcy court did indeed have "related to" jurisdiction, the circuit court abstained from hearing the case pursuant to 28 U.S.C. § 1334(c)(1). *Id.* at \*6.

<sup>193</sup> *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005).

<sup>194</sup> *Id.* at 1192.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

to complete the work, causing RSC and the bankruptcy trustee collectively to bring action in bankruptcy court alleging a number of contract claims.<sup>199</sup>

Applying the close nexus test, the court claimed postconfirmation “related to” jurisdiction over “breach of contract, breach of covenant of good faith and fair dealing, and fraud in inducement claims.”<sup>200</sup> The court adopted the close nexus test because it “recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility, which can be especially important in cases with continuing trusts.”<sup>201</sup> The court concluded that these claims involved interpretation of the Zortman Agreement and the confirmation plan and thus the bankruptcy court had “related to” jurisdiction.<sup>202</sup> The court reasoned that the claims and remedies could affect the implementation and execution of the plan itself, “which specifically called for the creation of RSC and the transfer of debtor money to fund it.”<sup>203</sup>

The decision in *In re Pegasus Gold Corp.* focuses on the presumption set forth in *Pacor*: that a close nexus will generally be found in a dispute over the interpretation of a bankruptcy court order. In these cases, a bankruptcy court will have the ability to interpret its own orders and agreements.

#### 4. Ninth Circuit: *In re Wilshire Courtyard*

Most recently, the Bankruptcy Appellate Panel of the Ninth Circuit applied the close nexus test in *In re Wilshire Courtyard*.<sup>204</sup> The debtor, Wilshire, owned and operated two commercial complexes in Los Angeles.<sup>205</sup> When business went south, Wilshire filed a chapter 11 bankruptcy petition in 1997.<sup>206</sup> The California Franchise Tax Board (CFTB) was listed as a creditor in the case, but did not file a claim or otherwise participate in the bankruptcy case.<sup>207</sup> The remaining creditors and Wilshire negotiated a consensual plan of reorganization that restructured the debtor, formerly a California general partnership, into a Delaware limited liability company that continued to own

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1189.

<sup>201</sup> *Id.* at 1194.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See Cal. Franchise Tax Bd. v. Wilshire Courtyard (*In re Wilshire Courtyard*), 459 B.R. 416 (B.A.P. 9th Cir. 2011).

<sup>205</sup> *Id.* at 419.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

and operate the properties of the debtor.<sup>208</sup> While the bankruptcy court approved Wilshire’s disclosure statement, the statement did not address state tax consequences for the Wilshire partners resulting from the proposed transactions.<sup>209</sup> The plan was confirmed, but the CFTB was not served with a copy of the plan nor did it receive notice of the confirmation hearing.<sup>210</sup>

After plan confirmation the partners of Wilshire reported \$208 million of cancellation of debt income (CODI) on their California state tax returns.<sup>211</sup> However, the CFTB sought to recharacterize the reorganization transaction as a sale that resulted in \$231 million of capital gains—not CODI.<sup>212</sup> The parties spent the next five years in numerous rounds of administrative hearings.<sup>213</sup> In 2009, Wilshire filed an ex parte motion to reopen the bankruptcy case arguing that the CFTB, through the administrative hearings, was “attempting to collaterally attack the confirmed chapter 11 plan by characterizing its terms as effecting a disguised sale of the [p]roperty while, according to the plan, Wilshire had retained ownership of the [p]roperty.”<sup>214</sup> After reopening the case, the court granted Wilshire’s motion for summary judgment, holding that the CFTB was prohibited by the plan from claiming that the partners could be taxed on the transaction.<sup>215</sup> In the summary judgment opinion, the court defended its subject matter jurisdiction by holding that the court had “continuing, post-confirmation jurisdiction over matters with a ‘close nexus’ to the bankruptcy case.”<sup>216</sup>

As a result, the CFTB appealed the decision to the Bankruptcy Appellate Panel for the Ninth Circuit.<sup>217</sup> On appeal the panel determined that the bankruptcy court lacked “related to” jurisdiction to determine the tax issues between Wilshire Partners and the CFTB.<sup>218</sup> The panel synthesized Ninth Circuit case law and determined that to support jurisdiction, “there must be a close nexus connecting a proposed post-confirmation proceeding in the bankruptcy court with some demonstrable effect on the debtor or the plan of

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 420.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 422–23.

<sup>216</sup> *Id.* at 422.

<sup>217</sup> *Id.* at 423.

<sup>218</sup> *Id.* at 430.

reorganization.”<sup>219</sup> With respect to the tax issues, the panel determined that the acts required to implement the plan had already been completed by the time the tax dispute arose.<sup>220</sup> Additionally, the tax dispute could not have had an effect on the reorganization of the debtor; rather, it could only affect Wilshire Partners.<sup>221</sup> Therefore, unlike *In re Pegasus*, the matter did not have a demonstrable effect on the debtor or implementation of the plan but instead had an effect on other parties.

