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Judicial Debates

Lisa B. Tancredi, Moderator
Gebhardt & Smith LLP; Baltimore

Prof. Bruce Grohsgal
Delaware Law School Widener University; Wilmington, Del.

Hon. Vincent F. Papalia
U.S. Bankruptcy Court (D. N.J.); Newark

Hon. Jerrold N. Poslusny, Jr.
U.S. Bankruptcy Court (D. N.J.); Camden

Hon. Christopher S. Sontchi
U.S. Bankruptcy Court (D. Del.); Wilmington

JUDICIAL DEBATES

SHOULD THE APPOINTMENT OF A COMMITTEE OF UNSECURED CREDITORS BE MADE OPTIONAL IN CHAPTER 11 CASES?

FOR: HON. CHRISTOPHER S. SONTCHI

AGAINST: PROF. BRUCE GROHSGAL

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SHOULD THE APPOINTMENT OF A COMMITTEE OF UNSECURED CREDITORS BE MADE OPTIONAL IN CHAPTER 11 CASES?

Why is a Committee of Unsecured Creditors Appointed in a Chapter 11 case?

1. First, because Bankruptcy Code section 1102 requires it.

The statutory mandate, *requiring* the United States trustee to appoint an unsecured creditors' committee, is clear:

> **11 U.S. Code § 1102 - Creditors' and equity security holders' committees**
>
> … as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee ***shall*** appoint a committee of creditors holding unsecured claims …
>
> 11 U.S. Code § 1102(a)(1)

The Code further provides that an official committee of unsecured creditors appointed by the United States trustee ordinarily consists of the "persons, willing to serve," that hold the seven largest unsecured claims against the debtor. The "ordinary" composition of the committee to which the statute refers is to a great extent aspirational, and is commonly varied by the U.S. trustee because the largest claimholders are unwilling to serve, because they will receive payment of their claims as critical vendors, or for other reasons.

The Code does *not* require the U.S. trustee to appoint an unsecured creditors' committee if the debtor is a small business debtor. Even in a small business case, though, the appointment is the statutory norm, and a party in interest must request – and show "cause" – that an unsecured creditors committee *not* be appointed.[1]

The Code in all other cases leaves the U.S. trustee with no discretion regarding its duty to appoint a committee of unsecured creditors, provided qualified creditors are willing to serve. It also does not expressly provide a basis on which a party in interest can request non-appointment.

2. Why Does the Code Require the Appointment of a Committee of Unsecured Creditors?

Official committees have their genesis in the equity receiverships by which railroads were reorganized in the 1800s. The "protective committees" of that time

[1] Section 1102(a) provides that: "On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed."

were formed to address an economic problem – a disparate group of creditors each of whom held a relatively small claim could not bear the expense associated with participating in a reorganization. Such committees advanced the interests of their constituencies and also facilitated reorganizations, by giving that constituency a single voice and a seat at the table at which the resolution of the distressed company was negotiated.

The Chandler Act and other 1930s amendments to the Bankruptcy Act established several extensive statutory schemes for business reorganizations. The Act included chapter X, designed to facilitate the reorganization large, publicly held corporations by a court-appointed trustee and the court. A likely unintended consequence of the Act was the tendency of large enterprises to file instead under chapter XI, which was expressly designed for the reorganization of smaller enterprises. The reasons for this trend included that chapter XI "placed the reorganization largely in the hands of the debtor and its unsecured creditors' committee and was premised on the efforts of these parties to structure a negotiated resolution to the debtor's financial distress."[2]

The Bankruptcy Code of 1978 codified the concept of "official" or "statutory" committees in section 1102, with some changes to promote transparency and prevent self-dealing.

An official or statutory committee under the Code has more than just a voice with which to advocate for its constituency. The Code requires the bankruptcy estate to pay the committee's expenses and, more importantly, the reasonable fees and expenses of its counsel and other professionals that the court has authorized it to retain.

For most kinds of committees, such as a committee of equity security holders, or employees, or retirees, the United States trustee "*may* appoint" or may elect *not* to appoint. 11 U.S.C. § 1102(a)(1). The Code gives the United States trustee discretion to appoint or not to appoint in the first instance. The bankruptcy court also may order the United States trustee to appoint such a committee, in which case the trustee must do so. 11 U.S.C. § 1102(a)(2). The grounds for ordering the appointment of such an additional committee vary, but include that equity is the residual stakeholder in the case or that the debtor is proposing to modify or terminate retiree benefits and the retirees are unlikely to obtain adequate representation other than by an official committee.

