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"All Writs" in Bankruptcy and District Courts: A Story of Differing Scope

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"All Writs" in Bankruptcy and District Courts: A Story of Differing Scope

George W. Kuney*

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I. INTRODUCTION

Since the enactment of the Judiciary Act of 1789, United States federal courts have had the authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1] This authority is expressly included in what is known as the "All Writs Act" (the Act).[2] The Act was first passed in 1911 and has been amended several times thereafter.[3] Section 1651 of the Act provides, in its

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1. 28 U.S.C. § 1651 (2012).

2. *Id.*

3. All Writs Act, Pub. L. No. 61-475, 36 Stat. 1087, 1134 (1911) (codified as amended at 28 U.S.C. § 1651).

current form, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[4] Traditionally, federal circuit courts of appeal and the Supreme Court have used the Act as statutory authority for appellate review, and federal district courts have used it to aid in the establishment of original jurisdiction.[5] The Act has also been used as a basis for issuing a myriad of injunctions and to remove cases from state court to federal court when removal was not proper under any other statutory authority.[6]

Section 105 of the Bankruptcy Code (the Code) grants bankruptcy courts, traditionally viewed as courts of equity, "broad authority" to accomplish the overriding goals of bankruptcy law and oversee the proper functioning of the Code, which "includ[es] the ability to modify the relationships between debtors and creditors."[7] Courts have noted that Section 105 can fill in gaps and ambiguities in the Code.[8] Bankruptcy courts, unlike federal courts in civil cases, have relied on this authority to craft an "enormous array of orders."[9] Parties to a bankruptcy proceeding often rely on Section 105(a) of the Code "as a means of enlisting the aid of judicial authority whenever the Bankruptcy Code does not expressly address a particular situation."[10]

> Perhaps the most widespread use of [Section] 105 has been in the area of injunctive relief in situations such as an extension of the automatic stay to nondebtor parties, the substantive consolidation of separate business entities, and the direction for third parties to

4. 28 U.S.C. § 1651(a).

5. Lonny S. Hoffman, *Traditional and Nontraditional Uses of the All Writs Act, 28 U.S.C. § 1651(a), by Federal Courts in Civil Cases*, ALI CLE COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 819, 821 (2002).

6. *See id.* at 832–37 (collecting cases).

7. Michael D. Sousa, *Equitable Powers of a Bankruptcy Court: Federal All Writs Act and § 105 of the Code Part I*, 25 AM. BANKR. INST. J. 28, 38 (2006).

8. *See, e.g.*, *In re* Ockerlund Constr. Co., 308 B.R. 325, 330 (Bankr. N.D. Ill. 2004) ("The Bankruptcy Court's equitable powers under 11 U.S.C. § 105(a) . . . fill[s] in gaps and ambiguities . . . .").

9. Sousa, *supra* note 7, at 38.

10. *Id.*

> either affirmatively act or refrain from taking a prescribed course of action.[11]

Some criticize the bankruptcy courts' willing use of Section 105 as a means of resolving conflict when the Code provides no solution on an issue before the court or a solution under the principles of equity and bankruptcy law.[12] That criticism, however, is not the focus of this Article.

This Article compares and contrasts the differences in the use of the "all writs" authority that is granted to federal district courts and bankruptcy courts by the two respective statutes. Historically, federal district courts seem reluctant to invoke the authority granted by the all writs act except under certain limited circumstances. On the contrary, bankruptcy courts seem much more willing to invoke the bankruptcy equivalent of the all writs act in a variety of circumstances. This Article comments on federal district courts' and bankruptcy courts' divergent uses of the all writs doctrine and attempts to provide an explanation for these differences in usage.

II. ALL WRITS IN DISTRICT COURTS

A. Injunctive Relief

Federal district courts most commonly invoke their all writs power to aid in the establishment of original jurisdiction.[13] The most common method federal district courts employ to establish original

11. Sousa, *supra* note 7, at 38.

12. *See generally* Lynne F. Riley & Maria C. Furlong, *The Supreme Court Restores Discretion and Enhances Jurisdiction of the Bankruptcy Courts*, 2008 NORTON ANN. SURV. BANKR. L. 4 (2008) (explaining that there is "a growing body of academia that examines the historical underpinnings of the bankruptcy court as a basis for disputing the court's status as a court of equity. Proponents of this theory profess strict limitations on the bankruptcy court's discretion to utilize equitable and inherent powers whenever the Bankruptcy Code is silent, vague, or contradictory").

13. *See* Hoffman, *supra* note 5, at 831 (stating that district courts most often use Section 1651(a) to establish original jurisdiction in support of injunctive relief).

jurisdiction is the issuance of injunctive relief.[14] Although there are no specific procedures for seeking the issuance of a writ from the district courts, there are several examples in which a federal district court has done so. For example, in *Blue Cross of California v. SmithKline Beecham Clinical Laboratories, Inc.*, the United States District Court for the District of Connecticut asserted injunctive relief that barred plaintiffs from bringing claims in a state court because the federal court already issued judgment on a majority of the claims.[15] In *Blue Cross*, a number of healthcare insurers sued SmithKline in federal court.[16] The court ultimately dismissed a majority of the insurers' claims, and, shortly thereafter, a substantial number of the plaintiffs in the federal suit filed an action in an Illinois state court, asserting claims that were essentially identical to those dismissed by the federal district court.[17] The district court ultimately issued a final judgment for the defendant on the remaining claims in the federal court, after which the defendant sought an injunction to block the on-going action in the Illinois state court.[18] The federal court sided with the defendant, granted the motion, and emphasized that there was a prior federal judgment on identical claims.[19] Further, the federal court concluded that the federal and state actions were based on the same allegations of fraud, and that the doctrine of res judicata, therefore, supported issuance of the injunction.[20] Additionally, for the claims pending in the Illinois state court to which the doctrine of res judicata did not apply, the federal court invoked its all writs authority and issued an injunction.[21] According to the federal court, the risk of "duplicative and inconsistent" orders from different courts justified enjoining prosecution by plaintiffs in the state court of the claims that were

14. *See* Hoffman, *supra* note 5, at 832–33 (discussing cases in which federal district courts have used the All Writs Act to "in aid of their original jurisdiction, to support issuance of injunctive relief").

15. 108 F. Supp. 2d 130, 132 (D. Conn. 2000).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 136.

