

# LITIGATING INSURANCE COVERAGE DISPUTES IN BANKRUPTCY CASES

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Like a fish out of water. That is how most insurance coverage litigators feel when they find that their insurance coverage dispute has been subsumed in a bankruptcy case. And most bankruptcy lawyers feel the same way when they find that the success of their bankruptcy case may rise or fall on the outcome of an insurance coverage dispute.

With the recent rash of bankruptcy cases—especially those involving asbestos or other mass torts—the availability of insurance assets has become the central focus of an increasing number of cases. Insurance coverage disputes pending at the time of filing must be transplanted into the bankruptcy case to determine whether the proceeds of insurance policies will be available for distribution to creditors. Moreover, the impact of the bankruptcy case itself may create new disputes over the parties' rights and obligations under existing insurance policies as well as settlements of prior insurance coverage disputes. Under the intense pressure of attempting to satisfy claims in the bankruptcy case, debtors and claimants are increasingly turning to new and aggressive litigation strategies to expand otherwise limited insurance coverage.

Because of these dynamics, insurance coverage disputes will be increasingly decided in the context of bankruptcy cases, whether the parties like it or not. Like any external change that requires adaptation to a new environment, the need to litigate insurance coverage disputes in the context of bankruptcy cases presents both

danger and opportunities.

Although a bankruptcy filing may complicate the litigation of an insurance coverage dispute, skillful practitioners who understand the mechanisms of bankruptcy jurisdiction can turn these complexities to their strategic and tactical advantage. This article reviews five mechanisms—withdrawal of the reference, transfer of venue, removal, remand, and abstention—that may be employed in attempts to control the course of insurance coverage litigation in bankruptcy cases.

## Bankruptcy Court Jurisdiction Issues

Pursuant to 28 U.S.C. § 1334(b), the district courts enjoy “original, but non-exclusive, jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”<sup>1</sup> Because a debtor’s insurance policies are considered “property of the estate,” actions to determine coverage under these policies, at a minimum, “arise in or relate to” the debtor’s bankruptcy case and thus fall within the broad bankruptcy jurisdiction conferred on the district courts by 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a), “[e]ach 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.” All district courts have established procedures under 28 U.S.C. § 157, either by local rule or standing orders of reference, by which bankruptcy-related matters

are automatically referred to the bankruptcy court for the district.

The scope of the bankruptcy court’s authority to preside over such matters is determined by 28 U.S.C. § 157(b) and (c), which codify the “core”/“noncore” distinction enunciated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*:<sup>2</sup>

1. in “core” proceedings, defined by 28 U.S.C. § 157(b), the bankruptcy court has the power to render a final judgment; and
2. in “noncore” or “related to” proceedings under 28 U.S.C. § 157(c), the bankruptcy court can only make a recommendation subject to review and approval by the district court unless the parties otherwise consent.

A nonexhaustive list of examples of “core” proceedings is provided at 28 U.S.C. § 157(b)(2).

Generally, “[a] proceeding is core [1] if it invokes a substantive right provided by title 11 or [2] if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case.”<sup>3</sup> Courts may also take into account “(1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization.”<sup>4</sup> Some jurisdictions, like the First Circuit Court of Appeals, interpret “core” proceedings more broadly than others, for example, the Ninth Circuit Court of Appeals.<sup>5</sup> As a practical matter, it would be extremely difficult to argue that an

action commenced before the bankruptcy filing, such as a prepetition insurance coverage dispute, “could arise only in the context of a bankruptcy case.” In contrast, case law defines the “related to” concept, stating “an action is related to the bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”<sup>6</sup> “[E]ven a proceeding which portends a mere contingent to tangential effect on a debtor’s estate” is “related to.”<sup>7</sup> In other words, as long as an action could *conceivably* affect the amount of property available for distribution to creditors or otherwise impact the bankruptcy, it is “related to,” even if it is also possible that the proceeding will ultimately have *no* effect on the bankruptcy.<sup>8</sup> Accordingly, a broad interpretation of “related to” jurisdiction is appropriate.<sup>9</sup> Recent attempts by some courts to retreat from a broad definition of “related to” jurisdiction, such as by restricting it to situations where “the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of another lawsuit,” have been criticized as “contrary to more pervasive authority . . . indicat[ing] that jurisdiction over a third party action exists where a claim for indemnification or contribution arising from that litigation has a conceivable effect on a bankruptcy proceeding.”<sup>10</sup>

