Reframing Arbitration & Bankruptcy

by

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I. Introduction

Most every analysis of arbitration in bankruptcy is wrong. A thick crust of judicial rhetoric has obscured unassailable principles of law that should frame the conversation. Going back to these foundational principles will build a coherent framework about how arbitration and bankruptcy law work together.

This article will work with four principles. First, bankruptcy jurisdiction is in rem jurisdiction over the bankruptcy estate. An entity without that in rem jurisdiction as well as jurisdiction over the claimants to that res lacks authority to issue binding orders about it. Second and somewhat of a corol-

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Parts of this article draw upon an amicus brief I co-authored with Professors Ralph Brubaker and Bruce Markell, the conversations we had while doing so and the many we have had since that time. I thank all the participants and organizers of the ABLJ Symposium at the 2022 National Conference of Bankruptcy Judges for their thoughtful comments and encouragement for this article.

lary to the first principle, a contractual agreement cannot bind third persons who are not parties to the contract. Third, a court has the power to police its own orders. Fourth, a contract signed in one capacity does not bind the person when they act in other capacities. For example, a contract signed in a capacity as a corporate president does not bind the person individually.

To state these principles is not to say arbitration has no role in bankruptcy. There is nothing special about bankruptcy. The Federal Arbitration Act (FAA) and the Bankruptcy Code are both congressional enactments of equal dignity. Courts must follow both statutes. Arbitration issues in bankruptcy are nothing more than statutory interpretation issues, requiring the reconciliation of two statutory schemes, enacted decades apart, without express guidance on putting them together.

This article is not normative, at least not in the broad sense. It lays out an analytical framework using well-accepted and uncontroversial principles of law. The article's thesis is that the decisional law often has strayed from these principles or used analyses that obscure the true legal principle at work. As such, this article does not engage with normative proposals on what the law of arbitration and bankruptcy should be.[1] My own preference would be to ban the enforcement of pre-dispute arbitration clauses in any consumer dispute. That is not the law, however. The article is perhaps normative in a narrower sense. Unless amended or repealed through the legislative process, courts should follow both statutes. The rule of law dictates as much.

This article addresses arbitrability, that is the question whether a pre-dispute arbitration clause strips the court of the power to decide a matter otherwise properly before the court. As such, it does not address post-dispute agreements to arbitrate where bankruptcy litigants agree to settle a matter through arbitration. It also does not address the bankruptcy tribunal's substantial discretion to set procedures to liquidate claims, which might include an arbitrator or special master fixing the claim when there are numerous creditors.

Another topic that this article does not discuss is the role executory contract analysis plays in deciding arbitrability. In his contribution to this symposium, Professor Ware concludes an arbitration agreement is specifically enforceable in bankruptcy, even if a debtor or trustee has rejected it.[2] I agree

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[1] *E.g.*, Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503 (2009) (proposing a cost-benefit weighing for bankruptcy arbitrability with a public-policy minded judicial review of arbitral awards in bankruptcy cases); Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 184 (2007) (proposing a statutory amendment to the Bankruptcy Code to render arbitration clauses unenforceable in core proceedings with "limited discretion" to ignore arbitration clauses in noncore proceedings).

[2] *See* Stephen J. Ware, *Arbitration Agreements as Executory Contracts in Bankruptcy After* Mission Prod. Holdings Inc. v. Tempnology LLC, 96 AM. BANKR. L.J. 769 (2022).

with Professor Ware's bottom-line conclusion about the remedy even if I do not necessarily agree with all his other conclusions.[3] Although specific enforcement is the remedy, there remains the question whether the agreement is enforceable in bankruptcy. That is the topic for this article.

Before proceeding, it is worth it to make clear another terminology point. In their article, Professors Casey and Macey use the wonderful phrase, "bankruptcy tribunal,"[4] to describe the court exercising the jurisdiction given to the federal courts to hear cases under title 11 or its predecessors.[5] I wish I had thought of this phrase first, but I am not too proud to borrow it. In this article, "bankruptcy tribunal" then does not necessarily mean the bankruptcy court "unit" of the district court to which the district court can refer bankruptcy matters.[6] As a practical matter, the bankruptcy tribunal will be the bankruptcy court "unit" in most every case because, in most every case, the district court has referred jurisdiction. Where this article uses the phrase "bankruptcy court," it will mean the bankruptcy court "unit" of the district court. In quotations, the original usage of the term "bankruptcy court" has been left unaltered.

First is a primer on the FAA basics and the bankruptcy law relevant to this article. Much of it will deal with the jurisdiction and structure of the bankruptcy system. Next, this article will identify common mistakes courts

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[3]Specifically, I am not persuaded that the "separability" inquiry for purposes of the arbitrability analysis ports over automatically to the bankruptcy analysis to whether an arbitration clause constitutes an independent, separate part of the contract. On this issue, Professor Ware has the overwhelming majority of cases and commentators on his side. I only have reason and logic, although I would guess that Professor Ware would characterize that reason and logic as "lawless" with a small "l." He might be right.

Also, even if an arbitration agreement is an independent agreement for purposes of 11 U.S.C § 365, I am not persuaded it is "executory" in a way that it can be rejected.

Where Professor Ware and I agree is that, regardless of how these issues are resolved, a right to specific performance of an arbitration agreement does not "give rise to a right to payment." 11 U.S.C. § 101(5)(B). First, for the reasons Professor Ware explains, applicable nonbankruptcy law does not consider money a replacement for arbitration. Second, the question is really one of statutory interpretation. Section 4 of the FAA, 9 U.S.C. § 4, is a congressional directive giving a party aggrieved by a failure to arbitrate a right to specific performance. As put in the text, the Bankruptcy Code and the FAA are statutes of equal dignity. Faced with an unclear application of one congressional directive in § 101(5)(B) and another congressional command in § 4 of the FAA, continuing to recognize the right to specific performance is the better interpretation that gives effects to both statutes. Of course, that conclusion is subject to the analysis in the rest of this article that many bankruptcy matters inherently conflict with the arbitration process contemplated by the FAA and the FAA must give way when they do.

[4]*See* Anthony J. Casey & Joshua C. Macey, *The Bankruptcy Tribunal*, 96 AM. BANKR. L.J. 749 (2022).

[5]28 U.S.C. § 1334(a) ("[T] the district courts shall have original and exclusive jurisdiction of all cases under title 11.").

[6]*See id.* § 151 ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."), *id.* § 157(a) (providing district courts can refer a list of matters specified in the next subsection to the bankruptcy judges of the district); *see also infra* Part III.A (elaborating further on the referral process and the core/noncore distinction at the heart of it).

and commentators make when analyzing arbitration issues in bankruptcy. The final part offers a set of principles that determine how to decide arbitration issues in bankruptcy.

Bankruptcy proceedings deal with comprehensive default and all a debtor's problems. As such, they can raise almost any legal issue. Setting out to state a set of principles that will resolve all issues is a fool's errand, although my critics may say that is exactly the sort of errand I am on. The principles should resolve most every issue that might arise, but exceptional cases will arise.

II. THE BASICS

A. The Federal Arbitration Act

To state the obvious, the FAA is just another federal statute. Congress can repeal or amend it. Congress might pass other statutes that implicate the FAA. When Congress enacts a statute, it would be great if it specified all the ways that statute interacted with all other congressional enactments. That, of course, does not happen, nor do we want it to happen lest the legislative process become even more sclerotic than it already is. Grappling with how two statutes work together is a common exercise in statutory interpretation.

Stating the obvious demystifies the exercise at hand. An oft-cited formula says the FAA applies unless the "other statute" has text or legislative history saying the FAA does not apply, or the "other statute" has an inherent conflict with the FAA.[7] Of course, if another statute says "the FAA shall not apply," the intellectual task is not difficult. The court simply follows that command.[8] Legislative history is a tool in furtherance of an interpretive inquiry, not an independent ground to ignore the FAA. Even the most ardent nontextualist must concede that legislative history alone has no force-of-law legitimacy. It can help us understand statutory language, but it is not statutory language. The difficult cases revolve around whether an "inherent conflict" exists and is certainly the issue for bankruptcy cases as the Bankruptcy Code is silent on the topic of the FAA's application.

To return to the opening point, the FAA is just another federal statute. That also means courts must obey it. Section 2 provides:

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[7]*See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Shearson/Amer. Express v. McMahon, 482 U.S. 220, 227 (1987).

Some courts in the Eleventh Circuit have expressed the rule as a three-factor test. *See, e.g.*, Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 795-96 (11th Cir. 2007); *In re* Williams, 564 B.R. 770, 777-78 (Bankr. S.D. Fla. 2017); *In re* BFW Liquidation LLC, 459 B.R. 757, 776 (Bankr. N.D. Ala. 2011). This formulation is legal gibberish. That the text of a statute directs a result is not a "factor" for the court to consider but a command for the court to follow.

[8]*See Shearson/Amer. Express*, 482 U.S. at 226 ("Like any statutory directive, the Arbitration Act's mandate may be overridden by another statutory command.").

> A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract . . ..[9]

This provision is the FAA's core. It may strike today's lawyer as odd to have a statute that directs a court to enforce a contract as written. The FAA, however, overturned a body of case law hostile to the idea of arbitration.[10] The FAA is nothing more or nothing less than a statutory command to the courts to abandon that body of case law.

The FAA is more than section 2, of course. Section 3 requires the court to stay any "suit or proceeding" sent to arbitration.[11] In a bankruptcy case, section 3 adds little to the analysis. The stay determination should follow automatically from the arbitrability decision. The language of the section itself distinguishes "suits" and "proceedings," providing textual support that only the portion of the bankruptcy case sent to arbitration gets stayed. No one appears to have decided (or even argued) otherwise. It would be absurd, for example, to halt the entirety of multibillion restructuring over the arbitration of a contract dispute with one supplier. The main implication of section 3 for the bankruptcy tribunal is that parties have a right to appeal when a stay is denied.[12] Because the bankruptcy tribunal will not issue a stay when

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[9] 9 U.S.C. § 2.

[10] As stated in the House report for the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. REP. NO. 96, 68th Cong., 1st Sess., 1-2 (1924) (cited in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985)). The two principal drafters of the FAA described it in a law review published immediately after the law's enactment as only repealing "the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 4 VA. L. REV. 265, 265 (1926).

[11] *See* 9 U.S.C. § 3.

[12] *See id.* § 16.

it finds a matter is nonarbitrable, the upshot is that such a finding is appealable. There is no comparable right to appeal a ruling sending a matter to arbitration.

Section 4 of the FAA gives a party the right to petition a district court for an order directing arbitration when its counterparty has not respected an agreement to arbitration.[13] The district court must otherwise have jurisdiction.[14] Of course, one district court—acting through its bankruptcy court "unit"—already has jurisdiction by virtue of the bankruptcy petition. And, the bankruptcy removal statute allows the removal even of actions in other federal district courts to the court hearing the bankruptcy case.[15] Thus, section 4 does no real work in bankruptcy cases as a party can raise arbitrability directly in the bankruptcy case, and the court would simply proceed to decide the issue under command in section 2 about the enforceability of arbitration clauses.

Section 2 is what bankruptcy tribunals need to follow when confronted with an arbitration clause. They are "valid, irrevocable, and enforceable," subject to the usual contract defenses. Bankruptcy tribunals must follow section 2 just as they must follow any section of the Bankruptcy Code or any other federal statute. If another statute "inherently conflicts" with the FAA, the other statute controls. The Bankruptcy Code is often such a statute.

B. The Bankruptcy Code

The classic context for an arbitrability inquiry is a claimant asserting a common-law or statutory remedy to redress a harm. The defendant cites an arbitration agreement to move the dispute to an arbitral forum. Bankruptcy is completely different.