20. *Id.*

21. *Blue Cross*, 108 F. Supp. 2d at 137.

originally asserted in the federal action, as well as those not asserted by plaintiffs in the federal action.[22]

Federal district courts have also issued injunctions extending to non-parties under their all writs authority. For example, in *In re BankAmerica Corp. Securities Litigation*, following the merger of BankAmerica and NationsBank, two dozen class actions were filed in six federal district courts.[23] Seven other class actions were filed in California state courts at virtually the same time.[24] Despite the variance in geography, each of the class actions included essentially identical claims against identical defendants.[25] The federal claims were consolidated, and, after some of the plaintiffs in the newly consolidated action became aware that they would not be the lead plaintiffs in the consolidated action, those plaintiffs withdrew from the federal action, preferring to litigate in state court.[26] The federal court subsequently enjoined the state court proceedings over counsel's objection that the state plaintiffs were not parties to the federal action.[27] The federal court maintained that its all writs authority "extends, under appropriate circumstances, *to persons who, though not parties to the original action* or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice."[28]

Another instance in which a federal court issued an injunction under its all writs power to stop duplicative litigation and to prevent an attempt to circumvent a prior judgment is *Phillips Beverage Co. v. Belvedere, S.A.*[29] In *Belvedere*,[30] Phillips was accused of importing counterfeit Belvedere products and patent infringement.[31] Belvedere's application for a temporary restraining order was denied in federal court.[32] Unsatisfied with the ruling of the district court, Belvedere sought relief from the United States

22. *Blue Cross*, 108 F. Supp. 2d at 137.
23. 95 F. Supp. 2d 1044, 1046 (E.D. Mo. 2000).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1048.
28. *Id.*
29. 204 F.3d 805, 806 (8th Cir. 2000).
30. *Id.*
31. *Id.* at 805.
32. *Id.* at 805–06.

Customs Service by recording its purported copyright in the product and requesting a customs order to detain the allegedly counterfeit and patent-infringing products.[33] Philips returned to federal court and obtained an injunction prescribing withdrawal of the application pending before Customs.[34] The Eighth Circuit affirmed, finding that the applicant tried "to make an end run around the district court's refusal to grant the interim relief . . . in a case over which the district court continued to have jurisdiction by going back to Customs and asking Customs to do what the district court would not."[35]

B. Removal Jurisdiction

Federal courts have also used their all writs power as an independent basis for removal jurisdiction. The Second Circuit was the first circuit court to approve the use of all writs as an independent basis for removal in *Yonkers Racing Corp. v. City of Yonkers*.[36] After *Yonkers*, numerous district courts have agreed, at least in theory, with the Second Circuit.[37] However, the Supreme Court

33. *Belvedere*, 204 F.3d at 805–06.

34. *Id.* at 806.

35. *Id.*

36. *See* Hoffman, *supra* note 5, at 833 (discussing Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988)).

37. *See id.* at 833–36 ("Since the *Yonkers* decision, on more than thirty occasions, in published opinions, federal district and circuit courts have considered the question of whether to uphold removal of a state case on the basis of the All Writs Act as an independent source of removal authority . . . . [and n]early every court which has considered this question has concluded that the All Writs Act may serve as an independent basis for removal."); *accord In re* Texas, 110 F. Supp. 2d 514, 527 (E.D. Tex. 2000) (noting that a "a federal court may employ the All Writs Act to remove an otherwise unremovable action"); Keeling v. Kronick, Moskovitz, Tiedemann & Girard, No. Civ. JFM-00-133, 2000 WL 708945 (D. Md. May 11, 2000) (finding that the All Writs Act was the basis for removal and the court retained jurisdiction over certain matters); Holden v. Connex–Metalna Mgmt. Consulting, No. Civ. A. 98-3326, 1999 WL 1072549 (E.D. La. Nov. 24, 1999) (finding that although the All Writs Act may support removal, there was insufficient justification for removal); First Union Nat'l Bank v. Frempong, No. 99-1434, 1999 WL 376021 (E.D. Pa. June 9, 1999), *aff'd*, 208 F.3d 205 (3d Cir. 2000) (recognizing that defendants can invoke the court's power under the All Writs Act, but the defendants failed to present circumstances justifying removal); Raggio v. Omega Inst., Inc., No. 98-CV-2782, 1998 WL 377904 (D.N.J. July 2, 1998) (recognizing a district court may invoke its power under the All Writs Act, but the defendant did not present an exceptional circumstance that required

effectively ended this practice in 2002. In *Syngenta Crop Protection, Inc. v. Henson*, Chief Justice Rehnquist, on behalf of a unanimous Court, rejected an attempt to independently justify removal under the Act.[38] Justice Rehnquist wrote that the Act does not, "by its specific terms, provide federal courts with an independent grant of jurisdiction," and, therefore, a district court cannot use its all writs authority under the Act to exercise removal jurisdiction.[39]

C. Contempt and the All Writs Act

The broad language of the Act begs the question: Does the Act authorize sanctions for contempt? Though a plain language reading of the Act seems to support the notion that contempt sanctions are appropriate under the Act, the Fifth Circuit reached a different conclusion.[40] In *ITT Community Development Corp. v. Barton*, ITT sued Barton, alleging various causes of action at law, and brought an action in equity for the imposition of a constructive

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removal); Lucas v. Planning Bd., 7 F. Supp. 2d 310, 318 (S.D.N.Y. 1998) ("There is an independent basis for federal jurisdiction in the authority conferred by the All Writs Act."); N.Y. State Laborers Political Action Comm. v. Mason Tenders Dist. Council of Greater N.Y., No. 97-CV-1731, 1998 WL 146248 (N.D.N.Y. Mar. 24, 1998) (finding that the All Writs Act provides for an independent basis for removal); Gehm v. N.Y. Life Ins. Co., 992 F. Supp. 209 (E.D.N.Y. 1998) (deciding that the district court did not have authority under the All Writs Act to remove an action from state court); Chance v. Sullivan, 993 F. Supp. 565 (S.D. Tex. 1998) (holding the All Writs Act gave the federal district court the authority to exercise subject matter jurisdiction over state claims that question a settlement approved by the court); 35 Acres Assocs. v. Adams, 962 F. Supp. 687 (D.V.I. 1997) (noting that removal under the All Writs Act is inappropriate for actions that do not concern class action litigation or complex consent decrees); Harbor Venture, Inc. v. Nichols, 934 F. Supp. 322 (E.D. Mo. 1996) (stating the court was persuaded that the case was removable under the All Writs Act); Holmes v. Trustmark Nat'l Bank, No. 1:95cv323GR, 1996 WL 904513, at *2 (S.D. Miss. 1996) (noting that "'[t]he All-Writs Act allows a federal court to issue an injunction against actions in state court'" (alteration in original) (quoting *In re* Joint E. & S. Dists. Asbestos Litig., 120 B.R. 648, 656 (Bankr. E.D.N.Y. 1990))).

38. 537 U.S. 28, 32 (2002).

39. *Id.* at 33.

40. Although this case was tried in the Fifth Circuit, the Eleventh Circuit in *Bonner v. City of Prichard* adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

trust.[41] ITT then moved to hold Barton in criminal contempt for allegedly obstructing justice through a series of fraudulent transfers calculated to remove his funds from the reach of the district court's process.[42] The district court scheduled a show-cause hearing and ordered Barton's attorneys, who had custody of some of the funds, to deposit these funds in the court registry.[43] However, the attorneys did not deposit the funds by the date of the show-cause hearing.[44] The district court held the attorneys in civil contempt, and the attorneys appealed.[45] The Fifth Circuit held that neither the Act nor the inherent powers doctrine authorized the district court to hold the attorneys in contempt.[46] According to the circuit court, the Act only authorized the district court to issue orders necessary to protect its subject matter jurisdiction:

> As we perceive it, the All Writs Act could have served as authority for the turn-over order here in question only to curb conduct which threatened improperly to impede or defeat the subject matter jurisdiction then being exercised by the court. Conversely, conduct not shown to be detrimental to the court's jurisdiction or exercise thereof could not have been enjoined under the Act. Thus, in the case at hand, for the turn-over order to have validity, it must be shown that it was directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.[47]

