

THE SCOPE OF BANKRUPTCY ANCILLARY JURISDICTION AFTER KATZ AS INFORMED BY PRE-KATZ ANCILLARY JURISDICTION CASES

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The United States Supreme Court correctly recognized in the 2004 *Hood* and 2006 *Katz* cases that the fundamental nature of bankruptcy cases and proceedings is distinct from litigation of statutes enacted under the Commerce Clause or other sections of Article I of the Constitution, in a way that is critical to sovereign immunity analysis.¹ Unlike the laws at issue in the *Seminole Tribe* and other non-bankruptcy sovereign immunity cases before *Hood* and *Katz*, the substantive provisions of bankruptcy statutes are not regulatory laws, and do not apply to the populace at large or mandate or proscribe any action in the course of everyday affairs. Bankruptcy laws only apply in conjunction with bankruptcy cases adjudicating the status of the bankrupt debtor. Effectively, the federal government supplies the forum and standards for resolution of private debt matters. Unlike federal regulatory statutes that are enforceable by federal authorities, bankruptcy discharges, the automatic stay, preference actions and the like are enforceable only by debtors and creditors, and only in the context of specific bankruptcy cases, not by United States Attorneys or federal agencies in federal or state court suits. It is only private parties who can enforce such bankruptcy law provisions through bankruptcy court proceedings in specific debtors' bankruptcy cases.

In his paper, Professor Ralph Brubaker describes bankruptcy as a procedural mechanism for regulating debtor-creditor and inter-creditor relations, which he conceptualizes as a federal forum power.² That concept is viable, but historically the Supreme Court has relied instead on *in rem* jurisdiction and proceedings ancillary to *in rem* cases to interpret the meaning and scope of bankruptcy jurisdiction. Applying those concepts to explain the Constitutional foundation of bankruptcy jurisdiction, and the abrogation of sovereign immunity in bankruptcy cases and proceedings, is sound and supported by centuries of jurisprudence. Revisiting that

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¹ See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 1004 (2006) (analyzing text of Bankruptcy Clause to give Congress power over states to mandate respect of other states' bankruptcy discharge orders); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004) (concluding debtor's initiation of suit to determine dischargeability of student loan is not claim against state for purpose of Eleventh Amendment).

² Ralph Brubaker, *Explaining Katz's New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 129 (2007) ("Conceptualizing Congress's Bankruptcy Power as a federal forum power, therefore, has precisely the dramatic and far-reaching implications for state sovereign immunity brought to fruition by the *Katz* decision.").

precedent is useful to understanding the scope of bankruptcy jurisdiction today, as well as the limitations of sovereign immunity in this area of the law.

I. THE KATZ ANALYSIS

The Supreme Court's opinion in *Seminole Tribe* prompted a flood of opinions and articles about States' ability to exert Eleventh Amendment immunity from federal bankruptcy jurisdiction.³ The Court took a substantial step toward precluding States from "opting out" of bankruptcy court proceedings in the 2004 *Hood* case.⁴ It held in *Hood* that bankruptcy discharge proceedings are a matter of *in rem* jurisdiction over the debtor as part of the bankruptcy *res*.⁵ Jurisdiction to bind parties to the discharge and jurisdiction over parties contesting the discharge does not implicate personal jurisdiction, and accordingly does not infringe sovereign immunity.⁶ The defense of sovereign immunity is simply inapplicable in such *in rem* proceedings, which would include a discharge determination.⁷ Focusing on the difference between *in rem* and *in personam* jurisdiction, the Court appeared to hold that as long as jurisdiction was not *in personam*, commencing proceedings through issuance of a summons instead of serving a motion would not affect a bankruptcy court's ability to bind a State.⁸

The *Hood* opinion distinguished discharge proceedings from adversary proceedings to recover property in the hands of a State.⁹ The Court addressed precisely that issue in *Katz*, where a trustee sought to recover preferential transfers from State entities. The Court concluded that sovereign immunity does not bar federal bankruptcy courts from exercising authority over States in adversary

³ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 n.16, 77 n.1 (Stevens, J., dissenting) (1996). *See, e.g.*, *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326, 339 (E.D.N.Y. 1998) (applying two part test set forth in *Seminole Tribe* to determine whether Congress abrogated State's sovereign immunity); *see also* Eric S. Johnson, *Unsheathing Alexander's Sword: Lapidus v. Board of Regents of the University System of Georgia*, 51 AM. U. L. REV. 1051, 1052–53 (2002) (discussing subsequent courts' inconsistencies in application of Eleventh Amendment jurisprudence).

⁴ *Hood*, 541 U.S. at 446–48 (stating states are bound by Bankruptcy Court's discharge regardless of state's choice to participate in proceeding).

⁵ *Id.* at 447 ("The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding The court's jurisdiction is premised on the debtor and his estate, and not on the creditors.") (citations omitted).

⁶ *Id.* at 448, 451. *See* *Heritage Assocs., II, L.L.C. v. Maryland (In re Heritage Assocs., II, L.L.C.)*, 336 B.R. 225, 258 (Bankr. D. Md. 2006) (asserting State sovereign immunity does not protect against bankruptcy court's exercise of *in rem* jurisdiction). *See generally* Anthony J. Enright, *The Originalist's Dilemma: Katz and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553, 1553–55 (2006) (discussing historical and current implications of bankruptcy courts' *in rem* jurisdiction and Eleventh Amendment state sovereign immunity).

⁷ *Hood*, 541 U.S. at 451. *See generally* 11 U.S.C. § 524(a) (2006) (explaining impact of discharge); *see, e.g.*, *California v. Deep Sea Research Inc.*, 523 U.S. 491, 507–08 (1998) (holding Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty action).

⁸ *Hood*, 541 U.S. at 453–55.

⁹ *Id.* at 454 (noting this case "is . . . unlike an adversary proceeding by a bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference.").

proceedings to recover preferential transfers.¹⁰ It reasoned that *in rem* bankruptcy jurisdiction includes "the power to issue compulsory orders to facilitate the administration and distribution of the *res*."¹¹ Further, "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."¹² The Court characterized the dischargeability proceedings in *Hood*, proceedings to obtain writs of *habeas corpus* directing States to release debtors from prison, and proceedings seeking orders mandating turnover of property after a preference determination or otherwise as "ancillary to and in furtherance of the court's *in rem* jurisdiction [although such a proceeding] might itself involve *in personam* process."¹³

The Court explained that while the principal focus of a bankruptcy is adjudication of rights in the *res* of the bankruptcy estate and discharge of the debtor, the Framers of the Constitution understood that proceedings brought pursuant to laws on the subject of bankruptcies encompassed certain ancillary proceedings as well.¹⁴ The Court concluded that such proceedings included avoidance of preferential transfers and recovery of preferentially transferred property.¹⁵ Through adopting the Constitution, the States abrogated sovereign immunity to effectuate *in rem* bankruptcy jurisdiction in at least some ancillary proceedings that Congress might authorize in enacting laws on the subject of bankruptcies:¹⁶

Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.¹⁷

In ratifying the Bankruptcy Clause, the States acquiesced in subordination of whatever sovereign immunity they might

¹⁰ *Katz*, 126 S. Ct. at 1001–02 ("[T]hose who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property.").

¹¹ *Id.* at 996.

¹² *Id.* at 1000.

¹³ *Id.* at 1001.

¹⁴ *See id.* at 1005 ("But while the principal focus of the bankruptcy proceedings is and was always the *res*, some exercises of bankruptcy courts' powers . . . unquestionably involved more than mere adjudication of rights in a *res*.").

¹⁵ *Id.* at 1001–02 ("[I]nterplay between *in rem* adjudications and orders ancillary thereto is evident in the case before us.").

¹⁶ *See id.* at 1002, 1004–05; *see also* *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (observing States are not "subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'"); *In re Kids World of Am., Inc.*, 349 B.R. 152, 165 (Bankr. W.D. Ky. 2006) ("[T]he Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders . . . the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.").

¹⁷ *Katz*, 126 S. Ct. at 1002.

otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy court.¹⁸

II. *IN REM* JURISDICTION

Analyzing jurisdictional questions starts with the fundamentals of subject-matter and personal jurisdiction. The United States Constitution left considerable judicial power in the States' courts. Federal courts were granted specific, limited jurisdiction over cases "arising under this constitution, the laws of the United States, . . . [and] between citizens of different states" ¹⁹ Federal subject-matter jurisdiction accordingly must be based on a constitutional or statutory right or diversity between the plaintiff and defendant, and cannot be conferred without meeting such prerequisites, including by consent.²⁰ The requirement of personal jurisdiction rests in the Due Process Clause of the Constitution. It restricts judicial power as a matter of individual liberty, not as a matter of sovereignty.²¹ Parties can thus consent to the jurisdiction of a given court in advance, and can waive objections to personal jurisdiction.²²

Bankruptcy cases do arise under the Constitution, *i.e.* under the Bankruptcy Clause.²³ As required by the wording of that clause, there must also be and now is a federal statutory basis for jurisdiction as well, the Bankruptcy Code. But bankruptcy also has a historical, theoretical grounding in *in rem* jurisdiction to render judgments relating to the bankruptcy *res* that informs the meaning of the constitutional and statutory provisions.

In rem jurisdiction is principally considered a method of obtaining jurisdiction over parties, and as an alternative to *in personam* jurisdiction.

Actions in rem or quasi-in-rem, like actions in personam, must meet subject matter jurisdiction requirements. Thus, either diversity of citizenship and the requisite amount in controversy, or some other basis of federal jurisdiction, must exist.²⁴

¹⁸ *Id.* at 1005.

¹⁹ U.S. CONST. art. III, § 2, cl. 1. Less common bases for federal jurisdiction in this clause include cases affecting ambassadors, admiralty cases, cases to which the United States is a party, and cases between two states. *Id.*

²⁰ *See, e.g.,* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (stating consent of parties is irrelevant when determining federal subject-matter jurisdiction).