Bankruptcy is not a cause of action. By filing bankruptcy, the debtor is not asking for a remedy to redress a harm someone has done to the debtor. Rather, bankruptcy provides a mechanism to address the debtor's inability to meet its obligations to its creditors. The Constitution gives Congress the authority to pass a bankruptcy law for this purpose, an authority Congress has used in enacting the current Bankruptcy Code and its predecessor. A bankruptcy law is procedural, not substantive. Bankruptcy is a procedural vessel to recognize, enforce, and distribute rights created under other laws.[16]

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[13]*See id.* § 4.

[14]*See* Vaden v. Discover Bank, 556 U.S. 49, 70 (2009) ("In sum, § 4 of the FAA instructs district courts asked to compel arbitration to inquire whether the court would have jurisdiction, 'save for [the arbitration] agreement,' over 'a suit arising out of the controversy between the parties.'"); *see also* Stephen J. Ware & Ariana Levinson, Principles of Arbitration Law § 8 (2017) (discussing *Vaden* and explaining that parties seeking to invoke the FAA "must use state court use state court unless they can point to some other source of federal jurisdiction" other than the FAA).

[15]*See* 28 U.S.C. § 1452(a) (allowing the removal of any action, not just actions in state court).

[16]In making this statement, I am not endorsing the strong normative view of bankruptcy "procedural-

That process is necessarily collective, involving all the parties with claims against the debtor. Most of these parties will not have dealt directly with each other, although they all will have a relationship with the debtor. Whoever oversees that process must take control over all the debtor's affairs as well as exercise jurisdiction over the claimants. There are other ways to run a bankruptcy system, but in the United States the overseer is a federal court.

We say this court has in rem jurisdiction.[17] The description of the collective, comprehensive nature of bankruptcy reminds us of what that phrase means. Upon the filing of a bankruptcy petition, "the jurisdiction of the bankruptcy court becomes paramount and exclusive."[18] This statement is not only doctrinally accurate of what the law is but also an accurate statement of how the bankruptcy system must operate in practice. The bankruptcy estate cannot have two masters.

Just like the FAA, Congress has passed a statute, the Bankruptcy Code, that empowers the federal court system to wield this exclusive bankruptcy jurisdiction. The broad description of this jurisdiction may seem like the FAA always should give way, but such a conclusion would ignore the congressional command of the FAA. Supreme Court precedent dictates the FAA only gives way when it "inherently conflicts" with another statute. Because of the broad nature of bankruptcy jurisdiction, that will often, but not always be the case. Part IV parses out the distinctions, but before getting there, it is first important to move past some common, but mistaken, reasoning in the case law.

III. THE MISTAKES

A. Forget the Core

The core-noncore distinction sorts out which matters the non-Article III bankruptcy court can "hear and determine."[19] Somehow, this jurisdictional housekeeping provision has taken over the analysis used by many—but not

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ism" which holds that the only proper role of a bankruptcy should be limited to distribution of rights recognized elsewhere. *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 Notre Dame L. Rev. 605, 617-20 (2008) (describing bankruptcy proceduralism and its discontents). Regardless of whether bankruptcy can and should recognize other goals, it is descriptively accurate to describe the current bankruptcy law as primarily distributing rights recognized under other law.

[17]The Supreme Court has repeatedly characterized bankruptcy jurisdiction as in rem, under the nation's different bankruptcy statutes. *See* Central Community College v. Katz, 546 U.S. 356, 369 (2006) ("Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally in rem jurisdiction."); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902) ("[A] decree adjudging a corporation bankrupt is in the nature of a decree in rem."); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 662 (1875) ("[A] decree adjudging a corporation bankrupt is in the nature of a decree in rem.").

[18]Taylor v. Sternberg, 293 U.S. 470, 472 (1935).

[19]28 U.S.C. § 157(a).

all—courts to decide the arbitrability of bankruptcy matters.[20] To borrow a phrase from Professor Westbrook in another context, "academics, judges, and lawyers are left . . . with the maddening feeling that [this analysis] has brought the final answer to the very tips of their tongues, but no farther."[21] The core-noncore distinction can lead to the better result,[22] but any arbitrability analysis should proceed as if the bankruptcy case in question was directly before the district court under a withdrawal of the reference.[23] It is not "core" jurisdiction that is doing the work in separating what matters are arbitrable but whether Congress has directed that the matter is part of the process that flows from the bankruptcy petition.

The idea of "core" bankruptcy matters comes from the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),[24] which created the current bankruptcy court system in title 28 of the United States Code. The statute addressed the constitutional infirmities declared in the *Northern Pipeline* decision that found the bankruptcy court system unconstitutional.[25] In that case the bankruptcy court had exercised jurisdiction over a state law contract action.[26] The Court ruled such disputes only could be resolved by Article III courts. Implicit in that decision was that a non-Article III court could only hear disputes involving rights created through the bankruptcy statute itself.

Although a day late and a dollar short, BAFJA was the congressional fix to create a bankruptcy system faithful to *Northern Pipeline*.[27] BAFJA gave the Article III district courts jurisdiction over the bankruptcy case[28] but

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[20]*See* WARE & LEVINSON, *supra* note 14, § 28(a)(3) (2017); Michelle M. Harner, *The Uneasy Relationship Between Arbitration and Bankruptcy*, 96 AM. BANKR. L.J. 685 (2022).

[21]Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 238 (1989). Professor Westbrook's comment was made in the context of the Countryman test for executory contracts, which he referenced as "brilliant." *Id.* at 230. His ambition was to cut through a "enormous corpus of case law," *id.* at 234, using first principles to arrive at a cleaner, functional analysis of executory contract law, *id.* at 243. This article is consciously modeled on Professor Westbrook's outstanding work on executory contracts and will be successful if it only cleans out half as much of the case law clutter as Professor Westbrook managed to do.

[22]*See infra* Part IV.G (discussing how most debtor-derived, nonbankruptcy actions are non-core and how practical reasoning leads to the conclusion they are arbitrable).

[23]*See* 28 U.S.C. § 157(a), (d) (the district court "may" refer bankruptcy cases to the bankruptcy court or "may" withdraw a reference already conferred).

[24]Pub. L. No. 98-353, 98 Stat. 333.

[25]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[26]*Id.* at 56-57.

[27]*See* Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. LEGIS. 1 (1985) (detailing the process leading to BAFJA, including the delays and complications in the statute); *see also* Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675 (1985) (reviewing BAFJA in the wake of its enactment and explaining constitutional issues that still remained).

[28]*See* 28 U.S.C. § 1334(a) ("[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11.").

allowed district courts to refer that jurisdiction to their bankruptcy court "units." All district courts now automatically make that referral through standing orders in every case,[29] rendering BAFJA's jurisdictional solution more legal fiction than reality. Upon referral, a bankruptcy court can hear and issue final orders in a statutorily enumerated list of "core" proceedings, but a bankruptcy court only can issue proposed findings of fact and conclusions of law in proceedings not on the list. In these "noncore" proceedings not on the list, the district court enters the final judgment, solving the *Northern Pipeline* problem of non-Article III judges deciding matters not created by the bankruptcy statute.

Core proceedings were Congress' attempt to specify the rights that are created through the bankruptcy process itself and that bankruptcy courts thereby could constitutionally hear. It was only partly successful. One of the enumerated core proceedings is "counterclaims by the estate against persons filing claims against the estate."[30] In *Stern v. Marshall*, the Supreme Court later held a bankruptcy court could not exercise jurisdiction over a debtor's counterclaim where that counterclaim was based on state common law.[31]

To lay out the history is to demonstrate the irrelevancy of the jurisdictional scheme to the arbitrability issue at hand.[32] That Congress created a list of items a non-Article III court can hear says nothing about whether the FAA applies to those items. Moreover, the jurisdictional scheme contemplates that the district courts can hear bankruptcy matters originally. If the district court hears a bankruptcy matter originally, the concept of a core proceeding is irrelevant. District courts can exercise full bankruptcy jurisdiction. Nowhere does it say that the FAA's application depends on which court is hearing a matter. Indeed, the FAA's premise is very much the opposite. It is forum neutral. Arbitration contracts are to be enforced in all courts.

Whence the idea that the core/noncore distinction has relevancy for the FAA's application to the Bankruptcy Code? The origin seems to be the Third Circuit's decision in *Hays v. Merrill Lynch*.[33] The great irony is that

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[29]*See id.* § 157(a) ("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."); 1 COLLIER ON BANKRUPTCY ¶ 3.02[1] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[E]very district court has provided by rule or order for automatic reference to bankruptcy judges.")

[30]28 U.S.C. § 157(b)(2)(C).

[31]*See* Stern v. Marshall, 564 U.S. 462 (2011).

[32]Another commentator reached the same conclusion. *See* Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Bankruptcy and Arbitration Through an Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 622 (2008) ("This exclusive focus on the nature of the claim is wrong.").

[33]Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989). I cannot find a reported decision or discussion in academic literature before *Hays* that considers the core/noncore distinction relevant to the arbitrability of bankruptcy matters. The concept of "core" jurisdiction was introduced by BAFJA in 1984, meaning that is the earliest date the concept could be mentioned. Important to the

Hays does not actually say that a bankruptcy tribunal has some mysterious, greater power to deny arbitration in core proceedings. The Third Circuit has tried to clarify that the core/noncore distinction for arbitrability rests on a misreading of *Hays*,[34] but few seem willing to listen.

In *Hays*, a chapter 7 trustee brought a lawsuit against the corporate debtor's securities broker. The lawsuit alleged claims under state and federal securities laws, the Racketeer Influence and Corrupt Organizations Act (RICO), and state common law.[35] The trustee also claimed rights under state fraudulent conveyance law and for a constructive trust under the trustee's section 544(b) powers to avoid transfers avoidable by a creditor under applicable law.[36] The debtor's contract with the brokerage contained an arbitration clause, which the broker moved to enforce. The Third Circuit ruled the trustee did not have to arbitrate the section 544(b) claims but did have to arbitrate the claims based on nonbankruptcy law.[37]

The trustee in *Hays* argued for nonabritrability because Congress had placed unified jurisdiction over the estate and claims against it in the bankruptcy court. That was no longer true after BAFJA, the *Hays* court responded. Congress had not given exclusive jurisdiction over noncore matters to the court hearing the bankruptcy. Also, in noncore matters only the district court, not the bankruptcy court, could make findings of fact and conclusions of law.[38] The lower court in *Hays* had relied on a Third Circuit case decided before BAFJA, where Congress had placed all bankruptcy jurisdiction in the bankruptcy court itself.[39] The then-new BAFJA concept of core jurisdiction displaced that circuit precedent. Thus, the *Hays* court necessarily spent a great deal of ink discussing the core/noncore distinction to explain why the circuit precedent no longer applied.

Nowhere, however, does *Hays* hold that there is to be one rule for arbitrability of core matters and a different rule for arbitrability of noncore matters. Tellingly, none of the briefs in *Hays* even mention the term "core" jurisdiction.[40] In fairness, the court did summarize its decision as saying a

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timeline is the Supreme Court's decision two years prior to *Hays* in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), which held that a statutory claim under section 10(b) of the Securities Exchange Act was arbitrable. The *McMahon* decision expanded interest in how the FAA interacted with other federal statutes, including the Bankruptcy Code, giving us the *Hays* decision two years later.

[34]*See* Mintze v. American Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 230 (3d Cir. 2006) ("[T]he *Hays* decision did not seek to distinguish between core and non-core proceedings.").

[35]*Hays*, 885 F.2d at 1150.

[36]*See* 11 U.S.C. § 544(b).

[37]*See Hays*, 885 F.2d at 1155.

[38]*See id.* at 1159-60.

[39]*See* Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3d Cir. 1983) (ruling bankruptcy tribunal had discretion to deny arbitration of debtor's action to recover contract damages).

