Unveiling the Mystery, History, and Problems Associated with the Jurisdictional Limitations of Bankruptcy Courts over Personal Injury Tort and Wrongful Death Claims

Ishaq Kundawala
Shepard Broad Law Center

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr
Part of the Bankruptcy Law Commons, and the Torts Commons

Recommended Citation
Ishaq Kundawala, Unveiling the Mystery, History, and Problems Associated with the Jurisdictional Limitations of Bankruptcy Courts over Personal Injury Tort and Wrongful Death Claims, 42 McGeorge L. Rev. (2016). Available at: https://scholarlycommons.pacific.edu/mlr/vol42/iss4/1

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Ishaq Kundawala*  

I. INTRODUCTION  

The current jurisdictional structure of bankruptcy courts in the United States is nothing short of a mystery. Scholars, judges, and practitioners have long struggled with finding their way through the confusing labyrinth of jurisdictional rules, exceptions, and exclusions in our current bankruptcy system. Courts spend countless hours each year considering all kinds of jurisdictional issues that arise in bankruptcy cases. This results in a diversion of judicial resources from substantive matters. Adding to this quandary is the limited scope of bankruptcy courts' jurisdiction over a small but very significant subset of claims—personal injury tort and wrongful death claims—which weaves yet another layer of complexity into an already complicated jurisdictional analysis. This additional complexity mystifies even the most adept bankruptcy professionals.  

The significance of this unnecessarily difficult jurisdictional analysis cannot be overstated. Presently, the dramatic increase in the number of complex Chapter 11 corporate bankruptcy cases in our country, including the resolution of hundreds of thousands of personal injury tort and wrongful death claims, is a centerpiece of debtor reorganization efforts. These are definitely not low-dollar claims at issue, and the claimants are indeed, in many cases, depending on a speedy, fair, and efficient resolution of their claims and, ultimately, a monetary distribution from the debtors.  

Unfortunately for both the Chapter 11 debtors (who wish to reorganize their enterprises as expeditiously as possible) and the personal injury tort and wrongful death claimants (who are depending on fair yet prompt distributions), the debtor reorganization process (including any resulting distributions to claimants) may

* Assistant Professor of Law, Shepard Broad Law Center, Nova Southeastern University, Fort Lauderdale, Florida. J.D., Tulane Law School; B.A., Austin College. I thank Nicole Saqui, Valerio Spinaci, and Thomas Zeichman for their invaluable assistance. I also thank Professor Theresa J. Pulley Radwan of Stetson University College of Law for her guidance and helpful suggestions. Last but certainly not least, I thank the editors of the McGeorge Law Review for their attention to detail and good work on finalizing this Article.
see considerable delays due to the jurisdictional constraints imposed on bankruptcy courts. The influence of very powerful political lobbies has largely shaped these constraints. Regrettably, the politically motivated product—the current jurisdictional structure—lacks sound rational grounds.

The delay inherent in our fractionalized bankruptcy system is both inevitable and highly problematic. As time passes, debtors’ assets will in all likelihood dissipate or depreciate, and the conditions of victims in personal injury tort or wrongful death claims may further deteriorate. Thus, claimants will demand a larger recovery against a smaller distribution pool. These claimants’ hopes for equitable and speedy recoveries diminish, as reality dictates that they must. A prospective recovery of fifty cents or more on the dollar may eventually turn into actual recovery of pennies on the dollar. This ill-fated reality must no longer be ignored.

This Article will explore and examine the current jurisdictional structure of the bankruptcy courts, the jurisdictional limitations of these courts over personal injury tort and wrongful death claims, the historical basis for such limitations, and finally, the various and substantial problems that continue to arise as a result. Scholars have written numerous articles about the interplay between mass tort law and bankruptcy, but none—until now—have concentrated exclusively on the jurisdictional issues that arise with respect to the treatment of personal injury tort and wrongful death claims in bankruptcy.

This Article begins anew the discussions regarding the efficacy of the current jurisdictional structure of the bankruptcy courts. These discussions should lead to significant dialogue for the resolution of the serious problems facing both debtors and creditors as a result of the fractionalized jurisdictional approach in our current bankruptcy system.

II. JURISDICTIONAL STRUCTURE OF BANKRUPTCY COURTS

The scope and breadth of bankruptcy courts’ jurisdiction has gone through several iterations, from the first national bankruptcy act to the current jurisdictional scheme, established by the 1984 Amendments to the Bankruptcy Code (1984 Amendments). As a starting point, the Bankruptcy Act of 1898 vested jurisdiction over bankruptcy matters in the federal district courts. However, the district courts referred the bankruptcy matters to specially appointed “referees,” rather than hearing the matters themselves. These

3. Block-Lieb, supra note 1, at 531.
bankruptcy referees are the predecessors to modern bankruptcy judges and the current bankruptcy court system.

Under the 1898 Act, much uncertainty arose over which disputes were actually within the jurisdiction of the bankruptcy referees appointed by the district courts because of a confusing division of summary and plenary jurisdiction over bankruptcy matters. Where cases did not fall under bankruptcy jurisdiction (then known as summary jurisdiction), parties litigated such matters (referred to as plenary jurisdiction) in other courts. A complex and thorny body of jurisprudence developed regarding which types of cases fell within summary or plenary jurisdiction. Needless to say, this division caused many problems and created some inconsistent results within the jurisprudence.

The report of the Commission on Bankruptcy Laws of the United States discussed the problems arising from the summary and plenary jurisdictional allocations under the 1898 Act as follows:

There are . . . serious flaws in the present allocation of responsibility for handling the administrative and judicial functions to be performed by the Bankruptcy Act . . . . The first and most important objection to the present dispensation is the division of labor between the bankruptcy court and other courts . . . . There are several objectionable results to the division of the jurisdiction of the judicial business generated . . . by bankruptcy cases. The first is delay . . . . Another objection to the division of jurisdiction is the extra expense entailed by the estate in litigating outside the bankruptcy court . . . . The most serious objection to the division of jurisdiction is the frequent, time consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction over a particular proceeding. As Professor McLachlan has

4. Id. at 532.

The summary jurisdiction of the bankruptcy court stood in contrast to the bankruptcy court’s lack of jurisdiction over plenary matters, which were triable only by the district court or relevant state court. The limitation on the power of the bankruptcy judge to hear and determine controversies such as preferences and fraudulent conveyances (plenary jurisdiction matters) came to be regarded as a major obstacle to the expeditious and efficient administration of bankruptcy cases.