### B. Fifth Circuit: “Related To” Jurisdiction Factor Analysis

As an alternative to the close nexus test, the Fifth Circuit has adopted a narrower factor analysis. This Section discusses the Fifth Circuit’s first postconfirmation jurisdictional analysis in *In re Craig’s Stores*<sup>222</sup> and the articulation of the factor analysis as set forth in *In re Encompass Services Corp.*<sup>223</sup> Additionally, this Section addresses a more recent factor analysis introduced in *In re Enron Corp. Securities*, which focused on three main factors.<sup>224</sup> Based on this analysis this Comment argues in Part IV that this test should not be used for postconfirmation “related to” jurisdictional analysis.

#### 1. In re Craig’s Stores

The test for postconfirmation bankruptcy jurisdiction in the Fifth Circuit originated in *In re Craig’s Stores*.<sup>225</sup> Craig’s Stores, the debtor in this case, had used the Bank of Louisiana to obtain financing to administer a private label credit card program and sold to the bank its accounts receivable.<sup>226</sup> In 1994, the court confirmed the debtor’s reorganization plan, which continued the relationship between the debtor and the bank.<sup>227</sup> In 1996, eighteen months after confirmation of the plan, Craig’s Stores brought action against the Bank of

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See Bank of La. v. Craig’s Stores of Tex. (In re Craig’s Stores of Tex.)*, 266 F.3d 388 (5th Cir. 2001).

<sup>223</sup> *See Gilbane Bldg. Co. v. Air Sys. Inc. (In re Encompass Servs. Corp.)*, 337 B.R. 864 (Bankr. S.D. Tex. 2006).

<sup>224</sup> *See Newby v. Enron Corp. (In re Enron Corp. Secs.)*, 535 F.3d 325 (5th Cir. 2008).

<sup>225</sup> *See* 6 NORTON, *supra* note 22, § 114:10, at 114-38.

<sup>226</sup> *In re Craig’s Stores of Tex.*, 266 F.3d at 389.

<sup>227</sup> *Id.*

Louisiana in bankruptcy court alleging state law causes of action for damages arising from postconfirmation activity.<sup>228</sup>

The court initially distinguished postconfirmation from preconfirmation “related to” jurisdiction because after the bankruptcy court confirms a plan of reorganization the debtor is free to attend to its business without the supervision of the bankruptcy court.<sup>229</sup> The court reasoned that “[a]fter a debtor’s reorganization plan has been confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.”<sup>230</sup> The court noted that the 1984 Act’s goal in addressing bankruptcy jurisdiction was to remove the expansive bankruptcy court jurisdiction after confirmation.<sup>231</sup> Furthermore, the court stated that because the goal of chapter 11 bankruptcy is a successful reorganization, the reorganization provisions of the Code “envisage that out of the proceedings will come a newly reorganized company capable of sailing forth in the cold, cruel business world with no longer the protective wraps of the federal bankruptcy court.”<sup>232</sup>

Using this more narrow approach to postconfirmation “related to” jurisdiction, the court held that the bankruptcy court lacked jurisdiction over the debtor’s claims against the bank because they dealt with postconfirmation relations and did not relate to the interpretation or execution of the debtor’s plan.<sup>233</sup> While the court articulated no specific standard for determining postconfirmation jurisdiction, it was clear that the court thought the scope of jurisdiction was narrower than the conceivable effects test as articulated by the Supreme Court in *Pacor*.<sup>234</sup> By not adopting the close nexus test, the Fifth

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<sup>228</sup> *Id.* The bankruptcy court heard the claim and entered a quarter-million dollar judgment against the bank. *Id.* at 390. The bank then appealed to the district court and the court inquired sua sponte about jurisdiction, and dismissed for lack of jurisdiction. *Id.* Craig’s Stores appealed. *Id.*

<sup>229</sup> *Id.*; see also *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991) (“Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the *protection* of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens.”).

<sup>230</sup> *In re Craig’s Stores of Tex.*, 266 F.3d at 390.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (citing *In re Seminole Park & Fairgrounds, Inc.* 502 F.2d 1011, 1014 (5th Cir. 1974)).

<sup>233</sup> *Id.* at 391 (citing 11 U.S.C. § 1142(b) (code year omitted by court)). The court noted that there were no facts or law deriving from the reorganization or the plan necessary to the claim asserted by Craig’s Store’s against the bank. *Id.* Furthermore, the fact that the status of the debtor’s contracts with the bank would affect distribution to creditors under the plan was not dispositive for bankruptcy court jurisdiction because the same could be said about any other postconfirmation contractual relationship. *Id.*

<sup>234</sup> See 6 NORTON, *supra* note 22, § 114:10, at 114-38.

Circuit left it to the bankruptcy courts to articulate the proper grant of postconfirmation jurisdiction.

