

The Scope of Post-Confirmation Bankruptcy Court Jurisdiction

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I. Introduction

The statutory provisions governing jurisdiction over bankruptcy cases and proceedings are set forth in 28 U.S.C. § 1334 and provide, in pertinent part, as follows:

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all *cases under title 11*.
- (b) 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*.
- (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
 - (1) of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
 - (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 1334 (emphasis added). Thus, bankruptcy jurisdiction extends to four types of matters: (1) cases "under" title 11, (2) proceedings "arising under" title 11, (3) proceedings "arising in" a case under title 11, and (4) proceedings "related to" a case under title 11. *See In re Combustion Eng'g*, 391 F.3d 190, 225 (3d Cir. 2005).

A district court may refer matters within its jurisdiction to a bankruptcy court within the district pursuant to 28 U.S.C. § 157(a). This provision is not a separate grant of jurisdiction, but rather provides the mechanism by which bankruptcy cases and proceedings may be sent by the district courts to the bankruptcy courts. Pursuant to 28 U.S.C. § 157(b)(1), the bankruptcy courts may enter final orders for "core" matters (a non-exclusive list of which is provided in 28 U.S.C. § 157(b)(2)). When hearing "non-core" matters, bankruptcy courts are not authorized to enter final orders (absent consent of the parties) -- but rather must submit proposed findings of fact and conclusions of law to the district court. *See* 28 U.S.C. § 157(c).

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These same statutory provisions apply both before and after confirmation of a plan, although, as discussed in detail below, it is almost universally accepted that a bankruptcy court's jurisdiction narrows after plan confirmation. In particular, after discussing the pre-confirmation jurisdiction of the bankruptcy courts in Section II below, these materials explore the post-confirmation jurisdiction of the bankruptcy courts in Section III, including the impact of plan jurisdiction retention provisions (Section III.C). Finally, in Section IV, these materials consider the retention of claims pursuant to 11 U.S.C. § 1123(b)(3)(B), which some courts treat (mistakenly) as a post-confirmation jurisdictional issue.

II. Pre-Confirmation Jurisdiction of the Bankruptcy Court

A. The Core of the Bankruptcy Court's Jurisdiction: "Cases Under," "Proceedings Arising Under" and "Proceedings Arising In"

The jurisdictional category of "cases under" title 11 refers to the bankruptcy petition itself. *See Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006). Jurisdiction under this provision is narrow and does not extend beyond the bankruptcy petition. *See Kovalchick v. Doblin (In re Kovalchick)*, 371 B.R. 54, 59 (Bankr. M.D. Pa. 2006) (discussing statutory basis for jurisdiction).

A proceeding "arises under" title 11 if it invokes a substantive right that is provided under title 11. *See id.* (citing *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 162-63 (3d Cir. 2004) ("*Resorts Int'l*"). "Bankruptcy 'arising under' jurisdiction is analogous to 28 U.S.C. § 1331, which provides for original jurisdiction in district courts 'of all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Stoe*, 436 F.3d at 216 (citations omitted).

A proceeding "arises in" a bankruptcy case if it has no existence outside of the bankruptcy context. *See id.* This category of proceedings includes, for example, the allowance and disallowance of claims, financing orders, complaints to determine the dischargeability of debts and plan confirmation. *See Kovalchick*, 371 B.R. at 60; *see also Stoe*, 436 F.3d at 216 (stating that proceedings "arising in" bankruptcy cases include orders to turn over estate property and orders determining the validity, extent and priority of liens).

B. The Fringes of the Bankruptcy Court's Jurisdiction: Proceedings "Related To" a Bankruptcy Case

(1) The *Pacor* Test

The seminal case interpreting the scope of "related to" jurisdiction is *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), *overruled on other grounds by Things Remembered Inc. v. Petrarca*, 516 U.S. 124 (1995).

The dispute in *Pacor* arose pre-confirmation in a products liability case where a defendant-distributor of asbestos products sought to implead an asbestos manufacturer who subsequently filed for bankruptcy. *See id.* at 986. The *Pacor* court held that the primary action

was not a proceeding "related to" the third-party asbestos manufacturer's bankruptcy proceedings and articulated the test for determining whether a proceeding is related to bankruptcy as "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id.* at 994 (citations and italics omitted). The court explained that a proceeding need not necessarily be against a debtor or its property to fall within a bankruptcy court's "related to" jurisdiction. *See id.* Rather, any action that "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate" satisfies the test. *See id.*

On the facts before it, the court found that the primary action between the parties would have no effect on the third-party defendant's bankruptcy proceedings because the debtor was not a party to the action, would not be bound by *res judicata* or collateral estoppel and could always relitigate any issue or adopt any position in a subsequent action by the defendant-distributor of asbestos products. *See id.* at 995. Thus, the primary action was not "related to" the bankruptcy proceedings.

(2) *Pacor* Adopted by Most Other Circuits; Sixth and Seventh Circuits Apply Narrower Tests

The First, Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted the *Pacor* test. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991), *overruled on other grounds by Conn. Nat'l. Bank v. Germain*, 503 U.S. 249 (1992); *Publicker Indus. Inc. v. U.S. (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002, n.11 (4th Cir. 1986); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987); *Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir. 1987); *Great W. Sav. v. Gordon (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988); *Gardner v. U.S. (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, n.19 (11th Cir. 1990).