Id.

6. Ralph Brubaker, One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction, 15 Bankr. Dev. J. 261, 267 (1999) (“The 1898 Act reduced the sweep of federal bankruptcy jurisdiction essentially through a return to the English in rem model of bankruptcy jurisdiction, in the now-infamous summary/plenary jurisdictional dichotomy erected by the 1898 Act.”). See Charles Jordan Tabb, The Law of Bankruptcy 219 (1997). “This divided jurisdictional scheme was widely condemned as cumbersome and inefficient, because it (1) prevented the bankruptcy judge with charge over the bankruptcy case from deciding many issues of importance to that case, and (2) engendered considerable litigation over which court had jurisdiction.” Id.
observed: 'When a “summary” proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy.'

Consequently, Congress passed the Bankruptcy Reform Act of 1978 (the Act), which eliminated the division of summary and plenary jurisdiction over bankruptcy matters and expanded the jurisdiction of the bankruptcy courts. In fact, one of the primary objectives of the Act was the elimination of the dichotomy between summary and plenary jurisdiction to concentrate all bankruptcy jurisdiction into a single forum.

The Act established a bankruptcy court in each federal judicial district as an adjunct for each district court. Under the Act, the bankruptcy court judges were appointed for fourteen-year terms, subject to removal on grounds of incompetence, misconduct, neglect of duty, or disability by the judicial council of the circuit in which they served. The Act mandated the salaries of bankruptcy judges, subject to adjustment. It also granted the bankruptcy courts jurisdiction over “all civil proceedings arising under Title 11 or arising in or related to cases under Title 11.” The Act vested concurrent jurisdiction in the district court and the bankruptcy court over these types of proceedings, which allowed bankruptcy courts to enter final judgments in matters considered plenary under the 1898 Act.

It is generally agreed that the Act made at least three significant changes from the bankruptcy laws that immediately preceded it. First, the Act substantially expanded bankruptcy courts' jurisdiction. Second, the Act gave bankruptcy judges broader powers than those exercised by the former bankruptcy referees. Third, and most significant, the relationship between bankruptcy courts and district courts changed. Under the Act, bankruptcy courts became

8. Id.; see also In re Whippany Paper Bd. Co., 15 B.R. 312, 316 (Bankr. D.N.J. 1981) (stating that “the intention of this Code was to eliminate the summary-plenary distinction which engendered much litigation under the Bankruptcy Act”).
11. Id. § 153(a).
12. Id. § 1471(b).
15. Id. at 54.
16. Id. at 55.
17. Id. at 53.
independent from district courts, rather than being merely subordinate adjuncts of the district courts.\textsuperscript{18}

This new legislative conferral of jurisdiction under the Act served to consolidate bankruptcy matters into one forum—the bankruptcy court—rather than sending litigants to various other courts to resolve their disputes.\textsuperscript{19} Despite this consolidation of jurisdiction into one forum, many problems still remained. Perhaps a major reason for these continued problems was that Congress gave bankruptcy courts many of the powers of Article III courts, but without Article III protections such as life tenure and protection against salary diminution. As the United States Supreme Court noted in the landmark case of \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.}, “[i]t is undisputed that the bankruptcy judges whose offices were created under the Bankruptcy [Reform] Act of 1978 do not enjoy the protections afforded to Article III judges.”\textsuperscript{20}

Prior to the 1984 Amendments, the Court in \textit{Marathon}\textsuperscript{21} considered the constitutionality of the broad conferral of jurisdiction under the Act to non-Article III bankruptcy courts.\textsuperscript{22} In \textit{Marathon}, a Chapter 11 debtor, Northern Pipeline Construction Co. (Northern), brought in the bankruptcy court an adversary proceeding against Marathon Pipe Line Co. (Marathon) seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress.\textsuperscript{23} In the words of the Court, “Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred Article III judicial power upon bankruptcy judges that lacked Article III protections, namely life tenure and protection against salary diminution . . . .”\textsuperscript{24}

The bankruptcy judge denied Marathon’s motion to dismiss, but the district court reversed on appeal and entered an order granting the motion on the ground that the jurisdictional scheme of the Act was unconstitutional.\textsuperscript{25} The issue in \textit{Marathon} was “whether the Act violated the command of Article III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards of Article III . . . .”\textsuperscript{26} The Court, in a divided

\textsuperscript{18} Id.
\textsuperscript{19} Block-Lieb, \textit{supra} note 1, at 533.
\textsuperscript{20} Marathon, 458 U.S. at 60. According to the Court, while bankruptcy courts “no longer have the confusing dichotomy between summary and plenary jurisdiction,” what exists today “is a confusing triple and potentially quintuple division of proceedings among ‘arising under,’ ‘arising in,’ ‘related to,’ ‘core,’ ‘noncore,’ and ‘otherwise related proceedings.’” \textit{In re Cemetery Dev. Corp.}, 59 B.R. 115, 118 (Bankr. D. La. 1986).
\textsuperscript{21} 458 U.S. at 50 (1982).
\textsuperscript{22} Id. at 50.
\textsuperscript{23} Id. at 56.
\textsuperscript{24} Id. at 56–57.
\textsuperscript{25} Id. at 57.
\textsuperscript{26} Id. at 62.
opinion, held that the Act's broad grant of jurisdiction violated Article III. The Court reasoned that "[t]he judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Article III . . . ." The Court further reasoned that "Article III bars Congress from establishing under its Article I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws . . . ." Marathon addressed a battle over the separation of powers among the three branches of government, as well as a battle over the bankruptcy courts' jurisdiction over public and private rights. The Court noted that "the federal judiciary was . . . designed by the Framers to stand independent of the executive and legislative branches of government—to maintain the checks and balances of the constitutional structure and also to guarantee that the [judicial function] itself remained impartial . . . ." The Court concluded that the Constitution requires that an independent judiciary, safeguarded by Article III, exercise the judicial power of the United States. In other words, bankruptcy courts, which lacked the protections of Article III, could not adequately decide matters traditionally reserved for judges of courts enjoying these Article III protections.

