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NONDEBTOR RELEASES AND INJUNCTIONS IN CHAPTER 11: REVISITING JURISDICTIONAL PRECEPTS AND THE FORGOTTEN CALLAWAY v. BENTON CASE

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In Callaway v. Benton decided in 1949, the Supreme Court was asked whether a reorganization court could permanently enjoin a state-court suit seeking a resolution of the rights and obligations inter se of various nondebtors. Although the reorganization court found that permanently enjoining the litigation was important to the debtor’s reorganization effort, the Supreme Court held that this finding provided no basis on which to displace the nonbankruptcy rights and obligations of the nondebtors. Now, over sixty years later, the federal courts are sharply divided on precisely the same issue (although clothed in different terminology): can a reorganization court approve nondebtor release and injunction provisions in a plan of reorganization when the nondebtor release is important to success of the debtor’s reorganization?

Of course, bankruptcy law has seen many changes since Callaway, and the scope of federal bankruptcy jurisdiction, which figured prominently in the Callaway opinion, is now greatly expanded. Nonetheless, Callaway’s prohibition against permanent nondebtor injunctions retains validity. The clumsy evolution of bankruptcy jurisdiction since Callaway, though, has completely obscured its present-day relevance. The jurisdictional reach of modern bankruptcy injunctions in reorganization proceedings is drawn from principles firmly established when Callaway was decided, and Callaway announced an important limiting principle. Understanding the significance of Callaway requires an understanding of the jurisdictional foundations for bankruptcy injunctions in reorganization cases. After describing the contemporary nondebtor release and the general nature of bankruptcy injunctions, this article explores those jurisdictional precepts and the continuing salience of the neglected Callaway v. Benton case.

Key Words: non-debtor releases, bankruptcy injunctions, complex litigation, non-debtor stays, injunctions in aid of jurisdiction, necessary to reorganization, channeling injunctions, summary jurisdiction, plenary jurisdiction, core jurisdiction, non-core jurisdiction
NONDEBTOR RELEASES AND INJUNCTIONS IN CHAPTER 11:
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by

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In Callaway v. Benton, the Supreme Court was asked whether a reorganization court could permanently enjoin a state court suit seeking a resolution of the rights and obligations inter se of various nondebtors.¹ Although the reorganization court found that permanently enjoining the litigation was important to the debtor's reorganization effort, the Supreme Court held that this finding provided no basis on which to displace the nonbankruptcy rights and obligations of the nondebtors.² Now, almost fifty years later, the federal courts are sharply divided on precisely this same issue (although clothed in different terminology): can a reorganization court approve nondebtor release and injunction provisions in a plan of reorganization when the nondebtor release is important to success of the debtor's reorganization?³

Of course, bankruptcy law has seen many changes since Callaway, and the scope of federal bankruptcy jurisdiction, which figured prominently in the Callaway opinion, is now greatly expanded. Nonetheless, Callaway's prohibition against permanent nondebtor injunctions retains validity. The clumsy evolution of bankruptcy jurisdiction since Callaway, though, has completely obscured its present-day relevance. The jurisdictional reach of modern bankruptcy injunctions in reorganization proceedings is drawn from principles firmly established when Callaway was decided,⁴ and Callaway announced an

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¹336 U.S. 132, 134-36 (1949). Specifically, the dispute was amongst the shareholders of a railroad corporation that was attempting to sell certain assets to the reorganization debtor. Minority dissenting shareholders sought to enjoin the sale, contending that applicable state law required unanimous approval of all shareholders for such a sale. See id. This case is fully discussed infra Part III.G.2.

²See 336 U.S. at 136-41.

³See sources cited infra notes 9, 12, 18, and 46.

important limiting principle. Understanding the significance of Callaway requires an understanding of the jurisdictional foundations for bankruptcy injunctions in reorganization cases. After describing the contemporary nondebtor release and the general nature of bankruptcy injunctions in Parts I and II of this Article, Part III explores those jurisdictional precepts and the continuing salience of the neglected Callaway v. Benton case.

I. THE RISE OF NONDEBTOR RELEASES AND INJUNCTIONS

The reorganization provisions of Chapter 11 of the Bankruptcy Code enable a business debtor to achieve a complex and comprehensive financial restructuring, through the workings of a plan of reorganization that provides for distribution on, and discharge of, all of the debtor’s prebankruptcy debts. A controversial development, though, is a growing judicial acceptance of reorganization plan provisions that not only provide for discharge of the obligations of the Chapter 11 debtor, but that also release nondebtor third parties from liability to the debtor’s creditors—often supplemented by injunctions that permanently restrain creditors from pursuing the released nondebtors. This practice raises some very basic questions concerning the proper reach of the bankruptcy reorganization process. May a debtor’s plan of reorganization release the debtor’s officers, directors, and employees from any potential personal liability they may have to corporate creditors and shareholders for their acts and omissions on behalf of the corporate debtor (e.g., personal liability under the federal securities laws)? May the debtor’s plan release the debtor’s bank group from liability for misrepresentation or fraud alleged by other creditors?

Long considered improper, such provisions nonetheless have regularly appeared in reorganization plans because inattentive creditors, who fail to object to confirmation of the plan, will find themselves bound to nondebtor releases by the preclusion principles of res judicata. More recently, though, nondebtor releases have become more than a trap for the unwary; several courts have opined that, in certain circumstances, nondebtor releases are an


*For a discussion of case law under the Bankruptcy Act of 1898, see infra note 133 and accompanying text.*

appropriate exercise of a bankruptcy court's equitable powers. Many of these releases are approved in the context of an insurer's settlement of a coverage dispute with the debtor's estate, such as the injunctions approved by the Second Circuit in the historic reorganization of Johns-Manville Corp.—dealing with Manville's massive product liability arising out of its manufacture of asbestos products. In these insurance coverage settlements, the nondebtor release and injunction protects the insurer from further insurance claims by the debtor's tort claimants. In many ways the insurance injunctions are sui generis, but two other circuit court opinions seized upon the Manville injunctions to pave the way for even broader nondebtor releases and injunctions.

The Second Circuit Court of Appeals approved nondebtor releases in the bankruptcy of former securities giant, Drexel Burnham Lambert Group, Inc. Drexel's bankruptcy was precipitated by massive securities fraud liability, in-

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8This Article will not discuss such insurance injunctions. Insurance injunctions involve property of the estate issues that are not implicated by broader nondebtor releases. See generally Charles A. Beckham, Jr., It's All an Unsecured Claim to Me: The Torsion Interference of Bankruptcy Law with Liability Insurance Proceeds, 22 TEX. TECH. L. REV. 779 (1991); Barry L. Zaretzky, Insurance Proceeds in Bankruptcy, 35 BROOK. L. REV. 373 (1989); George Ong, Note, Directors and Officers Insurance Proceeds in Bankruptcy: The Impact on an Estate and Its Claimants, 13 BANKR. DEV. J. 235 (1996). Likewise, partners' liability to a debtor-partnership for partnership deficiencies make nondebtor partner releases and injunctions, protecting individual partners from partnership creditors, unique and beyond the scope of this Article. See generally Nat'l. Bankr. Conference, Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project, Final Report 179-80 (1994); Paul R. Glassman, Third-Party Injunctions in Partnership Bankruptcy Cases, 49 BUS. LAW. 1081 (1994); Morris W. Macey & Frank R. Kennedy, Partnership Bankruptcy and Reorganization: Proposals for Reform, 30 BUS. LAW. 879 (1995). Enjoining creditors from asserting successor liability claims against purchasers of a debtor's assets also involves property concerns distinct from those addressed in this Article. In addition, the nondebtor obligations addressed by successor liability injunctions are distinctive in that they do not predate the bankruptcy proceedings. Rather, they are nondebtor obligations that would otherwise be generated by a bankruptcy sale of the debtor's assets. See generally Hon. William T. Bodoh & Michelle M. Morgan, Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants, 4 AM. BANKR. INST. L. REV. 325 (1996); David Gray Carlson, Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup, 30 L. & CONTEMP. PROBS. 119 (1987); Michael H. Reed, Successor Liability and Bankruptcy Sales, 51 BUS. LAW. 653 (1995); J. Maxwell Tucker, The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants, 12 BANKR. DEV. J. 1 (1995). Despite the differences, many cases, nonetheless, indiscriminately rely upon nondebtor releases in these special cases as support for the broader nondebtor releases critiqued in this Article. Compare In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 934-35 (Bankr. W.D. Mo. 1994) (citing a hodgepodge of cases involving permanent, temporary, consensual, and nonconsensual nondebtor releases and injunctions in insurance, partnership, res judicata, and other contexts as authority for uniform five-factor balancing test for approval of nonconsensual nondebtor releases), with Homesy v. Floyd (In re Vitek, Inc.), 51 F.3d 530, 538 n.39 (9th Cir. 1995) (cautioning against reliance upon court's insurance injunction opinion in other nondebtor liability contexts).

9SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 960 F.2d
curred through the illegal activities of Michael Milken and others in the junk bond market. Yet, Drexel's plan of reorganization extinguished any personal liability for the individual misdeeds of approximately 200 former Drexel employees, including Milken himself.

In the mass tort bankruptcy of A.H. Robins Co., manufacturer of the Dalkon Shield contraceptive device, the Fourth Circuit Court of Appeals affirmed nondebtor releases which precluded claimants from suing anyone for personal injuries caused by the Dalkon Shield. Beneficiaries of the nondebtor releases included Robins' insurer and alleged joint tortfeasor, Aetna, members of the Robins family, and other present and former off-


10See MARY ZEY, BANKING ON FRAUD: DREXEL, JUNK BONDS, AND BUYOUTS 3-10, 42-44 (1993). See also Drexel Burnham Lambert Group, Inc. v. Claimants Identified on Schedule 1 (In re Drexel Burnham Lambert Group, Inc.), 995 F.2d 1138, 1141-42 (2d Cir. 1993); Drexel, 960 F.2d at 287-88, aff'd 130 B.R. at 914.

11See Drexel, 138 B.R. at 753 (confirming plan of reorganization with nondebtor releases protecting "Identified Settling Parties"); Drexel, 995 F.2d at 1143 (affirming approval of settlement designating former employees as "Identified Settling Parties"). Milken's release came in exchange for a $500 million contribution to the Drexel plan, and the remaining employees contributed an aggregate of $300 million. See Drexel, 995 F.2d at 1143. Despite these substantial contributions, Milken retained personal worth of approximately $125 million, as well as control of family assets held in the names of his wife and children, reportedly worth another $350 million. See Robert J. McCartney & Susan Schmidt, FDIC FEARS OF LENIENCY FOR MILKEN BROTHER DELAY ACORD, WASHT. POST, Mar. 7, 1992, at C1; Pat Widdler, ACCORDS REACHED IN DREXEL SOGA, CHI. TRIB., Mar. 10, 1992, at B1. Cf. Zey, supra note 10, at 71-72 (describing the $300 million of remaining personal and family wealth reported in press as "an exceedingly low estimate, perhaps one-third of what it should be"). Most of the other settling employees protected by the nondebtor releases also emerged with considerable amounts of wealth intact. See Jill Dutt, SHEPHERD OF MILKEN PACT WIELDS A POWERFUL STAFF, NEWSDAY, Mar. 11, 1992, at 43. For example, Milken's chief deputy, Peter Ackerman, was the next largest contributor at $80 million, yet he retained the bulk of his fortune, worth anywhere from $325 to $500 million. See Anthony Bianco & Sana Siwolop, THE DREXEL DEBACLE'S "TEFLON GUY": PETER ACKERMAN, MILKEN'S RIGHT-HAND MAN, WILL Emerge With About $500 Million, BUS. WK., June 8, 1992, at 92; BILLIONAIRES (THE FORBES FOUR HUNDRED), FORBES, Oct. 18, 1993, at 112, 248.


ficers, directors, employees, and attorneys for Robins. Aetna and these individuals were alleged to have participated in efforts to defraud the public in the marketing of the Dalkon Shield and to have used Robins' attorneys to perpetuate and coverup the fraud.\textsuperscript{15} The Robins plan of reorganization discharged all of these individuals from any personal liability, and the Robins nondebtor releases even went so far as to preclude injured women from suing their doctors for claims of medical malpractice.\textsuperscript{16}

Rather than provoking a backlash, the Robins and Drexel cases led the way to a much more liberal attitude toward nondebtor release provisions.\textsuperscript{17} One court's attempt at a discretionary, multi-factored balancing test bespeaks the newfound legitimacy of nondebtor releases.\textsuperscript{18} Moreover, in the 1994 amendments to the Bankruptcy Code, Congress specifically authorized nondebtor release and injunction provisions\textsuperscript{19} protecting, \textit{inter alia}, a debtor's

\textit{Robins} nondebtor release of Aetna from the insurance injunctions discussed \textit{supra} notes 7-8 and accompanying text.

\textsuperscript{14}Along with Aetna, these Robins family members were also defendants in the Dalkon Shield claimants' class action suit. See \textit{Robins}, 83 B.R. at 375.

\textsuperscript{15}See \textit{Sobol, supra} note 13, at 220.

\textsuperscript{16}See \textit{In re A.H. Robins Co.}, 131 B.R. 292 (E.D. Va. 1991), rev'd and remanded \textit{sub nom.} Dalkon Shield Claimants Trust v. Reiser (\textit{In re A.H. Robins Co.}), 972 F.2d 77 (4th Cir. 1992) (interpreting scope of nondebtor releases as applied to medical malpractice claims). As in the Drexel case, Robins insiders profited handsomely from their liability releases. Although members of the Robins family were defendants in the class action and beneficiaries of the plan's nondebtor releases, noticeably absent from the judicial approvals of the class action settlement is any scrutiny of their potential liability. See \textit{Robins}, 88 B.R. at 758-63, \textit{aff'd}, 880 F.2d at 748-52; \textit{Robins}, 880 F.2d at 700, 701 n.6. The Robins family did make a contribution to the fund for compensation of Dalkon Shield claimants—one that the reorganization court, in confirming the plan, found to be "valuable consideration for the releases." 88 B.R. at 751. The Fourth Circuit, though, in affirming the settlement, characterized these amounts as "minimal contributions." 880 F.2d at 722 & n.15. The $10 million contribution was, indeed, minimal, given that the Robins family simultaneously received, under the plan of reorganization, American Home Products stock worth $385 million, as a tax-free distribution on their A.H. Robins stock. See \textit{Sobol, supra} note 13, at 221-22, 286.

\textsuperscript{17}In the author's experience, the practice of approving nondebtor releases is more widespread than the number of published judicial opinions would suggest. One explanation for this phenomenon is the relative scarcity of appellate review, as appellate challenges to plan of reorganization provisions are easily mooted by consummation of the plan. See, e.g., Bennett v. Veale, Nos. 93-3016, 93-4180, 1995 WL 383147 (6th Cir. June 25, 1995) (appellate challenge to release provisions of plan of reorganization was moot); \textit{In re Specialty Equip. Cos.,} 3 F.3d 1043, 1049 (7th Cir. 1993) (same); \textit{In re AOV Indus., Inc.,} 792 F.2d 1140, 1147, 1149 (D.C. Cir.) (same), vacated on other grounds, 797 F.2d 1004 (D.C. Cir. 1986).


\textsuperscript{19}Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(a), 108 Stat. 4106, 4113-17 (codified at 11 U.S.C. § 524(g) (1994)). In enacting § 524(g), Congress also expressly enacted a "rule of construction" that nothing in that section "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." \textit{Id.} § 111(b), 108 Stat. at 4117. See also 140 Cong. Rec. H10766 (daily ed. Oct. 4, 1994) (statement of Rep.
management and third-party financing institutions\textsuperscript{20} from liability to asbestos personal injury claimants in limited circumstances.\textsuperscript{21}

This somewhat remarkable shift in the law has been met with very little critical resistance, and, in fact, one commentator recently stated that a plan of reorganization “can and should be permitted to release all claims against . . . third parties . . . which are assertable against such third parties because they acted for the debtor or because of their actions or omissions in the course of their relationship with the debtor.”\textsuperscript{22} The issue is a pressing one, as the bankruptcy court is quickly becoming the forum for resolution of many of the largest and most complex mass litigations.\textsuperscript{23} Thus, the relative dearth of critical opposition to nondebtor releases is rather curious.

This Article challenges nondebtor releases through an analysis of jurisdictional authority to approve nondebtor releases, which ultimately proves nonexistent in the absence of an express congressional authorization of the practice.\textsuperscript{24} Section 524(e) of the Bankruptcy Code,\textsuperscript{25} almost reflexively relied

Brooks, sponsor) (“[R]ule of construction [is] to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan or [sic] reorganization. . . . The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind.”). But see Resorts Int’l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1402 n.6 (9th Cir. 1995) (citing Congress’ enactment of § 524(g) in asbestos context as enforcing court’s decision that § 524(e) prohibits nondebtor releases and injunctions in all other circumstances); Meltzer, supra note 6, at 31-33, 42 (acknowledging rule of construction, but nonetheless attaching interpretational significance to enactment of § 524(g)).


\textsuperscript{22} Hydee R. Feldstein, Reinterpreting Bankruptcy Code § 524(e): The Validity of Third-Party Releases in a Plan, 22 Cal. Bankr. J. 25, 46 (1994) [hereinafter Third-Party Releases]. Ms. Feldstein had previously presented this same conclusion at the 1994 Annual Meeting of the National Conference of Bankruptcy Judges. See Hydee R. Feldstein, Reinterpreting Bankruptcy Code Section 524(e): The Validity of Third Party Releases in a Plan, 1994 NAT’L CONF. BANKR. JUDGES 6-63, at 6-74 & n.1. Citing both Robins and Drexel, Ms. Feldstein also states that “[p]rovisions for releasing and enjoining actions against third parties have been an accepted part of large corporate reorganizations for some time.” Feldstein, Third-Party Releases, supra, at 38 & n.52.


\textsuperscript{24} The National Bankruptcy Review Commission, in reexamining the Bankruptcy Code for possible
upon by courts and commentators as supposedly prohibiting nondebtor releases, has proved to be a red herring and actually has stifled a more principled analysis. Nondebtor releases implicate an intricate interaction between bankruptcy policies and jurisdictional limitations. Nondebtor releases raise many fascinating issues regarding the proper role of reorganization policy in formulating bankruptcy law. This author has previously examined those issues and concluded that sound bankruptcy policy counsels against any judicial discretion to approve nondebtor releases.\textsuperscript{26} Many courts, though, after considering the relevant policies, have nonetheless approved nondebtor releases. For those courts, then, perhaps the more important analysis is one that demonstrates they lack authority to approve nondebtor releases. This Article sets forth that analysis, by examining the largely-neglected preliminary issue: jurisdiction to enjoin nondebtor actions. Through a careful historical analysis, it reveals that nondebtor releases overstep the bounds of limited federal bankruptcy jurisdiction; bankruptcy judges have no authority to approve nondebtor releases in the absence of express congressional authorization.

As background for this Article’s jurisdictional analysis of nondebtor releases, Part II describes the nature of bankruptcy injunctions and the differences between temporary nondebtor stays and permanent nondebtor releases. Part II also outlines the more limited statutory debate concerning nondebtor releases and its deficiencies. Part III then turns the inquiry to the jurisdictional foundations for nondebtor releases and injunctions. This exercise of equitable powers is examined against a backdrop of the historical development of bankruptcy courts’ injunctive powers under the Bankruptcy Act of 1898.\textsuperscript{27} In that jurisprudence, the Supreme Court developed a critical distinction between jurisdiction to adjudicate and jurisdiction to enjoin. Modern courts have lost sight of this distinction, as evidenced by the con-

\textsuperscript{26}11 U.S.C. § 524(e), discussed infra Part II.B.

fused exchange between the majority and the dissent in the Supreme Court's recent foray into bankruptcy jurisdiction and nondebtor injunctions in Celotex Corp. v. Edwards. Failure to appreciate the difference between jurisdiction to enjoin and jurisdiction to adjudicate has led the courts to approve nondebtor releases where they lack jurisdiction to adjudicate the released nondebtor claims. Even more startling, though, the courts appear to have completely ignored the Supreme Court's holding in Callaway v. Benton, striking down a permanent nondebtor injunction. A proper understanding of the reach of bankruptcy courts' jurisdiction and accompanying injunctive powers leads to the conclusion that nondebtor releases are not an appropriate extension of the historical injunctive powers of federal bankruptcy courts. In the absence of express congressional authorization, the courts have no jurisdictional authority to approve nondebtor releases.

II. BANKRUPTCY INJUNCTIONS AND THE EXTANT STATUTORY DEBATE

Restraint of nondebtor actions by a bankruptcy court is accomplished via nondebtor injunctions of two types: temporary nondebtor stays and permanent nondebtor releases. Both of these nondebtor injunctions issue pursuant to bankruptcy courts' general equitable powers and as supplements to statutory bankruptcy injunctions. A temporary nondebtor stay complements the Code's automatic stay provisions and is widely accepted as a legitimate exercise of a bankruptcy court's equitable powers. A permanent nondebtor release, as an adjunct to the Code's discharge injunction, however, is much more controversial. The statutory provision regarding the nondebtor effects of a discharge, though cited by courts and commentators as prohibiting nondebtor releases, simply does not speak to the issue.