²¹ *Id.*

²² *Id.* at 703. ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.")

²³ The Bankruptcy Clause empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

²⁴ 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3631 (3d ed. 1998).

When a defendant appears to contest the merits of an *in rem* action, it thereby subjects itself to an *in personam* judgment.²⁵

There are also subject matter jurisdictional aspects to *in rem* jurisdiction, however. This includes the ability of a federal court with *in rem* jurisdiction to enjoin lawsuits in any other court that interfere with the *res*, including state courts. The power of a federal court to consider a complaint seeking such injunctive relief precedes the Anti-Injunction Act, and has been applied in some of the earliest Supreme Court cases.²⁶ In *Toucey*, the Supreme Court described the ability to enjoin state courts as a principle of law with "uninterrupted and firmly established acceptance."²⁷ It is a matter of jurisdiction, and not policies of comity.²⁸ The right to enjoin state court proceedings has been held applicable in bankruptcy cases since the earliest bankruptcy laws.²⁹

Further, jurisdiction over the *res* requires more to bind a party, *i.e.* notice of the proceeding, whether or not parties to be bound appear and whether or not they are personally served with process.³⁰ Notice is the critical element, because personal jurisdiction is a matter of due process, as noted above. The quality of notice needed in an *in rem* action, where the presence of property is asserted as a basis for jurisdiction to litigate disputes over which the court would not otherwise have jurisdiction, has been tested since 1977 according to the same fair play and substantial justice test used for *in personam* jurisdiction.³¹ When setting that standard, the Court quoted an old Massachusetts case for the point that:

²⁵ 4B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1123 (3d ed. 2002) (indicating individuals lose their right to immunity from personal jurisdiction of states if they decide to sacrifice their rights).

²⁶ *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 135 (1941) (citing *Hagan v. Lucas*, 35 U.S. 400 (1836) and subsequent cases) (discussing rule of law allowing courts to "proceed without interference from a court of the other jurisdiction").

²⁷ *Id.* at 139. The right of federal courts acting *in rem* to enjoin state courts is incorporated into the "necessary in aid of" jurisdiction provision of the present Anti-Injunction statute. See 28 U.S.C. § 2283 (2000); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641 (1977) (noting incorporation of *in rem* jurisdiction in section 2283).

²⁸ See *Atl. Coast Line R. Co. v. Bhd. of Locomotive Eng'rs.*, 398 U.S. 281, 286–87 (1970) (refusing to accept argument that Act only establishes policies of comity); *Okla. Packing Co. v. Okla. Gas & Elec. Co.*, 309 U.S. 4, 8–9 (1940) (limiting state court's power); Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. REV. 925, 927–28 (1995) (explaining federal courts' power of injunction over state courts).

²⁹ See *Toucey*, 314 U.S. at 132–33 (discussing bankruptcy exception to Anti-Injunction statute in 1793); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239–40 (1934) (noting Anti-Injunction statute exception in bankruptcy proceedings).

³⁰ See *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933) (stating additional requirements by controlling power must be followed); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902) (describing personal service requirement).

³¹ See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (applying fair play test to *in rem* questions). The Court also explained that "[I]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." *Id.* at 209. In *Katz*, the Court ruled assertion of jurisdiction over States in bankruptcy cases does not violate the Constitution. The Court also noted that a court order in some instances, such as an order mandating turnover of property, "although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process." *Katz*, 126 S. Ct. at 1001 (emphasis in original).

All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.³²

Bankruptcy cases certainly affect a number of persons—the debtor, the creditors it owes, and parties possessing property of the bankruptcy estate or otherwise owing money to the debtor. Bankruptcy is also different than other proceedings involving numerous parties, such as class actions, because of the fundamental nature of bankruptcy laws that make an *in rem* analysis particularly compelling.³³

The Supreme Court repeatedly recognized that bankruptcy is an *in rem* proceeding even before *Hood* and *Katz*.³⁴ The *res* in a bankruptcy case is not merely the debtor's assets or the bankruptcy "estate," although the assets are part of it.³⁵ Rather, the *res* encompasses the bankrupt debtor personally. The Court so found in *Moyses*, where Max Moyses' discharge was upheld against a creditor that had not been served with process or appeared.³⁶ The Court recognized in that case that "[t]he subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities as well as to distribute his property."³⁷ The debtor as the *res* was even more evident when the Constitution was adopted than it is today, because then it was the debtor personally who was freed by federal court order from state debtors' prison by bankruptcy adjudication.³⁸ Discharging the debtor from prison was an integral aspect of bankruptcy when our Constitution was adopted, and it required an order by a federal court to a state court to release the debtor-prisoner. The *Katz* opinion cites issuance of a writ of habeas corpus to extricate a discharged

³² *Shaffer*, 433 U.S. at 207 n.22 (quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (1900) (Holmes, C.J.), *appeal dismissed*, 179 U.S. 405 (1900)).

³³ See *Hood*, 541 U.S. at 447 ("The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding."); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (adjudicating interests claimed in the *res*); *In re Bd. of Dirs. of Multicanal, S.A.*, 314 B.R. 486, 522 (Bankr. S.D.N.Y. 2004) (stating bankruptcy jurisdiction has traditionally been premised on *in rem* jurisdiction of courts).

³⁴ E.g., *Katchen v. Landy*, 382 U.S. 323, 329 (1966) ("This power to allow or to disallow claims includes 'full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based.'"); *Gardner*, 329 U.S. at 574 (explaining constitutional authority of bankruptcy court when State is actor); *Moyses*, 186 U.S. at 192 ("Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*").

³⁵ See *Gardner*, 329 U.S. at 574.

³⁶ *Moyses*, 186 U.S. at 183, 192. The Court held that bankruptcy proceedings are *in rem* with respect to the debtor. *Id.* at 192.

³⁷ *Id.* at 188; see *Bailey v. Baker Ice Mach. Co.*, 239 U.S. 268, 275–76 (1915) ("The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and disposition of his estate." (citations omitted)).

³⁸ See *In re Universal Labs. Inc.*, No. 77 B 4082, 1978 WL 21369, at *987–88 (N.D. Ill. Dec. 15, 1978) (elaborating on impact discharge has on debtors in prison). But see *Martin v. Kilbourne*, 11 Vt. 93, 94, 1839 Vt. LEXIS 18, at *2–3 (1839) (providing "the creditor shall have full power to discharge the debtor from prison").

debtor from prison as an example of a proceeding ancillary to the *in rem* discharge adjudication.³⁹

III. ANCILLARY JURISDICTION

Ancillary jurisdiction is a type of subject matter jurisdiction invoked when no such jurisdiction is expressly conferred on federal courts by the Constitution or by federal statute.⁴⁰ The court acquires jurisdiction of a case or controversy in its entirety, and as an incident to the disposition of that matter, may decide other matters raised by the case which it could not hear if independently presented.⁴¹ A concept similar to and derived from principles of ancillary jurisdiction is that of pendent jurisdiction, including pendent party jurisdiction.⁴² Under it, a federal court has power to hear non-federal causes of action that comprise one case, derived from a common nucleus of operative fact, despite the absence of express authority to do so in Article III of the Constitution.⁴³ The Supreme Court held that such pendent jurisdiction can extend to new parties not otherwise subject to federal jurisdiction if Article III of the Constitution permits it, and "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."⁴⁴

Thus, while ancillary and pendent jurisdiction are constitutional under Article III of the Constitution, the exercise of such powers may also be limited by statute.⁴⁵ In 1990, Congress provided broad statutory authority for the exercise of ancillary and pendent jurisdiction by federal courts under the name "supplemental jurisdiction."⁴⁶ Long before the supplemental jurisdiction statute was enacted,

³⁹ *Katz*, 126 S. Ct. at 1005 (explaining "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.").

⁴⁰ See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3523 (deeming ancillary jurisdiction most important when courts lack subject matter jurisdiction).

⁴¹ *Id.* The Supreme Court has previously held that sovereign immunity cannot exempt a State from monetary obligations that are ancillary to compliance with prospective injunctive relief against a State officer, even though a damages award for past actions may be barred. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (recognizing practical effect of relief under *Ex parte Young*, 209 U.S. 123 (1908)). Under that reasoning, a court may order a State to pay for programs designed to remedy past wrongdoing such as segregation of public schools. *Milliken v. Bradley*, 433 U.S. 267, 288–89 (1977). That is not a matter of ancillary jurisdiction, however, but of ancillary consequences of an exercise of jurisdiction under the *Ex parte Young* exception to sovereign immunity.

⁴² See *Aldinger v. Howard*, 427 U.S. 1, 9 (1976) (tracing history of pendent party jurisdiction cases from ancillary jurisdiction cases).

⁴³ *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Aldinger*, 427 U.S. at 11–12.

⁴⁴ *Aldinger*, 427 U.S. at 18.

⁴⁵ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) ("[S]tatutory law as well as the Constitution may limit a federal court's jurisdiction over nonfederal claims . . .").

