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Current Developments in Post-Confirmation Jurisdiction

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I. POST-CONFIRMATION JURISDICTION: THE BASICS

> Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens. . . . Formerly a ward of the court, the debtor is emancipated by the plan of reorganization.
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> Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991).

A. Introduction

Emancipated or not, debtors often return to the bankruptcy court post-confirmation, seeking various forms of relief. Unfortunately for some of these debtors, relief may not be available, as the bankruptcy court's jurisdiction may be more limited after a plan is confirmed. Post-confirmation jurisdiction in chapter 11 cases is a topic that has received varying degrees of treatment by the circuit courts. Some courts, such as the Third and Ninth Circuits, have specifically addressed the issue and articulated a test for bankruptcy courts to apply.[1] Other courts, such as the Eleventh Circuit, have declined to create or adopt a particular test; instead preferring to address the issue of jurisdiction on a case by case basis, and with focus on 28 U.S.C. § 1334, the statute which defines jurisdiction in bankruptcy cases (both pre- and post-confirmation). In part, the purpose of this seminar is to explore the various approaches of bankruptcy courts to the issue of post-confirmation jurisdiction.

Beyond examining post-confirmation jurisdiction generally, this seminar addresses three post-confirmation topics. First, retention of jurisdictions provisions in chapter 11 plans is discussed. Next, limitations on post-confirmation jurisdiction imposed by bankruptcy courts with respect of litigation by estate representatives is addressed, with focus on litigation trusts created

[1] See Binder v. Price Waterhouse & Co., LLP (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3d Cir. 2004); State of Mont. v. Goldin (*In re* Pegasus Gold Corp.), 394 F.3d 1189, 1193-94 (9th Cir. 2005) (discussed *supra*).

by debtors' plans. Last, an emerging post-confirmation issue is discussed—the distinction that some courts make between liquidating plans and reorganization plans, for purposes of post-confirmation jurisdiction.

B. Background: "Related to" Jurisdiction.

In all bankruptcy-based matters, the district court, and derivatively, the bankruptcy court, has jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §§ 157, 1334(b). For a variety of reasons, courts must distinguish between these three bases of jurisdiction: (1) "arising under;" (2) "arising in;" and (3) "related to." See 1 COLLIER ON BANKRUPTCY ¶ 3.01[4][c].

"Related to" jurisdiction is the broadest jurisdictional form. Id. ¶ 3.01[4][c][ii]. Although the statute does not specifically define "related to," an oft-cited formula comes from the case Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). The Pacor test has been cited with some approval by the Supreme Court, in an opinion that also cataloged the use of the Pacor test by several circuit courts:

> In attempting to strike an appropriate balance, the Third Circuit in [Pacor] devised the following test for determining the existence of "related to" jurisdiction:
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> > "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to 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." *Id.,* at 994 (emphasis in original; citations omitted).
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> The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation. [See *In re* G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1002, n. 11 (4th Cir. 1986); *In re* Wood, 825 F.2d 90, 93 (5th Cir. 1987); Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 583-584 (6th Cir. 1990); *In re*

> Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987); *In re* Fietz, 852 F.2d 455, 457 (9th Cir. 1988); *In re* Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re* Lemco Gypsum, Inc., 910 F.2d 784, 788, and n. 19 (11th Cir. 1990)]. The Second and Seventh Circuits, on the other hand, seem to have adopted a slightly different test. [See *In re* Turner, 724 F.2d 338, 341 (2d Cir. 1983); *In re* Xonics, *Inc.,* 813 F.2d 127, 131 (7th Cir. 1987); Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989)]. But whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.

Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.6 (1995); *cf. In re* Fedpak Systems, Inc., 80 F.3d 207, 213-214 (7th Cir. 1996) (remarking that the Celotex decision does not mandate applying the Pacor test).

