RECENT CASES

ARTICLE III — BANKRUPTCY COURTS — FOURTH CIRCUIT HOLDS THAT ARTICLE III MOOTNESS DOCTRINE DOES NOT APPLY TO BANKRUPTCY PROCEEDINGS. — *Kiviti v. Bhatt*, 80 F.4th 520 (4th Cir. 2023).

Bankruptcy courts do not exercise the "judicial Power of the United States,"[1] nor do their judges receive Article III tenure protections.[2] Because bankruptcy courts are not Article III courts, their power to adjudicate cases is limited.[3] So, lower courts have split on the applicability of Article III doctrines, such as standing and mootness, to bankruptcy courts.[4] Recently, in *Kiviti v. Bhatt*,[5] the Fourth Circuit held that bankruptcy courts' power to adjudicate cases was not limited by Article III's mootness doctrine and that Congress had statutorily authorized bankruptcy courts to adjudicate moot cases.[6] However, by focusing narrowly on statutory analysis, the Fourth Circuit failed to appreciate its holding's implications for the limits of non–Article III courts, potentially allowing Congress to circumvent Article III requirements.

Adiel and Roee Kiviti hired Naveen Bhatt to renovate their home.[7] Bhatt assured the Kivitis that he was properly licensed, but he was not.[8] Disappointed with the renovations, the Kivitis sued Bhatt in D.C. Superior Court for the money they had paid him.[9]

Bhatt in turn filed for Chapter 7 bankruptcy in federal court,[10] which automatically stopped the Superior Court proceedings.[11] Now, if the Kivitis wanted to recover their money in bankruptcy court, they had two options: file a proof of claim[12] or seek relief via an adversary proceeding.[13] A proof of claim would be satisfied in order of priority when the bankruptcy trustee liquidated Bhatt's assets.[14] But frequently, a debtor's assets cannot cover the debts owed to unsecured creditors, like the Kivitis, so those creditors receive pennies on the dollar.[15] An adversary proceeding, on the other hand, functions like a mini-suit within the

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1 U.S. CONST. art. III, § 1; *see* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 699 (2015).

2 *Sharif*, 575 U.S. at 668.

3 *See* Stern v. Marshall, 564 U.S. 462, 484 (2011).

4 *Compare, e.g.*, *In re* Technicool Sys., Inc., 896 F.3d 382, 385 (5th Cir. 2018), *with In re* Pettine, 655 B.R. 196, 209–10 (B.A.P. 10th Cir. 2023).

5 80 F.4th 520 (4th Cir. 2023).

6 *Id.* at 535.

7 *Id.* at 526.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 527; *see also* 11 U.S.C. § 362(a)(1).

12 *See Kiviti*, 80 F.4th at 527; FED. R. BANKR. P. 3001(a).

13 *See Kiviti*, 80 F.4th at 527; FED. R. BANKR. P. 7001(6).

14 *See Kiviti*, 80 F.4th at 527.

15 *See id.*

bankruptcy proceeding and would allow the Kivitis to simultaneously bring claims that (1) Bhatt owed them money, and (2) the debt was nondischargeable.[16] A debt is nondischargeable when obtained through "false pretenses, a false representation, or actual fraud."[17] And if a debt is nondischargeable, a creditor can attempt to collect on that debt outside the normal bankruptcy proceedings.[18] Hedging their bets, the Kivitis chose to pursue a proof of claim and adversary proceeding.[19] The bankruptcy court dismissed the Kivitis' claim that the debt was nondischargeable, but it allowed their claim that Bhatt owed them a debt to continue.[20] This posed a problem. That claim in the adversary proceeding was no different than the proof of claim they had filed.[21] So there was now no advantage to litigating the adversary proceeding — instead of allowing them to recover the full debt, the adversary proceeding would provide the same partial recovery as the proof of claim.[22] Because both parties wanted to know sooner rather than later if the debt was truly dischargeable, they agreed to dismiss the remaining adversary proceeding claim without prejudice in order to create a final order from which the Kivitis could appeal the dismissal of their nondischargeability claim.[23] The U.S. District Court for the Eastern District of Virginia affirmed the bankruptcy court's decision on the merits.[24]

The Fourth Circuit vacated and remanded.[25] Writing for the panel, Judge Richardson[26] held that the district court lacked jurisdiction to review the bankruptcy court's decision because it was not a final order.[27] The panel first acknowledged that the resolution of an adversary proceeding can be a final order appealable to the district court.[28] But the resolution must be just that — final — for the district court to have jurisdiction over the appeal.[29] Here, the bankruptcy court had dismissed only one of the two claims, and "an order dismissing fewer than all the claims against a defendant is not final."[30] Therefore, the Fourth Circuit reasoned that the dismissal of the nondischargeability claim alone was not enough to create finality and allow the Kivitis to appeal.[31]