Because ITT "made no showing that the issuance of a turn-over order was necessary to enable the court to try the [lawsuit] to final judgment," the Act did not authorize contempt sanctions.[48] This is not to say that federal courts lack the power to punish through

41. 569 F.2d 1351, 1353 n.2, 1357 n.13 (5th Cir. 1978).
42. *Id.* at 1354.
43. *Id.*
44. *Id.* at 1355.
45. *Id.*
46. *Id.* at 1354.
47. *ITT*, 569 F.2d at 1359 (citations omitted).
48. *Id.*

contempt. In fact, it is well settled that the federal courts have inherent power to punish for contempt[49]—a power that reaches both conduct before the court and conduct beyond the court's confines,[50] and which the court may exercise even after the action in which the contempt arose is terminated.[51] However, *ITT* makes clear that the inherent contempt power of the federal courts does not arise from the Act.[52]

III. ALL WRITS IN BANKRUPTCY COURT

Bankruptcy courts, like district courts, have the ability to issue all writs "necessary or appropriate" in aid of their jurisdiction. The Code's all writs provision provides: The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[53] Additionally, when Congress replaced the Bankruptcy Act of 1898 with the Code in 1978, it arguably made the Act applicable to bankruptcy courts.[54] However, whether this grant of power is constitutional, and whether bankruptcy courts do in fact possess the ability to grant equitable relief under the Act and Section 105(a), both remain unclear.[55] It is

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49. *E.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (suggesting that "it is firmly established that '[t]he power to punish for contempts is inherent in all courts'" (alteration in original) (quoting *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874))); United States v. Providence Journal Co., 485 U.S. 693, 704 (1988) (arguing that a federal court has "inherent authority to punish disobedience and vindicate its authority"); Bessette v. W. B. Conkey Co., 194 U.S. 324, 327 (1904) (reasoning that contempt proceedings are important for federal courts in order to "uphold the power of the court" and to "secure to suitors therein the rights by it awarded").

50. *Chambers*, 501 U.S. at 44.

51. *In re* E.I. DuPont De Nemours & Co.–Benlate Litig., 99 F.3d 363, 368 (11th Cir. 1996).

52. *ITT*, 569 F.2d at 1360.

53. 11 U.S.C. § 105(a) (2012).

54. *See* 28 U.S.C. § 451 (2012) (defining the phrase "court of the United States" in the Act to include all district courts).

55. In one of his articles, Michael D. Sousa provides detailed inquiry into the question of whether a bankruptcy court has the power to craft equitable relief under the All Writs Act independent of Section 105 of the Bankruptcy Code and, if so, in what manner and to what extent a bankruptcy court today can use the All Writs Act to fashion equitable relief. Michael D. Sousa, *The Equitable Powers of*

also possible that bankruptcy courts would not possess any additional authority under the Act that the courts did not already possess under Section 105(a).[56] Even if this is the case, bankruptcy courts have found little difficulty finding justification for their actions under Section 105(a).[57]

A. Section 105 and the Rights of Third Parties

Most are well aware of the protections afforded to the debtor estate immediately upon filing a bankruptcy petition. The "automatic stay," which provides the debtor protection from creditor's attempts at collecting on debt immediately after filing, is perhaps the best-known debtor protection in the Code.[58] Although the stay of section 362 clearly applies to the debtor, courts have used Section 105(a) to, among other things, provide third parties (who have not filed for protection under the Code) "both temporary stays

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a Bankruptcy Court: Are § 105 of the Code and the Federal All Writs Act Mutually Exclusive?, 2007 NORTON ANN. SURV. BANKR. L. 5 (2007). Sousa concludes that the creation of the bankruptcy courts is the result of an "Act of Congress" because the All Writs Act specifically provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," and bankruptcy courts are created under Article I of the Constitution pursuant to Congress's substantive authority over the law of bankruptcies. *Id.* Accordingly, the bankruptcy courts may use the All Writs Act as well as Section 105 of the Code in fashioning equitable relief. *Id.* Sousa argues, however, that "the parameters of the All Writs Act and [Section] 105 should be applied differently." *Id.* That is, a bankruptcy court should attempt to utilize Section 105 of the Code in the first instance in granting relief, so long as the remedy sought can be attributed to carrying out the provisions of the Code. *Id.* If the remedy cannot be tied to a provision of the Code, then subsequently a bankruptcy court should be able to utilize the All Writs Act, such as in situations when enjoining ongoing state court litigation is necessary to protect the jurisdiction of the bankruptcy court or to help prevent the devolution of the reorganization process. *Id.*

56. Riley & Furlong, *supra* note 12.

57. *See* Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7, 8 (2000) ("Section 105 of the Bankruptcy Code has been cited in thousands of reported cases as an authority to support a wide variety of judicial decisions and actions.").

58. 11 U.S.C. § 362(a) (2012).

from collection and permanent releases of liability."[59] Courts have also used Section 105(a) to cross-collateralize loans of undersecured creditors.[60] For example, in *In re Aldan Industries, Inc.*, the Bankruptcy Court for the Eastern District of Pennsylvania stated that the court had the authority to issue nondebtor stays, despite choosing not to stay arbitration proceedings in that case.[61] Of course, such actions by bankruptcy courts have been criticized.[62] However, in *Aldan* and similar cases, bankruptcy courts seem motivated to restrict the rights of third parties—primarily to protect the debtor against any substantial threat likely to eliminate the possibility of reorganization.

In the plan context, bankruptcy courts have used Section 105(a) to justify the inclusion of nondebtor releases or restructuring

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59. Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 794 (2003).

60. *Id.*

61. No. 00–10360DWS, 2000 WL 357719, at *9 (Bankr. E.D. Pa. Apr. 3, 2000). *See also In re* Optical Techs., Inc., 216 B.R. 989, 993–94 (Bankr. M.D. Fla. 1997) ("Some courts have taken the position that the plain language of Section 524(e), however, provides only that a discharge does not affect the liability of third parties and does not restrain the power of the bankruptcy court to otherwise grant a release to a third party. This interpretation is consistent with the language of Section 105 which is broadly written and allows all orders necessary to effectuate a reorganization . . . ." (citation omitted)); Robins v. Chase Manhattan Bank, N.A., Civ. A. No. 93–0063–H, 1994 WL 149597, at *3 (W.D. Va. Apr. 4, 1994) (affirming the authority of the court to enter a nondebtor stay but declining to do so on other grounds); *In re* F.T.L., Inc., 152 B.R. 61 (Bankr. E.D. Va. 1993) (enjoining collection actions against officers of debtor car wash company); *In re* Heron, 148 B.R. 660, 687 (Bankr. D.D.C. 1992) ("Section 524(e) contains no language of prohibition and should not be interpreted to limit the court's power under § 105(a).").

62. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Nondebtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 1080 (1997) ("This article has argued that the bankruptcy courts' practice of discharging creditor actions against non-debtors is an abusive one, with no redeeming theoretical merit. Policy concerns advanced by proponents of non-debtor releases seem designed primarily to obfuscate the redistributional consequences of these liability releases. Most bewildering, though, is the fact that authority to issue these exceptional injunctions has been manufactured out of whole cloth, and in disregard of Supreme Court precedent prohibiting them.").

provisions in Chapter 11 reorganization plans.[63] Nondebtor releases may be classified as estate releases, third-party releases, or exculpations. Bankruptcy courts are permitted to issue estate releases—releases of claims held by the debtor against a nondebtor third party—in accordance with Section 1123(b)(3)(A) of the Code.[64] Third-party releases—releases of a nondebtor third party's claim against another nondebtor third party—can be classified as either consensual or nonconsensual.[65] Bankruptcy courts have the authority to grant consensual releases, but whether they have the authority to grant nonconsensual releases is currently the subject of a circuit split in interpreting Sections 524(e) and 105(a) of the Code.[66] Exculpation, the release of claims by both debtor and nondebtor third parties of claims against professionals and other fiduciaries of the bankruptcy estate, appears permissible pursuant to Section 1103(c) of the Code.[67] In *Travelers Indemnity Company v. Bailey*, the Supreme Court was presented with the opportunity to answer the question of whether bankruptcy courts have jurisdiction to release nondebtors from claims of other nondebtors that have no impact upon, and are not derived from, the res of the bankruptcy estate.[68] Instead of reaching the question, however, the Court, in an opinion authored by Justice Souter and joined by Justices Roberts, Scalia, Kennedy, Thomas, Breyer, and Alito, disposed of the case under the principles of res judicata and the bar on collaterally attacking a final

63. George W. Kuney, *Nondebtor Releases and* Travelers v. Bailey*: A Circuit Split That Is Likely to Remain*, 2010 NORTON ANN. SURV. OF BANKR. L. 5 (2010).

64. *See infra* Part III(B) (discussing "estate releases").

65. Jason W. Harbour & Tara L. Elgie, *The 20-Year Split: Nonconsensual Nondebtor Releases*, 21 NORTON J. BANKR. L. & PRAC. 4 (2012), *available on Westlaw at* 21 J. Bankr. L. & Prac. 4 Art. 4 (discussing "permissibility of nonconsensual nondebtor releases . . . [and] what constitutes consent for consensual nondebtor releases").

66. *See infra* Part III(D) (discussing "nonconsensual third party releases"); *see also* Harbour & Elgie, *supra* note 65 (discussing the circuit split and the cases involved in detail).

67. *See In re* Pac. Lumber Co., 584 F.3d 229, 253 (5th Cir. 2009) ("We agree, however, with courts that have held that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.") (collecting cases).

68. Travelers Indem. Co. v. Bailey, 557 U.S. 137, 152 (2009).

order without opining on the scope of bankruptcy jurisdiction or the propriety of nondebtor releases.[69]

B. Estate Releases

Debtors are permitted to release their claims against specified nondebtor third parties as part of the reorganization plan pursuant to Section 1123(b)(3)(A), which provides that "a plan may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[70] In evaluating estate releases, courts generally apply the same standard as applied under Bankruptcy Rule 9019.[71] Bankruptcy Rule 9019 provides that "on motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."[72] A court may approve an estate release if it determines that the release is "fair, equitable, and in the best interests of the estate."[73]

Courts typically use these seven factors, or a similar variation, in determining whether an estate release is appropriate: (1) balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation and its attendant expense, inconvenience, and delay, including the difficulty in collecting the judgment; (3) interests of the creditors, including the affected class's relative benefits and creditor support; (4) whether other parties in interest support the plan; (5) counsel's competency and experience and judge's knowledge in reviewing the plan; (6) the nature and breadth of the releases; and (7) extent to which the plan is the product of arm's-length bargaining.[74]

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69. *Bailey*, 557 U.S. at 151–54. The question was also presented to the Court in the next term in *Ad Hoc Committee of Kenton County Bondholders v. Delta Air Lines, Inc.*, this time in the form of a request for direct review. 558 U.S. 1007 (2009). The Court denied certiorari without comment, however. *Id.*

70. 11 U.S.C. § 1123(b)(3)(A) (2012).

71. *In re* Coram Healthcare Corp., 315 B.R. 321, 334 (Bankr. D. Del. 2004) (citing FED. R. BANKR. P. 9019).

72. FED. R. BANKR. P. 9019(a).

73. *In re* Dewey & Lebouef LLP, 478 B.R. 627, 640 (Bankr. S.D.N.Y. 2012).

74. *In re* Iridium Operating LLC, 478 F.3d 452, 462 (2d Cir. 2007); *see also In re* Drexel Burnham Lambert Grp., 960 F.2d 285, 292–93 (2d Cir. 1992) (affirming the bankruptcy court's approval of a settlement due to the complexity of

C. *Consensual Third-Party Releases*

Courts have found that third-party releases against nondebtors (such as officers, directors, affiliates, parent companies, and guarantors) in a plan approved by creditors do not violate the Code; those creditors who vote in favor of the plan are deemed to have consented to the releases and are, therefore, bound by them.[75]

While bankruptcy courts are authorized to grant consensual releases, it is unclear whether declining to accept a plan on a ballot that provides the opportunity to opt-out of a nondebtor release constitutes sufficient consent to bind that party to the release. When the ballots allow voters to opt-out of the release, and the parties received adequate notice that abstaining from voting and declining to opt-out would result in granting the nondebtor releases, bankruptcy courts within the Second and Fourth Circuits have deemed parties that abstain and decline to opt-out to have consented to the releases.[76] Courts within the Third Circuit, however, have held that entities that abstained from voting and declined to opt-out did not consent to nondebtor releases, notwithstanding the fact that the ballots provided notice and an opportunity to opt-out of the release.[77]

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the claimants' litigation, the defendant's limited funds for recovery, and the potential for the fund's depletion as a consequence of ongoing litigation).

75. *See In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) ("[C]ourts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code."); *In re* Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010) ("Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan."); *In re* Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (noting that in order to accomplish a third-party release, the "affirmative agreement of the creditor affected" is necessary).

76. *See In re* DBSD N. Am., Inc., 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009) (holding that parties who abstain from voting, and who do not opt out, release the claims consensually); *In re* Calpine Corp., No. 05-60200, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) (consenting to release where parties declined to opt out).

77. *See In re* Washington Mut., Inc., 442 B.R. 314, 355 (Bankr. D. Del. 2011) (holding that "the opt out mechanism is not sufficient to support the third party releases . . . [and f]ailing to return a ballot is not a sufficient manifestation of consent to a third party release"); *In re* Coram Healthcare Corp., 315 B.R. 321 (Bankr. D. Del. 2004) (treating entities that abstained from voting as non-consenting creditors for purposes of post-petition interest).

D. Nonconsensual Third-Party Releases

Currently, the circuit courts are split on the issue of whether bankruptcy courts are authorized to issue nonconsensual releases of nondebtor third parties as part of the debtor's reorganization plan.[78] This split is a consequence of conflicting interpretations of Sections 524(e) and 105(a) of the Code. Section 524(e) provides that the "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."[79] Again, Section 105(a) grants broad equitable power to the bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[80] However, the Third Circuit has found that Section 105(a) "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."[81] That said, Section 105 has been, and remains, a tool used to justify many remedies that are not specifically provided for by the Code.[82]

The Fifth, Ninth, and Tenth Circuits prohibit nonconsensual nondebtor releases.[83] These circuits interpret Section 524(e) as preserving claims against nondebtor third parties, concluding that its specific provisions "displace the court's equitable powers under Section 105 to order the permanent relief [against a non-debtor] sought by [the debtor]."[84] These courts found the fact that Congress

78. Harbour & Elgie, *supra* note 65.

79. 11 U.S.C. § 524(e) (2012).