⁴⁶ See 28 U.S.C. § 1367 (2000). The statute was enacted in part to overrule a controversial 5–4 Supreme Court decision in *Finley v. United States*, 490 U.S. 545 (1989), requiring an affirmative statutory grant of pendent-party jurisdiction and possibly narrowing ancillary jurisdiction. See WRIGHT, MILLER & COOPER, 13B FEDERAL PRACTICE AND PROCEDURE § 3567.2 (2d ed.) ("The principal purposes of the statute were to overrule *Finley* and to permit pendent-party jurisdiction, at least in federal-question cases, and generally to restore pre-*Finley* practice.").

however, the Court upheld the exercise of ancillary jurisdiction in cases initiated under a federal bankruptcy statute as a matter of common law, sometimes referring to ancillary jurisdiction to *in rem* bankruptcy jurisdiction.⁴⁷

Ancillary jurisdiction usually falls within two categories of cases:

Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.⁴⁸

In a narrow sense, the "operative facts" of a bankruptcy case may be considered the debtor's discharge and the determination of claims and distribution of the debtor's assets to creditors. It is not a typical lawsuit where ancillary jurisdiction arises in the context of factually intertwined claims, counterclaims and third party claims.⁴⁹ However, ancillary jurisdiction may be needed for dischargeability litigation, as in the *Hood* case. And in many bankruptcy cases disputes over assets being liquidated requires litigation, and some of the assets consist of causes of action. Such litigation is not a matter of determining claims against the *res* of the estate, but it is certainly factually intertwined with the *res* and the amount that can be distributed to creditors.⁵⁰ The litigation encompasses both federal and state law issues, and may well entail purely state-law claims between non-diverse litigants.⁵¹

Bankruptcy court cases may be more complex and procedurally involved than ordinary bilateral commercial litigation. In reorganization cases especially, bankruptcy court orders may implement the restructuring of a business and the disposition of multiple assets and claims. A variety of court proceedings may be required to facilitate a successfully functioning reorganization case, and may be needed to implement reorganization decisions and effectuate court decrees. Some determinations that would require orders in non-bankruptcy cases are automatic in bankruptcy, such as the automatic stay, and litigation to enforce such statutory orders is not uncommon. Chapter 11 bankruptcy cases last for years, and litigation

⁴⁷ See, e.g., *Local Loan Co.*, 292 U.S. at 240–41 (stating bankruptcy proceedings are generally *in rem* proceedings); *Moyses*, 186 U.S. at 192; *Commercial Bank of Manchester v. Buckner*, 61 U.S. 108, 118 (1857) ("And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy . . .").

⁴⁸ *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379–80 (1994) (citations omitted).

⁴⁹ See, e.g., *Gibbs*, 383 U.S. at 725 (recognizing pendent jurisdiction over state claims arises out of "common nucleus of operative fact" with federal claims).

⁵⁰ See *Gardner*, 329 U.S. at 578 (holding "the reorganization court has jurisdiction over all of the property of the debtor . . ."); *In re Metromedia Fiber Network, Inc.*, 299 B.R. 251, 273 (Bankr. S.D.N.Y. 2003) (including aspects of estate administration within *in rem* proceedings).

⁵¹ See *Butner v. United States*, 440 U.S. 48, 54 (1979) (noting property rights in estate assets determined by applying state law)

under confirmed reorganization plans affecting creditor distributions may be commenced by restructured companies or liquidating trusts.

In a very real sense, many types of proceedings are factually interdependent with and indeed integral to the resolution of a bankruptcy case, and to the successful functioning of the bankruptcy court and effectuation of its orders. The *Katz* dissent accused the majority of offering "no principled basis on which to draw distinctions in future cases" between bankruptcy laws that may or may not infringe sovereign immunity.⁵² To determine the scope of ancillary or supplemental jurisdiction in bankruptcy cases, decisions analyzing such jurisdiction in federal receiverships and cases under various bankruptcy statutes are instructive.

A. Ancillary Jurisdiction in Receivership Cases.

Ancillary jurisdiction has been used in a receivership case by one creditor to bring another party into court that might have a conflicting lien or interest in a receivership asset.⁵³ The Supreme Court held that no other grounds for federal jurisdiction need be proved; the receivership *res* was enough.⁵⁴ Similarly, the Court has upheld ancillary jurisdiction in a receivership court over a dispute between a purchaser of property from the receiver and a creditor asserting that it was sold subject to its lien, *i.e.* a dispute over property formerly in the *res*, without regard for the citizenship of the parties.⁵⁵

In another case, the Court held that ancillary jurisdiction could not be exercised by a creditor seeking a judgment against a bank that previously exercised setoff rights against property claimed by that creditor, as well as the receivers.⁵⁶ There, the Court concluded that the controversy had no direct relation to property actually or constructively drawn into the receivership court's possession or control.⁵⁷ It distinguished the situation, though, from a "suit by a receiver, on authority of the appointing court, to collect assets or defend property rights."⁵⁸ Instead, the creditor's

⁵² Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1011 n.4 (2006).

⁵³ See *Morgan's Co. v. Tex. Cent. Ry. Co.*, 137 U.S. 171, 200–01 (1890) ("The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject-matter of the litigation.").

⁵⁴ See *id.* at 201.

⁵⁵ See *Minn. Co. v. St. Paul Co.*, 69 U.S. 609, 632–34 (1864) (finding jurisdiction not based on citizenship of parties, but instead on subject-matter of controversy which was in hands of receiver); see also *Carey v. Houston & T. C. Ry. Co.*, 161 U.S. 115, 130–31 (1896) (discussing well-settled principle that bill filed in federal court to enjoin court's judgment is considered continuation of main proceeding); *Cincinnati, I. & W. R. Co. v. Indianapolis Union Ry. Co.*, 279 F. 356, 362 (1922) (reiterating "broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce, or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court.").

⁵⁶ See *Fulton Nat'l Bank of Atlanta v. Hozier*, 267 U.S. 276, 279–80 (1925) (indicating Hozier may have proceeded against bank through original proceeding).

⁵⁷ See *id.* at 280.

⁵⁸ *Id.*

petition "sought to compel [the receiver] to litigate with the bank for his sole interest and without possibility of benefit to the estate."⁵⁹

Ancillary jurisdiction to liquidate assets in the receivership court, instead of in separate state court litigation, has long been upheld. In 1895, the Supreme Court held that a federal receiver has ancillary jurisdiction to bring a collection lawsuit against multiple defendants owing separate small debts in a single action, regardless of citizenship of the parties or the amount in controversy.⁶⁰ The Court said this was a matter of the inherent jurisdiction of the court winding up an insolvent corporation and collecting the assets of its estate.⁶¹

In another receivership case, the Supreme Court held that a state-law damages claim against a receiver for a railroad, alleging negligence on the part of railroad operators, could be removed to the federal court receivership case as a matter ancillary to that action.⁶² After judgment was entered against the receiver, he challenged the court's jurisdiction, asserting lack of federal question or diversity of citizenship as required by Article III of the Constitution.⁶³ The Court said the receiver could not revoke his consent after entry of judgment, but it went on to hold that the federal court had jurisdiction in any event because the lawsuit was against him as a receiver, and affected the property of the railroad in the exclusive control of the receivership court, being administered for the benefit of its creditors.⁶⁴

While not a receivership, the Supreme Court upheld similar ancillary jurisdiction in a federal court based on a foreclosure sale of a railroad in 1904.⁶⁵ The ancillary litigation concerned a successor liability dispute between the purchaser at the foreclosure sale and third parties claiming that the purchaser was liable for obligations of the seller as a matter of state law. The state courts had ruled for the third parties, and the sheriff levied on property the federal court had ordered to be sold free and clear of liens.⁶⁶ The Supreme Court held that a supplemental bill could be filed in the federal foreclosure case to determine what liens and claims should be charged upon the title conveyed by the court, to render effectual its prior decree, without regard for requirements of diversity jurisdiction.⁶⁷ The Court quoted a treatise on equity procedure that ancillary jurisdiction includes, in part, litigation:

⁵⁹ *Id.* at 281.

⁶⁰ *See White v. Ewing*, 159 U.S. 36, 39–40 (1895) (refusing to draw distinction between creditor's seeking payment from estate and receiver seeking to recover payments owed to estate when determining jurisdiction).

⁶¹ *See id.* at 40.

⁶² *See Baggs v. Martin*, 179 U.S. 206, 208–09 (1900) (finding jurisdiction based upon allegations involving misconduct of receiver and property in question in control of circuit court).

⁶³ *See id.* at 208 ("Did said Circuit Court for the District of Colorado, by virtue of the aforesaid removal, acquire lawful jurisdiction of said cause, and power to render the aforesaid judgment therein?").

⁶⁴ *Id.* at 209 (holding jurisdiction existed independent of parties' citizenship).

⁶⁵ *See Julian v. Cent. Trust Co.*, 193 U.S. 93, 101–02 (1904).

⁶⁶ *See id.* at 101–03 (noting conflict between federal courts and Supreme Court of North Carolina and mentioning North Carolina's reliance on *James v. Western North Carolina Railroad Company*, 121 N.C. 523, 528, 529, 28 S.E. 537, 538 (1897), to justify execution and sale by sheriff).

⁶⁷ *Id.* at 111–13 (stating purpose of federal court jurisdiction was to determine "all liens and demands to be paid by the purchaser").

[B]y the same or additional parties, standing in the same interest . . . to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court . . . or the collection of assets of any estate being administered by the court⁶⁸

Such a broad description would encompass litigation between creditors and other third parties, and collection suits by liquidating trustees under reorganization plans.

B. Ancillary Jurisdiction Under Pre-Code Bankruptcy Cases

The *Katz* Court pointed to early bankruptcy legislation as indicative of the breadth of bankruptcy jurisdiction contemplated by those participating in the plan of the Convention.⁶⁹ When interpreting the 1898 Bankruptcy Act, the Supreme Court expressly referred to the bankruptcy court's ancillary jurisdiction to its *in rem* jurisdiction in ruling that a state court could not enter an order interfering with the bankruptcy court's jurisdiction over estate assets:

[W]hen the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court.⁷⁰

In one case the Supreme Court upheld the use of ancillary jurisdiction to *in rem* bankruptcy jurisdiction to enjoin a state court lawsuit that would interfere with the debtor's discharge.⁷¹ Notably, the Court recognized that the debtor could have sought the same relief in the state court itself. But it said that option would entail a "long and expensive course of litigation" given state law appellate precedent, and accordingly the remedy was "entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves."⁷² This justification for using bankruptcy court ancillary jurisdiction might apply in numerous bankruptcy proceedings.

