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Chapter 7 Bankruptcy Proceedings May Be Sufficiently "Unusual" to Render Forum-Selection Clauses Unenforceable

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Introduction

The strong policy in favor of centralizing bankruptcy disputes in a single forum often overrides the deference typically owed to the enforceability of the enforceability of forum-selection clauses ("FSC"). As such, with the exception of the Seventh and Tenth Circuits, FSCs are less likely to be enforced in bankruptcy cases, especially when the pending claim is constitutionally core.[1] This memorandum explores the treatment of FSCs in bankruptcy cases. Section I discusses bankruptcy courts' strong presumption for centralized proceedings; Section II examines the treatment of FSC when the matter is core; and Section III reviews the rejection of the "core v. non-core" analysis by certain circuits.

Discussion

I. Background

A FSC is a contractual provision that designates a specific location for the resolution of disputes arising under a contract. Parties often employ FSCs to limit litigation expenses and

[1] *See, e.g., In re* Iridium Operating LLC, 285 B.R. 822, 837 (S.D.N.Y. 2002) (finding public policy towards enforcing FSCs "not so strong" as to mandate enforcement when it would require transfer of a core bankruptcy proceeding from the forum in which the underlying bankruptcy case is pending). *Contra In re* B.L. McCandless LP, 417 B.R. 80, 82–83 (Bankr. N.D. Ill. 2009) (enforcing FSC since all factors except the location of the debtor weighed in favor of transferring to designated forum).

avoid the threats of hostile foreign laws, judges, and juries. Additionally, since FSCs often "figure centrally" in a business agreement, non-bankruptcy courts generally enforce FSCs "in all but the most unusual cases."[2]

II. Bankruptcy Courts Are Less Likely to Enforce FSC's in Bankruptcy Cases Because of the Strong Presumption in Favor of Centralized Proceedings.

A. Overriding public interest in centralized proceedings may be sufficient to overcome typical deference to FSCs.

"Because the bankruptcy system implicates interests far broader than the private rights of the two parties in question, it is not unusual for prepetition contract obligations, particularly those dictating forum . . . to be modified or even ignored in a bankruptcy case."[3]

For example, in *In re Dozier Financial, Inc.*, a South Carolina bankruptcy court held relevant "public interests" made South Carolina an appropriate forum for a chapter 7 trustee's adversary proceeding against an accounting firm, despite a valid FSC designating a Texas forum.[4] There, the court noted that "the investments and losses in question involved a South Carolina business, investors located in South Carolina, and resulted in a South Carolina bankruptcy case."[5] Additionally, since the FSC bound only the firm and the Debtor, the court found pursuing the claims against the firm in Texas and the other five defendants in South Carolina would result in "substantially duplicative discovery" that would waste the time and resources of the parties, creditors, and court.[6] Consequently, the court held the relevant public

[2] A. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas, 571 U.S. 49, 66 (2013).
[3] *In re* Bavaria Yachts USA, LLLP, 575 B.R. 540, 560–63 (Bankr. N.D. Ga. 2017); *see also In re* Penson Worldwide, 587 B.R. 6, 16, n.46 (Bankr. D. Del. 2018) (noting "overriding public interest in centralizing entire dispute in the bankruptcy court").
[4] 587 B.R. 637, 651 (Bankr. D.S.C. 2018).
[5] *Id.* at 649.
[6] *Id.* at 650.

interests and practical considerations presented "unusual circumstances" that outweighed the deference typically owed to FSCs.[7] Accordingly, the court declined to transfer venue.[8]

Similarly, many bankruptcy courts have held that the district in which the underlying bankruptcy case was filed is presumptively the appropriate district for hearing and determining the case.[9]

B. Bankruptcy courts are more likely to centralize a proceeding if the matter is core.

The presumption in favor of centralized proceedings is strengthened when the matter is core.[10] "Core proceedings are matters arising under the Bankruptcy Code or arising in bankruptcy cases."[11] Notably, a case being constitutionally core determines whether bankruptcy courts have the power to enter a final judgment on the matter.[12] Thus, since final adjudicative authority in a matter generally eschews duplicative litigation—the purpose behind centralized proceedings—many courts find the core versus non-core distinction dispositive when determining the enforceability of a FSC.[13] Accordingly, when the matter is core, FSCs are less likely to be enforced. Conversely, when the matter is deemed non-core, enforcement of an FSC is more likely.[14]

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[7] *Id.* at 651.
[8] *Id.*
[9] *See, e.g., In re* Manville Forest Products Corp., 896 F.2d 1384, 1391 (2d Cir. 1990); *In re* Patriot Coal Corp., 482 B.R. 718, 739 (Bankr. S.D. N.Y. 2012); *In re* Bavelis, 453 B.R. 832, 873 (Bankr. S.D. Ohio 2011); *In re* DHP Holdings II Corp., 435 B.R. 264, 275 (Bankr. D. Del. 2010); *In re* Sherwood Investments Overseas Ltd., Inc., 442 B.R. 834, 837, (Bankr. M.D. Fla. 2010).
[10] *See generally* Ashley D. Champion, *Clash of the Policy Titans: The Applicability of Forum-selection Clauses in Bankruptcy*, 23 NO. 3 J. BANKR. L. & PRAC. NL ART. 1 (2014) ("the difference between core and non-core claims is a blurry distinction that has been thrust into further turmoil by a third category of claim -- core but unconstitutional -- created by *Stern v. Marshall*[, 131 S. Ct. 2594].") (reviewing bankruptcy venue provisions and summarizing the methods bankruptcy courts employ when deciding whether to enforce prepetition FSCs).
[11] *In re* Residential Capital, LLC, 519 B.R. 890, 900 (Bankr. S.D.N.Y. 2014).
[12] *See* Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1940 (2015).
[13] *See In re* Iridium, 285 B.R. at 836–37; *In re* Brown, 219 B.R. 725, 730–31 (Bankr. S.D. Tex. 1997).
[14] *See, e.g., In re* McCrary & Dunlap Constr. Co., 256 B.R. 264, 267 (Bankr. M.D. Tenn. 2000).