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16 *Id.*
17 11 U.S.C. § 523(a)(2)(A).
18 *See Kiviti*, 80 F.4th at 527.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 527–28.
23 *Id.* at 528.
24 Kiviti v. Bhatt, No. 21-cv-909, 2022 WL 636102, at *2 (E.D. Va. Feb. 9, 2022).
25 *Kiviti*, 80 F.4th at 536.
26 Judge Richardson was joined by Judge Motz and Judge Rushing. *Id.* at 526.
27 *Id.*
28 *Id.* at 529.
29 28 U.S.C. § 158(a)(1).
30 *Kiviti*, 80 F.4th at 530 (citing FED. R. CIV. P. 54(b)). This rule applies to adversary proceedings. FED. R. BANKR. P. 7054(a).
31 *Kiviti*, 80 F.4th at 530.

The panel then addressed the Kivitis' argument that the voluntary dismissal of the remaining adversarial proceeding claim created finality. According to the court, voluntary dismissal cannot be used to manufacture finality because it would circumvent Congress's command and functionally allow interlocutory review.[32] It is only when the remaining claims are "legally impossible to prevail on" that voluntary dismissal can be appealed because it "*recognize*[*s*]" the doomed nature of the remaining claims rather than "*create*[*s*]" it.[33] Here, the Kivitis could still prevail on their surviving adversary proceeding claim even though their nondischargeability claim was dead.[34] Therefore, the dismissal of the nondischargeability claim did not legally doom the other claim, and the voluntary dismissal could not be used to manufacture finality.[35]

The Kivitis, however, had one more argument up their sleeve. They contended that because the nondischargeability claim was dismissed, their surviving adversary proceeding claim was moot, which meant the dismissal order was final and appealable.[36] In short, even if they won on their remaining claim, they could not recover outside of the bankruptcy proceeding, and the adversary proceeding's result would be no different than their proof of claim that already entitled them to a pro rata share of the bankruptcy estate.[37] Thus, the remaining claim was no longer a live controversy because they had no stake in its outcome.[38]

The Fourth Circuit rejected this argument, explaining that "[m]ootness is an Article III doctrine, and bankruptcy courts are not Article III courts."[39] Because "bankruptcy courts are not Article III courts," the court reasoned that "they can constitutionally adjudicate cases that would be moot if heard in an Article III court."[40] To be sure, the panel agreed that bankruptcy cases must satisfy Article III both before the district court refers the case to a bankruptcy judge and also once the case returns to the district court.[41] But while the case is in bankruptcy court, Article III's strictures disappear.[42] The facts that the bankruptcy court's power over the case depends upon the district court's referral and that the bankruptcy courts are "unit[s] of the district courts"[43] do not change the analysis;[44] bankruptcy courts have their own power via a grant of statutory jurisdiction outside of the judicial power

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[32] *Id.* (citing Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017)).
[33] *Id.* at 531.
[34] *Id.*
[35] *Id.*
[36] Supplemental Brief of Appellants at 9, *Kiviti*, 80 F.4th 520 (No. 22-1216).
[37] *Id.* at 5.
[38] *Id.* at 9.
[39] *Kiviti*, 80 F.4th at 532.
[40] *Id.*
[41] *Id.* at 532–33.
[42] *Id.* at 533.
[43] *Id.* at 534 (alteration in original) (quoting 28 U.S.C. § 151).
[44] *Id.* at 534–35.

that district courts wield.[45] From a constitutional standpoint, Article III's case or controversy requirement does not apply to bankruptcy courts because they cannot exercise the judicial power.[46]

Having held that Article III does not pose a bar to bankruptcy courts adjudicating moot cases, the Fourth Circuit considered the question of statutory authority. It reasoned that bankruptcy courts are creatures of statutory creation, so they "have whatever power Congress *lawfully* gives them."[47] The panel noted that Congress has given bankruptcy courts the power to hear "*all* [bankruptcy] cases . . . and *all* core proceedings" related to those cases.[48] According to Judge Richardson, the term "cases" as used in the bankruptcy courts' jurisdictional statute did not carry the same meaning as "case" in Article III.[49] Jurisdictional statutes often use terms differently than Article III does.[50] And when Congress wants to impose Article III constraints on non–Article III courts, it knows how.[51] It did no such thing here, and the statutory language could be read, according to the Fourth Circuit, to encompass cases beyond what Article III courts could decide.[52] Therefore, the panel held that the statutory grant of power to bankruptcy courts permits those courts to decide cases that would be moot under Article III.[53] And so the bankruptcy court could have heard the Kivitis' surviving claim — making the dismissal of the other claim an order that was neither final nor appealable.