In bankruptcy, “liability insurance provides an additional fund with which to pay certain creditors, freeing up the actual bankruptcy estate to the extent there are liability insurance proceeds.”<sup>11</sup> Some courts may find that this effect alone establishes “noncore, related to” jurisdiction in disputes involving a debtor’s insurance coverage.<sup>12</sup> Other courts have found “related to” jurisdiction over a debtor’s nonbankrupt affiliates’ insurance policies based on the identity of interest created by shared insurance between

a debtor and its nonbankrupt affiliates where a finding of liability against the affiliates would deplete the funds available under the insurance policy and thereby affect the amount available for the estate.<sup>13</sup> Most recently, however, the Third Circuit Court of Appeals in *In re Combustion Engineering* refused to find “related to” jurisdiction where the record contained insufficient findings of fact regarding the terms, scope, or coverage of allegedly shared insurance policies.<sup>14</sup>

As discussed more fully below, the “core”/“noncore” distinction is a key factor. The majority of courts have held that insurance coverage actions are “noncore” proceedings where the claim for coverage arose before the filing of the bankruptcy case.<sup>15</sup> A minority of courts, however, has found that insurance coverage actions, including an action to determine whether an insurance policy is property of the debtor’s estate, *may* be core “when the results of such determination . . . are central to the possible success or failure of any reorganization” or where “ownership of the cash and rights over insurance policy proceeds would still greatly impact the distribution of assets to creditors if the [d]ebtor’s plan is for an orderly liquidation of assets.”<sup>16</sup>

An exception is found in some cases involving coverage claims that arise postpetition. Because of the impact of claims arising postpetition on the administration of the estate, some courts have held coverage claims arising postpetition to be “core” proceedings.<sup>17</sup> In some cases, this rule has been extended to coverage claims first arising postpetition but made under prepetition policies for prepetition occurrences.<sup>18</sup> Where the impact of prepetition insurance contracts on “core” bankruptcy functions is sufficiently significant, as where insurance proceeds represent the only potential source of recovery for personal injury claimants, some courts have designated as “core” declaratory judgment proceedings to determine a settle-

ment trust’s rights to such proceeds. In contrast, “[w]here insurance proceeds would only augment the assets of the estate for general distribution, the effect on the administration of the estate is insufficient to render the proceedings core.”<sup>19</sup>

### Withdrawal of the Reference

A threshold issue is whether the insurance coverage dispute should be litigated in the bankruptcy court in the first place. If not, how can it be moved to another court? A common perception exists, among lawyers for insurers at least, that the institutional biases of bankruptcy courts make district courts much more hospitable forums in which to litigate insurance coverage disputes. As such, withdrawal of the reference is often the first tactic to be employed.<sup>20</sup> Local rules of procedure and standing orders of reference, promulgated on a jurisdiction-by-jurisdiction basis, automatically refer bankruptcy-related matters to the bankruptcy courts. Often in insurance coverage disputes, however, it may be necessary or advantageous to withdraw the reference.

Pursuant to 28 U.S.C. § 157(d),

[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or the 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 the resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

No definition of “timely” is provided. Some courts may set a deadline by local rules, while others may consider timeliness on a case-by-case basis.

In considering motions to withdraw the reference, courts consider various goals, including

1. promoting uniformity in bankruptcy administration,
2. reducing forum shopping and confusion,
3. fostering economical use of the debtors' and creditors' resources, and
4. expediting the bankruptcy process.<sup>21</sup>

However, "the most important of the factors to consider in determining whether permissive withdrawal is appropriate is whether the . . . proceeding sought to be withdrawn is core or non-core."<sup>22</sup> Withdrawal of the reference typically occurs in "noncore, related to" proceedings, although a court may decline to withdraw the reference even as to a "noncore" dispute when other factors—such as the bankruptcy court's familiarity with the parties and issues and other considerations of efficiency and uniformity—favor the bankruptcy court's continued involvement.<sup>23</sup> While, in rare instances, judicial economy may justify withdrawing the reference in "core" proceedings, there is a strong presumption against it.<sup>24</sup>

Withdrawal of the reference may be appropriate in insurance coverage litigation where the coverage dispute involves federal laws, such as environmental statutes, that the district court would be better equipped to litigate than the bankruptcy court. Similarly, withdrawal of the reference may be appropriate where the insurance dispute is "entirely severable from the bankruptcy."<sup>25</sup> Indeed, withdrawal will be mandatory if the court "make[s] an affirmative determination that resolution of the claims will require substantial and material consideration of non-code statutes."<sup>26</sup>

Courts are split on whether a jury trial request mandates withdrawal of the reference. Whereas some courts have ruled that cause to withdraw reference "automatically exists" where jury trial has been requested because 28 U.S.C. § 157(e) requires consent of all

parties to conduct jury trial in bankruptcy court, others have ruled that withdrawal of reference will not always be triggered merely by request for a jury trial or the existence of state law issues.<sup>27</sup> Even when a jury trial has been requested, the bankruptcy court might find it to be unnecessary and therefore decline to withdraw the reference.<sup>28</sup> Moreover, the mere presence of a nonbankruptcy issue does not, however, mandate withdrawal. Interpretation, rather than mere application, is required.<sup>29</sup>

Withdrawal of the reference may be either the end goal or the starting point for transferring venue to another jurisdiction entirely.