In another case, the Court upheld a bankruptcy court's injunction against a non-debtor's alleged misuse of another court to interfere with and thwart a bankruptcy

⁶⁸ *Id.* at 113–14 (quoting BATES ON FEDERAL EQUITY PROCEDURE, vol. 1, sec. 97).

⁶⁹ *Katz*, 126 S. Ct. at 1002.

⁷⁰ *Murphy v. John Hoffman Co.*, 211 U.S. 562, 570 (1909).

⁷¹ *Local Loan Co.*, 292 U.S. at 240–41 (explaining bankruptcy court's jurisdiction in equity proceedings).

⁷² *Id.* at 241–42.

trustee's fraud investigation.⁷³ The trustee alleged that the non-debtor corporation was created by the debtor to hide securities and other assets in which the trustee claimed an equitable interest. He sued to stop the corporation from proceeding with litigation against a broker to establish the corporation's rights in securities, and get a judgment that would enable it to control and dispose of them.⁷⁴ The bankruptcy court was held to have jurisdiction to stay the corporation's lawsuit, which it could exercise to avoid the "embarrassments and obstacles" attendant to litigating in the other court.⁷⁵ It was an appropriate exercise of ancillary jurisdiction to protect the estate against waste and disintegration while alleged frauds to its integrity were investigated.⁷⁶

Opinions regarding bankruptcy court jurisdiction over ancillary litigation that could be adjudicated in other courts have referenced the applicable bankruptcy laws as the statutory authority for such proceedings. The 1841 Bankruptcy Act broadly granted jurisdiction over "all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned," including property the debtor sought to recover from an adverse claimant.⁷⁷ The 1867 Act was similarly broad. Interpreting it, the Supreme Court held that a federal court could exercise jurisdiction over a state-law collection suit by a bankruptcy assignee (counterpart to today's trustee) without meeting diversity requirements of Article III section 2 of the Constitution.⁷⁸ The Court reasoned that "[p]roceedings ancillary to and in aid of the proceedings in bankruptcy" may be brought in other courts, but also ought to be capable of being heard in federal courts under a "uniform system of bankruptcy."⁷⁹ The Court later explained that jurisdiction over such actions under the Bankruptcy Acts of 1867 and 1841 was concurrent with the jurisdiction of state courts, and while jurisdictionally possible, the 1898 Bankruptcy Act removed such federal jurisdiction without the defendant's consent.⁸⁰ Under the 1898 Act, the bankruptcy

⁷³ *Steelman v. All Continent Corp.*, 301 U.S. 278, 286–87 (1937) (providing court may grant injunction to prevent fraudulent acts by debtor).

⁷⁴ *Id.* at 282–84 (explaining trustee petitioned for stay of prosecution and asked trust be formed for benefit of trustee).

⁷⁵ *Id.* at 286–89.

⁷⁶ *Id.* at 289 ("Jurisdiction to administer the estate draws to itself, . . . an incidental or ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery.").

⁷⁷ *Ex parte Christy*, 44 U.S. 292, 313–14 (1845), *cited in* *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1000 (2006) (acknowledging history of ability to issue ancillary orders in bankruptcy disputes).

⁷⁸ *Lathrop v. Drake*, 91 U.S. 516, 519–20 (1875) (interpreting statutory provision allowing assignee in bankruptcy to prosecute lawsuit for recovery of any assets of estate in any federal circuit court).

⁷⁹ *Id.* at 518.

⁸⁰ *Bardes v. Hawarden Bank*, 178 U.S. 524, 534, 536–38 (1900) (comparing Bankruptcy Acts of 1867 and 1841 to Bankruptcy Act of 1898). Section 2 of the 1898 Bankruptcy Act provided in part that courts of bankruptcy had jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." *Id.* at 534–35 (citing Bankruptcy Act, ch. 541, § 2, 30 Stat. 544 (1898)); Bankruptcy Act, ch. 541, § 2, 30 Stat. 544 (1898). However, section 23(b) of the 1898 Bankruptcy Act provided: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by

court could not exercise jurisdiction over a state law collection lawsuit to recover money promised but unpaid.⁸¹ Notably, the Court said that a trustee's possession of contested claims against third parties would not support jurisdiction on the basis of property in the possession of the trustee.⁸²

In the 1938 Chandler Act, Congress removed the restriction on bankruptcy jurisdiction over state law suits to collect assets, including causes of action against officers and directors, when brought by trustees in chapter X reorganization cases.⁸³ This law also enabled property acquired post-petition to be included in property of the estate, a change held applicable to bring a right of redemption on foreclosed property into a pending bankruptcy case, to the distress of the foreclosure sale purchaser.⁸⁴ The Supreme Court explained that Congress may act within its constitutional bankruptcy power to affect state property rights, as long as due process limitations are observed.⁸⁵ In these cases and others, the Supreme Court repeatedly and expressly recognized that "by virtue of its constitutional authority over bankruptcies," Congress could confer or withhold jurisdiction to adjudicate a bankruptcy trustee's rights to property outside its possession, and impose conditions on such jurisdiction.⁸⁶ Congress can give federal courts broad jurisdiction in bankruptcy cases; it just has not always done so.

IV. BANKRUPTCY COURT JURISDICTION UNDER THE BANKRUPTCY CODE

The current Bankruptcy Code encompasses three types of subject matter jurisdiction in the federal district courts: proceedings "arising under" the Code; those "arising in" a bankruptcy case; and those "related to" a bankruptcy case.⁸⁷ Proceedings "arising under" the Bankruptcy Code are based upon rights that exist by virtue of Code provisions, such as recovery of preferential transfers at issue in *Katz*.⁸⁸ Proceedings "arising in" a case are exactly that, claim disputes, assertions of rights to estate assets, fee allowances and the like that may be based upon state law or contract, but concern actions taking place in the bankruptcy court in the context

consent of the proposed defendant." *Id.* at 529 (citing Bankruptcy Act, ch. 541, § 23(b), 30 Stat. 544 (1898)); Bankruptcy Act, ch. 541, § 23(b), 30 Stat. 544 (1898).

⁸¹ See *Kelley v. Gill*, 245 U.S. 116, 120–21 (1917) (holding lack of jurisdiction was due to no common issue between stockholders and corporation).

⁸² *Id.* at 121.

⁸³ *Williams v. Austrian*, 331 U.S. 642, 659–61 (1947) (holding "Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts").

⁸⁴ *Wright v. Union Cent. Ins. Co.*, 304 U.S. 502, 514–16 (1938).

⁸⁵ *Id.* at 517–18.

⁸⁶ *Schumacher v. Beeler*, 293 U.S. 367, 374 (1934). See *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 430–31 (1924) (noting Congress's power in matters of bankruptcy is paramount and Congress has power to determine to what extent jurisdiction is conferred).

⁸⁷ 28 U.S.C.A. § 1334(b) (2006).

⁸⁸ See, e.g., *Merritt Logan, Inc. v. Fleming Cos., Inc. (In re Merritt Logan, Inc.)*, 901 F.2d 349, 356 (3d Cir. 1990) ("arising under" jurisdiction occurs when case originates under title 11).

of a bankruptcy case.⁸⁹ "Related to" jurisdiction authorizes bankruptcy courts to hear matters that neither arise under the Code nor arise in a bankruptcy case, but still bear a relation to such a case.⁹⁰

The Code accordingly authorizes a broad, pervasive reach over all litigation affecting the bankruptcy estate.⁹¹ This is efficient and cost-effective, but extending that jurisdiction to bankruptcy courts created under Article I of the Constitution requires that Article III district courts delegate the authority.⁹² Federal district courts, sitting in bankruptcy cases, refer "core" proceedings over such fundamental bankruptcy precepts as the automatic stay, claims resolution, and the discharge to bankruptcy courts for final determinations. In turn, bankruptcy courts can hear "non-core" proceedings over peripheral matters affecting the bankruptcy case, but cannot enter final orders and judgments without the parties' consent.⁹³ The distinction has been held similar to the Bankruptcy Act of 1898 categories of "summary" jurisdiction over property in the actual or constructive possession of the bankruptcy court and matters of an administrative character, and "plenary" jurisdiction conferred only by consent over some other litigation.⁹⁴

Most litigation over bankruptcy jurisdiction concerns whether the minimum requirement of "related to" jurisdiction has been met, and arises in the context of lawsuits by bankruptcy trustees or others asserting causes of action held by a bankruptcy estate, or lawsuits between third parties affecting a bankruptcy estate. When such litigation concerns state-law causes of action between non-diverse parties, a federal bankruptcy or district court would lack subject matter jurisdiction but for the relationship to a bankruptcy case. At least one scholar has suggested that "related to" jurisdiction should be analyzed as a type of ancillary jurisdiction to support its constitutionality.⁹⁵ Alternatively, ancillary jurisdiction may also simply be available to supplement jurisdiction explicitly set forth in the bankruptcy jurisdictional statutes under general common law principles of ancillary jurisdiction described in Section III of this Paper.

⁸⁹ *Stoe v. Flaherty*, 436 F.3d 209, 218 (3d Cir. 2006) (stating claims that "'arise in' context of bankruptcy case are claims that by their nature, not by their particular factual circumstance, could only arise in context of bankruptcy case").

⁹⁰ *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) ("The 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.").

⁹¹ See 28 U.S.C.A. § 1334(b) (2006) (granting original jurisdiction to district courts in title 11 civil proceedings).

⁹² See 28 U.S.C. § 151 (2000) ("[T]he bankruptcy judges in regular active service shall constitute a unit of the district court."); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53–56 (1982) (discussing nature of judicial power granted in Constitution). Bankruptcy judges lack lifetime tenure required for status under Article III of the Constitution. They are appointed pursuant to the power accorded to Congress in Article I of the Constitution. U.S. CONST. art. I, § 8, cl. 9 (noting Congress' power "[t]o constitute tribunals inferior to the Supreme Court.").