Notwithstanding this declaration, the Court noted a distinction between public and private rights, holding that the former came within the jurisdiction of the bankruptcy courts but the latter did not. By the Court's reasoning, "[t]he public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial'" in nature. The Court observed that at a minimum, "a matter of public rights must arise . . . between the government and others," while "in contrast, the liability of one individual to another is a matter of private rights." Accordingly, the Court held that Marathon's breach of contract suit against Northern, which arose under state law, is a matter of private rights subject to adjudication before an Article III court, not a non-Article III bankruptcy court.
After Marathon, bankruptcy courts no longer had jurisdiction to enter final judgments in proceedings that were only “related to” bankruptcy cases and not “arising under or in . . . cases under Title 11.” The Supreme Court held that Congress might properly grant jurisdiction to non-Article III bankruptcy judges over matters that were central to the operation of the bankruptcy case, but not matters that were only related to the bankruptcy case and predicated on private rights. The problem with this approach is that the line dividing what is central to the operation of the bankruptcy case and what is merely only “related to” the bankruptcy case, is often quite blurred.

The divided Marathon court did not issue a majority opinion. Instead, four justices announced the opinion of the Court, with two justices concurring in the opinion and three justices dissenting. In the wake of Marathon, the bankruptcy court system was in crisis because there was little guidance as to what constituted the grant of jurisdiction to these courts.

Accordingly, many commentators urged Congress to clarify the scope of bankruptcy courts’ jurisdiction. Interestingly, the Court stayed the Marathon decision for a period of time to enable Congress to enact new legislation to remedy these problems. However, the stay did not last for the duration of the period between the Marathon decision and the 1984 legislation. During this gap, all district courts adopted an emergency rule, or a slight variation of it, which provided for the allocation of judicial power over bankruptcy cases.

38. Id. at 84–87.
39. See id. at 84–87.
40. Id. at 50–52.
41. See Anthony Michael Sabino, Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court, 21 SETON HALL L. REV. 258, 259 (1991) ( "[T]he landmark decision of the United States Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. a cataclysmic event, whose shock waves continue to rumble throughout the bankruptcy courts.").
44. Id.
45. See Memorandum of Administrative Office of the United States Courts, 3 (Sept. 27, 1982). The proposed emergency rule provided as follows:

(B) Reference to Bankruptcy Judges

(1) All cases under [T]itle 11 and all civil proceedings arising in or related to cases under [T]itle 11 are referred to the bankruptcy judges of this district.
(2) The reference to a bankruptcy judge may be withdrawn by the district court on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the
According to Anne Maseth, "[t]he emergency rule became effective as of December 25, 1982 and remained in effect until the 1984 Amendments were enacted on July 10, 1984."46

The 1984 Amendments and Federal Judgeship Act codified the current jurisdictional scheme for bankruptcy courts found in Title 28 of the United States Code.47 Three sections of Title 28 are particularly important with regard to bankruptcy court jurisdiction: §§ 151, 157, and 1334.

Section 151 describes the functions of bankruptcy courts.48 It provides that, "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."49 It further makes clear that, "[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court."50

Significantly, the 1984 Amendments refer to bankruptcy courts and judges as "units" of the district courts, rather than "adjuncts" of the district courts, as under the Act. In other words, the bankruptcy judge is a judicial officer of the district court. As such, bankruptcy judges may exercise only the authority conferred to them under Title 28 with respect to any action, suit, or proceeding. The critical difference is that under the 1984 Amendments, "bankruptcy courts do not exercise all jurisdiction vested in the district courts. Instead, the bankruptcy court is established as a unit of the district court to which the district court may refer any or all cases and proceedings."51

This seemingly minor change in terminology from adjunct to unit is critically important when one considers the constitutional challenge of the bankruptcy court system in Marathon. Recall that in Marathon, the Court held that bankruptcy courts were not valid Article I adjuncts to the Article III district courts because the essential attributes of the judicial power did not remain in the Article III courts.52 Under the structure created by the 1984 Amendments, the judicial power now remains in the Article III district courts.

---

49. Id.
50. Id.
Before turning to § 157, it is necessary to understand which court has jurisdiction over bankruptcy matters. Section 1334 covers the issue of jurisdiction and abstention over bankruptcy matters. With respect to jurisdiction, § 1334 (a) and (b) provide in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11.

Under the 1984 Amendments, the district courts have original and exclusive jurisdiction over bankruptcy cases arising under Title 11. However, one must keep in mind that the language of § 1334 (a) and (b) make a distinctions between bankruptcy cases and bankruptcy proceedings. The terms “bankruptcy case” and “bankruptcy proceeding” are not interchangeable. A bankruptcy case refers to the debtor’s entire Chapter 7, 9, 11, 12 or 13 case (from commencement to termination of a case), whereas a bankruptcy proceeding refers to any discrete dispute arising within the debtor’s bankruptcy case; i.e., a contested matter (claim objection, motion for relief from the automatic stay, motion for use of cash collateral, etc.) or an adversary proceeding (a civil suit seeking avoidance of a fraudulent or preferential transfer, etc.). It is important to note that the term “proceeding” is quite inclusive and, as such, it covers anything that occurs in a case; i.e., it would encompass contested matters, adversary proceedings, plenary actions, and disputes with respect to administrative matters under the current bankruptcy law.

Under § 1334(b), the district courts have original but not exclusive jurisdiction over three types of civil proceedings: (1) those arising under Title 11; (2) those arising in Title 11; or (3) those related to cases under Title 11. While each of these types of proceedings is subject to the district courts’ original but

---

53. 28 U.S.C. § 1334. The topic of abstention is beyond the scope of this Article; however, for a good overview of abstention in bankruptcy, see 1 COLLIER ON BANKRUPTCY ¶ 3.05 (Lawrence P. King ed., 15th ed. 1996). It is also important to note that the rules regarding abstention vary depending on whether a “proceeding” is characterized as “arising under,” “arising in,” or “related to,” a case under Title 11 in section § 1334(b).
54. 28 U.S.C. § 1334(a), (b) (emphasis added).
55. Id. § 1334(a).
56. See 1 COLLIER ON BANKRUPTCY, supra note 53, at ¶ 3.01.
57. Id.
58. 28 U.S.C. §1334(b).
not exclusive jurisdiction, it is still necessary and important to determine which type of proceeding is at issue because the type of proceeding impacts the rules regarding abstention and venue, among other things. 59 Unfortunately, the distinction between these three types of proceedings is sometimes obscure. 60