### Transfer of Venue

Strategic or tactical reasons might explain why a party to insurance coverage litigation may want venue of the case transferred to a district court other than the district court in which the bankruptcy case is pending. In such an event, that party may move to transfer venue. Pursuant to 28 U.S.C. § 1412, "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." To maintain consistency with 28 U.S.C. § 1334(b), discussed above, some courts have construed the phrase "under title 11" to limit the availability of 28 U.S.C. § 1412 to "core" proceedings, stating that 28 U.S.C. § 1404(a) applies in "non-core, related to" actions.<sup>30</sup>

In determining venue transfer motions under 28 U.S.C. § 1412, "there has developed a strong presumption that civil proceedings should be tried in the court in which the [bankruptcy] 'case' is pending, the 'home' court."<sup>31</sup> In considering whether a transfer of venue under 28 U.S.C. § 1412 is appropriate, "[t]he most important factor is whether the transfer of the proceeding would promote the economic and efficient administration of the estate."<sup>32</sup>

A second potential authority for transfer stems from 28 U.S.C. § 1404(a), which provides "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district or division where it might have been brought." By its terms, 28 U.S.C. § 1404(a) permits transfer of an action only to other districts where that action might have been brought.<sup>33</sup>

A third potential authority for transfer stems from 28 U.S.C. § 157(b)(5), which provides that [t]he 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.

By its terms, this venue transfer provision is limited to personal injury and wrongful death claims, such as those that may arise in a mass tort bankruptcy case.<sup>34</sup>

Although the express language of 28 U.S.C. § 157(b)(5) appears rather permissive, some courts have in fact construed this transfer provision quite narrowly. A recent Fifth Circuit Court of Appeals opinion, *Arnold v. Garlock, Inc.*,<sup>35</sup> holds that "the efficiencies to be obtained from issue preclusion . . . cannot . . . serve as the basis of the transfer of cases under 28 U.S.C. § 157(b)(5)."<sup>36</sup> The *Garlock* court further condemns appeal of denial of a Section 157(b)(5) transfer motion as "a procedural path that would invalidate the clerk's certification of remand and freeze further action in the district courts while permitting [the appellant] to perfect its appeal on the § 157(b)(5) transfer issue, without frontally challenging an unappealable remand order."<sup>37</sup>

Going one step further, 28 U.S.C. § 157(b)(5) applies to bodily injury claims but not to property damage claims. In the asbestos con-

text, most claimants assert *either* a bodily injury claim *or* a property damage claim, so application of 28 U.S.C. § 157(b)(5) is relatively straightforward. However, in one of the newest hybrids of mass tort bankruptcy/insurance coverage litigation—mold—many plaintiffs may assert *both* property damage claims and bodily injury claims, and would likely desire to litigate both in the same forum. Thus, creative applications of 28 U.S.C. § 157(b)(5) may emerge in the mold litigation context.

### Removal

Again, for strategic or tactical reasons, a party to a pending state court insurance coverage litigation may determine that its best interests are served by concluding the litigation in a federal court. The filing of a bankruptcy case provides a jurisdictional “hook” upon which to hang the case. This hook may become especially important where there was no jurisdictional basis for bringing or removing the case to federal court before the filing of the bankruptcy case. In such instances, any party to the pending insurance coverage litigation may remove the case to federal court.<sup>38</sup>

Pursuant to 28 U.S.C. § 1452(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.

The procedure for effecting removal is set forth in Bankruptcy Rule 9027(a). Generally, removal must be made within 90 days after the commencement of the bankruptcy case, unless the time is extended by the bankruptcy court,

which often occurs. The party seeking removal bears the burden of establishing federal jurisdiction.<sup>39</sup> However, 28 U.S.C. § 1452, “unlike the general federal jurisdiction removal provision, should be broadly construed in favor of removal.”<sup>40</sup>

Once removed to the district court pursuant to 28 U.S.C. § 1452(a), the action is automatically referred to the bankruptcy court for that district by the applicable standing order of reference or local rule promulgated pursuant to 28 U.S.C. § 157(a). Alternatively, following removal of a state court action, a motion to transfer venue (e.g., to the district court in which the bankruptcy case is pending) may be filed, in mirror reverse of withdrawal of the reference and transfer from the bankruptcy district to another venue.