As noted above, though, for unsecured creditors the appointment is required by Code section 1102. Why are unsecured creditors treated differently from other

[2] American Bankruptcy Institute Commission (the "ABI Reform Commission") to Study the Reform of Chapter 11 (2012-2014), Final Report and Recommendations (the "ABI Report"), pp. 8-9.

constituencies, such as secured creditors, retirees, or shareholders? A primary reason is that, *at the time the Code was enacted*, unsecured creditors were almost always the residual risk bearers of the reorganization and, thus, the most vulnerable. Indeed, Congress in enacting the Code noted that the Bankruptcy Act was designed "to give creditors control over the bankrupt's assets, which in equity belong to them." Thus, creditors were given a committee to represent them in the case. Congress went on to bemoan the fact that, under the Act, "creditor control of bankruptcy cases ha[d] become a myth in all but the largest cases. The only supervision is by the bankruptcy judges themselves."[3]

Congress in the Code envisioned an unsecured creditors' committee that would be the main negotiating body for the unsecured creditors that it represented. It noted that committees were more active in chapter XI cases than in chapter X cases, including because chapter XI committee counsel was compensated by the estate, even if a plan was not confirmed.[4]

The 1978 bill combined chapters X and XI of the Act into chapter 11 of the Code. The 1978 bill also required the appointment of an unsecured creditors' committee in chapter 11, because the unsecured creditors "normally [were] the largest body of creditors and most in need of representation."[5] Moreover, when the Code was enacted, secured debt normally was fully collateralized, and equity was out of the money. The unsecured creditors in most cases were the residual stakeholders of the enterprise. They had the most to gain – or lose – by whether and on what terms the debtor reorganized and, without a committee to represent them, also were the most vulnerable.

Should Section 1102 Be Amended to Make the Appointment of an Unsecured Creditors' Committee Optional in Chapter 11?

1. The Need for Change and ABI Reform Commission Proposal

The factual assumptions underlying current section 1102 of the Code are no longer true in many cases. Three developments in particular were not anticipated by Congress in 1978.

First, unsecured creditors presently are not the residual stakeholders in many chapter 11 cases, and they haven't been from some time. Instead, senior secured creditors often have blanket liens on substantially all of the debtor's assets, securing

[3] H.R. Rep. 95-595 (1977) at 89.
[4] *Id*. at 235.
[5] *Id*. at 235, 401. The 1978 bill also provided for the appointment, rather than the election, of the unsecured creditors' committee which the House Report indicated was the result of a compromise between the House and Senate. An earlier version of the bill provided for the appointment of the committee by the court, rather than by the U.S. trustee. Another compromise prevented the appointment of creditors who were unwilling to serve on a creditors' committee. *Id*. at 552.

debts that substantially exceed the value of their collateral, including the going concern value of the debtor's business.[6] Simply put, unsecured creditors are out of the money on a balance sheet basis. They can obtain some distribution in the case only by litigation commenced by the committee (e.g., actions to avoid unperfected liens or to avoid a fraudulent transfer arising from a leveraged buy-out), by the settlement of such litigation, or by the secured creditor's "gifting" some distribution to them (and to the committee's counsel) in exchange for the committee's standing down and cooperating in the process by which the secured creditor proposes to maximize going concern value in the sale process.

Second, especially in large cases – and likely because secured debt in excess of going concern value makes confirming a reorganization plan so difficult – going concern sales pursuant to Code section 363(b) substantially supplanted the chapter 11 plan negotiations envisioned by the Code. By such a section 363(b) sale, the debtor accomplishes a *de facto* reorganization: the debtor's business is sold, the sale proceeds are paid to its creditors in accordance with the Code's distributional priorities, and the new company emerges with new secured debt (typically the acquisition financing), new unsecured debt (such as new trade credit extended by the business's suppliers), and new owners (the purchasers of the company).[7]

Third, still more recently, prepackaged plans have become more prevalent. In a prepack, secured lenders seek to capture the longer-term upside of the debtor's business by pre-bankruptcy agreements that provide for the restructuring only of the secured debt, followed by an expedited bankruptcy proceeding culminating in the confirmation of a plan containing those pre-negotiated terms. This trend is in large part attributable to the predominance of secured debt in the debt and capital structures of many large chapter 11 debtors, as well as the administrative expense of a lengthy chapter 11 case. The proponents of a prepackaged plan seek quick confirmation of the plan, sometimes within less than a week of the debtor's filing the case. The plan normally leaves the unsecured creditors unimpaired, or provides that unsecured claims "ride through." The plan thus can be confirmed without the proponents' negotiating with, or even soliciting the votes of unsecured creditors, who have no need for a committee anyway because they presumably will be paid in full.

