Stop Changing the Subject! Recent Supreme Court Jurisprudence on Whether Statutory Requirements are Subject Matter Jurisdictional or Claims Processing Rules

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I. Introduction

In recent years, the U.S. Supreme Court has attempted to formulate a coherent framework for determining when a moving party's failure to satisfy a statutory requirement deprives a court of subject matter jurisdiction as opposed to simply depriving the movant of a basis for relief. As discussed below, this distinction is critical because unlike most defenses, a lack of subject matter jurisdiction can be raised at any time prior to final judgment—even on appeal. Recent Supreme Court cases in this area have focused on the requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure or have otherwise had significant implications in the bankruptcy context. As discussed infra, a fair reading of these cases supports the conclusion that in most instances, the failure of a movant to satisfy a Bankruptcy Code requirement will not deprive the bankruptcy court of jurisdiction to rule on the matter. Thus, parties seeking to collaterally attack bankruptcy court orders are unlikely to succeed by arguing that a movant's failure to meet its statutory burden deprived the court of subject matter jurisdiction. Although such arguments are relevant to the merits of the court's decision, they do not touch upon the court's adjudicatory authority over

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the matter. These arguments must therefore be timely raised or will be subject to waiver.

Parties seeking to collaterally challenge the bankruptcy court's subject matter jurisdiction are more likely to succeed if they can establish that the bankruptcy court's decision not only ran afoul of specific Bankruptcy Code requirements but that it also exceeded the grant of federal bankruptcy jurisdiction contained in 28 U.S.C.A. §§ 157 and 1334. As discussed below, this strategy was highlighted in the U.S. Court of Appeals for the Second Circuit's recent decisions in *In re Johns-Manville*. So long as a bankruptcy court's ruling is on firm jurisdictional ground for purposes of Title 28, however, successful challenges to a bankruptcy court's subject matter jurisdiction are likely to be few and far between.

II. Recent Supreme Court Jurisdictional Jurisprudence

Over its last seven terms, the U.S. Supreme Court has attempted to clarify precisely when a statutory or rule-based requirement determines whether a court has subject matter jurisdiction over proceedings. In doing so, the Court's stated goal has been to remedy courts' historically hasty and imprecise use of the term "jurisdictional" in describing certain statutory requirements. The Court's unanimity in nearly all of these decisions suggests a strong desire to discourage so-called "drive-by" jurisdictional rulings.

In *Kontrick v. Ryan*, at issue was whether the untimeliness of a creditor's complaint objecting to the debtor's discharge could be raised for the first time by the debtor *after* the bankruptcy court ruled on the merits of the complaint.[1] Under Bankruptcy Rule 4004(a), a creditor has "60 days after the first date set for the meeting of creditors" to file a complaint objecting to the debtor's discharge in Chapter 7 cases.[2] In *Kontrick*, the creditor objected to the debtor's discharge after the expiration of Rule 4004(a)'s 60-day period. The debtor, however, did not raise this issue with the bankruptcy court until after a ruling on the merits in favor of the objecting creditor.

According to the debtor, the time prescription contained in Rule 4004(a) was "jurisdictional," in that it could be raised at any stage in the proceedings.[3] Affirming the judgment of the Seventh Circuit Court of Appeals, a unanimous Supreme Court concluded that the time period listed in Rule 4004(a) was not "jurisdictional" and that "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."[4]

At the outset of its analysis, the Court noted that under Article III of the U.S. Constitution, only Congress is empowered to determine the

adjudicatory authority of lower federal courts. The Court stated that in 28 U.S.C.A. § 157(b)(2)(J) Congress specifically designated objections to discharge as "core proceedings" within the subject matter jurisdiction of bankruptcy courts.[5] The Court also noted that no act of Congress prescribed a time limit for filing such objections. Rather, the only time limits for filing discharge objections were found in the Court-promulgated Federal Rules of Bankruptcy Procedure.[6] As the Court pointed out, Bankruptcy Rule 9030 explicitly states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts."[7] In short, the Court concluded, "the filing deadlines prescribed by Bankruptcy Rule[] 4004... are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate."[8]

Although the debtor conceded that Rule 4004 did not vitiate the bankruptcy court's subject matter jurisdiction, the debtor argued that Rule 4004 has "the same import as provisions governing subject-matter jurisdiction."[9] Just as a lack of subject matter jurisdiction could be raised at any stage in an action, the debtor argued, so too could a creditor's failure to comply with the time restrictions of Rule 4004 be raised at any time—even after a ruling on the merits or on appeal.[10] According to the Court, however, the debtor "overlook[ed] a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule," namely that "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct" whereas "a claim-processing rule... can... be forfeited if the party asserting the rule waits too long to raise the point."[11] Because the debtor failed to raise the untimeliness of the discharge complaint until after the complaint was fully adjudicated on the merits, the lower courts had properly concluded that the debtor waived this argument.[12]