2. *In re Encompass Services Corp.*

Since the Fifth Circuit's decision in *In re Craig's Stores*, the bankruptcy courts in the Fifth Circuit have been charged with the task of articulating the proper postconfirmation jurisdictional inquiry.<sup>235</sup> For example, in *In re Encompass Services Corp.* the plaintiff, an assignee of a subcontract of the original debtor, filed its claim in California state court.<sup>236</sup> Subsequently, the state court granted a motion of summary judgment in favor of the plaintiff.<sup>237</sup> The defendant appealed the judgment in California state court.<sup>238</sup> At the same time, however, the defendant filed an adversary proceeding in federal bankruptcy court.<sup>239</sup> The bankruptcy court denied jurisdiction over the adversary proceeding, stating, "[T]his adversary proceeding presents an interesting attempt at using the Bankruptcy Code as a mechanism for forum shopping."<sup>240</sup>

In denying jurisdiction over the adversary proceeding, the court noted that the Fifth Circuit has adopted a more "exacting view of 'related to' jurisdiction, focusing on the debtor's emergence from bankruptcy protection."<sup>241</sup> Based on this, the court enumerated six factors to determine postconfirmation "related to" jurisdiction:

- (1) when the claim at issue arose;
- (2) what provisions in the confirmed plan exist for resolving disputes and whether there are provisions in the plan retaining jurisdiction for trying these suits;
- (3) whether the plan has been substantially consummated;
- (4) the nature of the parties involved;
- (5) whether state law or bankruptcy law applies; and
- (6) indices of forum shopping.<sup>242</sup>

The first factor relates to the time at which the claim arose. The court determined that many courts have granted postconfirmation jurisdiction where

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<sup>235</sup> *Gilbane Bldg. Co. v. Air Sys., Inc. (In re Encompass Servs. Corp.)*, 337 B.R. 864, 873 (Bankr. S.D. Tex. 2006).

<sup>236</sup> *Id.* at 876.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 867.

<sup>241</sup> *Id.* at 872 (citing *Bank of La. v. Craig's Stores of Tex. (In re Craig's Stores of Tex.)*, 266 F.3d 388, 390 (5th Cir. 2001)).

<sup>242</sup> *Id.* at 873.



the claim arose prepetition.<sup>243</sup> More specifically, “[a]ctual litigation, or at least antagonism between the parties, must be present on the petition date for the court to assert jurisdiction.”<sup>244</sup> The court in *In re Encompass* determined that this factor indicated a lack of jurisdiction because, while the contract at issue was entered into prepetition, it had not “accelerated to the point of near litigation before the bankruptcy petition was filed.”<sup>245</sup>

The second factor deals with the precise language of the bankruptcy plan itself and whether there is a retention provision for jurisdiction. In identifying the second factor, the court noted that some courts require the confirmed plan to expressly provide for jurisdiction over postconfirmation matters.<sup>246</sup> Thus, a plan that fails to retain subject matter jurisdiction may leave the bankruptcy court without jurisdiction over future matters.<sup>247</sup> Additionally, while the plan does not need to cover the specific act at issue, it does need to be broad enough to cover postconfirmation proceedings.<sup>248</sup> Applying this factor to the facts in *In re Encompass*, the court found that the language in the confirmed plan was not specific enough to favor a finding that the court had jurisdiction.<sup>249</sup>

The third factor addresses whether or not there has been a “substantial consummation” of the plan.<sup>250</sup> The court indicated that a plan has not been substantially consummated where an action would impact the debtor-creditor relationship.<sup>251</sup> The court stated that an action impacting a plan that has been substantially consummated would favor a finding of no jurisdiction.<sup>252</sup> The plan in *In re Encompass* was confirmed two years prior to the commencement date of the adversary proceeding at bar.<sup>253</sup> Additionally, the court determined that the requested relief would return assets to the bankruptcy estate, which no

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 874.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* (citing *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & ERISA Litig.)*, No. G-05-0012, 2005 WL 1745471, at \*5 (S.D. Tex. July 25, 2005)).

<sup>249</sup> *Id.* The confirmed plan included the following language: “[to] hear and determine disputes arising in connection with the interpretation, implementation, consummation, or enforcement hereof, and all contracts, instruments, and other agreements executed in connection with this Plan.” *Id.*

<sup>250</sup> *Id.* at 873.

<sup>251</sup> *Id.* at 875.

<sup>252</sup> *Id.* The court in *In re Encompass* suggested that a plan in place for two years without any adversary proceedings is presumed to be consummated. *Id.* at 874.

<sup>253</sup> *Id.* at 875.

longer existed.<sup>254</sup> Based on this, the court concluded that this factor weighed against continuing jurisdiction.<sup>255</sup>

The fourth factor addressed the nature of the parties involved. In turning to the fourth factor, the court noted that it is possible for the bankruptcy court to have jurisdiction even where the debtor is not a party, but that such jurisdiction exists “only if the suit has an impact on the bankruptcy estate.”<sup>256</sup> If the confirmed plan has been in effect for a substantial period of time, the debtor’s estate no longer exists, and neither party in the suit is a debtor, then the circumstances will point to a lack of postconfirmation jurisdiction.<sup>257</sup> In *In re Encompass*, the facts that the confirmed plan had been in effect for over two years and that neither party was a debtor supported a finding of no jurisdiction.<sup>258</sup>