80. 11 U.S.C. § 105(a).

81. *In re* Combustion Eng'g, Inc., 391 F.3d 190, 236 (3d Cir. 2004).

82. *See infra* Part III(F) (discussing the application of Section 105 when no other remedy exists).

83. *See In re* Pac. Lumber, 584 F.3d 229, 252 (5th Cir. 2009) (holding that applicable case law broadly forecloses nonconsensual nondebtor releases); *In re* Lowenschuss, 67 F.3d 1394, 1402 (9th Cir. 1995) (rejecting the argument that Section 105 gives bankruptcy courts the power to discharge the liabilities of nondebtors); *In re* Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995) (holding that Section 105 injunctions that discharge nondebtors must be overturned); *In re* W. Real Estate Fund, Inc., 922 F.2d 592, 598 (10th Cir. 1990) (reversing the bankruptcy court's decision to replace a debtor's contingency fee obligation with its own determination of a lower hourly fee).

84. *In re Lowenschuss*, 67 F.3d at 1402 (alteration in original) (quoting *In re* Am. Hardwoods, Inc., 885 F.2d 621, 625–26 (9th Cir. 1989)).

amended Section 524 to add Section 524(g), which authorized bankruptcy courts to impose a channeling injunction for nondebtors in mass asbestos cases, to further support the position that "Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases [and] reinforces the conclusion that [Section] 524(e) denies such authority in other, non-asbestos cases."[85]

The Second, Fourth, Sixth, and Seventh Circuits interpret Sections 524(e) and 105(a) to be reconcilable. These circuits interpret Section 105(a) to confer broad equitable power on bankruptcy courts, and find that the language of Section 524(e) which provides that a "discharge of a debt . . . does not affect the liability of [third parties],"[86] does not "purport to limit or restrain the power of the bankruptcy court" to grant nondebtor third-party releases when appropriate in limited circumstances.[87] Although these courts agree that Section 524(e) does not prohibit nonconsensual third-party releases, they use different standards to determine when it is appropriate to issue a release.

Courts in the Second Circuit have stated that they are reluctant to approve nonconsensual third-party releases both because Section 524(g), the only explicit authority for granting them in the Code, is limited to asbestos cases and because releases are susceptible to abuse since they "may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."[88] Courts in the Second Circuit permit nondebtor releases only when there is a "finding that truly unusual circumstances render the release terms important to the success of the plan."[89]

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85. *In re Lowenschuss*, 67 F.3d at 1402 n.6; *see also In re W. Real Estate Fund*, 922 F.2d at 600 (considering a permanent injunction precluding the debtor's former attorney's attempt to recover the unpaid portion of his fee from the settling party and holding that the plan's provision was improper based on Section 524(e)'s express language demonstrating that "Congress did not intend to extend [discharge] to third-party bystanders").

86. 11 U.S.C. § 524(e).

87. *E.g.*, *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) (arguing that the language of 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").

88. *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005).

89. *Id.* at 143. In *In re Drexel*, which involved a settlement agreement between classes of securities claimants and a bankrupt securities brokerage firm, the court upheld a nonconsensual nondebtor release after finding that an injunction

By comparison, the Fourth Circuit identified four factors relevant to deciding whether a nonconsensual release is proper: (1) the claimants overwhelmingly approve the plan; (2) the plan provides for full payment of the creditor's claims; (3) the injunction affects a very small percentage of the total claimants; and (4) the injunction is essential to the debtor's effective reorganization.[90]

Next, the Sixth Circuit permits the release of nonconsensual nondebtor claims in unusual circumstances, as determined by evaluating seven factors: (1) an identity of interests between the debtor and the third party, such that suit against the nondebtor will deplete the assets of the estate; (2) substantial contribution to the reorganization by the nondebtor; (3) whether the release is essential to the reorganization; (4) overwhelming acceptance of the plan by the affected class; (5) whether the plan provides payment to the affected class; (6) whether those claimants who choose not to settle are able to fully recover under the plan; and (7) specific factual findings by the bankruptcy court to support its conclusion.[91]

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limiting the number of lawsuits that could be brought against Drexel's former directors and officers was important to the success of the plan—without it, the directors and officers would have been less likely to reach the settlement agreement, which was "an essential element of Drexel's ultimate reorganization." 960 F.2d 285, 293 (2d Cir. 1992).

90. *In re* A.H. Robins Co., 880 F.2d 694, 701–02 (4th Cir. 1989). In *In re A.H. Robins*, which involved mass tort litigation resulting from petition claims, the plan enjoined suits against nondebtor third parties, including directors, attorneys, and insurance companies. *Id.* at 701. The plan included a settlement, but some claimants chose to opt-out of it in order to pursue their claims against insurers or other third parties. *Id.* at 701–02. Because the plan was overwhelmingly approved, provided a settlement allowing claimants to recover, and "the entire reorganization hinge[d] on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor," the court upheld the releases. *Id.* at 702.

91. *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002). Applying the *In re Dow Corning* test, a bankruptcy court did not approve the release of donors claims against the debtor–non-profit's directors and officers: (1) there was an identity of interests between the debtor and nondebtor officers and directors due to the near certainty of lawsuits against them, their rights to indemnification, and the advancement of legal expenses; (2) the fact that the officers and directors performed their duties was not sufficient because they performed them either for payment or to satisfy a fiduciary duty; (3) the possibility of officers and directors leaving the company did not make the releases essential; (4) although the creditors voted overwhelmingly in favor of the plan, the impacted class did not; (5) the plan did not provide any mechanism for the payment of affected claims; (6) as it was,

Finally, the Seventh Circuit has held that bankruptcy courts have broad equitable power to issue third-party releases so long as doing so is appropriate and not inconsistent with another provision of the Code.[92] The court based this conclusion both on the prior version of Section 524(e), which states that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," and where Congress intends to specifically limit the bankruptcy court's power, it has done so clearly—Section 105 states that "a court may not appoint a receiver in a case under this title."[93]

The First, Eleventh, and D.C. Circuits have not addressed the statutory conflict directly, but have issued decisions permitting the issuance of nondebtor releases.[94] In *In re Munford, Inc.*, the Eleventh Circuit considered an adversary proceeding in which the debtor alleged a breach of professional duty regarding a leverage buyout by a valuation firm.[95] The court held that Section 105(a) and Rule 16 of the Federal Rules of Civil Procedure supported the bankruptcy court's decision to enter an order barring non-settling defendants from claims of contribution and indemnity against the

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the release provisions' purpose to protect the nondebtor parties from any of the affected party's claims precluded recovery from third-party sources outside of the plan; (7) the only factor weighing in favor of approving the release was the potential for an obligation to indemnify the officers and directors, which "cannot by itself justify the Release Provisions." *In re* Nat'l Heritage Found., Inc., 478 B.R. 216, 231–32 (Bankr. E.D. Va. 2012).