As the Supreme Court in *Kontrick* makes clear, the time limits imposed by Rule 4004 do not implicate the bankruptcy court's subject matter jurisdiction. In other words, whether or not a discharge complaint is timely under Rule 4004, the bankruptcy court has adjudicatory authority over the matter. Thus, if a creditor has filed an untimely discharge complaint, the proper responsive pleading is a motion to dismiss for failure to state a claim on which relief can be granted (under Bankruptcy Rule 7012(b)(6)) rather than a motion to dismiss for lack of subject matter jurisdiction (under Bankruptcy Rule 7012(b)(1)). The importance of the distinction is well-highlighted by *Kontrick*, in that former basis for dismissal is subject to waiver if not timely asserted.

Also significant in *Kontrick* is the Court's recognition of its own and other courts' historically inartful use of the term "jurisdictional."[13] As the Court pointed out, there exists a plethora of case law using the

term "jurisdictional" to refer to "emphatic time restrictions in rules of court."[14] In seeking to avoid future confusion occasioned by the imprecise use of the term, the Court posited that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."[15]

One year later in *Eberhart v. U.S.*, at issue was whether a criminal defendant's failure to comply with the time limitations prescribed by Federal Rule of Criminal Procedure 33—which governs motions for new trials—deprives the district court of subject matter jurisdiction to grant a new trial.[16] Relying on its reasoning in *Kontrick*, the Supreme Court's per curium opinion held that Rule 33 does not limit subject matter jurisdiction because it is simply a claim-processing rule.[17] According to the Court, "[i]t is implausible that the [Bankruptcy] Rules considered in *Kontrick* can be claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction."[18]

This conclusion, the Court noted, "break[s] no new ground... despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdictional' in our earlier cases."[19] Nonjurisdictional rules such as Rule 33, the Court reiterated, can be "forfeited if the party asserting the rule waits too long to raise the point."[20] In *Eberhart*, because the government failed to raise the defense of untimeliness until after the district court reached the merits of the Rule 33 motion, it forfeited that defense.[21]

The next year in *Arbaugh v. Y&H Corp.*, the Court was faced with the question of "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief."[22] Title VII makes it unlawful for an "employer" to discriminate on certain enumerated grounds.[23] Title VII defines the term "employer" to include only those having "fifteen or more employees."[24] The plaintiff in *Arbaugh* brought a Title VII suit against her employer, alleging sexual harassment. Weeks after the plaintiff prevailed at trial, the employer moved to dismiss the action for lack of subject matter jurisdiction because, having fewer than 15 employees, it was not an "employer" subject to suit under Title VII.[25]

Ruling that the 15-employee requirement of Title VII was jurisdictional, the district court granted the motion to dismiss.[26] In rejecting this conclusion, a unanimous Supreme Court held that "the numerical threshold does not circumscribe federal-court subject-matter juris-

diction. Instead, the employee-numerosity requirement relates to the substantive adequacy of [the plaintiff's] Title VII claim."[27] As such, the Court concluded, the employer could not raise this defense after a judgment had been rendered on the merits.[28]

Before reaching its conclusion, the Court observed that subject matter jurisdiction over Title VII claims stemmed from two sources. First, 28 U.S.C.A. § 1331 provided the district court with jurisdiction over civil actions arising under federal law.[29] Second, Title VII itself granted district courts jurisdiction over Title VII claims.[30] According to the Court, although the plaintiff's claim clearly "arises" under federal law (Title VII), that law "specifies, as a prerequisite to its application, the existence of a particular fact, *i.e.*, 15 or more employees."[31] Thus, the task before the Court was determining whether the 15-employee requirement was simply an element of the plaintiff's claim or a jurisdictional prerequisite.[32]

In holding that the 15-employee requirement was merely an element of a plaintiff's claim, the Court noted that courts have an independent obligation to determine whether subject matter exists, even if the issue is not raised by the parties. Yet, there was nothing in the text of Title VII "indicat[ing] that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met."[33] Moreover, the Court observed, the employee numerosity did not appear in the section of Title VII granting jurisdiction but in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[34] According to the Court, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."[35]