The general removal statute, 28 U.S.C. § 1441, is also available in bankruptcy.<sup>41</sup> Whereas any party may seek removal pursuant to 28 U.S.C. § 1452, only a defendant may remove under 28 U.S.C. § 1441.<sup>42</sup> Moreover, removal under 28 U.S.C. § 1441 must be effected within 30 days after service of process, as compared to the more liberal time deadlines applicable to 28 U.S.C. § 1452, set forth in Bankruptcy Rule 9027(a).

Removal promotes judicial efficiency by permitting matters that are important to a pending bankruptcy case to be resolved in a single tribunal.<sup>43</sup> Often, where multiple, similar coverage actions are simultaneously pending in various jurisdictions, removal provides an attractive option of concentrating the litigation in a centralized forum—the bankruptcy court—that will serve as the “home” court for the consistent resolution of similar coverage disputes.

Unless a motion for remand is filed pursuant to 28 U.S.C. § 1452(b), or the court remands the action *sua sponte*, the removal is effected. Courts generally consider the following factors when assessing a request for removal:

1. duplication of judicial

- resources,
2. uneconomical use of judicial resources,
  3. effect of remand on the administration of the bankruptcy estate,
  4. whether the case involves questions of state law better addressed by a state court,
  5. comity considerations,
  6. prejudice to involuntarily removed parties,
  7. lessened possibility of an inconsistent result, and
  8. the expertise of the original court.<sup>44</sup>

Without applying these factors, however, the court in *Wheeling-Pittsburgh Corp. v. American Insurance Co.*<sup>45</sup> denied the removal request of a group of insurers of defendants where “the sole basis for removal was that plaintiffs’ claims for insurance coverage were related to plaintiffs’ bankruptcy case and that the insurance policies at issue were property of the plaintiffs’ bankruptcy estate.”<sup>46</sup>

Despite the attractiveness of removal from an insurer’s perspective, plaintiffs may find the bankruptcy jurisdiction an inconvenient forum, and removal is often an uphill battle, especially in a mass tort context. In *Garlock*, the Fifth Circuit rejected the appellant’s request for removal, concluding that the appellant “appears to be contemplating the availability of coordinated federal court judgments for their preclusive effect in future actions.”<sup>47</sup> Removal under Section 1452, and ultimately transfer of venue under 28 U.S.C. § 157(b)(5) to the District of Delaware, home court to the *Federal-Mogul* bankruptcy case, was sought. The *Garlock* court also implied that the appellant may have had a dilatory motive since that forum was already overloaded by the direct claims pending in five major bankruptcy cases and would perhaps be irreparably deluged by the additional burden of asbestos codefendants’ litigation as well.<sup>48</sup> *Garlock* has also been

interpreted by some courts as evidence of “a growing reluctance of federal courts to expand . . . related to jurisdiction.”<sup>49</sup>

### Remand

In response to a notice of removal, the party opposing removal must seek remand. In bankruptcy cases, both the general remand statute, 28 U.S.C. § 1447, and a bankruptcy-specific remand statute, 28 U.S.C. § 1452, are available.<sup>50</sup> Section 1452(b) provides that a court to which a claim related to a bankruptcy case has been removed “may remand such claim or cause of action on *any* equitable ground.”<sup>51</sup>

Bankruptcy Rule 9027(d) provides the procedure for remand. Substantially similar to the grounds for removal, equitable grounds for remand include, but are not limited to

1. the effect on the efficient administration of the bankruptcy estate,
2. the extent to which issues of state law predominate,
3. the difficulty or unsettled nature of state law,
4. comity,
5. the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
6. the existence of the right to a jury trial, and
7. prejudice to the involuntarily removed defendants.<sup>52</sup>

Often, a strong argument in favor of remand may be formulated where a coverage dispute involves breach of contract claims based entirely upon state law and seeks a declaration of rights and responsibilities under state law governing interpretation of contracts.<sup>53</sup> Remand may also be appropriate when a bankruptcy reorganization plan has already been confirmed, in which case the bankruptcy court’s jurisdiction “ceases to exist, other than for matters pertaining to implementation and execution of the plan.”<sup>54</sup>

Pursuant to 28 U.S.C. § 1452(b), orders remanding or refusing to remand are “not reviewable by appeal or otherwise by the court of appeals . . . or the Supreme Court of the United States” but are implicitly appealable to the district court or, where applicable, the bankruptcy appellate panel. Similarly, pursuant to 28 U.S.C. § 1447(d), “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”

In contrast to withdrawal of the reference, “[r]emand of removed claims or causes of action is also dictated if (a) the Seventh Amendment right to a jury trial applies to said claims or causes of action; and (b) a party has timely and properly demanded a jury trial with respect to said claims or causes of action.”<sup>55</sup> Clearly, the more grounds supporting remand, the better, but a jury demand can help tip the scales.