⁹³ 28 U.S.C.A. § 157(b) & (c) (2006).

⁹⁴ See *Marathon*, 458 U.S. at 53–54 (stating Act eliminates distinction between "summary" and "plenary" jurisdiction).

⁹⁵ John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis From the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188, 1235 (1993).

Bankruptcy estate causes of action encompass several types of proceedings. The bankruptcy estate created upon the filing of a bankruptcy case includes causes of action "arising under" the Bankruptcy Code to avoid and recover assets preferentially transferred to creditors pre-filing that result in unequal creditor treatment.⁹⁶ Further, property "that would have been part of the estate had it not been transferred before the commencement of the bankruptcy" is "property of the debtor" that can be recovered and become "property of the estate."⁹⁷ The district court, and by referral the bankruptcy court, has exclusive jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of the case and of property of the estate."⁹⁸

A bankruptcy estate may also include causes of action under state or non-bankruptcy federal law, encompassing lawsuits ranging from collection of accounts receivable to suits against officers, directors and professionals for breach of fiduciary duty and malpractice. In a recent Supreme Court case, the court ruled that federal bankruptcy courts had jurisdiction over a debtor's claim for tortious interference with a gift she expected, and directed the circuit court to evaluate on remand whether such jurisdiction was even "core" jurisdiction.⁹⁹ Such lawsuits could be brought in state or federal court, respectively, independent of the bankruptcy case. The state law claims do not arise under the Constitution or federal statutes, nor are they based in diversity of party citizenship as required for Article III subject matter jurisdiction; they must be tied to a case under the Bankruptcy Code, usually as property of a bankruptcy estate.¹⁰⁰ Any recovery would likewise be property of the estate, and could be used to satisfy creditors' claims. A lawsuit by a bankruptcy trustee to collect receivables or otherwise liquidate assets is rarely questioned as an appropriate exercise of "related to" jurisdiction. It is also rarely questioned as a "core" proceeding that a bankruptcy court can finally resolve. After a chapter 11 plan is confirmed, however, pursuit of such estate assets by a successor entity such as a litigation trustee or reorganized debtor entity is more tenuous, especially if the bankruptcy case is closed after plan confirmation and creditors' claims have been satisfied by receipt of beneficial interests in a litigation trust. Circuit courts are divided on whether such litigation has a sufficient nexus to the

⁹⁶ See 11 U.S.C. § 541(a)(1) (2006) ("estate is comprised of all . . . legal and equitable interests . . . in property as of the commencement of the case"); *id.* § 547 (discussing preference cause of action as of commencement of the case).

⁹⁷ *Begier v. I.R.S.*, 496 U.S. 53, 58 (1990). See 11 U.S.C. § 541(a)(3) (2006) (stating bankruptcy estate "is comprised of . . . any interest in property [recovered under] . . . § 550"); *id.* § 547(b)(2) (avoiding transfers); *id.* § 550 (discussing liability of transferee of avoided transfer).

⁹⁸ 28 U.S.C.A. § 1334(e)(1) (2006). See 28 U.S.C. § 157(a) (2000) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

⁹⁹ *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735, 1750 (2006).

¹⁰⁰ See 11 U.S.C. § 541(a)(1) (2006) ("all legal or equitable interests of the debtor in property"); see, e.g., *Marathon*, 458 U.S. at 71 n.26 (discussing bankruptcy court's ability to entertain breach of contract claim when related to debtor's reorganization); *Williams*, 331 U.S. at 658–60 (establishing jurisdiction of federal court to hear suit brought by reorganization trustee against officers and directors for misappropriation of corporate assets).

bankruptcy case to be brought in the bankruptcy court.¹⁰¹ A *Katz* ancillary jurisdiction nexus may sufficiently reinforce the connection to justify pursuit via adversary proceedings, especially if a plan confirmation order expressly provides for such litigation in the bankruptcy court.

Even during a bankruptcy case, questions of jurisdiction may arise with respect to causes of action not held by a bankruptcy estate that nonetheless affect the estate and its creditors. The plaintiff or defendant may seek to have such third-party litigation heard in bankruptcy court, via removal from state court or initiation of an adversary proceeding. The bankruptcy court may exercise discretion to hear the case if it is sufficiently related to the bankruptcy case, unless the court is required to abstain.¹⁰² Here, too, the *Katz* analysis may support bankruptcy court jurisdiction.

A. Jurisdiction Over Post-Confirmation Litigation

To the extent a liquidating trustee or successor entity asserts jurisdiction based on a reorganization plan and order confirming it, cases limiting the exercise of ancillary jurisdiction for post-judgment proceedings are relevant. A cause of action against a third party asserting theories for collecting a judgment that the defendant cannot satisfy on such grounds as alleged siphoning of assets from the defendant to prevent collection of the judgment, fraudulent conveyance or piercing the defendant's corporate veil has been held not ancillary to the initial lawsuit when not included in that suit before entry of the uncollectible judgment.¹⁰³ Such a claim for "entirely new and original" relief "of a different kind or on a different principle" than that of the previous judgment has been held to be outside the reach of federal ancillary jurisdiction.¹⁰⁴ A liquidating trustee or successor entity does not usually pursue litigation simply to pay an existing federal judgment, however, and an order confirming a reorganization plan does not usually adjudge even the debtor's specific indebtedness or basis for liability.¹⁰⁵

In *Kokkonen*, the Supreme Court held that ancillary jurisdiction did not extend to a lawsuit to enforce a settlement agreement that had resolved a federal diversity

¹⁰¹ See *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1198 (9th Cir. 2005) (upholding such jurisdiction over claims "related to" interpreting and implementing plan). *But see Resorts Int'l Financing, Inc. v. Price Waterhouse & Co., Inc. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 169 (3d Cir. 2004) (concluding no post-confirmation jurisdiction over accounting malpractice action).

¹⁰² 28 U.S.C.A. § 1334(c)(2) (2006) (directing district courts to abstain from hearing proceedings based upon state law claims related to cases under title 11 that could not have been commenced in district court absent jurisdiction under section 1334).

¹⁰³ See *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (explaining once federal court judgment had been entered in original suit, "the ability to resolve simultaneously factually intertwined [state law] issues vanished"); *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 498–99 (1910) (holding monetary judgment against directors of corporation was not an issue to be resolved by district court because it was not an ancillary proceeding to the original suit brought in federal court).

¹⁰⁴ *Peacock*, 516 U.S. at 358.

¹⁰⁵ *E.g., Pope v. Gordon (In re Camp)*, 310 B.R. 634, 636 (Bankr. N.D. Ala. 2004) (discussing trustee's suit seeking declaratory judgment as to validity of judgment liens entered by a Mississippi federal district court).

lawsuit and resulted in a simple dismissal of the complaint.¹⁰⁶ The Court noted that the case involved only enforcement of the settlement agreement, and not reopening the original suit by reason of breach of the agreement that was the basis for dismissal.¹⁰⁷ It said that "[t]he facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal court business."¹⁰⁸ While the facts in post-confirmation litigation to collect recoveries for creditor payments are often distinct from facts involved in the bankruptcy case itself, the litigation may be essential to the plan. Indeed, it may be just as important for creditor distributions as equivalent litigation by a trustee during a chapter 7 liquidation case.

Critically for bankruptcy cases, the *Kokkonen* Court expressly recognized that:

The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.¹⁰⁹

Reorganization plans must expressly provide for the means by which the plan will be implemented, such as through successor entity litigation to liquidate causes of action and other assets for distribution to creditors.¹¹⁰ Plans and confirmation orders generally include provisions for bankruptcy court jurisdiction over litigation to enforce and implement plan terms. Parties cannot confer subject matter jurisdiction by agreement, but bankruptcy *in rem* and ancillary jurisdiction is a mixture of subject matter and personal jurisdiction, as described above, and the Bankruptcy Code provides statutory authority for a bankruptcy court to "direct the debtor and any other necessary party . . . to perform any other act . . . that is necessary for consummation of the plan,"¹¹¹ and to "collect and reduce to money the property of the estate."¹¹² A district court sitting in a bankruptcy case may also have ancillary jurisdiction over such litigation through the federal supplemental

¹⁰⁶ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–82 (1994).

¹⁰⁷ *Id.* at 378.

¹⁰⁸ *See id.* at 381.

¹⁰⁹ *Id.* at 381.

¹¹⁰ *See* 11 U.S.C. § 1123(a)(5) (2006) (listing examples of "adequate means for the plan's implementation").

¹¹¹ *Id.* § 1142(b). However, the statute does not specify where the bankruptcy court could direct post-confirmation litigation to be filed. *See id.* (specifying only instruments dealing with transfer of property).

¹¹² *Id.* § 704 (incorporating by reference duty of chapter 11 trustee in 11 U.S.C. section 1106(a)(1)). *See id.* § 1123(b)(3)(B) (allowing plan to provide for retention and enforcement by debtor, trustee, or representative of estate for any estate claim or interest).

jurisdiction statute, which at least one circuit has held may be exercised by the bankruptcy court.¹¹³

The circuit courts analyzing whether bankruptcy courts have "related to" jurisdiction over litigation by a post-confirmation trust established under a reorganization plan have analyzed their jurisdiction under the widely adopted test set forth by the Third Circuit in *Pacor, Inc. v. Higgins*.¹¹⁴ As noted below with respect to third-party litigation during a bankruptcy case, the Supreme Court recently approved the *Pacor* test, and applied it in a broader way than the Third Circuit in *Pacor* itself.¹¹⁵ That holding tends to support a broader reach of post-confirmation jurisdiction, as does the *Katz* decision's focus on bankruptcy court ancillary jurisdiction. Indeed, *Katz* may reach even further than *Pacor* and *Celotex*, given the types of connections encompassed by ancillary jurisdiction in non-bankruptcy cases and in receivership and pre-Code bankruptcy cases.