The Sixth and Seventh Circuits have adopted more narrow tests. *See Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-84 (6th Cir. 1990) ("We too have accepted the *Pacor* articulation, albeit with the caveat that 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement'" (citations omitted)); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (stating that a proceeding is not "related to" a bankruptcy case "unless its resolution 'affects the amount of property available for distribution or the allocation of property among creditors.'" (citations omitted)).

III. Post-Confirmation Jurisdiction of the Bankruptcy Court

Although the statutory basis for a bankruptcy court's jurisdiction does not change after confirmation of a plan of reorganization (*i.e.*, jurisdiction still is governed by 28 U.S.C. § 1334), bankruptcy courts generally recognize that the scope of their jurisdiction narrows after confirmation of a plan. *See Penthouse Media Group v. Guccione (In re General Media, Inc.)*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005) ("*General Media*") (stating that while section 1334 does not limit a bankruptcy court's jurisdiction after plan confirmation, "all courts that have addressed

the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks"). This reduced scope of jurisdiction follows from the fact that as time passes after confirmation, the universe of matters that relates to a bankruptcy cases necessarily diminishes. *See Gray v. Polar Molecular Corp. (In re Polar Molecular Corp.)*, 195 B.R. 548, 555 (Bankr. D. Mass. 1996) ("*Polar Molecular*"). Further, as discussed below, while the tests applied by the courts to determine "arising under" and "arising in" jurisdiction remain the same after plan confirmation, courts generally apply more narrow tests to determine whether post-confirmation "related to" jurisdiction exists.

A. "Proceedings Arising Under" and "Proceedings Arising In" Jurisdiction After Confirmation of a Reorganization Plan²

The tests applied by the courts to determine "arising under" and "arising in" jurisdiction remain the same after plan confirmation. As in the pre-confirmation context, a proceeding "arises under" chapter 11 if it involves a cause of action created or determined by title 11. *See Winston & Stawn v. Kelly (In re Churchfield Management & Inv. Corp.)*, 122 B.R. 76, 80 (Bankr. N.D. Ill. 1990). For example, after confirmation, this jurisdictional grant typically encompasses causes of action created by title 11 that have been retained by the reorganized debtor or trust. *See, e.g., id. at 79-80* (holding that bankruptcy court had "arising under" jurisdiction to hear section 547 and 548 avoidance actions brought by successor in interest to chapter 11 trustee). Further, actions brought under 11 U.S.C. § 1142 "arise under" title 11 and by definition are brought post-confirmation. *See, e.g., Polar Molecular*, 195 B.R. at 552 ("An action seeking 'an order requiring the debtor or other necessary party to execute the provisions of a confirmed plan is a proceeding arising under Title 11.'" (quoting *In re Harlow Properties, Inc.*, 56 B.R. 794, 797 (9th Cir. BAP 1985))).

A post-confirmation proceeding "arises in" a bankruptcy case if it has no existence outside of the bankruptcy context. *See Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 260 (3d Cir. 2007) ("[C]laims that 'arise in' a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case." (citation omitted)). For example, in *Geruschat*, the court held that the bankruptcy court had post-confirmation "arising in" jurisdiction over an action that creditors brought against the debtor's accountant based on actions that the accountant had taken during the bankruptcy case. *See id. at 262-63* (finding that "a malpractice action against an accountant for misconduct during the bankruptcy on which the bankruptcy judge relied in confirming the plan of reorganization, and in reliance on which the bankruptcy court approved the fees to the accountants, and on which appellants' representatives relied to their detriment in selling the assets to pay their claims, in a manner that contravenes the terms of the reorganization plan, constitutes a core proceeding, more specifically a proceeding 'arising in' the bankruptcy").

² As discussed above, the jurisdictional category of "cases under title 11" refers to the bankruptcy petition itself. Thus, this category of jurisdiction has no significance after confirmation of a reorganization plan.

B. Post-Confirmation "Related to" Jurisdiction of the Bankruptcy Court

Although the statutory basis for a bankruptcy court's "related to" jurisdiction does not change after confirmation of a plan of reorganization, courts generally apply more narrow tests to determine which proceedings are "related to" a bankruptcy case after confirmation has occurred. This contrasts with the courts' approaches with respect to post-confirmation "arising under" and "arising in" jurisdiction, where the same tests are applied both before and after a plan has been confirmed.

(1) *Resorts International* and the "Close Nexus" Test

In *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154 (3d Cir. 2004), the Third Circuit Court of Appeals reexamined *Pacor* in the context of post-confirmation jurisdiction.

In *Resorts Int'l*, a litigation trust established under the debtor's confirmed chapter 11 plan commenced an adversary proceeding for malpractice against an accounting firm that had provided the trust with tax and accounting advice. *See id.* at 156-57. The main allegation in the complaint was that the accounting firm erroneously reported in an audit that accrued interest on the litigation trust's accounts belonged to the debtor rather than the trust. *See id.* at 157. The debtor was not a party to the malpractice action and had assigned all of its rights, title and interest in the litigation trust's primary asset, a claim against Donald Trump and affiliated entities, to the trust under its confirmed plan. *See id.*

In holding that the bankruptcy court lacked jurisdiction over the malpractice action, the court focused on the post-confirmation posture of the case. The court explained that a bankruptcy court's jurisdiction must be confined to appropriate limits and does not extend indefinitely. *See id.* at 164. Indeed, under the traditional analysis set forth in *Pacor*, jurisdiction does not extend unless there is a "logical possibility that the estate will be affected." *See id.* at 165 (citations omitted). Because the debtor's estate ceases to exist upon confirmation of a plan, it would be impossible for a post-confirmation dispute to affect the debtor's estate. *See id.*

Nevertheless, the court recognized that most courts do not apply the *Pacor* test so literally as to entirely bar post-confirmation jurisdiction. *See id.* Rather, courts have applied various standards to determine whether "related to" jurisdiction should be upheld post-confirmation. *See id.* at 166. However, the essential inquiry in all of these standards is "whether there is a 'close nexus' to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." *Id.* at 166-67. "Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Id.* at 167.