Courts in the First through Fourth, Sixth, Eighth, and Ninth Circuits have all found whether or not the matter is core to be controlling.[15]

The Fifth Circuit has developed a similar approach, but has yet to adopt a per se practice of declining enforcement of FSCs in core proceedings. For example, in *In re Spillman*, the court noted that the Circuit never "squarely held" that valid FSCs are *never* enforceable in core bankruptcy proceedings.[16] However, the court reasoned that public policy supporting a "federal bankruptcy forum . . . is at its *zenith*" when a pending matter involves "adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims."[17] Thus, since the pending credit bid claim involved "a right created by the Bankruptcy Code," the court found the core proceeding presented a "sufficiently strong public-policy interest" justifying nonenforcement of the FSC. *Id.*

C. Courts in the Seventh and Tenth Circuits reject the "core vs. non-core" analysis

Courts in the Seventh Circuit do not directly consider whether a matter is core.[18] Instead, Seventh Circuit courts employ a five-factor test that considers the location of the: (1) creditors,

[15] *See, e.g.*, *In re* N. Parent, Inc., 221 B.R. 609, 622 (Bankr. D. Mass. 1998) ("Retaining core proceedings in this Court, in spite of a valid forum selection clause, promotes the well-defined policy goals of centralizing all bankruptcy matters in a specialized forum to ensure the expeditious reorganization of debtors."); *In re* Iridium, 285 B.R. 822, 837 (S.D.N.Y. 2002) (denying transfer of core proceeding); *In re* Exide Techs., 544 F.3d 196, 206 (3d Cir. 2008) ("Whether claims are considered core or non-core proceedings dictates . . . [, *inter alia*,] the enforcement of forum selection clauses."); Creekridge Capital, LLC v. Louisiana Hosp. Ctr., LLC, 410 B.R. 623, 630 (D. Minn. 2009) (refusing to enforce FSC and instead transferring core matter to forum in which bankruptcy case was pending); Kismet Acquisition, LLC v. Icenhower *(In re* Icenhower*)*, 757 F.3d 1044, 1051 (9th Cir. 2014) (affirming nonenforcement of FSC in bankruptcy action in favor of forum of core bankruptcy proceeding); *see also In re* McCrary & Dunlap Constr. Co., 256 B.R. 264, 267 (Bankr. M.D. Tenn. 2000) ("The policy favoring centralization of bankruptcy proceedings is not so strong as to abandon the forum selection clause where the proceeding is *non-core*.") (emphasis added); *In re* Millennium Studios, Inc., 286 B.R. 300, 307 (D. Md. 2002) (same).

[16] *See* Fire Eagle LLC v. Bischoff (*In re* Spillman Dev. Group, Ltd.), 710 F.3d 299, 306 (5th Cir. 2013).

[17] *Id.* (emphasis added).

[18] *See In re* Pickwick Place Ltd. Partnership*,* 63 B.R. 290, 291–92 (Bankr. N.D.Ill. 1986).

(2) debtor, (3) debtor's assets, (4) necessary witnesses, and (5) forum that would provide the most efficient administration of the case.[19]

Similarly rejecting the core versus non-core analysis, courts in the Tenth Circuit adhere to the tenants of *Bremen v. Zapata Off–Shore Co.*[20] Under this rationale, courts reject the traditional bankruptcy presumption regarding centralizing proceedings and instead assume the FSC is valid and enforceable. Thus, unless the opposing party can show enforcement would be unreasonable under the circumstances, Tenth Circuit courts tend to enforce FSCs.[21]

Conclusion

Since bankruptcy courts have a particularly strong interest in centralized proceedings, FSCs, even if valid, are less likely to be enforced in bankruptcy cases, especially if the pending claim is core. However, approaches to enforceability are not uniform across the various circuits. As such, the enforceability of FSCs in bankruptcy cases is ultimately dependent on the jurisprudence of each circuit.

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[19] *In re* B.L. McCandless LP, 417 B.R. 80, 82–83 (Bankr. N.D. Ill. 2009) (enforcing FSC since all factors except the location of the debtor weighed in favor of transferring to designated forum).

[20] 407 U.S. 1 (1972). There, the Court articulated a general policy that freely negotiated FSCs must be enforced by Federal courts. *Id.* at 15. In so holding, the Court also delineated three exceptions to general enforcement: (1) if the FSC was obtained by fraud or overreaching; (2) enforcement would violate a strong public policy of the forum; or (3) enforcement under the circumstances would be so seriously inconvenient as to deprive a litigant of his, her, or its day in court. *Id.* at 15–17. Moreover, the Court held that parties claiming any exception bear a "heavy burden." *Id.*

[21] *See In re* D.E. Frey Group, Inc., 387 B.R. 799, 807 (D. Colo. 2008) (enforcing FSC and finding debtor failed to meet "its heavy burden under *Bremen* of showing that enforcing the forum selection clause would be unreasonable under the circumstances").