These changes in lending practices and in the resulting financial structures of many of the larger companies that file for chapter 11, and the responsive shifts in chapter 11 bankruptcy practice, have led some to call for corresponding amendments to Code section 1102. Simply put, should section 1102(a) continue to

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[6] See e.g., Ralph Brubaker, *The Post-RadLAX Ghosts of* Pacific Lumber *and* Philly News *(Part II): Limiting Credit Bidding*, Bankr. L. Letter, July 2014, at 4.

[7] See Brubaker, *supra.*, and Douglas G. Baird, *The New Face of Chapter 11*, 12 Am. Bankr. Inst. L. Rev. 69 (2004).

require the appointment of an unsecured creditors' committee in every large chapter 11 case when such a committee is no longer needed in every case?

The American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter 11, among others, has proposed certain changes to Code section 1102 for large bankruptcy cases:

> First, the appointment of an unsecured creditors' committee should remain mandatory, unless the court orders otherwise for cause. The term "cause" would include that the appointment of the committee would not be in the best interests of the estate or that the interests of general unsecured creditors do not need representation in the case because, for example, they will not receive any distributions in the case or their claims will be paid in full.
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> Second, the bankruptcy court *sua sponte*, the U.S. trustee, or any party in interest should be authorized to initiate a hearing to determine whether the appointment or continuation of an unsecured creditors' committee would be in the best interest of the estate.[8]

The ABI Reform Commission in making its recommendation stressed the need to balance the potential benefits of an active unsecured creditors' committee against the costs and potential delays associated with the various actions that a committee might take. It considered what it characterized as the tactics that a committee can use to increase costs or delay a material transaction (such as a going concern sale) or delay the resolution of a case (such as by a plan). The Commission further asserted that unsecured creditors who are either out of the money or unimpaired do not need a committee to represent them.

2. Is the Amendment of Code Section 1102 to Make the Appointment of an Unsecured Creditors' Committee Optional a Solution in Search of a Problem, and Might the "Fix" Break a Perfectly Functional Regime of Unsecured Creditor Empowerment?

Notwithstanding all of the very good reasons for amending Code section 1102 to make the appointment of an unsecured creditors' committee in chapter 11 optional, the proverb "if it ain't broke don't fix it" may apply. In addition, the "fix" proposed by the ABI Reform Commission might break a regime of unsecured creditor empowerment that still works fairly well, even in the midst of evolving chapter 11 practice and debt structures.

[8] ABI Report at 38-39.

Why is there not a problem? Mostly, because unsecured creditors appear to know what is best for them and for the chapter 11 case, with respect to whether an unsecured creditors' committee should be formed. The United States trustee can form a committee of unsecured creditors only if unsecured creditors are willing to serve. The ABI Report noted that, according to one study of chapter 11 cases filed between 2002 and 2008, more than half (51.7%) involved no creditors' committee, notwithstanding the requirements of section 1102.[9] In a case in which the unsecured creditors are woefully out of the money, or will be paid in full, unsecured creditors likely will decline to serve – whether because they recognize that the committee will have a fool's errand of getting blood from a stone, or that the costs of the committee will diminish the distributions that would otherwise be made to them, or that a committee is unnecessary because the prepackaged plan provides for payment in full or a "ride-through" of their claims.

Will the "fix" break or at least undermine a regime that currently empowers unsecured creditors to obtain some share of the going concern value that chapter 11 preserves, and to challenge the distributional priorities indicated by a debtor's balance sheet? Perhaps.

Reorganizations since the Chandler Act, through to the Code and current practices involving both section 363(b) sales and prepacks, have emphasized preserving the value of a going concern as compared with a piecemeal liquidation. A secured creditor whose claim exceeds the value of its collateral almost always prefers chapter 11 over a UCC Article 9 sale or other form of resolution because chapter 11 preserves – and enables creditors to recover – the going concern value of the enterprise, which in nearly all cases is greater than its liquidation value.