Reiterating a theme expressed earlier in *Kontrick*, the Court took note of the fact that "[o]n the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous."[36] Citing a decision by the Second Circuit, the Court observed that judicial opinions "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim."[37] According to the Court, such "unrefined... 'drive-by jurisdictional rulings'... should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim."[38]

After rendering unanimous decisions in *Kontrick*, *Eberhart,* and *Arbaugh*, a divided Supreme Court revisited jurisdictional issues in *Bowles v. Russell*.[39] At issue in *Bowles* was whether time limits for

filing notices of appeal were jurisdictional in nature such that a failure to timely file a notice of appeal deprives the appellate court of jurisdiction over the case.[40] In *Bowles*, the petitioner (Bowles) filed a federal habeas corpus petition after being convicted of murder in state court.[41] After the district court denied habeas relief, Bowles had 30 days to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C.A. § 2107(a). After the 30-day period expired, Bowles moved to extend the period for filing a notice of appeal.[42] Although Rule 4(a)(6) and 28 U.S.C.A. § 2107(c) allowed such extensions for an additional 14 days, the district court "inexplicably" granted the Bowles a 17-day extension.[43] Bowles thereafter filed his notice of appeal within the time period allowed by the district court but after the 14-day period allowed by Rule 4(a)(6) and section 2107(c).

On appeal, the Sixth Circuit dismissed Bowles' appeal for lack of subject matter jurisdiction on the basis that it was untimely under section 2107.[44] The result was warranted, the Sixth Circuit concluded, irrespective of Bowles' reliance on the district court's error. In affirming the Sixth Circuit's ruling, the Supreme Court noted that it had "long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"[45] According to the five-justice majority, "[a]lthough several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of *statutory* time limits for taking an appeal as jurisdictional."[46] Indeed, the Court noted, critical to its conclusion in *Kontrick*—that Bankruptcy Rule 4004's time limit for filing discharge objections was not jurisdictional—"was the fact that '[n]o *statute*... specifies a time limit for filing a complaint objecting to the debtor's discharge.'"[47]

"Jurisdictional treatment of statutory time limits makes good sense," the Court reasoned, because Congress has the authority to determine both whether federal courts can hear cases at all and the *conditions* under which federal courts can hear them.[48] "Put another way, the notion of 'subject-matter' jurisdiction obviously extends to 'classes of cases... falling within a court's adjudicatory authority,' but it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment."[49] Because the time limit was jurisdictional, Bowles could not "rely on forfeiture or waiver to excuse his lack of compliance."[50]

In a strongly worded dissent authored by Justice Souter, four members of the Court took serious issue with the majority's conclusion.

According to the dissent, the majority's conclusion was at odds with the Court's recent efforts to "avoid[] the erroneous jurisdictional conclusions that flow from the indiscriminate use of th[at] ambiguous word."[51] That is, "[a]lthough we used to call the sort of time limit at issue here 'mandatory and jurisdictional,' we have recently and repeatedly corrected that designation as a misuse of the 'jurisdiction' label."[52] In short, the dissent noted, the majority had reverted back to the very reasoning that *Kontrick*, *Eberhart*, and *Arbaugh* collectively—and unanimously—repudiated.[53]

In the dissent's view, the fact that the time limit at issue was established by statute did not make jurisdictional treatment automatic.[54] According to the dissent, "limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so."[55] Congress failed to make any type of jurisdictional designation, the dissent observed, when it established the time limit for filing a notice of appeal under 28 U.S.C.A. § 2107.[56] Such a deadline, the dissent noted, "is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear... unless Congress says otherwise."[57]

Three years later in *Reed Elsevier, Inc. v. Muchnick*, a once again unanimous Supreme Court held that a statutory prerequisite to filing suit under the Copyright Act is not a jurisdictional limitation.[58] At issue was section 411(a) of the Copyright Act, which requires registration of a copyright before a civil action for infringement can be brought.[59] Relying on two of its earlier precedents, the Second Circuit Court of Appeals had concluded that a litigant's failure to meet the registration requirement deprived the trial court of subject matter jurisdiction over the infringement claims.[60]

In reversing the Second Circuit's ruling, the Supreme Court first noted that nothing in section 411(a) explicitly rendered the registration requirement jurisdictional.[61] The Court next noted that the registration requirement of section 411(a)—like the employee numerosity requirement in Title VII at issue *Arbaugh*—was not contained in the statutory provision granting federal courts jurisdiction over copyright infringement claims.[62] Finally, the Court observed, section 411(a) expressly allowed courts to adjudicate infringement claims involving unregistered copyrights under certain circumstances.[63] In short, the Court posited, "The registration requirement of... Section 411(a)... is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provisions, and admits of congressional authorized exceptions."[64]

