Compelling Arbitration of Non-Core Claims and Denying Arbitration of Core Claims: Is Bifurcation Efficient and Fair?

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INTRODUCTION

The extent to which arbitration clauses must be enforced within the context of a bankruptcy case has sparked much debate and decision making in recent years. On one end of the debate are debtors and trustees, as representatives of the debtor estate, who generally advocate for non-enforcement of arbitration in favor of bankruptcy court adjudication of all claims regardless of whether they relate to the bankruptcy. The rationale for this view is that bankruptcy, by design, offers debtors a single forum for the resolution of claims in a collective proceeding and, where a trustee is appointed, the trustee serves the creditors and is not party to the prepetition arbitration agreement. On the other end of the debate are the non-debtor contract counterparties who bargained for arbitration clauses and who point to no exception to the mandate of the Federal Arbitration Act in the text of the Bankruptcy Code.

At the center of the debate is the bankruptcy court being asked to decide the proper forum for dispute resolution where the claims of just one or several creditors of a debtor are governed by a contractual arbitration clause. The general rule that has emerged from the relevant case law may be summarized as follows: bankruptcy courts must enforce arbitration agreements unless such enforcement would conflict with the provisions and objectives of the Bankruptcy Code. More technically, the party seeking to prevent enforcement of an arbitration agreement must show that Congress evinced an intention to preclude waiver of judicial remedies for the statutory rights at

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issue. The courts that have examined the issue have held that constitutionally core claims are indicative of Congressional intent to limit arbitration. Where a matter involves both constitutionally core claims and other, non-core claims, however, the analysis is more complicated. This article will examine how some bankruptcy courts have addressed these issues.

COMPELLING ARBITRATION IN THE CONTEXT OF A BANKRUPTCY CASE

A. The Tension Between Two Federal Statutory Regimes

Section 2 of the Federal Arbitration Act ("FAA") provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable *save upon grounds as exist at law or equity for the revocation of any contract*."[1] The FAA creates a strong presumption in favor of arbitration and federal law strongly favors the arbitration of disputes under private contracts affecting commerce in accordance with arbitration agreements.[2] There are times, however, where a dispute involving the Bankruptcy Code and the FAA present a conflict of "near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."[3]

The Bankruptcy Code, unlike the FAA, is not focused on contract rights per se. Rather, the Bankruptcy Code strives to balance the varying rights of a multitude of parties in interest. Bankruptcy is a collective process intended to address claims of creditors in a single forum, to provide consistency and certainty in the resolution of matters potentially affecting the debtor's estate, and to ensure fair and equal treatment of creditors, while allowing a debtor the opportunity for a fresh start and, in many cases, to propose a plan of repayment of creditors.

Underpinning both the FAA and the Bankruptcy Code are policy considerations of efficiency and fairness. When the FAA and the Bankruptcy Code intersect, courts apply two-step process to determine whether Congress intended to preclude arbitration and the FAA's applicability.[4] Specifically, courts will analyze (a) the text and legislative history of the Bankruptcy Code, and (b) whether there is an inherent conflict between the arbitration and the underlying purposes of the Bankruptcy Code.[5]

The "inherent conflicts test" - stated by the Supreme Court in *Shearson/American Express, Inc. v. McMahon* - is a preeminent test for courts to evaluate whether Congress intended the FAA's policy favoring arbitration to yield to the jurisdictional policies behind a countervailing federal bankruptcy statute.[6] This test requires a party opposing enforcement of an arbitration provision to establish a contrary congressional command, or Congress's intent to create an exception to the FAA's mandate.[7] Such intent may be established in one of three ways: (1) the statute's text; (2) the statute's legislative history; or (3) the existence of an "inherent conflict between arbitration and the statute's underlying purposes."[8] The relevant caselaw

prescribes that, if Congress intended to make an exception of a particular claim from the Federal Arbitration Act, "such intent will be deducible" from the text or legislative history of a particular statute or "from an inherent conflict between arbitration and the statute's underlying purpose."[9]

Because the legislative history and text of the Bankruptcy Code is silent regarding the FAA, the vast majority of courts that have evaluated whether to enforce an arbitration clause in a bankruptcy case have focused on whether there is an inherent conflict between the Bankruptcy Code and enforcement of arbitration pursuant to the FAA.