Applying this test, the court found that the malpractice action at issue lacked a close nexus to the bankruptcy plan or proceeding and affected only matters collateral to the bankruptcy process. *See id.* at 169. The court reasoned that resolution of these claims would not impact the estate and would not interfere with implementation of the plan. *See id.* Although the proceeding would affect the debtor's former creditors as trust beneficiaries, these former

creditors no longer had a close nexus to the bankruptcy plan or proceeding because they had exchanged their creditor status to attain rights to the litigation claims. *See id.* The court also rejected the litigation trust's argument that the estate was affected by the action because the trust was a continuation of the estate. *See id.* The court found that the debtor's deliberate act to separate the litigation claims from the bankruptcy estate (through assignment of the litigation claims to the trust) weakened the trust's claim that it had the same jurisdictional nexus as that of the estate. *See id.* Nor was there any impact on the debtor because it was not a party to the litigation and had assigned away its rights to the litigation claims. *See id.* at 169-70. Thus, there was no "related to" jurisdiction and the trust could not pursue the malpractice claim in bankruptcy court.

Courts in the Third Circuit have applied the "close nexus" test in a variety of situations. *See, e.g., In re Shenango Group, Inc.*, 501 F.3d 338, 343-44 (3d Cir. 2007) (finding that bankruptcy court appropriately applied "related to" jurisdiction over post-confirmation dispute where debtor was party to dispute and dispute involved interpretation of plan provisions); *Harrow v. Street (In re Fruehauf Trailer Corp.)*, 369 B.R. 817 (Bankr. D. Del. 2007) (exercising "related to" jurisdiction over breach of contract and breach of fiduciary duty claims asserted against trustee of liquidating trust established under debtor's confirmed plan where, *inter alia*, claims were closely tied to execution and administration of plan and trust agreement).

(2) Second, Fourth, Sixth and Ninth Circuit Courts Apply Close Nexus Test

Second Circuit. While the Second Circuit Court of Appeals has not addressed the issue, a recent district court in the Second Circuit considered the various tests employed by other courts and adopted the "close nexus" test. *See Kirschner v. Grant Thornton LLP (In re Refco, Inc. Sec. Litig.)*, No. 07 Civ. 11604 (GEL), 2008 WL 1827644, at *8-10 (S.D.N.Y. Apr. 21, 2008) (finding "close nexus" between bankruptcy case and state law claims asserted by liquidating trustee against certain debtor insiders, professionals and advisors where claims were transferred by debtors to trust and prosecution of claims directly implicated implementation and execution of plan and litigation trust agreement); *see also Cantor v. Am. Banknote Corp.*, No. 06 Civ. 1392 (PAC), 2007 WL 3084966, at *3 (S.D.N.Y. Oct. 22, 2007) (stating that party invoking bankruptcy court's post-confirmation jurisdiction must show that matter has "close nexus" to bankruptcy plan or proceeding and that plan provides for retention of jurisdiction over dispute); *Guccione v. Bell*, No. 06 Civ. 492 (SHS), 2006 WL 2032641, at *4 (S.D.N.Y. July 20, 2006) (same).

Fourth Circuit. In *Valley Historic Ltd. Partnership v. Bank of New York*, 486 F.3d 831, 837 (4th Cir. 2007), the Fourth Circuit Court of Appeals adopted the "close nexus" test set forth in *Resorts Int'l*. The Court reasoned that the "close nexus" test "insures that the proceeding serves a bankruptcy administration purpose on the date the bankruptcy court exercises that jurisdiction." *Id.* "Without such a purpose, 'related to' jurisdiction would extend beyond the limited jurisdiction conferred upon bankruptcy courts in the post-confirmation context." *Id.* Here, the court found no bankruptcy administration purpose would be served by the debtor's breach of contract and tortious interference claims because the confirmed plan made no provision for use of recovery from such actions and all creditors had been paid prior to

commencement of the adversary proceeding. *See id.* Accordingly, the Court held that the bankruptcy court lacked "related to" jurisdiction over the debtor's post-confirmation action.