In chapter 11 cases in which a plan has not yet been confirmed, using the Pacor test for "related to" jurisdiction has remained useful to courts in their assessment of section 1334 subject matter jurisdiction. However, attempting to use the Pacor test after confirmation creates a jurisdictional dilemma. Confirmation of a plan re-vests the property of the estate in the debtor (to the extent not otherwise provided in the plan or order confirming the plan), and terminates the estate. See 11 U.S.C. § 1141(b); see also Fairfield Cmtys., Inc. v. Daleske (*In re* Fairfield Cmtys., Inc.), 142 F.3d 1093, 1095 (8th Cir. 1998). With the estate terminated, a jurisdictional inquiry that focuses on "effects on the estate" is no longer helpful. This has lead to some circuits recognizing and making a distinction between pre- and post-confirmation jurisdiction.[2]

[2]The post-confirmation distinction discussed in this paper is confined to "related to," as opposed to "core," proceedings. This is explained succinctly in Williams v. McGreevey (*In re* Touch America Holdings, Inc.), 2009 WL 259721, *6-7, No. 08-51415 (Bankr. D. Del., Feb. 03, 2009) (slip opinion). Touch America involved an adversary proceeding that asked the bankruptcy court to determine whether certain claims that a plan trustee sought to pursue against corporate insiders were derivative claims belonging to the debtor-corporation, so as to be included in "property of the estate," or direct claims which belonged to individual shareholders. The court determined that this was a proceeding over which the bankruptcy court could exercise "core" jurisdiction, and which it could decide even after a chapter 11 plan was confirmed, without the need to establish any "close nexus" with the plan ("close nexus" is a post-confirmation jurisdiction test discussed below). The court, citing Geruschat v. Ernst Young LLP (*In re* Seven Fields Dev. Corp.), 505 F.3d 237, 260 (3d Cir. 2007), found that while it is generally appropriate for a bankruptcy court to exercise post-confirmation, "related to" jurisdiction only over matters in which there is close nexus to the bankruptcy plan or proceeding, this "close nexus" test is inapplicable when the

C. Post-Confirmation Jurisdiction, Generally

To deal with the effects of confirmation, some circuits have crafted specific tests for post-confirmation jurisdiction. As indicated above, this is the approach used by the Third Circuit, and, through the adoption of the Third Circuit's test, the Ninth Circuit. See Binder v. Price Waterhouse & Co., LLP (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3d Cir. 2004); State of Mont. v. Goldin (*In re* Pegasus Gold Corp.), 394 F.3d 1189, 1193-94 (9th Cir. 2005). The Fourth Circuit has also cited the Resorts International formulation with approval. Valley Historic Ltd. Partnership v. Bank of New York, 486 F.3d 831, 837 (4th Cir. 2007).[3] The Fifth Circuit uses a similar test, but remains committed to its own formulation for post-confirmation jurisdiction. See Bank of La. v. Craig's Stores of Tex., Inc. (*In re* Craig's Stores of Tex., Inc.), 266 F.3d 388 (5th Cir. 2001). Other circuit courts have not articulated a specific a test—these circuits either use broad phrases to discuss jurisdiction or simply assess jurisdiction on a case by case basis, guided by section 1334. See, e.g., Norwest Equip. Fin., Inc. v. Nath (*In re* D & P Partnership), 91 F.3d 1072, 1074 (8th Cir. 1996) (finding that post-confirmation jurisdiction exists for matters relating to plan "administration and interpretation").

Only one circuit court completely rejects a pre- and post-confirmation jurisdiction distinction. The First Circuit Court of Appeals has rejected the proposition that jurisdiction in

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matter over which such post-confirmation jurisdiction is sought is not a "related to," but a "core," proceeding, as core proceedings are necessarily within the court's jurisdiction without regard to plan confirmation.

[3]Several bankruptcy and district courts have reviewed the Third and Ninth Circuit tests for post-confirmation jurisdiction and cited them with approval. See Kirschner, v. Grant Thornton LLP (*In re* Refco, Inc. Sec. Litig.), 2008 WL 1827644, *10-11, No. 07 Civ. 11604 (GEL) (S.D.N.Y., April 21, 2008) (unreported); Krys v. Sugrue, 2008 WL 4700920, *5, 08 Civ. 7416 (GEL) (S.D.N.Y. Oct. 23, 2008) (slip opinion); Thickstun Bros. Equip. Co., Inc. v. Encompass Servs. Corp. (*In re* Thickstun Bros. Equip. Co., Inc.), 344 B.R. 515, 520-522 (B.A.P. 6th Cir. 2006); Premium of Am., LLC v. Sanchez (*In re* Premium Escrow Servs., Inc.), 342 B.R. 390, 396-400 (Bankr. D. D.C. 2006). However, the circuit courts in these various districts have not yet weighed in on the issue, so it remains to be seen how widespread the Resorts International court's formulation for post-confirmation jurisdiction will be implemented as controlling law.

post-confirmation cases is necessarily more limited. See Boston Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Boston Reg'l Med. Ctr., Inc.), 410 F.3d 100 (1st Cir. 2005). The court's analysis on this point stems from the plain language of section 1334, which does not make a distinction between pre- and post-confirmation jurisdiction. Id. at 106. This court's jurisdictional inquiry deviates from all of the other circuit courts, and is discussed further in Part IV.