B. Determination of an Inherent Conflict Between the Bankruptcy Code and FAA

When a bankruptcy court is tasked with determining whether to compel arbitration and stay proceedings pending arbitration, it must "undertake a multi-step process: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be non-arbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings."[10]

Once it has been determined that there is an enforceable arbitration agreement that encompasses the claims in question, the focus is whether the claim is arbitrable. To make this determination, many bankruptcy courts use two factors: "(i) whether the claim arises in a core or non-core proceeding, and (ii) if the claim is core, whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing the arbitration clause."[11] The second factor focuses on "whether the underlying dispute concerns rights created under the Bankruptcy Code or non-Bankruptcy Code issues derivative of the debtor's pre-petition business activities. In the former situation, the bankruptcy court has discretion to refuse arbitration, but in the latter it does not."[12] Core claims are not automatically excepted from the reach of an enforceable arbitration clause. The bankruptcy court must still determine whether "any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing the arbitration clause" and "the arbitration clause should be enforced unless [doing so] would seriously jeopardize the objectives of the Code."[13] Indeed, not all bankruptcy proceedings are premised on provisions of the Bankruptcy Code that inherently conflict with the FAA and arbitration of such proceedings may not necessarily jeopardize the objectives of the Bankruptcy Code.[14] The extent of any conflict is made on a claim-by-claim basis.[15]

In evaluating whether the court has discretion to refuse to compel arbitration, core claims,[16] "implicate more pressing bankruptcy concerns" than non-core claims.[17] Examples of core claims include fraudulent conveyance claims[18] and turnover.[19] Examples of non-core claims would be claims for breach of contract[20] and unjust enrichment.[21] Deciding that a claim is core, however, is not of itself a sufficient basis under this test to deny arbitration

where the arbitration clause is broad and covers the dispute.[22] Where core claims are presented, the bankruptcy court must undertake a further analysis to determine that arbitrating the dispute would severely conflict with the provisions of the Bankruptcy Code. This analysis requires "a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy case.[23] The fact that a claim may be core does not mean that the bankruptcy court must adjudicate the dispute. Courts that have examined the issue have delineated between core claims that are procedurally core and core claims that are substantively core. These courts conclude that procedurally core claims can be arbitrated, and only substantively core claims must be decided by the bankruptcy courts.

Procedurally core claims are usually based on the parties' prepetition relationship that become core because of the manner in which the dispute arises or gets resolved.[24] An example of procedurally core claims would be objections to proofs of claims and counterclaims asserted by the estate.[25] Arbitration of procedurally core claims seldom conflicts with any policy of the Bankruptcy Code unless the resolution would fundamentally and directly affect a core bankruptcy function.[26] Substantively core claims, by contrast, typically involve rights created under the Bankruptcy Code.[27] These claims are rarely covered by an arbitration clause as parties likely did not agree to arbitrate bankruptcy claims and even if such claims fall within the scope of the arbitration clause, it is more likely arbitration of such claims will conflict with bankruptcy policy.[28]

In determining whether a claim is arbitrable, other courts have distinguished between claims which are constitutionally core and those which are merely statutorily core. These courts apply the Supreme Court's rule in *Stern v. Marshall*, notwithstanding that *Stern* addressed the limitations on the authority of the bankruptcy courts as courts created under Article I of the Constitution, and not on whether that authority might be limited contractually under the FAA. Under *Stern*, a claim is constitutionally core when it "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[29] A bankruptcy estate's state-law counterclaim against a creditor "would necessarily be resolved in the claims allowance process" when it shares common questions of fact and law with the creditor's claim(s) and when it "seek[s] to directly reduce or recoup the amount claimed." [30] Consequently, "a counterclaim by the bankruptcy estate that seeks affirmative monetary relief to augment the estate but does not directly modify the amount claimed would not qualify as a claim to be resolved in ruling on the proof of claim."[31]

The analysis surrounding enforcement of arbitration clauses in bankruptcy becomes less clearly defined when the claims presented are a combination of core and non-core claims. To refer the non-core claims to arbitration in accordance with the mandate of the FAA and retain jurisdiction over core claims could result in inefficiencies such as increased litigation costs and inconsistent findings and determinations. Acutely aware of this concern, at least one recent bankruptcy court, in *In re McPherson*, concluded nonetheless that splitting the claims was necessary based on Fourth Circuit prece-

dent, notwithstanding these inefficiencies.[32]