The Court next responded to the argument that under *Bowles*, section 411(a)'s registration requirement should be deemed jurisdictional because it has consistently been interpreted as such by lower courts.[65]

In response to this argument, the Court clarified its holding in *Bowles* as follows:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* stands for the proposition that context, including this court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.[66]

Recognizing that *Bowles* stood out as anomalous in light of the Court's other recent jurisdictional rulings, Justice Ginsburg's concurring opinion set forth her understanding of how *Bowles* was distinguishable from both the case at hand and from the reasoning in *Arbaugh*.[67] The relevant distinction, the concurrence observed, was that *Bowles* relied on a significant number of Supreme Court decisions interpreting the time limit at issue to be a jurisdictional limitation.[68] The precedent interpreting the registration requirement section 411(a), on the other hand, were all from lower courts.[69] Moreover, the concurrence observed, most of those decisions were "'drive-by jurisdictional rulings'" that carelessly used the term "jurisdictional" without sufficient explanation.[70] Thus, although Justice Ginsburg dissented from *Bowles*, her concurring opinion in *Muchnick* suggests a way to contain *Bowles*' precedential force without overruling it.

Later the same term, in *United Student Aid Funds, Inc. v. Espinosa*, the Court unanimously concluded that certain statutory and Bankruptcy Rule requirements attendant to the granting of a Chapter 13 discharge were not jurisdictional.[71] In *Espinosa*, the Chapter 13 debtor obtained a discharge of his student loan debts without obtaining an "undue hardship" determination as required by 11 U.S.C.A. § 523(a)(8). The debtor also failed to initiate an adversary proceeding as required by Bankruptcy Rule 7001(6) for such a discharge. Although the lender had notice that the debtor's Chapter 13 plan proposed to discharge the student loan debt, the lender did not object to the debtor's failure to initiate an adversary proceeding.[72] The lender also failed to object to (and thereafter, appeal) the bankruptcy court's failure to make the requisite "undue hardship" determination.[73] Years later, the lender argued that the order granting the discharge was void under Federal Rule of Civil Procedure 60(b)(4) because it was issued in violation of the Bankruptcy Code and Bankruptcy Rules.[74]

In rejecting the lender's argument, the Court observed that Rule 60(b)(4) was not to be used as "a substitute for a timely appeal."[75] Although the lender did not attempt to argue that the bankruptcy court lacked subject matter jurisdiction to issue the discharge order, the Court made it clear that such an argument would have failed because "§ 523(a)(8)'s statutory requirement that a bankruptcy court find an undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limit on the bankruptcy court's jurisdiction."[76] Similarly, the Court noted, the debtor's failure to comply with Bankruptcy Rule 7001(6) did not deprive the bankruptcy court of jurisdiction because, under *Kontrick v. Ryan*, such rules are simply procedural and do not impact jurisdiction.[77] In short, although a debtor must meet certain requirements to obtain a discharge of student loan debt, the debtor's failure to do so does not deprive the bankruptcy court of subject matter jurisdiction to grant a discharge—even if the granting of such a discharge is in error.

III. Applying the Supreme Court's Analytical Framework in the Bankruptcy Context

Following the Supreme Court's recent jurisdictional pronouncements discussed above, the following analytical framework should be used in ascertaining whether a statutory or rule-based requirement is jurisdictional in nature: (1) does the statute or rule expressly state that the requirement is jurisdictional?; (2) if the statute is silent on whether the particular requirement is jurisdictional, does it appear within a statutory provision conferring subject matter jurisdiction?; (3) does the statute or rule recognize exceptions to the particular requirement at issue?; and (4) has the Supreme Court historically and uniformly construed the requirement as a jurisdictional limitation?