Secured creditors assert that they are entitled to all of that going concern value, at least until their claims are paid in full. But why shouldn't unsecured creditors who are out-of-the-money on a balance sheet basis be able to seek and obtain their fair share of it?

An unsecured creditors' committee enables the unsecured creditors to obtain some part of that going concern value, by bringing an action to avoid an unperfected lien, or an action to avoid a fraudulent transfer based on a leveraged buy-out, or simply

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[9] *Id*. at 40, n. 147, citing Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 Vand. L. Rev. 749, note 140, at 777 (2011) (finding that in a study of chapter 11 cases filed between 2002 and 2008, 48.3 percent of cases involved at least one creditors' committee and 51.7 percent involved no creditors' committee), and *In re* Aspen Limousine Serv., Inc., 187 B.R. 989, 994 n. 6 (Bankr. D. Colo. 1995), *aff'd as modified*, 198 B.R. 341 (D. Colo. 1996) ("[I]n practice, a committee is rarely appointed in a smaller case.").

by throwing itself in front of the train in an effort to derail it unless committee's constituency is paid something in the case.

Moreover, the determination that unsecured creditors are out-of-the-money at the beginning of a chapter 11 case is based on nothing more than hypothetical valuations as reflected by the debtor's balance sheet, by any appraisals that may have been obtained, and, in some cases, by an initial, stalking-horse bid for the enterprise. The going concern value of the enterprise has not yet been fully tested by the market. Even if there is an initial arm's length bid for the assets, that bid is subject to the market in the form of higher bids that might be received after the bankruptcy filing at an auction or otherwise.

The distributional priorities that the balance sheet reflects also have not been tested. The debtor's balance sheet does not show, for example, whether liens are unperfected, and thus may be avoided under Code section 544, or whether the debtor's current owners acquired the business by a leveraged buyout that may be avoided as a fraudulent transfer under section 548 and/or applicable state law.

Under current law and large-case practice, a committee of unsecured creditors normally raises these issues, with the result that distributions to unsecured creditors are maximized and the Code's distributional priorities are respected. Who will raise these issues if there is no unsecured creditors' committee? Likely no one.

And what about the prepackaged bankruptcy, in which unsecured creditors will be unimpaired or whose claims will "ride through" under the proposed plan? Well, the plan is just that – "proposed." If the prepack is not a true prepack or the agreements behind it break down, as they sometimes do, such that plan confirmation cannot be quickly obtained, the need for an unsecured creditors' committee often reemerges. Under current practice, unsecured creditors appear to take a "wait and see" attitude, showing little interest in serving on a committee so long as the prepackaged case is progressing as proposed. Currently, if the confirmation of the prepack plan is derailed, it's fairly easy for several unsecured creditors to contact the United States trustee, to say that they're willing to serve and to ask for the appointment of the committee. With the proposed amendment to Code section 1102, those same creditors presumably would need to hire counsel, at their own expense, to file a motion and argue for the appointment of a committee. The proposed amendment to Code section 1102(a) raises a barrier to the formation of a committee, notwithstanding that in such event an unsecured creditors' committee and the unsecured creditor empowerment that it engenders are clearly needed.

Judicial Debates: Arbitration and Bankruptcy: When Are Core Bankruptcy Proceedings Subject to Arbitration? Always, Never or Just Sometimes

Honorable Vincent F. Papalia

Honorable Jerrold N. Poslusny, Jr.

United States Bankruptcy Court
District of New Jersey

Materials prepared by Sara C. Temes
Member, Bond, Schoeneck & King PLLC

I. The Federal Arbitration Act (FAA): General Rules

A. Section 2 of the FAA: "A written provision in a contract . . . to settle by arbitration . . . shall be valid, irrevocable, and enforceable."

B. Section 3 of the FAA: "Where a contract includes an arbitration provision the trial must be stayed "until such arbitration has been had in accordance with the terms of the agreement."

C. General Rule: The FAA mandates that a valid arbitration provision be enforced. *In re Mintze*, 434 F.3d 222, 229 (3d Cir. 2006) (The FAA "requires rigorous enforcement of arbitration agreements.").