Sixth Circuit. In *Thickstun Bros. Equip. Co. v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.)*, 344 B.R. 515, 522 (6th Cir. BAP 2006), the Bankruptcy Appellate Panel for the Sixth Circuit adopted the analysis set forth in *Resorts Int'l* and applied the "close nexus" test to conclude that the bankruptcy court had post-confirmation jurisdiction to interpret plan provisions to determine whether the plan preserved the debtor's right to challenge a claim post-confirmation without filing a formal claim objection in the bankruptcy court. The Court noted that "[i]t is difficult to imagine a closer nexus to the Debtor's bankruptcy case and the confirmed Plan than this direct request for interpretation and clarification of the Plan's terms." *Id.*

Ninth Circuit. The Ninth Circuit Court of Appeals expressly adopted the "close nexus" test in *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189 (9th Cir. 2005) (finding sufficiently "close nexus" between contract and tort claims and bankruptcy proceeding where resolution of claims likely would require interpretation of plan and remedies could affect implementation and execution of plan); *see also Sea Hawk Seafoods, Inc. v. Alaska (In re Valdez Fisheries Dev. Ass'n, Inc.)*, 439 F.3d 545, 548 (9th Cir. 2006) (recognizing adoption of "close nexus" test).

(3) Courts in Fifth, Seventh and Eighth Circuits Apply Narrower Tests

Fifth Circuit. The Fifth Circuit Court of Appeals applies a much narrower test of post-confirmation jurisdiction. In *Bank of Louisiana v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Texas, Inc.)*, 266 F.3d 388 (5th Cir. 2001) ("*Craig's Stores*"), a case that pre-dates *Resorts Int'l*, the court focused on the debtor's emergence from bankruptcy and the need for a reorganized debtor to function without the "protective wraps" of the bankruptcy court. *See id.* at 390-91. The court explained 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.*" *Id.* at 390 (citing *Fairfield Communities, Inc. v. Daleske (In re Fairfield Communities, Inc.)*, 142 F.3d 1093, 1095 (8th Cir. 1998)) (emphasis added).³ "No longer is expansive bankruptcy court jurisdiction required to facilitate 'administration' of the debtor's estate, for there is no estate left to reorganize." *Craig's Stores*, 266 F.3d at 390. Here, the Court declined to assume post-confirmation jurisdiction over the debtor's state law claims against a bank for the bank's alleged breach of an assumed contract between the parties where such claims did not bear upon interpretation or execution of the debtor's plan. *See id.* at 391.

³ While the *Craig's Stores* court relied on *Fairfield Communities* for this proposition, the court's analysis in *Fairfield Communities* turned on a plan jurisdiction retention provision -- and not on the scope of section 1334. Thus, *Fairfield Communities* does not stand for the proposition cited by the *Craig's Stores* court.

Since *Craig's Stores*, the Fifth Circuit Court of Appeals has applied the "implementation or execution" test on multiple occasions. See, e.g., *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002) (recognizing Fifth Circuit's adoption of narrow post-confirmation jurisdiction standard providing that after plan has been confirmed, debtor's estate and thus bankruptcy court jurisdiction ceases to exist other than for matters pertaining to implementation or execution of plan); *Lloyd Ward & Assocs., P.C. v. U.S. Trustee (In re Network Cancer Care, L.P.)*, 197 Fed. Appx. 284, 286 (5th Cir. 2006) (affirming lower courts and finding that bankruptcy court had jurisdiction over post-confirmation professional fee matter where professional's services pertained to the "implementation and execution" of the debtor's reorganization plan).

Seventh Circuit. As is the case prior to plan confirmation, courts in the Seventh Circuit apply a narrow test to determine post-confirmation bankruptcy court jurisdiction. Indeed, Seventh Circuit courts appear to apply the same "related to" jurisdictional standard both before and after confirmation of a plan. See, e.g., *Cytomedix, Inc. v. Perfusion Partners & Assocs., Inc.*, 243 F. Supp. 2d 786, 789-91 (N.D. Ill. 2003) (declining to exercise "related to" jurisdiction over patent law claims where outcome of case would not impact amount of property available for distribution or allocation of property among creditors); *CLC Creditors' Grantor Trust v. Sonnenschein Nath & Rosenthal LLP (In re Commercial Loan Corp.)*, 363 B.R. 559, 565-66 (Bankr. N.D. Ill. 2007) (declining to exercise "related to" jurisdiction over state law claim asserted after confirmation of plan where recovery on claim would not affect amount of estate property distributed under plan or allocation of such property among creditors); *Federalphia Steel LLC Creditors' Trust v. Fed. Pipe & Steel Corp.*, 341 B.R. 872, 880-81 (Bankr. N.D. Ill. 2006) (rejecting "close nexus" analysis and declining to exercise related to jurisdiction over pre-petition state laws claims where recovery on claims would not affect amount or allocation of estate property distributed to creditors); *Conseco, Inc. v. Adams (In re Conseco, Inc.)*, 318 B.R. 425, 427-429 (Bankr. N.D. Ill. 2004) (declining to exercise post-confirmation jurisdiction over state law claims because action would not affect any creditor's distribution of assets under plan).

Although Seventh Circuit courts frequently observe that post-confirmation "related to" jurisdiction is "sharply reduced" and that "exercise of such jurisdiction is appropriate only to ensure that reorganization plans are implemented and to protect estate assets devoted to implement the confirmed plan," *Cytomedix, Inc.*, 243 F. Supp. 2d at 789, these courts nonetheless appear to apply their prepetition jurisdictional standard unchanged. See, e.g., *id.* at 790-91, *Federalphia Steel*, 341 B.R. at 880-81.