[40]*See* Brief of Appellee Hays and Company, as Trustee for Monge Oil Corporation, Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989) (No. 88-1680), 1988 WL 1038951; Brief of

district court could not deny enforcement of an arbitration clause in a "non-core adversary proceeding."[41] Certainly, that statement could be read as implying the decision might have been different in a core proceeding. If the court intended such a rule, it is odd that it would bury it, and only implicitly so, in one sentence of a 14-page opinion. A more likely explanation is that, per long-standing judicial practice, the court simply stated its holding in the narrowest terms possible. An even more likely explanation is that courts, like all authors, expect their words to be understood within the broader whole and not cherry-picked out of context. It is also important to remember that the core/noncore distinction was still new at the time of the *Hays* decision. In places, the opinion uses "core proceeding" as a synonym for the entire bankruptcy case, which would not be consistent with current usage.[42] The court's discussion of core and noncore proceedings does not bear the weight of the case law that developed.

Nonetheless, a massive body of case law did develop. For those who still use such things in an era of online databases, there is an entire American Law Reports annotation about arbitrability built around the core/noncore distinction.[43] A standard formulation of the reasoning goes like this:

> Courts addressing the issue of whether arbitration inherently conflicts with the Bankruptcy Code distinguish between core and non-core proceedings. In general, bankruptcy courts do not have the discretion to decline to enforce an arbitration agreement relating to a non-core proceeding. However, even if a proceeding is determined to be a core proceeding, the bankruptcy court must still analyze whether enforcing a valid arbitration agreement would inherently conflict with the underlying purposes of the Bankruptcy Code.[44]

Even by lawyering standards, the hedging in this "rule" is remarkable. To say that something is the rule "in general" is to say that sometimes it is not,

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Appellee Hays and Company, as Trustee for Monge Oil Corporation, Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989) (No. 88-1680), 1988 WL 1038951; Reply Brief of Appellant Merrill Lynch, Pierce, Fenner & Smith, Inc., Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989) (No. 88-1680), 1998 WL 34083909.

[41]*Hays*, 885 F.2d at 1150.

[42]*See id.* at 1158 (discussing "adverse impact on the core proceeding" in the context of delay in claims allowance and payment); *see also* 1 COLLIER ON BANKRUPTCY ¶ 3.02[2] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("It has already been noted that the 'case' is the umbrella under which the numerous proceedings that can arise during a title 11 case take place.").

[43]George L. Blum, Annotation, *Arbitration of Disputes in Bankruptcy Core Proceedings*, 63 A.L.R. FED. 2D 327 (2012).

[44]Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 796 (11th Cir. 2007) (citations omitted).

which also means it is not really a rule. In the context here, courts both have and do not have "discretion" not to enforce arbitration agreements. The final sentence turns the entire formulation into a circle, saying in essence: "whether arbitration inherently conflicts with the Bankruptcy Code depends on whether it is core or noncore, but after determining whether something is core, see if it inherently conflicts." Despite the incoherence of these ideas, they are a very popular, albeit not uniform, decisional rule when courts are asked to determine the arbitrability of disputes in bankruptcy.[45]

The core/noncore distinction attempts to discern which matters Congress has committed to the bankruptcy process. Related is the idea that Congress has vested original and exclusive jurisdiction over "all cases under title 11" to the district courts, as well as original and nonexclusive jurisdiction over proceedings "arising in or related to" cases under title 11.[46] That Congress has committed a matter to the exclusive jurisdiction of a court does not inform us about the arbitrability of that matter. After all, the whole point of the arbitrability inquiry is to ask whether a pre-dispute agreement moves the dispute out of a that would otherwise have jurisdiction. In *McMahon*, the Supreme Court held a claim under the Securities Exchange Act of 1934 had to be sent to arbitration although that statute gives the federal district courts exclusive jurisdiction over such claims.[47]

Any inherent conflict between the bankruptcy law and the FAA flows

[45]In addition to the *Whiting-Turner* case cited in the previous footnote, here is a partial list of cases leaning on the core/noncore distinction to settle the arbitrability of a bankruptcy matter: Moses v. Cash-Call, Inc. (*In re* Moses), 781 F.3d 63 (4th Cir. 2015); MBNA America Bank v. Hill, 436 F.3d 104 (2d Cir. 2006); Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160 (2d Cir. 2000); United States Lines, Inc. v. Amer. S.S. Owners Mut. Prot. & Indem. Assoc. (*In re* United States Lines, Inc.), 197 F.3d 631 (2d Cir. 1999); Pilgrim Skating Arena, Inc. v. Laubenstein (*In re* Laubenstein), No. 20-bk-3697, 2021 WL 857142 (M.D. Fla. Mar. 5, 2021); Golden v. Discover Bank (*In re* Golden), No. 16-40809, 2021 WL 1535784 (Bankr. E.D.N.Y. Jan. 5, 2021); Yip v. Grant Thornton LLP (*In re* Providence Fin. Invs., Inc.), 593 B.R. 884 (Bankr. S.D. Fla. 2020); Santangelo v. Touchstone Home Health Care LLC (*In re* Touchstone Home Health LLC), 572 B.R. 555 (Bankr. D. Colo. 2017); Drennan v. Certain Underwriters at Lloyd's of London (*In re* Residential Cap., LLC), 563 B.R. 756 (Bankr. S.D.N.Y. 2016); Wyatt v. Wade (*In re* Wade), 523 B.R. 594 (Bankr. W.D. Tenn. 2014); Bill Heard Chevrolet Corp. v. Blau (*In re* Bill Heard Enters., Inc.), 400 B.R. 806 (Bankr. N.D. Ala. 2009).

It is not just courts. *See* André Albertini, *Arbitration in Bankruptcy: Which Way Forward?*, 90 AM. BANKR. L.J. 600, 619 (2016) (calling the classification of a claim as core of "critical importance, since it determines . . . whether a bankruptcy court has discretion to deny enforcement of a valid prepetition arbitration clause"); Julian Ellis, *A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings*, 92 AM. BANKR. L.J. 141, 170-71 (2018) (describing the core versus noncore distinction as "sensible")

[46]28 U.S.C. § 1334.

[47]*See* Shearson/Amer. Express v. McMahon, 482 U.S. 220, 227 (1987); *see also* 15 U.S.C. § 78aa (codifying section 27 of the Securities Exchange Act and providing the district courts with exclusive jurisdiction over violations of the statute). In *McMahon*, the plaintiff had an even stronger textual argument. Section 29 of the Securities Exchange Act prohibits waiver of its provisions. 15 U.S.C. § 78cc. The plaintiff argued the arbitration clause was a waiver of the statute's exclusive jurisdiction in the district courts, and the Court rejected that argument. *McMahon*, 482 U.S. at 228. There is no anti-waiver rule in

not from its jurisdictional allocations but from the fact that Congress has created a procedure that settles the bankruptcy claim against a res in the court's custody, the bankruptcy estate. Enforcement of the nonbankruptcy rights on which the claim is based and outside that bankruptcy process are forever barred. The process requires binding parties with claims against the res with ultimate recourse to the state's monopoly on force coerce those who would refuse. Arbitrators can only bind parties who have agreed to appear before them. Courts can compel parties to appear or risk losing their rights. The core/noncore inquiry comes close to the right answer because most core proceedings are an integral part of that process, and thus the FAA inherently conflicts with the bankruptcy law for that core proceeding. As explained above, however, the inquiry is both under and overinclusive.

More than a few courts have rejected the core/noncore distinction as the dominant inquiry of whether a bankruptcy matter is arbitrable. For example, the Fifth Circuit commented the core/noncore distinction "conflated" the inquiry required by Supreme Court precedent. The court then held that the bankruptcy tribunal would interpret how a chapter 11 plan provision applied to a dispute with the debtor's insurer despite arbitration clauses in the insurance contracts.[48] The Third Circuit has attempted to clarify its *Hays* decision by saying it was trying to "distinguish between causes of action derived from the debtor and bankruptcy actions that the Bankruptcy Code created for the benefit of the creditors of the estate."[49]

This latter formulation still misses the mark. Rights "derived from the debtor" still can be nonarbitrable. As explained below, the amount of a claim against the estate is nonarbitrable even if the claim is based on a contract with the debtor. Similarly, a cause of action in the Bankruptcy Code can be arbitrable, such as a debtor's personal claim for damages for violation of the automatic stay. The primary question is whether the matter implicates the power to control the bankruptcy estate and bind nonconsenting third parties. Courts possess those powers. Arbitrators do not.

B. The Irrelevance of "Policy"

Another mistake is to weigh bankruptcy "policy" versus arbitration "policy," and conclude the most important "policy" wins.[50] Not surprisingly,

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the corresponding provisions of the bankruptcy law, making it all the more difficult to argue the bankruptcy jurisdictional scheme by itself precludes arbitration.

[48]*See* Ins. Co. of N. Amer. v. NGC Settlement Trust & Asbestos Claim Mgmt. Corp. (*In re* National Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997).

[49]Mintze v. American Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 230 (3d Cir. 2006).

[50]*See, e.g.*, Moses v. CashCall Inc. (*In re* Moses), 781 F.3d 63, 72 (4th Cir. 2015) (weighing arbitration policy versus bankruptcy policies of a fresh start and equitable distribution).

judges who have spent their career practicing or judging within our specialized bankruptcy system think its policies are pretty darn important.

Congress enacts statutes, not policies. The proper question is whether one statute conflicts with the other. When they do, one must give way. If not, the courts should enforce both statutes. This is the lesson from the Supreme Court's decision in *Epic Systems Corp. v. Lewis*.[51] The plaintiff alleged a national accounting firm had violated the Fair Labor Standards Act (FLSA) and California state law by not paying overtime to employees the firm had misclassified as professionals. The plaintiff invoked the FLSA's provision allowing, but not requiring, enforcement on behalf of similarly situated employees.[52] Further, the National Labor Relations Act guarantees employees the right to collectively bargain as well as "to engage in other concerted activities for . . . other mutual aid or protection."[53] When the accounting firm moved to require arbitration, and hence preclude collective litigation, the plaintiff pointed to the policies evidenced by these two labor statutes as overriding the FAA. In precluding collective litigation, arbitration would conflict with the FLSA's policy of allowing enforcement by third parties. The Court rejected the plaintiff's argument, finding "no conflict at all" between the FAA and the labor statutes.[54] It was possible to comply with all the statutes, meaning the Court's role was to enforce all of them and not pick between competing policies.[55]

The Court also has made clear that we should not valorize arbitration policy. In *Morgan v. Sundance, Inc.*, an employee brought a class action under the FLSA alleging her employer had systematically engaged in illegal recordkeeping to avoid paying overtime.[56] The employer litigated for eight months. With the litigation not going so well, the employer decided to invoke the arbitration clause.[57] A more textbook example of waiver there probably could not be—the employer had knowingly relinquished a defense by litigating rather than asserting the defense. The lower courts, however, adopted a special waiver rule requiring prejudice because of "federal policy favoring ar-

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[51]138 S. Ct. 1612 (2018).

[52]*See* 29 U.S.C. § 216(b) ("An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."). The plaintiff also sought class-action status. *Epic Sys.*, 138 S. Ct. at 1620.

[53]29 U.S.C. § 157; *see also Epic Sys.*, 138 S. Ct. at 1624 ("Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA . . . . From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.").

[54]*Epic Sys.*, 138 S. Ct. at 1625.

[55]*Id.* at 1624 ("Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be.").

[56]142 S. Ct. 1708 (2022).

[57]*See id.* at 1710.

bitration."[58] The Supreme Court unanimously rejected a special arbitration rule: "A directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions is simply a command to apply the usual federal procedural rules . . . ."[59]

Epic Systems and *Morgan* illustrate that the arbitrability inquiry is not about weighing up policies. As the Court noted in *Epic Systems*, it has rejected every argument that the policies in some statutory scheme means it conflicts with the FAA.[60] Bankruptcy professionals see many important policies in the Bankruptcy Code—the fresh start principle, the maximization of value to creditors, reorganization of viable businesses and job preservation. As important as these policies may be, they do not create a conflict with the FAA, which after all has its own important policy of enforcing the contractual obligation of the parties.