The fifth factor is whether state law or bankruptcy law applies. Even though the claim may contain bankruptcy issues, the fact that state law applies will support a finding of no jurisdiction.<sup>259</sup> In *In re Encompass*, California law governed the dispute over the contract.<sup>260</sup> Additionally, the two non-debtor entities had already litigated the issue in a California state court.<sup>261</sup> Since the California court had already spent substantial time adjudicating the matter, this factor weighed heavily against a finding of jurisdiction.<sup>262</sup>

The sixth factor requires an examination of indicators of forum shopping.<sup>263</sup> The court noted that “[a]ll courts should attempt to protect both the state and federal court systems from the illegitimate gamesmanship involved in forum shopping.”<sup>264</sup> A debtor in a bankruptcy estate would likely want to adjudicate the matter in a bankruptcy court as they are viewed as debtor-friendly. The plaintiff in *In re Encompass* filed the original action in California state court, which was adjudicated in favor of the plaintiff on a

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<sup>254</sup> *Id.* at 876.

<sup>255</sup> *Id.* at 875.

<sup>256</sup> *Id.* at 874 (citing *Newby v. Enron Corp.*, (*In re Enron Corp. Sec., Derivative & ERISA Litig.*), No. G-05-0012, 2005 WL 1745471, at \*4 n.19 (S.D. Tex. July 25, 2005)).

<sup>257</sup> *Id.* at 876.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

summary judgment motion.<sup>265</sup> After this outcome, the defendant appealed the California decision while concurrently filing a petition in bankruptcy court asking it to assert jurisdiction over the matter.<sup>266</sup> In finding that this factor supported no continuing jurisdiction, the court concluded it “is not an insurer against the outcome of bad choices.”<sup>267</sup>

After addressing the six factors, the court determined that while the issues had a relationship to bankruptcy law and a bankruptcy court’s power to interpret and implement the confirmed plan, the assertion of jurisdiction was not appropriate.<sup>268</sup>

### 3. *In re Enron Corp. Securities*

While the bankruptcy courts in the Fifth Circuit have been applying this factor analysis to determine postconfirmation jurisdiction, the analysis has not been expressly adopted by the Fifth Circuit. However, in *In re Enron Corp. Securities*, the circuit court clarified its holding in *In re Craig’s Stores* and implemented a new factor analysis in its postconfirmation jurisdictional determination.<sup>269</sup> At issue in *Enron* were state law securities actions that had been commenced in state court and removed to federal court based on the debtor’s chapter 11 filing.<sup>270</sup> In determining whether the court had postconfirmation jurisdiction, the court did not rely on the six factors as articulated by the bankruptcy courts of the Fifth Circuit, but focused instead on three factors: (1) whether the claim at issue principally deals with preconfirmation relations between the parties; (2) whether there was antagonism between the parties as of the date of the reorganization (i.e., as of the date of the plan confirmation hearing); and (3) whether there are any facts or law deriving from the reorganization of the plan that are necessary to the claim.<sup>271</sup>

The court found that the security law claims in *Enron* were outside the purview of the first two factors as the claims were raised preconfirmation and involved preconfirmation relations between the parties.<sup>272</sup> As two of three

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 877.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Newby v. Enron Corp. (In re Enron Corp. Secs.)*, 535 F.3d 325, 335–36 (5th Cir. 2008).

<sup>270</sup> *Id.* at 328.

<sup>271</sup> *Id.* at 335.

<sup>272</sup> *Id.*

factors heavily favored jurisdiction there was no need to analyze the third factor.<sup>273</sup> Accordingly, the court held that the bankruptcy court had jurisdiction over the plaintiff's claims.<sup>274</sup> The focus in *Enron* provides guidance for bankruptcy practice in the Fifth Circuit. In analyzing whether a bankruptcy court will have jurisdiction over a claim, practitioners should focus on the three factors in *Enron*. However, regardless of the three-factor test or the six-factor test, the courts in the Fifth Circuit apply a more narrow approach than that of the courts that follow the close nexus test. This is primarily because the balancing approach examines more than whether there is a significant relationship between the postbankruptcy matter and the adjudication of the bankruptcy case. As such, the factor test is less in line with the congressional intent of a broad jurisdictional grant than the close nexus test. To be sure, the close nexus test allows bankruptcy courts to evaluate the overall effect of the claim on the bankruptcy case as opposed to being limited by specific factors.

### C. Second Circuit: Modified Close Nexus With Retention Requirement

Prior to the Third Circuit's decision in *In re Resorts International*, the Second Circuit had interpreted postconfirmation jurisdiction in accordance with the "significant connection" standard.<sup>275</sup> After the Third Circuit's announcement of the close nexus test, however, at least one bankruptcy court in the Second Circuit expressly adopted that test with a slight modification.<sup>276</sup> The modification is a requirement that bankruptcy court jurisdiction over the matter be expressly provided for in the chapter 11 reorganization plan.<sup>277</sup> Like the factor analysis, this requirement prevents the bankruptcy court from adjudicating matters it otherwise would be able to under a close nexus jurisdiction.