BIFURCATION OF CORE AND NON-CORE CLAIMS

At the heart of both the FAA and the Bankruptcy Code are policy considerations concerning efficiency and fairness. Where a request to compel arbitration in a bankruptcy case involves both core bankruptcy claims and non-core claims, the bankruptcy court may be required to do what is neither efficient nor fair based on the FAA's mandate and existing precedent. In *McPherson*, the Bankruptcy Court for the District of Maryland recently wrestled with these issues and addressed the extent to which an arbitration clause in a prepetition agreement was enforceable to a prepetition arbitration proceeding stayed by a chapter 11 filing.[33] More specifically, in *McPherson*, Judge Harner sought to balance the competing objectives of the FAA and Bankruptcy Code when presented with non-core contract claims and constitutionally core claims.

McPherson involved an individual chapter 11 case filed by John McDonnell McPherson. Prior to the bankruptcy filing, McPherson had entered into a litigation funding agreement (the "Funding Agreement") with Camac Fund, L.P. (the "Lender"). Under the terms of the Funding Agreement, the Lender had agreed to extend financing to McPherson in exchange for a percentage of any recoveries in McPherson's pending whistleblower actions. Prior to McPherson's bankruptcy filing, disputes arose under the Funding Agreement and the Lender commenced an arbitration, invoking its rights under the Funding Agreement's arbitration clause. The claims in the prepetition arbitration included claims concerning the parties' performance under the Funding Agreement ("Contract Claims") and claims arising under the Fair Debt Collection Practices Act ("FDCPA Claims") and state law claims governing the Funding Agreement (together with the Contract Claims and FDCPA Claims FDCPA, the "Non-Bankruptcy Claims"). In the prepetition arbitration, McPherson challenged the validity of the arbitration and asserted counterclaims against the Lender including claims based on usury. Before these issues were decided in the arbitration, McPherson filed his voluntary bankruptcy petition.

In the bankruptcy, McPherson filed an adversary complaint asserting various claims against the Lender including claims under sections 502, 510, 523, 543, 544, 547 and 553 of the Bankruptcy Code (the "Bankruptcy Claims"). Additionally, the Lender filed an adversary complaint seeking determination that its claims against McPherson were non-dischargeable. The Lender also filed two motions - one for relief from the automatic stay to proceed with the prepetition arbitration and a second motion for an order staying McPherson's adversary proceeding asserting the Bankruptcy Claims pending arbitration.

In its analysis, the Court in *McPherson* first undertook the four-factor "arbitrability analysis":

> [F]irst, it must determine whether the parties agree to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be

> nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.[34]

The Court determined that the arbitration clause in the Funding Agreement was narrow and might not encompass all of the claims asserted by the parties in the prepetition arbitration or the chapter 11 case.[35] The Court further held that it was not required to determine this prong of the arbitrability analysis as it was not clear from the arbitration clause who the parties intended to decide arbitrability and, further, regardless of arbitrability, the bankruptcy court would have to evaluate the parties' arguments on stay relief and abstention. Next, the Court in *McPherson* analyzed the federal claims at issue and their arbitrability. The Court began with the Bankruptcy Claims and evaluated whether such claims were constitutionally core[36] concluding that each of the Bankruptcy Claims met the standard for such classification. The Court then evaluated the Non-Bankruptcy Claims and determined that the FDCPA Claims were not constitutionally core and that the state law claims governing the Funding Agreement were non-core proceedings.

The *McPherson* Court next considered the appropriate role for arbitration in McPherson's chapter 11 case particularly as it presented a hybrid case involving constitutionally core and non-core proceedings. In doing so, the Court was guided by Fourth Circuit precedent also involving constitutionally core and non-core claims.[37] In *CashCall*, the consumer debtor had filed an adversary proceeding against a loan company for the bankruptcy court's declaration that the loan was illegal and void and to obtain damages against the loan company for alleged illegal debt collection activities.[38] The loan company moved to dismiss the adversary proceeding or for a stay of the proceeding and to compel arbitration pursuant to the loan documents. The Fourth Circuit upheld the district court's denial of arbitration of the debtor's declaratory relief claim that the loan was illegal or void, ruling that the claim was constitutionally a core proceeding and that arbitrating such claim would substantially interfere with the debtor's plans for reorganization.[39] As for the money damages claim, the Fourth Circuit, held that the district court erred in denying a motion to compel arbitration of the debtor's claim for damages under the North Carolina Debtor Collection Act. However, Circuit Judge Niemeyer dissented from the finding that the non-core claim should have gone to arbitration. Judge Niemeyer stated: "I believe that splitting Moses' closely related claims and sending Moses' non-core claim to a questionable and perhaps illusory arbitration proceeding would inherently conflict with the purposes of the Bankruptcy Code."[40] He noted that the distinction between core and non-core is not necessarily dispositive and that courts may consider the connection between the two claims and other factors such as potential change to the debtor's ability to pay unsecured creditors in her bankruptcy, delays caused by separate litigation over the legitimacy of the arbitration process, and the potential preclusive effect of non-bankruptcy findings on the bankruptcy court.[41] Before *McPherson*, lower courts in the Fourth Circuit had followed *CashCall* but disagreed as to whether a