B. Jurisdiction Over Third-Party Litigation.

In its 1995 *Celotex* case, the Supreme Court adopted the Third Circuit's *Pacor* test for "related to" jurisdiction.¹¹⁶ The Court noted that the jurisdictional grant in the Bankruptcy Code is broader than that conferred under previous Acts which had been limited to possession of property by the debtor or consent, and that it extends to "(1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate."¹¹⁷ It quoted the *Pacor* test as follows:

The usual articulation of the 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* Thus, the proceeding need not

¹¹³ See 28 U.S.C. § 1367(a) (2000) (granting supplemental jurisdiction to district courts over all claims which are so related to claims over which district courts have original jurisdiction that they form part of same case or controversy under Article III); see, e.g., *In re Pegasus Gold Corp.*, 394 F.3d at 1194–95 (granting supplemental jurisdiction to bankruptcy courts over remaining claims that "involve a common nucleus of operative facts"); see also *Sasson v. Sokoloff* (*In re Sasson*), 424 F.3d 864, 869 (9th Cir. 2005) (stating bankruptcy court's jurisdiction includes supplemental jurisdiction over "related to" claims); *Hospitality Ventures/Lavista v. Heartwood II, LLC* (*In re Hospitality Ventures/Lavista*), 2007 WL 30330, at *2 (Bankr. N.D. Ga. Jan. 4, 2007) (authorizing supplemental jurisdiction over a third party claim).

¹¹⁴ See *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) ("[A]n 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"); *In re Pegasus Gold Corp.*, 394 F.3d at 1193–94 (limiting *Pacor* test in post confirmation "related to" jurisdiction context); see also *In re Resorts Int'l, Inc.*, 372 F.3d at 163–65 (discussing *Pacor* test).

¹¹⁵ See *Celotex Corp.*, 514 U.S. at 308 (1995) (approving *Pacor* test and expanding bankruptcy courts' jurisdiction to "more than simple proceedings involving the property of the debtor or the estate").

¹¹⁶ *Id.* at 308; *Pacor*, 743 F.2d at 994.

¹¹⁷ *Celotex Corp.*, 514 U.S. at 307–08 & n.5. The court stated the first type of proceeding involves a claim like the state-law breach of contract action at issue in *Marathon*, *supra*, and the *Celotex* case involved the second type of proceeding. *Id.* at n.5.

necessarily be against the debtor or against the debtor's property. 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.¹¹⁸

"Conceivably any effect" is very broad, and the *Pacor* court limited its effect by adding a restriction that the effect must be immediate, such that the possibility of an indemnity action against the estate that would need to be brought in a separate action, with no automatic liability, was insufficient.¹¹⁹ The Supreme Court said in *Celotex* that eight circuits had adopted the *Pacor* test with little variation, while two circuits seemed to have adopted a slightly different test.¹²⁰ In fact, some circuits do not impose a requirement that the impact of the litigation on the estate be automatic,¹²¹ and some focus on the extent of the financial effect.¹²² The Supreme Court did not rule on the nuances of the test for jurisdiction, but did agree that it "cannot be limitless."¹²³

In its holding, however, the *Celotex* Court found "related to" jurisdiction for a bankruptcy court to rule on a creditor's entitlement to execution on a bond that did "not directly involve Celotex, except to satisfy the judgment against it secured by the bond" because that action would prompt the sureties to seek to lift the stay to reach collateral the debtor had posted with the bonding company, which in turn would adversely affect the debtor's ability to formulate a feasible plan.¹²⁴ This was hardly a direct and immediate impact, since it would entail a lift stay proceeding that had not been filed and the drafting of a plan.

The Court stated in *Celotex* that the jurisdiction of bankruptcy courts may extend more broadly in chapter 11 reorganization cases than in liquidations under

¹¹⁸ *Id.* at 308 n.6 (emphasis in original) (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original)).

¹¹⁹ See *Pacor*, 743 F.2d at 995 (enumerating limitations to broad bankruptcy jurisdiction). The Third Circuit was not as strict in a later case where it found "related to" jurisdiction for the bankruptcy court to determine rights between a purchaser of property from the debtor and a taxing authority creditor years after the closing of the sale. See *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264–65 (3d Cir. 1991) (arguing if it is a "related to" proceeding, bankruptcy court has jurisdiction).

¹²⁰ *Celotex Corp.*, 514 U.S. at 308 n.6 (agreeing with *Pacor* court's analysis of jurisdiction concerning bankruptcy proceedings).

¹²¹ See *Lindsey v. O'Brien (In re Dow Corning Corp.)*, 86 F.3d 482, 491–93 (1996) (emphasizing lack of requirement for automatic liability); *Parrett v. Bank One, N.A. (In re Nat'l Century Fin. Enters., Inc.)*, 323 F. Supp. 2d 861, 869 (S.D. Ohio 2004) (following *In re Dow Corning Corp.* method for finding "related to" jurisdiction); see also *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991) ("The justification for the injunction here is not effect on the debtor (although the presence of such an effect certainly strengthens the case for the injunction), but protection of a federal judgment.").

¹²² See, e.g., *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (maintaining overlap between bankruptcy proceedings and other disputes are insufficient when resolution affects bankrupt's estate of allocation of assets to creditors).

¹²³ *Celotex Corp.*, 514 U.S. at 308 (confirming *Pacor* court's jurisdictional test).

¹²⁴ See *id.* at 309–10 (establishing "related to" jurisdiction for bankruptcy proceeding at issue).

chapter 7 of the Bankruptcy Code.¹²⁵ It cited as examples a Supreme Court case upholding bankruptcy court jurisdiction to enjoin creditors in a railroad reorganization from selling collateral that was likely to prevent formulation of a yet-undrafted plan,¹²⁶ a circuit court case finding jurisdiction to enjoin creditor lawsuits against a debtor's guarantors that might affect a plan,¹²⁷ and creditor actions against a debtor's insurers.¹²⁸

In its *Celotex* opinion, the Court agreed with the Third Circuit's admonition in *Pacor* that the bankruptcy court's "related to" jurisdiction is not "limitless."¹²⁹ The *Pacor* court said in that reference that "there is a statutory, and eventually constitutional, limitation to the power of a bankruptcy court."¹³⁰ The constitutional limitation may now be evaluated as a matter of ancillary jurisdiction to bankruptcy *in rem* jurisdiction, recognized in the *Katz* case. The "conceivably any effect" test of *Pacor* and *Celotex* is one way of meeting that ancillary jurisdiction standard, and there is also a "factually interdependent" standard for ancillary jurisdiction generally.¹³¹ Ancillary jurisdiction cases, especially in receivership and bankruptcy cases, may provide practitioners and courts with precedent to determine the extent of bankruptcy jurisdiction.

V. THE ANCILLARY JURISDICTION EXCEPTION TO SOVEREIGN IMMUNITY

The broad historical scope of ancillary to *in rem* bankruptcy jurisdiction bears on the scope of the exception to sovereign immunity established in *Katz*. The Eleventh Amendment was written using subject matter jurisdiction terminology; it limits "[t]he Judicial power of the United States."¹³² The Supreme Court cited to that language in *Seminole Tribe*:

¹²⁵ See *id.* at 310 (asserting broader bankruptcy jurisdiction under chapter 11 reorganization situations than under chapter 7 cases).

¹²⁶ See *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 676 (1935) (recognizing bankruptcy court's power to issue injunctions).

¹²⁷ *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.)*, 885 F.2d 621, 623–24 (9th Cir. 1989) (adopting Third Circuit's expansive definition of "related to" jurisdiction to include lawsuits that "could conceivably" affect reorganization plans).

¹²⁸ *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988) (noting section 105(a) of Bankruptcy Code "has been construed liberally to enjoin suits that might impede the reorganization process"); *Oberg v. Aetna Casualty & Surety Co. (In re A.H. Robins Co., Inc.)*, 828 F.2d 1023, 1024–26 (4th Cir. 1987) (upholding stay on third-party suit because of possible ramifications on debtor's reorganization).

¹²⁹ *Celotex Corp.*, 514 U.S. at 308 (citing *Pacor*, 743 F.2d at 994).

¹³⁰ *Pacor*, 743 F.2d at 994.

¹³¹ *Kokkonen v. Guardian Life Ins. Co. of Amer.*, 511 U.S. 375, 379–80 (1994) (noting ancillary jurisdiction has been asserted so "factually interdependent" claims can be settled in one case).

¹³² U.S. CONST. amend. XI. The choice of words may have simply been a response to the language in *Chisholm v. Georgia*, 2 U.S. 419 (1793), which was decided based on constitutional language granting subject matter jurisdiction, and it may have been an attempt to ensure applicability of the amendment to pending cases, or to ensure that States could determine when they could be sued. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1603–07 (2002) (discussing possible reasons Congress chose wording of Eleventh Amendment).

The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.¹³³

The Supreme Court expressly declined to decide whether "Eleventh Amendment immunity is a matter of subject-matter jurisdiction" in the *Schact* case.¹³⁴ The Court recognized in that case, however, that the existence of a claim to which an Eleventh Amendment bar may be asserted does not destroy a federal court's jurisdiction over the lawsuit.¹³⁵ The State can waive the defense and, if not raised by the State, it can be ignored by the court, unlike diversity jurisdiction which the court must address on its own.¹³⁶ Determining whether an Eleventh Amendment waiver has occurred has been the subject of numerous decisions, and prompted Justice Kennedy to declare the jurisdictional bar of the Eleventh Amendment to be a "hybrid."¹³⁷ He wrote:

In certain respects, the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*. Permitting the immunity to be raised at any stage of the proceedings, in contrast, is more consistent with regarding the Eleventh Amendment as a limit on federal courts' subject matter jurisdiction.¹³⁸

Just as Eleventh Amendment sovereign immunity is a "hybrid" of subject matter and personal jurisdiction, bankruptcy *in rem* ancillary jurisdiction highlighted by the *Katz* case is also a hybrid, as discussed in this Paper. The Supreme Court may have limited the breadth of such litigation against States, however, in that the *Katz* case analyzed the understanding of the framers of the Constitution as well as the concept of ancillary jurisdiction to *in rem* proceedings. Several times, the Court used limiting language in describing the States' surrender of immunity with respect to bankruptcy in the plan of the Convention:

[R]atification of the Bankruptcy Clause does represent a surrender by the States of their sovereign immunity in *certain* federal proceedings.¹³⁹

¹³³ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

¹³⁴ *Wis. Dep't of Corr. v. Schact*, 524 U.S. 381, 391 (1998).