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30 This Article will refer to actions by a Chapter 11 debtor's creditors and/or shareholders against nondebtor third parties asserting liability arising out of the nondebtor's relationship with the debtor as creditors' nondebtor actions. A creditor's dual claims against both the debtor and a nondebtor can be graphically represented as follows:

![Diagram](#)

Temporary restraint of creditors' nondebtor actions will be referred to herein as a nondebtor stay. Permanent discharge of such a nondebtor claim through plan of reorganization provisions and supplementary injunctions will be referred to as a nondebtor release.
A. Statutory Bankruptcy Injunctions

The Bankruptcy Code contains two injunctions imposed by statute in reorganization cases under Chapter 11: the automatic stay and the discharge injunction. Initially, commencement of the bankruptcy case operates as an automatic stay of all creditor collection actions and proceedings of whatever nature.\(^{31}\) The dual purposes of the automatic stay are to: (1) halt the creditors’ proverbial race to the courthouse, in favor of the Code’s overriding preference for creditor equality; and (2) provide the debtor a temporary “breathing spell” in which the debtor can attempt to reorganize.\(^{32}\) The vehicle by which the debtor can then emerge from bankruptcy as a reorganized entity is the Chapter 11 plan of reorganization, through which all of the debtor’s prebankruptcy debts are discharged and all ownership interests are terminated.\(^{33}\) In the place of these old debts and ownership interests, the plan of reorganization provides the debtor with an entirely new capital structure.

Creditors whose claims are automatically stayed upon commencement of the Chapter 11 proceedings can thereafter pursue their rights against the debtor only by way of a proof of claim filed in the bankruptcy court.\(^{34}\) Creditors whose claims are allowed by the bankruptcy court will then be entitled to a distribution pursuant to the terms of the confirmed plan of reorganization,\(^{35}\) but nothing more. The bankruptcy discharge effected by confirmation of the plan is implemented by a statutory discharge injunction, prohibiting creditors from asserting any further rights against the reorganized debtor.\(^{36}\)

B. Supplementary Equitable Injunctions and § 524(e)

By their terms, both the automatic stay and the discharge injunction only restrain a creditor’s actions against the debtor, the debtor’s property, and property of the debtor’s bankruptcy estate;\(^{37}\) they do not reach any action the creditor might take against third parties who also may be liable to the creditor, such as contractual guarantors or joint tortfeasors. In fact, § 524(e) of the Code expressly states that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”\(^{38}\) In addition to these statutory injunctions, though, bank-

\(^{34}\) See id. § 501(a).
\(^{35}\) The bankruptcy court determines the allowability of any claims to which an objection is posed. See id. § 502(a)-(b). The plan of reorganization specifies the treatment all creditor claims and shareholder interests will receive. See id. § 1123(a)(2)-(3).
\(^{36}\) See id. § 524(a).
\(^{37}\) See id. §§ 362(a), 524(a).
\(^{38}\) Id. § 524(e).
ruptcy courts also possess the general injunctive powers of a court of equity, by virtue of § 105(a) of the Code.\footnote{Id. § 105(a), discussed infra notes 62-65 and accompanying text.} Congress specifically contemplated that bankruptcy courts would issue § 105 injunctions "to stay actions not covered by the automatic stay," with the courts "to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed."\footnote{See generally 2 Lawrence P. King et al., Collier on Bankruptcy ¶ 105.03[1]-[2][b][i] (15th ed. rev. 1997); Barry L. Zaretzky, Co-Debtor Stays in Chapter 11 Bankruptcy, 73 Cornell L. Rev. 213 (1988).} Thus, in a variety of circumstances, the courts have issued § 105 injunctions as a supplement to the automatic stay, where nondebtor actions threaten to frustrate the objectives of the automatic stay.\footnote{See 2 King et al., supra note 41, at ¶ 105.03[2][a]-[b][i]; Elizabeth H. Winchester, Note, Expanding the Bankruptcy Code: The Use of Section 362 and Section 105 to Protect Solvent Executives of Debtor Corporations, 58 Brook. L. Rev. 929 (1992).} For example, when creditors assert liability on the part of the debtor and individual members of the debtor's management, continuing litigation against individual officers, directors, and employees may unduly divert such individuals' time and energies away from the debtor's reorganization efforts. Therefore, courts often temporarily enjoin such nondebtor litigation in order to fully effectuate the breathing spell from creditor actions that the automatic stay seeks to afford the debtor.\footnote{See 11 U.S.C. § 362(c)(2)(C) (stay terminates upon grant of discharge in Chapter 11 case); id. § 1141(d)(1) (order confirming Chapter 11 plan of reorganization operates as a discharge). Of course, upon confirmation of the plan, the automatic stay is replaced by the discharge injunction. See id. § 524(a).} The breathing-spell rationale, though, expires upon confirmation of a plan of reorganization, and like the automatic stay itself,\footnote{See 2 King et al., supra note 41, ¶ 105.03[2][b][ii], at 105-43.} such supplementary nondebtor stays do not extend beyond plan confirmation.\footnote{514 U.S. 300 (1995), discussed infra Part III.D & III.F.} The use of such temporary nondebtor stays in certain circumstances has gained widespread acceptance in the courts and, indeed, was implicitly sanctioned by the Supreme Court in the recent Celotex Corp. v. Edwards opinion.\footnote{See Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 759-62 (5th Cir. 1995); Landsing Diversified Proper-
Although this Article contends that a bankruptcy court does, indeed, lack authority to approve a nonconsensual release of creditors’ nondebtor claims, the courts’ and commentators’ reliance upon § 524(e) as a statutory prohibition is mistaken and unfortunate. Section 524(e) is necessary, as a matter of mere mechanics, to prevent the debtor’s discharge from automatically discharging codebtors and guarantors, through the operation of common law suretyship rules which release secondary obligors upon release of the primary obligor.48 Consistent with this limited purpose, and as several courts have noted, the literal terms of § 524(e) say nothing more than the debtor’s discharge does not, by its own force, affect the liability of others. Nothing in § 524(e) can be read to affirmatively prohibit a bankruptcy court from using its equitable injunctive powers in furtherance of a successful reorganization by the debtor.49

Preoccupation with the interpretational debate over § 524(e) has allowed the practice of approving nondebtor releases to take hold, given the absence of any full and meaningful response to the equitable powers argument. The remainder of this Article takes the scrutiny of nondebtor releases beyond what this author believes to be an unproductive § 524(e) debate, by examining jurisdictional authority to approve nondebtor releases pursuant to courts’ equitable injunctive powers—ultimately concluding that, in the absence of express congressional authorization, courts have no authority to approve nondebtor releases.

amendments to the Bankruptcy Code that would expressly authorize consensual nondebtor releases, pursuant to which “[c]reditors that agree in a separate document to release nondebtor parties will be bound by such releases, whereas creditors that decline to release their claims against nondebtor parties will not be bound to release their claims.” Nat’l Bankr. Rev. Comm’n, supra note 24, at 534.

48See, e.g., Restatement (Third) of Suretyship and Guaranty §§ 39-44 & intro. note, at 167 (1996). Section 524(e) has predecesors in every prior bankruptcy statute, including § 16 of the 1898 Act, § 33 of the 1867 Act, § 4 of the 1841 Act, and § 34 of the 1800 Act. See 1A James Wm. Moore et al., Collier on Bankruptcy ¶ 16.01, at 1522-23 & n.1 (14th ed. 1978) (reproducing statutory provisions). The clear purpose of all of these provisions was to preempt efforts by co-obligors to assert the debtor’s discharge as an affirmative defense to their own personal liability. See Hill v. Harding, 130 U.S. 699, 703-04 (1889) (construing § 33 of the 1867 Act); 1A Moore et al., supra, at ¶¶ 16.02, 16.05; Feldstein, Third-Party Releases, supra note 22, at 28-34.

49See, e.g., Specialty Equipment, 3 F.3d at 1047 (stating that “section 524(e) . . . does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a release to a third party [and] . . . a per se disfavoring all releases . . . would be similarly unwarranted, if not a misreading of the statute”); Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) (stating that “we do not think that Section [524(e)] must be literally applied in every case as a prohibition on the power of the bankruptcy courts”); Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987) (stating that “the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization”).
III. BANKRUPTCY JURISDICTION TO ENJOIN NONDEBTOR ACTIONS

Perhaps the most complicated and confusing aspect of the controversy surrounding nondebtor releases and injunctions is the preliminary inquiry for any exercise of judicial power—jurisdiction.\textsuperscript{50} Without regard to the advisability of a nondebtor release in any particular case, is there bankruptcy jurisdiction to release nondebtors from liability to creditors and permanently enjoin creditors’ actions against them? Most of the cases approving or disapproving nondebtor releases contain little, if any, discussion of the jurisdictional issue, and what little discussion appears is rather cryptic and conclusory.\textsuperscript{51} Courts that have approved nondebtor releases have done so pursuant to the equitable injunctive powers of bankruptcy courts under § 105 of the Bankruptcy Code. Section 105, however, is not an independent source of jurisdiction, a notion that § 105(c) now makes explicit.\textsuperscript{52} Therefore, a more searching inquiry into the jurisdictional foundations for such an extraordinary injunction is warranted.\textsuperscript{53}

The traditional powers of a federal court to enjoin collateral litigation that would interfere with the court’s jurisdiction cannot sustain this exceptional exercise of injunctive powers.\textsuperscript{54} It can only be defended based upon the unique character of jurisdiction over bankruptcy reorganization proceed-

\textsuperscript{50}This jurisdictional discussion focuses on the subject matter jurisdiction of federal courts under federal bankruptcy law, enacted pursuant to Article I, § 8, clause 4 of the United States Constitution. Personal jurisdiction in bankruptcy proceedings is rarely problematic, as Bankruptcy Rule 7004(d) authorizes nationwide service of process, unrestricted by any requirement of “minimum contacts” with the forum state. The relevant forum for “minimum contacts” in the bankruptcy setting is the United States as a whole. See generally 1 NORTON, supra note 23, at § 4.41. But see Jeffrey T. Perriell, The Perils of Nationwide Service of Process in a Bankruptcy Context, 48 WASH. & LEE L. REV. 1199 (1991) (arguing that the courts’ failure to consider whether nationwide service of process is fundamentally fair in a given case raises due process concerns); E. Scott Frushwald, The Related To Subject Matter Jurisdiction of Bankruptcy Courts, 44 DRAKE L. REV. 1, 33-37 (1995) (same).

\textsuperscript{51}See infra notes 202-204 and accompanying text.

\textsuperscript{52}Section 105(c) provides as follows:

The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the [jurisdictional] provisions relating to such judge, officer, or employee set forth in [the Judicial Code]. This subsection shall not be interpreted to exclude bankruptcy judges . . . from its operation.


\textsuperscript{53}Another analysis of bankruptcy jurisdiction to enjoin nondebtor actions can be found in Howard C. Buschman III & Sean P. Madden, The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors, 47 BUS. LAW. 913 (1992).

\textsuperscript{54}See infra Part III.A.
ings. The Supreme Court recently spoke to the jurisdictional issue in the context of a temporary nondebtor stay in *Celotex Corp. v. Edwards*. Unfortunately, the *Celotex* opinion did not clarify the most important jurisdictional questions, especially those surrounding permanent nondebtor releases.

A complete understanding of any bankruptcy jurisdictional issue requires some background in the rich history of bankruptcy jurisdiction. That historical perspective reveals that wide-ranging status quo injunctions have always been integral to the administration of bankruptcy estates, especially in bankruptcy reorganization proceedings. Temporary nondebtor stays narrowly tailored to promote a Chapter 11 debtor’s attempts to successfully reorganize are fully consistent with these historical injunctive powers. Permanent nondebtor releases and injunctions, however, go well beyond the traditional status quo injunction; in the name of promoting the debtor’s successful reorganization, they extinguish obligations of nondebtors that historically have been completely beyond the reach of bankruptcy jurisdiction.

Expansion of bankruptcy jurisdiction, with enactment of the Bankruptcy Reform Act of 1978, removed courts’ misgivings about the propriety of temporary nondebtor stays. To the extent courts perceive this expanded bankruptcy jurisdiction as somehow sanctioning permanent nondebtor releases, however, the reversal in judicial attitude has gone too far. Loose usage of jurisdictional terminology has blurred critical jurisdictional distinctions to a point where bankruptcy courts use permanent nondebtor releases and injunctions to expunge nondebtor claims that they could not adjudicate directly. Most significantly, though, confusion concerning jurisdiction to enjoin nondebtor actions has led the courts to overlook Supreme Court precedent under the 1898 Act striking down a permanent nondebtor injunction in *Callaway v. Benton*. In light of that precedent, this Article concludes that nondebtor releases are not an appropriate use of a bankruptcy court’s injunctive powers, and that bankruptcy courts are without authority to approve nonconsensual nondebtor releases in the absence of express congressional authorization.

A. INJUNCTIONS IN AID OF JURISDICTION

Those courts that approve nondebtor releases rely upon § 105(a) of the Bankruptcy Code, which provides that “[t]he court may issue any order, pro-

56See infra Part III.B.
57See infra Part III.C.
59See infra Part III.D. & III.F.
60See infra Part III.E & III.G.1.
cess or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. This provision, like its predecessor under the 1898 Act, gives to federal bankruptcy courts the powers of courts of equity granted to all federal courts in the All Writs Act. The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions," which includes writs of injunction.

63 Legislative history makes this clear:

Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. § 1651 . . . .
The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.

65 See 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.29, at 359 (2d ed. 1996).

With respect to enjoining state court proceedings, though, federal courts operate under the strictures of the Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (emphasis added). Bankruptcy Code § 105 is an "expressly authorized" exception to the Anti-Injunction Act, permitting federal bankruptcy courts to enjoin state court proceedings. H.R. Rep. No. 95-595, at 317 (1977) ("This section [105] is also an authorization, as required by 28 U.S.C. § 2283, for a court of the United States to stay the action of a State court.", reprinted in 1978 U.S.C.C.A.N. 5963, 6274. See also S. Rep. No. 95-989, at 29 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5815. Bankruptcy injunctions were the first explicit exception to the Anti-Injunction Act, added in 1874 to except "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4221, at 497 & n.6 (2d ed. 1988) (quoting § 720 of former Revised Statutes). See also Toucey v. New York Life Ins. Co., 314 U.S. 118, 132-33 (1941). Before the 1874 bankruptcy exception to the Anti-Injunction Act, there were inconsistent pronouncements from the Supreme Court regarding the ability of a federal bankruptcy court to enjoin state court proceedings. Compare Ex parte Christy, 44 U.S. (3 How.) 292, 318 (1845) (Story, J.) ("We entertain no doubt that, under the provisions of the [Bankruptcy Act of 1841], the District Court does possess full jurisdiction to suspend or control such proceedings in state courts.") with Peck v. Jenness, 48 U.S. (7 How.) 612, 625-26 (1849) (holding, without citing Ex parte Christy, that the Bankruptcy Act of 1841 "confers no authority on the District Court to restrain proceedings [in state court] by injunction or any other process," citing Anti-Injunction Act). When the Anti-Injunction Act was amended after the Toucey decision, the specific bankruptcy exception was removed and replaced with a general exception for any injunction expressly authorized by another federal statute. See 28 U.S.C. § 2283 historical and revision notes.

Even though Bankruptcy Code § 105 is an "expressly authorized" exception to the Anti-Injunction Act, courts give similar constructions to the parallel "in aid of jurisdiction" language in both the All Writs Act and the second exception of the Anti-Injunction Act. In fact, "[t]he phrase 'in aid of its jurisdiction' was added [to the Anti-Injunction Act] to conform to [the All Writs Act in] section 1651." Id. See also Kline v. Burke Constr. Co., 260 U.S. 226, 228-29 (1921) (stating that Anti-Injunction Act "is to be construed in connection with" the All Writs Act); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197, 201 n.9 (3d Cir. 1993) (construing parallel "in aid of jurisdiction" language similarly); In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985) (same). These general "in aid of jurisdiction" powers, in turn, are helpful in defining the scope of a bankruptcy court's injunctive powers under § 105. See In re G.S.F.
One of the most enigmatic arguments advanced to justify nondebtor releases is an "in aid of jurisdiction" argument dubbed the so-called channeling rationale. Both the Robins and Drexel courts characterized the nondebtor releases they approved as appropriate "channeling" injunctions, obviously alluding to a discussion in the Manville confirmation opinion that coined the phrase "equitable channeling injunctions." The purported "channeling" in the Robins and Drexel cases was related to the fact that many released parties made contributions of various types to the debtor's reorganization, creating a bigger reorganization pot for creditors. Through the nondebtor releases, then, creditor claims were supposedly "channeled" away from the released parties and into the now-bigger reorganization pot. The superficial appeal of the channeling rationale is such that it has become common to rationalize nondebtor releases as equitable channeling injunctions, but without a genuine understanding of what an equitable channeling injunction is, and why nondebtor releases are not a proper exercise of equitable channeling powers.

The Manville discussion of equitable channeling injunctions centered around the power of a court to effectuate the sale of an asset free and clear of liens. Such a free-and-clear sale effectively enjoins claimants from fur-
ther pursuit of that asset and channels lien claims to the proceeds of the sale, for satisfaction from those proceeds.\textsuperscript{72} The Supreme Court has explained this injunctive power as one rooted in notions of \textit{in rem} jurisdiction:

This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property.\textsuperscript{73}

This concept of exclusive jurisdiction applies to an \textit{in rem} or \textit{quasi in rem} action to the extent that possession or control of property is necessary for effective relief.\textsuperscript{74} When a court exercises such exclusive \textit{in rem} jurisdiction, "\textit{[t]o protect its jurisdiction, that court may issue an injunction."}\textsuperscript{75}

The general power to prevent interference with exclusive \textit{in rem} jurisdiction over property by enjoining collateral proceedings is limited to enjoining other \textit{in rem} actions against that same property.\textsuperscript{76} In this way, any such claim against the property can be channeled to the court with exclusive \textit{in rem} jurisdiction over the property. Equitable channeling of all \textit{in rem} claims into the court with exclusive jurisdiction over the property in no way prejudices the channeled claims; it simply assures orderly resolution of all conflicting claims to the property. A collateral \textit{in personam} suit, though, does not interfere with a court's exclusive \textit{in rem} control of property. An \textit{in personam} suit will not establish a plaintiff's claim to any specific property inter-

\textsuperscript{72} The power of a bankruptcy court to effectuate sale of a debtor's property free and clear of liens, with the liens attaching to the proceeds of the sale, is now codified. See 11 U.S.C. § 363(e)-(f) (1994).

\textsuperscript{73} Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 737-38 (1931).


\textsuperscript{75} Ex \textit{parte} Baldwin, 291 U.S. 610, 614 (1934). This in \textit{rem} injunctive power is so firmly established that it was considered an implicit exception to the Anti-Injunction Act, even before explicit addition of the "in aid of jurisdiction" exception. See Toucey v. New York Life Ins. Co., 314 U.S. 118, 134-36 (1941).

\textsuperscript{76} See Penn General Casualty, 294 U.S. at 195.
est, but will merely determine the defendant’s personal obligations to the plaintiff, irrespective of what assets might be available to satisfy those obligations.77 Exclusive in rem jurisdiction, therefore, is not a basis on which to enjoin collateral in personam actions.78

Federal bankruptcy courts possess the in rem “exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of” the bankruptcy case.79 Nonetheless, the essence of a nondebtor release is that it forever bars any action against a nondebtor based on the nondebtor’s personal liability to creditors—in personam actions that in no way encroach upon the bankruptcy court’s exclusive in rem jurisdiction over the debtor’s property. Extinguishing these in personam actions, therefore, cannot be founded upon “the equitable and inherent power to channel claims to a specific res,”80 not even by analogy. Applying the channeling rationale to nondebtor releases takes a mechanism designed to preserve, consolidate, and resolve all in rem claims, and transforms it into a mechanism that forcibly converts creditors’ in personam claims against a nondebtor into in rem claims against the debtor’s property. In the process, those in personam rights against the nondebtor are extinguished, without any assurance that the substituted in rem rights against the debtor’s property are the equivalent of the extinguished in personam rights.81 This drastic alteration of in personam claims against a nondebtor, in the guise of merely protecting the bankruptcy court’s exclusive in rem jurisdiction over the debtor’s property, is not a proper exercise of traditional in rem channeling powers.82

77See Kline, 260 U.S. at 230 (stating that “a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing”). Indeed, in the equitable receivership context, mere liquidation of a claim against the debtor by reduction to judgment (as opposed to collection of the claim) in collateral proceedings was not considered an action that impaired the exclusive in rem jurisdiction of the federal receivership court. See Riehle v. Margolies, 279 U.S. 218, 223-25 (1929).


82The Fourth Circuit, in affirming the Robins nondebtor releases, floated another inapposite analogy—the “ancient but very much alive” equitable doctrine of marshaling of assets. Robins, 880 F.2d at 701. The marshaling analogy, however, fails on roughly the same grounds as the channeling analogy. “The equitable doctrine of marshaling rests upon the principle that a creditor having two funds to satisfy his debt may not, by his application of them to his demand, defeat another creditor, who may resort to only one of the funds.” Sowell v. Federal Reserve Bank, 268 U.S. 449, 456-57 (1925). By the doctrine of
Moreover, nondebtor releases cannot be considered an appropriate corollary to a federal bankruptcy court’s *in personam* jurisdiction, under conventional standards for “in aid of jurisdiction” injunctions. An elemental and unique attribute of a nondebtor release is that it precludes collateral litigation of *in personam* nondebtor claims that the bankruptcy court has not and will not attempt to adjudicate or resolve in any manner whatsoever.\(^{83}\) The so-called channeling of a nondebtor claim to the debtor’s estate does not mean that the creditor now has two claims against the debtor’s estate—one for its rights against the debtor and one for its “channeled” rights against the nondebtor. Through the channeling sleight of hand, the court completely extinguishes the claim against the nondebtor and leaves the creditor with only its claim against the debtor’s estate, without even purporting to address the merits of the released nondebtor claim. This sort of channeling is unknown to general “in aid of jurisdiction” jurisprudence.