Eighth Circuit. The Eighth Circuit Court of Appeals similarly has applied a narrow standard in analyzing the post-confirmation jurisdiction of the bankruptcy courts. See *Fairfield Communities*, 142 F.3d 1093. The *Fairfield Communities* court stated the general rule that "once a bankruptcy debtor's reorganization plan has been confirmed, as Fairfield's plan was before Fairfield initiated this case, 'the estate of the debtor, and thus the bankruptcy court's jurisdiction, ceases to exist.'" *Id.* at 1095 (citation omitted). The court went on to qualify this general rule by explaining that "[n]evertheless, even after the confirmation of a debtor's plan, 'a bankruptcy court may explicitly retain jurisdiction [by stating so in the order confirming the plan] over aspects of a plan related to its administration and interpretation.'" *Id.* (citation omitted). Thus, at least under *Fairfield Communities*, a bankruptcy court may have post-

confirmation "related to" jurisdiction over matters affecting the "administration and interpretation" of the plan -- but only to the extent that such jurisdiction was explicitly retained in the plan or confirmation order.

(4) First Circuit Applies Broader Test in Liquidating Plan Context

On the other hand, the First Circuit Court of Appeals has applied a much broader test than that articulated in *Resorts Int'l* in the context of a liquidating plan. *See Boston Reg'l Med. Ctr., Inc. v. Reynolds (In re Boston Reg'l Med. Ctr., Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005) (asserting "related to" jurisdiction over post-confirmation action and holding that "when a debtor (or a trustee acting to the debtor's behoof) commences litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization, the compass of related to jurisdiction persists undiminished after plan confirmation"). While the court recognized that the "related to" jurisdiction of the bankruptcy courts generally contracts after plan confirmation, the court found that this outcome should be different in the case of a liquidating plan. *See id.* at 106. First, in the case of a liquidating plan, the reorganized debtor is not reentering the marketplace, but rather "the reorganized debtor's sole purpose is to wind up its affairs, convert its assets to cash, and pay creditors a pro rata dividend." *Id.* Further, in contrast to the case where the debtor is reorganizing and fewer proceedings will relate to the underlying bankruptcy cases as time passes, any litigation involving a liquidating debtor much more directly relates to the bankruptcy case (since proceeds merely will be distributed to creditors and will not be used to fund the going-forward business). *See id.* at 106-07. Finally, retaining broad post-confirmation jurisdiction furthers "the strong federal policy in favor of the expeditious liquidation of debtor corporations and the prompt distribution of available assets to creditors." *Id.* at 107.

(5) No Clear Test Articulated by Tenth or Eleventh Circuits

Although the Tenth Circuit Court of Appeals has not adopted a particular test with respect to post-confirmation related to jurisdiction, the court has provided some guidance regarding its views on this subject. *See U.S. Trustee v. CF & I Fabricators of Utah, Inc. (In re CF & I Fabricators of Utah, Inc.)*, 150 F.3d 1233, 1237 (10th Cir. 1998) ("*CF & I Fabricators*") (finding post-confirmation jurisdiction over action by U.S. Trustee to collect quarterly fees because creditors' recovery under plan would be affected). In *CF & I Fabricators*, the court acknowledged that if a matter "sufficiently affects creditors' recoveries under a plan of reorganization," post-confirmation "related to" jurisdiction exists. *See id.* However, the court was not adopting any single test in making its decision but merely was identifying this factor as an example. *See id.*

The Eleventh Circuit Court of Appeals has provided no guidance regarding the test it would apply in evaluating post-confirmation related to jurisdiction.

C. Impact of Jurisdiction Retention Provisions

The scope of a court's post-confirmation jurisdiction may be impacted by a plan's jurisdiction retention provisions. Almost all plans contain such provisions, which recite that the

bankruptcy court will retain post-confirmation jurisdiction over general matters such as resolution of claims and also specific matters unique to the particular case. Retention of jurisdiction provisions may attempt to broaden the bankruptcy court's jurisdiction under 11 U.S.C. § 1334, or they may not explicitly seek to exercise the full scope of jurisdiction available under that section (*e.g.*, a provision might specifically retain the bankruptcy court's post-confirmation jurisdiction over preference matters, but might not mention jurisdiction over claims resolution matters). Sometimes a retention of jurisdiction provision may specifically exclude certain matters from the bankruptcy court's post-confirmation jurisdiction, even though such matters otherwise would have fallen within the court's jurisdiction under 11 U.S.C. § 1334.

While courts generally agree that a plan's jurisdiction retention provision can not expand a court's statutory subject matter jurisdiction, there is disagreement among courts regarding whether such a jurisdiction provision can limit a court's jurisdiction (either explicitly or by omission). In particular, some courts find that a court's jurisdiction under 11 U.S.C. § 1334 is not affected by a plan's jurisdiction provision (*i.e.*, such a provision can not expand or contract a court's statutory subject matter jurisdiction), while other courts find that a court's post-confirmation subject matter jurisdiction depends upon a plan's jurisdiction retention provision.