Core proceedings under § 157 correspond to both proceedings “arising under” or “arising in” a case under Title 11. 61 Civil proceedings “arising under” Title 11 involve claims for “relief created or determined by a specific statutory provision,” while proceedings “arising in” are commonly “administrative type matters that arise only in bankruptcy cases . . . .” 62 A few examples of proceedings “arising under” Title 11 cases include, but are not limited to: proceedings related to relief from the automatic stay under § 362(d) of the Bankruptcy Code; proceedings to determine, avoid, or recover preferences under §547(b) of the Bankruptcy Code; and proceedings related to determinations of the validity, extent, or priority of liens. 63 A few examples of proceedings “arising in” a case under Title 11 include, but are not limited to, proceedings related to the allowance or disallowance of claims, assumption or rejection of executory contracts or leases, and objections to discharge. 64

The last type of civil proceeding over which bankruptcy courts have jurisdiction is a non-core proceeding that is “related to” the bankruptcy case. A bankruptcy court’s “related to” jurisdiction covers matters that impact the bankruptcy estate, and it is broader and more expansive than the jurisdictional categories of “arising under” or “arising in.” 65 In the landmark case of Pacor, Inc. v. Higgins, 66 the Third Circuit devised the following test to determine whether “related to” jurisdiction exists:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that

---

59. Id. § 1334(c)-(d).
61. 28 U.S.C. § 157(b). The specific types of core proceedings will be discussed in this Article, infra.
62. Neilson, 419 B.R. at 818; In re Mid-States Express, Inc., No. 09-B10818, 2010 Bankr. LEXIS 1969, at *695–696 (Bankr. N.D. Ill. July 2, 2010) ("A proceeding 'arises under' the Bankruptcy Code if it 'invokes a substantive right provided by Title 11.'"); 1 COLLIER ON BANKRUPTCY, supra note 53 at ¶ 3.01 (“Many authorities indicate that ‘arising in’ jurisdiction is a residual category of proceedings that do not fit within the definition of ‘arising under’ but are still core proceedings because they deal with matters inherent to the bankruptcy process.”).
63. See 28 U.S.C. § 157(b)(2) (enumerating each of these examples under the list of “core” proceedings).
64. Id.
65. Celotex Corp. v. Edwards, 514 U.S. 300, 307–08 (1995) (observing that the jurisdictional grant in 28 U.S.C. § 1334(b) “was a distinct departure from the jurisdiction conferred to bankruptcy courts under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction”).
66. 743 F.2d 984 (3d Cir. 1984).
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. 67

The Pacor test appears to be the leading test for “related to” jurisdiction and has received overwhelmingly positive support from the United States Supreme Court and a vast majority of appellate courts. 68 While initially this test seems extraordinarily broad, the Pacor court observed that a bankruptcy court’s “related to” jurisdiction is not limitless. 69 Proceedings “related to” the bankruptcy include, but are not limited to, “causes of action owned by the debtor which become property of the estate” under § 541 of the Bankruptcy Code and “suits between third parties which have an effect on the bankruptcy estate.” 70 However, it is critical to note that while a bankruptcy court has jurisdiction to hear any non-core matters that are otherwise related to a case under Title 11, the bankruptcy court cannot enter a final order regarding the matter. 71 Instead, in such a proceeding, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court for consideration and entry of final judgment. 72

Section 1334(b) confers bankruptcy jurisdiction on the district court, as explained above, but § 157 allows the district court to refer this specific type of jurisdiction and its related powers to the bankruptcy court. 73 Section 157 provides in pertinent part that “[e]ach district court may provide that any or all cases under [T]itle 11 and any or all proceedings arising under [T]itle 11, or arising in or related to a case under [T]itle 11 shall be referred to the bankruptcy judges for the district.” 74 While district courts have total discretion whether to refer bankruptcy cases and proceedings to the bankruptcy courts, they almost universally do. 75 In fact, most district courts have rules in place that automatically

67. Id. at 994 (emphasis added).
68. Celotex Corp., 514 U.S. at 308 n.6 (noting that the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the Pacor test with little or no variation) (citations omitted).
69. 743 F.2d at 994.
70. Celotex Corp., 514 U.S. at 307 n.5 (noting that the “first type of ‘related to’ proceeding involves a claim like the state-law breach of contract action at issue in Marathon”).
72. Id.
73. Id.
74. Id. at § 157(a) (emphasis added).
refer bankruptcy cases and proceedings to the bankruptcy courts within their districts without any further action.\textsuperscript{76} Once a bankruptcy case or proceeding has been referred to the bankruptcy judge, the district court may still withdraw the reference and take the case back. Section 157 governs the district court's authority to withdraw the reference, providing for mandatory and permissive withdrawal.\textsuperscript{77}

Section 157 also provides which types of matters bankruptcy judges may hear and determine.\textsuperscript{78} Section 157(b)(1) provides in pertinent part, "[b]ankruptcy judges may hear and determine all cases under [T]itle 11 and all core proceedings arising under [T]itle 11, or arising in a case under [T]itle 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this [T]itle."\textsuperscript{79}

All cases are within the bankruptcy court's jurisdiction to hear and determine, but not all proceedings are. Instead, only "core" proceedings "arising under," "arising in," or "referred under subsection (a) are subject to the bankruptcy court’s jurisdiction for both hearings and final determinations.\textsuperscript{80} Fortunately, the statute also provides a non-exhaustive list of "core" proceedings which provides as follows:

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

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under [C]hapter 11, 12, or 13 of [T]itle 11 [11 USCS §§ 1101 et seq., 1201 et seq. or 1301 et seq.] but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under [T]itle 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

\textsuperscript{76} Id.
\textsuperscript{77} 28 U.S.C. § 157(d) (2006). As at least one court has pointed out, at the logical extreme of judicial economy, all bankruptcy proceedings should be withdrawn since everything the bankruptcy court decides is reviewable by the district court. See In re G-I Holdings, Inc., 295 B.R. 211, 216 (D. N.J. 2003). Obviously, this is not the result that Congress intended. Id.
\textsuperscript{78} 28 U.S.C. § 157(b)(1).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;
(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of Title 11.8

Recall that this is a non-exclusive list. However, if a matter is not “core,” then it must obviously be “non-core.” And if it is non-core, recall the limitations on the bankruptcy court’s jurisdiction under § 157(c)(1), discussed above. The bankruptcy judge has discretion to determine whether a proceeding is “core” or “non-core.”82

As one should easily conclude, the current jurisdictional structure of the bankruptcy courts is far from clear and readily comprehensible.83 Even now, years after the 1984 Amendments refined the jurisdictional scheme, many

