

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. MW 98-064

**In re: FIREPRO INCORPORATED,
Debtor.**

**In re: FIREPRO INTERNATIONAL, LLC,
Debtor.**

**LEE C. DEVITO, FIREPRO INCORPORATED
and FIREPRO EMPLOYEE STOCK OWNERSHIP TRUST,
Plaintiffs/Appellees,**

V.

**REXFORD WILSON, FIREX INSTITUTE, LTD.,
d/b/a FIREPRO INSTITUTE,
Defendants,
and
ERNST & YOUNG, LLP,
Defendant/Appellant.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. James F. Queenan, U.S. Bankruptcy Judge)**

**Before
Lamoutte, Haines and Vaughn, U.S. Bankruptcy Judges**

**Christian M. Hoffman and Colin J. Zick of Foley, Hoag & Eliot LLP, on brief for the
appellant.**

Ann Brennan and Stephen E. Shamban, on brief for the appellees.

November 24, 1998

Per Curiam. Ernst & Young, LLP, appeals the bankruptcy court's refusal to abstain from hearing claims lodged against it by Lee C. DeVito in a pending adversary proceeding removed from state court. DeVito, together with Firepro Inc. (the Chapter 11 debtor), Firepro International, LLC, (also a Chapter 11 debtor) and the Firepro Employee Stock Ownership Plan & Trust, oppose the appeal. For the reasons set forth below, we conclude that the claims asserted against Ernst & Young by DeVito are not within the bankruptcy court's jurisdiction. Accordingly, we will dismiss the appeal and remand the matter to the bankruptcy court with instructions to dismiss those claims or remand them to state court.

Appellate Jurisdiction

Appellate jurisdiction to review the bankruptcy court's order refusing Ernst & Young's motion seeking mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) is available, notwithstanding the fact that the order is obviously interlocutory. See 28 U.S.C. § 158(a)(3). Leave to appeal has not been requested. See id. We will not tarry to consider the question whether it is appropriate to exercise appellate jurisdiction, see Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp., 218 B.R. 643 (1st Cir. BAP), because it is apparent to us that the claims at issue are not, in the first instance, within the bankruptcy court's jurisdiction.

Background

In December 1996, well before any bankruptcy filing, DeVito and assorted co-plaintiffs filed state law claims against Ernst & Young (and multiple co-defendants) in Massachusetts state court. Their claims arose from DeVito's purchase of a majority interest in Firepro from its former principal. Among the multiple counts in the complaint were Counts IV and V, under which DeVito, individually, sought relief against Ernst & Young for fraud and for violations of Massachusetts securities laws. Although Ernst & Young counterclaimed against Firepro, it made no counterclaims against DeVito individually.

Following the 1997 commencement of the Firepro Chapter 11 cases, the state court action was removed to the bankruptcy court in March 1998. (App. at 1-3.) On April 1, 1998, Ernst & Young's co-defendants moved the bankruptcy court for mandatory abstention as to the entire lawsuit. (App. at 9-13.) Ernst & Young joined the motion almost immediately, (App. at 5), and in support of its request argued, inter alia, that its defense of Mr. DeVito's claims was a dispute between two non-debtors and did not belong in the bankruptcy court. (App. at 141.) Following entry of the court's order denying Ernst & Young's motion for mandatory abstention, (App. at 124), Ernst & Young timely filed its appeal. (App. at 177-79.)

Discussion

Throughout the proceedings below, the parties feinted at, but did not really come to grips with, issues of subject matter jurisdiction. As to the portion of the controversy before us on this appeal (i.e., the DeVito/Ernst & Young dispute), the record is sufficient for us to determine readily that the bankruptcy court is without subject matter jurisdiction. Therefore, this appeal should be dismissed and the dispute remanded to the bankruptcy court with instructions that it dismiss Counts IV and V of the complaint or remand them to the state court for determination. Here is why:

As a federal court, we are duty-bound to inquire into matters of jurisdiction sua sponte if necessary. Such concerns may be addressed at any time. See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 813 (1st Cir. 1988) ("absence of subject matter jurisdiction can be raised at any time in the litigation" by a party or by the appellate court sua sponte).