(1) Almost All Courts Recognize That Jurisdiction Retention Provisions Cannot Expand Bankruptcy Court Jurisdiction Beyond That Provided Under 11 U.S.C. § 1334

Almost all courts agree that a plan's jurisdiction retention provision cannot expand a bankruptcy court's post-confirmation jurisdiction beyond that provided by statute. *See, e.g., Shenango Group*, 501 F.3d at 344 n.1 (analyzing the existence of post-confirmation "related-to" jurisdiction and stating that court has "not placed any independent weight upon the retention of jurisdiction provision in [the debtor's] Reorganization Plan"); *Valley Historic Ltd. Partnership*, 486 F.3d at 837 (stating that "neither the parties nor the bankruptcy court can create § 1334 jurisdiction by simply inserting a retention of jurisdiction provision in a plan of reorganization if jurisdiction is otherwise lacking"); *Resorts Int'l*, 372 F.3d at 161 ("[I]f a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating that it has jurisdiction in a confirmation or other order."); *U.S. Brass Corp.*, 301 F.3d at 303 (5th Cir. 2002) ("In asserting jurisdiction, the bankruptcy court relied on both a broad retention-of-jurisdiction provision in the confirmed plan and its authority under the Bankruptcy Code to clarify and enforce its own orders. 'However, the source of the bankruptcy court's subject matter jurisdiction is neither the Bankruptcy Code nor the express terms of the Plan. The source of the bankruptcy court's jurisdiction is 28 U.S.C. §§ 1334 and 157.'" (citation omitted)); *Harstad v. First Am. Bank*, 39 F.3d 898, 902 n.7 (8th Cir. 1994) (acknowledging that plan provision cannot confer jurisdiction upon bankruptcy court); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) ("[T]he fact that the bankruptcy court, in the orders approving the bankruptcy sale and later in the plan of reorganization, purported expressly to assume jurisdiction to entertain such proceedings could not confer jurisdiction. A court cannot write its own jurisdictional ticket."); *Guttman v. Martin (In re Railworks Corp.)*, 325 B.R. 709, 722-23 (Bankr. D. Md. 2005) ("If there is no jurisdiction under 28 U.S.C. § 1334 ... retention of jurisdiction provisions in a plan of reorganization or trust agreement are fundamentally irrelevant."); *Diagnostic Int'l, Inc. v. Aerobic Life Prods. Co. (In re Diagnostic Int'l, Inc.)*, 257 B.R. 511, 514 (Bankr. D. Ariz. 2000)

(stating that retention of jurisdiction clause cannot grant subject-matter jurisdiction over proceeding when proceeding is outside court's jurisdictional limits defined by statute); *see also Ins. Corp. v. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (stating that subject matter jurisdiction cannot be conferred upon a federal court by consent of the parties).

(2) Some Courts Find That Plan's Failure To Retain Jurisdiction Does Not Diminish Bankruptcy Court Jurisdiction Under 11 U.S.C. § 1334

Some courts correspondingly recognize that a plan's failure to include a jurisdiction retention provision has no affect on the scope of the bankruptcy court's post-confirmation jurisdiction. *See, e.g., U.S. Trustee v. Gryphon At The Stone Mansion, Inc.*, 216 B.R. 764, 769 (W.D. Pa. 1997), *aff'd*, 166 F.3d 552 (3d Cir. 1999) ("*Gryphon*") (finding that lack of jurisdiction retention provision within confirmed plan did not limit court's jurisdiction to consider U.S. Trustee's request for payment of quarterly fees). The district court's opinion in *Gryphon* states:

[R]etention of jurisdiction in the confirmed plan is not dispositive on the issue of the bankruptcy court's jurisdiction.

"[J]urisdiction cannot be conferred by consent." A retention of jurisdiction provision within a confirmed plan does not grant a bankruptcy court jurisdiction. Similarly, the absence of a provision retaining jurisdiction in a confirmed plan does not deprive a bankruptcy court of jurisdiction. Hence, the lack of a jurisdiction provision within the confirmed plan does not affect the bankruptcy court's jurisdiction to consider the request of the United States Trustee for quarterly fees.

[T]he source of the bankruptcy court's subject matter jurisdiction is neither the Bankruptcy Code nor the express terms of the Plan. The source of the bankruptcy court's jurisdiction is 28 U.S.C. §§ 1334 and 157, and pursuant to those statutory sources, the bankruptcy court has jurisdiction to adjudicate the United States Trustee's request for quarterly fees.

Gryphon, 216 B.R. at 769 (internal citations omitted).

Other courts similarly find that a plan retention of jurisdiction provision is not necessary for a bankruptcy court to assume jurisdiction over a proceeding. *See Burlington Motor Carriers, Inc. v. Comdata Network, Inc. (In re Burlington Motor Holdings, Inc.)*, Civ. A. 99-573-GMS, 2002 WL 73490, at *1-2 (D. Del. Jan. 18, 2002) (recognizing that absence of retention of jurisdiction provision within confirmed plan does not deprive a bankruptcy court of jurisdiction and finding that bankruptcy court retained jurisdiction over avoidance actions even though such actions were not enumerated in plan retention of jurisdiction provision); *Vergos v. Uncle Bud's, Inc.*, No. 3-97-0296, 1998 WL 652542, at *13-14 (M.D. Tenn. Aug. 17, 1998) (holding that bankruptcy court had jurisdiction over U.S. Trustee's request for post-confirmation quarterly fees despite absence of plan provision retaining jurisdiction over such matters); *TGX Corp. v. J.C.*

Templeton (In re TGX Corp.), 168 B.R. 122, 130 n.29 (W.D. La. 1994) ("The defendants place great emphasis upon the confirmed plan's failure to explicitly provide for the bankruptcy court's retention of jurisdiction over the instant proceedings. ... With the advent of the Bankruptcy Code ... however, the extent of federal jurisdiction over adversary proceedings became governed by 28 U.S.C. § 1334."); *In re CSC Indus., Inc.*, 226 B.R. 402, 405 (Bankr. N.D. Ohio 1998) ("Despite no specific provision in the confirmed plan regarding the retention of jurisdiction, we conclude that the absence of such provision does not preclude this Court's jurisdiction."); *Holly's, Inc. v. City of Kentwood (In re Holly's, Inc.)*, 172 B.R. 545, 555 (Bankr. W.D. Mich. 1994) ("[If] 28 U.S.C. § 1334 conferred subject matter jurisdiction over a postconfirmation proceeding, the absence of reference to such a proceeding in the plan's retention of jurisdiction provision would not destroy the court's subject matter jurisdiction.").