Aside from this outlier circuit, courts have overwhelmingly accepted that there is a pre- and post-confirmation jurisdiction distinction.[4] The test used by the Third and Ninth Circuits is instructive of how the jurisdictional inquiry changes post-confirmation. These two circuits have held that the "essential inquiry" is "whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." Resorts Int'l, 372 F.3d at 166-67; Pegasus Gold, 394 F.3d at 1194. Assessing whether a "close nexus" exists may seem either overly broad or imprecise, but in application this test is both functional and useful to determining post-confirmation jurisdiction. The facts of both the Resorts International and Pegasus Gold cases provide helpful examples. Resorts International involves a litigation trust, and is discussed in Part III, *infra*, in conjunction with the discussion of post-confirmation issues particular to trust arrangements.

1. Pegasus Gold

Pegasus Gold involved 19 debtors (Pegasus Gold Corporation and 18 of its affiliates) that operated two mines in Montana. Pegasus Gold, 394 F.3d at 1192. A settlement was reached during the course of the bankruptcy regarding certain environmental cleanup and reclamation responsibilities of the debtors. Id. Pursuant to this settlement, the debtors would create a new entity, Reclamation Services Corporation ("RSC"), which would perform this cleanup and

[4] But see note 2, infra.

reclamation work. Id. Provisions regarding the creation of RSC were incorporated into the debtors' plan, which was subsequently confirmed. Id. RSC was formed and retained by the State of Montana to do the cleanup. Id.

Disagreement arose between RSC and the state, and Montana fired RSC and engaged a different firm to do the cleanup/reclamation work, named Spectrum Engineering. Id. RSC and the bankruptcy trustee then brought an action in the bankruptcy court against the State of Montana and Spectrum Engineering, alleging a variety of tort and contract claims, as well as breach of the settlement and plan provisions. Id. The defendants sought dismissal, on the grounds that the bankruptcy court lacked subject matter jurisdiction. Id. at 1193.

In denying the motion to dismiss, the Ninth Circuit applied the close nexus test. See id. at 1194. Quoting the Third Circuit, the court looked to whether the dispute was a matter "affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan." Id. The court recognized that the majority of the claims asserted by RSC and the trustee were common state tort and contract claims that arose post-confirmation. Id. However, court found that the resolution of these post-petition claims would requires an interpretation of the plan and the prior-approved settlement agreement that created RSC. Id. The court therefore found a sufficient "close nexus" to uphold jurisdiction.[5] Id.

2. Craig's Stores

The Fifth Circuit essentially uses the same post-confirmation jurisdiction test as the Third and Ninth Circuits, but, as evidenced by a recent case, remains committed to the formulation it stated in Bank of La. v. Craig's Stores of Tex., Inc. (*In re* Craig's Stores of Tex., Inc.), 266 F.3d

[5] With regard to the claims that were only tangentially within the bankruptcy court's jurisdiction, the court found supplemental jurisdiction existed. Pegasus Gold, 394 F.3d 1194-95 (citing 28 U.S.C. § 1367). Most courts have determined that 28 U.S.C. § 1367 is applicable in bankruptcy proceedings. See generally Susan Bock-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721 (1994).

88 (5th Cir. 2001).[6] See Newby v. Enron Corp. (*In re* Enron Corp. Sec.), 535 F.3d 325, 335-36 (5th Cir. 2008) (citing Craig's Stores, 266 F.3d at 391).[7]

The Craig's Stores case begins with a fairly fundamental premise: "bankruptcy court jurisdiction does not last forever." 266 F.3d at 389. Craig's Stores involved a debtor that had confirmed a plan of reorganization, and, as part of the plan, assumed a pre-petition contract with a bank. Id. Three years after confirmation, Craig's Stores commenced an adversary proceeding against the bank, alleging various state law claims that were based on post-confirmation events. Id. Craig's Stores argued post-confirmation jurisdiction existed for the following reasons:

> (a) the parties' contract existed before confirmation; (b) the contract was assumed in the plan of reorganization; (c) the resolution of the claim could affect Craig's ability to make payments under the plan; and . . . (d) the Bank's "counter-claim" to convert the confirmed case to Chapter 7 invoked jurisdiction sufficient to include Craig's original suit against the Bank.