It is not bankruptcy policies that conflict with the FAA but the statute itself. In the Bankruptcy Code, Congress has created a procedure to bind persons with claims to the bankruptcy estate. Congress has committed that procedure to a particular forum. The FAA contemplates a different procedure. As explained in Part IV, many (but not all) bankruptcy procedures inherently conflict with the FAA's statutory command to recognize an available arbitral forum. Bankruptcy is inherently a collective proceeding among parties, not all of whom have dealt with each other. Arbitration is inherently with parties who all have dealt with each other. In the words of *Morgan*, bankruptcy is just the application of "usual federal procedural rules."

C. There Is No Discretion

The final shibboleth to displace is the rhetoric in many cases that the bankruptcy tribunal has "discretion" whether to order arbitration. Examples abound.[61] Indeed, it is more difficult to find cases that do not frame the in-

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[58] *See id.* at 1712 (quoting *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1120 (8th Cir. 2011)).

[59] *Id.* at 1714 (quoting 9 U.S.C. § 6).

[60] *See Epic Sys.*, 138 S. Ct. at 1627 (listing cases involving the Sherman Act, the Clayton Act, the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act).

[61] *See, e.g.*, Moses v. CashCall Inc. (*In re* Moses), 781 F.3d 63, 71-72 (4th Cir. 2015) (stating if there is an inherent conflict between the FAA and the Bankruptcy Code, the court has "discretion" to deny arbitration); Ins. Co. of N. Amer. v. NGC Settlement Trust & Asbestos Claim Mgmt. Corp. (*In re* National Gypsum Co.), 118 F.3d 1056, 1066 (5th Cir. 1997) (framing the issue as whether the bankruptcy tribunal had "discretion" to enforce an arbitration clause); Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149, 1155 (3d Cir. 1989) ("Having concluded that the trustee is bound by the arbitration clause . . . we now inquire whether the Bankruptcy Code invested the district court with discretion to refuse to enforce that clause . . . ."); Sternklar v. Heritage Auction Galleries (*In re* Sternklar), 434 B.R. 1, 10 (D. Mass. 2010) (asking whether the bankruptcy tribunal had "discretion" to compel arbitration); Brown v. Mortg. Elec. Registration Sys., (*In re* Brown), 354 B.R. 591, 603 (D.R.I. 2006); (holding the bankruptcy tribunal had "discretion" to refuse arbitration of a claim under the Truth in Lending Act); Cibro Petro-

quiry as whether a bankruptcy tribunal has "discretion" in deciding the arbitrability of a bankruptcy proceeding. Most often, the rhetoric is a variant of the core/noncore distinction debunked above.[62] Courts will say they have more (or less) "discretion" in core (or noncore) cases.[63]

It is nonsense to talk of the court's "discretion" over arbitrability. If the FAA requires arbitration, the court must order arbitration. If a party has properly invoked the jurisdiction of the bankruptcy tribunal, the court has a duty to hear the matter. The court does not have discretion to decline jurisdiction.[64]

These are statutory commands that do not leave room for discretion, in the sense that word is usually used in law. Courts use "discretion" to mean when a judge can choose among a range of outcomes and is often based on broad principles.[65] The court has no more "discretion" to order arbitration than it has "discretion" to follow any statutory command in the Bankruptcy Code, the FAA, or any other federal statute.[66] Certainly, the court may have

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leum Prods. v. City of Albany, (*In re* Winimo Realty Corp.), 270 B.R. 108, 118 (S.D.N.Y. 2001) (stating the court first must decide whether it has discretion to refuse arbitration and then decide how to exercise that discretion); Homaidan v. SLC Corp. (*In re* Homaidan), 587 B.R. 428, 439 (Bankr. E.D.N.Y. 2018) (commenting if the bankruptcy tribunal determines arbitration would present a "'severe' or 'inherent' conflict with the purposes of the Bankruptcy Code" the court has discretion not to compel arbitration); Wyatt v. Wade (*In re* Wade), 523 B.R. 594, 613-14 (Bankr. W.D. Tenn. 2014) (characterizing its decision as exercising "discretion" to deny arbitration); Trinity Christian Center v. Koper (*In re* Koper), 516 B.R. 707, 719 (Bankr. E.D.N.Y. 2014) (describing the court as having "discretion" to decline arbitration when it would severely conflict with the Bankruptcy Code).

[62]*See supra* Part III.B.

[63]*See, e.g.*, Cont'l Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1021 (9th Cir. 2012) ("In core proceedings, by contrast, the bankruptcy court, at least when it sees a conflict with bankruptcy law, has discretion to deny enforcement of an arbitration agreement."); MBNA Am. Bank v. Hill (*In re* Hill), 436 F.3d 104, 108 (2d Cir. 2006) ("Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters."); Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 165-66 (2d Cir. 2000) (elaborating the bankruptcy court's discretion as a function of the issue being core or non-core); Kittay v. Landegger (*In re* Hagerstown Fiber Ltd. P'ship), 277 B.R. 181, 202-03 (Bankr. S.D.N.Y. 2002) ("Initially, the bankruptcy court must decide if the proceeding is core or non-core.").

[64]As with most every legal issue, there are exceptions. For example, a bankruptcy can sometimes abstain "in the interest of justice, or in the interest of comity with State courts." 28 U.S.C. § 1334(c)(1).

[65]*See, e.g.*, Lagnes v. Green, 282 U.S. 531, 541 (1931) ("The term 'discretion' denotes the absence of a hard and fast rule."); Cook v. City of Bella Villa, 582 F.3d 840, 856 (8th Cir. 2009) ("That is the definition of judicial discretion: the realm of reasoned decisions within which a judge decides questions not expressly controlled by fixed rules of law."); *Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "judicial discretion" as the exercise of judgment "based on what is fair under the circumstances," not what a litigant can claim "as a matter of right").

[66]An unsigned student note came to the same conclusion:

> There is no basis for the substantial discretion placed in courts by the current methodology. The FAA creates a mandatory binary framework: If a valid arbitration clause exists, arbitration must be ordered. If the FAA has been explicitly or impliedly repealed with respect to the type of claim raised, then arbitration cannot be ordered.

to determine facts or other issues of law. In a lay, nontechnical sense of the word, perhaps one might say the court is exercising "discretion" when it makes these determinations. Once the facts or law are determined, however, the court does not have "discretion" within the technical, legal meaning lawyers and judges use the word.

The point is not mere pedantry about word choice. Words matter, and this word matters a lot. "Discretion" implies a range of available options. The word suggests the weighing of broadly outlined factors and exactly the sort of vague, generalized inquiry about weighing competing policies the Supreme Court has rejected in deciding arbitrability. Also, "discretionary" decisions receive a deferential standard of review on appeal. Notably, the only time the Supreme Court appears to have used the word "discretion" in an arbitrability dispute was to reject it. In *Dean Witter Reynolds, Inc. v. Byrd*, the lower court had held when arbitrable and nonarbitrable claims were "intertwined," the court had "discretion" to deny arbitration.[67] The Supreme Court unanimously rejected the "intertwining" doctrine that some circuits had developed: "By its terms, the Act leaves no place for the exercise of discretion by a district court . . . ."[68]

A deep dive into history further undermines the idea that bankruptcy tribunals have "discretion" on whether to do something a statute might direct. As the progenitor of the core/noncore misdirection as discussed above, the *Hays* case played an important role in the idea's (mistaken) development.[69] The lower court in *Hays* "concluded that it had discretion by virtue of the Bankruptcy Code to decline to enforce the arbitration clause."[70] The lower court reached this decision because circuit precedent held arbitrability is within the bankruptcy judge's "discretion."[71] *Hays* rejected the lower court's reasoning because the circuit precedent relied on a since-overturned Supreme Court case.[72] Because *Hays* was rejecting a lower court holding about its "discretion," the appellate opinion is understandably replete with references to the term. The body of the opinion uses the word "discretion" fourteen times, and the unofficial syllabus in the West reporter does not help

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Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2304 (2004).

[67]470 U.S. 213, 216-17 (1985).

[68]*Id.* at 218.

[69]*See supra* text accompanying notes 33-42 (discussing Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989)).

[70]*Hays*, 885 F.2d at 1155.

[71]Zimmerman v. Continental Airlines, Inc., 712 F.2d 55, 56 (3d Cir. 1983).

[72]In *Wilko v. Swan*, 346 U.S. 727 (1953), the Supreme Court had ruled the private right of action the Securities Act of 1933 meant Congress intended to preclude arbitration. Thirty-six years later, the Court expressly overruled *Wilko*. Rodriguez de Quijas v. Shearson/Amer. Exp., Inc., 490 U.S. 477, 485 (1989) ("[W]e overrule the decision in *Wilko*."). *See also Hays*, 885 F.2d at 1159-60 (commenting that *Zimmerman* relies on an overruled Supreme Court case).

by framing the holding as the district court "lacking discretion" to deny arbitration. Regardless, a holding that a court lacks discretion is hardly an endorsement of the idea that it does.

Going back further in the case law demonstrates that discretion is a misplaced concept in the modern law of arbitrability in bankruptcy. The circuit precedent at issue in *Hays* simply asserted, without citation to any authority, that arbitrability is within the "sound discretion of the bankruptcy judge."[73] The circuit precedent had not picked the idea entirely out of thin air. When read from an online database (or, for those of a certain age, from the pages of a bound volume), appellate opinions can read like abstract discussions, but they very much are reactions to the briefs and lower court ruling presented to them. Perhaps not surprisingly, the circuit court merely picked up on language in the district court opinion.[74]

The district court relied on a 1963 decision called *Muskegon Motors*.[75] In that decision, a company was liquidating under chapter X of the Bankruptcy Act of 1898. Union employees asserted a right to vacation pay. The dispute was whether the vacation pay stopped accruing on the date the debtor ceased operations or instead ran through the end of the collective bargaining agreement.[76] As the court noted, the case was fundamentally about claims allowance.[77] As such, it was part of the court's summary jurisdiction.[78] Despite the bankruptcy tribunal's exclusive power over the claims allowance process, it does not offend that exclusive power when the bankruptcy tribunal permissively allows another court to value the claim. It was this specific authority to which the *Muskegon Motors* court referred, not a free-floating "discretion" to ignore another federal statute like the FAA. The court said it took "exceptional circumstances" for a bankruptcy tribunal to surrender its

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[73]*See Zimmerman*, 712 F.2d at 56. Technically, the parties were disputing whether the bankruptcy tribunal had to stay an adversary proceeding with the bankruptcy case for which the debtor's counterparty had asserted an arbitration clause. *See id.* Because the issuance of a stay is mandatory under the FAA, *see* 9 U.S.C. § 3 (stating the court "shall" stay a proceeding subject to arbitration), the issue of arbitrability was inextricably linked to the dispute and the court treated it as such.

[74]*See* Zimmerman v. Cont'l Airlines (*In re* Ludwig Honold Mfg. Co.), 22 B.R. 436, 437 (Bankr. E.D. Pa. 1982) ("The decision to compel or deny arbitration is discretionary with the bankruptcy judge."), *aff'd*, 712 F.2d 56 (3d Cir. 1983).

[75]Int'l Union v. Davis (*In re* Muskegon Motor Specialties Co.), 313 F.2d 841 (6th Cir. 1963).

[76]*See id.* at 842.

[77]*See id.* at 843 (commenting the right of the employees to present a proof of claim had been preserved by the court).