In those cases in which federal courts have addressed enjoining collateral *in personam* litigation in order to protect their own *in personam* jurisdic-

\(^{83}\) See, e.g., LTV Corp. v. Asta Cas. & Sur. Co. (*In re Chateauay Corp.*), 167 B.R. 776, 781, 780-82 (S.D.N.Y. 1994) (noting that the bankruptcy court below, in approving nondebtor release over creditors' objections, had stated that creditors' nondebtor suit “is not before me and I am not prepared to pass on the merits of it,” yet court remanded for determination of whether nondebtor release was nonetheless permissible as “essential” to the debtor's reorganization). *See also* Brubaker, *supra* note 24, at 977-78, 992-93, 998.
tion.\textsuperscript{84} They have made it clear that, as the Supreme Court put it, "nonexistent jurisdiction . . . cannot be aided."\textsuperscript{85} The only proper use of this power is by an "injunction in aid of any jurisdiction which has been invoked and is being exercised."\textsuperscript{86} Thus, federal courts will not enjoin collateral proceedings with respect to claims and issues that are not before the federal court for resolution,\textsuperscript{87} and this is especially true when the collateral proceedings in-

\textsuperscript{84} Although injunctions in aid of in rem jurisdiction are firmly established in the federal courts, courts have been much more hesitant to enjoin collateral proceedings in aid of their in personam jurisdiction, with the general rule being: "Where the judgment sought is strictly in personam, . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation . . . ." Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189, 195 (1935). Only recently have the federal courts begun chipping away at this rule, enjoining collateral proceedings that would interfere with their in personam jurisdiction over school desegregation cases, Voting Rights Act cases, and complex class actions. See generally 1A, pt.2 MOORE ET AL., supra note 65, ¶ 0.209[2], at 2339-40 (2d ed. 1996 & Supp. 1995-96); 17 WRIGHT ET AL., supra note 65, § 4225, at 531-33 (2d ed. 1988 & Supp. 1997).

\textsuperscript{85} Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 519 (1955).

\textsuperscript{86} Joa. L. Muscarelle, Inc. v. Central Iron Mfg. Co., 328 F.2d 791, 794 (3d Cir. 1964). See also 1A, pt.2 MOORE ET AL., supra note 65, ¶ 0.209[2], at 2337 ("The Richman case in no way impairs the power of a federal court to enjoin state proceedings where necessary in aid of jurisdiction which it properly has and is exercising."). Commentators have advocated abandonment of the in rem/in personam gloss the Court has placed on the "in aid of jurisdiction" provisions of the injunction statutes, with a correspondingly larger role for injunctions in aid of a federal court's in personam jurisdiction. See, e.g., William T. Mayton, \textit{Ersatz Federalism Under the Anti-Injunction Statute}, 78 COLUM. L. REV. 330, 354-70 (1978); Edward F. Sherman, \textit{Class Actions and Duplicative Litigation}, 62 IND. L. J. 507, 531-32, 548-49 (1987). This approach, though, does not go so far as to lose the "in aid of" injunction from the jurisdictional anchor of an existing federal action. See, e.g., MARTIN H. REDISH, \textit{FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER} 335 (2d ed. 1990) (advocating revised interpretation of "in aid of jurisdiction" injunctions, but noting that such injunctions "cannot be used if the sole claim in federal court is the prayer for a suit injunction, for in those circumstances the federal court has no preexisting jurisdiction to aid"). The American Law Institute has proposed a novel system for massive consolidation of complex litigation that would include a broad federal injunctive power with respect to collateral litigation. See AMERICAN L. INST., \textit{COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS} § 5.04 (1994). Yet, this proposal makes clear that such "[a]ntisuit injunctions should be used against those cases that are truly duplicative, and not those only tangentially related," and "the mere existence of a consolidated proceeding cannot justify intrusions on . . . parties' rights that go beyond what is necessary to promote the efficient handling of the cases being litigated in the magnet forum." Id. § 5.04, reporter's note 11 to cmt. d, at 274.

\textsuperscript{87} See, e.g., Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 294-96 (1970) (restraint of collateral suit on state-law claims not in aid of jurisdiction of federal suit addressing only federal claims, because "it is not enough that the requested injunction is related to that jurisdiction"); United States v. International Bhd. of Teamsters, 907 F.2d 277, 279-80 (2d Cir. 1990) (injunction merely channeled all litigation concerning consent decree into federal court with jurisdiction over implementation of consent decree); In re Baldwin-United Corp., 770 F.2d 328, 334, 336-37, 339 (2d Cir. 1985) (injunction in aid of class action would not extend to any action that doesn't affect the rights of members of plaintiff class in pending class action); Alton Box Bd. Co. v. Esprit De Corp., 682 F.2d 1267, 1271 & n.7 (9th Cir. 1982) (injunction in aid of class action could not enjoin parties from pursuing claims not part of federal class action). Foreshadowing arguments in support of nontender stays and releases in bankruptcy, the Seventh Circuit held that a risk that the distinct collateral litigation will destroy a plaintiff's financial ability to continue its federal suit is not an appropriate basis on which to stay the collateral suit in aid of the federal court's jurisdiction. See Kurek v. Pleasure Driveway & Park Dist., 574 F.2d 892, 896 (7th Cir.), vacated and remanded on other grounds, 435 U.S. 992 (1978).
volve persons not party to the federal court adjudication. Thus, whatever jurisdiction a bankruptcy court might exercise in resolving creditors’ claims against the debtor provides no basis for an “in aid of jurisdiction” injunction that extinguishes collateral claims against a nondebtor that the bankruptcy court will not address. As with the in rem channeling argument, this perverts the function of the “in aid of jurisdiction” injunction as a device to channel identical or duplicative claims into one forum for efficient resolution. Nondebtor releases improperly convert the procedural channeling in

88See, e.g., Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203-04 (3d Cir. 1993) (injunction in aid of jurisdiction over class action would not apply to opt-out plaintiffs); White Mountain Apache Tribe v. Smith Plumbing Co., 836 F.2d 1301, 1306 (9th Cir. 1988) (collateral suit against contractor’s surety could not be enjoined in aid of jurisdiction of federal court entertaining underlying contract dispute); St. Paul Fire & Marine Ins. Co. v. Lack, 443 F.2d 404, 405-07 (4th Cir. 1971) (collateral suit by injured party against insurer could not be enjoined in aid of jurisdiction of federal court entertaining underlying insurance coverage suit between insurer and insured); Pacific Indem. Co. v. Acel Delivery Serv., Inc., 432 F.2d 952, 954-56 (5th Cir. 1970) (same); Jos. L. Muscarella, 328 F.2d at 793-94 (subcontractors’ lien suits against owner could not be enjoined in aid of jurisdiction of federal suit between general contractor and subcontractors); Safeco Ins. Co. of Am. v. Norris & Hirshberg, Inc., 640 F. Supp. 712, 715-16 (N.D. Ga. 1986) (collateral suit by injured party against insurer could not be enjoined in aid of jurisdiction of federal insurance coverage suit between insurer and insured).

89This conclusion is bolstered by consideration of the third exception to the Anti-Injunction Act, for a federal court injunction “to protect or effectuate its judgments.” 28 U.S.C. § 2283 (1994). The Supreme Court has said that the “necessary in aid of jurisdiction” phrase “implies something similar to the concept of injunctions to ‘protect or effectuate’ judgments.” Atlantic Coast Line, 398 U.S. at 295. The “protect or effectuate judgments” exception is commonly known as the relitigation exception, and an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.” Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988). Thus, in the prejudgment phase of litigation, “in aid of jurisdiction” can be thought of as restricted to claims or issues that actually have been placed before the federal court for resolution. Judge Learned Hand applied these principles to a nondebtor injunction in reorganization proceedings under the 1898 Act, saying that “since this stay is permanent, and not merely to give the debtor or the trustee a chance so to intervene, it can be defended only in case the [nondebtor action] may eventually fall within the jurisdiction in invitum of the bankruptcy court, and also in case the state suit will interfere with that power.” Radin v. Chemical Bank & Trust Co. (In re Prudence Bonds Corp.), 75 F.2d 262, 263 (2d Cir. 1935). In the context of a bankruptcy sale under the 1898 Act, where the court approved a sale of the debtor’s property subject to the interests of claimants to that property (without adjudicating those interests), the Ninth Circuit held that the bankruptcy court could not permanently enjoin a subsequent state court suit by the claimants to determine their interests in the property. See McQuaid v. Owners of NW 20 Real Estate (In re Federal Shipping Way, Inc.), 717 F.2d 1264, 1266-69 (9th Cir. 1983). The injunction could not be one to protect or effectuate a bankruptcy court judgment, because the bankruptcy court never addressed the claimants’ interests in the property. See id. at 1269-73. Moreover, because the bankruptcy court no longer had jurisdiction to adjudicate the claimants’ interests in the property, the injunction could not be in aid of the bankruptcy court’s jurisdiction, in spite of various claims that the collateral suit would somehow interfere with administration of the bankruptcy estate. See id. at 1273-75.

90The historical antecedent of the modern-day “in aid of jurisdiction” injunction is the equitable bill of peace, “which enabled a single party facing a multitude of independent yet related claims to compel all claimants to bring suit in a single court of equity.” American L. Inst., supra note 86, § 504, reporter’s note 2 to cmt. a, at 267. With respect to its stay of actions against the debtor, bankruptcy’s automatic stay functions as such a channeling injunction—channeling all claims against the debtor into the bank-
junction into a tool for summarily expunging creditors’ substantive in personam rights against nondebtor.

Settled principles of federal “in aid of jurisdiction” injunctions simply do not support the contention that nondebtor releases are an exercise of established channeling powers. In fact, even temporary nondebtor stays are beyond the traditional channeling powers of federal courts to the extent that the stay promotes something other than a bankruptcy court’s resolution of the nondebtor dispute—namely, the debtor’s successful reorganization.91 Thus, any validity of nondebtor stays and releases must rest upon unique aspects of bankruptcy jurisdiction and “any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.”92

B. SUMMARY JURISDICTION TO ENJOIN UNDER THE BANKRUPTCY ACT OF 1898

Bankruptcy court’s powers to enjoin collateral litigation developed under the 1898 Act, predecessor to the current Bankruptcy Code. The injunctive powers of courts of bankruptcy were codified in the Act’s jurisdictional grant in § 2a(15), the statutory precursor to § 105(a) of the Code.93 The contours


91In the equitable receivership context, the Tenth Circuit refused to permit the temporary stay of a nondebtor action, requested on grounds similar to those relied upon to support temporary nondebtor stays in Chapter 11 reorganization proceedings, and emphasized that permanently enjoining the nondebtor action would never be proper, because the receivership court would not adjudicate the nondebtor action. See Commodity Futures Trading Comm’n v. Chilcott Portfolio Management, Inc., 713 F.2d 1477, 1483-86 (10th Cir. 1983). See also Greenbaum v. Lehrenkrauss Corp., 73 F.2d 285, 287 (2d Cir. 1934) (in equitable receivership proceedings, stay of suits against debtor’s nondebtor subsidiaries and affiliates was improper, “and the present case permits us definitely to repudiate the idea that, because it may be convenient for all persons interested to have a single reorganization of the receivership defendant and all its subsidiaries, this can be accomplished by merely filing a bill in equity against the parent corporation”).


[C]ourts of bankruptcy . . . are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the [district court] judge only[.]

1898 Act § 2a(15) (emphasis in original). Under bankruptcy statutes predating the 1898 Act, injunctive powers were implicit in grants of equity jurisdiction over “all matters and proceedings in bankruptcy.” See
of this injunctive jurisdiction are very instructive in analyzing the modern jurisdictional issues with which the Supreme Court recently wrestled in Celotex Corp. v. Edwards,\(^4\) including questions as to the appropriate division of jurisdictional authority between federal district courts and their adjunct bankruptcy courts. Under the 1898 Act, because of a recognized distinction between jurisdiction to enjoin and jurisdiction to adjudicate, courts presiding over bankruptcy proceedings could enjoin collateral disputes of all kinds through summary proceedings—even disputes beyond bankruptcy jurisdiction to adjudicate through summary proceedings.

Jurisdiction under the 1898 Act was essentially in rem jurisdiction over property in the actual or constructive possession of the court and proceedings to administer that property for the benefit of creditors.\(^5\) This in rem jurisdiction to administer property in the possession of the court was denoted summary jurisdiction. The summary jurisdiction label was a useful convention, not only to distinguish summary in rem jurisdiction from in personam jurisdiction over individual parties to a dispute (known as plenary jurisdiction), but also as an accurate descriptor of the more informal procedures used in summary matters.\(^6\)

Of course, a debtor's property often included things not within the possession of the court, such as a disputed cause of action against a third party or tangible property held under a substantial claim of right by a third party, a

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\(^4\) Babbitt v. Dutcher, 216 U.S. 102, 105-08 (1910) (stating that § 2 of the 1898 Act, including § 2a(15), granted jurisdiction substantially identical to jurisdiction under the Bankruptcy Acts of 1841 and 1867 over "all matters and proceedings in bankruptcy"). See also Ex parte Christy, 44 U.S. (3 How.) 292, 311-13, 317-22 (1845) (Story, J) (construing § 6 of the Bankruptcy Act of 1841).

\(^5\) The 1898 Act conferred jurisdiction on courts of bankruptcy to "[c]ause the estates of bankrupts to be . . . reduced to money, and distributed, and determine controversies in relation thereto." 1898 Act § 2a(7). See generally Katchen v. Landy, 382 U.S. 323, 326-27 (1966); Local Loan Co. v. Hunt, 292 U.S. 234, 241 (1934) ("generally, proceedings in bankruptcy are in the nature of proceedings in rem"); 2 Moore et al., supra note 48, ¶ 23.03, at 443. By operation of law, the filing of the petition in bankruptcy caused all property of the debtor to pass into the custody of the bankruptcy court, under the control of a trustee or receiver, an officer of the court. See id. ¶ 23.05[2], at 474-75.

\(^6\) See 2 Moore et al., supra note 48, at ¶ 23.02[1]. A plenary suit was an ordinary civil action conducted according to normal rules of civil procedure, including summons and complaint, formal pleadings, discovery and trial, all according to the timetables for a normal civil action. Summary proceedings, by contrast and as the name indicates, were much less formal and more expeditious, initiated by a motion or petition, with a relatively short notice period before a hearing, where the evidence would often be presented through affidavits. See generally id. ¶ 23.02[2]. With respect to the procedural differences, the summary/plenary distinction roughly corresponds to the current distinction in bankruptcy proceedings between adversary proceedings, largely conducted according to the Federal Rules of Civil Procedure, and contested matters, initiated by motion contemplating a hearing. See Fed. R. Bankr. P. pt. VII (defining matters that constitute adversary proceedings and incorporating and modifying the Federal Rules of Civil Procedure); Fed. R. Bankr. P. 9014 & advisory committee note (all proceedings that are not adversary proceedings are contested matters generally conducted by motion and hearing). See generally John Silas Hopkins, III, The Bankruptcy Litigator's Handbook chs. 16-18 (1993).
so-called adverse claimant. A court of bankruptcy had no summary jurisdiction to adjudicate disputes with adverse claimants. Such a dispute could be resolved only by an ordinary civil action (a plenary suit), and the 1898 Act conferred very little plenary jurisdiction on the federal courts of bankruptcy. By and large, a trustee or receiver could bring a plenary suit only in a state or federal court that would have independent jurisdiction over the action, without regard to the pending bankruptcy proceedings. Federal bankruptcy jurisdiction under the 1898 Act, then, was largely summary in rem jurisdiction, with only limited bankruptcy jurisdiction over plenary in personam actions between adverse claimants.

The 1898 Act vested bankruptcy jurisdiction over both summary and plenary proceedings, as an initial matter, in the United States district courts, sitting as "courts of bankruptcy." However, adjuncts to the district courts, entitled bankruptcy referees, were authorized to exercise most of the district court's summary jurisdiction through a referral system. Nonetheless, a referee's jurisdiction over proceedings in referred cases was limited, not only by some specific exceptions in the 1898 Act itself, but also by an interpretation of the Act that limited a referee to the exercise of summary jurisdiction. A referee had no jurisdiction over plenary matters; but the

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97 See 2 Moore et al., supra note 48, ¶ 23.05[3], at 480-83, 23.05[4], 23.06[1], at 494.
98 See id. ¶ 23.06[1], at 494-95.
99 Thus, while § 2a(7) of the Act gave federal courts jurisdiction to "[c]ause the estates of bankrupts to be collected . . . and determine controversies in relation thereto," the scope of this jurisdiction was restricted by the proviso "except as herein otherwise provided." 1898 Act § 2a(7). Section 23 of the Act provided otherwise with respect to plenary suits, giving the federal courts jurisdiction only "in the same manner and to the same extent as though such [bankruptcy] proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." 1898 Act § 23a. See generally 2 Moore et al., supra note 48, at ¶ 23.12. The primary exceptions were federal jurisdiction by consent and federal plenary jurisdiction over suits to avoid liens and recover preferences and fraudulent conveyances. See generally id. ¶ 23.08, 23.14, 23.15. In addition, § 23 did not apply to restrict plenary jurisdiction in corporate reorganization proceedings under Chapter X. See Williams v. Austrian, 331 U.S. 642, 661-62 (1947). See generally 6 Moore et al., supra note 48, at ¶ 3.18.
100 See 1898 Act § 1(10) (district courts are "courts of bankruptcy"); id. § 2a ("courts of bankruptcy . . . are hereby invested . . . with . . . original jurisdiction in proceedings under this Act").
101 Referees were officers of the district court, appointed by the district court judges for terms of six years. See id. §§ 33, 34a.
102 When a bankruptcy case was referred to a referee, the 1898 Act gave referees "jurisdiction to . . . perform such duties as are by this Act conferred on courts of bankruptcy, . . . except as herein otherwise provided." Id. § 38(6). In addition, the 1898 Act contained a definition of "court" that included both the district court and the referee, making clear that in referred cases, the referee acted as the court. See id. § 1(10) (definition of "court"); id. § 1(20) (definition of "judge"); id. § 1(26) (definition of "referee"). See also White v. Schloerb, 178 U.S. 542, 546 (1900) (when a "case in bankruptcy is referred by the court of bankruptcy to a referee, . . . he exercises much of the judicial authority of that court"). In many cases, rules provided for automatic reference to the referee. See 2 Moore et al., supra note 48, at ¶ 22.03.
103 See Weidhorn v. Levy, 253 U.S. 268, 274 (1920). The only exception was that the parties could consent to summary proceedings before the referee. See MacDonald v. Plymouth County Trust Co., 286 U.S. 263, 266-68 (1932). See also sources cited supra note 99, discussing jurisdiction by consent.
referee's summary jurisdiction was indistinguishable from that of the district court, including the power to enter orders reviewable only by appeal\textsuperscript{104} and carrying the full collateral preclusiveness of \textit{res judicata}.\textsuperscript{105}

Injunctive orders pursuant to § 2a(15) were a matter so closely tied to administration of the bankruptcy estate that they could issue in summary proceedings.\textsuperscript{106} Early cases involved injunctions concerning property deemed within the possession of the court; therefore, summary \textit{in rem} jurisdiction to protect that possession by injunctive order was quite exceptional.\textsuperscript{107} Summary jurisdiction to issue § 2a(15) injunctions, though, extended well beyond property in the possession of the court, as established in the seminal case on the injunctive powers of federal bankruptcy courts, \textit{Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.}\textsuperscript{108}

In that case, those companies comprising the Chicago, Rock Island railway system were undergoing a reorganization pursuant to the railroad reorganization provisions of the 1898 Act.\textsuperscript{109} Various banks that had loaned money to the debtors held in their possession, as collateral for the loans, marketable securities issued by the debtors. These securities were, in turn, secured by liens on the debtors' property.\textsuperscript{110} The district court presiding over the reorganization proceedings, fearing that release of the securities into the marketplace would unduly complicate the debtors' task of formulating a reorganization plan, temporarily enjoined the banks from disposing of the pledged securities, through summary proceedings.\textsuperscript{111} The Supreme Court, in affirming the propriety of the injunction,\textsuperscript{112} rejected the banks' jurisdictional objection.