Id. at 390. The Fifth Circuit declined to find jurisdiction, and in so doing stated a formulation for post-confirmation jurisdiction that, in form but not necessarily in substance, is more limited than that used by the Third and Ninth Circuits. See id. The court wrote: "After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction,

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[6]Some bankruptcy courts in the Fifth Circuit have began using a six factor test for post-confirmation jurisdiction, but the Fifth Circuit Court of Appeals has not weighed in on the appropriateness of this test at this point. See Gilbane Bldg. Co. v. Air Sys. Inc. (*In re* Encompass Servs. Corp.), 337 B.R. 864 (Bankr. S.D. Tex. 2006); see also *In re* Blast Energy Servs., Inc., 396 B.R. 676, 685-688 (Bankr. S.D. Tex. 2008). The Gilbane court stated:

> Based on the Fifth Circuit decisions and the case law applying those rulings, this Court has identified six pertinent factors for a post-confirmation subject matter jurisdiction inquiry: (1) when the claim at issue arose; (2) what provisions in the confirmed plan exist for resolving disputes and whether there are provisions in the plan retaining jurisdiction for trying these suits; (3) whether the plan has been substantially consummated; (4) the nature of the parties involved; (5) whether state law or bankruptcy law applies; and (6) indices of forum shopping.

Gilbane, 337 B.R. at 873.

[7] As of January 12, 2009, a Westlaw search revealed no reported Fifth Circuit case that cites to the test used by the Third Circuit in Resorts International or the Ninth Circuit in Pegasus Gold.

ceases to exist, other than for matters pertaining to the implementation or execution of the plan." Id.

Although stating a narrower formulation, the Craig's Stores opinion is not contrary to Pegasus Gold. The Fifth Circuit noted that post-confirmation would exist over a default on an obligation (a promissory note) that was created by a debtor's reorganization plan. Id. at 391. This is roughly analogous to the creation of RSC by the Pegasus plan, followed by the subsequent dispute regarding the entity's termination. Therefore, in application, the Fifth Circuit's test appears to be analogous to the Third and Ninth Circuits' test.

II. RETENTION OF JURISDICTION PROVISIONS

As noted above, section 1334(b) sets the boundaries of bankruptcy jurisdiction, both pre- and post-confirmation. However, post-confirmation, merely because an issue falls within these boundaries (because it meets the close nexus test or its intra-circuit equivalent), does not guarantee that the court will retain jurisdiction.[8] The reason for this has to do with section 1141 of the Bankruptcy Code.

Plan confirmation has the effect of binding the debtor, its principals and equity security holders, and its creditors, to the provisions of the plan.[9] 11 U.S.C. § 1141. It revests all property

[8] See generally David R. Kuney, *Liquidation Trusts and the Quagmire of Postconfirmation Jurisdiction: the Case of the Disappearing Estate*, 14 J. BANKR. L. & PRAC. 6 (Dec. 2005).

[9] Section 1141(a) states, in part:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

of the estate in the debtor, and makes such property free and clear of the claims of creditors, except as provided by the plan. Id. In sum, the plan is effectively a final judgment that binds all parties involved in the case. Enron v. New Power Co. (*In re* New Power Co.), 438 F.3d 1113, 1120 n.7 (11th Cir. 2006) ("[C]onfirmation of a bankruptcy plan binds all parties to the proceeding and has the same preclusive effect as a final judgment on the merits."); JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 870 (8th Cir. 2008) ("Once confirmed, a Chapter 11 plan acts as both a contract which binds the parties and as an order of the bankruptcy court.").

These effects can interfere with the intent of the debtor. Often, the debtor (or a liquidating or litigation trust created by the plan, as explained next in Part III), wants to prosecute various pre-bankruptcy causes of action, and would prefer these causes of action be heard in the bankruptcy court. Unless the plan specifically retains jurisdiction, the court may be unable to hear these causes of action, even if the section 1334 criteria for subject matter jurisdiction is otherwise met.[10] See 7 COLLIERS ON BANKRUPTCY ¶ 1123.02[3][b].