In applying the foregoing framework in the bankruptcy context, the U.S. Courts of Appeals have issued several recent decisions concluding that the Bankruptcy Code and rule-based provisions under consideration were not jurisdictional limitations.[78] For example, the Second Circuit Court of Appeals in *Adams v. Zarnel (In re Zarnel)*, recently held that bankruptcy eligibility requirements contained in Bankruptcy Code section 303 were not jurisdictional in nature.[79] In reaching this conclusion, the Second Circuit overturned its contrary precedent, which could not be reconciled with the Supreme Court's decision in *Arbaugh*.[80] The Second Circuit further concluded that under *Arbaugh*, the credit counseling requirements for individual debtors contained in Bankruptcy Code section 109(h) could not be read as jurisdictional.[81]

Comparatively fewer are recent appellate decisions concluding that Bankruptcy Code and rule-based requirements under examination were jurisdictional limitations.[82] Indeed, under the framework articulated by the Supreme Court, it appears that few provisions of the Bankruptcy Code will be deemed subject matter jurisdictional. This conclusion follows in large part because of the broad federal bankruptcy jurisdiction conferred by Title 28 of the U.S. Code. Specifically, section 1334 of Title 28 provides district courts with "original and exclusive jurisdiction of all cases under title 11," and "original but not exclusive jurisdiction of *all civil proceedings arising under title 11, or arising in or related to cases under title 11*."[83]

In short, federal bankruptcy jurisdiction exists in three categories of proceedings: those that "arise under title 11," those that "arise in cases under title 11," and those "related to cases under title 11." Given this broad grant of jurisdiction, it should come as no surprise that federal bankruptcy jurisdiction will exist in most instances where relief is sought under specific provisions of the Bankruptcy Code.[84] Title 28, however, is not necessarily the beginning and end of all jurisdictional inquiries. As the cases discussed supra recognize, the Bankruptcy Code itself may contain further jurisdictional limitations beyond those contained in Title 28. For example, Bankruptcy Code section 505(a) may be interpreted to limit the bankruptcy court's subject matter jurisdiction to determine tax liabilities.[85] Additionally, Bankruptcy Code section 904, by its terms, limits the bankruptcy court's subject matter jurisdiction to interfere with the governmental or political powers of municipal debtors, and Bankruptcy Code section 945, by implication, cuts off bankruptcy court jurisdiction over municipal debtor cases after successful implementation of the debtor's plan.[86] Explicit jurisdictional limitations within the Bankruptcy Code, however, are few and far between.

Based on the foregoing, parties seeking to challenge the bankruptcy court's subject matter jurisdiction are more likely to meet with success by establishing that the bankruptcy court's decision not only ran afoul of specific Bankruptcy Code requirements but exceeded the grant of federal bankruptcy jurisdiction contained in 28 U.S.C.A. §§ 157 and 1334. Such a strategy was highlighted recently in the U.S. Court of Appeals for the Second Circuit's decisions in *In re Johns-Manville Corp.* (*Manville I*).[87]

In *Manville I*, the debtor sought to enjoin creditors' claims against the debtor's insurer (Travelers) notwithstanding the fact that (i) such claims were predicated on an independent duty owed by Travelers to creditors under state law (and thus were not derivative of the debtor's liability) and (ii) such claims did not seek recovery from property of the debtor's

bankruptcy estate (i.e., they did not seek payment from the proceeds of the debtor's insurance policies).[88] The Second Circuit concluded that the ability to enjoin such claims exceeded the bankruptcy court's "related to" jurisdiction under Title 28:

> Plaintiffs aim to pursue the assets of *Travelers*. They raise no claim against [the debtor's] insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court has no jurisdiction to enjoin the Direct Action claims against Travelers.[89]

On appeal, the Supreme Court vacated the Second Circuit's decision on the basis that the appellants failed to timely appeal the bankruptcy court's original order, which had been issued in 1986.[90] The Supreme Court emphasized, however, that its holding was narrow and did "not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing."[91] The Supreme Court further indicated that to the extent parties did not receive adequate notice of the original 1986 order—and were thereby deprived of constitutional due process—those parties might be able to mount a successful challenge to the bankruptcy court's jurisdiction to enter the order.[92]

On remand, the Second Circuit concluded that certain parties did not receive constitutionally sufficient notice of the bankruptcy court's 1986 order.[93] As such, those parties could collaterally challenge the bankruptcy court's 1986 order.[94] With respect to those parties, the Second Circuit expressly reaffirmed its holding in *Manville I* that the bankruptcy court lacked subject matter jurisdiction to enter the 1986 order.[95] Since the Second Circuit's decision in *Manville I*, other courts have reached similar conclusions regarding the jurisdictional limitations on a bankruptcy court's ability to enjoin claims of nondebtors against other nondebtors.[96]

IV. Conclusion

Using the *Manville* line of cases as guidance, parties seeking to challenge a bankruptcy court's subject matter jurisdiction are well-advised to focus on whether the requested relief falls within the parameters of the federal bankruptcy jurisdiction conferred by Title 28.[97] If the relief being sought is explicitly authorized by the Bankruptcy Code, however, parties will be hard-pressed to argue that such relief is not encompassed within Title 28's "arising in," "arising under," or "related to" jurisdiction.