The banks claimed that because the property at issue, the pledged securi-

\textsuperscript{104}See Weidhorn, 253 U.S. at 271. See generally 2A MOORE ET AL., supra note 48, at \textsuperscript{11} 39.16, 39.28.
\textsuperscript{106}Indeed, in what has been described as a chain of decisions affirming and reaffirming general principles of summary jurisdiction, the first, \textit{White v. Schloerb}, addressed an injunctive order issued under the authority of § 2a(15). See 2 MOORE ET AL., supra note 48, \textsuperscript{13} 23.04\textsuperscript{[2]}, at 456 (citing \textit{White v. Schloerb}, 178 U.S. at 547).
\textsuperscript{107}In \textit{White v. Schloerb}, the district court, through summary proceedings, issued an order restraining disposition and directing return of goods seized by replevin after they were deemed to pass into the constructive possession of the court upon the debtors' bankruptcy filing, and the Supreme Court held that the district court's order properly issued in summary proceedings. See 178 U.S. at 542-48. The Court subsequently held that a referee also had summary jurisdiction to order turnover of property in the constructive possession of the court. See Mueller v. Nugent, 184 U.S. 1, 4, 11-18 (1902).
\textsuperscript{108}294 U.S. 648 (1935).
\textsuperscript{109}1898 Act § 77.
\textsuperscript{110}See 294 U.S. at 656-60.
\textsuperscript{112}See discussion infra notes 123-127 and accompanying text.
ties, was in their possession and not the court’s, the district court had no summary jurisdiction to enjoin their disposition of the property.\textsuperscript{113} The Court’s response to this contention is the key to deciphering the jurisdictional quandary presently facing the courts with respect to nondebtor injunctions:

[T]he claim of the [banks] in respect of their rights in the collateral security or the rank of their liens [was not] questioned by the debtor. In short, no adverse claim was brought forward by either of the parties to the controversy. The only question was in respect of the [banks’] remedy; and the sole point is as to the authority of the bankruptcy court to delay for a reasonable time an interference with the reorganization proceeding which would result from an immediate sale of the collateral.\textsuperscript{114}

Thus, the Court recognized and articulated a critical distinction between jurisdiction to adjudicate an underlying controversy and jurisdiction to provisionally enjoin an action that might prove harmful to the bankruptcy estate. While the former might be outside the summary jurisdiction of a court of bankruptcy—for example, a proceeding challenging the validity or enforceability of the banks’ liens on the collateral—the latter is a separate and distinct inquiry. The temporary injunction does not have as its purpose or effect an adjudication of any such controversy; it merely preserves the status quo.

Just two years later, the court applied this distinction to restraint of a collateral lawsuit in \textit{Steelman v. All Continent Corp.}\textsuperscript{115} The dispute in that case centered on securities held by stockbrokers in Philadelphia, for the account of All Continent Corp. A man named Fox had filed a bankruptcy petition in New Jersey, and, in those proceedings, the bankruptcy trustee was actively investigating whether All Continent was a sham devised to shelter Fox’s assets in the hopes of bringing the corporation’s assets into Fox’s bankruptcy estate. In the meantime, the corporation commenced a proceeding in federal district court in Pennsylvania to clear its purported title to the securities held by the stockbrokers.\textsuperscript{116} In summary proceedings, the New Jersey district court presiding over Fox’s bankruptcy proceedings enjoined All Con-

\textsuperscript{113}See 72 F.2d at 449.
\textsuperscript{114}294 U.S. at 681.
\textsuperscript{115}301 U.S. 278 (1937).
\textsuperscript{116}See id. at 279-82. Prior to Fox’s bankruptcy filing, a creditor with an unsatisfied judgment against Fox obtained a restraining order from a New York state court, preventing the brokers from releasing the securities to All Continent, on the same theory that the trustee was pursuing, that the securities really belonged to Fox. This prompted All Continent’s action to quiet title to the securities. See id. at 281-82.
tinent from further prosecution of the Pennsylvania action, in order to allow
the trustee to go forward with his suit against All Continent in an appropri-
ate forum, join all interested parties, and resolve title to all of All Continent’s
assets, not merely the securities held in Philadelphia.117

All Continent challenged the summary jurisdiction of the New Jersey
court of bankruptcy to enjoin the Pennsylvania action, as the securities that
were the subject of the Pennsylvania action were not in the possession of the
bankruptcy court. The New Jersey court responded with the distinction
eunctuated in Continental Illinois: The injunction itself would not adjudicate
the parties’ adverse claims to the property; it would merely preserve the
status quo pending such adjudication in a proper forum. Therefore, a sum-
mery injunctive order was entirely proper.118 The Supreme Court affirmed
the opinion of the New Jersey district court, and, in specifically rejecting All
Continent’s jurisdictional objection, the Court said, “[t]he argument miscon-
ceives the grounds upon which the trustee looks to us for aid.”119

Thus, the distinction between jurisdiction to adjudicate and jurisdiction
to enjoin was firmly established in the 1898 Act jurisprudence. The lower
courts recognized the distinction and repeatedly invoked their summary
§ 2a(15) powers to enjoin actions and proceedings that could be adjudicated
on the merits only through a plenary suit. These injunctions issued by orders
both from district courts, sitting as “courts of bankruptcy,”120 and from bank-

117 See id. at 282-84. The trustee commenced such a suit within a week. See id. at 283.
118 See In re Fox, 16 F. Supp. 949, 950 (D. N.J.), rev’d sub nom. All Continent Corp. v. Steelman (In re
Fox), 86 F.2d 913 (3d Cir. 1936), rev’d, 301 U.S. 278 (1937).
119 301 U.S. at 290. “He is not seeking an injunction to vindicate his exclusive control over a res in his
possession, actual or constructive, of the court that appointed him.” Id. at 291.
Jurisdiction to administer the estate draws to itself, when once it has attached, an incidental or ancillary
jurisdiction to give protection to the estate against waste or disintegration . . . .” Id. at 289. “[W]e think
the court of bankruptcy has been armed with abundant power to preserve the status quo until there can
be an adequate trial with all the necessary parties and a judgment on the merits.” Id. at 288.
120 See, e.g., Halpert v. Engine Air Serv., Inc., 212 F.2d 860, 862-63 (2d Cir. 1954) (enjoined disposition
of property pending plenary suit by trustee to recover property); Magidson v. Duggan, 180 F.2d 473, 475-
77 (8th Cir. 1950) (enjoined state court suit pending plenary suit by trustee in federal court); Atlanta
Flooring & Insulation Co. v. Russell, 146 F.2d 884, 889 (5th Cir. 1945) (discussing injunction of state
court suit pending plenary suit by trustee); In re Standard Gas & Elec. Co., 139 F.2d 149, 153 (3d Cir.
1943) (injunction of shareholder derivative suit); Peck v. Howard, 130 F.2d 1001, 1002-03 (9th Cir. 1942)
(enjoining state court water rights dispute pending determination by district court whether there were
claims adverse to those of the estate); Zeleznik v. Grand Rivera Theater Co., 128 F.2d 533, 537 (6th Cir.
1942) (shareholder derivative suit); In re Mitchell, 278 F. 707, 709-10 (2d Cir. 1922) (disposition of
property pending plenary suit by trustee); Sproul v. Gambone, 34 F. Supp. 441, 442-43 (W.D. Pa. 1940)
(same); In re Central Forging Co., 31 F. Supp. 1020, 1022-23 (M.D. Pa. 1940) (shareholder derivative
suit); In re Three Pines Restaurant, Inc., 15 F. Supp. 53, 54 (S.D.N.Y. 1936) (disposition of property); In re
Nathan Turim, Inc., 55 F.2d 672, 673-74 (S.D.N.Y. 1931) (same); In re Perl, 28 F.2d 1002, 1002 (W.D. Pa.
1928) (same); Pyle v. Texas Transp. & Terminal Co., 185 F. 309, 310-11 (E.D. La. 1911) (same); In re
Norris, 177 F. 598, 598-99 (W.D.N.Y. 1910) (same); Lawrence v. Lowrie, 133 F. 995, 995-96 (M.D. Pa.
1903) (same).
ruptcy referees.\textsuperscript{121} For all practical purposes, a referee's injunctive powers under § 2a(15) were coextensive with those of the district court and included jurisdiction to enjoin collateral suits that were beyond the referee's summary jurisdiction to adjudicate.\textsuperscript{122}

\textsuperscript{121}See, e.g., Milens v. Bostian, 139 F.2d 282, 285 (8th Cir. 1943) (injunction of disposition of assets being administered in state probate proceedings pending plenary suit by trustee); Goggin v. Bolsa Chica Oil Corp. (In re Sterling), 125 F.2d 104, 106-07 (9th Cir. 1942) (injunction against nondebtor's improper use of its property); In re Metzger's, Inc., 68 F. Supp. 663, 666-67 (W.D. Mich. 1946) (enjoining disposition of property pending plenary suit by trustee); In re Custom Shop, Inc., 1 F. Supp. 32, 33 (S.D.N.Y. 1932) (same); In re Wilkes, 112 F. 975, 976-77 (E.D. Ark. 1902) (same).

\textsuperscript{122}Referees could issue such injunctions, despite the proviso in § 2a(15) "[t]hat an injunction to restrain a court may be issued by the [district court] judge only." 1898 Act § 2a(15). This proviso was added by the Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840, 843 (1938). The purpose of the amendment was to make clear that referees did have the power to issue injunctions:

There has also been some question about the power of referees to issue injunctions. The weight of authority seems to be that the referee may enjoin the parties to a suit although they are prohibited by General Order XII, clause 3, from enjoining the court itself, this power, being reserved to the judge. As a matter of actual practice, of course, injunctions are not issued to restrain the court, but to restrain the parties litigating therein. These matters should be cleared up.

H.R. REP. NO. 75-1409, at 19 (1937). See generally 1 Moore et al., supra note 48, at \( \S \) 2.64; A. Alan Reich, Injunctive Relief Under the Bankruptcy Act, 19 Brook. L. Rev. 222, 222 (1953). Contemporaneously, in the bankruptcy context, the Supreme Court articulated the distinction between enjoining a court and enjoining the litigants before the court, in the All Continent case, discussed supra notes 115-119 and accompanying text: "We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases." All Continent, 301 U.S. at 291. See also Ex parte Christy, 44 U.S. (3 How.) 292, 318 (1845) (Story, J.) ("We entertain no doubt that, under the provisions of the [Bankruptcy Act of 1841], the District Court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts, . . . but by acting on the parties through the instrumentality of an injunction."). Moore's states that "as a general rule . . . the restraint of a party is not equivalent to the direct restraint of a court." 1A pt.2 Moore et al., supra note 65, \( \S \) 0.208[3–1], at 2315 (citing All Continent and discussing Anti-Injunction Act jurisprudence as an exception to the general rule). Restraint of litigants, rather than another court, is an English doctrine devised by Sir Francis Bacon in 1616, to permit the chancery courts to enjoin proceedings in courts of law. See Mary B. McManamon, Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History, 46 Wash. & Lee L. Rev. 863, 888 n.164 (1989). Consistent with this long-standing distinction, then, courts interpreted the proviso to § 2a(15) of the 1898 Act to permit referees to enjoin parties from pursuing collateral litigation, as long as the referee did not directly restrain a court from acting. See, e.g., Stout v. Green, 131 F.2d 995, 996, 997 (9th Cir. 1942); Seattle Curb Exch. v. Knight (In re Cochran's Estate), 46 F.2d 34, 36 (9th Cir. 1931), aff'd 40 F.2d 282, 284-85 (W.D. Wash. 1930); In re Roger Brown & Co., 196 F. 758, 762 (8th Cir. 1912) (dicta); In re Coger, 319 F. Supp. 589, 601 (W.D. Va. 1970); Metzger's, 68 F. Supp. at 666-67; In re California Pea Prods., Inc., 37 F. Supp. 638, 662-63 (S.D. Cal. 1941); In re Lombardy Inn Co., 266 F. 394, 394-95 (D. Mass. 1919); In re Mustin, 165 F. 506, 507-08 (N.D. Ala. 1908); In re Adams, 134 F. 142, 142-43 (D. Conn. 1905); In re Martin, 183 F. 753, 753-54 (W.D.N.Y. 1900); In re Steuer, 104 F. 976, 980 (D. Mass. 1900) (dicta); In re Booth, 96 F. 943, 943-44 (N.D. Ga. 1899); E.C. Ernst Int'l Corp. v. Andary (In re E.C. Ernst, Inc.), 1 B.R. 262, 264 (Bankr. S.D.N.Y. 1979). For a case in which it was necessary for a federal district court, sitting as a court of bankruptcy, to directly enjoin a state court judge, see In re William E. De Lany & Co., 124 F. 280 (N.D.N.Y. 1903).
C. Nondebtor Stays and Releases Under the Bankruptcy Act of 1898

In its *Continental Illinois* decision, the Supreme Court planted the seeds for temporary nondebtor stays in reorganization cases, but they would not fully take root until passage of the Bankruptcy Reform Act of 1978, over forty years later. Even though the reasoning of the *Continental Illinois* case would support temporary nondebtor stays, the lower courts consistently concluded that they had no jurisdiction to enjoin nondebtor actions.

While *Continental Illinois* established the distinction between jurisdiction to adjudicate and jurisdiction to enjoin, in discussing the injunctive powers of courts of bankruptcy, the Court explained them as a corollary of jurisdiction to adjudicate. While the two are not coextensive, they are inextricably intertwined:

[C]ourts of bankruptcy . . . are essentially courts of equity, and their proceedings inherently proceedings in equity . . . . The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity . . . . An injunction may be issued . . . for the purpose of protecting and preserving the jurisdiction of the court “until the object of the suit is accomplished and complete justice done between the parties.”

Of course, this was merely an explication of the general “in aid of jurisdiction” powers of federal courts. In discussing the jurisdiction that a reorganization court protects and preserves by injunction, though, the Court said:

By section 2(15) of the Bankruptcy Act, courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . . It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained . . . . But a [reorganization] proceeding . . . is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is

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125 394 U.S. at 675-76 (citing former version of All Writs Act and quoting *Looney v. Eastern Tex. R.R. Co.*, 247 U.S. 214, 221 (1918)).
126 See supra Part III.A.
to defeat the very end the accomplishment of which was the sole aim of the [reorganization statute], and thereby to render its provisions futile.\textsuperscript{127}

Thus, the Court viewed § 2a(15) as a broad grant of power to enjoin actions that would interfere with the reorganization proceedings, which conceivably could include actions and suits between nondebtors. Nonetheless, the lower courts did not take the Continental Illinois rationale that far under the 1898 Act.

An oft-repeated principle under the 1898 Act was that Congress did not give federal courts jurisdiction over all controversies that are in some way related to pending bankruptcy proceedings.\textsuperscript{128} And, as a general matter, the courts concluded that there was no bankruptcy jurisdiction whatsoever, neither summary nor plenary, to decide disputes between two nondebtor, even if the cause of action arose out of the parties' relationship with the debtor.\textsuperscript{129} Of course, absence of jurisdiction to adjudicate disputes between

\textsuperscript{127} 294 U.S. at 676 (citations omitted). The district court's order enjoining sale of pledged collateral was based on a finding that sale of the collateral "would hinder, impede, obstruct, delay, and in effect prevent the orderly preparation and consummation of a plan of reorganization." Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co. (In re Chicago, R.I. & P. Ry. Co.), 72 F.2d 443, 447 n.3 (7th Cir. 1934) (setting forth findings and order of district court), aff'd, 294 U.S. 648 (1935). The court of appeals characterized this as a finding that sale of the pledged collateral would make reorganization "impossible." Id. at 451 ("it would be quite impossible to proceed with any reorganization"), aff'd, 294 U.S. at 664-67, 678-79.

\textsuperscript{128} This principle is most often attributed to Callaway v. Benton, 336 U.S. 132, 142 (1949) ("There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."). This case is discussed infra Part III.G.2.

\textsuperscript{129} See, e.g., Uranga v. Geib (In re Paso Del Norte Oil Co.), 755 F.2d 421, 423-25 (5th Cir. 1985); Gordon v. Shirley Duke Assocs. (In re Shirley Duke Assocs.), 611 F.2d 15, 18-20 (2d Cir. 1979); First State Bank & Trust Co. v. Sand Springs State Bank, 528 F.2d 350, 353-54 (10th Cir. 1976); Richmond v. United States (In re Richmond), 546 F.2d 458, 463-65 (3d Cir. 1972); Kaplan v. Gutman, 217 F.2d 481, 484-85 (9th Cir. 1954); Evarts v. Eloy Gin Corp., 204 F.2d 712, 717 (9th Cir. 1953); Sylvan Beach, Inc. v. Koch, 140 F.2d 852, 861-62 (8th Cir. 1944); Central Hanover Bank & Trust Co. v. Kelby, 133 F.2d 873, 875-76 (2d Cir. 1943); McGrath v. Lubliner & Trinz Theatres, Inc. (In re Lubliner & Trinz Theatres, Inc.), 100 F.2d 646, 650-52 (7th Cir. 1938); Morrison v. Rockhill Improvement Co., 91 F.2d 639, 642 (10th Cir. 1939); Smith v. Chase Nat'l Bank, 84 F.2d 608, 612-16 (8th Cir. 1936); Nixon v. Michaels, 38 F.2d 420, 422-25 (8th Cir. 1928); Crocker v. Chakos (In re Chakos), 24 F.2d 482, 485 (7th Cir. 1928); Henrie v. Henderson, 145 F. 316, 319-20 (4th Cir. 1906); Brumby v. Jones, 141 F. 318, 320-23 (5th Cir. 1905).

Section 2a(6) of the 1898 Act conferred bankruptcy jurisdiction to "[b]ring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy." 1898 Act § 2a(6). Thus, bankruptcy courts would adjudicate a nondebtor controversy only if they thought resolution of the dispute was "necessary" to administration of the debtor's estate, with the necessity standard being "that the bankruptcy court does have jurisdiction to resolve a dispute between third parties if it is impossible to administer completely the estate of the bankrupt without determining the controversy." Uranga, 755 F.2d at 425 (quoting First State Bank, 528 F.2d at 353 (emphasis added)). Given such a stringent standard, very few nondebtor disputes were considered necessary to administration of the debtor's estate, and these generally concerned conflicting claims to ownership of the stock interests or debt obligations of the debtor. See, e.g., McGuire v. Cohen (In re Brookwood
nondebtors need not have been fatal to attempts to enjoin litigation of such disputes during reorganization proceedings. To the extent that collateral litigation between nondebtors could improperly interfere with the debtor's reorganization efforts, the rationale of Continental Illinois would seem to support bankruptcy jurisdiction to temporarily stay such suits by injunction, without regard to the court's jurisdiction to adjudicate the nondebtor action.

Lower courts, however, refused to approve even temporary stays of suits between nondebtors, reasoning primarily from their lack of bankruptcy jurisdiction to adjudicate nondebtor disputes—often emphasizing the statutory jurisdictional grant in reorganization cases over "the debtor and its property" and the fact that these nondebtor suits were not directed against the debtor or its property. When presented with an argument, à la Continental Illinois, of interference with the debtor's reorganization, the courts almost invariably concluded that any incidental effects of a nondebtor action on the

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COUNTRY CLUB), 338 F.2d 562, 564 (7th Cir. 1964) (resolution of dispute over ownership of reorganization debtor's stock necessary for purposes of shareholder voting on plan); Reconstruction Fin. Corp. v. Riverview State Bank, 217 F.2d 455, 458-60 (10th Cir. 1954) (resolution of dispute over ownership of secured claim necessary to creditor voting on debtor's plan of reorganization); In re International Power Sec. Corp., 170 F.2d 399, 402-06 (3d Cir. 1948) (resolution of dispute over ownership of debtor's bonds necessary to determine debtor's setoff rights); In re Burton Coal Co., 126 F.2d 447, 448-49 (7th Cir. 1942) (determination of validity of creditor's lien on shares of stock in reorganization debtor necessary to determine validity and extent of creditors' secured and/or unsecured claims against the debtor for purposes of voting on plan of reorganization); J. Henry Schroder Banking Corp. v. L.S. Branch Mfg. Corp. (In re Railroad Supply Co.), 78 F.2d 530, 531-33 (7th Cir. 1935) (resolution of dispute over ownership of claim against debtor necessary to determine party entitled to dividends from estate); New York Life Ins. Co. v. Irving Trust Co. (In re United Cigar Stores Co.), 75 F.2d 290, 291-92 (2d Cir. 1935) (same).

The various reorganization chapters under the 1898 Act all contained a nearly identical jurisdictional grant of "exclusive jurisdiction of the debtor and its property, wherever located." 1898 Act § 111 (Chapter X corporate reorganizations). See also id. § 311 (Chapter XI arrangements); id. § 411 (Chapter XII real property arrangements); id. § 611 (Chapter XIII wage earners' plans). The railroad reorganization jurisdictional grant at issue in Continental Illinois was also one of "exclusive jurisdiction of the debtor and its property wherever located." 294 U.S. at 663 n.4 (quoting § 77(a) of the 1898 Act). Nonetheless, in its discussion of the source of the reorganization court's injunctive powers, the Supreme Court emphasized the court's jurisdiction over the debtor's reorganization, not its jurisdiction over the debtor's property. See id. at 675-76.