### Abstention

Abstention provides another mechanism for getting insurance coverage litigation previously removed to federal court back to state court. In addition to 28 U.S.C. § 1452, 28 U.S.C. § 1334 provides two additional grounds for a federal court to decline to exercise jurisdiction over a properly removed action: mandatory abstention and permissive abstention. As summarized by one court, “Section 1334(c) abstention should be read in *pari materia* with section 1452 remand so that section 1334(c) applies only to those cases in which there is a related proceeding that either permits abstention in the interest of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2).”<sup>56</sup>

Pursuant to 28 U.S.C. § 1334(c)(2),  
[u]pon 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 a proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Many courts construe the phrase “is commenced” to require that the state court cause of action have been commenced before the filing of the bankruptcy petition.<sup>57</sup>

Courts generally interpret 28 U.S.C. § 1334(c)(2) to require the following five factors for mandatory abstention to be appropriate:

1. the motion to abstain must have been timely made;
2. the proceeding must be based on a state law claim or cause of action;
3. the proceeding must be related to a Title 11 case but must be a “noncore” proceeding;
4. the action must be incapable of having been commenced in federal court absent jurisdiction under § 1334; and
5. an action must be commenced, and capable of being timely adjudicated, in a state court with proper jurisdiction.<sup>58</sup>

“A party is not entitled to mandatory abstention if it fails to prove any one of the statutory requirements.”<sup>59</sup> However, pursuant to 28 U.S.C. § 157(b)(4), “noncore” proceedings under 28 U.S.C. § 157(b)(2)(B) for the liquidation of personal injury tort and wrongful death cases are not subject to the mandatory abstention provisions of § 1334(c)(2).<sup>60</sup>

Basically, “a district court must abstain from hearing a noncore, related matter if that matter can be timely adjudicated in state court.”<sup>61</sup> However, some courts require a state court proceeding to

already be under way as a prerequisite for mandatory abstention.<sup>62</sup> Courts within the Second Circuit Court of Appeals in particular have found that, once an action has been removed from state court, no pending state court action remains and therefore mandatory abstention is inappropriate.<sup>63</sup>

In the event a court does not find that it *must* abstain from exercising jurisdiction pursuant to 28 U.S.C. § 1334(c)(2), it may nonetheless elect to abstain. Pursuant to 28 U.S.C. § 1334(c)(1), which, in contrast to 28 U.S.C. § 1334(c)(2), applies to both “core” and “noncore” matters, a district court may abstain from hearing an action related to a case under Title 11 “in the interest of justice, or in the interest of comity with State courts or respect for State law.” Courts apply the same equitable considerations applicable under 28 U.S.C. § 1452 to determine the propriety of permissive abstention pursuant to 28 U.S.C. § 1334(c)(1).<sup>64</sup> Absent any unique or unsettled issues of state law, and where remand would likely encourage a race for assets, bankruptcy courts may decline to abstain.<sup>65</sup>

Generally, like remand orders, abstention orders are appealable only to the district court or, where applicable, the bankruptcy appellate panel.<sup>66</sup> However, in rare cases where mandamus review is justified, i.e., when the case presents questions of unusual importance necessary to the economical and efficient administration of justice, the court of appeals may be permitted to review the abstention determination.<sup>67</sup> Even in a mass tort bankruptcy context, decisions to abstain must be made on a case-by-case basis.<sup>68</sup>

### Conclusion

Understanding the five mechanisms discussed above—withdrawal of the reference, transfer of venue, removal, remand, and abstention—enables practitioners to maneuver insurance coverage

disputes from court to court, as circumstances warrant, even after, and sometimes because of, the filing of a bankruptcy case.

Depending on one’s views, or colloquially on “whose ox is being gored,” the line between creative lawyering and opportunistic forum shopping is indeed fuzzy. ■

### Notes

1. See, e.g., *Fed. Ins. Co. v. Sheldon*, 167 B.R. 15, 19–20 (S.D.N.Y. 1994); *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 776 (Bankr. M.D. La. 2001).

2. 458 U.S. 50 (1982).

3. *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1178 (3d Cir. 1997) (quoting *In re Marcus Hook*, 943 F.2d 261, 267 (3d Cir. 1991)).

4. *Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.*, 313 B.R. 9, 17 (D. Conn. 2004). See also *In re U.S. Lines, Inc.*, 197 F.3d 631, 637 (2d Cir. 1999).