Assuming Title 28 jurisdiction is established, parties can attempt to alternatively argue that a movant's failure to meet a specific Bankruptcy

Code requirement defeats subject matter jurisdiction. However, based on the Supreme Court's recent jurisdictional rulings, such arguments are unlikely to meet with success in the majority of instances. This conclusion follows because very few Bankruptcy Code provisions expressly speak in jurisdictional terms. In short, a movant's failure to meet its statutory burden centers less on the bankruptcy court's adjudicatory authority than on the merits of the court's decision. Such merits-based arguments should be timely asserted or they risk being waived. Parties asserting merits-based arguments for the first time on appeal under the guise "subject matter jurisdiction" will do so at their peril.

Notes

1. Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867, 42 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 969, Bankr. L. Rep. (CCH) P 80031 (2004).
2. Fed. R. Bankr. P. 4004(a).
3. According to the debtor, the use of the term "jurisdictional" was not intended to suggest that Rule 4004 constrained the subject matter jurisdiction of the bankruptcy court but merely that Rule 4004 imposes a mandatory and "nonextendable time limit" for filing complaints objecting to discharge. Kontrick, 540 U.S. at 454.
4. Kontrick, 540 U.S. at 447.
5. Kontrick, 540 U.S. at 447-48.
6. Kontrick, 540 U.S. at 448.
7. Kontrick, 540 U.S.at 453 (citation omitted).
8. Kontrick, 540 U.S. at 454.
9. Kontrick, 540 U.S. at 455.
10. Kontrick, 540 U.S. at 447.
11. Kontrick, 540 U.S. at 456.
12. Kontrick, 540 U.S. at 460 ("No reasonable construction of complaint-processing rules, in sum, would allow a litigant situated as [the debtor] is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits.").
13. Kontrick, 540 U.S. at 454-55.
14. Kontrick, 540 U.S. at 454.
15. Kontrick, 540 U.S. at 455.
16. Eberhart v. U.S., 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005).
17. Eberhart , 546 U.S. at 403.
18. Eberhart , 546 U.S. at 405.
19. Eberhart , 546 U.S. at 405.
20. Eberhart , 546 U.S. at 404 (citation and internal quotation marks omitted).
21. Eberhart , 546 U.S. at 407.
22. Arbaugh v. Y&H Corp., 546 U.S. 500, 503, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 97 Fair Empl. Prac. Cas. (BNA) 737, 87 Empl. Prac. Dec. (CCH) P 42264 (2006).
23. 42 U.S.C.A. § 2000e-2(a)(1).
24. 42 U.S.C.A. § 2000e(b).
25. Arbaugh, 546 U.S. at 504.
26. Arbaugh, 546 U.S. at 504.
27. Arbaugh, 546 U.S. at 504.

28. Arbaugh, 546 U.S. at 504.

29. Arbaugh, 546 U.S. at 505.

30. Arbaugh, 546 U.S. at 505.

31. Arbaugh, 546 U.S. at 513.

32. Arbaugh, 546 U.S. at 514.

33. Arbaugh, 546 U.S. at 514.

34. Arbaugh, 546 U.S. at 515 (citation and internal quotation marks omitted).

35. Arbaugh, 546 U.S. at 516. In other words, the issue of whether an employer is covered by Title VII does answer the question of whether a court can adjudicate a harassment claim.

36. Arbaugh, 546 U.S. at 511.

37. Arbaugh, 546 U.S. at 511 (quoting Da Silva v. Kinsho Intern. Corp., 229 F.3d 358, 361, 83 Fair Empl. Prac. Cas. (BNA) 1714, 79 Empl. Prac. Dec. (CCH) P 40220 (2d Cir. 2000) (internal quotation marks omitted)).

38. Arbaugh, 546 U.S.at 511 (citation and internal quotation marks omitted).

39. Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 68 Fed. R. Serv. 3d 190 (2007).

