

1988

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Recommended Citation

Shaun Sweeney, *Removal of Action from State Court to Bankruptcy Court*, 26 Duq. L. Rev. 941 (1988).
Available at: <https://dsc.duq.edu/dlr/vol26/iss4/6>

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COMMENTS

REMOVAL OF ACTION FROM STATE COURT TO BANKRUPTCY COURT

The issue discussed in this comment is: "Under what circumstances will a United States Bankruptcy Court accept removal of an action from state court to the Bankruptcy Court for hearing and possibly final adjudication?"

Let us assume the following hypothetical. Corporation X files a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code.¹ Subsequent to that filing, Corporation X enters into an insurance contract with Insurance Company A. Shortly thereafter, Corporation X cancels the policy and obtains insurance from Insurance Company B, all before any Chapter 11 reorganization is approved by the bankruptcy court. Insurance Company A then brings an action in state court to recover a premium allegedly owed by Corporation X.² For any number of reasons, Corporation X wishes to transfer the action from the state court to the bankruptcy court where the Chapter 11 reorganization is pending.³

The starting point for answering the question illustrated above is contained in Title 28 of the United States Code. Three statutes in

1. 11 U.S.C.A. § 1101, *et seq.* (1979).

2. Because the "claim" or "cause of action" against Corporation X did not arise until after Corporation X filed the bankruptcy petition, the automatic stay of 11 U.S.C.A. § 362 (1979) would not apply. *See* Turner Broadcasting System, Inc. v. Sanyo Electric, Inc., 33 B.R. 996 (Bankr. N.D.Ga. 1983), *aff'd*, 742 F.2d 1465 (Bankr. 11th Cir. 1984); Avellino & Bienes v. M. Frenville Co., Inc., 744 F.2d 332 (Bankr. 3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); Continental Air Lines v. Hillblom (*In re* Continental Air Lines), 61 B.R. 758 (Bankr. S.D.Tex. 1986); Holland America Insurance Co. v. Succession of Roy, 777 F.2d 992 (Bankr. 5th Cir. 1985).

3. The most obvious reasons, of course, would be to minimize legal fees and obtain a speedier adjudication of claims.

particular address different aspects of the question. In general, these three statutes address jurisdiction of bankruptcy courts,⁴ cases which may be removed to the bankruptcy courts,⁵ and the procedures for removal.⁶ It is clear from these statutes that in deciding whether

4. 28 U.S.C.A. § 1334 (Supp. 1987) provides:

(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) 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.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect to State law, from abstaining from hearing a particular proceeding under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

5. 28 U.S.C.A. § 1452 (Supp. 1987) provides:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise.

6. 28 U.S.C.A. § 157 (Supp. 1987) provides:

Section 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy 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

Corporation X may remove the action to the bankruptcy court, one

orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

- (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 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (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; and
- (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.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear

must first determine whether the action in the state court is a "core" proceeding or an action which is merely "related to" the proceedings in the bankruptcy court. The importance of characterizing a proceeding as either a "core" proceeding or as a "related" proceeding becomes apparent upon examination of the advantages that a core proceeding enjoys when the question of transferability arises. In a "related" proceeding, as opposed to a "core" proceeding, (1) the bankruptcy judge does not have the authority to enter final orders or judgments without the consent of all parties to the proceeding,⁷ and (2) mandatory abstention may be applicable.⁸ The next question then obviously is: "How does one know if the particular proceeding at issue is a core proceeding or a related proceeding?"

To answer this question, one should first proceed to 28 U.S.C.A. § 157(b)(2). There are fifteen nonexclusive illustrations of core proceedings (which bankruptcy judges "may hear and determine") provided in section 157 (b)(2).¹⁰ Each of the proceedings listed in section 157 (b)(2) falls within one of four distinguishable categories. Those categories are: (1) matters of administration; (2) avoiding actions; (3) matters concerning property of the estate; and, (4) other actions.¹¹ Category (1), "matters of administration," encompasses the type of proceedings listed in subparts (A), (B), (D), (G), (I), (J), and (L).¹² Category (2), "avoiding actions," includes the type of proceedings contained in section 157 (b)(2)(F) and (H).¹³ The third category, "matters concerning property of the estate," includes subparts (E), (K), (M), and (N).¹⁴ The fourth, and last, category, "other

and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

7. See 28 U.S.C.A. § 157(c)(1).

8. See 28 U.S.C.A. § 1334(c)(2).

9. See 28 U.S.C.A. § 157(b)(1).

10. See *supra* note 6.

11. King, *Collier on Bankruptcy*, § 3.01, at 3-37.

12. *Id.* The proceedings which fall within this first category are proceedings which are obviously unique to bankruptcy cases. Accordingly, there has been almost no litigation regarding bankruptcy court jurisdiction in these matters. *Id.*