See, e.g., Amadori Constr. Co. v. Hoffenberg (In re Stanndco Developers, Inc.), 534 F.2d 1050, 1052-54 (2d Cir. 1976) (suit against debtor's surety); In re Unishop, Inc., 494 F.2d 689, 690 (2d Cir. 1974) (suit against debtor's subsidiary); United States v. Ash (In re Weissberg Corp.), 458 F.2d 975, 976 (7th Cir. 1972) (suit against debtor's trustee as responsible party for taxes of debtor's subsidiary); Baker & Taylor Drilling Co. v. Stafford, 369 F.2d 551, 556 (9th Cir. 1966) (suit against debtor's co-owner of oil well); In re South Jersey Land Corp., 361 F.2d 610, 613-14 (3d Cir. 1966) (foreclosure suit against property of debtor's subsidiary); In re Journal-News Corp., 193 F.2d 492, 492 (2d Cir. 1951) (sale of debtor's stock by a shareholder); Curtis v. O'Leary, 131 F.2d 240, 244-46 (8th Cir. 1942) (suit between debtor's shareholders for fraud and breach of contract in sale of debtor's stock); Thomas v. Rossetter (In re 4145 Broadway Hotel Co.), 124 F.2d 891, 891-92 (7th Cir. 1941) (lien suit against debtor's reorganization trustee); In re Prudence Bonds Corp., 79 F.2d 212, 215-17 (2d Cir. 1935) (suit on notes and mortgages issued by nondebtor and guaranteed by debtor's affiliate). But see In re Federal Biscuit Co., 203 F.3d, 38-39 (2d Cir. 1913) (suit against debtor's surety, where debtor's assets secured indemnity obligation to surety, stayed pending plenary suit to determine whether transfer of security was preferential transfer of debtor's assets).
debtor or its reorganization attempt were insufficient to overcome the perceived jurisdictional impediment.\(^{132}\)

\(^{132}\)See, e.g., Parkview-Gem, Inc. v. Stein (In re Parkview-Gem, Inc.), 516 F.2d 807, 811 (8th Cir. 1975) (even if "the termination of the lease of the [debtor's] subsidiary would adversely affect the debtor," such "an adverse affect upon the debtor is not an adequate basis for granting the bankruptcy court jurisdiction"); Feldman v. Trustees of Beck Indus., Inc. (In re Beck Indus., Inc.), 479 F.2d 410, 419 (2d Cir. 1973) (no jurisdiction to enjoin state court suit against debtor's subsidiary, even if "restraint of the . . . suit will facilitate . . . administration of the debtor's estate, already a complicated task, since . . . will otherwise be forced to divert their energies to defense of that suit in an inconvenient forum in order to preserve the value of the debtor's stock interest in its Subsidiary"); In re Magnus Harmonica Corp., 237 F.2d 867, 869 (3d Cir. 1956) (officers/guarantors' indemnification claims against debtor provided no basis for injunction of creditor's suit against officers/guarantors); In re Magnus Harmonica Corp., 233 F.2d 803, 803-04 (3d Cir. 1956) (improper to enjoin creditor's suit against debtor's officers/guarantors, even if officers' assets subject to execution in suit were essential patents being licensed to debtor); First Citizens Bank & Trust Co. v. Martin (In re Hotel Martin Co.), 94 F.2d 643, 643 (2d Cir. 1938) (no jurisdiction to enjoin sale of bonds issued by debtor, owned by debtor's president/trustee and posted as collateral for loan to president, and "[n]o sufficient reason is advanced why the sale or disposition of the [debtor's] bonds would in any wise interfere or affect the reorganization of the debtor"); Northern Paper Mills v. Cary (In re Patten Paper Co.), 86 F.2d 761, 762, 764-66 (7th Cir. 1936) (no jurisdiction to enjoin foreclosure sale of stock owned and pledged by nondebtors to permit reorganization debtor and nondepositors to jointly sell their stock as a control block at substantially higher per share sales price); General Am. Tank Car Corp. v. Adolf Gobel, Inc. (In re Adolf Gobel, Inc.), 80 F.2d 849, 852-53 (2d Cir. 1936) ("The argument that [the statute] has for its object reorganization, and grants to the court power to enjoin an action in the state court which renders reorganization more difficult, is . . . without merit. . . . Though facility in reorganization is desirable, it is not the sole consideration. It is merely a basis for the exercise of jurisdiction in cases where jurisdiction exists.") (citation omitted); In re New York & Worcester Express, Inc., 294 F. Supp. 1163, 1164-65 (S.D.N.Y. 1968) (no jurisdiction to enjoin labor grievance proceedings against debtor's owner, even if an award would impede financing of debtor's reorganization and even if owner will file indemnification claim against debtor); Roll Form Prods., Inc. v. All State Trucking Co. (In re Roll Form Prods., Inc.), 8 B.R. 479, 483-85 (Bankr. S.D.N.Y.) (mere fact that carrier's efforts to collect shipping charges from debtor's customers and suppliers was hurting debtor's business "cannot be deemed an interference with the administration of a [reorganization] case justifying the issuance of an injunction under § 2(a)(15)"), rev'd on other grounds, 662 F.2d 150 (2d Cir. 1981). Although reported opinions refused to approve temporary nondebtor stays in reorganization proceedings, the practice may have existed nonetheless. See, e.g., In re Nine N. Church St., Inc., 82 F.2d 186, 188 (2d Cir. 1936) (in disapproving a permanent nondebtor release and injunction, court noted that upon commencement of reorganization proceedings, reorganization court enjoined state court action against nondebtor guarantor).

In a prominent and rare 1898 Act case that approved a nondebtor injunction, the court did so only after concluding that it did have jurisdiction to adjudicate creditors' fraud claims against the debtor's subsidiaries, through necessity jurisdiction, and only after permitting the creditors to present those nondebtor fraud claims for resolution in the debtor's reorganization proceedings. See In re Equity Funding Corp., 396 F. Supp. 1266, 1268-70, 1271-74 (C.D. Cal. 1975). See also supra note 129, discussing necessity jurisdiction. The nondebtor fraud actions at issue were numerous individual and class actions arising out of transactions in the debtor's securities, and most of the suits had been consolidated in multi-district litigation proceedings in federal court. See Equity Funding, 396 F. Supp. at 1268. The court of bankruptcy found necessity jurisdiction over these nondebtor suits, because stock in the debtor's subsidiaries served as collateral for secured bank loans, and the outcomes of the nondebtor actions could have a material effect on the value of that collateral. Therefore, resolution of the nondebtor claims was deemed necessary to valuation of the secured and/or unsecured portions of the banks' claims against the debtor for purposes of voting and proper claim treatment under the debtor's plan of reorganization. See id. at 1272-74. See also In re Samoset Assocs., 654 F.2d 247, 253-54 (1st Cir. 1981) (bankruptcy judge could enjoin state court litigation between nondebtors where resolution of dispute under three-way contract involving
Because courts under the 1898 Act, as a rule, refused to enjoin suits between nondebtors, even temporarily, it is not at all surprising that these courts also rejected occasional efforts to obtain permanent nondebtor releases through a plan of reorganization—most of which involved plan provisions that purported to release contractual guarantors from their personal liability for the debtor’s obligations. The courts’ apprehensions about nondebtor injunctions, however, disappeared with the enactment of the Bankruptcy Reform Act of 1978.

D. TEMPORARY NONDEBTOR STAYS UNDER THE BANKRUPTCY REFORM ACT OF 1978

The Bankruptcy Reform Act of 1978 brought sweeping changes to bankruptcy law, repealing the 1898 Act and enacting the Bankruptcy Code. Undoubtedly the most significant changes came through an expansive grant of federal bankruptcy jurisdiction. The courts promptly seized upon this enlarged bankruptcy jurisdiction to find jurisdiction to enjoin nondebtor actions, and the Supreme Court recently held that federal courts do have bankruptcy jurisdiction to temporarily stay nondebtor actions.

debtor was necessary to administer estate completely and bankruptcy judge would adjudicate the nondebtors’ dispute; In re Bargain City U.S.A., Inc., 212 F. Supp. 111, 115-16 (E.D. Pa. 1962) (lessor’s state court claim against debtor’s assignor enjoined and lessor could prosecute its nondebtor action against assignor in debtor’s arrangement proceedings). The manner in which the Equity Funding court subsequently resolved the enjoined nondebtor actions, though, made the Equity Funding injunction resemble a permanent nondebtor release. The plan of reorganization approved by the court imposed a mandatory settlement of the fraud claims against the debtor’s subsidiaries. See In re Equity Funding Corp., 416 F. Supp. 132, 139, 142, 150-52, 154 (C.D. Cal. 1975). See Brubaker, supra note 24, at 972-80 (discussing relationship between nondebtor releases and mandatory class actions).

See, e.g., Union Carbide Corp. v. Newboles, 686 F.2d 593, 594-95 (7th Cir. 1982) (refusing to give res judicata effect to plan release of contractual guarantors of debtor’s obligations); Commercial Wholesalers, Inc. v. Investors Commercial Corp., 172 F.2d 800, 801 (9th Cir. 1949) (final decree, entered after plan of arrangement was confirmed, purporting to release nondebtors and permanently enjoin suits against them was “void for want of jurisdiction”); Weber v. Diversey Bldg. Corp. (In re Diversey Bldg. Corp.), 86 F.2d 456, 456-58 (7th Cir. 1936) (reversing permanent injunction of suits against debtor’s guarantor entered in conjunction with plan release of guarantor); Nine N. Church St., 82 F.2d at 187-89 (same). Cf. In re Fruinence Bonds Corp., 79 F.2d 212, 215-17 (2d Cir. 1935) (no jurisdiction over notes and mortgages issued by nondebtor and guaranteed by debtor’s affiliate, so “[i]t follows that this property cannot be included in any plan or plans for reorganization of the debtor; hence it was error to stay the prosecution of the [creditor’s] foreclosure suit”); In re 1775 Broadway Corp., 79 F.2d 108, 110 (2d Cir. 1935) (stating in dicta that “[reorganization] court did not have jurisdiction of nonassenting noteholders to release debt claims against the [nondebtor] seller of the [debtor’s] notes” in approving debtor’s plan of reorganization); In re Emergency Beacon Corp., 40 B.R. 113, 115-18 (Bankr. S.D.N.Y. 1984) (no jurisdiction to permanently enjoin creditor from pursuing action against reorganization debtor’s guarantor). But cf. Equity Funding, 416 F. Supp. at 139, 142, 150-52, 154, discussed supra note 132.


135See id. §§ 401, 402(a), 92 Stat. at 2682.

136Celotex Corp. v. Edwards, 514 U.S. 300 (1995), discussed infra notes 145-161 and accompanying text. The Supreme Court’s decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), holding the Reform Act’s jurisdictional provisions unconstitutional, was not directed
The Reform Act created federal bankruptcy jurisdiction over all matters “related to” a bankruptcy case.\textsuperscript{137} The Reform Act also created a new court to exercise this broad bankruptcy jurisdiction: an adjunct to each federal district court, denominated the “United States Bankruptcy Court for the district.”\textsuperscript{138} Thus, the new jurisdictional scheme removed the summary in \textit{rem} strictures that confined the power of the former referees and gave the newly created bankruptcy courts both in \textit{rem}\textsuperscript{139} and full in \textit{personam} jurisdiction over any controversy related to a bankruptcy case.\textsuperscript{140}

The Reform Act provisions regarding injunctive powers of the new bankruptcy courts were remarkably similar to those under the 1898 Act. On their face, then, those provisions would appear to give bankruptcy courts no more power to enjoin actions between nondebtors than existed under the

to the broad grant of bankruptcy jurisdiction \textit{per se}; it only condemned the exercise of the full range of bankruptcy jurisdiction by non-Article III adjuncts. For a discussion of the Marathon case, see infra Part III.E. The Celotex holding did not require consideration of the implications of Marathon. See infra notes 179-181 and accompanying text. The impact of the Marathon holding on jurisdiction to enjoin nondebtor actions is addressed infra Part III.E-G.1.

\textsuperscript{137}The Reform Act gave federal district courts “original and exclusive jurisdiction of all [bankruptcy] cases” and “original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code] or arising in or related to [bankruptcy] cases.” See Pub. L. No. 95-598, § 241(a), 92 Stat. at 2668 (enacting 28 U.S.C. § 1471(a)-(b) (1982) (repealed 1984)).

\textsuperscript{138}Id. § 201(a), 92 Stat. at 2657 (enacting 28 U.S.C. § 151(a) (1982) (repealed 1984)). Although bankruptcy jurisdiction was initially vested in federal district courts, the Reform Act provided that “the bankruptcy court for the district in which a [bankruptcy] case is commenced shall exercise all of the jurisdiction conferred by this section on the district courts,” id. § 241(a), 92 Stat. at 2668 (enacting 28 U.S.C. § 1471(c) (1982) (repealed 1984)), with review only through ordinary appellate procedures, see id. §§ 201(a), 236(a), 238(a), 241(a), 92 Stat. at 2659, 2667, 2668, 2671 (enacting 28 U.S.C. §§ 160, 1293, 1334, 1482 (1982) (amended and repealed 1984)). The Reform Act’s jurisdictional provisions were to be phased in over a transition period, with former referees continuing service as bankruptcy judges and exercising all of the expanded jurisdiction granted to the new bankruptcy courts. See id. §§ 404-405, 92 Stat. at 2683-85 (repealed 1984).

\textsuperscript{139}The in \textit{rem} jurisdiction of the new bankruptcy courts came via a grant of “exclusive jurisdiction of all of the property, wherever located, of the debtor, as of commencement of such [bankruptcy] case.” Pub. L. No. 95-598, § 241(a), 92 Stat. at 2669 (enacting 28 U.S.C. § 1471(e) (1982) (repealed 1984)). This was substantially the same as the summary in \textit{rem} jurisdiction of reorganization courts under the 1898 Act. See supra note 130; 6 Moore \textit{et al.}, supra note 48, at ¶ 3.05 (Chapter X corporate reorganizations); 8 id. ¶ 3.02 (Chapter XI arrangements); 9 id. ¶ 3.01[1]-[2] (Chapter XII real property arrangements).

\textsuperscript{140}Legislative history described the change as follows:

Actions that formerly had to be tried in State court or in a Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in \textit{personam} jurisdiction also as in \textit{rem} jurisdiction to handle everything that arises in a bankruptcy case.

1898 Act.\textsuperscript{141} But with expanded bankruptcy jurisdiction, the 1898 Act’s presumed jurisdictional obstacle to such injunctions evaporated. The courts quickly concluded that § 105 of the Code, in conjunction with the broad jurisdictional grant, gave bankruptcy courts jurisdiction to enjoin an action between non债务ors if the action was, in the words of the jurisdictional grant, “related to” the pending bankruptcy case.\textsuperscript{142} In Chapter 11 reorganization cases, the courts have held that jurisdiction to enjoin attaches if prosecution of the nondebtor action would interfere with the debtor’s prospects for a successful reorganization.\textsuperscript{143} Of course, this approach to jurisdiction to stay

\textsuperscript{141}Section 105(a) of the new Bankruptcy Code gave bankruptcy courts substantially the same power as referees exercised to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a) (1994). See 1898 Act § 2a(15), quoted supra note 93. This power also came with the same proviso as under § 2a(15) of the 1898 Act, that “[a] bankruptcy court . . . may not enjoin another court.” Pub. L. No. 95-598, § 241(a), 92 Stat. at 2671 (enacting 28 U.S.C. § 1481 (1982) (repealed 1984)). See supra note 122.


\textsuperscript{143}See, e.g., Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 979 (1st Cir. 1995) ("such [nondebtor] actions would entail or threaten adverse ‘impact’ on the administration of the chapter 11 estate"); Willis v. Celotex Corp., 978 F.2d 146, 149 (4th Cir. 1992) ("the bankruptcy court may ‘enjoin a variety of [nondebtor] proceedings . . . which will have an adverse impact on the Debtor’s ability to formulate a Chapter 11 plan’") (quoting Johns-Manville Corp. v. Asbestos Litig. Group (In re Johns-Manville Corp.), 40 B.R. 219, 226 (S.D.N.Y. 1984)); Ober v. Actna Cas. & Sur. Co. (In re A.H. Robins Co.), 828 F.2d 1023, 1025 (4th Cir. 1987) (nondebtor “litigation that could interfere with the reorganization of the debtor”); F.T.L., Inc. v. Crestar Bank (In re F.T.L., Inc.), 152 B.R. 61, 63 (Bankr. E.D. Va. 1993) ("to provide the debtor with a realistic opportunity to formulate a plan of reorganization"); In re Celotex Corp., 128 B.R. 478, 484 (Bankr. M.D. Fla. 1991) ("the role of Section 105 in this type of case is first to protect the reorganization process"); In re John Renton Young, Ltd., 87 B.R. 635, 636 (Bankr. D. Nev. 1988) ("enjoin activities which will allegedly interfere with [debtor’s] ability to reorganize [are within] subject matter jurisdiction"); In re Monroe Well Serv., Inc., 67 B.R. 746, 753 (Bankr. E.D. Pa. 1986) (jurisdiction depends upon “the impact upon the debtors which would follow if the lien creditors were allowed to exercise their state created rights against [nondebtors]”); Rustic Mfg., Inc. v. Marine Bank Dane County (In re Rustic Mfg., Inc.), 55 B.R. 25, 27 (Bankr. W.D. Wis. 1985) ("a significant impact on the debtor’s chances to reorganize [is] sufficient relation to the bankruptcy case . . . to secure jurisdiction");
nondebtor actions is precisely in accord with the Supreme Court's view of the role of injunctions in reorganization cases, as originally articulated in the Continental Illinois case: a tool to protect and promote the debtor's reorganization effort. Moreover, the Supreme Court recently held this to be a proper jurisdictional foundation for temporary nondebtor stays in the case of Celotex Corp. v. Edwards.

The nondebtor stay the Supreme Court considered in Celotex was issued in the Chapter 11 reorganization proceedings of Celotex Corp.—one of many asbestos manufacturers whose massive potential liability for asbestos personal injuries precipitated a Chapter 11 filing. When Celotex filed its Chapter 11 petition it was appealing adverse judgments in over 100 personal injury suits in state and federal courts. For each of these judgments on appeal Celotex had posted a supersedeas bond to stay collection on the judgment pending the outcome of the appeal. A third party acted as surety on the bond, undertaking to pay the amount of the judgment should Celotex lose the appeal. Celotex, in turn, not only promised to pay the surety in the event it paid on the supersedeas bond, but also secured this obligation by granting the surety various property interests as collateral. In many instances, Celotex's liability insurers served as sureties for Celotex's supersedeas bonds, and often Celotex secured its reimbursement obligation on those bonds by promising the insurance company an offset against any insurance proceeds Celotex would otherwise be entitled to receive.

Shortly after Celotex filed Chapter 11, the bankruptcy court issued a § 105 injunction as a supplement to the automatic stay of § 362, staying all proceedings involving Celotex, including any action against a supersedeas bond posted by Celotex. The bankruptcy court refused all requests to

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145 314 U.S. 300 (1945).


148 See 140 B.R. at 913-14; 128 B.R. at 479-80, 482-83. These supersedeas bonds involved several different sureties and 227 judgment creditors with judgments totaling nearly $70 million. See 514 U.S. at 302 n.2, 304 n.4; 140 B.R. at 916; 128 B.R. at 479-80, 482-83. These suits in which judgment was already entered against Celotex were but a small subset of the more than 141,000 asbestos personal injury suits pending against Celotex when Celotex filed its Chapter 11 petition. See 128 B.R. at 479.


150 See 514 U.S. at 303. The bankruptcy court subsequently lifted the stay to allow pending appeals to
proceed against Celotex's sureties, primarily citing the sureties' corresponding offset rights against Celotex's insurance proceeds and the difficulties this would cause in Celotex's attempts to resolve coverage disputes with its insurers, which "may well be the linchpin of [Celotex's] formulation of a feasible plan."\textsuperscript{151}

Despite the bankruptcy court's § 105 stay, some plaintiffs whose judgments were affirmed on appeal sought permission to execute on posted supersedeas bonds, not from the bankruptcy court, but from those courts in which the bonds had been posted.\textsuperscript{152} The Fifth Circuit Court of Appeals affirmed a Texas district court that permitted plaintiffs to execute on a Celotex supersedeas bond, but the Supreme Court reversed the Fifth Circuit decision.\textsuperscript{153} Because it was not a direct review of the bankruptcy court's § 105 stay order, the Supreme Court did not assess the propriety of the injunction. Rather, the Court limited its inquiry to whether the bankruptcy court had jurisdiction to stay execution on the supersedeas bond—an action against a nondebtor—and thus was an order that should be respected in the collateral execution proceedings.\textsuperscript{154}

In approving execution on the supersedeas bond, the Fifth Circuit acknowledged that jurisdiction over any matter "related to" a bankruptcy case was broad enough to encompass temporary stays of actions against nondebtors.\textsuperscript{155} But the "related to" link the Fifth Circuit applied was whether "pursuing actions pending in other courts [would] threaten the in-

\textsuperscript{151} 140 B.R. at 915. The court also relied on the possibility that certain judgment creditors' claims might be subject to subordination or avoidance pursuant to the Bankruptcy Code. See id. at 914. Thus, the bankruptcy court continued the § 105 stay of actions against sureties, but set a deadline for Celotex to commence any action to avoid or subordinate judgment creditors' claims. In order to preserve the status quo, the court also set forth conditions to assure that judgment creditors' rights against the sureties were adequately protected pending formulation of a plan of reorganization that could comprehensively provide for Celotex's various obligations, presumably with payment in full for any bonded judgment creditor whose claim was not avoided or subordinated. See id. at 914-17.

\textsuperscript{152} When a federal district court in Virginia granted permission to execute on a supersedeas bond, the Fourth Circuit vacated the order, holding that the bankruptcy court was within its jurisdiction in enjoining actions against Celotex's sureties. See Willis v. Celotex Corp., 978 F.2d 146, 149-50 (4th Cir. 1992).


\textsuperscript{154} 514 U.S. at 312-13. The Court applied the standards for determining when persons subject to an injunctive order are bound to obey it, namely that the order was issued by a court with jurisdiction and that the order had more than a frivolous pretense of validity. See id. at 306 (citing GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 386-87 (1980)).