An example of the Second Circuit's approach can be found in *In re General Media*. In this case, the Bankruptcy Court for the Southern District of New York determined that a party invoking the bankruptcy court's

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<sup>273</sup> *Id.* at 336.

<sup>274</sup> *Id.* Subsequent to the *In re Enron Corp. Securities* decision, the Bankruptcy Court for the Southern District of Texas in *In re MSB Energy, Inc.* relied on the new three-factor test articulated in *In re Enron Corp. Securities*. Parker v. MSB Energy, Inc. (*In re MSB Energy, Inc.*), 438 B.R. 571, 589 n.12 (Bankr. S.D. Tex. 2010).

<sup>275</sup> See Luan Inv. S.E. v. Franklin 145 Corp. (*In re Petrie Retail, Inc.*), 304 F.3d 223 (2d Cir. 2002); 1 NORTON, *supra* note 22, § 4:126, at 4-438.

<sup>276</sup> See Penthouse Media Grp. v. Guccione (*In re Gen. Media, Inc.*), 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005); 6 NORTON, *supra* note 22, § 114:10, at 114-34 (2008).

<sup>277</sup> See *In re Gen. Media*, 335 B.R. at 73-74; 1 NORTON, *supra* note 22, § 4:126, at 4-440.

postconfirmation jurisdiction must establish two prerequisites.<sup>278</sup> First, the matter must satisfy the close nexus test.<sup>279</sup> Second, “the plan must provide for the retention of jurisdiction over the dispute.”<sup>280</sup>

In *In re General Media*, the plaintiff was a successor in interest to the debtor based on the chapter 11 reorganization plan.<sup>281</sup> The plaintiff filed an adversary proceeding against the reorganized debtor’s former chairman to recover money damages and other relief.<sup>282</sup> In response, the defendant moved to dismiss for lack of subject matter jurisdiction.<sup>283</sup> The court determined that the plaintiff’s lawsuit lacked a close nexus to the debtor’s confirmation plan and as such the claims fell outside of the courts postconfirmation jurisdiction.<sup>284</sup> The court also noted that it could not hear a postconfirmation dispute just because the proceedings might increase the recovery to creditors; this could “endlessly stretch a bankruptcy court’s jurisdiction.”<sup>285</sup> As the court determined that the claim lacked a close nexus to the bankruptcy case, the court did not need to reach the language of the confirmed plan to determine that the bankruptcy court lacked jurisdiction.<sup>286</sup> Thus, while it appears that the Second Circuit has adopted the close nexus test endorsed by the Third and Ninth Circuit, the Second Circuit is applying an additional requirement that the chapter 11 confirmation plan preserves jurisdiction over the dispute.<sup>287</sup>

#### IV. DEFINING THE LIMITS OF 28 U.S.C. § 157 AND RECOMMENDATIONS MOVING FORWARD FOR POSTCONFIRMATION JURISDICTION

In discussing Congress’s intentions with relation to postconfirmation jurisdiction, it is worth noting at the outset that nothing in the legislative history refers to postconfirmation jurisdiction.<sup>288</sup> Additionally, nothing in 28 U.S.C. §§ 157 or 1334 or their legislative histories define the concept of

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<sup>278</sup> *In re Gen. Media*, 335 B.R. at 73–74.

<sup>279</sup> *Id.* at 73 (citing *Binder v. Price Waterhouse & Co. (In re Resorts Int’l, Inc.)*, 372 F.3d 154, 168–69 (3d Cir. 2004)).

<sup>280</sup> *Id.* at 73–74 (citing *Hosp. & Univ. Prop. Damage Claimants v. Johns Manville Corp. (In re Johns Manville Corp.)*, 7 F.3d 32, 34 (2d Cir. 1993)).

<sup>281</sup> *Id.* at 68.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 71.

<sup>284</sup> *Id.* at 74–75.

<sup>285</sup> *Id.* at 75.

<sup>286</sup> *Id.* at 75–76.

<sup>287</sup> See 1 NORTON, *supra* note 22, § 4:126, at 4-443.

<sup>288</sup> See 130 CONG. REC. 20080-94, 20206-34 (June 29, 1984).

“related to” jurisdiction.<sup>289</sup> Because of the lack of legislative guidance, the courts have been left to construe the boundaries of the bankruptcy courts’ “related to” jurisdiction.

It is the view of this Comment, however, that Congress meant to give bankruptcy courts the most expansive jurisdiction possible over bankruptcy matters without violating constitutional restraints. The reason for this is that Congress intended to provide for the most efficient resolution of bankruptcy cases.<sup>290</sup> This goal applies to the area of postconfirmation “related to” jurisdiction. Looking at the split between jurisdictions as to the extent of postconfirmation jurisdiction, it is apparent that the close nexus test is the most in line with Congress’s intent in developing the current jurisdictional scheme because it allows for the broadest grant of jurisdiction within the constitutional limits. Regardless, in moving forward the best way to resolve this issue is by amending the Bankruptcy Code, receiving guidance from the Supreme Court, or implementing an Article III bankruptcy court system.