92. *In re* Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008).

93. *Id.* at 656 n.4 (quoting 11 U.S.C. § 34 (1976) (repealed Oct. 1, 1979); 11 U.S.C. § 105 (2006)). In *Airadigm*, the court approved a plan providing for the release of a third-party creditor from liability for any act or omission connected with the plan other than willful misconduct as it found the release to be appropriate and necessary to the reorganization: It was limited only to claims arising out of the reorganization; the limitation was subject to the plan's other provisions, e.g., one that expressly reserved the FCC's regulatory powers, preventing the nondebtor from "skirting the FCC's regulations"; and the bankruptcy's evidence was adequate that the nondebtor required the limitation before it would provide requisite financing, "which was itself essential to the reorganization. . . . Absent [the nondebtor's] involvement, the reorganization simply would not have occurred." *Id.* at 657.

94. Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 977 (1st Cir. 1995); *In re* Munford, Inc., 97 F.3d 449, 454 (11th Cir. 1996); *In re* AOV Indus., Inc., 792 F.2d 1140, 1145–46 (D.C. Cir. 1986).

95. 97 F.3d at 452.

valuation firm: "Section 105(a) clearly provides that the bankruptcy court can enter 'any order' necessary to carry out the provisions of the Bankruptcy Code, while Rule 16 authorizes the use of special procedures to assist the parties in reaching a settlement."[96]

It is unclear whether the nonconsensual release of nondebtor third parties is permitted in the Third Circuit. In *In re Continental Airlines*, the court held that when the plaintiffs received no consideration for having their claims permanently enjoined, the bankruptcy court's factual findings were insufficient to establish the reorganization was fair and necessary—the "hallmarks of permissible non-consensual releases."[97] Subsequently, in *In re Combustion Engineering*, the court considered nonconsensual nondebtor releases proposed to the bankruptcy court as channeling injunctions under Section 524(g), but the court approved the releases as equitable injunctions under Section 105(a) after concluding that Section 524(g) did not authorize a channeling injunction over independent, non-derivative third-party actions against nondebtors.[98] The Third Circuit refused to approve the Section 105(a) injunction on the basis that it "would violate [Section] 524(g)(4)(A), would improperly extend bankruptcy relief to non-debtors, and would jeopardize the interests of future . . . claimants" of the nondebtor affiliates.[99] It further held that Section 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law"[100] and opposed the injunction as its practical effect was to allow the nondebtors to "cleanse themselves of non-derivative asbestos liability without enduring the rigors of bankruptcy."[101] These decisions suggest that nonconsensual nondebtor releases are not permissible in the Third Circuit.

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96. *In re Munford*, 97 F.3d at 455 (citing FED. R. CIV. P. 16).

97. 203 F.3d 203, 213–14 (3d Cir. 2000).

98. 391 F.3d 190 (3d Cir. 2004).

99. *Id.* at 234.

100. *Id.* at 236 (quoting *In re* Aquatic Dev. Group, Inc., 352 F.3d 671, 680–81 (2d Cir. 2003)) (internal quotation marks omitted).

101. *Id.* at 237.

E. Treatment of Critical Vendors Under Sections 105 and 363

In the preplan context, some courts have held that Section 105, coupled with Section 363 (use, sale, or lease of estate property), authorizes the payment of the unsecured prepetition claims of so called "critical vendors" based upon the "doctrine of necessity."[102] In *In re Tropical Sportswear International*, the Bankruptcy Court for the Middle District of Florida justified pre-plan payments to a specific group of creditors by holding that a "bankruptcy court may utilize [S]ections 105(a) and 363 of the Bankruptcy Code to justify the grant of critical vendor status under appropriate circumstances. Bankruptcy courts recognize that [S]ection 363 is a source for authority to make critical vendor payments, and [S]ection 105 is used to fill in the blanks."[103] *In re Women First Healthcare, Inc.* provides another example of how courts approach issues stemming from the use of Section 363: the Delaware Bankruptcy Court held that Section 105 could not be used as a basis to award an administrative claim to a stalking horse bidder when a sale order was rescinded.[104]

On the contrary, when a sale did go forward and there was insufficient disclosure concerning one of the assets that was acquired in the sale, the Bankruptcy Court for the Western District of Kentucky held that Section 105, coupled with Section 363, authorized the court to enter a remedial order requiring the purchasing party to pay additional consideration.[105]

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102. *See In re* Tropical Sportswear Int'l Corp., 320 B.R. 15, 17 (Bankr. M.D. Fla. 2005) ("[T]he Court will exercise its authority pursuant to [S]ections 105 and 363 of the Bankruptcy Code to issue orders providing for the payment of pre-petition amounts to critical vendors only if . . . the payments are necessary to the reorganization process . . . ."); *In re* NVR L.P., 147 B.R. 126, 128 (Bankr. E.D. Va. 1992) ("To justify the pre-plan payment of a pre-petition obligation the proponent of the payment must show substantial necessity. By definition, the 'necessity of payment' rule is a rule of necessity and not one of convenience.").

103. *In re Tropical Sportswear Int'l Corp.*, 320 B.R. at 20.

104. 332 B.R. 115, 120 (Bankr. D. Del. 2005) (awarding a claim under Section 503(b)(1)(A)).

105. *In re* LWD, Inc., 332 B.R. 543, 555 (Bankr. W.D. Ky. 2005), *aff'd*, 340 B.R. 363 (W.D. Ky. 2006).

F. Section 105 When No Other Remedy Exists

Additionally, bankruptcy courts seem particularly willing to invoke Section 105 to provide a remedy when no remedy would otherwise exist. Section 105(a), coupled with Section 365(d), has been employed to authorize retroactive rejection of nonresidential leases.[106] The Ninth Circuit Court of Appeals held in *In re At Home Corp.* that the bankruptcy court had equitable authority to approve rejection of an unexpired nonresidential lease retroactive to the filing date of the motion to reject.[107] At least one court has used Section 105 to authorize the disallowance or surcharge of exemptions allowed under Section 522 based upon the debtor's post-petition bad acts—this is contrary, of course, to subsequent Supreme Court precedent on this exact point.[108]

In *In re Hoffinger Industries, Inc.*, the court relied on Section 105 to authorize the re-characterization of a loan from debt to equity.[109] One court relied on Section 105 to authorize substantive consolidation of two or more separate debtors.[110] Another court authorized an equitable credit, through its power under Section 105, with respect to a Section 549 claim for monies a creditor received from a debtor post-petition in partial repayment of loans where the lender advanced money to the debtor and was unaware of the bankruptcy filing.[111]

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106. *In re* At Home Corp., 392 F.3d 1064, 1071 (9th Cir. 2004).

107. *Id.* at 1072.

108. *In re* Koss, 319 B.R. 317, 323 (Bankr. D. Mass. 2005). The subsequent Supreme Court contrary authority is *Law v. Siegel*, in which the Court unanimously held that bankruptcy courts cannot contravene specific provisions of the Code because that would contradict the principle of statutory construction that specific prohibitions limit general authority to take action. 134 S. Ct. 1188, 1194 (2014).