\textsuperscript{155} See 6 F.3d at 318.
tegrity of a bankrupt’s estate.”156 Because the court concluded that the unfavorable outcome of its appeal left Celotex with no further interest in the supersedeas bond, the court perceived no threat to the integrity of Celotex’s estate from execution on the bond.157 The Supreme Court, though, evidently viewed the Fifth Circuit’s approach as a throwback to the in rem jurisdictional precepts that deterred lower courts from enjoining nondebtor actions under the 1898 Act,158 saying “that the ‘related to’ language . . . must be read to give . . . jurisdiction over more than simple proceedings involving the property of the debtor or the estate.”159 Instead, the Court reaffirmed the vitality of the Continental Illinois rationale for injunctions in reorganization cases, prominently citing that case for the proposition that jurisdiction may extend more broadly in reorganization cases than in liquidation cases.160 Consistent with Continental Illinois, the Court also adopted the approach of the lower courts that find a sufficient “related to” connection to temporarily stay a nondebtor action if continuation of the action would impede the debtor’s ability to successfully reorganize.161

The one thing that Celotex makes crystal clear is that the supposed jurisdictional constraints under the 1898 Act, which prevented lower courts from extending Continental Illinois to temporary stays of nondebtor actions, are now gone. Jurisdiction over Chapter 11 reorganization proceedings includes the power to protect that jurisdiction by staying suits that could endanger the debtor’s ability to reorganize, even if those suits are solely between nondebtors and are not directed against the debtor’s property. Nonetheless, the Celotex case expressly left open important jurisdictional questions with respect to temporary nondebtor stays, and even more arise when one attempts to apply this jurisdictional framework to permanent nondebtor releases. All of these questions revolve around the 1984 bankruptcy jurisdiction amendments, which were necessitated when the Supreme Court

156Id. at 320 (citing In re Davis, 730 F.2d 176, 184 (5th Cir. 1984)).
157See id.
158See supra Part II.C.
159514 U.S. at 308.
161The Supreme Court upheld the jurisdiction of the Celotex bankruptcy court to stay execution against Celotex’s sureties based upon the bankruptcy court’s findings that bonded judgment creditors’ immediate execution on the bonds, in the words of the Court, “would have a direct and substantial adverse effect on Celotex’s ability to undergo a successful reorganization.” Id. at 310. It is unclear whether the Court intended the “direct and substantial adverse effect” language as a jurisdictional prerequisite for nondebtor stays. In surveying circuit court opinions that the Court said are in accord with its holding, it described the jurisdictional connection as “affect administration of debtor’s reorganization plan,” “might impede the reorganization process,” and “would interfere with debtor’s reorganization.” Id. at 310-11. These characterizations suggest that the Court was not announcing a test for the necessary jurisdictional nexus to stay a nondebtor action.
declared the Reform Act’s jurisdictional scheme unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*\(^{162}\)

**E. Marathon and the 1984 BAFJA Amendments**

After the Supreme Court struck down the Reform Act’s jurisdictional provisions as unconstitutional, Congress responded, not by reducing the scope of federal bankruptcy jurisdiction, but by reducing the jurisdiction exercised by the adjunct bankruptcy judges. So while *Celotex* holds that temporary nondebtor stays are within the bounds of federal bankruptcy jurisdiction, the lingering uncertainty is whether an adjunct bankruptcy court can issue such a nondebtor injunction.

The adjunct bankruptcy courts created by the 1978 Reform Act exercised all of the expanded federal bankruptcy jurisdiction,\(^{163}\) yet the Reform Act bankruptcy judges were not given Article III status, with its protections of lifetime tenure and undiminished compensation.\(^{164}\) In *Marathon*, the Court held that this jurisdictional design violated Article III as applied to the case before it, a suit by a Chapter 11 debtor to recover damages from a third party for breach of contract.\(^{165}\) Of course, under the 1898 Act, such a suit would have been a plenary action against an adverse party, outside the summary jurisdiction of a bankruptcy referee, requiring plenary suit in state court or a federal district court.\(^{166}\) Under the Reform Act, however, this suit fell within the broad “related to” jurisdiction of the new bankruptcy courts.\(^{167}\) A plurality of the Court concluded that this grant of jurisdiction to bankruptcy judges had “impermissibly removed most, if not all, of the essential attributes of the judicial power” from the Art. III district court, and ha[d] vested those attributes in a non-Art. III adjunct.”\(^{168}\)

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\(^{162}\) 458 U.S. 50 (1982).

\(^{163}\) See supra notes 137-140 and accompanying text.

\(^{164}\) U.S. Const. art. III, § 1. Specifically, the bankruptcy judges were to be appointed by the President for only fourteen-year terms, and they were subject to removal during their terms by their circuit judicial councils. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 201(a), 92 Stat. 2549, 2657-58 (enacting 28 U.S.C. §§ 152-153 (1982) (repealed 1984)). In addition, the Reform Act set bankruptcy judges’ salaries, but made them subject to adjustment under the Federal Salary Act. See id. § 201(a), 92 Stat. at 2558 (enacting 28 U.S.C. § 154 (1982) (repealed 1984)).

\(^{165}\) See 438 U.S. at 56 (suit for breach of contract and warranty, with allegations of misrepresentation, coercion, and duress).

\(^{166}\) See supra notes 95-105 and accompanying text.

\(^{167}\) See 458 U.S. at 54.

\(^{168}\) 458 U.S. at 87 (Brennan, J., plurality opinion). The concurring justices agreed that jurisdiction to adjudicate the debtor’s action, which would exist in essentially the same form even if the debtor had not filed bankruptcy, could only be vested in an Article III judge. See id. at 89-92 (Rehnquist, J., concurring opinion). Perhaps the broadest proposition on which both the plurality and concurrence agreed was this: “It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against [defendant] Marathon.” Id. at 87 n.40 (Brennan, J., plurality opinion). See also id. at 92 (Burger, J., dissenting) (describing narrow basis of concurrence as holding of
Congress’ response to the *Marathon* holding was the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) of 1984,\(^{169}\) which put in place the current bankruptcy court and jurisdictional structure. The BAFJA amendments are essentially a return to a system of jurisdiction by referral, similar to that of the 1898 Act.\(^{170}\) The BAFJA amendments retained the adjunct bankruptcy courts for each district and retained the Reform Act’s broad grant of bankruptcy jurisdiction over any matter “related to” a bankruptcy case.\(^{171}\) Unlike the Reform Act, however, the BAFJA amendments did not commit all of this jurisdiction to bankruptcy judges.

The BAFJA amendments permit the district courts to refer to bankruptcy judges all bankruptcy cases and proceedings within the district court’s broad bankruptcy jurisdiction.\(^{172}\) Yet, the power of a bankruptcy judge with

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\(^{170}\) A bankruptcy judge is a non-Article III “unit of the district court,” with the bankruptcy judge serving “as a judicial officer of the district court.” 28 U.S.C. § 151 (1994). Bankruptcy judges are appointed by the circuit courts of appeals for fourteen-year terms. See id. § 152(a)(1). As under both the 1898 Act and the Reform Act, federal district courts continue to be the initial repositories of bankruptcy jurisdiction, with the BAFJA jurisdictional grant being exactly the same as that of the Reform Act: “original and exclusive jurisdiction of all [bankruptcy] cases” and “original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to [bankruptcy] cases.” Id. § 1334(a)-(b). See supra note 137 (quoting Reform Act jurisdiction provisions). The district courts also continue to have “exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such [bankruptcy] case, and of property of the estate.” 28 U.S.C. § 1334(c). See supra notes 130 and 139 (quoting in *In re* jurisdiction provisions of 1898 Act and Reform Act).

\(^{172}\) See 28 U.S.C. § 157(a). With one exception, every judicial district, by local rule, has provided that all bankruptcy cases and proceedings will be referred automatically to the bankruptcy court. See 1 King et al., supra note 41, ¶ 3.02[1], at 3-31; 1 Norton, supra note 23, § 4:18, at 4-93. The one exception is the District of Delaware, which recently revoked its standing orders of reference with respect to Chapter
respect to a referred proceeding differs markedly depending upon whether the proceeding constitutes what the statute denominates a "core proceeding[,] arising under [the Bankruptcy Code], or arising in a [bankruptcy] case," as contrasted with "a proceeding that is not a core proceeding but that is otherwise related to a [bankruptcy] case." In a core proceeding, a bankruptcy judge has the power to "hear and determine" the controversy and "enter appropriate orders and judgments," subject only to appellate review. A bankruptcy court can hear a noncore, "related to" proceeding. However, unless the parties consent to a final determination by the bankruptcy judge, the bankruptcy judge's jurisdiction in such a noncore proceeding is limited to submitting proposed findings of fact and conclusions of law to the district court, for entry of any final order or judgment after a de novo review. Thus, under the current jurisdictional system, determining which proceedings are within the core jurisdiction of bankruptcy courts is a critical inquiry.

The core/noncore distinction takes on peculiar twists as applied to nondebtor injunctions. The courts developed the jurisdictional test for temporary nondebtor stays before the 1984 BAFJA amendments and under the theory that they have jurisdiction to enjoin nondebtor actions "related to" the bankruptcy case. The Supreme Court subsequently approved this approach in Celotex. But under the BAFJA amendments establishing the core/noncore dichotomy, if the nondebtor action is a noncore, "related to"


173 See id. § 157(c)(1).
174Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

Id. § 157(b)(1). Initial appeals are to bankruptcy appellate panels composed of three bankruptcy judges unless either party elects to have such appeal heard by the district court. See id. § 158(c). Thereafter, appeal is to the courts of appeals. See id. § 158(d).

175 See supra Part III.D.

176 In that event, the bankruptcy judge's role is exactly the same as in a core proceeding. See id. § 157(c)(2).

177 A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Id. § 157(c)(1).
178 One author opines that "[t]he determination of whether or not a particular proceeding is a core proceeding may be among the most important questions in any bankruptcy case." 1 Norton, supra note 23, § 4:21, at 4-153.
179 See supra Part III.D.
proceeding, is a temporary stay of the nondebtor action now a matter outside the core jurisdiction of bankruptcy courts? The Celotex majority opinion expressly avoided that issue, because the parties did not raise it.\(^{180}\) The dissent, however, questioned both the core jurisdiction of the bankruptcy court and whether a bankruptcy court has any authority at all to enjoin collateral litigation.\(^ {181}\) Solving the core/noncore mystery, therefore, is a significant issue in its own right. More importantly, though, deciphering the jurisdictional obscurities of temporary nondebtor stays reveals the dubious jurisdictional basis for permanent nondebtor releases.

**F. Core Jurisdiction to Temporarily Stay Nondebtor Actions**

Although a nondebtor action is, at best, only a noncore proceeding outside a bankruptcy court's core jurisdiction to adjudicate, a bankruptcy judge nonetheless has core jurisdiction to temporarily stay a nondebtor action. The Continental Illinois distinction between jurisdiction to enjoin and jurisdiction to adjudicate\(^ {182}\) compels the conclusion that a bankruptcy judge's core jurisdiction to temporarily stay a nondebtor action is not dependent upon jurisdiction to adjudicate that nondebtor action.

Restricting the adjudicatory jurisdiction of bankruptcy courts to core proceedings was obviously an attempt to cure the constitutional infirmities of the Reform Act. The terminology of "core" bankruptcy proceedings has no statutory ancestors and is apparently taken from Justice Brennan's plurality opinion in Marathon, wherein he said that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case."\(^ {183}\) In considering the appropriate legislative response to Marathon, then, this terminology of "core" proceedings became a way of referring to those matters within the traditional, historical reach of bankruptcy laws and summary referee jurisdiction, and, therefore, presumably appropriate for adjudication by a non-Article III bankruptcy judge.\(^ {184}\)

\(^{180}\)The judgment creditor conceded that the bankruptcy court had jurisdiction to enjoin execution on the supersedeas bond if the execution proceedings were "related to" Celotex's bankruptcy, and that is the only issue decided by the majority opinion. See Celotex Corp. v. Edwards, 514 U.S. 300, 309 n.7 (1995) (Rehnquist, C.J.).

\(^{181}\)See infra notes 193 and 197-198.


\(^{184}\)See 1 Norton, supra note 23, § 4:21, at 4-137; H.R. Rep. No. 98-55, at 33 (1983); 129 Cong. Rec. 9,952 (1983) (statement of Sen. Thurmond) ("those proceedings that are authorized by title 11, are integral to the core bankruptcy function of restructuring debtor-creditor rights, and were within the
Nowhere does the statute define a “core” proceeding. Nonetheless, meaning can be divined from the statutes’ “arising under” and “arising in” jurisdictional nexuses. A proceeding is one “arising under” the Bankruptcy Code when a claim is made pursuant to a cause of action created by the Bankruptcy Code. A proceeding “arising in” a bankruptcy case, although not grounded in a cause of action created by the Code, is a proceeding that would have no existence in the absence of the bankruptcy case.

185The closest thing to a definition comes through a nonexclusive list of matters included within core proceedings, including the catch-all categories of “matters concerning the administration of the estate” and “other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship.” 28 U.S.C. § 157(b)(2)(A) & (O) (1994). The second catch-all core category, like the “core” terminology itself, also apparently has its origins in Justice Brennan’s Marathon opinion, quoted supra text accompanying note 183. See 1 King et al., supra note 41, ¶ 3.02[3](d)(ii), at 3-43.

186The statute uses this terminology in conjunction with both the initial grant of bankruptcy jurisdiction to district courts, see 28 U.S.C. § 1334(b), quoted supra note 171, and the grant of core jurisdiction to bankruptcy judges, see id. § 157(b)(1), quoted supra note 175. Compare 1 King et al., supra note 41, ¶ 3.02[2], at 3-33 (“core” proceedings are the equivalent of proceedings “arising under” and “arising in”), with 1 Norton, supra note 23, § 4:21, at 4-159 to 4-160 (“core” proceedings may be independent of nexuses, but bankruptcy court can only adjudicate a core proceeding that also satisfies the nexus requirements).

187See 1 King et al., supra note 41, at ¶ 3.01[4][c][i]; 1 Norton, supra note 23, § 4:38, at 4-231. For example, a proceeding to recover a preferential transfer pursuant to § 547 of the Bankruptcy Code would be a proceeding “arising under” the Bankruptcy Code. A preference action is also included among the statutes’ illustrative listing of core proceedings. See 28 U.S.C. § 157(b)(2)(F). By including “arising under” bankruptcy jurisdiction in the 1978 Reform Act, Congress intended to replicate “arising under” federal question jurisdiction, embodied in id. § 1331. See H.R. REP. No. 95-595, at 445 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6400. See generally 1 King et al., supra note 41, at ¶ 3.01[4][c][i]; 1 Norton, supra note 23, § 4:38, at 4-225 to 4-231.

188See 1 King et al., supra note 41, ¶ 3.01[4][c][iv], at 3-27; 1 Norton, supra note 23, § 4:38, at 4-231. An example is allowance or disallowance of a creditor’s disputed claim against the debtor’s estate. The underlying dispute as to the claim itself could well be grounded upon a traditional state-law cause of action. Yet, allowance of claims against a bankruptcy estate has traditionally been regarded as an integral part of the in rem process of distributing the assets of the bankruptcy estate, distinct from a nonbankruptcy adjudication of the claim. See Katch v. Landy, 382 U.S. 323, 329-30 (1966) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res, and thus falls within the principle . . . that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." (citation omitted) (quoting Gardner v. New Jersey, 329 U.S. 565, 574 (1947))). See also Langenkamp v. Culp, 498 U.S. 42, 44 (1990) ("the claims allowance process . . . [is] integral to the restructuring of the debtor-creditor relationship through the bankruptcy court’s equity jurisdiction" (emphasis in original)); Granfinanciera, S.A. v. Nordberg, 492
An action between nondebtors, such as a suit by a creditor to recover its claim from a personally responsible third party, cannot be a core proceeding. The creditor’s cause of action is founded on third-party liability under nonbankruptcy law, and such a nondebtor action would exist in exactly the same form irrespective of the debtor’s bankruptcy proceedings. At best, then, such an action could be a noncore proceeding “related to” the debtor’s bankruptcy case, but outside the scope of a bankruptcy court’s core jurisdiction to adjudicate. In fact, the two prototypical noncore, “related to” proceedings are: (1) an action by a debtor against a third party, such as the breach of contract suit at issue in Marathon;¹⁸⁹ and (2) suits between nondebtors that could have an effect on the bankruptcy estate.¹⁹⁰ The Supreme Court, in Celotex, cited these two examples of “related to” proceedings, and said that “[t]he instant case involves the second type of ‘related to’ proceeding.”¹⁹¹

If the nondebtor action sought to be stayed in Celotex was only “related to” the debtor’s bankruptcy case, this might lead one to believe that the nondebtor stay in the Celotex case must be a noncore, “related to” proceeding, outside the core jurisdiction of the bankruptcy court. Likewise, in determining jurisdiction to temporarily stay a nondebtor action, both the Supreme Court and lower courts have framed the issue as whether the action is “related to” the bankruptcy case¹⁹²—that could also lead one to believe that a temporary stay of such a “related to” proceeding must be a noncore, “related to” matter as well. Indeed, that was the approach of the dissenting opinion in Celotex.¹⁹³ That line of reasoning, though, loses sight of the historical distinction between jurisdiction to adjudicate the dispute underlying an action and jurisdiction to temporarily enjoin that action in order to preserve the status quo.

A temporary status quo injunction simply does not adjudicate the parties’


¹⁹⁰See 1 KING ET AL., supra note 41, ¶¶ 3.01[4][c][ii], at 3-23, 3.02[2], at 3-33.


¹⁹²See supra Part III.D.

¹⁹³The dissent started with the proposition that the judgment creditor’s nondebtor action against Celotex’s surety was a “related to” proceeding and concluded that the jurisdictional statute that gives bankruptcy courts jurisdiction to “hear and determine” core matters, and jurisdiction only to “hear” (but not “determine”) noncore, “related to” proceedings, does not give bankruptcy courts jurisdiction to enter a binding injunctive order directed at such a noncore, “related to” proceeding. See Celotex, 514 U.S. at 317-24 (Stevens, J., dissenting). Compare 28 U.S.C. § 157(b)(1) (quoted supra note 175), with id. § 157(c)(1) (quoted supra note 177).
underlying dispute. Thus, jurisdiction to temporarily stay an action is not dependent upon jurisdiction to adjudicate the parties’ controversy. Under the 1898 Act, status quo injunctions for the preservation of the estate (including protection of a reorganization endeavor) were so intimately connected to administration of the estate that they were within the summary jurisdiction of “courts of bankruptcy” (including referees), even with respect to actions that could be adjudicated only through a plenary suit. Likewise, under the current jurisdictional scheme, a temporary nondebtor stay, premised upon preservation of a debtor's reorganization effort, is properly considered a core matter concerning the administration of the estate, even though the action being stayed is outside the bankruptcy court’s core jurisdiction to adjudicate. Such a status quo injunction could well be considered a proceeding “arising under” the Bankruptcy Code, because the authority to issue such an injunction comes from § 105 of the Code. Alternatively, the nondebtor stay is a proceeding uniquely “arising in” the bankruptcy reorganization case that has no separate existence absent the reorganization proceedings. Even though the collateral nondebtor suit is one with an existence

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194 The Celotex majority hinted at this in a footnote that: (1) raised, but left unresolved, the core/noncore issue; and (2) responded to the dissent’s argument, discussed supra note 193, that the bankruptcy court was without jurisdiction to stay a “related to” proceeding that it could not “determine.” See Celotex, 514 U.S. at 309 n. 7 (Rehnquist, C.J.). The majority de-emphasized that portion of the statute relied upon by the dissent that gives bankruptcy courts jurisdiction only to “hear” (but not “determine”) noncore, “related to” proceedings, and emphasized that portion of the statute that reserves to the district court jurisdiction to enter any “final order or judgment” in a noncore, “related to” proceeding. See 28 U.S.C. § 157(c)(1), quoted supra note 177. Thus, the majority opined that the statute does not necessarily deprive a bankruptcy court of jurisdiction to temporarily stay a noncore, “related to” proceeding, because such a temporary stay is an interlocutory order, not a final order. See Celotex, 514 U.S. at 309 n.7 (Rehnquist, C.J.). Accord In re Davis, 730 F.2d 176, 183 (5th Cir. 1984); Lesser v. A-Z Assocs. (In re Lion Capital Group), 46 B.R. 850, 854 (Bankr. S.D.N.Y. 1985). This response is dangerously simplistic in ignoring the difference between a stay entered by the court presiding over the collateral litigation, which would be an interlocutory order, and a stay of collateral litigation entered by the bankruptcy court. The unique nature of bankruptcy proceedings has led to the development of more liberal standards of finality for purposes of appeal from orders in bankruptcy proceedings. See generally 1 KING ET AL., supra note 41, at ¶ 507[1][b]; John P. Hennigan, Jr., Toward Regularizing Appealability in Bankruptcy, 12 BANKR. DEV. J. 583 (1996). Consequently, a bankruptcy court order temporarily staying collateral litigation between nondisputants may be a final, appealable order. See Lomas Fin. Corp. v. Northern Trust Co. (In re Lomas Fin. Corp.), 932 F.2d 147, 150-52 (2d Cir. 1991); Gathering Restaurant, Inc. v. First Nat’l Bank (In re Gathering Restaurant, Inc.), 79 B.R. 992, 997-98 (Bankr. N.D. Ind. 1986). The majority's point, though, is essentially a restatement of the historical distinction between jurisdiction to “determine” or adjudicate a matter and jurisdiction to temporarily stay a collateral suit involving the matter. A temporary status quo injunction of collateral litigation does not “determine” or adjudicate any of the claims raised in the collateral litigation.