¹³⁵ *Schact*, 524 U.S. at 389 ("The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so.").

¹³⁶ *Id.* (citing to earlier Supreme Court cases declaring same principles).

¹³⁷ *Id.* at 394.

¹³⁸ *Id.* (internal citations omitted).

¹³⁹ *Katz*, 126 S. Ct. at 1000 n.9 (emphasis added).

The Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in *certain limited* respects, for more than simple adjudications of rights in the *res*.¹⁴⁰

[T]he power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit *within a limited sphere*.¹⁴¹

The Court analyzed the historical record, and determined that the particular type of ancillary proceeding at issue in *Katz* was within the understanding of the people crafting and ratifying the Constitution when they authorized Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."¹⁴² Thus, it is possible to argue that one must evaluate whether other types of actions were also within the Founding Fathers' understanding of the nature and scope of bankruptcy proceedings, and must look to historical evidence of the type cited by the Court in *Katz*. This is consistent with the historical approach to jurisdiction reflected in other recent Supreme Court cases.¹⁴³

However, the reasoning of the *Katz* opinion shows that approach may be too superficial. The Court did not simply interpret the Bankruptcy Clause of the Constitution and Eleventh Amendment in light of the historical understanding of States' rights. The *Katz* opinion noted States' concerns about being held liable to pay debts.¹⁴⁴ Indeed, the dissent quoted from the *Federalist* papers and showed that "[t]o the Framers, it was a particularly grave offense to a State's sovereignty to be hauled into court by a private citizen and forced to make payments on debts."¹⁴⁵

Instead of using such historical concerns to limit the meaning of the Bankruptcy Clause, the *Katz* opinion used history to show that the Framers of the Constitution were aware of the issues and intentionally conferred broad authority to enact "Laws on the subject of Bankruptcies" that could bind States.¹⁴⁶ It explained that this power could be exercised by Congress to treat States in a special manner, or to treat

¹⁴⁰ *Id.* at 1000 (emphasis added).

¹⁴¹ *Id.* at 1004 (emphasis added).

¹⁴² *Id.* at 1000–02 (quoting U.S. CONST. art. I, §8, cl. 4)

¹⁴³ See, e.g., *Marshall*, 126 S. Ct. at 1745–46 (discussing extent of probate exception to federal bankruptcy jurisdiction). *Marshall* affirmed the analysis in *Ankenbradt v. Richards*. See 504 U.S. 689, 695–706 (1992) (explaining source and expanse of "domestic relations" exception to federal diversity jurisdiction); cf. *Alden v. Maine*, 527 U.S. 706, 759 (1999) (noting Framers of Constitution did not intend to allow individuals to bring suit against states in state court without state's consent).

¹⁴⁴ *Katz*, 126 S. Ct. at 1004 (indicating Framers' intention to draft Bankruptcy Clause was to "give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders").

¹⁴⁵ *Id.* at 1010 (citing THE FEDERALIST NO. 81 (Alexander Hamilton)).

¹⁴⁶ *Id.* at 1004 (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (internal quotations omitted)).

them like other creditors; the Constitution did not impose restrictions.¹⁴⁷ Referring to the Bankruptcy Act of 1800, the Court said:

That Congress felt the need to carve out an exception for States' preferences undermines any suggestion that it was operating against a background presumption of state sovereign immunity to bankruptcy laws.¹⁴⁸

The point, said the Court, was that Congress was empowered to make determinations about the extent of bankruptcy court power over States:

The relevant question is not whether Congress has "abrogated States" immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress' determination that States should be amenable to such proceedings is with the scope of its power to enact "Laws on the subject of Bankruptcies."¹⁴⁹

The Supreme Court cautioned that "[w]e do not mean to suggest that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."¹⁵⁰ The Court may have intended to imply that sovereign immunity was abrogated to a smaller universe of proceedings than those within the scope of bankruptcy jurisdiction *per se*. Analogizing historical examples cited by the Court in *Katz* to modern-day equivalents, however, it is evident that bankruptcy proceedings determining rights of States are extensive.

For example, *Katz* cited *habeas corpus* proceedings directing States to release debtors from state prisons as an illustration of the exercise of jurisdiction ancillary to *in rem* bankruptcy jurisdiction.¹⁵¹ The current Bankruptcy Code expressly does not stay criminal actions against debtors, or state proceedings to suspend or restrict debtors' licenses to move in vehicles or operate their businesses.¹⁵² But a bankruptcy statute could provide otherwise under the reasoning in *Katz* and older Supreme

¹⁴⁷ *Id.* at 1005.

¹⁴⁸ *Id.* at 1003 n.12.

¹⁴⁹ *Katz*, 126 S. Ct. at 1005 (internal citations omitted).

¹⁵⁰ *Id.* at 1005 n.15.

¹⁵¹ *Id.* at 1004–05 (recognizing Sixth Congress' authorization of federal courts to release debtors from state prisons).

¹⁵² 11 U.S.C. § 362(b)(1) (2006) ("The filing of a petition . . . does not operate as a stay . . . of the commencement or continuation of a criminal action or proceeding against the debtor . . ."); *id.* § 362(b)(2)(D) ("The filing of a petition . . . does not operate as a stay . . . of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law . . ."); see 3 COLLIER ON BANKRUPTCY ¶ 362.05, at 362–47, 52 (Alan Resnick, et al. eds., 15th ed. rev. 2006) (identifying bankruptcy concern not to provide shelter from criminal penalties and providing overview of addition of section 362(b)(2)(D) in 2005). See generally Craig Peyton Gaumer, *Curbing an Expropriation of Power: The Argument Against Allowing Bankruptcy Courts to Enjoin State Criminal Proceedings*, 16 AM. BANKR. INST. J. 2, at 12 (Mar. 1997) (analyzing contradiction between bankruptcy courts' enjoining of criminal proceedings and text of section 362(b)(1)).

Court cases, and federal bankruptcy court *in rem* ancillary jurisdiction over a debtor apparently would encompass adversary proceedings to enjoin government officials from exercising such power to terminate a debtor's rights. The Bankruptcy Code does stay numerous other types of actions States can take, such as seizing tax refunds or impressing liens on estate property to satisfy debts.

Katz noted that historically, bankruptcy courts had authority "to imprison recalcitrant third parties in possession of the estate's assets" and to "pursue any *legal* method of recovering [the debtor's] property" ¹⁵³ The *Katz* opinion recognized that the bankruptcy court has power under the current Bankruptcy Code to recover property under section 550 and mandate turnover of assets to marshal the entirety of a debtor's estate. ¹⁵⁴ By inference as well as by statute, the bankruptcy court accordingly has jurisdiction over adversary proceedings to seize assets in which the estate allegedly has an interest, pursue avoidance actions of all kinds, and simply liquidate assets including causes of action. *Katz* repeatedly referenced bankruptcy courts' ancillary power "to issue compulsory orders to facilitate administration and distribution of the bankruptcy *res*." ¹⁵⁵ That would logically include authority to determine an estate's tax liability, contract assumption rights, claim allowance and status, rights and claims with respect to use and sale of estate property, and similar matters. ¹⁵⁶

Congress may have determined that States should not be obliged to participate in some bankruptcy proceedings without their consent, however. Section 106(a) of the Bankruptcy Code lists numerous Code provisions where Congress specified that "sovereign immunity is abrogated as to a governmental unit." ¹⁵⁷ The list does not include section 541, which defines "property of the estate" and encompasses causes of action the debtor can pursue under state law. The legislative history of that provision indicates the omission was intentional. ¹⁵⁸ This arguably shows that Congress chose to exercise the option *Katz* described to determine that States should not be subject to forced litigation in such cases unless the debtor is exercising setoff rights or the State has filed a proof of claim. ¹⁵⁹ On the other hand, the Court explained in *Katz* that the relevant abrogation was effected in the plan of the Convention, not section 106 of the Bankruptcy Code. ¹⁶⁰ The express

¹⁵³ *Katz*, 126 S. Ct. at 1000 (emphasis in original).

¹⁵⁴ *Id.*; see 11 U.S.C. §§ 550, 541, 542 (2006) (discussing property of estate, turnover of property to estate, and liability of transferee of avoided transfer).

¹⁵⁵ *Katz*, 126 S. Ct. at 996 (recognizing bankruptcy court's power to distribute *res*).

¹⁵⁶ 11 U.S.C. §§ 363, 364, 365, 502, 505, 506, 510 (2006) (discussing use, sale, or lease of property, obtaining credit, executory contracts and unexpired leases, allowance of claims or interests, determination of tax liability, determination of secured status, and subordination).

¹⁵⁷ *Id.* § 106(a) (2006).

¹⁵⁸ 140 CONG. REC. H10752-01 (daily ed. Oct. 4, 1994) ("This allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under § 541.").

¹⁵⁹ See 11 U.S.C. § 106 (b) & (c) (2006).