constitutionally core claim by its nature inherently conflicts with the purposes of the Bankruptcy Code requiring denial of arbitration.[42] These decisions, unlike *McPherson*, did not involve both constitutionally core and non-core claims.

In *McPherson*, Judge Harner expressed her agreement with the views Judge Niemeyer expressed in his dissent in *CashCall* that "[e]ven though non-core claims are ancillary to reorganization, it is apparent that they can nonetheless affect a debtor's efforts to reorganize and that sending non-core claims to arbitration can, in given circumstances, interfere with the debtor's chance to complete a fair and efficient . . . reorganization."[43] Bound by the Fourth Circuit's decision in *CashCall*, however, Judge Harner determined to bifurcate the Bankruptcy Claims (determined to be constitutionally core claims) from the Non-Bankruptcy Claims (determined to be non-core claims) and directed the Non-Bankruptcy Claims to proceed in arbitration.[44] Concerned that that "if the arbitrator resolves the [Non-Bankruptcy Claims] prior to this Court addressing the Bankruptcy Claims, the parties could face conflicting results, or one forum may be bound by the other's decision under the doctrine of claim or issue preclusion," Judge Harner stayed the litigation of the Bankruptcy Claims pending arbitration of the Non-Bankruptcy Claims.[45] Other bankruptcy courts presented with a hybrid case involving core and non-core claims have reached a similar result.[46]

The decision to *stay prosecution of non-arbitrable claims* pending conclusion of arbitration is committed to the court's discretion[47] and the power to grant such a stay stems from the court's power "to control the disposition of the cases in its docket with economy of time and effort for itself, for counsel, and for litigants."[48] Section 3 of the FAA provides that the court "upon being satisfied that the issue involved . . . is preferable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[49] A stay of the bankruptcy proceedings pending arbitration is appropriate where (1) the arbitrable claims predominate and the non-arbitrable claims are of questionable merit, or (2) the stay will promote judicial economy, avoidance of confusion and possible inconsistent results without working an undue hardship or prejudice against the plaintiff.[50]

Conversely, the decision to *stay arbitration* pending determination of core claims by the bankruptcy court will similarly turn on the interests of judicial economy and the court's ability to carry out the provisions of the Bankruptcy Code. Section 105 of the Bankruptcy Code authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"[51] and, based on this, to "enjoin[] proceedings in other forums against non-debtors."[52] Where proceeding with arbitration would interfere with the administration of the debtor's bankruptcy case, a stay of arbitration pending determination of the bankruptcy claims may be warranted.[53]

CONCLUSION

Hybrid cases involving motions to compel arbitration of both core and

non-core claims present procedural challenges to bankruptcy courts. Where arbitration of non-core claims would significantly delay or otherwise impede a debtor's bankruptcy case or the core and non-core claims are inextricably intertwined such that it would not only be more efficient but necessary for such claims to be decided in a single forum, bankruptcy courts should - to the extent not otherwise bound by precedent within their circuit - retain jurisdiction over such disputes and deny a motion to compel arbitration. Where, on the other hand, non-core claims predominate and the core claims are either procedurally core or constitutionally core claims for which a decision by an arbitrator would not "seriously jeopardize the objectives of the Code,"[54] bankruptcy courts should consider referring the core and non-core claims to arbitration. In all other hybrid cases, bankruptcy courts presented with both constitutionally core claims and non-core claims should bifurcate the parties' claims if doing so would not seriously impact the policies and purposes of the Bankruptcy Code. Bifurcation exposes the process to the risk of inconsistent results if the arbitrator rules on the non-bankruptcy claims before the bankruptcy court rules on the core claims.[55] To mitigate this risk, bankruptcy courts should consider staying the litigation of bankruptcy claims pending arbitration or, where the bankruptcy claims are more pressing or the determination could impact the arbitration, staying the arbitration pending the bankruptcy determination of the bankruptcy claims. Judicial economy and policies of fairness and efficiency are promoted by bifurcation of claims and imposing a stay of the litigation in either the arbitration or bankruptcy court. While bifurcation of claims is not ideal and somewhat inconsistent with the policy consideration of efficiency and the expectation that bankruptcy claims be decided in a single forum, such approach is most respectful of the FAA's mandate and existing federal court jurisprudence.