[78]*See* Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 996 & n.157 (2022), https://www.yalelawjournal.org/pdf/F9.BrubakerFinalDraftWEB_n2mi.pdf.; Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 11, 88 (2016); Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 123, 128 & n.31, 173 (2012)

exclusive jurisdiction.[79] The court rejected the union's argument that "clear federal policy favor[ing] arbitration of labor disputes" were such exceptional circumstances.[80] All these concepts are consistent with the discussion below about arbitration in the context of claims allowance.[81]

In turn, *Muskegon Motors* had taken its lead from *Thompson v. Magnolia Petroleum Co.*[82] In that case, the Supreme Court was asked about the ownership of a valuable oil field. The trustee had succeeded to the rights of a railroad in reorganization. The owners of the land atop the oil field claimed the railroad only had an easement and no right to the oil. The trustee claimed the railroad had fee simple ownership over the land and thus also the oil. If the trustee was right, the bankruptcy tribunal had summary jurisdiction to decide the dispute. If the trustee was wrong, the court lacked that authority. Gordian knots are no match for ultimate arbiters. The Supreme Court held state courts should hear the dispute so they could resolve the "unsettled questions of State property law."[83] The only "discretion" the Supreme Court found the bankruptcy tribunal to have was to maintain the oil field and impound the proceeds of oil sales pending the resolution of the dispute.[84] What does any of that have to with whether bankruptcy tribunals today have "discretion" to ignore the FAA? Nothing. That is the point. The history lesson ends in a foundation of sand.

It would be best if the term "discretion" was stricken from discussions about the arbitrability of bankruptcy disputes. Even if the term is not completely inapposite in the context of arbitrability of claims allowance,[85] "discretion" implies the wrong theoretical frame. Striking "discretion" focuses the inquiry on statutory conflicts between the FAA and the Bankruptcy Code. That is the inquiry the Court has directed, and the inquiry to which the next part turns.

IV. APPLYING THE PRINCIPLES

A. Arbitration of the Petition

An easy issue is a good place to start because it will illustrate how to resolve bankruptcy arbitrability issues as directed by the Supreme Court and

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[79] *See Muskegon Motors*, 312 F.3d at 842.

[80] *See id.*

[81] *See infra* Part IV.E (showing claims allowance inherently conflicts with the FAA but also concluding that in rare situations the courts can permissively allow an arbitration to proceed that might liquidate a claim).

[82] 309 U.S. 478 (1940).

[83] *See id.* at 483-84.

[84] *See id.* at 482-83.

[85] *See infra* notes 155-165 and accompanying text (discussing court power permissively to allow an arbitrator to fix a claim).

without the crust of lower court case law that has developed. Suppose a debtor files a bankruptcy petition. A creditor contends the debtor must proceed to arbitration instead of in the bankruptcy tribunal. The example may seem contrived, but arbitration clauses in many consumer contracts are broad enough to apply. The agreement might say the debtor must arbitrate "any dispute" and further defines a "dispute" as any "unresolved disagreement."[86] The creditor has an argument that its insistence on having its debt paid instead of discharged is a "disagreement," bringing the dispute within the arbitration clause. Moreover, the arbitration clause might commit the issue of arbitrability to the arbitrator.[87] Section 2 of the FAA statutorily directs the court to enforce the arbitration clause.

The Bankruptcy Code statutorily directs other things. Among those things are the imposition of an automatic stay, the appointment of a trustee, the creation of a bankruptcy estate, and a direction to parties holding the debtor's property to turn it over to the estate. Significantly, the Bankruptcy Code also directs that a bankruptcy case "is commenced by the filing with the bankruptcy court of a petition."[88] Any other act does not commence a bankruptcy case, whether that act is commencing an arbitration proceeding or shouting "I declare bankruptcy" to your coworkers.

The assertion that a bankruptcy petition itself is arbitrable violates several of the legal principles at play. A bankruptcy petition implicates many third-party rights. The debtor and its creditor cannot contractually agree among themselves about the resolution of those rights. Maybe one could stretch the conceptual boundaries about what it means to have in rem jurisdiction and say a private arbitrator could have jurisdiction over the res. It will not matter because the arbitrator lacks power to issue decisions binding anyone but the debtor and the creditor. For example, the arbitrator could not enjoin persons from continuing to collect debts during the case as with the automatic stay, nor could the arbitrator issue a discharge injunction preventing persons from collecting debts after the case was over. The arbitrator can

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[86]This example is drawn from a Wells Fargo arbitration agreement from 2017 reproduced in a law-school textbook. ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS & REGULATION 68 (2018).

[87]"Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (internal citations omitted); *see also* AMERICAN ARBITRATION ASSOC., CONSUMER ARBITRATION RULES 7 (2014) (specifying in R-14 that the arbitrator has jurisdiction to "determine the arbitrability of any claim) (available at https://www.adr.org/sites/default/files/Consumer_Rules_Web_2.pdf); AMERICAN ARBITRATION ASSOC., COMMERCIAL ARBITRATION RULES 13 (2019) (specifying the same rule in R-7) (available athttps://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 714 n.44 (1999) ("[T]he parties can agree to have contractual arbitrability decided by the arbitrator.").

[88]11 U.S.C. § 301(a).

only bind those who have contractually agreed, and third parties have not so agreed.

In the end, the FAA and the Bankruptcy Code both tell the court to do things. It is impossible to comply with both. The statutes "inherently conflict," within the meaning of the *McMahon* framework. We must pick one of these two congressional commands, and *McMahon* directs us to the Bankruptcy Code. The system does not work otherwise, at least not without rewriting or ignoring centuries of jurisprudence about foundational legal principles.

The conclusion that the FAA does not direct arbitration of the bankruptcy petition is neither surprising nor novel, which may explain why apparently there has not been a case where a creditor claimed the petition itself was arbitrable. Nevertheless, the issue is a good place to start reframing how the FAA and the Bankruptcy Code work together because it illustrates how we can resolve the issue clearly, cleanly, and consistently with Supreme Court precedent. There is no need to resort to concepts of core jurisdiction. There is no need to count up policies such as the right to a fresh start or equality of creditors and deem those policies superior to other policies such as that courts should enforce the bargain of the parties. The example also elucidates what it means for the Bankruptcy Code to "inherently conflict" with the FAA. Having tackled an easy issue, we now move to a slightly more difficult one.

B. Discharge Issues

Consider a claim that the debtor must arbitrate whether the discharge should issue. This might be an issue over whether a ground exists to deny the discharge under section 727 or perhaps whether a condition precedent to issuance of the discharge has occurred, such as the requirement to complete payments in a chapter 13 plan. Broad contractual language about submitting any "dispute" to arbitration could bring the issue within the scope of an arbitration clause.

The same principles come into play as with arbitration of the petition. The Bankruptcy Code expressly gives "the court" the power to issue the discharge, no one else. Also, the issuance of a discharge affects persons who are not parties to the arbitration contract. Even if an arbitrator could issue a discharge, an arbitrator lacks the power to bind third parties to it. The FAA directs the court to enforce the arbitration clause, but enforcement cannot be accomplished within the statutory structure of the Bankruptcy Code. There is an inherent conflict. The FAA must give way.

Next is a claim that the action of a particular creditor violates a discharge that has been issued. Analytical clarity will come by focusing first on just the discharge enforcement issue. For the moment, we will put aside disputes

where the creditor claims a dischargeability exception applies and hence no violation has occurred.

The arbitrability of a discharge violation was at issue in *Anderson v. Credit One Bank*.[89] The debtor alleged his credit-card issuer had violated the discharge injunction by refusing to remove a "charge-off" notation on his credit report. The debtor filed a piece of paper purporting to be a class action to enforce the discharge injunction on behalf of himself and others from around the country who had been similarly treated.[90] The parties and the courts treated the proceeding as a motion for contempt,[91] which was odd given that courts generally cannot enforce orders from other courts. It is especially odd in the bankruptcy context because Federal Rule of Bankruptcy Procedure 4004(f) allows the registration of a discharge in another district for purposes of enforcement, suggesting no free-floating authority exists to enforce another court's discharge absence such a registration.[92]

These procedural details matter a great deal on the issue of arbitrability. A motion for contempt implicates the principle that a court has the power to enforce its own orders. It is not even a "claim" subject to arbitration, as the court noted in relying on an amicus brief that I had joined.[93] As we explained in that brief, when a debtor requests enforcement of the discharge injunction through contempt, the debtor is not requesting new relief but rather asking for vindication of a right already awarded to it through a process Congress has committed to bankruptcy tribunals.[94] A motion for contempt also impli-

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[89]884 F.3d 382 (2d Cir. 2019).

[90]*See id.* at 386 ("Anderson thereafter filed an amended class action complaint in the bankruptcy court alleging that Credit One violated 11 U.S.C. § 524(a)(2) . . . .").

[91]*See id.* at 391 ("Instead, violations of this court-ordered injunction are enforceable only by the bankruptcy court and only by a contempt citation.").

[92]My point here is not in opposition to Professor Bruce's contribution to this symposium. She argues that Federal Rule of Bankruptcy Procedure 4004(f) indicates the contempt power includes a bankruptcy tribunal enforcing a discharge issued by another court. *See* Kara J. Bruce, *Bankruptcy's Arbitration Countercurrent and the Future of the Debtor Class Action*, 96 AM. BANKR. L.J. 819 (2022). Where Professor Bruce and I may part ways is whether, in the absence of a registration under Rule 4004(f), a bankruptcy tribunal has the power to enforce the discharge from another bankruptcy tribunal. If the power to enforce another court's discharge already and inherently exists in bankruptcy tribunals, then there would seem never to have been any reason for Rule 4004(f).

[93]*Anderson*, 884 F.3d at 391.

[94]*See* Brief of Amici Curiae Professors Ralph Brubaker, Robert M. Lawless, and Bruce A. Markell in Support of Appellee at pp. 12-15, Anderson v. Credit One Bank, No. 16-2496 (2d. Cir. Feb. 27, 2017) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925494); *see also In re* Jorge, 568 B.R. 25, 36 (Bankr. N.D. Ohio 2017) ("Violations of the discharge injunction are inherently non-arbitrable because the discharge injunction vindicates a federal right that this Court previously awarded the Debtors—i.e., the bankruptcy discharge.").

An old Second Circuit case, *Fallick v. Kehr*, 369 F.2d 899 (2d Cir. 1966), is sometimes cited incorrectly for the proposition that the bankruptcy discharge is subject to arbitration. *E.g.* Allegaert v. Perot, 548 F.2d 432, 438 (2d Cir. 1977); D. James Mackall, *Balancing Section 3 of the United States Arbitration Act and Section 1471 of the Bankruptcy Act*, 53 U. CINN. L. REV. 231, 237-38 (1984); Stewart E. Sterk, *Enforce-*

cates the court's authority to see that its orders are followed.[95] Again, we have two conflicting statutory commands—"arbitrate" and "enforce the discharge." Supreme Court precedent directs that the FAA stands aside, which was the result reached by the Second Circuit in *Anderson*.[96]

On the other hand, if the debtor in *Anderson* had been asserting a private right of action for a violation of the discharge injunction, then it would have been subject to arbitration. Although most courts have rejected the idea that a private right of action exists for discharge violations,[97] one circuit court has held the bankruptcy tribunal's powers under section 105 allow it to order monetary damages for a discharge violation that very much look like a private right of action.[98] A private right of action for a discharge violation does not implicate any of the principles at play. The debtor seeks to recover for the debtor's own benefit, thereby not implicating issues about the estate, the court's in rem jurisdiction, third-party rights, or contractual capacity. A private right of action remedies harm to the debtor. Rule-of-law concerns that might factor into a contempt remedy for failure to obey a court order are not relevant to the harm to the debtor. Indeed, if such a private right of action exists, federal question jurisdiction would give any federal district court the power to hear it, assuming the usual rules of personal jurisdiction and venue were met. Arbitrating a private right of action for enforcement of a right under the Bankruptcy Code is no different than the other private rights of

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ability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CARDOZO L. REV. 481, 536-37 (1981). This reading misses an important statutory change. Prior to 1970, a bankruptcy tribunal had discretion to enforce the discharge by issuing an injunction under the "special circumstances" of *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). *See generally* Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1 (1971). In *Fallick*, the Second Circuit decided there were no "special circumstances" in the case before it and no injunction would issue. Therefore an arbitrator (or any other tribunal) could decide the applicability of the discharge as a defense to a creditor lawsuit. The lower courts recognized they could have deprived the arbitrator of authority by issuing an injunction, a proposition the Second Circuit did not contest. *See Fallick*, 369 F.2d at 901. Because 11 U.S.C. § 524 provides for an injunction to enforce the discharge in all cases, the *Fallick* decision in many ways supports, rather than undermines, the nonabritrability of the discharge.