5. Compare *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987), with *In re Castlerock Props.*, 781 F.2d 159, 162 (9th Cir. 1986).

6. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis added). See also *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 226 (3d Cir. 2004) (noting that the Supreme Court has affirmed the *Pacor* test for “related to” jurisdiction); *Halper v. Halper*, 164 F.3d 830, 836 (3d Cir. 1999); *New Horizon of NY LLC v. Jacobs*, 231 F.3d 143, 151 (4th Cir. 1999).

7. *Nat’l Union Fire Ins. Co. v. Titan Energy, Inc.* (*In re Titan Energy, Inc.*), 837 F.2d 325, 330 (8th Cir. 1988); *Kaiser Aluminum & Chem. Corp. v. Monument Select Ins. Co.*, Civil Action No. 03-889-JJE, 2004 U.S. Dist. LEXIS 19868, at \*5 (D. Del. Sept. 30, 2004).

8. *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987).

9. *Celotex v. Edwards*, 514 U.S. 300, 307–08 (1994); *New Horizon*, 231 F.3d at 151. See also *In re Salem Mortgage Co.*, 783 F.2d 626, 633–34 (6th Cir. 1986); *In re Boughton*, 49 B.R. 312, 315 (Bankr. N.D. Ill. 1985) (trustee’s action against insurer for negligent and willful failure to settle resulting in debtor’s excess liability was “related to”).

10. Compare *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002), with *N.Y. City Employees’ Retirement Sys. v. Ebbers* (*In re*

*WorldCom, Inc.*), 293 B.R. 308, 320 (S.D.N.Y. 2003) (criticizing *Federal-Mogul*).

11. *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 779 n.38 (Bankr. M.D. La. 2001).

12. *Id.* See also *Coar v. Nat’l Union Fire Ins. Co.*, 19 F.3d 247, 249 (5th Cir. 1994).

13. See *Lindsey v. O’Brien* (*In re Dow Corning Corp.*), 86 F.3d 482, 493 (6th Cir. 1996).

14. See *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 232–33 (3d Cir. 2004) (ultimately finding that 11 U.S.C. § 105(a) does not permit the extension of a channeling injunction to nonderivative claims against a debtor’s nonbankrupt affiliates). Interestingly, while noting that “the courts of the Third Circuit are clearly in the best position to determine whether and to what extent claims against debtor’s non-bankrupt affiliates could conceivably affect the debtor’s estate,” the Southern District of New York reached the contrary result under the same facts prior to the Third Circuit’s ruling. See *Certain Underwriters at Lloyd’s London v. ABB Lummus Global, Inc.*, 03 Civ. 7248 (JGK), 2004 U.S. Dist. LEXIS 10621, at \*22 (S.D.N.Y. June 10, 2004) (“related to” jurisdiction existed as to the claims against nonbankrupt affiliates because, without the affiliates’ ability to contribute their insurance, the plan could conceivably unravel or at least be altered in ways affecting the debtor’s rights and options).

15. See *In re United States Brass Corp.*, 110 F.3d 1261, 1268–69 (7th Cir. 1997); *Orion Pictures Corp. v. Showtime Networks* (*In re Orion Pictures Corp.*), 4 F.3d 1095, 1102 (2d Cir. 1993); *In re Titan Energy*, 837 F.2d 325, 329 (8th Cir. 1988); *Amatex Corp. v. Aetna Cas. & Sur. Co.* (*In re Amatex Corp.*), 107 B.R. 856, 863 (E.D. Pa. 1989), *aff’d*, 908 F.2d 961 (3d Cir. 1990).

16. *Koken v. Reliance Group Holdings, Inc.* (*In re Reliance Group Holdings, Inc.*), 273 B.R. 374, 393 (Bankr. E.D. Pa. 2002). See also *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 748 (7th Cir. 1989); *In re Celotex Corp.*, 152 B.R. 667, 672 (Bankr. M.D. Fla. 1993).

17. See *In re Ben Cooper, Inc.*, 924 F.2d 36 (2d Cir. 1991) (reinstating earlier opinion, *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), on remand from the Supreme Court,

which entered a judgment, *Insurance Co. of the State of Pa. v. Ben Cooper, Inc.*, 498 U.S. 964 (1990), vacating the prior decision and directing the Second Circuit to address the question of appellate jurisdiction).