NOTES:

[1]9 U.S.C.A. § 2 (emphasis added).

[2]See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185, Fed. Sec. L. Rep. (CCH) P 93265, R.I.C.O. Bus. Disp. Guide (CCH) P 6642 (1987).

[3]U.S. Lines, Inc. v. Am. Steamship Owners Mut. Prot. And Indem. Assoc. (In re U.S Lines, Inc.), 97 F.3d 631, 640 (2d Cir. 1999) (internal citations omitted).

[4]See, e.g., Shearson/ Am. Express, 482 U.S. at 227; see also Moses v. CashCall, Inc., 781 F.3d 63, Bankr. L. Rep. (CCH) P 82792 (4th Cir. 2015).

[5]CashCall at 71.

[6]482 U.S. 220, 226 (1987).

[7]482 U.S. at 226 (emphasis added).

[8]482 U.S. at 227.

[9]Shearson, 482 U.S. at 226, 227.

[10]In re Bethlehem Steel Corp., 390 B.R. 784, 789, 50 Bankr. Ct. Dec. (CRR) 75 (Bankr. S.D. N.Y. 2008); In re Hagerstown Fiber Ltd. Partnership, 277 B.R. 181, 202 (Bankr. S.D. N.Y. 2002).

[11]In re Try The World, Inc, 2021 WL 3502607, * 9 (Bankr. S.D. N.Y. 2021).

[12]In re Hagerstown Fiber Ltd. Partnership, 277 B.R. 181, 202 (Bankr. S.D. N.Y. 2002).

[13]Hagerstown, 277 BR at 200–01.

[14]In re Winimo Realty Corp., 270 B.R. 108, 118, 47 Collier Bankr. Cas. 2d (MB) 186 (S.D. N.Y. 2001).

[15]Bethlehem Steel, 390 B.R. at 794 (noting that to determine whether a conflict exists between the Bankruptcy Code and FAA to deny a request to arbitrate "requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy") (citations omitted).

[16]"Core" claims are matters that directly affect a fundamental bankruptcy function. Examples of core claims are identified in section 157 of title 28 of the United States Code and include objections to a creditor's proof of claim, challenges to the automatic stay or discharge of debtors, preference actions and counterclaims against person fling claims against the debtor's estate.

[17]Non-core claims are matters that are not core proceedings but may be related to a bankruptcy case. Non-core claims are claims that do not appear on the illustrative list of core claims under 28 U.S.C.A. 157(b), do not invoke a substantive right under the Bankruptcy Code and do not only arise within a bankruptcy context. In re Paragon Offshore PLC, 598 B.R. 761, 768 (Bankr. D. Del. 2019), leave to appeal denied, 2020 WL 1815550 (D. Del. 2020).

[18]Fraudulent conveyance claims are not arbitrable as the right to recover fraudulent transfers by a trustee or debtor in possession becomes a claim and comes into existence once the transferor files bankruptcy and such claims belong to the trustee and estate creditors and they are not parties to the prepetition arbitration agreement. In re Try The World, Inc, 2021 WL 3502607 (Bankr. S.D. N.Y. 2021).

[19]A claim for turnover arises under title 11 of the United States Code. See 11 U.S.C.A. § 542. The sole recipient of a turnover claim is the trustee as representative of the estate. Further, a claim for turnover is a substantively core claim. 28 U.S.C.A. § 157(b). Finally, compelling arbitration of a turnover claim would conflict with the policies and objectives of the Bankruptcy Code inasmuch as a trustee's function is to marshal and liquidate the assets of the debtor. See In re Try The World, Inc, 2021 WL 3502607, * 14 (Bankr. S.D. N.Y. 2021) (denying motion to arbitrate turnover claim).