[95]*See Ex Parte* Robinson, 86 U.S. 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2960 (3d ed. 2013) ("A contempt of court consists of the disregard of judicial authority. A court's ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots.").

[96]*Anderson*, 884 F.3d at 392.

[97]*E.g.*, Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002); Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001); Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000).

[98]Bessette v. Avco Fin. Servs., 230 F.3d 439 (1st Cir. 2009). Three lower courts also found a private right of action under section 524, but those cases are now overruled by circuit-level precedent. *See* Molloy v. Primus Automotive Fin. Servs., 247 B.R. 804 (C.D. Cal. 2000); Malone v. Norwest Fin., Inc., 245 B.R. 389 (E.D. Cal. 2000); Rogers v. NationsCredit Fin. Servs., 233 B.R. 98 (N.D. Cal. 1999).

action under other federal statutes the Supreme Court has ordered to arbitration.

Two years after its decision in *Anderson*, the Second Circuit made exactly the distinction suggested by this analysis.[99] The debtors alleged the same discharge violation as in *Anderson*, namely that postbankruptcy creditors had refused to update the status of a charged-off debt on a credit report. The debtors moved for contempt and recovery of monetary damages on behalf of a class of similarly situated debtors.[100] The Second Circuit reaffirmed *Anderson* and specifically rested its decision on the fact the debtors were seeking to recover "for an alleged violation of a court order and injunction."[101] The Second Circuit again made clear, "[T]he only court that may offer a contempt remedy is the court that issued the discharge order—the bankruptcy court." Notably, the Second Circuit then continued by expressing doubt the bankruptcy tribunal could enforce discharges entered by other courts but also noted that issue was not before the court.[102] Merely because the discharge issue does not go to an arbitrator does not mean a court can entertain a contempt motion on a discharge it did not issue.

C. Dischargeability

This section turns from the discharge broadly of all debts to the dischargeability of a particular debt, a topic that presents issues for arbitration both different and the same from enforcement of the discharge. In many ways, dischargeability issues are the same as the discharge issues explored in the previous part. Dischargeability asks the court only to determine the scope of its own discharge order. There are also differences. Dischargeability rests on the application of a standard specified in section 523. In any event, bankruptcy lawyers and courts generally treat dischargeability issues as conceptually separate from discharge.

When anyone invokes the jurisdiction of the bankruptcy tribunal to decide a debt's dischargeability, that person is asking the court to interpret its

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[99]*See* Belton v. GE Capital Retail Bank (*In re* Belton), 961 F.3d 612 (2d Cir. 2020).

[100]*Id.* at 614.

[101]*Id.* at 616.

[102]Specifically, the court said the rationale that courts were uniquely positioned to assess their own orders was "anathema to a nationwide class action" asking the bankruptcy tribunal to enforce discharges issued by other courts. *Id.* at 617.

Characterizing it as dictum, a lower court has refused to follow *Belton*'s language that only the bankruptcy tribunal that issued it can enforce its own discharge. *See* Anderson v. Credit One (*In re* Anderson), No. 14-22147, 2022 WL 1926608 (Bankr. S.D.N.Y. June 3, 2022) (granting motion for class certification for enforcement of discharge injunction). Oddly, the lower court purports to rely on an Eleventh Circuit case, but that case was consistent with *Belton*. *See* Crocker v. Navient Solutions, LLC (*In re* Crocker), 941 F.3d 206, 216 (11th Cir. 2019) ("We adopt the language of the Second Circuit that returning to the issuing bankruptcy court to enforce an injunction is required at least in order to uphold 'respect for judicial process.'").

own order. That judicial order has arisen from a statutorily authorized process, namely the Bankruptcy Code. It does not matter that an arbitrator could make a nondischargeability determination or that an arbitrator may (or may not) be able to do so more efficiently or cheaply. The arbitrator is not the court. To shuttle that process to an arbitrator through the FAA conflicts with the congressional command in the Bankruptcy Code that the bankruptcy tribunal is to issue a discharge. The power to interpret an order is the power to enhance or destroy it. Implicit in that congressional command must be the power to determine the scope of the order.

The resolution of dischargeability issues thus depends on the procedural context. Dischargeability issues that arise in the federal bankruptcy case itself or are brought to that court are not for an arbitrator to decide. Dischargeability issues that arise in nonbankruptcy forums should be sent to an arbitrator when an arbitration clause applies.

Consider a student loan debt, the dischargeability of which could be raised in several procedural postures.[103] (And, remember that this article does not address post-dispute agreements to arbitrate.) The debtor might ask the bankruptcy tribunal to determine the debt is dischargeable because it imposes an undue hardship on the debtor or the debtor's dependents. Another possibility is the debtor may be looking for a judicial declaration that the debt is not covered by the student loan discharge exception because it is not a "qualified student loan" or an "educational benefit."[104] In theory, it could even be a creditor asking the bankruptcy tribunal for a determination of dischargeability,[105] although in practice most every dischargeability determination is brought by a debtor. In all these instances, the party has asked the court to determine whether its own order covers a particular set of facts. An arbitration clause cannot strip a court of this inherent power.

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[103]The student loan example is drawn from *Homaidan v. SLC Corp. (In re Homaidan)*, 587 B.R. 428 (Bankr. E.D.N.Y. 2018), where a student loan servicer demanded arbitration of an adversary proceeding brought as a class action. The debtor asked the court to find that certain debts were not within the scope of 11 U.S.C. § 523(a)(8) and thus the servicer had violated the discharge injunction by postbankruptcy collection efforts. *Id.* at 432-33. The court refused to send the case to arbitration, using circuit-level precedent that relied heavily on the core/noncore distinction and an "severe and inherent" conflict with "the objectives" of the Bankruptcy Code. *Id.* at 442. The same court reached an identical decision in a later case. *See* Golden v. Discover Bank (*In re* Golden), No. 16-40809, 2021 WL 1535784 (Bankr. E.D.N.Y. Jan. 5, 2021). This article reaches the same outcomes but, as explained above, rejects the core/noncore distinction as irrelevant. *See supra* Part III.A.

[104]For example, debtors have established certain private student loans were not an "educational benefit" within the meaning of 11 U.S.C. § 523(a)(8) and thus were dischargeable like any other unsecured debt. *See e.g.*, Homaidan v. Sallie Mae, Inc., 3 F.4th 595 (2d Cir. 2021); McDaniel v. Navient Solutions, LLC (*In re* McDaniel), 973 F.3d 1083 (10th Cir. 2020); Crocker v. Navient Solutions, LLC (*In re* Crocker), 941 F.3d 206 (5th Cir. 2019).

[105]FED. R. BANKR. P. 4007(a) ("A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.").

An alternative procedural posture would be a collection action outside of the bankruptcy case where the parties, for whatever reason, do not bring the issue back to the bankruptcy tribunal. In practice, such a procedure would be extremely rare (at best), but the concept helps us understand the principles at play for arbitrability. If neither party invokes the jurisdiction of the bankruptcy tribunal, the nonbankruptcy court can decide the student loan's dischargeability.[106] If either party cites a valid arbitration clause, the FAA directs that nonbankruptcy court to enforce the clause and send the matter to arbitration. Certainly, any determination by the nonbankruptcy court or the arbitrator necessarily interprets the scope of the bankruptcy tribunal's discharge order. Either party could have brought the matter within the bankruptcy tribunal's jurisdiction. Conceptually, failing to do so is a waiver of that right or also a matter of res judicata or other finality principles, if there has been a final determination.[107]

Bankruptcy tribunals always have the power to interpret their own orders, but if the parties do not invoke that power, there is nothing for the bankruptcy tribunal to do. That courts have an inherent power to interpret their own orders does not mean they have a mission to ensure that no one else does. Courts decide the issues put before them by the parties, and when the parties do not put an issue before the court, it has no mandate.

The principles here apply to any dischargeability issues with the exceptions discussed next. Student loans were a useful example to start for two reasons. First, "undue hardship" might seem like a discrete issue an arbitrator could always hear but as the discussion shows, not all student loan dischargeability issues are arbitrable. Second, there is sometimes a misconception that student loan dischargeability can only be heard in the bankruptcy case. That is not true. As a matter of practice, most every student loan dischargeability dispute gets heard in the bankruptcy case. But such disputes could be heard by another court which can then put the issue in front of an arbitrator.

Congress has committed three dischargeability exceptions exclusively to

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[106]*See, e.g.*, Stucker v. Cardinal Bldg. Materials (*In re* Stucker), 153 B.R. 219, 222 (Bankr. N.D. Ill. 1993) (parties can raise dischargeability in several ways procedurally, including by raising the bankruptcy discharge as an affirmative defense); Vermont Student Assistance Corp. v. Zeichner, 708 A.2d 1351, 1352 (Vt. 1998) ("Because these student loans are not discharged automatically under § 523(a)(8), it is unnecessary for the creditor to appear at the bankruptcy proceedings and file a complaint that the loans should not be discharged."); Indiana Univ. v. Canganelli, 501 N.E.2d 299, 301 (Ill. App. Ct. 1986) ("The bankruptcy and State courts have concurrent jurisdiction to determine whether a government student loan debt is dischargeable under section 523(a)(8).").

[107]The result finds support in the Supreme Court's reasoning in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). *See also supra* notes 56-60 (discussing *Morgan*). In *Morgan*, the Court ruled that the usual waiver rules apply to a party who chooses to litigate rather than assert an arbitration clause as a defense. The converse proposition would be that, under the usual waiver rules, a party who chooses to litigate can waive its ability to defeat the arbitration clause.

the bankruptcy tribunal. For debts incurred for fraud, defalcation in a fiduciary capacity, or a willful and malicious injury, the creditor must bring a dischargeability action in the bankruptcy case itself.[108] The creditor has sixty days after the first meeting of creditors to file the action.[109] If the creditor does not do so, the court discharges the debt. Thus, the procedural posture for these dischargeability exceptions make it impossible for an arbitrator to hear them. It will always be the bankruptcy tribunal itself that has been asked to interpret them, making arbitration always inappropriate for these three exceptions.

D. Cash Collateral, Automatic Stay, Turnover & Other Estate "Housekeeping"

Moving from discharge issues, this section consider the arbitrability of "housekeeping" provisions around the bankruptcy estate. These are rules that order or protect bankruptcy estate such as the authority to use cash collateral, the automatic stay, or turnover. Disputes about bankruptcy "housekeeping" are nonarbitrable, except where the debtor uses one of these provisions to recover for the debtor's own benefit. Again, arbitrability cleaves down the line of whether the court is acting within is exclusive power over the bankruptcy estate. The end of this section addresses "faux housekeeping" claims, where a nonbankruptcy cause of action is pleaded in the language of a turnover proceeding. Courts should use look through these claims and consider arbitrability as they would for the trustee's assertion of any other affirmative recovery under nonbankruptcy law.[110]

A paradigm "housekeeping" case is *In re Hostess Brands*, where the debtor had provided cash deposits to ensure performance of its obligations under an insurance contract, including the obligation to pay deductibles.[111] Upon filing bankruptcy, the debtor also filed a motion for authority to use cash collateral, namely the deposits the debtor had provided to the insurance company. The insurance company responded by moving to refer the matter to arbitration under its agreement with the debtor.

Using this article's framework, the insurance company's claim for arbitration easily fails. The court agreed, making many of the same points. First, the Bankruptcy Code expressly refers the cash collateral determination to the

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[108]11 U.S.C. § 523(c) ("[T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed . . . the court determines such debt to be excepted from discharge. . . .").

[109]Fed. R. Bankr. P. 4007(c). In a chapter 13 case where the debtor moves for a "hardship discharge" under 11 U.S.C. § 1328(b), the deadline is a time entered by the court after the debtor files the motion. *Id.* 4007(d).