81. Id. § 157(b)(2)(A)–(P).
82. Id. § 157(b)(3).
83. The United States Supreme Court seriously questioned the constitutionality of the 1984 Amendments in the landmark case of Granfinanciera, S.A. v. Nordberg. 492 U.S. 33, 94 (1989) (Blackmun, J., dissenting) (“Congress has legislated treacherously close to the constitutional line by denying a jury trial in a fraudulent conveyance action in which the defendant has no claim against the estate.”). While Granfinanciera was really about jury trial rights in bankruptcy, the Court spent some time discussing the constitutionality of the entire bankruptcy court system that the 1984 Amendments created. Id. at 61 & n.16, 63 n.17, 94.
scholars still consider the jurisdictional scheme to be "bizarre" and "controversial." While the jurisdictional scheme may be difficult to comprehend, it certainly becomes even more complex after one considers the specific limitations of the bankruptcy court’s jurisdiction over certain types of claims. There are certain statutorily enumerated limitations on the bankruptcy court’s jurisdiction over personal injury tort and wrongful death claims; these limitations add yet another dimension of complexity to an already difficult jurisdictional analysis.

III. LIMITATIONS ON BANKRUPTCY COURTS’ JURISDICTION OVER PERSONAL INJURY TORT AND WRONGFUL DEATH CLAIMS

A bankruptcy court’s jurisdiction over personal injury tort and wrongful death claims is substantially limited in scope. The 1984 Amendments made it quite clear that Congress intended to remove judicial authority and control over personal injury tort and wrongful death claims from the bankruptcy courts. Statutes preclude bankruptcy courts from entering any final judgments with respect to personal injury tort and wrongful death claims. The statutes in question, specifically 28 U.S.C. § 157(b)(2)(B) and § 157(b)(5), provide in pertinent part:

Core proceedings include, but are not limited to—

(2)(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under [C]hapter 11, 12, or 13 of [T]itle 11 [11 USCS §§ 1101 et seq., 1201 et seq. or 1301 et seq.] but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under [T]itle 11;

88. Id. § 157(b)(2)(B). Note, however, that this provision does not—in most jurisdictions—prevent bankruptcy courts from estimating personal injury tort or wrongful death claims for purposes other than distribution; for example, estimating such claims for purposes of plan feasibility. MANUAL FOR COMPLEX LITIGATION § 22.541 (4th ed. 2004).

752
Further, § 157(b)(5) provides that:

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.99

These two provisions unquestionably strip the bankruptcy courts of jurisdiction to finally adjudicate personal injury tort and wrongful death claims.90 Indeed, the very purpose of § 157(b)(5) was to prevent bankruptcy courts from trying personal injury tort claims.91

Lurking in the shadows, however, is the foundational question of what exactly constitutes a personal injury claim.92 This question must be answered before determining whether the § 157 exceptions will constrict the jurisdiction of bankruptcy courts. Of course, if a claim is not characterized as a personal injury tort claim, then there are no limitations on a bankruptcy court’s exercise of jurisdiction, and such courts have the authority to finally adjudicate the claim under their traditional jurisdictional powers conferred to them by the district courts.93

Unfortunately, neither Title 28 nor Title 11 expressly define the term "personal injury tort claim."94 Consequently, courts continue to disagree as to what constitutes such a claim.95 Three main views have evolved in the jurisprudence—a narrow view, a broad view, and a middle approach.96

One court, espousing the narrow view, concluded that "the personal injury exception under § 157 is limited to a narrow range of claims that involve an

89. 28 U.S.C. § 157(b)(5).
91. In re Poole Funeral Chapel, Inc., 63 B.R. at 532. However, the jurisprudence overwhelmingly supports the proposition that bankruptcy courts can try personal injury tort or wrongful death claims by consent of the parties. See Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.), 505 F.3d 237, 248 (3d Cir. 2007); Adams v. Cumberland Farms, No. 95-1736, 1996 U.S. App. LEXIS 10458, at *6–7 (1st Cir. May 7, 1996); In re Wysong and Miles Co., No. 04-10005, 2005 WL 3723200, at *2 (Bankr. M.D.N.C. 2005) (noting that consent may be obtained through claim objection procedures).
96. Id.
actual physical injury. For example, some courts require a finding that emotional distress claims are so severe as to rise to the level of traditional personal injury tort claims before concluding that such claims come within the § 157 exception. Courts often base this narrow view on the statements of a congressman contained in the legislative history of § 157, which may indicate that Congress intended the § 157 exception to be read only to apply to a narrow range of claims.

Likewise, other courts espousing the narrow view have excluded from the purview of personal injury tort claims certain mental distress claims that do not involve physical injury or trauma. Courts have also held that violations of anti-discrimination laws are not personal injury tort claims. Obviously, a narrower view results in fewer claims being classified as personal injury tort claims, because courts using this view seem to require actual physical injury.

Other courts espouse a broader view of what should be considered personal injury tort claims. Courts adopting the broader view do not limit personal injury tort claims strictly to those claims involving an actual physical injury; instead, courts taking the broader view have expanded such claims to include invasions of personal rights. These courts seem to base their views on the lack of specificity in the § 157 exceptions; that is, if Congress wanted to limit personal injury tort claims to only those involving actual physical injury, then it could have done so expressly in the statute itself.

Under this view, courts have found that, “the term ‘personal injury tort’ embraces a broad category of private and civil wrongs or injuries” for which a claim for damages arises. These types of claims could include civil rights deprivations such as defamation and mental suffering. Thus, adoption of the broader view results in courts deeming more claims as personal injury torts and thus outside the jurisdiction of the bankruptcy courts.

103. See id. (discussing Judge Stocks’ view of what Congress intended in § 157). See also In re Poole Funeral Chapel, Inc., 63 B.R. 527, 530 (Bankr. N.D. Ala. 1986) (finding that since Congress knew how to use restrictive language and chose an unrestricted definition of personal injury tort claim in § 157, “then it must have intended such words be interpreted broadly”).
105. Id.
Instead, some courts choose a middle ground between the narrow and broad views of how to characterize a personal injury tort claim. According to one court, "[t]he middle ground encompasses torts involving bodily and reputational harm, without including those personal injury torts designated by statute only." Under the middle ground approach, even defamation claims have been found to come within the purview of a personal injury tort claim.