The first part of this Section addresses the costs and uncertainties associated with the current jurisdictional scheme and the reasons either the Supreme Court or Congress needs to provide guidance. Additionally, this Section discusses the history of the current Bankruptcy Code and the various bankruptcy policies all pointing to a broad grant of postconfirmation jurisdiction to the bankruptcy courts. This Section argues that the close nexus test best fits the policy goals of the Bankruptcy Code. In closing, this Section provides recommendations for the Supreme Court and Congress in moving forward in postconfirmation bankruptcy jurisdiction.

#### A. *Historical and Policy Considerations for Postconfirmation Jurisdiction*

The legislative history makes it clear that Congress intended the jurisdictional reach of the bankruptcy courts to be as broad as possible, without being unconstitutional. Since the Bankruptcy Act of 1841, Congress has determined that one of the primary goals of bankruptcy courts is the expedited administration and resolution of bankruptcy cases.<sup>291</sup> During the floor debates in 1984 and as addressed in the accompanying House and Senate Reports, Congress reiterated its intention for bankruptcy cases to be dealt with

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<sup>289</sup> *Levovitz v. Verrazano Holding Corp. (In re Verrazano Holding Corp.)*, 86 B.R. 755, 761 (Bankr. E.D.N.Y. 1988); see 28 U.S.C. §§ 157, 1334 (2006).

<sup>290</sup> See S. REP. NO. 95-989, at 153–54 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939–40.

<sup>291</sup> Block-Lieb, *supra* note 2, at 541.

efficiently within the constitutional constraints of Article III as identified by the Supreme Court in *Marathon*.<sup>292</sup> The Supreme Court restated that intent in *Celotex*, noting, “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts to deal efficiently and expeditiously with all matters connected with the bankruptcy estate.”<sup>293</sup> It has long been recognized that in reorganization cases the confirmed debtor should be returned to the commercial community and cease to be under the “[indefinite] tutelage” of the bankruptcy court in which the reorganization of the case was pending.<sup>294</sup> However, at the same time, the courts must balance this constraint with the need for the bankruptcy court to interpret and implement its own reorganization plan to best return the bankrupt corporation to the market.

There are also additional costs to a bankruptcy court with limited jurisdictional reach. Every time the judicial functions of bankruptcy courts are limited, it creates a delay in the administration of a bankruptcy case and increases the cost of litigation.<sup>295</sup> A narrow approach to postconfirmation jurisdiction will postpone the resolution of bankruptcy cases because litigation will be conducted in multiple forums.<sup>296</sup> Additionally, the litigation of bankruptcy related issues in other state or federal forums will delay the administration of the bankruptcy case because the resolution of the case will be pending the resolution of issues in the other courts.<sup>297</sup>

In addition to increased costs is the propensity for forum shopping for postconfirmation jurisdiction. When debtors have the decision of where to file for bankruptcy, it is likely that they will choose the forum most amenable to the debtor. It is possible that jurisdictions with a more expansive test of bankruptcy court jurisdiction will be favored in this area. This is due to the fact that the bankruptcy court may be more favorable to the debtor corporation. Thus, the debtor will prefer the ability to adjudicate more matters “related to” the bankruptcy. This type of forum shopping is detrimental to the bankruptcy

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<sup>292</sup> *Id.* at 542; *see also* 130 CONG. REC. 20083-84 (June 29, 1984) (statement of Sen. Robert Dole), *reprinted in* 1984 U.S.C.C.A.N. 586, 586–89; 130 CONG. REC. 20227-28 (June 29, 1984) (statement of Rep. Robert Kastenmeier), *reprinted in* 1984 U.S.C.C.A.N. 579, 579–80.

<sup>293</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); H.R. REP. NO. 95-595, at 43–48 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6004–11.

<sup>294</sup> *See N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944).

<sup>295</sup> *Block-Lieb*, *supra* note 2, at 544.

<sup>296</sup> *Id.* at 545.

<sup>297</sup> *Id.*

system because the district with more favorable postconfirmation jurisdiction may have little connection to the reorganization.

*B. Which Test Fits Best?*

The close nexus test, as articulated by the Third and Ninth Circuits, best meets the bankruptcy policy goals of efficient administration, reduced costs, and discouragement of forum shopping. This test provides for “related to” noncore bankruptcy jurisdiction over matters after confirmation if there is “a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction.”<sup>298</sup> Under the close nexus test, the bankruptcy court will find bankruptcy jurisdiction in a broad range of matters as long as there is a relationship to the debtor’s bankruptcy case.<sup>299</sup> Compared to the factor analysis test, this test allows for a more expanded area of postconfirmation jurisdiction in bankruptcy courts. For example, one of the factors includes whether a provision in the confirmed plan provides for jurisdiction over the matter. In using this factor in the jurisdictional analysis, fewer matters will be within the jurisdictional reach of the bankruptcy courts as opposed to under a close nexus standard. To be sure, if the parties do not foresee future litigation they cannot provide for them in the plan. Additionally, the notion of whether state law or bankruptcy law applies in the case is not a requirement needed under a close nexus analysis. This additional consideration will also remove more cases from the bankruptcy court’s jurisdictional reach. Federal courts often apply and interpret state laws in diversity cases, and the ability of a federal court to apply state law will greatly add to the resolution of a bankruptcy case. Based on these constraints in the factor analysis test, the close nexus test will place more postconfirmation matters within the jurisdiction of the bankruptcy court, which is in line with the goal of Congress of administering bankruptcy proceedings efficiently.<sup>300</sup>