An important question then, is what must these retention of jurisdiction provisions include? May they simply assert that "the court retains jurisdiction to the maximum extent permitted by section 1334," or must these clauses be more specific? On the point, courts disagree. Id.

For example, in Advantage Healthplan, Inc. v. Potter, 391 B.R. 521 (D. D.C. 2008), the court found jurisdiction was retained on the basis of a very general provision. The plan listed 19 non-exhaustive categories of jurisdiction, and stated that jurisdiction was retained "[t]o the maximum extent permitted by the Bankruptcy Code." Id. at 547. Based on these general

[10] Each of the post-confirmation cases discussed in Part I in which jurisdiction was found to exist had a provision retaining jurisdiction.

provisions, the court found jurisdiction over a post-confirmation fee dispute between an entity created to pursue pre-petition claims, and that entity's counsel. Id. at 545.

Most cases, however, are to the contrary with regard to the sufficiency of blanket reservation retention clauses however. Browning v. Levy, 283 F.3d 761 (6th Cir. 2002), provides an example. In Browning, the debtor's confirmed plan contained the following provision:

> 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 sections 542, 543, 544, 547, 548, 550, or 553 of the Bankruptcy Code.

Id. at 769. The debtor initiated a post-confirmation adversary proceeding against its former attorneys, alleging pre-petition misconduct. Id. at 766. The Sixth Circuit found post-confirmation jurisdiction lacking with regard to this claim. Id. at 775. The court stated that this type of "blanket reservation" of rights does not defeat the res judicata effect of the confirmed plan. Id. The court found significant that the retention provision did not name the law firm or the factual basis for the reserved claims. Id. Without such information, the court found the retention provision did not "enable the value of [the debtor's] claims to be taken into account in the disposition of the debtor's estate." Id. Other courts have likewise required that jurisdiction retention provisions be specific. See, e.g., D & K Props. Crystal Lake v. Mut. Life Ins. Co. of New York, 112 F.3d 257, 259-262 (7th Cir. 1997) (provision preserving "all causes of action existing in favor of the Debtor" was ineffective).

Obviously, the requirement of specificity can be problematic. Debtors often file a plan during the 180 day period of exclusivity. This gives debtor a fairly short period of time then to identify potential causes of action and list them in the plan. In recognition of this, courts have come to disparate conclusions as to the degree of specificity required in jurisdiction retention

provision. See Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Sec. Corp., 2004 WL 1119652, *3 & n.5, No. 00 Civ.8688 (WHP) (S.D.N.Y. May 20, 2004) (unreported) ("A majority of courts have held that . . . the reservation must identify with some specificity what claims it intends to preserve and against whom those claims are asserted. . . . The degree of specificity required in a reservation clause in unsettled.").

Accordingly, some courts have given effect to retention clauses if they refer to a type or class of proceedings. See Fleet Nat'l Bank v. Gray (*In re* Bankvest Capital Corp.), 375 F.3d 51, 59-60 (1st Cir. 2004) (retaining jurisdiction over avoidance actions as a class); Hosp. and Univ. Prop. Damage Claimants v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 7 F.3d 32, 34 (2d Cir. 1993) (retaining jurisdiction over objections to a particular class of claims); Cohen v. TIC Fin. Systems. (*In re* Ampace Corp.), 279 B.R. 145, 160-61 (Bankr. D. Del. 2002) (avoidance actions); see also Katz v. I.A. Alliance Corp. (*In re* I. Appel Corp.), 300 B.R. 564, 569 (S.D.N.Y. 2003) ("It is neither reasonable nor practical to expect a debtor to identify in its plan of reorganization or disclosure schedules every outstanding claim it intends to pursue with [an extremely high] degree of specificity.").

Other courts, such as the Ninth Circuit, have determined that formulating a test for the required specificity of retention provisions which would be applicable to every case is not possible. See Davis v. Yageo Corp., 481 F.3d 661, 682 (9th Cir. 2007). Rather, these courts address the required specificity of retention provisions on a case by case basis. See id. (finding it "impractical and unnecessary to expect that a disclosure statement and plan must list each and every possible defendant and each and every possible theory," but not approving of blanket reservation provisions).