109. 327 B.R. 389, 408 (Bankr. E.D. Ark. 2005). *But cf. In re* Mirant Corp., 327 B.R. 262, 268–69 (Bankr. N.D. Tex. 2005) ("[R]echaracterization of the Agreements would require exercise by the court of its equitable powers. Yet bankruptcy courts have been repeatedly instructed to use their equitable powers sparingly . . . . Thus, it is not appropriate for the court to entertain at this juncture the Recharacterization Claim, which should therefore be dismissed." (citations omitted)).

110. *In re* Bonham, 229 F.3d 750, 763–64 (9th Cir. 2000).

111. *In re* Cybridge Corp., 312 B.R. 262, 273 (D.N.J. 2004) (relying on Section 550(d) for support). *But cf. In re* Patterson, 330 B.R. 631, 641 (Bankr.

G. *Section 105 and the Partial Discharge of Student Loans*

While debtors are provided a variety of discharges in bankruptcy, Section 523 of the Code provides specific limitations on the types of debts eligible for discharge.[112] Educational loan providers who issue loans backed by the federal government are among a limited class of creditors strongly protected from a discharge when the debtor files a bankruptcy petition.[113] One notable exception to the immunity from discharge enjoyed by educational lenders is discharge of the student loan debt when the debtor can show that the loans are an "undue hardship."[114] In essence, the showing of undue hardship is an "all or nothing" affair; if a debtor is able to show undue hardship under the generally acceptable standard, then the student loans are discharged, if not, then the student loans remain.[115] This generally accepted standard is

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E.D. Tenn. 2005) (holding that Section 105 does not allow a defense of equitable subrogation to a preference claim).

112. 11 U.S.C. § 523 (2012).

113. *Id.* § 523(a)(8).

114. *Id.* What exactly constitutes "undue hardship" has predictably been a topic of debate. *See* Robert B. Milligan, Comment, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 246–53 (2000) ("[C]ourts applying the same undue hardship test reach inconsistent results . . . ."). To evaluate undue hardship claims, a majority of federal courts have thus applied the three-part test set forth by the Second Circuit in *Brunner v. New York State Higher Education*, 831 F.2d 395, 396 (2d Cir. 1987). *See* Jennifer L. Frattini, Comment, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537, 558 n.124 (2001) (collecting cases applying or explicitly adopting the *Brunner* test); *see also In re* Rivers, 213 B.R. 616, 619 (Bankr. S.D. Ga. 1997) (referring to *Brunner* as the "leading authority" on the undue hardship exception). To articulate undue hardship within the meaning of Section 523(a)(8), the *Brunner* court required proof that (1) the debtor cannot currently maintain a minimal standard of living if forced to repay the loans; (2) this condition is likely to continue throughout the loan repayment period; and (3) the debtor has made good faith efforts to repay the loans. *Brunner*, 831 F.2d at 396.

115. *See In re* Brightful, 267 F.3d 324, 327–28 (3d Cir. 2001) (holding that the undue hardship test must be strictly construed; if one of the elements is not proven, the loans cannot be discharged); *In re* Rifino, 245 F.3d 1083, 1087–88 (9th Cir. 2001) (holding that a debtor must satisfy all three requirements of the undue hardship test to be able to discharge the debt); *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993) (noting that if the debtor's financial hardship is only

subject to at least one notable exception. In *In re Hornsby*, the Sixth Circuit held that, despite the fact that undue hardship justifying discharge of debtors' student loan debts was not established and total discharge was not warranted, the bankruptcy court nonetheless had the power to take action short of total discharge under its authority to issue orders necessary to carry out provisions of Code, notably Section 105.[116]

H. Section 105 and Contempt

Although the Code does not explicitly provide bankruptcy courts with civil or criminal contempt powers, it should come as no surprise that bankruptcy practitioners and judges alike are prone to believe that a bankruptcy court possesses such power.[117] Some scholars have argued, and courts have held, that a bankruptcy court may properly use Section 105 as the source of its contempt order, if the order is necessary to effectively enforce or use another specific provision of the Code.[118] Other scholars, however, have argued that Section 105 does not provide bankruptcy courts with contempt powers.[119] While some courts have held that the contempt power is

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temporary, the debtor fails to meet the undue hardship requirement for discharge of student loans); *Brunner*, 831 F.2d at 396–97 (2d Cir. 1987) (affirming judgment denying discharge of student loans for debtor who did not establish each element of undue hardship). *But see In re* Hornsby, 144 F.3d 433, 438–39 (6th Cir. 1998) ("In a student-loan discharge case where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act.").

116. *In re Hornsby*, 144 F.3d at 438–39; *see also In re* Lawson, 256 B.R. 512, 518 (Bankr. M.D. Fla. 2000) (holding that the bankruptcy court can modify a non-dischargeable loan under its Section 105 power); *In re* Rivers, 213 B.R. 616, 618 (Bankr. S.D. Ga. 1997) (applying the same exception).

117. *See, e.g.*, Burd v. Walters, 868 F.2d 665, 669 (4th Cir. 1989) (stating that Section 105 provides a basis for bankruptcy court's civil contempt powers).

118. *See, e.g.*, Bogart, *supra* note 59, at 815 n.73 ("For example, a bankruptcy judge may issue a turn over order under [S]ection 542 of the Code that is ultimately disobeyed by the party to whom the order is directed."); *In re* Spectee Group, Inc., 185 B.R. 146, 155 n.15 (Bankr. S.D.N.Y. 1996) (holding that Section 105 "empower[s] the bankruptcy court to award sanctions in conjunction with its inherent powers").

119. William S. Parkinson, *The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues*, 65 AM. BANKR. L.J. 591, 613–19 (1991). According to Judge Parkinson:

inherently judicial and cannot constitutionally be vested in a non-Article III court such as a bankruptcy court,[120] other courts have suggested that all courts, whether created pursuant to Article I or Article III of the Constitution, have inherent civil-contempt power.[121]

> [C]ontempt matters in bankruptcy cases are directly analogous to contempts occurring before magistrate judges or administrative law judges. These agencies are precluded from deciding such matters and must certify them to a district court for initial adjudication. Given the bankruptcy court's limited authority to adjudicate only matters arising in a bankruptcy case, it would be more constitutionally palatable to have the bankruptcy court follow a similar procedure. While one might sympathize with the difficulties presented by limiting use of [Section] 105(a) solely for administrative convenience, the breach of established constitutional principles in the name of practical expediency is not the proper means by which to resolve the problem.

Id. at 618–19 (footnotes omitted); *see also* Manuel L. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 505–14 (1988) (exploring bankruptcy courts' ability to exercise contempt power). Judge Leal argues that contempt powers of a bankruptcy court do not implicate the core proceedings. *Id.* at 507–08. He then states:

> No contempt power is mentioned in [S]ection 105. Because of the origins and authority of the bankruptcy court as a creature of Congress, it is limited by congressional grant. The restrictive approach [to Section 105] relies upon the legislative ability of Congress to generate a clear legislative scheme as to the authority of the bankruptcy court. Congress has not legislatively provided the bankruptcy court with such power. If the authority to order contempt is to be included in the powers of the bankruptcy court, it is Congress that must so legislate to provide the necessary authority.