[20]A "breach of contract action by a debtor against a party to a pre-petition contract, who has filed no claim with the bankruptcy court, is non-core." In re Orion Pictures Corp., 4 F.3d 1095, 1102, 24 Bankr. Ct. Dec. (CRR) 1139, 29 Collier Bankr. Cas. 2d (MB) 1341, Bankr. L. Rep. (CCH) P 75459, 123 A.L.R. Fed. 681 (2d Cir. 1993); see also In Re: Enron Corp., et al., Debtor., 2002 WL 32155353, at *2 (Bankr. S.D. N.Y. 2002) (finding that an "action based on a breach of contract that is brought by a debtor against a party to a pre-petition contract is non-core when its only effect on the administration of the estate is to augment the assets of the estate").

[21]Courts generally find claims for unjust enrichment to be non-core claims. See, e.g., In re JVJ Pharmacy Inc., 618 B.R. 408, 416, 69 Bankr. Ct. Dec. (CRR) 24 (Bankr. S.D. N.Y. 2020), vacated and remanded, 630 B.R. 388, 70 Bankr. Ct. Dec. (CRR) 126, Bankr. L. Rep. (CCH) P 83691 (S.D. N.Y. 2021) (finding that an unjust enrichment claim arose under state laws before the bankruptcy case and was non-core); In re Paragon Offshore PLC, 598 B.R. 761, 768 (Bankr. D. Del. 2019), leave to appeal denied, 2020 WL 1815550 (D. Del. 2020) (finding that claim for unjust enrichment was non-core because it is not included on the 'illustrative list" of core claims in 28 U.S.C.A. § 157(b), does not invoke a substantive right

under the Bankruptcy Code, and does not only arise within a bankruptcy context.); In re Great Lakes Comnet, Inc., 588 B.R. 1, 7, 65 Bankr. Ct. Dec. (CRR) 223 (Bankr. W.D. Mich. 2018) (holding that liquidating trustee's claim for unjust enrichment was non-core because it arose under state law, did not comprise a claim that can arise solely in the context of a bankruptcy case and could have been pursued without the prerequisite of a bankruptcy filing). If, however, there is overlap between a claim for unjust enrichment and a core claim such as an avoidance claim, courts will examine whether the claims are (i) "intimately intertwined", (ii) arise from the same facts and (iii) could have been brought prepetition. In re Try The World, Inc, 2021 WL 3502607, *13 (Bankr. S.D. N.Y. 2021) (granting motion to compel arbitration of claim for unjust enrichment on the basis that such claim was not intimately intertwined with the other core claims asserted in the complaint).

[22]In re U.S. Lines, Inc., 197 F.3d at 639; see also BERKOFF AND DRISCOLL, TO ENFORCE OR NOT TO ENFORCE: WHAT TEST SHOULD COURTS APPLY WHEN FACED WITH ARBITRATION AGREEMENTS IN BANKRUPTCY?, 28 No. 4 J. BANKR. L. & PRAC. NL Art 6 (August 2019).

[23]MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 108, Bankr. L. Rep. (CCH) P 80445 (2d Cir. 2006)

[24]2021 WL 3502607 *10.

[25]See 28 U.S.C.A. 157(b)(2); see also Hagerstown, 277 B.R. 181, 203 (describing procedurally core claims as "garden variety pre-petition contract disputes dubbed core because of how the dispute arises or gets resolved."); In re Cardali, 2010 WL 4791801, *9 (Bankr. S.D. N.Y. 2010) (finding that "issues involving the filing and validity of a proof of claim are often denominated 'procedurally core' " and thus arbitrable); In re S.W. Bach & Co., 425 B.R. 78, 90 (Bankr. S.D. N.Y. 2010) ("non-core claims against a creditor may turn into core claims after the creditor files a proof of claim since an adversary proceeding against such a creditor would affect the allowance or disallowance of the creditor's claim . . . If an otherwise non-core claim aris[es] out of the same transaction as the creditor's proof of claim, or the adjudication of the claim . . . require[s] consideration of the issues raised by the proof of claim . . . such that he two are logistically connected, the claim is core.").

[26]277 B.R. at 203.

[27]277 B.R. at 203; 2021 WL 3502607 *10.

[28]277 B.R. at 203.