Ultimately, although the circuits disagree on what exactly is required of a jurisdiction retention provision, it is apparent that the unifying theme of these cases is that the courts are simply looking for adequate notice to all parties in interest. See Guttman v. Martin (*In re* Railworks Corp.), 325 B.R. 709, 716-17 (Bankr. D. Md. 2005) (collecting cases on this issue). If the retention provision is adequate, and subject matter jurisdiction exists under section 1334,[11] jurisdiction will often, but not always, exist. The next section, which discusses litigation trusts, helps delineate the outer limits of post-confirmation jurisdiction.

III. LITIGATION TRUSTS

Section 1123(b) provides that "[s]ubject to subsection (a) of this section, a plan may . . . (3) provide for . . . (B) 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." Two common "representatives of the estate" that are appointed to retain claims and interests of debtors are liquidation trusts and litigation trusts.[12] The post-confirmation jurisdiction limitations often affect these trusts; in fact, the Third Circuit's Resorts International case that created the close nexus test for post-confirmation jurisdiction involves a litigation trust. The facts of this case are helpful to understanding some of the limitations and issues that confront trustees of these trusts. Following this discussion, other cases dealing with the jurisdiction of plan-created trusts are considered.

[11] Of course, a retention provision cannot create jurisdiction where jurisdiction does not otherwise exist. Valley Historic Ltd. P'ship. v. Bank of New York, 486 F.3d 831, 837 (4th Cir. 2007) (explaining that jurisdiction must exist under section 1334 and that the debtor cannot "write its own jurisdictional ticket").

[12] The use of section 1123(b) to create such trusts has been considered and tacitly approved by the Supreme Court. See Holywell Corp. v. Smith, 503 U.S. 47 (1992) (approving the assignment of all property of the debtor to a liquidating trust).

A. Resorts International

In Resorts International, the debtors, four affiliated entities, formulated a plan that created a Litigation Trust for the benefit of certain creditors. 372 F.3d at 157-58. The retention of jurisdiction provision in the plan specifically assigned and retained jurisdiction over all claims held by Resort International, Inc., against Donald Trump and his affiliated entities, that arose from Trump's purchase of a particular resort. Id. at 158. This dispute was ultimately settled. Id.

The adversary proceeding at issue in Resorts International was not against Trump; rather, it was commenced against Price Waterhouse & Company, the Litigation Trust's accountants, and alleged professional negligence and breach of contract. Id. The trustee for the Litigation Trust argued that "related to" jurisdiction existed because the trust was created by the plan and the dispute involved the performance of professionals whose retention was mandated by the plan and whose duties were set out in the Litigation Trust Agreement (referenced in the plan). Id. at 160-61. Also, since a recovery from Price Waterhouse would result in a larger distribution to the creditors that the trust was created to benefit, the trustee believed the bankruptcy court retained jurisdiction, citing a Fifth Circuit case. Id. at 163 (citing Southmark Corp. v. Coopers & Lybrand (*In re* Southmark Corp.), 163 F.3d 925 (5th Cir. 1999) (finding jurisdiction, pre-confirmation, over a state-law malpractice action against a debtor's accountant).

The Third Circuit, distinguishing Resorts International from Southmark, found the fact of confirmation to be determinative. Id. The court acknowledged that "litigation trusts by their nature maintain a connection to the bankruptcy even after the plan has been confirmed." Id. at 167. However, in announcing and applying the close nexus test, the court found jurisdiction lacking. Id. at 169. The fact that the assets of the Litigation Trust (the litigation claims) were once assets of the estate was not sufficient, without more, to create a close nexus. Id. The court

was likewise not persuaded that a close nexus existed merely because the beneficiaries of the action were once creditors that had claims in the bankruptcy case. Id. The court found that these creditors had traded their creditor status for an interest in the Litigation Trust's recovery. Id. Since the reorganized debtor would not be affected, there was no close nexus, and therefore no jurisdiction. Id.

B. Other Litigation Trust Cases

The result in Resorts International is logically correct, but may nonetheless seem troubling, given that the creation of litigation trusts is both quite common and procedurally helpful to the administration of many bankruptcy cases. A 2006 case from the Northern District of Illinois, with facts that closely track Resorts International and reaches the same result (no jurisdiction), addresses this concern:

> This dismissal may strike some as hypertechnical, exalting form over substance. The Trust, after all, is simply pursuing for the benefit of creditors claims that the debtor would have pursued for the benefit of creditors had there been no Trust. It could fairly be asked whether the mere transfer of these claims to the Trust should be dispositive of the jurisdictional issue. The fact remains, however, that the claims are no longer property of the estate, so their liquidation affects neither the distribution of estate property nor its allocation among creditors. There is, consequently, no jurisdiction. And if that result seems formalistic, even mechanical, jurisdictional rules are meant to be mechanical. Indeed, "[t]he more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity."