[110]*See infra* Part IV.G (discussing the arbitrability of nonbankruptcy claims brought in a bankruptcy proceeding).

[111]No. 12-22052-rdd, 2013 WL 82914 at *1 (Bankr. S.D.N.Y. Jan. 7, 2013)

bankruptcy tribunal.[112] Second, a cash collateral order implicates the rights of all parties to the bankruptcy case.[113] For example, a cash collateral ruling necessarily implicates what is and is not collateral, meaning there is more (or less) available for distribution to other claimants. In the bankruptcy tribunal, the other parties have a right to appear and be heard on a cash collateral issue.[114] Allowing a private party to make these determinations thus raises significant due process concerns. Also, the court cannot simply direct these other parties into the arbitration because they have no contractual obligation to arbitrate. In short, a cash collateral determination implicates the bankruptcy tribunal's exclusive in rem authority over the bankruptcy estate. For all these reasons, arbitration inherently conflicts with the statutory scheme for determining the use of cash collateral in bankruptcy.

Another "housekeeping" provision is the automatic stay, which of course seeks to preserve the bankruptcy estate. How the automatic stay interacts with arbitrability is illustrated by *MBNA America Bank v. Hill.*[115] The debtor had authorized MBNA to withdraw funds from a bank account to pay her loan. The debtor alleged MBNA continued to make withdrawals even postpetition.[116] If the debtor's allegation was true, MBNA violated several provisions of the automatic stay, not the least of which would be the collection of a prepetition debt. MBNA invoked the arbitration clause in its agreement with the debtor.

The arbitrability analysis is very similar to that for discharge.[117] Violations of the automatic stay are contempt or, for those who quibble about the bankruptcy courts' inherent powers, can be punished by bankruptcy courts as contempt under their statutory authority.[118] An agreement between the

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[112]*See* 11 U.S.C. § 363(c)(2), (e) (providing that the trustee may not use cash collateral unless the court authorizes such use after a finding of adequate protection); *Hostess Brands*, 2013 WL 82914, at *4 ("Congress did expressly provide for the Court to make the relevant determination under section 363(e), and applied it to a trustee or debtor in possession, not the prepetition debtor.").

[113]*Hostess Brands*, 2013 WL 82914, at *4 ("It is hard to see how Congress would have meant to turn over this particular type of determination, in which . . . parties in interest would have the right to intervene if they wanted to an arbitration panel in a two-party dispute . . . .") (citation omitted).

[114]*See* 11 U.S.C. § 1109(b) (specifying that a party in interest has a right to appear and be heard on any matter in a chapter 11 case); *see also* Term Loan Holder Cmte. v. Ozer Group, LLC (*In re* The Caldor Corp.), 303 F.3d 161 (2d Cir. 2002) (recognizing creditors' right to intervene in an adversary proceeding that would determine the amount available for distribution).

[115]436 F.3d 104 (2d Cir. 2006).

[116]*See id.* at 106.

[117]*See supra* Part IV.B.

[118]*See, e.g.*, Spookyworld Inc. v. Town of Berlin (*In re* Spookyworld, Inc.), 346 F.3d 1, 8 (1st Cir. 2003) (commenting that bankruptcy courts have 11 U.S.C. § 105 powers to punish violations of the automatic stay); Knupfer v. Lindblade, (*In re* Dyer), 322 F.3d 1178, 1189-90 (9th Cir. 2003) (stating contempt remedy is clearly available); Jove Eng'g Inc. v. IRS, 92 F.3d 1539, 1553-54 (11th Cir. 1996) (holding bankruptcy court has statutory contempt power under 11 U.S.C. § 105 to punish violations of the automatic stay); *see also* Sosne v. Reinert & Dupree, P.C. (*In re* Just Brakes Corp. Sys.), 108 F.3d 881, 884-85

debtor and MBNA cannot deprive the court of its authority to punish contempt. It is not a claim or dispute between the parties. The debtor is asking the court merely to vindicate relief that already belonged to the debtor. The contempt motion also implicates the authority of the court and respect for its orders.[119]

In other circumstances, it might be a bankruptcy trustee moving for contempt. A trustee's motion for contempt raises additional concerns. First, the trustee or the creditors whose interests the trustee represents are not parties to the arbitration agreement. Second, the trustee's contempt motion will seek to remedy harm to the bankruptcy estate. For example, the trustee may seek to recover costs incurred because of the stay violation or to have property returned to the bankruptcy estate. A trustee motion under the automatic stay thus also raises the bankruptcy tribunal's exclusive authority over the estate. To the extent a debtor or trustee seeks contempt sanctions for a stay violation, ordering arbitration would inherently conflict with the congressionally created statutory scheme that gives bankruptcy tribunals exclusive authority over the bankruptcy estate.

In the *MBNA* case, it was the debtor seeking a remedy, and the debtor was not seeking to vindicate the rights of the estate. The debtor's bankruptcy case had closed, and the debtor was seeking damages under section 362(k) of the Bankruptcy Code. Moreover, the debtor sought to do so on behalf of a nationwide class.[120] That subsection allows an individual debtor to recover actual damages for violations of the automatic stay and even punitive damages if the violation was willful. In this procedural posture, all the concerns melt away. The debtor was not asking the court to vindicate its authority because a party had ignored its orders. Rather, the debtor was seeking to recover damages for its own benefit. There were no third-party interests at stake or parties that were not bound by the arbitration agreement. The debtor's action did not implicate the bankruptcy estate because any recovery would go to the debtor. For the relief the debtor asked, there was no inherent conflict between the operation of the bankruptcy case and the FAA. The dispute was arbitrable, and the court so held.[121]

(8th Cir. 2001) (questioning whether bankruptcy courts have formal contempt powers but concluding they have equivalent inherent equitable powers to remedy stay violations); Mountain Am. Credit Union v. Skinner (*In re* Skinner), 917 F.2d, 444, 447 (10th Cir. 1990) (ruling bankruptcy courts have contempt powers for stay violations under 11 U.S.C. § 105).

[119]*See supra* notes 93-96 and accompanying text.

[120]*See MBNA Am. Bank*, 436 F.3d at 106. At the time of the decision, the private right of action for a violation of the automatic stay was codified in subsection (h) of 11 U.S.C. § 362.

[121]The court gave three reasons, only of which was relevant. First, as explained above, the damages would flow to the debtor meaning the interests of the bankruptcy estate were not implicated. *See MBNA Am. Bank*, 436 F.3d at 110.

The other two reasons the court gave were not relevant. The court secondly noted the debtor had

The flip side of an automatic stay violation is turnover, which seeks recovery of estate property. Turnover again implicates the tribunal's exclusive authority over the estate. To the extent a trustee (or a debtor-in-possession acting as a fiduciary on behalf of the estate) seeks the turnover of a thing, the possessor of the thing cannot insist on arbitration. Turnover also implicates the third-party rights of creditors with interests in the estate.

The filing of the bankruptcy petition creates a bankruptcy estate. The court is *in custodia legis* over all property of the estate, no matter where located. Historically, turnover was part of the bankruptcy tribunal's summary jurisdiction, where the bankruptcy tribunal had power to protect the rest of the bankruptcy estate.[122] Summary jurisdiction was appropriate for things in the actual or constructive custody of the court. In contrast, if there was a question whether the thing actually belonged to the estate, the jurisdiction was in personam.[123]

Most turnover claims are not for the return of physical things. Intangible items can be property subject to turnover, but a turnover claim against an intangible item often involves an account or a contract right. If the party resisting turnover does not contest the validity of the estate's claim to the intangible thing, the inquiry is the same as a physical thing. The rights are property of the estate over which the bankruptcy tribunal has exclusive authority.

Often, however, the party resisting turnover defends that the money is not owed or the debtor failed to meet its obligations under the contract or any other of a myriad of defenses that might arise depending on the facts. In these cases, the trustee has dressed up a nonbankruptcy claim as a turnover claim. Such pleading is not procedurally wrong. If the counterparty does owe what the trustee claims, that value belongs to the bankruptcy estate and meets the language of the Bankruptcy Code's turnover provision. The trustee can plead turnover as an alternative theory to breach of contract, "money had

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brought a class action. *Id.* It is doubtful the court could enforce the automatic stay in bankruptcy cases other than the case before it, making class status inappropriate *See supra* notes 91-92 and accompanying text (discussing courts' inability to enforce other courts' orders). But, class action status had no relevance to the question of whether there was an inherent conflict with the FAA. Third, the court noted the automatic stay arose by operation of statutory law and stated that 28 U.S.C. § 1334(b) also gave district courts authority over proceedings under title 11. Thus, the automatic stay was "not a matter within the exclusive jurisdiction of the bankruptcy courts." *See MBNA Am. Bank*, 436 F.3d at 110. In this latter statement, the court completely misunderstood the nature of that section, which gives district courts bankruptcy jurisdiction which they then refer to their bankruptcy court "unit" under 28 U.S.C. § 157(b). Whatever jurisdiction, exclusive or otherwise, that the bankruptcy court has, its jurisdiction is derivative of the jurisdiction the district court could exercise if it chose to do so.

[122]*See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Case of* Callaway v. Benton, 72 AM. BANKR. L.J. 1, 23-24 (1998).

[123]*See id.*

and received," fraud, or whatever other cause of action might fit the facts.[124] The difficulty, of course, is that someone must decide whether the counterparty owes the money. If an arbitration clause exists, it is a contractual commitment that the someone should be an arbitrator.

It would elevate form over substance to allow the mere invocation of turnover to defeat that contractual commitment. It is trivial to recast a nonbankruptcy lawsuit as a turnover action—"You owe the debtor money because of [*insert nonbankruptcy law here*]. That money is therefore property of the estate. Turn it over." What is needed is a way to distinguish nonarbitrable, "true" turnover actions from arbitrable, "costumed" turnover actions.

To be consistent with the Supreme Court's directive to look for an inherent conflict with the FAA, the crux of the test must be whether the action implicates the bankruptcy tribunal's exclusive authority over the bankruptcy estate. The core/noncore distinction is tempting because it feels like it is dividing the world between "true" bankruptcy and nonbankruptcy matters. That distinction's purpose, however, is to delineate the proper scope of a *bankruptcy court*'s powers within the constitutional limits that the separation of powers dictates. Better is the historical distinction of summary versus plenary actions in turnover cases because it went directly to whether the dispute falls primarily within the court's in rem jurisdiction over the estate.

The suggestion is not to import the historical case law on the plenary versus summary distinction to modern-day turnover actions. The current statutory language already provides the framework, as it should. Turnover is appropriate for property over which an entity has "possession, custody, or control."[125] The trustee must be able to "use, sell, or lease" the property.[126] For a debt to be subject to turnover, it must be "matured, payable on demand, or payable on order."[127] Claims that fit these criteria are "true" turnover actions over which the court is exercising its exclusive authority over estate property.

Although the inquiry suggested here is more general principle than specific rule, it has proved workable as illustrated by court decisions across a variety of fact settings. For example, a construction company that had served as a subcontractor on a public works project sued the general contractor, sureties, and the government agency. The complaint had theories of action based on an accounting, breach of contract, and restitution.[128] The defend-

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[124]*See* FED. R. CIV. P. 8(a)(3) (allowing parties to plead in the alternative); FED. R. BANKR. P. 7008 (applying the same rule in bankruptcy).

[125]11 U.S.C. § 542(a).

[126]*See id.*

[127]*Id.* § 542(b).