[29]Stern v. Marshall, 564 U.S. 462, 499, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011).

[30]In re TP, Inc., 479 B.R. 373, 385 (Bankr. E.D. N.C. 2012); see also In re Pulaski, 475 B.R. 681, 688 (Bankr. W.D. Wis. 2012) (noting that "if the debtor's claim can be resolved without considering the creditor's claim, then the bankruptcy court lacks the constitutional authority to hear the debtor's claim").

[31]TP, Inc., 479 B.R. at 385.

[32]In re McPherson, 630 B.R. 160, 70 Bankr. Ct. Dec. (CRR) 79 (Bankr. D. Md. 2021).

[33]630 B.R. 160.

[34]In re McPherson, 630 B.R. 160, 170, 70 Bankr. Ct. Dec. (CRR) 79 (Bankr. D. Md. 2021) (citing In re MF Global Holdings Ltd., 571 B.R. 80, 89–90 (Bankr. S.D. N.Y. 2017)).

[35]630 B.R. 160, 169 (The arbitration clause in the funding agreement at issue in *McPherson* provided that "[i]f a dispute arises under this Agreement . . . the parties agree to submit such dispute to binding arbitration . . .").

[36]630 B.R. 160, 172 (asking "whether the claim 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process' ") (citing Stern v. Marshall, 564 U.S. 462, 499, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011)).

[37]See Moses v. CashCall, Inc., 781 F.3d 63, Bankr. L. Rep. (CCH) P 82792 (4th Cir. 2015).

[38]781 F.3d at 66.

[39]781 F.3d at 66–67.

[40]781 F.3d at 73.

[41]781 F.3d at 73.

[42]See, e.g., In re Taylor, 594 B.R. 643, 651 (Bankr. E.D. Va. 2018), judgment aff'd, 420 F. Supp. 3d 436 (E.D. Va. 2019) (debtor's claim to disallow creditor claim under section 502 and class claim for creditor's alleged violation of Virginia consumer finance law were found to be constitutionally core claims and "referring those core claims to arbitration would inherently conflict with the purposes of the Bankruptcy Code"); In re TP, Inc., 479 B.R. 373, 382 (Bankr. E.D. N.C. 2012) (statutorily core "counterclaims" held to be constitutionally non-core and referred to arbitration); But see In re Barker, 510 B.R. 771 (Bankr. W.D. N.C. 2014) ("Even if a matter is constitutionally core, a bankruptcy court possesses broad discretion to grant a motion to compel arbitration if there is a written agreement to arbitrate and if doing so would be helpful to the court and would assist the bankruptcy court in exercising its bankruptcy jurisdiction).

[43]630 B.R. 160, 176 (quoting CashCall, 781 F.3d 63, 73–74 (Niemeyer, J., dissenting)).

[44]630 B.R. 160, 178.

[45]630 B.R. 160, 179.

[46]See, e.g., In re Try The World, Inc, 2021 WL 3502607 (Bankr. S.D. N.Y. 2021) (compelling arbitration of breach of contract and unjust enrichment claims, denying motion to compel arbitration of claims for turnover and fraudulent transfer and staying arbitration of breach of contract and unjust enrichment claims pending the bankruptcy court's determination of the fraudulent transfer claims).

[47]277 B.R. at 99 (citations omitted).

[48]Citrus Marketing Bd. of Israel v. J. Lauritzen A/S, 943 F.2d 220, 225, 1991 A.M.C. 2705 (2d Cir. 1991) (citations omitted).

[49]9 U.S.C.A. § 3.

[50]Hagerstown, 277 B.R. at 199 (citations omitted).

[51]11 U.S.C.A. § 105(a).

[52]S.W. Bach, 425 B.R. at 98.

[53]In re TP, Inc., 2013 WL 865982 (Bankr. E.D. N.C. 2013) ("the administration of the debtor's bankruptcy case cannot proceed efficiently and conclusively without resolution of the three core claims"). In *TP*, the court found that compelling arbitration of the non-core claims simultaneous with its determination of the core claims would waste the potential for judicial economy and narrowing the scope of the issues in dispute. 2013 WL 865982 * 3.

[54]In re U.S. Lines, Inc., 197 F.3d 631, 640, 35 Bankr. Ct. Dec. (CRR) 187, 2000 A.M.C. 784 (2d Cir. 1999).

[55]McPherson, 630 B.R. 160.