18. See, e.g., *In re Prudential Lines, Inc.*, 170 B.R. 222 (S.D.N.Y. 1994).

19. *In re U.S. Lines*, 197 F.3d 631, 638–39 (2d Cir. 1999). See also *Orion Pictures*, 4 F.3d at 1102. Cf. *Mt. McKinley Ins. Co. v. Corning, Inc.*, 02 Civ. 5835, 2003 U.S. Dist. LEXIS 4295, at \*16–17 (S.D.N.Y. Mar. 20, 2003) (rejecting proposition that disputes over prepetition contracts are necessarily “noncore” because “[w]here the debtor is an asbestos manufacturer seeking to fund a trust to pay countless personal injury claims, indemnification insurance is central to the administration of the estate and the success of the reorganization”).

20. Of course, the nonbankrupt party to pending insurance coverage litigation—that is, the insurer—could always move for relief from the automatic stay to continue the litigation in a nonbankruptcy court. However, that strategy is beyond the scope of this article.

21. See *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir. 1990); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985); *Lawrence Group, Inc. v. Hartford Cas. & Sur. Co.* (*In re Lawrence Group, Inc.*), 285 B.R. 784, 788–89 (N.D.N.Y. 2002).

22. *HA 2003, Inc. v. Fed. Ins. Co.* (*In re HA 2003, Inc.*), No. 03 C 9008, 2004 U.S. Dist. LEXIS 4674, at \*5 (N.D. Ill. 2004).

23. See *id.*

24. See *Valley Forge Plaza Assoc. v. Fireman’s Fund Ins. Co.*, 107 B.R. 514, 518 (E.D. Pa. 1989) (court denied insurers request for withdrawal of reference in litigation seeking interpretation of debtor’s postpetition insurance policy, a “core” proceeding). But see *In re Wedtech Corp.*, 81 B.R. 237, 237 (S.D.N.Y. 1987) (where a proceeding is “related to” an action already pending in the district court, judicial economy may provide sufficient cause for withdrawal of even a “core” proceeding).

25. *Allied Prod. Corp. v. Hartford Accident & Indem. Co.* (*In re Allied Prod. Corp.*), No. 02 C 8436, 2003 U.S. Dist. LEXIS 2596, at \*5 (N.D. Ill. 2003).

26. *In re White Motor Corp.*, 42

B.R. 693, 705 (N.D. Ohio 1984). See also *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *Hatzel & Buehler, Inc. v. Orange & Rockland Utils., Inc.*, 107 B.R. 34, 37 (D. Del. 1989) (finding withdrawal was mandatory because “substantial and material” consideration of environmental regulations was involved). But see *Joshua Hill, Inc. v. Whitmarsh Township Auth.* (*In re Joshua Hill, Inc.*), Civil Action No. 03-MC-246, 2004 U.S. Dist. LEXIS 10075, at \*10–11 (E.D. Pa. May 28, 2004) (denying motion to withdraw reference in action to recover cleanup costs incurred in connection with remediation and valuation of environmentally contaminated real property owned by the debtor, and finding action to be “core” due to direct impact on bankruptcy estate).

27. *Compare Comdisco Ventures, Inc. v. Fed. Ins. Co.* (*In re Comdisco Ventures, Inc.*), Nos. 04 C 2007 & 04 C 2393, 2004 U.S. Dist. LEXIS 11128, at \*14 (N.D. Ill. June 22, 2004), with *In re DeLorean Motor Co.*, 49 B.R. 900, 912–13 (Bankr. E.D. Mich. 1985).

28. See, e.g., *In re Ramex Int’l, Inc.*, 91 B.R. 313, 316 (E.D. Pa. 1988).

29. See *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 954 (7th Cir. 1996).

30. See, e.g., *Ni Fuel Co., Inc. v. Jackson*, 257 B.R. 600, 623 (N.D. Okla. 2000).

31. *Kotlicky v. Belford*, 64 B.R. 679, 681 (N.D. Ill. 1986) (and cases cited therein); *In re Kersting*, 85 B.R. 61, 63 (Bankr. S.D. Ohio 1988); *In re Nixon Mach. Co.*, 27 B.R. 871, 873 (Bankr. E.D. Tenn. 1983).

32. *Kotlicky*, 64 B.R. at 682 (and cases cited therein). See also *Freide & Goldman, Ltd. v. Bennett, Civ. Action No. 01-2915T(5)*, 2001 U.S. Dist. LEXIS 21828, at \*3 (E.D. La. Dec. 27, 2001) (Louisiana district court granted insurer’s motion to transfer venue to Southern District of Mississippi to reduce the risk of inconsistent verdicts where, inexplicably, debtor chose to file bankruptcy in Mississippi but sought restraining order against insurer in Louisiana district court, in direct conflict with previously issued order of bankruptcy court).

33. See, e.g., *Ni Fuel Co.*, 257 B.R. at 623.

34. See, e.g., *In re Dow Corning Corp.*, 86 F.3d 482, 496 (6th Cir. 1996)

(citing *In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994), and *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1013 (4th Cir. 1985)).