In the court below, there was much ado about whether the claims between and among all parties were "core" or "non-core," and whether, through the timing of the moving parties' filing of Rule 9027 statements on that point, the defendants had waived objections to the bankruptcy court's jurisdictional exercise.¹

¹ At the plaintiff's request, the court below struck as untimely the defendants' Rule 9027(e)(3) statements contesting the "core" character of the removed claims. (App. at 125.) The parties have made much of the issue in their briefs and even identified it as one of the major issues on appeal. However, in

It is beyond equivocation that DeVito's individual claims, brought in the state court before the bankruptcy filing, neither "arise under" Title 11 nor "arise in" a Title 11 case.² If DeVito's claims are within the jurisdiction delegated to the bankruptcy court by the district court pursuant to 28 U.S.C. §§ 157(a) and 1334, they must be "related to" Firepro's bankruptcy case.

"Related to" jurisdiction is the most expansive component of bankruptcy jurisdiction, see 28 U.S.C. § 1334(b), but it is not boundless. See, e.g., In re Arnold Print Works, Inc., 815 F.2d at 167 (abstention from hearing non-core "related to" matters is permissive and sometimes mandatory). Whether the claims are sufficiently related to a bankruptcy case is a question of whether they are "sufficiently connected" to the debtor's reorganization. "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that

ruling on the abstention issues the bankruptcy judge expressly disavowed any reliance on the untimely character of the parties' Rule 9027 filings. (App. at 162.)

² In short, DeVito's claims against Ernst & Young do not "arise under" Title 11 because they derive from state law, rather than from federal bankruptcy law. They do not "arise in" the bankruptcy court because the claims are of a character that can be brought outside a bankruptcy proceeding. See In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991), abrogated on other grounds by Connecticut Nat'l Bank v. Germain, 503 U.S. 259 (1992); Wood v. Wood (In re Wood), 825 F.2d 90, 96-97 (5th Cir. 1987); Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.), 815 F.2d 165, 167 (1st Cir. 1987); Boyajian v. Deluca (In re Remington Dev. Group, Inc.) 180 B.R. 365, 368 (Bankr. D.R.I. 1995).

proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis in original), overruled on other grounds by Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995). See also In re G.S.F. Corp., 938 F.2d at 1475 (quoting Pacor, Inc.). "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 bankruptcy estate." Pacor, Inc., 743 F.2d at 994. Accord In re G.S.F. Corp., 938 F.2d at 1475; see also In re Parque Forestal, Inc., 949 F.2d 504, 509 (1st Cir. 1991) ("The term 'related to' has not been given a settled definition by the courts of appeals; some courts have given it a broad construction while others have defined it more narrowly"); see generally In re Remington Dev. Group, Inc., 180 B.R. at 368-69 (collecting cases).

DeVito's claims vis-a-vis Ernst & Young present disputes between two non-debtor entities. "At best, ... jurisdiction to adjudicate a dispute between two non-debtors is tenuous." Cioffi v. Old Stone Bank (In re C.A.C. Jewelry, Inc.), 124 B.R. 419, 422 (Bankr. D.R.I. 1991). Disputes between non-debtors may come within "related to" jurisdiction under a variety of circumstances. See generally 1 Lawrence P. King et. al., Collier on Bankruptcy ¶ 301 [4][c][ii] (15th ed. rev. 1998) (listing examples). There are no

apparent circumstances linking the debtor's fate with the resolution of DeVito's individual claims against Ernst & Young. Moreover, after extensive questioning at oral argument, appellees' attorney was unable to identify any such connection. In short, DeVito's success or failure in pursuing Ernst & Young will not enlarge the estate, create liabilities for the estate, or otherwise have a conceivable, cognizable impact on Firepro's reorganization.

Although there may be some evidentiary overlap between DeVito's claims and those between and among the Chapter 11 debtor and other parties, there is no bankruptcy nexus. Although it may support supplemental jurisdiction in the district court, actual and evidentiary overlap is not, in and of itself, a sufficient basis to sustain bankruptcy jurisdiction over third-party disputes. See In re Remington Dev. Group, Inc., 180 B.R. at 371-75 (holding that supplemental jurisdiction bestowed on the district courts under 11 U.S.C. § 1367 does not extend to bankruptcy courts via the district court delegation provided for in 28 U.S.C. § 157(b)). For these reasons, we see no necessity in examining the abstention issues or in examining the jurisdictional issues further either in this court or below. The bankruptcy court is without subject matter jurisdiction over the DeVito/Ernst & Young controversy.

Conclusion

For the reasons set forth above, Ernst & Young's appeal is

dismissed, and the matter is remanded to the bankruptcy court with instructions to dismiss Counts IV and V or to remand them to the state court for disposition.³

³ The parties indicated at oral argument that fair disposition of Counts IV and V may require some consideration of the relative impact of dismissal and remand in light of issues such as the statute of limitations. As an appellate court we are ill-equipped to undertake that inquiry. We leave it to the bankruptcy court's discretion.