Federalpha Steel LLC Creditors' Trust v. Fed. Pipe & Steel Corp. (*In re* Federalpha Steel LLC), 341 B.R. 872, 882 n.6 (Bankr. N.D. Ill. 2006) (citations omitted).[13]

Hypertechnical or not, these jurisdictional rules have important implications for creditors contemplating entering into litigation trust arrangements, or considering voting in favor of a plan

[13] In general, trust creation does not divest the bankruptcy court of jurisdiction over the pre-petition claims transferred by the estate. See Astropower Liquidating Trust v. Xantrex Tech., Inc. (*In re* AstroPower Liquidating Trust), 335 B.R. 309, 325 (Bankr. D. Del. 2005); see also Street v. The End of the Road Trust, 386 B.R. 539, 545 (D. Del. 2008) ("[T]rusts by their nature maintain a connection to the bankruptcy even after the plan has been confirmed.").

that proposes the creation of a litigation trust. If the court in a particular jurisdiction intends to follows the above-cited cases, the unwary creditor may find itself litigating a malpractice action or challenging the reasonableness of litigation professional fees in state court, rather than in the bankruptcy court. See, e.g., *In re* WRT Energy Corp., 2007 WL 2893426, *8-9, No. 96-50212 (Bankr. W.D. La., Sept. 28, 2007) (unreported) (finding no jurisdiction over post-confirmation claims against trustee of litigation trust); see also Premium of Am., LLC v. Sanchez (*In re* Premium Escrow Servs., Inc.), 342 B.R. 390, 399 (Bankr. D. D.C. 2006) ("If a litigation trust prosecutes a cause of action that did not belong to the debtor or the debtor's estate prior to confirmation, that cause of action belongs to the litigation trust personally rather than in its capacity as representative of the debtor's estate" and is not within bankruptcy court jurisdiction).

There is one case contrary to the above decisions. In Berstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co., Inc.), 86 F.3d 364 (4th Cir. 1996), a mass tort case, the Fourth Circuit found that the district court (which had revoked the reference) retained jurisdiction over matters affecting a trust created by the debtor's plan, the purpose of which was to pay medical injury claimants. Id. at 373. In A.H. Robins, the court determined that the trust would have a significant amount of money left over after the payment of all claims submitted. Id. at 367. It found it retained jurisdiction over the trust because, inter alia, the trust had taken the estate's place, and therefore matters related to the administration of the trust were within the court's jurisdiction. Id. at 373. However, the A.H. Robbins case has not been influential in this area of law. See Falise v. Am. Tobacco Co., 241 B.R. 48, 60-61 (E.D.N.Y. 1999) (discussing A.H. Robbins).

IV. LIQUIDATING VERSUS NON-LIQUIDATING DEBTORS

A fairly recent development in post-confirmation jurisdiction is the creation of a distinction, for jurisdictional purposes, between liquidating and non-liquidating debtors. As mentioned in Part I, the First Circuit's Boston Regional case has rejected the proposition that there is necessarily a distinction between pre- and post-confirmation jurisdiction. See Boston Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Boston Reg'l Med. Ctr., Inc.), 410 F.3d 100, 106 (1st Cir. 2005). In making its jurisdictional analysis, the court found a distinction between liquidating and non-liquidating plan; holding that jurisdiction is broader with regard to the former. See id. Subsequently, parties in several different courts, seeking to establish jurisdiction in post-confirmation disputes, have cited Boston Regional for the proposition that jurisdiction remains intact in their liquidating plan. As explained below, this argument has received some acceptance.