(3) Other Courts Find That Bankruptcy Court Jurisdiction Relies on Plan Jurisdiction Retention Provisions

On the other hand, other courts hold that a jurisdiction retention provision is essential to preserve the court's post-confirmation subject matter jurisdiction. *See, e.g., Fairfield Communities*, 142 F.3d at 1095 (stating that although a bankruptcy court's jurisdiction generally ceases to exist upon plan confirmation, a bankruptcy court may assume jurisdiction over aspects of a plan related to its administration and interpretation if such jurisdiction is explicitly retained in the plan); *Hosp. and Univ. Property Damages Claimants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 7 F.3d 32, 34 (2nd Cir. 1993) ("*Johns-Manville*") (stating that "[a] bankruptcy court retains post-confirmation jurisdiction in a chapter 11 proceeding only to the extent provided in the plan of reorganization" and, accordingly, "[t]he bankruptcy court's post-confirmation jurisdiction ... is defined by reference to the Plan"); *General Media*, 335 B.R. at 73-74 (following *Johns-Manville* and requiring that party invoking post-confirmation jurisdiction establish that matter has "close nexus" to bankruptcy plan or proceeding and that plan provides for retention of jurisdiction over dispute); *Gallien v. Sanwa Leasing Corp. (In re Gallien)*, 214 B.R. 583, 585 (Bankr. E.D. Ark. 1997) ("[T]he [b]ankruptcy court lacks subject matter jurisdiction over adversary proceedings commenced post-confirmation unless the plan expressly provides for retention of such jurisdiction.") (citing *Johns-Manville*); *see also Smith v. John Peter Lee, Ltd. (In re Smith)*, unpublished opinion, 114 F.3d 1179, *3 (9th Cir. Mar. 20, 1998) (relying on plan jurisdiction retention provisions in finding that bankruptcy court had post-confirmation jurisdiction over debtor's assets).

In addition, some courts find that plan provisions specifically excluding certain matters from a bankruptcy court's post-confirmation jurisdiction are effective. *See, e.g., Grossman v. Murray (In re Murray)*, 214 B.R. 271, 277 (Bankr. D. Mass. 1997) (finding that court did not retain jurisdiction over post-confirmation adversary proceedings where language in plan and confirmation order manifested parties' intention to reserve jurisdiction over adversary proceedings only to the extent that such proceedings were pending on confirmation date).

IV. Retention of Claims Under 11 U.S.C. § 1123(b)(3)(B)

Section 1123(b)(3)(B) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), provides that a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest" 11 U.S.C. § 1123(b)(3)(B). This provision is not jurisdictional in nature but rather provides authority for the post-confirmation pursuit of claims (*i.e.*, claims that are not properly retained under section 1123(b)(3)(B) are lost). Nonetheless, some courts discuss section 1123(b)(3)(B) in terms of jurisdiction and find that they lack jurisdiction when claims have not been properly retained under section 1123(b)(3)(B).

There is great divergence among the bankruptcy courts regarding the specificity required under section 1123(b)(3)(B) in order to successfully retain claims for post-confirmation adjudication. At one end of the spectrum, some courts have found that debtors need only include a general reservation clause within a plan to preserve the right to pursue claims post-confirmation. Courts on the other end of the spectrum require that debtors specifically identify target defendants, potential causes of action and the factual bases for such causes of action in order to successfully retain claims. Thus, counsel for both debtors and creditors must be keenly aware of the legal standard that will be applied in their particular jurisdictions in assessing retention of claims under section 1123(b)(3)(B).

A. Some Courts Find That General Claims Retention Clause Sufficient to Retain Claims

Some courts require only a very general retention of claims provision under section 1123(b)(3)(B) in order to preserve such claims for post-confirmation adjudication. For example, in *JP Morgan Trust Co. v. Mid-America Pipeline Co.*, 413 F. Supp. 2d 1244, 1249 (D. Kan. 2006), the liquidating trustee of a trust formed under the debtor's chapter 11 plan brought an action to recover damages arising from the termination of a lease relating to use of a pipeline for transporting natural gas to a refinery owned by the debtor. The defendants asserted that the claims were barred by *res judicata* because the debtor failed to commence or properly reserve these claims prior to entry of the confirmation order. The claims retention clause provided that:

[T]he Liquidating Trustee ... will, pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, retain and become the holder of, and have the exclusive right to enforce any and all present or future Litigation Claims and any and all rights of any and all of the Debtors that arose before or after the Commencement Date, including, but not limited to, rights, claims, causes of action, avoiding powers, suits and proceedings arising under Chapter 5 of the Bankruptcy Code, including, without limitation, any and all potential rights, claims and causes of action related to payments made by the Debtors prior to the Petition Date and Disclosed in the Schedules.