195 See supra Part III.B.


197 The Celotex dissent branded this approach to core jurisdiction as a “jurisdictional bootstrap,” giving bankruptcy courts core jurisdiction to do anything and everything a party might request pursuant to § 105. Celotex, 514 U.S. at 326-27 (Stevens, J., dissenting). In the context of nondebtor stays, the bootstrap is cut by the jurisdictional prerequisite that the nondebtor action pose a threat to the debtor’s
independent of the bankruptcy proceedings, a temporary stay of the nondebtor action does not involve the sort of adjudication of an independent action that motivated the Marathon holding and the subsequent core/noncore dichotomy.\textsuperscript{198} The bankruptcy proceeding to stay the nondebtor reorganization efforts. In addition, recognizing the crucial jurisdictional differences between a temporary nondebtor stay and a permanent nondebtor release, discussed infra Part IIIG, would check the unlimited jurisdiction phenomenon that seems implicit in many courts’ use of § 105 powers.

\textsuperscript{198}In addition to introducing the core/noncore division of bankruptcy jurisdiction, the 1984 BAFJA amendments also repealed the following provision of the 1978 Reform Act: “A bankruptcy court shall have the powers of a court of equity, law and admiralty, but may not enjoin another court . . . .” Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2671 (codified as 28 U.S.C. § 1481 (1982) (repealed 1984)). Giving bankruptcy courts the powers of a court of equity, law and admiralty was seen as a “concomitant of the bankruptcy courts [sic] increased jurisdiction” and “in addition to any power granted . . . under § 105 of the bankruptcy code.” H.R. REP. No. 95-395, at 448 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6404. This broader supplementary § 1481, then, rather than § 105, became the repository of the proviso, carried forward from § 105’s predecessor, prohibiting bankruptcy courts from enjoining another court. See supra notes 93, 122, and 141. Subsequent retraction of the bankruptcy court’s jurisdiction, necessitated by Marathon, resulted in repeal of § 1481 by the BAFJA amendments. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 98 Stat. 333, 343. Mysteriously, though, § 1481 was repealed in its entirety, including the proviso limiting restraint of another court. The Celotex dissenting opinion attached great significance to this proviso and its subsequent repeal, apparently believing that the proviso denied bankruptcy courts the power to enjoin even the litigants before another court. See Celotex, 514 U.S. at 322-23 n.9, 327-29 (Stevens, J., dissenting). See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 n.37 (1982) (Brennan, J., plurality opinion) (erroneously equating scope of the § 1481 proviso with that of the Anti-Injunction Act, which forbids restraint of litigants). Of course, this completely misperceives the history of the proviso and its limited scope. Its predecessor under the 1898 Act only restricted a referee’s ability to directly restrain another court, not the parties to collateral litigation before another court. See supra note 122. Nothing in the legislative history indicates that Congress intended the proviso to have any other meaning under the Reform Act. See, e.g., Bankruptcy Court Revision: Supplementary Hearings on Courts and Administrative Structure for Bankruptcy Cases Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong. 81-82 (1977) (testimony of Louis W. Levit, Esq., Chairman, Special Committee on the National Bankruptcy Act of the Commercial Law League of America) (“[T]he limitation on the injunctive powers would be intended to refer primarily, if not solely, to the power to enjoin another court . . . . It is, as we all know, extremely rare that such power is sought. It’s even more rare that it’s exercised by a district court today.”). See also Frank R. Kennedy, The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction, 55 Am. Bankr. L.J. 63, 90 (1981) (“Since the bankruptcy court can enjoin parties in litigation in other courts, the disability to enjoin other courts does not augur any serious difficulty.” (footnote omitted)). In addition, courts construed the Reform Act proviso in exactly the same limited manner as under the 1898 Act. See, e.g., In re Davis, 730 F.2d 176, 183-84 (5th Cir. 1984); Davis v. Sheldon (In re Davis), 691 F.2d 176, 177 n.5 (3d Cir. 1982); Bank of Commonwealth v. Bevan, 13 B.R. 989, 995 n.11 (E.D. Mich. 1981); Apollo Molded Prods., Inc. v. Kleinman (In re Apollo Molded Prods., Inc.), 83 B.R. 189, 191 (Bankr. D. Mass. 1988); Cournoyer v. Town of Lincoln (In re Cournoyer), 43 B.R. 354, 360 n.7 (Bankr. D.R.I. 1984), aff’d in part, rev’d in part, 53 B.R. 478 (D.R.I. 1985), aff’d, 790 F.2d 971 (1986); Redenbaugh v. Gable (In re Redenbaugh), 37 B.R. 383, 385 (Bankr. C.D. Ill. 1984). But see Stuart Motel, Inc. v. Columbia Banking Savs. & Loan Ass’n (In re Stuart Motel, Inc.), 15 B.R. 28, 30 (Bankr. S.D. Fla. 1981) (erroneously relying on Anti-Injunction Act cases).

Proceeding from this erroneous assumption about the reach of the § 1481 proviso, the Celotex dissent then concluded that repeal of § 1481, in its entirety, should be construed as removing the only source of authority for bankruptcy courts to enjoin proceedings in other courts. See Celotex, 514 U.S. at 329 (Stevens, J., dissenting). This conclusion ignores the fact that § 1481 was a new, supplementary provision,
action is distinct from the collateral nondebtor litigation itself, as is the jurisdictional basis for each proceeding, and a temporary nondebtor stay issued by a bankruptcy court is properly considered a core proceeding.  

In the context of nondebtor stays, the distinction between jurisdiction to enjoin and jurisdiction to adjudicate has been blurred and confused by cases under the 1898 Act that refused to stay nondebtor actions based on lack of jurisdiction to adjudicate and by the Code cases' misplaced and misleading use of the "related to" terminology to describe jurisdiction to stay nondebtor actions. Nonetheless, since the enactment of the BAFJA amendments, the lower courts that have confronted the issue, for the most part, have correctly concluded that temporary nondebtor stays are within the core jurisdiction of bankruptcy judges.

and the primary source of a bankruptcy court's power to enjoin collateral litigation under the 1898 Act was the predecessor to current Code § 105, which of course, remains intact. See supra note 93 and accompanying text. Thus, Congress' failure to re-enact the proviso regarding restraint of another court when repealing § 1481 is best explained as an oversight. Nonetheless, it should not prove too troublesome, as direct restraint of another court is rarely necessary, and even federal district courts operate under a general rule that they should not enjoin another court if restraint of the parties would suffice. See W.K. Ingram v. Marlec Farms, Inc. (In re W.F. Hurley, Inc.), 553 F.2d 1096, 1102-03 (8th Cir. 1977). Cf. State Bank & Trust Co. v. Park (In re S.Y. Park, Ltd.), 198 B.R. 956, 969 (Bankr. C.D. Cal. 1996) (concluding that "since nothing short of enjoining the state court would appear capable of completely stopping the proceedings here," and "[g]iven the uncertainty on this jurisdictional question and the absence of any precedent for injunctions directed specifically at state courts and their judges, as opposed to the parties," then "any injunctive relief at this stage of the proceeding would require an order entered by the district court")

199 The Celotex majority acknowledged this approach:

We recognize the theoretical possibility of distinguishing between the proceeding to execute on the bond in the Fifth Circuit and the § 105 stay proceeding in the Bankruptcy Court in the Eleventh Circuit. One might argue, technically, that though the proceeding to execute on the bond is "related to" the title 11 case, the stay proceeding "arises under" title 11, or "arises in" the title 11 case. We need not and do not decide this question here.

Celotex, 514 U.S. at 311 n.8 (Rehnquist, C.J.) (citation omitted). Professor Zaretzky also concluded that temporary stay of a nondebtor action should be considered a core proceeding within the jurisdiction of a bankruptcy court to hear and determine. See Zaretzky, supra note 41, at 213, 222-23 nn.31 & 33.

200 See supra Part III.C.
G. Jurisdiction to Permanently Release Nondebtors

For purposes of jurisdictional analysis, temporary nondebtor stays must be distinguished from permanent nondebtor releases. While there is bankruptcy jurisdiction to temporarily stay a nondebtor action, there is no jurisdiction to permanently release a nondebtor claim. Notwithstanding the confusion that the Celotex majority and dissenting opinions generate, the lower courts appear to have adequately resolved the issue of jurisdiction to temporarily stay nondebtor actions. They have not had similar success, however, with respect to jurisdiction to release and permanently enjoin nondebtor actions.

Courts rejecting nondebtor releases only occasionally assert lack of jurisdiction as a basis. On the other side of the issue, the Robins and Drexel releases were approved with little more than a passing mention of the courts' jurisdiction, and there is very little in the way of analytical reasoning from either camp. Most courts, without regard to their view of the propriety of nondebtor releases, simply have applied to nondebtor releases the same jurisdictional framework used in temporary nondebtor stay cases. Under that approach, again, jurisdiction depends on whether the nondebtor action to be released is "related to" the debtor's reorganization case—with "related to" meaning that continuation of the nondebtor action will make the debtor's


reorganization more difficult in some way. Moreover, transporting nondebtor stay jurisdiction into the nondebtor release context also leads to the conclusion that a jurisdictionally sufficient nondebtor release is a core proceeding respecting administration of the debtor’s estate and confirmation of the debtor’s plan of reorganization.204

As is true with temporary nondebtor stays, this jurisdictional threshold, as distinguished from the propriety of the release on the merits, usually is not difficult to meet. Prosecution of nondebtor actions might adversely impact the debtor's reorganization in any number of ways, especially when courts consider potential loss of some contribution a nondebtor is willing to make to the debtor's reorganization in exchange for a nondebtor release.205 Thus, this approach usually leads to the conclusion that a bankruptcy court has core jurisdiction to approve a nondebtor release.206

The courts’ approach to jurisdiction to approve nondebtor releases is fundamentally flawed, as it permits an oblique enlargement of courts’ bankruptcy jurisdiction. It abuses the historical distinction between jurisdiction to enjoin and jurisdiction to adjudicate, and it improperly assumes that facilitation of the debtor's reorganization effort is an independent basis upon which to adjudicate a nondebtor action. Most importantly, though, it ignores the Supreme Court opinion in Callaway v. Benton,207 which refused to take the Continental Illinois reasoning beyond status quo injunctions, to permanent nondebtor injunctions.


205See Brubaker, supra note 24, at 992 & n.120, 1023.

206This reasoning appears to be the basis on which the Robins and Drexel courts found jurisdiction to approve the releases in those cases. See supra note 203.

1. The Indirect Jurisdictional Enlargement

Jurisdiction to permanently release a nondebtor action is not the equivalent of jurisdiction to temporarily stay a nondebtor action. The error in equating the two concepts is that it unthinkingly incorporates the historical distinction between jurisdiction to enjoin and jurisdiction to adjudicate. That distinction has shaped and is at the heart of the jurisdiction of bankruptcy courts to issue far-reaching status quo injunctions, touching matters well beyond their jurisdiction to adjudicate. In the case of a permanent nondebtor release and injunction, however, the distinction between jurisdiction to enjoin and jurisdiction to adjudicate disappears, because the injunction does adjudicate. A nondebtor release is not a mere status quo injunction; a nondebtor release effectively adjudicates the released nondebtor action. The release operates as an adjudication on the merits, fully binding for res judicata/preclusion purposes.\footnote{See supra note 6 and accompanying text. In terms of Chief Justice Rehnquist's formulation of the distinction between jurisdiction to enjoin and jurisdiction to adjudicate, discussed supra note 194, while stay of a nondebtor action is only interlocutory as to that collateral action, a nondebtor release is final.}

By any analysis, the nondebtor actions that are "adjudicated" through nondebtor releases are, at best, noncore, "related to" actions, beyond the jurisdiction of a bankruptcy judge to finally adjudicate, without consent of the litigants.\footnote{See supra Part III.E.} Final resolution of such an action by a non-Article III bankruptcy judge, whether it be by traditional adjudication on the merits or by nonconsensual release, certainly approximates the sort of adjudication held unconstitutional in Marathon—closely enough, that is, to warrant a construction of the jurisdictional statute that denies bankruptcy courts core jurisdiction to approve nondebtor releases.\footnote{It is axiomatic that in the absence of a clear expression of congressional intent, a statute should be construed to avoid difficult constitutional questions. This approach applies equally to construction of bankruptcy statutes, see United States v. Security Indus. Bank, 459 U.S. 70, 82 (1982), and with special force in construing the reach of a non-Article III bankruptcy judge's core jurisdiction, see Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159, 162 (9th Cir. 1986) (courts "should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems").} By using their § 105 powers to release nondebtor claims that they could not adjudicate directly, bankruptcy courts violate the cardinal principle that a court's "in aid of jurisdiction" powers cannot be used to expand the court's jurisdictional reach.\footnote{See 11 U.S.C. § 105(c) (1994), discussed supra note 52 and accompanying text. See also 9 Moore et al., supra note 65, ¶ 110.29, at 359 (All Writs Act "authorizes issuance of writs only in aid of the court's jurisdiction, and confers on the district courts no original jurisdiction" (footnote omitted)).}

An even more troubling enlargement of jurisdiction through nondebtor releases\footnote{Limitations on a bankruptcy court's core jurisdiction are not implicated where the district court enters the final order approving nondebtor release and injunction provisions. For example, the district court presided over the A.H. Robins reorganization and approved the Robins nondebtor releases. See In re} lies in the fact that many of these released nondebtor actions ar-
guably fall completely outside "related to" jurisdiction to adjudicate. Again, under any analysis, a nondebtor action that is not "related to" the debtor's bankruptcy case simply cannot be adjudicated in a federal bankruptcy forum—by either a bankruptcy court (by consent) or by a district court. Likewise, neither a bankruptcy court nor a district court can properly "adjudicate" such a nondebtor action through a nondebtor release. This is another reason why the courts' use of the "related to" terminology to describe jurisdiction to temporarily stay nondebtor actions is so pernicious. As applied by the courts, the "related to" standard for adjudication of a nondebtor action is very different from the "related to" standard for the temporary stay of a nondebtor action. When confronted with a straightforward request to adjudicate a nondebtor action, rather than temporarily stay or permanently release it, the courts have concluded that many of these nondebtor actions are not sufficiently "related to" the debtor's reorganization to provide jurisdiction to adjudicate. A good example is the seminal case on "related to" jurisdiction, Pacor, Inc. v. Higgins.

That case involved an asbestos personal injury suit in state court against an asbestos supplier, Pacor, Inc. In that suit, Pacor filed a third-party indemnification complaint against Johns-Manville Corp., the original manufacturer of the asbestos. When Johns-Manville filed its Chapter 11 petition, Pacor sought to: (1) remove the entire action to federal court as "related to" Manville's bankruptcy case; and (2) transfer the action to the district in which Manville's Chapter 11 proceedings were pending. If successful, then, both the personal injury claim against Pacor and Pacor's potential indemnifi-


213This analysis is limited to that federal bankruptcy jurisdiction contained in 28 U.S.C. § 1334(b) (1994). Whether a federal court can, as an incident to such bankruptcy jurisdiction, adjudicate matters outside the bounds of the statutory grant through doctrines of supplemental jurisdiction is a matter of considerable doubt. See Susan Block-Lieb, The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis, 62 FORDHAM L. REV. 721 (1994); Fruchtwald, supra note 30, at 23-33.

214See supra text accompanying note 200.

215Previous efforts to explain jurisdiction to enjoin nondebtor actions have been stymied by a failure to fully appreciate this divergence. See, e.g., Buschman & Madden, supra note 53, at 923-29 (equating "related to" jurisdiction to adjudicate with jurisdiction to enjoin nondebtor actions). Cf. Block-Lieb, supra note 213, at 735-37 & n.91 (analyzing nondebtor stay cases against the backdrop of jurisdiction to adjudicate and concluding that the nondebtor stay cases "possibly exceed[] the statutory mandates of 28 U.S.C. § 1334(b)").

216743 F.2d 984 (3d Cir. 1984).

217The current version of the bankruptcy removal statute, which is substantially the same as the one at issue in Pacor, provides that "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has [bankruptcy] jurisdiction of such claim or cause of action . . . ." 28 U.S.C. § 1452(a) (1994).
cation claim against Manville could be heard in the same forum, but only if the nondebtor personal injury action against Pacor was “related to” Manville’s Chapter 11 case.\textsuperscript{218}

Those courts approving nondebtor releases have placed great weight on the effect of potential contribution and indemnification claims against the debtor and the need to eliminate such claims by releasing creditors’ nondebtor actions—such as the nondebtor asbestos personal injury claim against Pacor.\textsuperscript{219} Indeed, the proclaimed adverse effects of these contribution/indemnification claims on the debtor’s ability to reorganize presumably means the underlying nondebtor action that gives rise to a contribution/indemnification claim is “related to” the debtor’s bankruptcy case, under the “related to” standard developed in the nondebtor stay context. When that standard is mechanically transferred to the nondebtor release context, then, it appears that there is jurisdiction to “adjudicate” the nondebtor action through a nondebtor release. Yet, the Third Circuit held that the potential for an indemnification claim by Pacor against Manville’s bankruptcy estate did not give the federal courts “related to” bankruptcy jurisdiction to adjudicate the nondebtor action against Pacor.\textsuperscript{220}

\textsuperscript{218}See \textit{Pacor}, 743 F.2d at 986.

\textsuperscript{219}See Brubaker, supra note 24, at 1002-09, 1022-23. The triangular relationship among these claims can be represented graphically as follows:

\textsuperscript{220}See \textit{Pacor}, 743 F.2d at 995-96. In determining whether the nondebtor asbestos personal injury claim against Pacor was “related to” Manville’s Chapter 11 proceedings, the Third Circuit set forth the dominant expression of the meaning of “related to” jurisdiction to adjudicate:

\textbf{[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy…. 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 bankrupt estate.}''

\textit{Id.} at 994 (citations omitted). However, the court limited this broad statement by also stating that “the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of [“related to” jurisdiction]. Judicial economy itself does not justify federal jurisdiction.” \textit{Id.} at 994 (citations omitted).

In \textit{Celotex}, without adopting any particular test, the Supreme Court noted that the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the \textit{Pacor} test for “related to” jurisdiction, and that the Second and Seventh Circuits have a slightly different test. \textit{Celotex Corp. v. Edwards}, 514 U.S. 300, 308-09 n.6 (1995). Nonetheless, the Court agreed with so much of the \textit{Pacor} opinion as stated that “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy
Since Pacor, the courts have not agreed on the circumstances under which a nondebtor action falls within “related to” jurisdiction to adjudicate. Yet, nondebtor actions of all kinds are permanently extinguished en masse through blanket nondebtor releases, without even a mention of the court’s jurisdiction to adjudicate those actions. In fact, the extremely broad nature of most nondebtor releases—providing for wholesale release of estate.” Id. at 308 (quoting Pacor, 743 F.2d at 994). The fact that most circuits have nominally adopted the Pacor test masks great disparities in their views as to its proper application. See Block-Lieb, supra note 213, at 735-37; Fruchwald, supra note 50, at 6-22. See also infra note 221 and accompanying text.

221 Compare National City Bank v. Coopers & Lybrand, 802 F.2d 990, 993-94 (8th Cir. 1986) (no jurisdiction over nondebtor professional malpractice action, because it is “at most a precursor to potential indemnification action” against debtor), with Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 490-94 (6th Cir. 1996) (potential indemnification and contribution claims against debtor by codefendants in breast implant litigation sufficient to give “related to” jurisdiction over nondebtor actions against codefendants), and Wood v. Wood (In re Wood), 825 F.2d 90, 94 (5th Cir. 1987) (“related to” jurisdiction over nondebtor action that alleged joint conduct of party and nondebtors), and Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 635 (6th Cir. 1986) (“related to” jurisdiction over nondebtor actions where parties to challenged transactions were “more intertwined than the parties in Pacor”). See also Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 164 (7th Cir. 1994) (noting “larger question, on which the courts are divided, whether a suit that might trigger a related suit... is itself therefore a related action”); Sykes v. Texas Air Corp., 834 F.2d 488, 489 n.2 (5th Cir. 1987) (noting that existence of “related to” jurisdiction over nondebtor action “probably turns on the precise nature of [nondebtor defendant’s] claim against [debtor]”). Compare Pacor, 743 F.2d at 993-96 (distinguishing nondebtor actions on contractual guaranties of debtor’s obligations that are “related to” bankruptcy because of automatic indemnity action against debtor), with River Oaks Ltd. Partnership v. Things Remembered, Inc., No. 92 C 7877, 1993 WL 147409, at 2-3 (N.D. Ill. May 3, 1993) (discussing split in Seventh Circuit over whether claim against debtor’s guarantor is “related to” bankruptcy). Compare Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 755-57 (5th Cir. 1995) (indemnification agreed to as part of settlement approved by bankruptcy court insufficient to confer “related to” jurisdiction over nondebtor actions that might give rise to indemnification claims against debtor), with Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1142-43 (6th Cir. 1991) (“related to” jurisdiction over nondebtor action because of debtor’s potential indemnification liability arising out of indemnification provisions of purchase agreement embodied in plan of reorganization and approved by bankruptcy court).