Id. at 514. Extending Judge Leal's thought, Federal Rule of Bankruptcy Procedure 9020 (FED. R. BANKR. P. 9020 (1987)), pertaining to and by implication permitting the entry of contempt orders, is not a congressional action, and can no more serve as a basis for bankruptcy court contempt powers than does Section 105.

120. *See, e.g.*, *In re* Haddad, 68 B.R. 944, 946–47 (Bankr. D. Mass. 1987) (discussing cases that hold the bankruptcy courts do not have contempt powers because it is an inherently judicial power possessed only by Article III courts); *In re* Cont'l Air Lines, Inc., 61 B.R. 758, 775 (S.D. Tex. 1986) (holding that issuing a final contempt order is inconsistent with the constitutional limitations imposed upon the authority of the bankruptcy courts); *In re* Indus. Tool Distribs., Inc., 55 B.R. 746, 751–52 (N.D. Ga. 1985) (concluding that delegation of contempt power to bankruptcy judges is unconstitutional).

121. *In re* Miller, 81 B.R. 669, 675–76 (Bankr. M.D. Fla. 1988).

Some courts have also characterized a bankruptcy court's exercise of contempt power to enforce a proper order as incidental to Congress's power to define the right it has created and, thus, as not violating the constitutionally mandated separation of powers.[122] Several courts have found that Section 105 of the Code confers civil contempt power on bankruptcy judges,[123] at least in core proceedings,[124] or if contempt power is not excepted from the bankruptcy judges' power under a district court's general order referring cases and proceedings to the bankruptcy judges in its district.[125]

I. Limits on the Power of Bankruptcy Courts

Despite the historically broad sanctioning of authority to bankruptcy courts, after the 2011 United States Supreme Court decision of *Stern v. Marshall*, the extent of bankruptcy courts' jurisdictional authority was seriously put into question.[126] But, *Stern*'s effect was somewhat diminished by the subsequent Supreme Court decision of *Executive Benefits Insurance Co. v. Arkinson*.[127]

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122. *In re* Skinner, 917 F.2d 444, 448–50 (10th Cir. 1990); *In re* Walters, 868 F.2d 665, 670 (4th Cir. 1989).

123. *In re* Dyer, 322 F.3d 1178, 1192 (9th Cir. 2003); *In re* Terrebonne Fuel & Lube, Inc., 108 F.3d 609, 612–13 (5th Cir. 1997); *In re Skinner*, 917 F.2d at 447.

124. *In re* Roush, 88 B.R. 163, 163–64 (Bankr. S.D. Ohio 1988) (indicating that bankruptcy courts have the power pursuant to Section 105 to hear and determine a request for civil contempt emanating from the violation of one of its orders in a core proceeding); *In re* Walters, 868 F.2d 665, 669–70 (4th Cir. 1989); *In re* Bowen, 89 B.R. 800, 807 (Bankr. D. Minn. 1988); *In re Haddad*, 68 B.R. at 948.

125. *In re Indus. Tool Distribs.*, 55 B.R. at 749–50.

126. *See* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011) (removing state law counterclaims that were not resolved in the claims-allowance process from core bankruptcy jurisdiction); *see generally* Jonathan W. Young & Dana G. Hefter, *Creating a Defensible Border: Reasonable Limits on Post-Stern Bankruptcy Jurisdiction*, AM. BANKR. INST. J., July 2013, at 29 (discussing *Stern*'s effect on bankruptcy courts' jurisdiction).

127. 134 S. Ct. 2165, 2173 (2014) (clarifying *Stern* by explaining that *Stern* did not create a gap rendering courts powerless to act on *Stern* claims and requiring district courts to hear these claims in the first instance; instead, Section 157(c) permits courts to proceed with *Stern* claims, treating them as "non-core" under the statute); *see also* Danielle Spinelli & Craig Goldblatt, *Constitutional and Statutory Limits After Executive Benefits*, AM. BANKR. INST. J., Aug. 2014, at 16–17 (discussing the implications of executive benefits).

The Court in *Stern* held that the bankruptcy court's power to adjudicate "counterclaims to proofs of claim," although statutorily defined as "core" under 28 U.S.C. § 157(b)(2), was premised on state law independent of the bankruptcy case and, thus, its final adjudication by the bankruptcy court was unconstitutional.[128] Even though the *Stern* Court characterized its holding as "narrow," not intending to call into the question of authority of bankruptcy courts generally, it has caused lower courts to reexamine whether bankruptcy courts have the constitutional authority to hear and decide other statutorily codified "core" actions under Section 157(b)(2).[129] Since *Stern*, courts have addressed what types of causes of actions and counterclaims a bankruptcy court may finally adjudicate without breaching the constitutional restrictions imposed by Article III of the Constitution.[130]

Wherever the courts ultimately fall regarding bankruptcy courts' jurisdiction over "core" and "noncore" decisions, the idea that bankruptcy judges do and should lack the authority of Article III judges is not new. Professor Thomas Plank has discussed the constitutional limits inherent within the bankruptcy court system, and according to Professor Plank:

> A summary bankruptcy proceeding makes as much sense today as it did in 1789. Typically, the debtor has few liquid assets and many creditors. The full adjudicatory procedures for resolving a dispute between two individual litigants is neither useful nor justified in bankruptcy matters. On the other hand, bankruptcy judges should not resolve matters that are not within the realm of bankruptcy. The best way to keep alive the idea of Congress's limited power to enact laws on the subject of bankruptcies is to retain the current system of bankruptcy adjudication of core

128. *Stern*, 131 S. Ct. at 2620.

129. *See, e.g.*, *In re* Ambac Fin. Grp., Inc., 457 B.R. 299, 308, *order aff'd*, 2011 WL 6844533 (S.D. N.Y. Sept. 23, 2011), *aff'd*, 2012 WL 2849748 (2d Cir. 2012) ("Unfortunately, *Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.").

130. *See, e.g.*, *In re* Global Technovations Inc., 694 F.3d 705, 722 (6th Cir. 2012) (discussing fraudulent-transfer claims in light of *Stern*).

> proceedings by bankruptcy judges appointed by and removable by Article III judges.[131]

IV. CONCLUSION: WHY THE DISCREPANCY?

Bankruptcy courts appear more willing to invoke their all writs authority under the Code than their Article III counterparts are willing to invoke their all writs authority under the Act. The only questions remaining are why and how? Any practicing member of the federal bar can tell you that the federal district courts in many jurisdictions are clogged with non-civil proceedings. It could be the case that in such non-civil proceedings, such as criminal proceedings, where the preservation of due process is constantly evaluated and confirmed, federal judges are less likely to stray from a strict adherence to the United States Code. In contrast, bankruptcy courts seem willing to do what is necessary to resolve a case both efficiently and equitably, including invoking their all writs authority under the Code, perhaps shrouding the exercise of this power in the cloak of the "doctrine of necessity."[132] If this is the case, even if all of the parties to the bankruptcy proceeding are completely content with bypassing or sidestepping procedure when convenient in favor of results, there is simply no viable justification other than the pattern of past practice for such a vast and varying use of the all writs doctrine in bankruptcy courts, particularly if the underlying power of bankruptcy judges is unclear.

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131. Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 639 (1998).

132. *See In re* Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) ("A 'doctrine of necessity' is just a fancy name for a power to depart from the Code.").