A. Boston Regional

The debtor in Boston Regional was a hospital that had ceased all operations, filed chapter 11, and confirmed a liquidating plan. 410 F.3d at 103-04. A controversy arose when, after confirmation, the debtor became aware of a charitable trust created by Elizabeth Krauss, whom had died approximately eleven months before the debtor filed bankruptcy. Id. The trust had three intended beneficiaries—the debtor and two churches. Id. The debtor became aware that the trust did not intent to make a distribution to it because of the ongoing liquidation. Id. The debtor then filed an adversary proceeding against the trust to compel turnover of its share of the trust assets. Id. at 104. The churches intervened, arguing that the original intent of Ms. Krauss would be violated by a distribution to the debtor (Ms. Krauss wanted to provide for care to indigent persons). Id.

The bankruptcy court overruled a challenge to jurisdiction, finding that "related to" jurisdiction existed over the dispute. Id. It held a hearing on the merits, and found in favor of the hospital. Id. at 104-05. The district court affirmed, and the churches appealed to the First Circuit. Id.

The First Circuit affirmed, specifically addressing the argument regarding jurisdiction. Id. at 105, 115. It noted that pre-confirmation, there would clearly be "related to" jurisdiction over a claim owned by the estate, based on an allegation that money was owed to it by a party such as Ms. Krauss' trust. Id. at 105. The court then turned to the churches' argument that the close nexus test should be applied; an argument the court noted "presupposes that the scope of the bankruptcy court's jurisdiction narrows dramatically once a plan of reorganization has been confirmed." Id. at 105-06.

The court considered Resorts International and Pegasus Gold, focusing on the reorganization context of those cases. Id. at 106. Context, the court stated, was key—the First Circuit found that the general rule of section 1334 should not be abandoned in all post-confirmation cases. Id. In liquidating plans, the court stated that that the "specter of endless bankruptcy jurisdiction" was absent." Id. Further, the court found that post-confirmation proceedings commenced by liquidating debtors are more likely to relate more directly to the underlying bankruptcy. Id. 106-07. In the words of the court, "a liquidating debtor exists for the singular purpose of executing an order of the bankruptcy court." Id. at 107.

B. The Response to Boston Regional

The Boston Regional opinion does not address the res judicata effect of a confirmed plan, the revesting of property of the estate in the debtor, or how other effects of confirmation might create a pre- and post-confirmation jurisdictional distinction. This has lead to criticism of the

Boston Regional case (discussed *infra*), but has not resulted in the First Circuit's reconsideration of its liquidating/non-liquidating distinction in the more than three and a half years since it was first issued. In the meantime, the Boston Regional case has gained some adherents.

One such adherent hails from the Second Circuit: the bankruptcy court for the Southern District of New York, in the case *In re* Cross Media Mktg. Corp. v. CAB Mktg., Inc. (*In re* Cross Media Mktg. Corp.), 367 B.R. 435 (Bankr. S.D.N.Y. 2007). In Cross, the debtor commenced an adversary proceeding against two defendants, involving a dispute over misappropriation of customer lists, on the basis those lists constituted trade secrets under state law. Id. at 439. This adversary proceeding was initiated post-confirmation, alleging pre- and post-petition misconduct by the defendants. Id. at 444. The court assessed jurisdiction sua sponte. In a short, two paragraph discussion citing only First Circuit cases, the court noted that the confirmed plan was a liquidating plan. Id. at 444-45. Therefore, the court determined that it had jurisdiction. Id. (citing Boston Regional). No other cases were cited, and no other reasons or bases for jurisdiction were stated.

Interestingly, a case from a Fourth Circuit court, the bankruptcy court for the District of Maryland, also cites to Boston Regional and the reorganization/liquidation distinction, but applies the close nexus test of Resorts International as well. See Air Cargo, Inc. Litig. Trust v. i2 Techs., Inc. (*In re* Air Cargo, Inc.), 2008 WL 352619, *4-6, No. 06-2011-JS (Bankr. D. Md., Feb. 7, 2008) (unreported). The facts of the case indicate that post-confirmation jurisdiction was proper notwithstanding any reorganization/liquidation distinction, but the court's citation of Boston Regional implies that this distinction may be gaining acceptance by bankruptcy judges.

No other circuit court has addressed the Boston Regional case. Only one court has specifically considered Boston Regional and rejected the liquidation/reorganization distinction.

That court declined to make this distinction based on the plain language of section 1334—that section does not differentiate between liquidating and reorganizing debtors. See Shandler v. DLJ Merch. Banking, Inc. (*In re* Insilco Techs., Inc.), 330 B.R. 512, 524-25 (Bankr. D. Del. 2005).

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