D. Two notable exceptions to the FAA's general rule favoring the enforcement of arbitration provisions:

1. An arbitration clause will not be enforced if it violates core fundamental principles of contract law, such as:

   a. Fraud;

   b. Coercion; or

   c. Unconscionability

   In re Patwari, No. 08-cv-26178 (JKS), 2016 WL 1577842, at *5 (citing *Prima Plant Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 400 (1967)).

2. The mandate to arbitrate may be overridden but only by a contrary congressional command. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 224 (1987).

II. When Must Arbitration Agreements be Enforced by Bankruptcy Courts

A. All "non-core" matters which are subject to clear, binding arbitration clauses must be arbitrated.

B. Certain "core" matters may be arbitrated as well if doing so does not pose an "inherent conflict" with the Bankruptcy Code. This is particularly true when the "core" matter is intertwined with an otherwise arbitrable state law claim.

III. Identification of Conflict Between the Bankruptcy Code and Federal Arbitration Act

A. The Second Circuit has directed bankruptcy courts to undertake a "particularized inquiry," taking the facts and circumstances of the bankruptcy case into consideration. *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018)

B. In *Anderson*, the Court identified certain "objectives of the Bankruptcy Code relevant to this inquiry" including:

1. "the goal of centralized resolution of purely bankruptcy issues,"

2. "the need to protect creditors and reorganizing debtors from piecemeal litigation," and

3. "the undisputed power of a bankruptcy court to enforce its own orders."

C. Some courts have indicated that the Bankruptcy Code and FAA do not conflict even where a core matter is implicated, if:

1. the debtor's estate is fully administered; or

2. the claims lack a direct connection to bankruptcy case; and the bankruptcy court is not uniquely able to interpret and decide the claims.

D. The Third Circuit in *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006) and *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) considered the standards to be applied in determining whether the party opposing arbitration can establish congressional intent to the contrary and whether the Bankruptcy Court has discretion to deny enforcement of an arbitration clause. In both cases, the Court found that no contrary intent was established and that the disputes were therefore arbitrable.

IV. Establishing Contrary Congressional Command: The Difficulties of Avoiding the FAA's Arbitration Mandate

A. The burden of proof must be carried by the party seeking to avoid arbitration.

B. Must show that Congress "intend[ed] to limit or prohibit waiver of a judicial forum for a particular claim."

C. The contrary congressional command must be "clear and manifest".

D. Courts should operate under the "strong presumption" that federal statutory claims may be handled through arbitration. *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

E. In *Epic Systems*, the Supreme Court noted that it has rejected every prior attempt to assert a conflict between the FAA and other federal statutes.

1. The Court has even rejected such efforts where the conflicting statute is designed to further important social policies.

2. The National Labor Relations Act (NLRA) was the statute at issue in the *Epic Systems* case, and the Court held that the NLRA "does not express approval or disapproval of arbitration" and the statute itself does not so much as "hint at a wish to displace the [FAA]".

V. Contrary Congressional Command: What Evidence Shows such a Command?

A. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court referenced that the FAA's arbitration mandate "may be overridden by a contrary congressional command"

B. The *McMahon* court found that the party seeking to oppose arbitration on the basis of "contrary congressional command" has the burden to show that Congress intended to prevent the enforcement of arbitration agreements.

C. Such intent may be deduced from:

1. The statute's **text**;

2. The statute's **legislative history**; or

3. From an **inherent conflict** between arbitration and the statute's underlying purposes.

D. The statute's text:

If Congress plainly expresses in the statute itself that it intends to override the arbitration mandate, then the statute will satisfy the "clear and manifest" intent test.

E. Legislative history:

Although the Supreme Court stated in *McMahon* that legislative history may be analyzed to deduce Congress' intent, that proposition was in dicta.

F. Inherent conflict with the statute's underlying purpose:

1. To date, the Supreme Court has never used legislative history or the "inherent conflict" test to override the FAA.

2. The Court's 2018 decision in *Epic Systems* offered propositions that would both undermine and strengthen the use of legislative history in overriding the FAA:

   a. First, the Court undermined the dicta in *McMahon* by stating:

      (i) Inferring intent to override the FAA through "legislative history is not the law" and

      (ii) Following the enactment of a statute, courts "do not inquire what the legislature meant, [they] ask only what the statute means."

   b. However, the Court also seemingly strengthened *McMahon's* dicta by:

      (i) examining the language and policies of the statutes at issue,

      (ii) referring to statutory language and underlying policies as "textual and contextual clues."