13. *Id.*

14. *Id.* at 3-39.

actions," includes the type of proceedings contained in subparts (C) and (O).¹⁵

The language of the various subparts which are included in the first three categories makes it perfectly clear that the contract action by the insurance company could not be removed pursuant to any of those categories.¹⁶ However, the fourth category, "other actions," includes section 157(b)(2)(O).¹⁷ According to that subpart, core proceedings include "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."¹⁸ The broad language of subpart (O) lends itself to an argument that the hypothetical action against the Chapter 11 debtor by the insurance company would fall within the parameters of the fourth category of core proceedings. However, the courts have not been willing to give such an all-encompassing interpretation to subpart (O), which, like subpart (A), has been called a "catch-all" provision.¹⁹

One of the most respected commentators in the field of bankruptcy has stated that core proceedings are those which arise in title 11

15. *Id.* at 3-41.

16. Obviously, the common law contract action is not a matter concerning the administration of the proceeding in the bankruptcy court, such as an order in respect to obtaining credit or a confirmation of a plan. Furthermore, the contract action is not an action which is in any way similar to a determination, avoidance or recovery of preferences or fraudulent conveyances. Finally, the contract action does not fall into the category of proceedings establishing priority of liens or to approve the lease, use or turning-over of estate property.

17. *See supra* note 6.

18. *Id.*

19. Subparts (A) and (O) both have been described as "catch-all" provisions. *See King, Jurisdictional Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 687-88 (1985). However, one extreme interpretation completely disregarded subparts (A) and (O).

The apparent broad application that could be given to section 157(b)(2)(A) and (O) should, however, be tempered by Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982) and the other categories of section 157(b)(2) which are more specific in their terminology. . . . Clearly, subsections 157(b)(2)(A) and (O) should not be interpreted to include related non-core proceedings since 28 U.S.C.A. section 157(c)(1) specifically prevents a bankruptcy judge from rendering final judgments in such instances. A common sense interpretation of the term "core" would dictate that it include only those proceedings which are specifically defined in subsection (b)(2)(B) through (N) or in the Bankruptcy Code itself.

Cameron v. Anderson (*In re American Energy, Inc.*), 50 B.R. 175 (Bankr. D.N.D. 1985).

cases or arise under title 11 (implying that the language in the catch-all provisions is not authoritative).²⁰ Because this definition alone is not always very helpful, and because the fifteen examples found in section 157(b)(2) are not exclusive and in fact are very general in nature, definitions that have been provided by several bankruptcy courts may be referred to as a means of obtaining a better understanding of what is meant by a "core" proceeding. One case²¹ in particular expressed a number of factors to be examined in determining whether a proceeding is core or non-core:

1. Does the proceeding fall within one of the specific categories of core proceedings set forth in 28 U.S.C.A. § 157(a)(b)(2)?²²

2. To what extent does the resolution of the proceeding impact upon the bankruptcy case? Does the ability of the debtor to reorganize and say its creditors hinge on the quick resolution of the proceeding, or is the proceeding merely "peripheral" to the case?²³

3. Is the proceeding one which the Bankruptcy Court traditionally has been empowered to decide?²⁴

4. Is there a "federal rule of decision provided for any of the issues in the lawsuit?" If the proceeding arises entirely under state law, does it present substantial questions of law and fact for adjudication?²⁵

Another expression of the meaning of "core" holds that it "was meant to encompass those proceedings which would not exist at law in absence of the Bankruptcy Code."²⁶ Still another interpretation defines core as including those proceedings at the core of the bankruptcy court's power - proceedings which would have no existence outside of a bankruptcy proceeding.²⁷

The main reason for the restrictive interpretations by the district courts of the provision describing core proceeding in section 157(b)(2) is the case of *Northern Pipeline Construction Co. v. Marathon Pipe*

20. King, *Collier on Bankruptcy*, § 3.01, at 3-35. Although, as discussed in the text above, examples of core proceedings are provided in § 157(b)(2), the Bankruptcy Code does not provide conclusive definitions of "core" or "non-core" proceedings.

21. *Baldwin-United Corp. v. Adams* (Matter of Baldwin-United Corp.), 52 B.R. 541 (Bankr. S.D.Ohio 1985).