The close nexus test also satisfies the jurisdictional constraints of *Marathon*. Under the close nexus test, the bankruptcy judge will make proposed findings of fact and conclusions of law to the district judge, and the district judge may enter the final order in the proceeding after reviewing the bankruptcy courts recommendations de novo.<sup>301</sup>

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<sup>298</sup> *Binder v. Price Waterhouse & Co. (In re Resorts Int’l, Inc.)*, 372 F.3d 154, 166–67 (3d Cir. 2004).

<sup>299</sup> *See supra* Section III.A.

<sup>300</sup> Block-Lieb, *supra* note 2, at 541.

<sup>301</sup> *See* 1 COLLIER, *supra* note 8, ¶ 3.03[2].



Considering the close nexus test in the context of the requirement that the confirmation plan itself retain jurisdiction over the matter, this additional jurisdictional hurdle is not in line with the policies of bankruptcy law. First, a retention requirement will make it much less likely that a bankruptcy court will be able to exercise jurisdiction over a related matter after confirmation of a chapter 11 plan. Additionally, this requirement will increase the amount of litigation, which is counter to Congress's goal of efficient adjudication of bankruptcy cases. With this requirement, the courts have required that the confirmed plan explicitly state what types of disputes are covered.<sup>302</sup> This extra requirement will cause an increased amount of litigation over whether the plan language is specific enough to cover the disputed matter, running counter to an efficient adjudication of bankruptcy matters. Therefore, the close nexus test without the plan requirement is the most in line with the goals of bankruptcy law.

### *C. Recommendations for Postconfirmation Jurisdiction*

While the close nexus test is closest to the goals of the Bankruptcy Code, additional clarity provided by Congress or the Supreme Court can further aid bankruptcy courts in adjudicating "related to" matters. In order to maximize the efficiency of bankruptcy cases, the circuits must provide for a broad jurisdictional grant. The discussion above explains that some circuits are imposing a more limited reach of postconfirmation jurisdiction which, in turn, is creating a more costly and time consuming adjudicative process. While the prior discussion determined that the closest test to Congress's intent is the close nexus test, further steps should be taken to provide for a more consistent approach to postconfirmation jurisdiction. First, the Supreme Court could grant a writ of certiorari in order to define the limits of "related to" jurisdiction in a postconfirmation scenario. Second, Congress could amend the statute to provide for a list of noncore "related to" proceedings over which the bankruptcy court has jurisdiction. Third, Congress could revise the current jurisdictional scheme and create Article III bankruptcy judges. Each of these proposals will be discussed in turn.

First, the Supreme Court could take up the issue of postconfirmation jurisdiction to determine the limits of bankruptcy court "related to" jurisdiction. In *Celotex*, the Supreme Court addressed "related to" jurisdiction

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<sup>302</sup> See *Penthouse Media Grp. v. Guccione (In re Gen. Media Inc.)*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005).

in a preconfirmation context.<sup>303</sup> The Court adopted the Third Circuit's test in *Pacor* that a court retains jurisdiction if the proceeding could conceivably affect the estate being administered in bankruptcy.<sup>304</sup> However, there was no discussion in *Celotex* of how "related to" jurisdiction changes after the plan is confirmed in a chapter 11 case. Thus, uncertainty still exists as to the limit of "related to" jurisdiction. If the Supreme Court hears and decides this issue, it will resolve the circuit split and determine the proper jurisdictional scope.

A second possibility would be for Congress to amend the current jurisdictional statute to describe the matters that are within the bankruptcy court's "related to" jurisdiction. While the Supreme Court's adoption of a uniform test for postconfirmation jurisdiction would increase clarity, it would not solve the problem of excessive jurisdiction litigation. In this case, while a test would resolve the circuit split, jurisdictional litigation would still be substantial in determining what matters would be within the reach of the accepted standard. As stated above, 28 U.S.C. § 157(b)(2) provides a nonexclusive list of core proceedings.<sup>305</sup> This list provides guidance as to what matters bankruptcy courts can hear and determine. If Congress amended the statute to provide for a similar list of noncore proceedings, it would provide bankruptcy courts with a reliable list of matters they can hear. By amending the statute, Congress can also provide for the distinctions between pre- and postconfirmation "related to" jurisdiction.