The Fourth Circuit's focus on the statutory powers of bankruptcy courts failed to consider the implications of *Kiviti*'s holding for the powers of non–Article III courts. The Fourth Circuit was correct that bankruptcy courts are not Article III courts because bankruptcy courts do not exercise the judicial power.[54] Despite not being Article III courts, bankruptcy courts can adjudicate those claims that involve "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power."[55] Yet the Supreme Court has also *not* endorsed the idea that bankruptcy claims fall within the "public right" exception to Article III.[56] As a result, lower courts have struggled to explain exactly why

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[45] *Id.* at 535.

[46] *Id.* at 533; *see also* Stern v. Marshall, 564 U.S. 462, 469 (2011) (explaining that Article III bars bankruptcy courts from exercising the judicial power of the United States).

[47] *Kiviti*, 80 F.4th at 533 (emphasis added).

[48] *Id.* (alteration in original) (quoting 28 U.S.C. § 157(b)(1)).

[49] *Id.* at 535.

[50] *Id.* (citing Navy Fed. Credit Union v. LTD Fin. Servs., LP, 972 F.3d 344, 352 (4th Cir. 2020)).

[51] *See id.* at 534 (discussing how 11 U.S.C. § 1109(b) created the so-called "bankruptcy standing" requirement).

[52] *Id.* at 533–34.

[53] *Id.* at 535.

[54] *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 669 (2015).

[55] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).

[56] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989). *But see N. Pipeline*, 458 U.S. at 71 (plurality opinion).

these courts can adjudicate seemingly private rights and what the limits of their jurisdiction are.[57] Here, the Fourth Circuit's logic admits of no meaningful limiting principle, disrupts current practice, and applies, perhaps, to other non–Article III tribunals.

The Supreme Court has never articulated a clear limiting principle regarding bankruptcy courts' powers. Several Justices have suggested that some bankruptcy powers are a historical exception to Article III,[58] thereby limited to the historical power of bankruptcy commissioners in England at the Framing.[59] Others have taken a more functional balancing approach,[60] wherein the limiting principle is a combination of factors coupled with the statutory grant of authority Congress makes under its Article I, section 8, clause 4 power.[61] Yet a majority has never clearly defined the source of limitations on bankruptcy courts' powers, despite Justices pointing out the confused nature of the Court's precedents.[62] As a result, lower courts are divided on whether Article III doctrines, such as mootness and standing, apply to bankruptcy courts. The Fifth Circuit has come down on the same side as *Kiviti*.[63] Contrastingly, some courts have held that Article III doctrines do constrain bankruptcy courts' jurisdiction. Most have adopted a derivate-power justification.[64] In their view, because bankruptcy courts' jurisdiction is derived from district courts' jurisdiction, district courts' jurisdictional limits carry over to bankruptcy courts.[65] Finally, some circuits have asserted that all federal courts are subject to Article III requirements, regardless of Article III status.[66] Despite these competing theories, the Supreme Court has yet to resolve the confusion.

This uncertainty has implications both for bankruptcy courts and other non–Article III tribunals. Bankruptcy courts' unique historical pedigree is in some respects sui generis.[67] At the same time, attempts

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[57] *Kiviti*, 80 F.4th at 532 n.8 ("The harder question may be why [bankruptcy courts] can constitutionally adjudicate cases that are *within* the judicial Power and so could be heard in Article III courts.").

[58] *See* Stern v. Marshall, 564 U.S. 462, 505 (2011) (Scalia, J., concurring); *Sharif*, 575 U.S. at 690 (Roberts, C.J., dissenting).

[59] *Sharif*, 575 U.S. at 722 (Thomas, J., dissenting).

[60] *See N. Pipeline*, 458 U.S. at 113–14 (White, J., dissenting); *Granfinanciera*, 492 U.S. at 94 (Blackmun, J., dissenting).

[61] *Stern*, 564 U.S. at 513, 518 (Breyer, J., dissenting).

[62] *See, e.g.*, *id.* at 504 (Scalia, J., concurring); *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring in the judgment).

