THE REVIEW OF
BANKING & FINANCIAL SERVICES
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 33 No. 7 July 2017

ARBITRATION AND BANKRUPTCY: A TUG OF WAR

The pro-arbitration policies underlying the FAA conflict with the centralization policies of the Bankruptcy Code, causing these two statutes to pull in opposite directions. After describing this conflict, the authors discuss the interplay between the statutory regimes for "non-core" and "core" bankruptcy matters and how courts have dealt with them. They conclude that the standards and analyses employed by courts are open-ended and highly dependent on the facts of the case.

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The Federal Arbitration Act (the "FAA") requires courts to enforce arbitration provisions. In furtherance of the FAA's purpose, the Supreme Court continues to aggressively enforce arbitration provisions, including those applicable to federal statutory rights. *Shearson/American Express Inc. v. McMahon* stands as the seminal case delineating the burden faced by parties opposing arbitration.[1] There, the Supreme Court decided whether to compel arbitration over a customer's Racketeer Influenced and Corrupt Organizations Act (the "RICO") claims against a broker. In examining the interplay between the RICO and the FAA, the Supreme Court explained that the FAA prevails, unless the party opposing arbitration can show congressional intent for the RICO to serve as an exception to the FAA. In short, *McMahon* requires a party opposing arbitration to show that Congress intended for the competing federal statute to serve as an exception to the FAA.[2] Accordingly, the FAA and the Supreme Court present high hurdles to parties opposing arbitration.[3]

The authority afforded to bankruptcy courts to decide substantive bankruptcy issues in bankruptcy cases parallels the broadening scope of the FAA. Centralization of creditor claims in a transparent and public forum is one of the leading policies underlying the Bankruptcy Code. Such policy, however, militates

[1] 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

[2] *In re Bethlehem Steel Corp.*, 390 B.R. 784, 793 (Bankr. S.D.N.Y. 2008).

[3] *McMahon*, 482 U.S. at 226 ("The [FAA], standing alone, mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."); *In re Gandy*, 299 F.3d 489, 494 (5th Cir. 2002) (explaining that "[t]he [FAA] directs courts rigorously to enforce agreements to arbitrate").

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