¹⁶⁰ *Katz*, 126 S. Ct. at 1005 (stating relevant abrogation is "the one effected in the plan of the Convention, not by statute").

authorization in section 106(b) and (c) to pursue any cause of action "that is property of the estate" without a sovereign immunity defense in a setoff context or upon the filing of a State proof of claim, and the lack of special treatment for States in the substantive provisions of the Code relevant to this issue, evidence Congressional authorization for debtors to exercise such *in rem* ancillary jurisdiction over States. Further, section 106(a) lists turnover actions among the substantive proceedings where States cannot assert sovereign immunity, and section 542(b) requires that any entity, with no exception for a State, "that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt" to the estate except to the extent of any offset.¹⁶¹

Katz upheld bankruptcy court jurisdiction to recover payments preferentially made to State entities.¹⁶² The Court's reasoning appears broad enough to encompass all or virtually all proceedings that might be brought under the bankruptcy court's "arising under, arising in and related to" jurisdiction.¹⁶³ The scope of such proceedings themselves, when evaluated by a test of *in rem* ancillary jurisdiction, is far-reaching, even if section 106(a) is construed as a limited recognition of sovereign immunity in bankruptcy.

VI. KATZ AND TRIBAL SOVEREIGNTY

States are not the only governmental entities that assert sovereign immunity in bankruptcy court proceedings. Native American tribes raise such defenses too, and the *Katz* opinion has implications for this litigation. Courts look to State sovereign immunity precedents to analyze abrogation with respect to tribal sovereign immunity; but the doctrines are different in fundamental ways. Indian "tribes were not at the Constitutional Convention," and not parties to the concessions on sovereignty in the Constitution.¹⁶⁴

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.¹⁶⁵

Indian sovereign immunity is a doctrine of federal common law.¹⁶⁶ It can be abrogated or restricted by Congress.¹⁶⁷ Any waiver of Indian sovereign immunity

¹⁶¹ 11 U.S.C. § 542(b) (2006). Two-step litigation to recover against a State may be used in some cases to frame a cause of action as a turnover claim. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 333–34 (1966) (reasoning bankruptcy court has summary jurisdiction to order return of preference if issue of preference was summarily adjudicated).

¹⁶² *Katz*, 126 S. Ct. at 994 (recovering preferential transfers to each of petitioners).

¹⁶³ *Id.* at 995–96 (failing to implicate state sovereignty to the "same degree as other kinds of jurisdiction").

¹⁶⁴ *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

¹⁶⁵ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

¹⁶⁶ *See Kiowa Tribe*, 523 U.S. at 756–58 (explaining "tribal immunity is a matter of federal law" and emphasizing "[t]he doctrine of tribal immunity is settled law").

must be unequivocal, however; it cannot be simply implied.¹⁶⁸ That is the same test for a waiver of State sovereign immunity, without the overlay of the Eleventh Amendment.¹⁶⁹ In a bankruptcy context, the question is whether section 106 of the Bankruptcy Code meets this test. It provides for abrogation of sovereign immunity with respect to numerous sections of the Bankruptcy Code for "governmental units."¹⁷⁰ A "governmental unit" is defined as "United States; State; Commonwealth; District; Territory; municipality; foreign state; . . . or other foreign or domestic governments."¹⁷¹ The term "Indian tribe" is not used.

The Supreme Court has characterized Indian tribes as "domestic dependent nations."¹⁷² Applying that precedent, and statutory interpretation principles, some courts have concluded that Congress abrogated Indian sovereign immunity in section 106:

Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states).¹⁷³

Because in § 101(27) all other forms of domestic government prior to the semicolon are enumerated, if the phrase following the semicolon is not read as referring to Indian tribes and other indigenous peoples, the phrase becomes meaningless. There are no other forms of domestic government that have not already been specified.¹⁷⁴

Sovereign immunity is abrogated as to all domestic governments. Indian tribes are domestic governments. Hence sovereign immunity is abrogated as to Indian tribes . . . [Comparably,] sovereign

¹⁶⁷ See *id.* at 759 (recognizing Congress' power and capacity "subject to constitutional limitations . . . to weigh and accommodate the competing policy concerns").

¹⁶⁸ See *Santa Clara*, 436 U.S. at 58 (reinforcing "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'" (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))).

¹⁶⁹ See *Seminole Tribe*, 517 U.S. at 55 (1996) (establishing abrogation of state's immunity must be apparent in intention of Congress).

¹⁷⁰ See 11 U.S.C. § 106(a)(2) (2006) ("The court may hear and determine any issue arising with respect to the application of such sections to governmental units.").

¹⁷¹ 11 U.S.C. § 101(27) (2006).

¹⁷² *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

¹⁷³ *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057–58 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004).

¹⁷⁴ *Mayes v. Cherokee Nation (In re Mayes)*, 294 B.R. 145, 159 (B.A.P. 10th Cir. 2003) (McFeeley, J., dissenting) (applying strict semantic interpretation to 11 U.S.C. § 101(27) as well as relying on principal of contract interpretation *expressio unius est exclusio alterius*).

immunity is abrogated as to States, Arizona is a state, therefore sovereign immunity is abrogated as to Arizona.¹⁷⁵

Finally, it seems ludicrous that Congress would abrogate virtually every potential claimant to sovereign immunity and not include Indian tribes, when bankruptcy law sets out not only to regulate bankruptcy but to make it uniform.¹⁷⁶

As the court explained in *Russell*, the method of reasoning to reach the conclusion that sovereign immunity was abrogated for Indian tribes in section 106 is not the prohibited "implication" or "inference," but rather reasoning by deduction and induction.¹⁷⁷ The Supreme Court has held such reasoning results in sufficient clarity of intent to abrogate State sovereign immunity in a non-bankruptcy context.¹⁷⁸ However, at least one appellate court, the Tenth Circuit Bankruptcy Appellate Panel, nonetheless concluded that the language of section 106 does not express Congress' unequivocal intent to limit tribal immunity.¹⁷⁹ The *Mayes* opinion also discussed an *in rem* analysis, and held it inapplicable to proceedings affecting only a specific creditor, which it found "much more akin to the exercise of personal jurisdiction over the creditor . . ."¹⁸⁰ *Mayes* suggested a conclusion many would draw as a consequence of *Katz*:

[I]f a bankruptcy court's *in rem* jurisdiction over a debtor's property always prevailed over sovereign immunity, Appellant's so-called *in rem* exception would swallow the rule. There would be *no* bankruptcy case or proceeding where sovereign immunity would apply.¹⁸¹

¹⁷⁵ See *Russell v. Fort McDowell Yavapai Nation (In re Russell)*, 293 B.R. 34, 40–41 (Bankr. D. Ariz. 2003) (deducing abrogation of Indian sovereign immunity syllogistically when not specifically addressed in legislation); see also *Krystal Energy*, 357 F.3d at 1058 ("So the category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.").

¹⁷⁶ *In re Mayes*, 294 B.R. at 160 (McFeeley, J., dissenting).

¹⁷⁷ *In re Russell*, 293 B.R. at 38–41 (recognizing power and practicality of implication and inference while finding that "even if 'implied' were meant to mean 'inferred,' a further analysis shows that the process of determining whether tribes are included within § 106's abrogation is not by inference, but by an altogether different process, deduction").

¹⁷⁸ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–75 (2000) (interpreting syllogistically various sections of the Age Discrimination in Employment Act to deduce Congress intended to abrogate state's sovereign immunity from suit, and to find it incorporates remedial and procedural powers of Fair Labor Standard Act which further supports its conclusion), cited with approval in *Krystal Energy*, 357 F.3d at 1058.

¹⁷⁹ See *In re Mayes*, 294 B.R. at 148 n.10 (noting even if appellant had raised section 106 argument, Panel majority would have held that language used does not unequivocally abrogate tribal sovereign immunity).

¹⁸⁰ *In re Mayes*, 294 B.R. at 155.

¹⁸¹ *Id.* at 156 (emphasis added).

The *Katz* holding that Congress has broad authority to enact bankruptcy laws overriding sovereign immunity, founded on the broad scope of *in rem* ancillary jurisdiction in bankruptcy cases, will likely result in future opinions contrary to *Mayes*. *Katz* also bears on the analysis of a circuit opinion that relied on the Supreme Court's *Hoffman* and *Nordic Village* opinions to find that section 106 did not waive sovereign immunity as to a suit for a money judgment.¹⁸² The *Katz* opinion effectively overruled *Hoffman* and *Nordic Village*, as pointed out by the *Katz* dissent.¹⁸³

In sum, the Supreme Court's reasoning and its conclusions in *Katz* have significantly extended its *in rem* analysis in *Hood*. Many types of proceedings can be deemed ancillary to a bankruptcy case, especially a bankruptcy reorganization. Opinions finding jurisdiction ancillary to *in rem* jurisdiction in Bankruptcy Act and receivership cases support an expansive construction of Bankruptcy Code "related to" jurisdiction in bankruptcy courts, despite their Article I status. States cannot rely on a sovereign immunity defense in any such proceedings, although they might argue that Congress agreed to recognize their sovereign immunity in adversary proceedings brought purely as a matter of such causes of action being property of a bankruptcy estate, given the exclusion of Bankruptcy Code section 541 in section 106. The same conclusion is likely to be drawn with respect to sovereign immunity of Indian tribes in bankruptcy cases.

¹⁸² See *Richardson v. Mt. Adams Furniture (In re Greene)*, 980 F.2d 590, 597-98 (9th Cir. 1992) ("If we assume, without deciding, that Indian tribes are 'governmental units' for the purposes of [section] 106, then the waiver of sovereign immunity accomplished by § 106 does not extend to actions for money damages against Indian tribes." (citing *Hoffman v. Conn. Dept. of Income Maint.*, 492 U.S. 96 (1989) and *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992))). *Greene* has been distinguished and implicitly overruled by *Krystal Energy*, 357 F.3d at 1057-58 n.3 ("As the court in *In re Greene* was not applying the present language of § 106 . . . , *In re Greene* does not aid us in deciding the issue before us today.")

¹⁸³ *Katz*, 126 S. Ct. at 1008, 1013 (Thomas, J., dissenting).