The courts adopting the middle ground find this approach fits more closely with traditional understandings of common law torts; while this approach accepts claims of emotional or reputational harm, it retains the power of bankruptcy courts to define which claims are personal injury torts. Instead, other courts may look to whether a claim falls within the purview of a personal injury claim under the broader view, yet retain bankruptcy jurisdiction over the claim if it has "earmarks of a financial, business or property tort claim, or a contract claim."

As one can clearly see, what courts classify and do not classify as a personal injury tort claim is subject to much dispute and can vary from jurisdiction to jurisdiction. The difficulty in classifying personal injury torts only adds another layer of complexity in trying to comprehend the jurisdictional reach of the bankruptcy courts. This complexity also adds to the inconsistent treatment of claims. For example, a court in one jurisdiction may find a claim to be a personal injury tort claim, thus placing the claim outside of the bankruptcy court's jurisdiction. However, a bankruptcy court in another jurisdiction may find that the same claim is not a personal injury tort claim, and thus within the bankruptcy court's jurisdiction.

Notably, some courts have questioned whether a distinction between personal injury tort claims and contract claims should be made. This raises an important and critical series of questions regarding why federal law recognizes a distinction between personal injury tort and wrongful death claims versus other types of claims that arise in a typical bankruptcy case, such as contract or property claims. In order to understand how this distinction arose under federal

107. Id. at 852.
110. Id. at 160 (concluding that § 157's special treatment for personal injury tort claims was not constitutionally required, but, rather, was a response to lobbying by the personal injury tort bar); In re Dow Corning Corp., 215 B.R. 346, 353–54 (Bankr. E.D. Mich. 1997) (noting that there is no rational way to distinguish trial of a contract claim from trial of a personal injury tort claim in bankruptcy court and it would be constitutional to try the latter in a bankruptcy court).
111. In re Dow Corning Corp., 215 B.R. at 353–54 (noting that "[t]here is no rational way . . . [t]o distinguish the trial of a contract claim from the trial of a [personal injury] tort claim in bankruptcy court" and it would be constitutional to try the latter in a bankruptcy court). See also In re Ice Cream Liquidation, 281 B.R. at 161 (concluding that the Constitution did not require § 157's special treatment for personal injury tort claims,
law, we must examine the historical basis underlying the addition of these various exceptions in the 1984 Amendments.

IV. AN OVERVIEW OF THE HISTORICAL BASIS FOR JURISDICTIONAL LIMITATIONS

Congress enacted the 1984 Amendments for numerous purposes other than resolving the issues that arose from the Supreme Court’s decision in Marathon.112 In these amendments, Congress also eliminated bankruptcy courts’ jurisdiction to finally adjudicate personal injury tort and wrongful death claims and preserved claimants’ jury trial rights.113 The critical question that arises is whether Congress eliminated bankruptcy court jurisdiction over these claims and preserved claimants’ jury trial rights because of a constitutional mandate or for other reasons.114

There are two pervasive theories regarding the underlying justification of Congress’ decision to eliminate bankruptcy court jurisdiction over these claims and to preserve claimants’ jury trial rights in the district court. On one hand, unlike most other creditors involved in a bankruptcy proceeding who had voluntarily associated with the debtor, personal injury tort and wrongful death claimants had not voluntarily associated with the debtor.115 Thus, according to one theory, Congress intended to protect these involuntary creditors by eliminating bankruptcy court jurisdiction over their claims and by preserving their jury trial rights by requiring that their claims be tried in the district court.116

The more prevailing theory, however, is that Congress preserved these claimants’ jury trial rights as a compromise in response to the very strong and powerful lobbying efforts of the personal injury tort bar.117 It is no secret that

but, rather, the special treatment was a response to lobbying by the personal injury tort bar).

113. See e.g., 28 U.S.C. §§ 157(b)(5), 1411(a) (2006). Section 1411(a) provides, “[e]xcept as provided in subsection (b) of this section, this chapter and Title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.”
116. See In re Arnold, 407 B.R. at 851 (attributing the exclusion of personal injury tort claims to Congress’ recognition that creditors stand in a different relationship with bankruptcy debtors because they did not voluntarily enter into dealings with the debtor).
117. Roos, 30 Cal. Rptr. 3d at 456; In re Dow Corning Corp., 215 B.R. at 353–54; In re Clark, 75 B.R. 337, 339–40 (N.D. Ala. 1987); Alison J. Brehm et al., To Be, or Not to Be: The Undiscovered Country of
during the early mass tort bankruptcy cases of the 1980s, personal injury lawyers’ initial experiences with the bankruptcy process were unpleasant.\(^{118}\) Personal injury attorneys were accustomed to trying their clients’ cases in front of juries in state or federal district courts, not by one judge in a bankruptcy court.\(^{119}\) Bankruptcy judges rarely awarded the same high level of damages that juries might have awarded in state or federal courts.\(^{120}\)

Thus, it should come as no surprise that these same attorneys and their very powerful lobbies\(^ {121}\) ensured that, to the extent possible, future personal injury tort and wrongful death claims would be treated differently than other unsecured claims.\(^{122}\) Indeed, their strong lobbying efforts were successful. In fact, one court noted, “[i]t is an open secret that in order to obtain a quick solution to the recent bankruptcy dilemma, Congress inserted the right to jury trial in personal injury and wrongful death claims as a compromise with the lawyers who represent personal injury plaintiffs.”\(^{123}\) Several other scholars agree that, “[t]he passage of § 157 was the result of successful lobbying on the part of the personal injury bar to limit the ability of bankruptcy judges to decide personal injury or wrongful death claims and to preserve these claimants’ right to a jury trial.”\(^ {124}\)

Consequently, as a result of successful lobbying efforts, the current jurisdictional scheme of bankruptcy courts prevents bankruptcy judges from resolving personal injury tort and wrongful death claims. Absent a change in the

\(^{118}\) In re Ice Cream Liquidation, Inc., 281 B.R. at 161; In re Dow Corning Corp., 215 B.R. at 355–54.

\(^{119}\) Cf. In re Ice Cream Liquidation, Inc., 281 B.R. at 161 (describing how the personal injury bar’s negative experiences in bankruptcy courts drove them to lobby Congress to eliminate bankruptcy courts’ jurisdiction over personal injury tort claims).


\(^{121}\) The plaintiffs’ bar is a very organized and powerful political lobbying group. For example, in the 2000–2004 election cycles, the Association of Trial Lawyers of America—the major national plaintiffs’ bar organization—contributed almost $11 million to political campaigns. Andrew P. Morriss & Susan E. Dudley, Defining What to Regulate: Silica and the Problem of Regulatory Categorization, 58 ADMIN. L. REV. 269, 347 n.449 (2006).