222 For a rare case where the bankruptcy court recognized this aspect of the jurisdictional defects of nondebtor releases, see In re Market Square Inn, Inc., 163 B.R. 64, 67 (Bankr. W.D. Pa. 1994) (“jurisdictional problem” in approving nondebtor release, because there is “nothing which gives the bankruptcy court jurisdiction to adjudicate claims between two non-debtor third parties”). For a characteristically perspectice opinion by Judge Learned Hand under the reorganization provisions of the 1898 Act, see Radin v. Chemical Bank & Trust Co. (In re Prudence Bonds Corp.), 75 F.2d 262, 263 (2d Cir. 1935) (“Since this stay is permanent, and not merely to give the debtor or the trustee a chance so to intervene, it can be defended only in case the [nondebtor action] may eventually fall within the jurisdiction in invitum of the bankruptcy court.”). The Fifth Circuit, in a rather lengthy exploration of jurisdiction to approve a permanent nondebtor release and injunction as part of a debtor’s settlement with its liability insurer, identified jurisdiction to approve the nondebtor release as dependent upon “related to” jurisdiction to adjudicate the released nondebtor actions. See Zale, 62 F.3d at 751-57. Yet, the court then incorrectly held that “related to” jurisdiction to adjudicate released nondebtor actions would give a bankruptcy court (as opposed to the district court) jurisdiction to entertain the request for a permanent nondebtor release and injunction. See id. at 757-59. See also In re Arrowmill Dev. Corp., 211 B.R. 497, 501-03 (Bankr. D.N.J. 1997); In re Sybaris Clubs Int’l, Inc., 189 B.R. 152, 155 (Bankr. N.D. Ill. 1995). Cf. Monarch Life Ins. Co. v. Ropes & Gray (In re Monarch Capital Corp.), 173 B.R. 31, 37-38 (D. Mass. 1994) (noting that released nondebtor
any and all claims that a creditor or shareholder might have against the released nondebtor—makes a careful and discriminating analysis of jurisdiction to adjudicate each released claim virtually impossible.  

223

2. Facility in Reorganization and the Forgotten Callaway v. Benton Case

The few cases which bother to analyze jurisdiction to permanently release and enjoin nondebtor actions focus on potential interference with the debtor’s reorganization. This approach not only permits an indirect “adjudication by release” of nondebtor actions that a federal bankruptcy court could not adjudicate directly, it also implicitly assumes that facilitation of the debtor’s reorganization effort is an independent basis for jurisdiction to adjudicate matters that are otherwise beyond the jurisdiction of the court.  

This takes the Continental Illinois notion of a general jurisdiction to protect and promote the debtor’s reorganization beyond status quo injunctions, to binding alterations of nonbankruptcy rights and obligations between nondebtors. Yet, in Continental Illinois itself, the Supreme Court repeatedly

actions are noncore, but holding that nondebtor release is core and failing to recognize or explain the inconsistency, aff’d, 65 F.3d 973 (1st Cir. 1995).

223 See, e.g., Monarch, 65 F.3d at 976 (quoting nondebtor release provisions of bankruptcy court’s confirmation order: “this Order constitutes an injunction against all persons . . . from . . . commencement of any action or proceeding arising from or related to a claim against the Debtor . . . against or affecting any of [released nondebtor]” (emphasis in original)); Drexel Burnham Lambert Group, Inc. v. Claimants Identified on Schedule 1 (In re Drexel Burnham Lambert Group, Inc.), 995 F.2d 1138, 1144 (2d Cir. 1993) (quoting release provisions as releasing nondebtors “from any and all claims, obligations, rights, causes of action and liabilities which . . . any holder of a Claim or Equity Interest in the Debtors have asserted or may be entitled to assert . . . in any way relating to the Debtors”); In re A.H. Robins Co., 131 B.R. 292, 294 (E.D. Va. 1991) (quoting nondebtor release provisions of plan of reorganization: “all persons (i) who have held, hold or may hold Claims . . . or (ii) who have held, hold or may hold Robins Common Stock . . . will be deemed to have forever waived, released and discharged all rights or claims . . . which they heretofore, now or hereafter possess or may possess against any Person . . . based upon or in any manner arising from or related to . . . the Dalkon Shield”), rev’d and remanded on other grounds sub nom. Dalkon Shield Claimants Trust v. Reiser (In re A.H. Robins Co.), 972 F.2d 77 (4th Cir. 1992).

224 The court made this leap explicitly in Polygram Distribution, Inc. v. B-A Systems, Inc. (In re Burstein-Applebee Co.), 63 B.R. 1011 (Bankr. W.D. Mo. 1986). There, the bankruptcy court recognized that approval of a permanent nondebtor injunction would effectively adjudicate noncore matters, which the court believed would be at odds with the Marathon holding. See id. at 1012-15. Nonetheless, the court held that the 1898 Act doctrine of necessity jurisdiction gave it core jurisdiction to issue the permanent nondebtor injunction. See id. at 1018-22. As explained infra Part III.G.2.a, such an application of necessity jurisdiction is suspect in light of the Callaway v. Benton case, and Marathon makes it doubly suspect. In addition, the subsequent expansion of bankruptcy jurisdiction, to permit adjudication of nondebtor disputes that affect administration of the estate, makes the continued viability of any residual necessity jurisdiction highly questionable. And, of course, under the 1898 Act the necessity doctrine only provided a basis to actually hear and adjudicate the merits of an action between nondebtors—not to permanently expunge the nondebtor action through a nondebtor release. See supra notes 129 and 132.

emphasized the temporary, status quo nature of the injunction at issue.\textsuperscript{226} Moreover, the Court subsequently refused to extend Continental Illinois to permanent alterations of nondebtor rights, in Callaway v. Benton.\textsuperscript{227}

Callaway v. Benton, like Continental Illinois, involved railroad reorganization proceedings under the 1898 Act, for the Central of Georgia Railway Co. Central had been leasing certain rail lines from the South Western Railroad Co. that were very important to Central’s long-term operations, and Central wished to acquire these lines from South Western as part of its plan of reorganization. Thus, the plan proposed a purchase of these lines from South Western.\textsuperscript{228} South Western’s directors formally resolved to accept Central’s plan, subject to approval by a majority of South Western’s shareholders, who subsequently approved the plan by a two-thirds majority vote. Two of South Western’s dissenting minority shareholders, however, brought suit in state court seeking to enjoin South Western’s sale of its lines to Central. The minority shareholders contended that sale of these lines to Central was a sale of substantially all of South Western’s assets, requiring unanimous approval of all of South Western’s shareholders, pursuant to applicable Georgia state law.\textsuperscript{229}

On the authority of Continental Illinois, the district court presiding over the reorganization proceedings permanently enjoined the state court suit. The reorganization court based its permanent injunction on a finding that “[t]he purpose, and, if the state court injunction had been allowed to stand, the effect of the suit . . . in the State Court, was to completely disrupt the reorganization proceeding by preventing the consummation of the plan.”\textsuperscript{230} The reorganization court went on to decide that “[i]n the exigencies which confront the South Western, it clearly has power to sell its property to the newly Reorganized Company without the unanimous consent of its stockholders.”\textsuperscript{231} The Supreme Court, in reversing the reorganization court, addressed two different aspects of the reorganization court’s decision: jurisdiction to adjudicate the nondebtor dispute\textsuperscript{232} and jurisdiction to perma-

\textsuperscript{226} See 294 U.S. at 679 (“without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out”); id. at 681 (“the sole point is as to the authority of the bankruptcy court to delay for a reasonable time an interference with the reorganization proceeding”); id. at 685 (“[i]t contemplates, as we have already suggested, only reasonable delay”).

\textsuperscript{227} See Benton v. Callaway, 165 F.2d 877, 878-80 (5th Cir. 1948), aff’d, 336 U.S. 132 (1949). In order to induce South Western to sell, Central’s plan of reorganization provided that in the event South Western did not sell, Central would reject its lease of these lines. See 336 U.S. at 134-35.

\textsuperscript{228} See 165 F.2d at 885-86 n.2 (Hutcheson, C.J., dissenting) (setting forth findings of fact of district court presiding over the reorganization proceedings).

\textsuperscript{229} Id. at 887 n.4 (Hutcheson, C.J., dissenting) (setting forth conclusions of law of reorganization court).

\textsuperscript{231} Id. at 888 n.4 (Hutcheson, C.J., dissenting) (setting forth conclusions of law of reorganization court).

\textsuperscript{232} See 336 U.S. at 141-51.
nently enjoin the collateral nondebtor action.\textsuperscript{233}

\begin{itemize}
\item a. Jurisdiction to Adjudicate a Nondebtor Action
\end{itemize}

The Supreme Court held that the reorganization court erred in adjudicating this nondebtor dispute "requir[ing] a determination of the rights of the stockholders of South Western inter se to sell" South Western's lines to Central.\textsuperscript{234} This was a nondebtor dispute, outside the jurisdiction of the reorganization court, involving "internal management of the lessor . . . not properly subject to the court's control."\textsuperscript{235} In response to the assertion that the reorganization court could adjudicate the nondebtor dispute because its resolution was important to the debtor's reorganization, the Court rejected the idea that the \textit{Continental Illinois} line of cases supported jurisdiction to adjudicate this nondebtor dispute:

No suggestion has been made that a final decision of the state law question will be unreasonably delayed. Under these circumstances, we do not believe that the \textit{Continental Illinois} decision provides any support for the district court's action . . . Unless the offer is a sham and the lessor's discretion illusory, the plan may be effectively consummated whether the offeree accepts or not. \textit{The district court did not merely postpone action which would have hindered the development of the plan; it took to itself the decision of a question which the plan left open for decision elsewhere.}\textsuperscript{236}

The \textit{Callaway} opinion is somewhat ambiguous on the question of whether \textit{Continental Illinois} and facilitation of the debtor's reorganization provide an independent basis for a federal bankruptcy court to adjudicate a nondebtor controversy otherwise outside its jurisdiction. Nonetheless, it suggests that this may be an improper basis on which to premise jurisdiction to finally adjudicate a nondebtor dispute because it does more than "merely postpone" the nondebtor action pending formulation of a plan of reorganization.\textsuperscript{237} Likewise, many modern cases reject accommodation of the debtor's reorganization effort as an independent basis on which to adjudicate a

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\textsuperscript{233}\textit{See id. at} 136-41.
\textsuperscript{234}\textit{Id. at} 143.
\textsuperscript{235}\textit{Id. at} 144.
\textsuperscript{236}\textit{Id. at} 149-50 (emphasis added) (citations omitted).
\textsuperscript{237}It is unclear whether the Court would have allowed adjudication by the reorganization court if the terms of the plan made its entire consummation subject to acquisition of the South Western lines or there were some other showing that resolution of the dispute was important to progress of the reorganization. The reorganization court and the dissent in the Fifth Circuit seemed to believe that such a showing had been made. For the reorganization court's findings, \textit{see supra} notes 230-231 and accompanying text. \textit{See also} Benton v. \textit{Callaway}, 165 F.2d 877, 884 (5th Cir. 1948) (Hutcheson, C.J., dissenting) (characterizing acquisition of South Western lines as "vital to the reorganization" based upon reorganization court's find-
\end{flushleft}
nondebtor dispute, characterizing it as jurisdiction without limits.238

If facilitation of the debtor’s reorganization does not supply jurisdiction to
adjudicate a nondebtor action, then the courts are “adjudicating by release”
many nondebtor actions they have held to be outside the scope of “related to”
jurisdiction to adjudicate. More importantly, though, the Callaway opinion
speaks to the direct and ultimate jurisdictional issue posed by nondebtor re-
leases and holds that jurisdiction to release and permanently enjoin a
nondebtor action is wanting, without regard to jurisdiction to adjudicate the
nondebtor action.

b. Jurisdiction to Release a Nondebtor Action

Even assuming that the importance of a nondebtor dispute to a debtor’s
reorganization effort might give a federal court bankruptcy jurisdiction to
actually hear and adjudicate that dispute using governing nonbankruptcy law,
can that jurisdiction to protect and promote reorganization be extended even

...ings), aff’d, 336 U.S. 132 (1949). This lends support to a reading of the Callaway opinion that such a
showing is irrelevant to jurisdiction to adjudicate the nondebtor action.

238 A forceful articulation of this view is contained in Holland Industries, Inc. v. United States (In re
Holland Industries, Inc.), 103 B.R. 461 (Bankr. S.D.N.Y. 1989). In that case, the Chapter 11 debtor sought
to have the bankruptcy court vacate IRS liens on the property of certain nondebtors, because the debtor
contemplated using that property to help finance its plan of reorganization, and alleged that “unless the
liens are vacated prior to the confirmation hearing, confirmation of the plan will be ‘substantially impeded,
if not defeated.’” Id. at 464. The bankruptcy court rejected this asserted adverse effect on the debtor’s
reorganization as a jurisdictional basis for passing on the validity of the IRS liens:

The Debtor’s assertion that confirmation of its plan is impacted by the IRS lien is
an argument asserting unlimited jurisdiction. The desires of every Chapter 11
debtor are affected by a myriad of external indirect effects created by the circum-
stances in which it operates. Whether they arise from the ebbs and flows of com-
merce, the effects of governmental action or the acts of third parties with respect to
property of nondebtors, their impact on a debtor’s attempt to reorganize does not
afford the bankruptcy courts with jurisdiction to determine the dispute merely be-
cause of that impact.

Id. at 466. See also Mego Int’l, Inc. v. Packaging & Assembly Mfg. Corp. (In re Mego Int’l, Inc.), 30 B.R.
479, 483 (S.D.N.Y. 1983) (“need to help Mego in its effort to reorganize is an inappropriate basis . . . for
Bankruptcy Court jurisdiction . . . in a [nondebtor] contract action).

In Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 81
F.3d 635 (6th Cir.), amended, 86 F.3d 482 (6th Cir. 1996), in finding “related to” jurisdiction to adjudicate
breast implant claims against the debtor’s codefendants, the Sixth Circuit initially relied upon the practical
litigation burdens the nondebtor actions would place upon the debtor—the same sort of litigation burdens
used to justify temporary stay of nondebtor actions. See 81 F.3d at 646-47, 648-49. The court sub-
sequently withdrew those portions of the opinion, though, stating that “[u]pon reconsideration, we believe
our finding that ‘related to’ jurisdiction exists is best supported by the [potential] contribution and indem-
nification.” 86 F.3d at 490 n.9. This reinforces the point that, as applied by the courts, “related to” for
purposes of jurisdiction to temporarily stay a nondebtor action (meaning interference with the debtor’s
reorganization effort) will not necessarily supply “related to” jurisdiction to adjudicate the nondebtor
action. See supra notes 212-223 and accompanying text. See also Clark Oil & Refining Corp. v. Chicap
debtor’s attempt to reorganize sufficient for jurisdiction to stay nondebtor action, even though it might be
insufficient for jurisdiction to adjudicate).
further—can a federal court permanently extinguish the nondebtor action, without even purporting to address the merits of the underlying dispute, all in the interests of aiding the debtor’s reorganization? Whether this is couched in terms of jurisdiction or merely the proper reach of a bankruptcy court’s injunctive powers, the Callaway opinion, rather unambiguously, disapproved such an injunction:

The district court’s injunction was based primarily on the premise that the plan of reorganization requires the inclusion of South Western’s lines within the system of the reorganized company. The state action is said to be an attempt . . . ‘to prevent the consummation of the plan as respects South Western.’ . . . [T]he court held that ‘the question of the . . . sale, and under what conditions South Western may convey its property to the reorganized company, in consummation of the plan, is not a question of State law; it is a question of Bankruptcy law . . . .’ The court’s conclusion was, therefore, that although the question whether a Georgia railroad corporation can convey all of its properties without unanimous consent of its stockholders would ordinarily be one of state law cognizable in the state’s courts, under these circumstances the decision was one for the bankruptcy court applying federal law.

We do not agree . . .

The [bankruptcy] statute does not . . . give the . . . court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property . . . . The fact that the [state] law may make acceptance of the offer less likely than would be the case if the offeree were incorporated elsewhere does not change the picture. We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, or to make the criterion to be applied the effect of the law upon the prospects of acceptance by the offeree.\textsuperscript{239}

\textsuperscript{239}336 U.S. at 136-41 (citation omitted). In the omitted portions of the quoted passage, the Court also emphasized that Central’s plan of reorganization, by its own terms, did not require acquisition of the South Western lines and contemplated rejection of Central’s lease on those lines should South Western refuse to sell them. See id. However, the reorganization court had found that acquisition of those lines was important to Central’s reorganization, nonetheless, and the plan’s lease rejection provisions were, no doubt, intended to prod South Western to sell. See \textit{supra} notes 228 and 237. In fact, there are suggestions in the Court’s opinion that rejection of the lease was not an attractive alternative for South Western. See 336 U.S. at 134 (noting that during Central’s equity receivership and subsequent reorganization proceedings
In other words, the reorganization court could not permanently release and enjoin enforcement of these nondebtor rights and obligations in order to facilitate the debtor's reorganization efforts. Whatever rights a South Western shareholder had to veto a sale of South Western's assets to the debtor must remain intact, regardless of their impact upon the debtor's reorganization.

The lower courts largely read Callaway as a pronouncement of a lack of bankruptcy jurisdiction over nondebtor disputes, and as a corollary, that federal courts possess no power to enjoin such nondebtor actions, not even temporarily. The opinion, though, seems to explicitly reserve the possibility that Continental Illinois permits a temporary, status quo stay of a nondebtor action when appropriate to development of the plan of reorganization. Callaway, then, seems to speak solely to the impropriety of a permanent nondebtor release and injunction.

With respect to temporary nondebtor stays, any misreading of the Callaway opinion has been corrected, albeit awkwardly, through subsequent expansion of federal bankruptcy jurisdiction. In the process, however, Callaway's prohibition of permanent nondebtor releases has been completely ignored. Subsequent expansion of bankruptcy jurisdiction in no way denigrates the continuing vitality of the Callaway holding. In fact, this aspect of the Callaway opinion precedes any discussion of bankruptcy jurisdiction and is not premised upon the presence or absence of jurisdiction to adjudicate the nondebtor dispute. Rather, Callaway disapproved the permanent nondebtor release and injunction because there was no explicit statutory authority for displacing and extinguishing the nondebtor rights and obligations.

"South Western's lease was adopted successively by Central's Receiver and Trustees," and South Western "haa, in consequence, remained solvent, and no petition for reorganization has ever been filed in its behalf.

See supra Part III.C.

See 336 U.S. at 150 (stating that "[t]he district court did not merely postpone action which would have hindered the development of the plan"). Of course, this is entirely consistent with Continental Illinois and the historical distinction between bankruptcy jurisdiction to adjudicate and bankruptcy jurisdiction to enjoin. See supra Part III.B-C.

See supra Part III.D.

See 336 U.S. at 136-41. Even though this case arose under the 1898 Act, it retains its precedential authority under the Code.

When Congress amends the bankruptcy laws, it does not write "on a clean slate." Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.

In the end, then, the jurisdictional infirmity of permanent nondebtor releases and injunctions is that suggested by general “in aid of jurisdiction” jurisprudence. Whatever ambiguity may exist in attempts to distinguish procedure from substance in other contexts, those characterizations effectively capture the jurisdictional defect in nondebtor releases. The courts’ procedural power to protect the integrity of the reorganization process, through channeling and status quo injunctions, cannot be converted into a substantive power to extinguish nondebtor rights and obligations, independent of any explicit statutory authorization. It is not a matter of determining whether Code § 524(e) prohibits nondebtor releases; it is a matter of finding statutory authorization for nondebtor releases.

Section 105 alone, with its grant of a general equitable power to protect the integrity of the reorganization process by injunction, certainly cannot be the sole source of this new substantive power. The Supreme Court has stated emphatically that “whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.” Bankruptcy courts must respect the substantive rights created by state and federal nonbankruptcy law, except to the extent those rights are specifically modified by the Bankruptcy Code. Section 105 and the bankruptcy court’s general equity powers are an inappropriate basis for creating new substantive rights or altering those substantive rights in a manner not authorized by the Code. Nondebtor releases improperly extin-


244 See supra Part III.A.


246 The 1898 Act cases disapproving nondebtor releases recognized this more readily than do modern cases. For example, both the Second and Seventh Circuits looked first to general “in aid of jurisdiction” powers for authority to approve the releases and concluded that nondebtor releases were beyond the appropriate reach of such injunctive powers, notwithstanding the authority of Continental Illinois. Bankruptcy Code § 524(e)’s predecessor, 1898 Act § 16, merely provided additional support for the conclusion that nondebtor releases were an improper use of “in aid of jurisdiction” injunctive powers. See Weber v. Diversey Bldg. Corp. (In re Diversey Bldg. Corp.), 86 F.2d 456, 457-58 (7th Cir. 1936); In re Nine N. Church St., Inc., 82 F.2d 186, 188-89 (2d Cir. 1936).


249 See, e.g., In re Lloyd, 37 F.3d 271, 275 (7th Cir. 1994) (stating that “[t]he bankruptcy court does not have ‘free-floating discretion,’ to create rights outside the Code”); United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986) (“That statute [§ 105] does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity,” (footnote omitted)); Federal Land Bank v. Glenn (In re Glenn), 760 F.2d 1428, 1440 (6th Cir. 1985) (“a bankruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law” (quoting Johnson v. First Nat'l Bank, 719 F.2d 270, 274 (8th Cir. 1983)));
guish creditors' substantive causes of action against nondebtors, without even a hint of congressional endorsement of the practice.

CONCLUSION

This Article has constructed a jurisdictional analysis heretofore missing from the debate over nondebtor releases and has come to a most bewildering conclusion: these exceptional injunctions have gained a new level of prominence and favor in total disregard of Supreme Court precedent prohibiting them. Given both the weight of this issue in complex reorganizations and the circuit split regarding authority to approve nondebtor releases,250 the matter seems ripe for resolution by the Supreme Court—again.

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Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985) ("section 105(a) does not authorize the bankruptcy court to create rights not otherwise available under applicable law").

250See authorities cited supra notes 9, 12, 18, and 46.