35. 278 F.3d 426 (5th Cir. 2001).

36. *Id.* at 443.

37. *Id.*

38. If the nonbankrupt party is the plaintiff or a counterclaimant in the removed case, there may be automatic stay implications that should be carefully considered.

39. *McKinley Ins. Co. v. Corning, Inc.*, 02 Civ. 5835, 2003 U.S. Dist. LEXIS 4295, at \*11 (S.D.N.Y. Mar. 20, 2003).

40. *Id.* at \*18–19 (nonetheless, finding that insurance declaratory judgment action was “improvidently removed” where movant failed to establish federal jurisdiction, and remanding to state court).

41. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

42. See *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 103 (2d Cir. 2004).

43. See *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996).

44. See, e.g., *Albright v. Aeroquip Corp.*, No. 3:94CV447, 1995 U.S. Dist. LEXIS 10819, at \*8 (M.D.N.C. 1997).

45. 267 B.R. 535 (N.D. W. Va. 2001).

46. *Id.* at 537.

47. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 442 (5th Cir. 2001).

48. *Id.*

49. *Wise v. Travelers Indem. Co.*, 192 F. Supp. 2d 506, 517 (N.D. W. Va. 2002) (finding no basis for “related to” jurisdiction despite insurer-defendant’s contention that it was “related to” the *Armstrong World Industries Chapter 11* case pending in Delaware).

50. See *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 267 (3d Cir. 2002).

51. Emphasis added.

52. See *Ni Fuel Co., Inc. v. Jackson*, 257 B.R. 600, 613 (N.D. Okla. 2000); *Burke v. Donington, Karcher, Salmond, Ronan & Rainone, P.A.* (*In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.*), 194 B.R. 750, 760 (D.N.J. 1996).

53. Cf. *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 802 (Bankr. M.D. La. 2001) (remanding state law environmental liability suit against

defendant-debtor and, under Louisiana direct action statute, insurers, following joint removal attempt by debtor and insurers).

54. See *Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.*, 313 B.R. 9, 15 (D. Conn. 2004) (granting insurer's motion to remand action seeking declaratory judgment with respect to insurer's defense and indemnity obligations, over which insured sought "related to" jurisdiction although its bankruptcy case had been closed five years earlier).

55. *Woods v. Passodelis* (*In re Passodelis*), 234 B.R. 52, 65 (Bankr. W.D. Pa. 1999).

56. *Schulman v. Cal.* (*In re Lazar*), 237 F.3d 967, 981 (9th Cir. 2001) (quoting *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1010 (9th Cir. 1997)).

57. See 1 COLLIER ON BANKRUPTCY ¶ 3.05[2] (15th ed. 2000).

58. See *In re WorldCom, Inc.*, 293 B.R. 308, 331 (S.D.N.Y. 2003) (citing *ML Media Partners, LP v. Century/ML Cable Venture* (*In re Adelphia Communs. Corp.*), 285 B.R. 127, 141 (Bankr. S.D.N.Y. 2002)); *Wheeling-Pittsburgh Corp. v. Am. Ins. Co.*, 267 B.R. 535, 538 (N.D. W. Va. 2001) (citing *In re Midgard Corp. v. Kennedy*, 204 B.R. 764, 776-79 (B.A.P. 10th Cir. 1997), and *Howe v. Vaughan*, 913 F.2d 1138, 1142 (5th Cir. 1990)); *In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.*, 194 B.R. 750, 757 (D.N.J. 1996).

59. *WorldCom*, 293 B.R. at 331 (citing *Adelphia*, 285 B.R. at 143-44).

60. *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996). *WorldCom*, 293 B.R. at 331 (citing *Adelphia*, 285 B.R. at 143-44).

61. *Howe*, 913 F.2d at 1142.

62. E.g., *Adelphia*, 285 B.R. at 140-43.

63. See *Certain Underwriters at Lloyd's London v. ABB Lummus Global, Inc.*, 03 Civ. 7248 (JGK), 2004 U.S. Dist. LEXIS 10621, at \*26 (S.D.N.Y. June 10, 2004) (citing *Renaissance Cosmetics, Inc. v. Dev. Specialists, Inc.*, 277 B.R. 5, 13 (S.D.N.Y. 2002)).

64. See *In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.*, 194 B.R. 750, 757 (D.N.J. 1996).

65. See *WorldCom*, 293 B.R. at 332-34.

66. See 28 U.S.C. § 1334(d).

67. See, e.g., *Lindsey v. Dow Chem. Co.* (*In re Dow Corning Corp.*), 113 F.3d 565, 569 (6th Cir. 1997).

68. *Id.* at 571.