22. *Id.* at 546.

23. *Id.*

24. *Id.*

25. *Id.* at 547.

26. *United States v. Farmers State Bank (In re Alexander)*, 49 B.R. 733, 736 (Bankr. N.D. 1985).

27. *See In re Seton-Scherr, Inc.*, 26 B.R. 563 (Bankr. N.D.Ohio 1983).

*Line Co.*²⁸ (hereinafter "*Marathon*"). In *Marathon*, an action was instituted by debtor-in-possession Northern Pipeline against Marathon to recover damages for breach of contract.²⁹ The suit was commenced pursuant to the Bankruptcy Act of 1978³⁰ ("Act") in the United States Bankruptcy Court for the District of Minnesota two months after Northern Pipeline had petitioned for reorganization in that court.³¹ Marathon filed a motion to dismiss the action on the ground that the Bankruptcy Act unconstitutionally conferred Article III judicial power upon bankruptcy judges who neither had life tenure nor protection against salary diminution under the Act.³² The bankruptcy judge denied the motion, but on appeal to the United States District Court for the District of Minnesota, Marathon's motion to dismiss was granted.³³ On direct appeal, the Supreme Court of the United States affirmed the decision of the district court.³⁴

As the court stated in *Shaford Companies Inc., v. Curr International Coffees, Inc. (In re Shaford Companies, Inc.)*,³⁵ "the only clear 'holding' of the divided court"³⁶ in *Marathon* was stated in the concurring opinion by Justice Rehnquist. In reaching his decision that Northern Pipeline's lawsuit could not be adjudicated by a bankruptcy court, Justice Rehnquist stated:

From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation and other counts which are the stuff of the traditional actions at common law There apparently is no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that Court.³⁷

Consequently, it is not at all surprising that the district courts in the cases discussed above have not been willing to interpret "core

28. 458 U.S. 50 (1982).

29. *Id.* at 56.

30. Pub. L. 95-598, 92 Stat., 2549, effective Oct. 1, 1979.

31. *Marathon*, 458 U.S. at 56.

32. *Id.* at 56-57.

33. *Id.* at 57.

34. *Id.* at 87.

35. 52 B.R. 832 (Bankr. D.N.H. 1985).

36. *Id.* at 835. The Court in *Marathon* was divided with Justice Brennan writing the plurality opinion joined by Justices Marshall, Blackmun and Stevens. Justice Rehnquist wrote a concurring opinion in which Justice O'Connor joined. Former Chief Justice Burger wrote a dissenting opinion. Justice White wrote a dissenting opinion in which Justice Powell and former Chief Justice Burger joined.

37. *Marathon*, 458 U.S. at 90.

proceedings" to permit bankruptcy judges to hear and finally determine state-based causes of action.

In discussing the scope to be given to the term "core" and section 157(b)(2), the court in the case of *United States v. Farmers State Bank (In re Alexander)*³⁸ provided a discussion which very accurately sums up the findings expressed in the vast majority of the opinions on the subject:

The term "core" proceeding is not defined in the Bankruptcy Code but, by enumerated illustrations set out in section 157(b)(2), was meant to encompass those proceedings which would not exist at law in absence of the Bankruptcy Code. One court has defined the term as including those proceedings at the core of the bankruptcy court's power-proceedings which would have no existence outside of a bankruptcy proceeding. . . . The apparent broad application that could be given to section 157(b)(2)(A) and (O) must be tempered by [*Marathon*] and the specifically enumerated categories of section 157(b)(2). Although section 157(b)(2) is a non-exclusive list of what constitutes core proceedings, this Court does not believe the sections or categories should be interpreted or expanded so as to in effect emasculate the jurisdictional proscriptions of the *Marathon* case. . . . A common sense interpretation of the term "core" would dictate that it includes only those proceedings which are specifically set forth in either section 157(b)(2) or the Bankruptcy Code itself.³⁹

Because the majority rule establishes that the contract action illustrated in the hypothetical obviously would not be characterized as a "core" proceeding,⁴⁰ the next step is to determine whether the action might be characterized as a "related" proceeding. Generally, "[t]he test for determining whether a civil proceeding is 'related to' a bankruptcy case is 'whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.'"⁴¹ "An action is 'related to' a bankruptcy case 'if the

38. 49 B.R. 733 (Bankr. D.N.D. 1985).

39. *Id.* at 736.