Id. at 1279-80. The Plan defined "Litigation Claims" as "the claims, rights, causes of action, defenses, counterclaims, suits or proceedings, whether in law or in equity, whether known or unknown, that the Debtors, the Estates or the Bankruptcy Committees may hold or assert against

any non-Debtor entity, including, without limitation, all claims, rights of action, suits and proceedings under Chapter 5 of the Bankruptcy Code" *See id.* at 1280.

The court found that the language of the retention clause combined with the broad definition of "Litigation Claims" was sufficient to retain the claims asserted by the liquidating trustee against the defendants here. *See id.* Further, this was true regardless of when the claims arose or whether the defendant had knowledge of such claims at the time the confirmation order was entered by the court. *See id.* at 1278.

Similarly, in *Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51 (1st Cir. 2004), the court found that a broad claims retention clause was sufficient to retain claims of the particular type identified and that such provision was not required to specifically list individual claims. *See id.* at 59-60. The clause provided that:

The Liquidating Supervisor, under the supervision of the Post-Effective Date Committee ... is authorized to investigate, prosecute and, if necessary, litigate, any Cause of Action [the definition of which expressly includes avoidance actions] ... on behalf of the Debtor and shall have standing as an Estate representative to pursue any Causes of Action and Claim objections, whether initially filed by the Debtor or the Liquidating Supervisor

Id. at 59. The court distinguished this clause from others which have been struck down by stating that the defective clauses were "of a far more general nature." *See id.* at 59.

Other courts have found general claims retention clauses merely identifying the types or categories of actions to be reserved sufficient. *See, e.g., Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 564 (9th Cir. BAP 2002) (stating that reservation of categories of actions is sufficient under section 1123(b)(3)(B), and that it is unnecessary to list all defendants and possible theories of litigation in order to reserve claims); *In re Value Music Concepts, Inc.*, 329 B.R. 111, 119-120 (Bankr. N.D. Ga. 2005) (finding no requirement under section 1123(b)(3)(B) that specific defendants or claims be named, but rather that retention of claims by type or category is sufficient); *Alberts v. Tuft (In re Greater Southeast Community Hosp. Corp.)*, 333 B.R. 506, 533 (Bankr. D.D.C. 2005) (rejecting cases requiring that claims and potential defendants be identified with specificity in retention clauses as such a requirement would be onerous and detrimental to the confirmation process); *Cohen v. TIC Fin. Sys. (In re Ampace Corp.)*, 279 B.R. 145, 160 (Bankr. D. Del. 2002) (finding that "a general reservation in a plan of reorganization indicating the type or category of claims to be preserved should be sufficiently specific to provide creditors with notice that their claims may be challenged post-confirmation").

B. Other Courts Require Detailed Claims Retention Clause to Retain Claims

Other courts find that broad claims retention provisions, even those listing categories or types of claims to be retained, contain insufficient specificity to effectively retain claims for post-confirmation adjudication. For example, in *Browning v. Levy*, 283 F.3d 761,

774-75 (6th Cir. 2002), the court found that claims were not reserved through the following omnibus claims retention clause:⁴

In accordance with section 1123(b) of the Bankruptcy Code, the Company shall retain and may enforce any claims, rights, and causes of action that the Debtor or its bankruptcy estate may hold against any person or entity, including, without limitation, claims and causes of action arising under section 542, 543, 544, 547, 548, 550, or 553 of the Bankruptcy Code.

Id. The court found it significant that the retention clause neither named the intended defendants nor stated the factual bases for the reserved claims. *See id.* at 775. Further, the court noted that the "blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding because it did not enable the value of the [debtor's] claims to be taken into account in the disposition of the debtor's estate." *Id.* Accordingly, the retention clause failed to defeat the application of *res judicata* to the debtor's litigation claims. *See id.*

The court in *D&K Properties Crystal Lake*, 112 F.3d 257 (7th Cir. 1997) reached a similar result. In *D&K Properties Crystal Lake*, the former chapter 11 debtor brought an action against its secured mortgage lender for bad faith and breach of contract in improperly adjusting the interest rate on its loan. The retention clause in the debtor's confirmed plan retained "all causes of action existing in favor of the Debtor." *See id.* at 260. The court found that because the retention provision failed to specifically identify the claims to be preserved, the cause of action at issue was barred. *See id.* ("A blanket reservation that seeks to reserve all causes of action reserves nothing.").

Similarly, in *Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698, 704-05 (9th Cir. BAP 1996), the court precluded the debtor from objecting to a creditor's claim because the claim was not specifically identified in the plan's claims retention provision. The debtors relied on language in the plan providing the debtors with thirty days from plan confirmation to initiate adversary proceedings to contest the amount, allowability, priority and secured status of claims and to bring counter-claims against creditors asserting claims. *See id.* at 704. Further, although the debtors specifically noted in their disclosure statement that they might have various counter claims against the particular defendant, the court found that such expression still failed to mention the grounds for the potential claims. *See id.*

⁴ Although the claims retention provision was set forth in debtor's disclosure statement rather than its plan, the court did not focus on this distinction. Section 1123(b)(3)(B) provides that a *plan* may retain claims.