\(^{122}\) In re Ice Cream Liquidation, 281 B.R. at 161; In re Dow Corning Corp., 215 B.R. at 355–54.


\(^{124}\) Brehm et al., supra note 117, at 245 n.277; Patrick A. Murphy, supra note 117, at 566; Sabino, supra note 117, at 266; Toll, supra note 117, at 373–74.
jurisdictional structure, § 157 limits debtors’ ability to resolve their personal injury tort and wrongful death claims to the district courts. In the next section, this Article will examine some of the problems that have arisen as a result of bankruptcy courts’ lack of jurisdiction over personal injury tort and wrongful death claims.

V. PROBLEMS ARISING IN CONNECTION WITH JURISDICTIONAL LIMITATIONS ON PERSONAL INJURY TORT AND WRONGFUL DEATH CLAIMS

There are several notable problems and issues that have arisen, and continue to arise, in bankruptcy cases due to bankruptcy courts’ collective inability to finally adjudicate personal injury tort and wrongful death claims. First, as discussed earlier in this Article, there is an inconsistency among jurisdictions as to the foundational question: what constitutes a personal injury tort claim? This inconsistency results in a court in one jurisdiction deeming a claim a non-personal injury tort claim, while a court in another jurisdiction deeming such a claim a personal injury tort claim. This determination directly impacts whether a bankruptcy court has jurisdiction to adjudicate the claim.

Second, the fact that this subset of claims cannot be resolved in bankruptcy courts creates delays for both debtors and tort claimants, since these claims must be removed to other courts for ultimate resolution. The inconsistency of bankruptcy courts’ treatment of personal injury tort and wrongful death claims cannot be overemphasized. The question of whether to designate a particular claim as a personal injury tort or wrongful death claim has—as we have seen—tremendous jurisdictional consequences for both the debtor and the claimant. The fact that a court in one jurisdiction, but not another, may see a particular claim as a personal injury tort claim obviously creates inconsistent and unpredictable results for both parties. This pattern of inconsistency also presents yet another reason for a debtor to engage in venue shopping for a bankruptcy court before filing a petition for relief under Title 11.

Recall the courts’ differing approaches to classifying personal injury tort and wrongful death claims—the narrow, broad, and middle ground approaches. However, even when bankruptcy courts agree—under whichever approach they

125. See supra Part IV.
126. Id.
129. See supra notes 94–109 and accompanying text.
use—as to whether a claim is a personal injury tort claim, they may still disagree on what they can and cannot do with that claim under their current jurisdictional powers or lack thereof.

In the case of In re Johns-Manville Corp., the court made clear that § 157(b)(2)(B) could not be read in isolation to require that all personal injury tort and wrongful death claims related to a bankruptcy case be tried in the district courts. The Johns-Manville court found that such an interpretation would void the effect of § 502(c) of the Bankruptcy Code, regarding estimation of personal injury tort and wrongful death claims, and make § 157(b)(2)(B) “superfluous.”

The court ultimately concluded that “section 157(b)(2)(B) ensures that only district courts could enter final orders and judgments regarding the estimation or liquidation of personal injury tort or wrongful death claims for purposes of distribution.” The court went on to state that:

If the liquidation is by trial, under section 157(b)(2)(B), the trial must be held in the district court. Jurisdiction remains with the bankruptcy court, however, to make findings of fact and conclusions for de novo review by the district court for purposes of distribution when liquidation is not by trial and to estimate the claims for the purposes of allowance.

The Johns-Manville decision is among many other decisions that read the jurisdictional exclusion of § 157(b)(2)(B) narrowly. Under this narrow reading, bankruptcy courts not only retain jurisdiction to estimate personal injury tort and wrongful death claims for purposes other than distribution, but they also may disallow these claims on legal grounds and dispose of them through summary proceedings.

131. Id. at 826.
132. Id.
133. Id.
135. See, e.g., Foster v. Granite Broad. Corp. (In re Granite Broad. Corp.), 385 B.R. 41, 49 (S.D.N.Y. 2008) (concluding that the “threshold determination of whether [the plaintiff’s] claims are allowable and whether such claims are subject to estimation for all purposes” was still within the authority of the bankruptcy court); U.S. Lines, Inc. v. U.S. Lines Reorganization Trust (In re U.S. Lines, Inc.), 262 B.R. 223, 234 (S.D.N.Y. 2001) (holding that the bankruptcy court may apply statutes of limitations and dispositive legal defenses in the disallowance of personal injury claims including violation of procedures order related to such claims); ACR Mgmt., L.L.C. v. Alexander (In re ACR Mgmt., L.L.C.), 329 B.R. 142, 143–33 (Bankr. W.D. Pa. 2005) (stating that the bankruptcy court has jurisdiction to rule on the validity of personal injury claims even for distribution purposes at any time prior to trial of such claims, but may not resolve such claims by trial); In re G-I Holdings, Inc., 323 B.R. 583, 613 (Bankr. D.N.J. 2005) (stating that the bankruptcy court may determine the validity of personal injury asbestos claims as a matter of law during the claims allowance phase, but once a claim is determined allowable, valuation must take place by a jury trial in district court pursuant to 28 U.S.C. §§ 157(b)(5) and 1411); In re Aquaslide ‘N’ Dive Corp., 85 B.R. 545, 549 (B.A.P. 9th Cir. 1987) (holding that the bankruptcy court’s disallowance of the claim on summary judgment based on no issues of material fact was not
On the other hand, many courts have espoused a broad view of the jurisdictional limitation. These courts instead hold that the district court must make all dispositive rulings regarding personal injury tort and wrongful death claims, even where the legal invalidity of the claims is clear.136

Thus, even in those instances where courts agree on one thing—whether a claim is a personal injury tort claim—they may still disagree on the extent of a bankruptcy court’s jurisdiction over that particular claim. In effect, there is inconsistency among courts in both their classification of personal injury tort or wrongful death claims and their respective jurisdictional treatment of those claims. This creates two layers of inconsistency within the bankruptcy court system with respect to this subset of claims. This double layer of inconsistency seems highly undesirable in a federal judicial system which should at least strive for uniformity in the application of bankruptcy law.137

Of course, inconsistency also presents itself in other ways. The debtors’ other creditors do not enjoy the same right to a jury trial, and thus the treatment of their claims is inconsistent with the treatment of personal injury tort or wrongful death claims. This disparate treatment often results in unequal bargaining power among creditors.