40. In addition to *Alexander*, the following cases also hold that state law contract claims which arguably fell within the catch-all provisions of § 157(b)(2) were not "core" proceedings but were only "related" proceedings under § 157(c): *In re Castlerock Properties*, 781 F.2d 159 (Bankr. 9th Cir. 1986); *K-Rom Construction Corp. v. Behling (In re K-Rom Construction Corp.)*, 46 B.R. 745 (Bankr. S.D.N.Y. 1985); *Mohawk Industries, Inc. v. Robinson Industries, Inc.*, 46 B.R. 464 (Bankr. D. Mass. 1985); *Morse Elec. Co. v. Logicon (In re Morse Electric Co.)*, 47 B.R. 234 (Bankr. N.D. Ind. 1985).

41. *Howard Brown Co. v. Reliance Insurance Co.*, 66 B.R. 480, 481 (Bankr. E.D.Pa. 1986), *citing* *Bobroff v. Continental Bank (In re Bobroff)*, 766 F.2d 797, 802 (Bankr. 3d Cir. 1985).

outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate."⁴² Accordingly, "state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C.A. § 157(b)(2)(B)-(N) are related proceedings under 28 U.S.C.A. § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections 157(b)(2)(A) and (O)."⁴³

Although these cases indicate that the contract action by Insurance Company A most likely will be treated as a related proceeding which may be heard by a bankruptcy judge, bankruptcy court jurisdiction in our hypothetical instance still is not certain. The bankruptcy judge may choose either (1) to abstain from hearing the action "in the interest of justice,"⁴⁴ or (2) find that abstention is mandated.⁴⁵ One case in particular examined applicable case law to determine the instances in which the section 1334(c)(2) mandatory abstention provision should be invoked⁴⁶ and found that four factors must be present for invocation of mandatory abstention:

42. *Howard Brown*, 66 B.R. at 481, citing *Bobroff*, 766 F.2d at 802.

43. *Castlerock*, 781 F.2d at 162. In *Howard Brown*, the plaintiff had brought action in state court to recover on a bond issued by the defendant as surety of the debtor. The defendant subsequently removed the action to the United States District Court for the Eastern District of Pennsylvania on the basis that there was substantial claims and related issues between the parties in the state court action which related to and were identical to issues that were to be adjudicated in the bankruptcy court. The court found that the state proceeding was related to the bankruptcy case because it would possibly affect the plaintiff's status as creditor of the debtor's bankruptcy estate by reducing or even eliminating its claim against the bankruptcy estate.

In *Castlerock*, the defendant in a contract action filed a Chapter 11 proceeding in bankruptcy court, thereby automatically staying the state contract action. When the plaintiff filed for relief from the automatic stay, the defendant filed an answer incorporating state law contract counterclaims against the plaintiff. Without entering an order regarding the automatic stay, the bankruptcy judge elected to try the counterclaims. After the denial of plaintiff's motion to dismiss or sever the counterclaims, in which the plaintiff questioned the propriety of deciding counterclaims in a relief from a stay proceeding, the plaintiff filed an answer to the counterclaims. The bankruptcy court tried the relief of stay issue and the defendant's counterclaims and entered judgment for the defendant. The district court vacated the judgment, holding that the bankruptcy court did not have jurisdiction to determine the substantive issues. As indicated above, the court of appeals found the contract claims to be "related" proceedings and that the bankruptcy court had no jurisdiction to enter judgment.

44. See 28 U.S.C.A. § 1334(c)(1).

45. See 28 U.S.C.A. § 1334(c)(2). See *supra* note 3 for the text of 28 U.S.C.A. §§1334(c)(1) and (2).

46. *Allegheny, Inc. v. Laniado Wholesale Co. (In re Allegheny, Inc.)*, 68 B.R. 183 (Bankr. W.D.Pa. 1986).

1. There has been a timely motion by a party in interest;
2. the proceeding involves determinations of state law and is 'related' to the bankruptcy case;
3. the cause of action has already been commenced in a state court tribunal; and
4. the cause of action can be timely adjudicated in said state tribunal.⁴⁷

Accordingly, this test will be applied to the facts of the hypothetical to determine whether the bankruptcy judge *must* abstain from hearing the contract action by Insurance Company A against Corporation X.