40. Bowles, 551 U.S. at 206.

41. Bowles, 551 U.S. at 207.

42. Bowles, 551 U.S. at 207.

43. Bowles, 551 U.S. at 207.

44. Bowles, 551 U.S. at 207.

45. Bowles, 551 U.S. at 209 (citations omitted).

46. Bowles, 551 U.S. at 210 (emphasis added).

47. Bowles, 551 U.S. at 211 (citing Kontrick, 540 U.S. at 448) (emphasis added) (alteration and omission in original).

48. Bowles, 551 U.S. at 212-13.

49. Bowles, 551 U.S. at 213 (citation omitted) (alteration in original).

50. Bowles, 551 U.S. at 213.

51. Bowles, 551 U.S. at 215-16 (Souter, J., dissenting).

52. Bowles, 551 U.S. at 216 (Souter, J., dissenting) (citations omitted).

53. Bowles, 551 U.S. at 216 (Souter, J., dissenting).

54. Bowles, 551 U.S. at 217 (Souter, J., dissenting).

55. Bowles, 551 U.S. at 217 (Souter, J., dissenting).

56. Bowles, 551 U.S. at 217 (Souter, J., dissenting).

57. Bowles, 551 U.S. at 218 (Souter, J., dissenting).

58. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 176 L. Ed. 2d 17, 38 Media L. Rep. (BNA) 1321, 93 U.S.P.Q.2d 1719 (2010).

59. Muchnick, 130 S. Ct. at 1242.

60. Muchnick, 130 S. Ct. at 1243.

61. Muchnick, 130 S. Ct. at 1245.

62. Muchnick, 130 S. Ct. at 1246.

63. Muchnick, 130 S. Ct. at 1246 (noting that "[i]t would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.").

64. Muchnick, 130 S. Ct. at 1247.

65. Muchnick, 130 S. Ct. at 1247.

66. Muchnick, 130 S. Ct. at 1247-48 (footnote omitted).

67. Muchnick, 130 S. Ct. at 1250 (Ginsburg, J., concurring).

68. Muchnick, 130 S. Ct. at 1251 (Ginsburg, J., concurring).

69. Muchnick, 130 S. Ct. at 1251 (Ginsburg, J., concurring).

70. Muchnick, 130 S. Ct. at 1251 (Ginsburg, J., concurring).

71. United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 63 Collier Bankr. Cas. 2d (MB) 428, Bankr. L. Rep. (CCH) P 81716, 76 Fed. R. Serv. 3d 364 (2010).

72. Espinosa, 130 S. Ct. at 1373.

73. Espinosa, 130 S. Ct. at 1373.

74. Espinosa, 130 S. Ct. at 1373.

75. Espinosa, 130 S. Ct. at 1377.

76. Espinosa, 130 S. Ct. at 1377-78 (citation omitted).

77. Espinosa, 130 S. Ct. at 1378 (citation omitted).

78. See, e.g., In re Turner, 574 F.3d 349, 354, 61 Collier Bankr. Cas. 2d (MB) 1949, Bankr. L. Rep. (CCH) P 81526 (7th Cir. 2009) (holding that requirements for perfecting a bankruptcy appeal that do not involve filing deadlines are not jurisdictional); In re Ross-Tousey, 549 F.3d 1148, 1155, 61 Collier Bankr. Cas. 2d (MB) 257, Bankr. L. Rep. (CCH) P 81376 (7th Cir. 2008) (holding that deadline in Bankruptcy Code section 704(b) for trustee to file motion to dismiss Chapter 7 case was not a jurisdictional limitation and thus was subject to waiver by debtor); In re Trusted Net Media Holdings, LLC, 550 F.3d 1035, 1043, 50 Bankr. Ct. Dec. (CRR) 254, 61 Collier Bankr. Cas. 2d (MB) 292, Bankr. L. Rep. (CCH) P 81366 (11th Cir. 2008) (concluding that requirements in Bankruptcy Code section 303(b) for commencing an involuntary bankruptcy petition are not subject matter jurisdictional and therefore subject to waiver).

79. In re Zarnel, 619 F. 3d 156, 168, Bankr. L. Rep. (CCH) P 1834 (2d Cir. 2010).

80. Zarnel, 619 F.3d at 169.

81. Zarnel, 619 F.3d at 168-169.

82. See, e.g., Emann v. Latture (In re Latture), No. 09-6016, 2010 U.S. App. LEXIS 10276, at *20 (10th Cir. May 20, 2010) (concluding that time limit to file appeal under Bankruptcy Rule 8002(a) was jurisdictional because such time limit is incorporated by statute—28 U.S.C.A. § 158(c)(2)); In re Taylor, 343 Fed. Appx. 753, 755 n.1 (3d Cir. 2009) (same); Central Valley AG Enterprises v. U.S., 531 F.3d 750, 755, 50 Bankr. Ct. Dec. (CRR) 49, 59 Collier Bankr. Cas. 2d (MB) 1624, Bankr. L. Rep. (CCH) P 81269, 2008-2 U.S. Tax Cas. (CCH) P 50405, 101 A.F.T.R.2d 2008-2682 (9th Cir. 2008) (explaining that requirements of Bankruptcy Code section 505(a) are jurisdictional because section 505(a) expressly conditions the bankruptcy court's jurisdiction to determine tax claims on specific criteria being met).