3. Following the decision in *Epic Systems*, lower courts have been divided on how to interpret its handling of *McMahon's* dicta:

   a. The Seventh Circuit held that legislative history is now irrelevant for the purposes of ascertaining Congress' intent to displace the FAA's arbitration mandate. *Graffers v. Kelly Services, Inc.*, 900 F.3d 293, 296 (7th Cir. 2018).

   b. The Southern District of New York rejected the argument that *Epic Systems* overruled *McMahon*. *In re Belton*, No. 15-CV-1934, 2019 WL 1017293 (S.D.N.Y. Mar. 3, 2019).

VI. Are Bankruptcy Cases Arbitrable?

A. Both the Ninth and the Eleventh Circuits have issued specific holdings that neither the text nor the legislative history of the Bankruptcy Code support a prohibition against enforcing arbitration. *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1020 (9th Cir. 2012); *Whiting-Turner Contracting Co. v. Elec. Mach Enters. (In re Elec. Mach. Enters.)*, 479 F.3d 791, 796 (11th Cir. 2007).

B. When a matter is non-core, a majority of bankruptcy courts, district courts and circuit courts considering the issue have held that bankruptcy courts are required to enforce arbitration agreements.

C. When a matter is core, the key question is whether there is an "inherent conflict" between the relevant Bankruptcy Code provision and the FAA.

D. The Third Circuit has declined to "subscribe to a hierarchy of Congressional concerns that places the bankruptcy law in a position of superiority over [FAA]". *Hays & Co. v. Merrill Lynch*, *Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989).

E. Considerations for determining whether an inherent conflict exists between a certain provision of the Bankruptcy Code and the FAA:

1. When ruling on whether a core bankruptcy issue can be decided through arbitration, the Third Circuit in *Hays* held that a Court must decide "whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause."

2. There is no blanket rule for arbitration of core bankruptcy issues; the underlying facts must be analyzed within the context of the bankruptcy case as a whole.

3. Some bankruptcy courts have considered, beyond the core/non-core inquiry, whether the issue to be arbitrated will determine whether the debtor is able to reorganize, or whether the issue is arising after plan confirmation.

VII. Are Actions to Enforce the Discharge Injunction Arbitrable?

A. Section 524 of the Bankruptcy Code provides for protection of the discharge injunction through civil contempt proceedings.

B. A plaintiff prevails if it can prove that the defendant had knowledge of the discharge injunction, but willfully ignored it.

C. Do arbitrators have the authority to enforce discharge injunctions? Courts appear to be divided:

1. There is some authority that discharge injunction issues can be arbitrated:

   a. "[I]t is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court." *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

   b. "The second policy reason behind not compelling arbitration within the context of bankruptcy – the need to protect creditors and reorganizing debtors from piecemeal litigation – is absent here for the same reasons set forth above. With the main bankruptcy case being closed, the current Adversary Proceeding involves a two-party dispute. With there being no need to protect creditors or reorganizing debtors, the Order Compelling Arbitration does not conflict with the policy reasons advanced by *National Gypsum*." *Trevino v. Select Portfolio Servicing, Inc., et al.*, No. 16-7024, 2019 WL 1090165, *12 (Bankr. S.D. Tex. Mar 7, 2019).

   c. "Where an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to deny its enforcement, unless the party opposing arbitration can establish congressional intent." *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006).

2. There is other persuasive authority that issues concerning a debtor's discharge injunction are not arbitrable:

   a. "The discharge injunction is an order issued by the bankruptcy court and . . . the bankruptcy court alone possesses the power and unique expertise to enforce it." *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018).

   b. "The bankruptcy court is in the best position to interpret its own orders." *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999)

   c. "The Court entered those [discharge] orders. The Court is party to those orders and the Court is an entity offended if the orders are not obeyed. A party who has not agreed to arbitration of its claims cannot be forced to arbitrate. This Court does not agree to arbitrate the claims." *In re Grant*, 281 B.R. 721, 724 (S.D. Ala. 2000) (internal citations omitted).

   d. "Courts—not arbitration proceedings—are the appropriate forums to address alleged violations of court orders." *In re Golden*, 587 B.R. 414 (Bankr. E.D.N.Y. 2018)).