[63] *See* Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, 32 F.3d 205, 210 n.18 (5th Cir. 1994); *see also In re* Technicool Sys., Inc., 896 F.3d 382, 385 (5th Cir. 2018).

[64] *See, e.g.*, *In re* Pettine, 655 B.R. 196, 209–10 (B.A.P. 10th Cir. 2023); *In re* Kilen, 129 B.R. 538, 542 (Bankr. N.D. Ill. 1991); *In re* Interpictures, Inc., 86 B.R. 24, 28–29 (Bankr. E.D.N.Y. 1988).

[65] *E.g.*, *In re Pettine*, 655 B.R. at 209–10.

[66] *E.g.*, *In re* FedPak Sys., Inc., 80 F.3d 207, 211–13 (7th Cir. 1996); *see also In re Pettine*, 655 B.R. at 206 n.26 (collecting cases involving standing).

[67] *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 606–09 (1998); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 690 (2015) (Roberts, C.J., dissenting).

have been made to tie the power of bankruptcy courts to the powers of other non–Article III courts.[68] Thus, the Fourth Circuit's decision certainly has consequences for bankruptcy courts and possibly for all non–Article III courts. The Fourth Circuit, however, did not consider these potential doctrinal ripple effects.

In *Kiviti*, the Fourth Circuit decided that a statutory grant of jurisdiction was sufficient for the bankruptcy court to adjudicate the claim because Article III was inapplicable;[69] this has implications for bankruptcy courts' power to adjudicate. For one, the Fourth Circuit's analysis does not present a clear limiting principle for what cases bankruptcy courts can adjudicate. *Kiviti* suggests that if a claim falls outside Article III, then Congress can assign it to whatever court it chooses.[70] But even if mootness is not the proper limiting principle, congressional authorization to adjudicate cannot alone be sufficient.[71] By treating Article III as the sole limiting principle here, *Kiviti* would allow bankruptcy courts to adjudicate the exact same *moot* claims that bankruptcy courts were prohibited from adjudicating in *Stern v. Marshall*.[72] Because moot claims are not the sort where "the responsibility for deciding that suit rests with Article III judges in Article III courts,"[73] nothing would prevent Congress from assigning those claims to non–Article III courts. This means Congress could authorize the adjudication of moot *Stern* claims[74] in bankruptcy courts, even though *Stern* claims themselves cannot be brought in bankruptcy court.[75] Thus, without a limiting principle outside of Article III, *Kiviti* could be read as allowing Congress to circumvent Article III requirements by describing various adjudications as bankruptcy proceedings even if they have no historical relationship to bankruptcy.[76] *Kiviti* belies any historical limiting principles by assuming that once Article III doctrines do not apply Congress can authorize anything it chooses.

In fairness to the *Kiviti* majority, tying bankruptcy courts' current powers to the historical powers of bankruptcy commissioners is difficult. Our modern bankruptcy system has gone far beyond its common law

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[68] *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 660–62 (2004) (noting how arguments about bankruptcy courts' powers are linked to arguments about Article I tribunals' powers).

[69] *Kiviti*, 80 F.4th at 535.

[70] *See id.* at 532–33.

[71] *See* Stern v. Marshall, 564 U.S. 462, 469 (2011). *But see Kiviti*, 80 F.4th at 533 ("Bankruptcy courts . . . have whatever power Congress lawfully gives them.").

[72] 564 U.S. 462 (2011).

[73] *Id.* at 484.

[74] These are state common law claims that bankruptcy courts cannot constitutionally hear. *Id.* at 503.

[75] *Id.* at 469.

[76] *Cf.* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 490–91 (1996) (explaining the likely limitations on what Congress can define as bankruptcy law).

counterpart,[77] with Congress repeatedly employing its Article I bankruptcy power to confront new problems.[78] As a result, it is hard to identify a unifying theory of Congress's bankruptcy power[79] because there are some historical constraints that legislative action can remove (such as opening proceedings to nonmerchants), but there are some constraints that it cannot (such as opening proceedings to state common law claims). The Fourth Circuit did not acknowledge this interplay between history and Congress's bankruptcy power, even though history has been the traditional source of limitations on Congress's bankruptcy power.[80] Instead, the panel prioritized legislative action because *Kiviti* appeared to be a heartland bankruptcy case without considering whether moot bankruptcy cases are historically the same as all other bankruptcy cases. In doing so, *Kiviti* ignored the risk that Congress will attempt to circumvent historical limits on the power of bankruptcy courts.