83. 28 U.S.C.A. § 1334(a) to (b) (emphasis added). Section 151 of Title 28 provides that the bankruptcy courts are "a unit of the district court." 28 U.S.C.A. § 151. Section 157(a) of Title 28 further permits each district court to "provide that any or all cases under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C.A. § 157(a). Pursuant to section 157(a), the various federal district courts have enacted standing orders referring all bankruptcy cases to the bankruptcy courts.

84. See, e.g., Zarnel, 619 F.3d at 169 (concluding that eligibility bankruptcy requirements of Bankruptcy Code section 303 were not jurisdictional in part because "the Bankruptcy Code is governed by a separate jurisdictional provision, 28 U.S.C. § 1344 [*sic*], which contains other restrictions and exclusions.").

85. 11 U.S.C.A. § 505(a).

86. 11 U.S.C.A. §§ 904, 945.

87. See .[Manville I] In re Johns-Manville Corp, 517 F.3d 52, 49 Bankr. Ct. Dec. (CRR) 144, Bankr. L. Rep. (CCH) P 81107 (2d Cir. 2008), cert. granted, 129 S. Ct. 761, 172 L. Ed. 2d 752 (2008) and cert. granted, 129 S. Ct. 762, 172 L. Ed. 2d 752 (2008) and rev'd and remanded, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 51 Bankr. Ct. Dec. (CRR) 210, 61 Collier Bankr. Cas. 2d (MB) 1441, Bankr. L. Rep. (CCH) P 81505 (2009), aff'g in part & rev'g in part, 600 F.3d 135 (2d Cir. 2010) [Manville II].

88. Manville I, 517 F.3d at 55.

89. Manville I, 517 F.3d at 64-65 (emphasis added).

90. Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 2205, 174 L. Ed. 2d 99, 51 Bankr. Ct. Dec. (CRR) 210, 61 Collier Bankr. Cas. 2d (MB) 1441, Bankr. L. Rep. (CCH) P 81505 (2009) ("But once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction), they became res judicata to the parties and those in privity with them." (citation and internal quotation marks omitted)).

91. Travelers, 129 S. Ct. at 2207.

92. See Travelers, 129 S. Ct. at 2205, 2207.

93. Manville II, 600 F.3d at 158, petition for cert. pending.

94. Manville II, 600 F.3d at 158, petition for cert. pending.

95. Manville II, 600 F.3d at 146, 158.

96. See, e.g., In re SportStuff, Inc., 430 B.R. 170, 179 (B.A.P. 8th Cir. 2010) (concluding that bankruptcy court lacked subject matter jurisdiction to approve broad settlement injunction, which enjoined claims against nondebtors); In re Dreier LLP, 429 B.R. 112, 133 (Bankr. S.D. N.Y. 2010) (concluding that bankruptcy court lacked subject matter jurisdiction to enjoin claims against third parties for the same reasons articulated by the Second Circuit in *Manville I*: "The Bar Order, however, goes well beyond derivative claims, and ultimately exceeds the Court's subject matter jurisdiction. While the Bar Order is limited to creditors and parties in interest in the [Debtors'] cases, these parties may also have direct claims against [the non-debtor to be released] relating to the debtors... [but] unrelated to their status as creditors or parties in interest... Such claims do not affect property of the estate or the administration of the estate... and the Court lacks subject matter jurisdiction to enjoin their prosecution.").

97. As noted above, in the *Manville* line of cases, the Second Circuit held that the bankruptcy court lacked subject matter jurisdiction under Title 28 to enjoin certain claims of nondebtors against other nondebtors. There are, of course, other types of bankruptcy court adjudications that have been held to exceed the jurisdictional bounds of Title 28. See, e.g., In re Kirkland, 600 F.3d 310, 316-17, Bankr. L. Rep. (CCH) P 81705 (4th Cir. 2010) (explaining that for Title 28 "related to" jurisdiction to exist in the postconfirmation stage, there must be a close nexus to the bankruptcy plan or proceeding and holding that the bankruptcy court exceeded this jurisdictional limitation when it determined creditor's entitlement to interest and collection costs arising from Chapter 13 debtor's postdischarge payment default).