Planning for Post-Confirmation Jurisdiction

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Bankruptcy jurisdiction has presented challenges almost from the inception of the Bankruptcy Code in 1978. The placement of the bankruptcy case itself exclusively in the federal courts is unremarkable – after all, cases would likely be filed in federal courts anyway under federal question jurisdiction, *see* 28 U.S.C. § 1331, though section 1334(a) assures that bankruptcy cases be filed *exclusively* in federal court. *See* 28 U.S.C. § 1334(a). In an effort to avoid the divided jurisdiction that persisted under the Bankruptcy Act, and to achieve centralized case administration to the maximum extent possible, Congress designed section 1334(b) to be as broad as possible, so that virtually all aspects of the bankruptcy could be attended to by the bankruptcy court.[1] Indeed, a number of decisions and commentators have noted that Congress intended bankruptcy jurisdiction to extend to the constitutional limits of federal jurisdiction. That means, however, that there *are* limits. This paper explores where those limits might be, and offers some practical suggestions for staying inside the line (assuming we can discover where that line lies!).

At the outset, let's lay out the framework. The statute's language is essentially unchanged from its original enactment version in 1978:

> Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). Note first that the jurisdiction over *proceedings* is expressly *concurrent* with other courts (including state courts). Note second that "arising under" matters would be federal in any event, because they are also matters that arise under a federal law. *See* 28 U.S.C. § 1331. Note thirdly that, by necessity, a matter that originates

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[1] This paper deals primarily with bankruptcy jurisdiction, as distinguished from bankruptcy courts' judicial power to adjudicate a given dispute. While the issues overlap, they are *not* co-extensive. That is, a matter might well fall within the ambit of bankruptcy jurisdiction, but not be capable of being adjudicated by a bankruptcy judge (because such judges are not appointed under Article III of the Constitution). Of course, if a matter falls outside federal bankruptcy *jurisdiction*, then it could not be heard by *any* federal court, regardless whether appointed under Article III. This paper focuses on the latter issue only. The important question of whether Congress' intent to centralize bankruptcy administration has been frustrated by Congress' failure to create an Article III tribunal to administer those cases must be left for another day. For purposes of this paper, we will use "bankruptcy court," without further reference to the referral statute, and without stressing over distinctions between matters that can be heard only by the district court for reasons having nothing to do with jurisdiction.

from events that occurred prior to the filing of the title 11 case will virtually never be categorized as "arising in" the title 11 case. Note finally that a matter need only be "related to" the title 11 *case* in order to fall under the umbrella of section 1334 jurisdiction.

At this point in most papers on jurisdiction, the author proceeds to talk about *Pacor,* the Third Circuit seminal opinion on "related to" jurisdiction. That is the wrong place to begin, however. We will instead begin with the Constitution, as the intentions of Congress were that the "related to" terminology extend federal jurisdiction in the bankruptcy context to its constitutional limits. *See* H.R. Rep. 95-595, 95th Cong., 1st Sess. The relevant provisions of the Constitution are found in Article III. Section 2 of that Article provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority …

U.S. CONST., Art. III, § 2. Jurisdiction can, as a matter of necessity, not exceed the scope of judicial power[2] accorded under the Constitution. This observation would seem to be true as a matter of pure logic: were Congress to confer on the courts jurisdiction to hear and determine a given matter that did not arise under the laws of the United States, then perforce the resulting exercise of judicial power would exceed that granted by Article III, and so violate the Constitution. Thus, for instance, Congress could not authorize the federal courts to hear divorce actions that arise under state law where there is no concomitant federal law regarding divorce (unless, of course, the matter arose under the court's diversity jurisdiction).

Yet the federal courts, including the Supreme Court, have found ways to stretch these limits, relying on a variety of ultimately unsatisfactory theories that have been

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[2] As the limits are imposed by what judicial power can be exercised, it is easy to see how a law designed to extend federal jurisdiction to those limits might also exceed the amount of judicial power that could be exercised by a court that lacked tenure under Article III, setting the stage for *Marathon* just a few years after the Code's enactment. In fact, the drafters of the Code understood the problem all too well, but could not overcome the objections of the Chief Justice and the Judicial Conference. *See generally* Kenneth Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L.R. 941, 954 (1979). Again, however, judicial power is not the focus of this paper, except as it informs the scope of jurisdiction question.

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