The third and most drastic possibility would be to eliminate the current jurisdictional system and replace it with an Article III bankruptcy court system. The National Bankruptcy Review Commission recommended to Congress that "[t]he bankruptcy court should be established under Article III of the Constitution."<sup>306</sup> The Commission made this recommendation because it would create a jurisdictional system free from constitutional concerns and eliminate costly litigation over bankruptcy courts' authority.<sup>307</sup> In doing this, Congress would resolve all questions over the reach of the bankruptcy courts because their jurisdiction would be the same as the district courts under Article III. While bankruptcy courts would still be charged with overseeing the rehabilitation of debtors, their powers would be increased to hear even more

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<sup>303</sup> See *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

<sup>304</sup> *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); see also *Celotex*, 514 U.S. at 309; 1 NORTON, *supra* note 22, § 4:126, at 4-432.

<sup>305</sup> See 28 U.S.C. § 157(b)(2) (2006).

<sup>306</sup> See NAT'L BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 718 (1997).

<sup>307</sup> See *id.* at 721.

matters related to the bankruptcy case. As the current system diminishes the bankruptcy goal of expeditious administration, an Article III system would solve these problems.<sup>308</sup> Additionally, changing to an Article III system would remove the constitutional constraints imposed on bankruptcy courts by the *Marathon* decision. In the new system, bankruptcy courts would be able to hear and determine all core and noncore matters, as opposed to only being able to determine core matters. Also, an Article III system would remove jurisdictional uncertainty and add finality to bankruptcy court determinations. Therefore, an Article III bankruptcy court system would greatly improve the efficiency of the bankruptcy system in line with the goals of Congress.

However, the creation and implementation of an Article III bankruptcy court system would be challenging due to political issues. Some commentators have argued that the creation of Article III bankruptcy judges would increase costs to the bankruptcy system because of the permanence of bankruptcy judges' salaries.<sup>309</sup> This monetary increase comes as Article III judges are vested with life tenure, as opposed to the fourteen-year terms of bankruptcy judges.<sup>310</sup> As this would have to be approved by Congress, the creation of an Article III bankruptcy court faces political pressure. Some commentators have also suggested that "an Article III bankruptcy court would diminish the prestige of existing Article III federal district and circuit judges."<sup>311</sup> Regardless of these concerns, an Article III bankruptcy court system would alleviate the current jurisdictional confusion and promote the more efficient resolution of bankruptcy cases.

#### CONCLUSION

Ever since the 1898 Act, Congress has tried to vest bankruptcy courts with broad jurisdiction to provide for the efficient resolution of bankruptcy cases. However, the Supreme Court's decision in *Marathon* forced Congress to enact a fractionalized jurisdictional system split between the district courts and bankruptcy courts. Unfortunately, the resulting 1984 Amendments created circuit splits on varying jurisdictional issues that have yet to be addressed by Congress or the Supreme Court. Perhaps the murkiest split is overdefining the boundary of a bankruptcy court's jurisdiction after the confirmation of a

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<sup>308</sup> Block-Lieb, *supra* note 2, at 566.

<sup>309</sup> *See id.* at 564.

<sup>310</sup> *See id.*

<sup>311</sup> *See id.*

chapter 11 reorganization plan. The resulting tests in the various circuits have all attempted to balance the constitutional constraints of the current bankruptcy system with the policy goal of retaining jurisdiction for the efficient adjudication of bankruptcy related matters.

This Comment suggests that while the legislative history does not define “related to” bankruptcy jurisdiction, either in a pre- or postconfirmation context, the relevant legislative history and bankruptcy policy favor a broad jurisdictional reach. When Congress revised the Bankruptcy Code, its purpose was to authorize as broad a jurisdiction as possible within the bankruptcy courts without being unconstitutional. The policy rationale was to be as cost-efficient as possible in adjudicating bankruptcy cases. This Comment, after analyzing the various circuits’ tests for postconfirmation “related to” jurisdiction, proposes that the one most in line with these goals is the close nexus test. This test provides for post-confirmation bankruptcy jurisdiction if there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction.”<sup>312</sup> This test, compared to the other circuits’ proposals, provides for the most expansive jurisdictional reach and is therefore most in line with Congress’s intent.

While the close nexus test is most in line with the policy goals of bankruptcy, this Comment suggests that other changes to the current jurisdictional system can provide for more comprehensive reform. First, Congress could amend the current Bankruptcy Code to include a list of noncore “related to” proceedings over which bankruptcy courts would have jurisdiction. In amending the statute, Congress should delineate matters that can be heard both preconfirmation and postconfirmation. Doing this would provide bankruptcy courts with certainty in delineating the line between matters they can hear and matters that must be heard by the district court. This would greatly increase the efficiency with which bankruptcy cases and related matters are adjudicated.

Secondly, this Comment suggests that Congress could restructure the current bankruptcy scheme and grant Article III status to all bankruptcy judges. In doing this, the bankruptcy courts would no longer be adjuncts to the district court judges. There would be no jurisdictional fractionalization, as bankruptcy judges could hear and determine the same matters as Article III district court judges.

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<sup>312</sup> 1 NORTON, *supra* note 22, § 4:126, at 4-437.

Regardless of the method pursued by the Supreme Court or Congress, the circuit split in postconfirmation “related to” jurisdiction must be resolved. A resolution of the current dispute will greatly aid in the efficient adjudication of bankruptcy cases and better promotion of bankruptcy policy goals.

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