1. *Timely Motion By a Party In Interest*

In deciding whether a motion for abstention was timely filed, the court in *Acolyte Elec. Corp. v. City of New York*⁴⁸ stated:

The adversary proceeding was initiated on June 9, 1986 and the motion before Chief Judge Weinstein seeking abstention and withdrawal of reference was made on July 21, 1986. Although the word 'timely' is not defined in title 28, and although there is no definitive pronouncement as to who has the burden of establishing or negating timeliness, since there is no claim of prejudice or change of position between these dates, there is no reason to hold the motion untimely.⁴⁹

2. *The Proceeding Involves Determination of State Law and is "Related" to the Bankruptcy Case*

In the hypothetical, the action by Insurance Company A is a common law breach of contract action brought in state court and governed by state law. There are no federal statutes or federal constitutional questions involved. Also, and as demonstrated previously, the contract action is related to the bankruptcy action under the generally applied standard.⁵⁰

3. *The Cause of Action Has Already Been Commenced in State Court*

This third "prong" is self-explanatory. Upon review of the facts of the hypothetical the answer is obviously affirmative.

47. *Id.* at 192.

48. 69 B.R. 155 (Bankr. E.D.N.Y. 1986).

49. *Id.* at 179.

50. The "generally applied standard" referred to is the standard which was discussed above and used in *In re Bobroff*. See *supra* note 30.

4. *The Cause of Action Can Be Timely Adjudicated in State Court*

The party making the motion for abstention (Insurance Company A in the hypothetical) cannot satisfy the requirement of this fourth prong merely by making a "naked assertion" to that effect without substantiating that assertion.⁵¹ The question of whether the action can be timely adjudicated in state court "requires an examination by the court of the state court's calendar, the status of the bankruptcy proceeding, the complexity of the issues, and whether the state court proceeding would prolong the administration, or liquidation of the estate."⁵² Obviously, the answer to this fourth prong will turn on the factors as they exist in each particular case.

Upon close examination of section 1334(c)(2), it becomes apparent that there is one more requirement for mandatory abstention (a fifth prong not discussed by the court which expressed the four-prong test): the action could not have been commenced in a court of the United States absent jurisdiction under section 1334.⁵³ This fifth prong is crucial to the hypothetical case as it may be the only prong which would prevent mandatory abstention.⁵⁴ In other words, even if the action against Corporation X in state court satisfies the mandatory abstention requirements as set forth in the four-prong test, the fifth prong would prevent mandatory abstention if the action might otherwise have been brought in the federal court (as a diversity case, for example).

Nevertheless, even if one necessary prong of the five-prong mandatory abstention test has not been satisfied, the bankruptcy court still may exercise its discretion to abstain.⁵⁵ When it appears that most of the criteria for mandatory abstention have been satisfied, the bankruptcy court "should give careful consideration whether it would be appropriate to exercise [its] discretion to abstain under

51. *Burgess v. Liberty Savings Assoc. (In re Burgess)*, 51 B.R. 300 (Bankr. S.D. Ohio 1985).

52. *Allard v. Benjamin (In re Delorean Motor Co.)*, 49 B.R. 900, 911 (Bankr. E.D. Mich. 1985).

53. See *supra* note 3 for the text of § 1334(c)(2).

54. Interestingly, the cases cited by the court which established the four-prong test (see *supra* note 34) as authority for the formulation of the test all recognized the additional requirement referred to above as the "fifth prong." See *In re Allied Mechanical and Plumbing Corp.*, 62 B.R. 873 (Bankr. S.D.N.Y. 1986); *Harley Hotels, Inc. v. Rain's International, Ltd.*, 57 B.R. 773 (Bankr. M.D. Pa. 1985).

55. 28 U.S.C.A. § 1334(c)(1).

[section] 1334(c)(1).”⁵⁶ Most likely then, Corporation X would not have been successful in its effort to transfer the contract action to the bankruptcy court.

In conclusion, an action, whether arising pre-petition or post-petition,⁵⁷ may be removed from state court to bankruptcy court if the state court action is a “core” proceeding or is “related” to the bankruptcy case. However, the case law interpreting the statutory authority for removal to the bankruptcy courts places several obstacles in the path to removal. In order to obtain removal of an action as a core proceeding, the action must fit within the confines of extremely narrow interpretations of what constitutes “core”. When attempting removal of an action as a related proceeding, one must overcome at least one of five prongs to avoid mandatory abstention by a bankruptcy court. Even if one of the prongs is not satisfied and mandatory abstention is avoided, case authority indicates that a failure to overcome a majority of the prongs will result in discretionary abstention by the bankruptcy court.

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56. U.I.U. Health and Welfare Fund v. Levit (*In re Futura Industries*), 69 B.R. 831, 834 (Bankr. E.D.Pa. 1987).

57. See *supra* note 2.