---

136 See, e.g., Pettibone Corp. v. Easley, 935 F.2d 120, 124 (7th Cir. 1991) (denying existence of both core and non-core jurisdiction over a proceeding involving limitations defense to a personal injury claim); Moore v. Ideallease of Wilmington, 358 B.R. 248, 252 (E.D.N.C. 2006) (stating that, absent consent, “a district court should retain control over all aspects of personal injury tort claims under § 157(b)(5)”; In re UNR Indus., Inc., 74 B.R. 146, 148–49 (N.D. Ill. 1984) (granting claimant’s motion to transfer summary judgment proceedings to the district court under § 157(b)(5) and finding that the bankruptcy court had no jurisdiction to rule on summary judgment where doing so could effectively adjudicate the claim); In re Corner Pocket Billiards, Inc., No. 04-04313-HB, 2008 Bankr. LEXIS 162, at *7 (Bankr. D.S.C. Jan. 17, 2008) (refusing to enforce settlement agreement as it would effectively liquidate wrongful death claim); Ogando Batista v. Redondo Constr. Corp. (In re Redondo Constr. Corp.), No. 02-02887(GAC), 2006 Bankr. LEXIS 3831, at *7 (Bankr. D.P.R. June 29, 2006) (holding that it is for the district court to decide if the employment discrimination case should be barred); In re Schepps Food Stores, Inc. 169 B.R. 374, 377–78 (Bankr. S.D. Tex. 1994) (holding that the bankruptcy court has no jurisdiction to disallow a personal injury claim on limitations grounds because doing so would effectively liquidate the claim as prohibited by § 157(b)(2)(B) and violate § 157(b)(5)).

similarly situated claimants. Unequal bargaining power among claimants of the same class can lead to inconsistencies in the calculation and settling of claims by agreement.

The classification and treatment of these claims is not the only problem with respect to inconsistency. Ultimately, when personal injury tort and wrongful death claimants try their cases in front of juries in the federal district courts, they risk obtaining dissimilar verdicts for similar types of claims among similarly situated claimants. This risk of disparate treatment would likely be much less if one bankruptcy court presided over the resolution of all such claims facing a particular debtor.

Inconsistency is one of the major problems with the current jurisdictional scheme, but delay is another. Of course, in a judicial system that gives power to bankruptcy courts for some matters (resolution of a debtor’s bankruptcy case, generally) but not others (resolution of the debtor’s personal injury tort or wrongful death liabilities), there will inherently be, as a consequence, some delay and inefficiency.

There is little doubt that fractionalizing bankruptcy courts’ jurisdiction causes delay. The division of jurisdiction over personal injury tort and wrongful death claims between bankruptcy courts and district courts creates yet another complicated procedural layer for the parties to resolve before they can actually get to the heart of their disputes. This additional procedural layer inevitably slows down the resolution process for both the debtor and the creditors.

A perhaps unintended, unexpected, and overlooked consequence for those who proposed the limitations on bankruptcy courts’ jurisdiction over personal injury tort and wrongful death claims is that debtors, not creditors, benefit from delay. A delay in the resolution of a debtor’s bankruptcy case allows the debtor-in-possession or the trustee to obtain greater concessions from creditors.

138. See, e.g., Eric A. Posner & Cass R. Sunstein, Dollars and Death, 72 U. Chi. L. Rev. 537, 570 (2005) (stating that “[t]ort law leaves this question to the jury, which, without any guidance, is likely to produce amounts that are unreliable, unpredictable, or both”).


140. Block-Lieb, supra note 1, at 542 (stating that many of the 1984 Amendments actually undermine efficiency due to the division of bankruptcy court jurisdiction over core and non-core proceedings and the exclusion from core proceedings of “‘the liquidation or estimation’ of ‘personal injury tort or wrongful death claims for purposes of distribution’”).

141. Id. at 541–42.

142. Id. at 545.

143. Id.

who are eager to recover at least part of their claim while minimizing their collection expenses. Delays also expose creditors to competition from other competing claims which may reduce the size of the bankruptcy estate. The time value of money further incentivizes creditors to accept concessions over delay. These concessions are easily obtained in light of the reality. As the bankruptcy proceedings are prolonged, debtors’ assets will in all likelihood diminish and the conditions of victims of personal injury tort or wrongful death claims will further deteriorate. Thus, claimants will demand a larger recovery from a constantly shrinking asset pool. The claimants’ hopes for an equitable and speedy recovery fade away. Potential recoveries of fifty cents on the dollar or more may transform into pennies on the dollar with the passage of time.

Inconsistency and delay create problems for both debtors and creditors. Obviously, for a debtor, it becomes quite difficult to propose a meaningful plan of reorganization without knowing the full extent of the liabilities. And if the resolution of personal injury tort and wrongful death claims delays the determination of the debtor’s liabilities, so then too will it delay the resolution of the debtor’s bankruptcy case and the ultimate distribution to creditors. Thus, the claimants that are most likely to need a fair yet prompt resolution will be prejudiced by a bankruptcy court’s inability to provide one for them.

VI. CONCLUSION

The jurisdictional scheme of the bankruptcy courts is no doubt filled with many complex layers. The jurisdictional limitations imposed on bankruptcy courts with respect to personal injury tort and wrongful death claims were likely imposed as a knee-jerk reaction to the Marathon decision and as a result of successful lobbying efforts by the personal injury tort bar. Unfortunately, it does not appear that Congress and the lobbies that influenced Congress gave much meaningful thought to the consequences of creating a court system that must resolve debtors’ bankruptcy cases but at the same time is unable to fully resolve all of the debtors’ pending liabilities. In other words, the politically motivated product—our current jurisdictional structure—lacks sound rational grounds.

It is time now that a conversation begins anew as to the efficacy of the current jurisdictional structure of the bankruptcy courts. Hopefully, this conversation will lead to meaningful dialogue and perhaps some innovative proposals regarding the resolution of the serious problems facing both debtors and creditors as a result of the fractionalized jurisdictional approach currently in place. Among these potential solutions, we should strive to address whether

145. Id.
146. Id.
147. Id.
Congress should repeal the portions of 28 U.S.C. §§ 157(b) and 1411 that restrict bankruptcy courts from fully adjudicating personal injury tort and wrongful death claims and whether or not bankruptcy judges should be elevated to Article III status.