The Fourth Circuit's logic could also create procedural problems in bankruptcy courts, demonstrating its disruptive implications. Before the district court refers a case to a bankruptcy court and after the case returns, it must satisfy Article III.[81] But *Kiviti* potentially turns bankruptcy courts into black holes from which cases can never escape despite statutory language allowing district courts to "withdraw . . . *any* case or proceeding referred" to the bankruptcy court.[82] A case that becomes moot during bankruptcy cannot be withdrawn because it no longer satisfies Article III; this effectively eliminates this statutory language, which was meant to serve as an essential check on the power of bankruptcy courts.[83] Likewise, *Kiviti* ignores bankruptcy appellate panels, which replace district courts in bankruptcy appeals in some circuits.[84] Can they hear appeals in moot cases? *Kiviti*'s logic suggests they can,[85] but that creates the strange situation where the Kivitis could appeal in the First, Eighth, Ninth, Tenth, and part of the Sixth Circuits but not

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[77] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *474 (explaining the bankruptcy system was open only to merchants); BRUCE H. MANN, REPUBLIC OF DEBTORS 223–24 (2002) (explaining the formally involuntary, adversarial nature of bankruptcy proceedings).

[78] *See* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1982–85 (2022) (tracing the historical evolution of the powers of bankruptcy courts in response to Congress's perceived concerns).

[79] *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1574–75 (2020).

[80] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (plurality opinion) (striking down a bankruptcy scheme that "does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply").

[81] *Kiviti*, 80 F.4th at 533.

[82] 28 U.S.C. § 157(d) (emphasis added).

[83] *Cf.* Baude, *supra* note 79, at 1575 (suggesting that bankruptcy courts must be justified if they are not exercising independent judicial power).

[84] *See* 28 U.S.C. § 158(b).

[85] Bankruptcy appellate panels are not Article III courts. *See id.* § 158(b)(1).

in the others.[86] Thus, the panel's reasoning creates inequitable access to appellate review, an outcome the court failed to consider.

More broadly, the Fourth Circuit ignored whether its reasoning applied beyond bankruptcy courts. If bankruptcy courts can adjudicate moot cases, can Congress authorize the NLRB or courts-martial to do the same? None of them are Article III courts,[87] so if the mootness doctrine doesn't apply to one court outside Article III, it is not immediately apparent why it would apply to others. Because *Kiviti*'s analysis was limited to statutory grants of power, its logic would allow Congress to expand those tribunals' power to adjudicate moot cases as well. Perhaps there are historical[88] or practical[89] reasons for treating bankruptcy courts differently. *Kiviti*, however, didn't point to one. And nothing in *Kiviti* suggests mootness is unique; standing requirements appear to be fair game, too. Imagine if an individual who had never invested in the stock market could bring a claim against Bernie Madoff before an SEC administrative law judge. The individual would have suffered no injury, and Madoff himself is dead, so there would be no chance of legal redress against him personally. But under *Kiviti*'s logic, if Congress amended the SEC's organic statutes to allow private parties to prosecute "all" cases involving securities fraud before the SEC, such a hypothetical could suddenly be possible. There might be a good public policy reason for allowing such an innovation, but it might still raise eyebrows. At the very least, it would be a radical upending of the way we currently think about adjudications in Article III courts or elsewhere to say that a party that has suffered no injury can require a non–Article III tribunal to adjudicate a claim that will result in no legal redress. In throwing open the gates to grant jurisdiction to one non–Article III court to adjudicate moot cases, the Fourth Circuit failed to consider what it might be allowing Congress to do for other non–Article III tribunals.

The Fourth Circuit's conclusion in *Kiviti* may be correct. But the court did not adequately address the significant implications its reasoning would have for all non–Article III tribunals. If Congress authorizes jurisdiction, *Kiviti* suggests bankruptcy courts can adjudicate cases between parties without standing or a live controversy. That logic appears to apply to non–Article III courts generally. The Fourth Circuit should have recognized the potentially sweeping consequences of its decision.

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[86] *See Court Insider: What Is a Bankruptcy Appellate Panel?*, U.S. CTS. (Dec. 5, 2012), https://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel [https://perma.cc/9T38-2K2N].

[87] *See* Pfander, *supra* note 68, at 742, 749, 754.

[88] *See* Stern v. Marshall, 564 U.S. 462, 505 (2011) (Scalia, J., concurring) (citing Plank, *supra* note 67, at 607–09).

[89] *See* Seymour, *supra* note 78, at 1939 (describing bankruptcy as the "platypus of U.S. law" requiring "a special approach to judging").