[128]*See* Rotondo Weirich Enters. v. Sundt/Layton (*In re* Rotondo Weirich Enters.), 583 B.R. 860, 864 (Bankr. E.D. Pa. 2018).

ants moved to enforce the arbitration clauses in their agreements with the company. As it was a chapter 11 debtor, the company argued its recoveries were in the nature of a turnover action excepted from arbitration, although none had been formally pled as such. The court readily batted away the debtor's position, basing its decision in the language of the Bankruptcy Code:

> It is settled that a turnover action under 11 U.S.C. § 542 does not lie "to liquidate contract disputes or otherwise demand assets whose title is in dispute." Rather, turnover is a remedy "to obtain [possession of] what is acknowledged to be property of the bankruptcy estate."
>
> It is patently clear that the Debtor's claims in this case are disputed contract claims that are not encompassed by 11 U.S.C. § 542.[129]

Another court applied similar reasoning to a chapter 7 trustee's lawsuit to recover against a grain broker who had done prepetition business with the grain elevator debtor. The complaint alleged two counts each of breach of contract and unjust enrichment with an additional count repeating the allegations but seeking turnover under section 542 of the Bankruptcy Code.[130] The court characterized the turnover count as a mere "tent for the substantive claims" and ordered the matter to arbitration.[131] Section 542 allows a turnover for a "matured debt," which the court characterized as "pursuing property where the estate's right is undisputed, and the proceeding is about putting a number on that debt and getting the money."[132] The trustee's lawsuit was neither of those.

Yet a different court used the "true turnover" analysis suggested here to find a chapter 7 trustee's lawsuit was indeed a true turnover action. As such, it implicated the bankruptcy tribunal's exclusive control over estate property and was nonarbitrable. The debtor sought to recover on an invoice for prepetition services performed. The defendant did not dispute the required services and materials had been provided.[133] Consequently, the trustee sought turnover of the funds. Although unfortunately casting much of its decision

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[129]*Id.* at 872 (quoting Philadelphia Ent. & Dev. Partners v. Commonwealth of Pennsylvania (*In re* Philadelphia Ent. & Dev. Partners), 549 B.R. 103, 143 (Bankr. E.D. Pa. 2016) and Asousa P'ship v. Pinnacle Foods, Inc. (*In re* Asousa P'ship), 264 B.R. 376 (Bankr. E.D. Pa. 2001)).

[130]*See* Gavilon Grain, Inc. v. Rice (*In re* Gavilon Grain, Inc.), No. 2:17-cv-40-DPM, 2017 WL 3508721, at *1 (E.D. Ark. Aug. 16, 2017).

[131]*See id.* at *5.

[132]*See id.* at *4.

[133]*See* Goldsmith v. Marci Assocs., Inc. (*In re* E & G Waterworks, LLC), 571 B.R. 500 (Bankr. D. Mass. 2017)

around the core/noncore rhetoric of arbitrability,[134] the court found the trustee's suit to be a true turnover action. The debt was "matured" within the meaning of section 542(b) because it was presently payable and not subject to a contingency.[135]

Those still paying attention this far into a lengthy law review article may notice this discussion about turnover has elided one of the article's central principles, namely that an arbitration agreement only binds those who have signed it. The trustee, or even the debtor-in-possession acting in a fiduciary capacity, will not have signed the agreement. What then is the relevance of the "true" turnover action inquiry? The answer is that if a cause of action is not a "true" turnover action, then it will be a garden-variety lawsuit under nonbankruptcy law. Such nonbankruptcy lawsuits are discussed below with the conclusion that they are subject to arbitration, rendering the contractual capacity issue beside the point.[136] Before turning to true nonbankruptcy actions, some bankruptcy-specific procedures are yet to be discussed, including the claims allowance process to which the next section turns.

E. Claim Allowance

A common permutation of the arbitrability issue occurs upon an objection to a claim, and the creditor cites a pre-dispute arbitration clause in its contract with the debtor to move the dispute to an arbitrator. To start with the easiest case, the objecting party could be another creditor.[137] Obviously, the other creditor is not a party to the contract. On these facts, the FAA does not even apply. It requires the enforcement of agreements to arbitrate, but there is no such agreement with the objecting creditor. The debtor and one creditor cannot agree among themselves to deny a different creditor its day in court.

If the objection comes from the trustee, the analysis remains the same. The trustee is similarly not a party to the arbitration agreement. The trustee acts on behalf of the bankruptcy estate, representing the interests of all creditors. The creditor body and its representative are no more bound to an arbitration contract they did not sign than their individual constituents.[138]

There is an additional and even stronger reason to deny arbitrability. A claim objection again implicates the exclusive power of the bankruptcy tribunal over the bankruptcy estate. To use an old metaphor, the bankruptcy es-

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[134]*See supra* Part III.A (explaining the irrelevance of whether a decision is core or non-core to the arbitrability inquiry).

[135]*See In re E & G Waterworks*, 571 B.R. at 507.

[136]*See infra* Part IV.G.

[137]*See* 11 U.S.C. § 502(a) (a claim is allowed unless a party in interest objects).

[138]The inability of an arbitration agreement to bind a trustee who is not a party to the agreement is explored in more detail *infra* notes 166-70 and accompanying text.

tate is a pie, and the bankruptcy process is about dividing up the pie among creditors. Congress has given that authority to the bankruptcy tribunal. There is only one pie, and it can be divided up only once. There can be only one decision maker. If the court says it should be eight pieces or one piece should be bigger than the others, it is literally impossible to divide the pie in another way. The bankruptcy statute and FAA inherently conflict.

Claim objections by a debtor-in-possession use the same analysis. Unlike the trustee, there may be an agreement bearing the name of the party now in chapter 11. That party, however, now is debtor-in-possession and acts in a fiduciary capacity for the estate. The debtor-in-possession did not sign the arbitration agreement in its fiduciary capacity and is not bound by it when acting in that fiduciary capacity.[139] The result is no different.

Sometimes a claims objection might come from a debtor, not acting as debtor-in-possession in a chapter 11 case. The bankruptcy tribunal's exclusive jurisdiction over the estate still precludes arbitration based on a prebankruptcy, pre-dispute arbitration clause (and for reasons that further bolster the conclusion that a claim objection by a debtor-in-possession is nonarbitrable). All claim objections implicate the bankruptcy tribunal's power over the bankruptcy estate "res" and third-party rights in it. That includes the bankruptcy tribunal's power to determine the debtor's stake in that res, if any. Also, in the bankruptcy tribunal all other parties with an interest at stake would have the right to appear and be heard on the debtor's claim objection.[140] Depriving them of those rights by moving the resolution of the dispute to a private forum implicates due process concerns.

Claim objections come in different flavors. So far, the analysis has assumed an objection in the nature of a defense that completely or partially negates the claim, such as the debtor already paid or the goods were nonconforming. A claims objection might also come in the form of a counterclaim, such as a debt the creditor owes to the debtor or for damages caused to the debtor by the creditor's action. The distinction between a defense and a counterclaim is not always clear, but it does not matter. The entire claims allowance process is about dividing up the estate over which the bankruptcy tribunal has exclusive jurisdiction. Even if the claims objection raises a counterclaim as an offset to the claim, the matter is still not arbitrable.

The analysis falls out of Supreme Court case law, which has characterized claims allowance as follows:

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[139]*See infra* notes 171-74 and accompanying text (elaborating why a debtor-in-possession is not bound by contracts signed in its capacity as a prebankruptcy debtor).

[140]Standing to object to claims can be contested. Generally speaking, many courts require a party to have a pecuniary interest to have standing to object to a claim. Many chapter 7 debtors lack a pecuniary interest in how the estate is distributed. *See* 4 COLLIER ON BANKRUPTCY ¶ 5.02[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).

> The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash.[141]

Thus, when a state submitted its tax claim to the bankruptcy tribunal, it lost the power to adjudicate that claim and even its tax liens in another forum, including waiving its sovereign immunity as well.[142] The principal that claims allowance is an inherent part of the court's exclusive power over the bankruptcy estate is long-standing.[143] For example, in a case under the Bankruptcy Act of 1867 the Supreme Court was faced with a creditor's appeal from a court decision rejecting its claim. The Court held it had no jurisdiction because the proceeding to prove the creditor's claim was part of the bankruptcy case and not a separate suit.[144] Because the creditor had submitted a claim, the creditor subject itself to the "dominion of the court, and must abide the consequences."[145] Under the applicable appellate procedure of the time, one consequence was to lose the right to contest the claims allowance under other procedures.

The Supreme Court again affirmed these principles in the influential case of *Katchen v. Landy*.[146] An insider filed a claim, and the trustee responded by asserting preference liability.[147] Decided under the Bankruptcy Act of 1898, the question was whether the bankruptcy tribunal could hear the claims objection under its summary jurisdiction, or whether the trustee had to bring a plenary suit in a separate proceeding outside the bankruptcy.[148] If the creditor had not filed a claim, the trustee would have had to bring the separate lawsuit, but the Court held that by filing a claim, the creditor had converted its "legal claim into an equitable claim to a pro rata share of the res."[149] The

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[141]Gardner v. New Jersey, 329 U.S. 565, 574 (1947).

[142]*See id.* at 578 (holding "the reorganization court has jurisdiction over all of the property of the debtor" including property the state claimed was covered by a tax lien).

[143]*See id.* at 573 (describing the principle as "traditional bankruptcy law").

[144]*See* Wiswall v. Campbell, 93 U.S. 347, 349 (1876).

[145]*Id.* at 351.

[146]382 U.S. 323 (1966).

[147]*See id.* at 325. The trustee also sought recovery on an unpaid stock subscription, but the trustee did not contest the district court's denial of that recovery. *See id.* at 325, 332-33. The Supreme Court's decision was based solely on the preference claim.

[148]*See supra* note 125 and accompanying text (explaining the concepts of summary and plenary jurisdiction under the Bankruptcy Act of 1898).

[149]*See Katchen*, 382 U.S. at 336. In *Langenkamp v. Culp*, 498 U.S. 42 (1990), the Court relied on *Katchen* to rule that a creditor who had submitted a claim had no Seventh Amendment right to a jury trial. By submitting a claim, the creditor had subjected itself to the bankruptcy tribunal's equity jurisdiction. *See id.* at 44-45. Because jury trials were not traditionally held in equity, the common law versus equity distinction lies at the heart of *Langenkamp*. For arbitrability issues, the relevant issue is the bank-

bankruptcy tribunal had summary jurisdiction to resolve the issues because of its "actual or constructive possession" of the bankruptcy estate.[150]

Katchen's reasoning again illustrates that Congress has committed the claims allowance process exclusively to bankruptcy tribunals. It is also true that, through the FAA, Congress has instructed courts to enforce arbitration agreements. The two commands inherently conflict. Once Congress has committed the claims allowance process to one decisionmaker, it is logically impossible for another decisionmaker to issue rulings potentially inconsistent with that process. The "pie" cannot simultaneously be divided up in different ways.

Katchen suggests that even where the counterclaim to a claim objection seeks a positive monetary recovery beyond negation of the claim, it is still part of the court's exclusive jurisdiction over the bankruptcy res. That holding is in the context of a preference counterclaim and applies only to bankruptcy causes of actions such as preferences and fraudulent transfers. The same limitation applies to the arbitrability issue. *Katchen* relied on a provision of the Bankruptcy Act of 1898 that made claims allowance contingent on the surrender of any preference.[151] That provision is the forerunner of section 502(d) of the current Bankruptcy Code, which prohibits claims allowance unless the creditor has satisfied its liability under various avoidance provisions. As *Katchen* recognized and as recodified now in section 502(d), avoidance is part-and-parcel of the claims allowance process.

Consider, however, a trustee who seeks an affirmative recovery beyond the claim and based on a nonbankruptcy cause of action. Now, the claim objection itself remains nonarbitrable, but the nonbankruptcy matter is arbitrable. An example will make the point clearer. Suppose a creditor files a claim for $50,000 for services performed. The trustee believes the estate is entitled to $125,000 in damages from the creditor because of fraud, professional malpractice, or some other right derivative of the debtor. In the trustee's account of the facts, the creditor should have no claim to the bankruptcy estate and, putting aside questions of setoff, indeed should have to kick in at least an additional $75,000 to grow the estate. If the creditor cites an arbitration clause to force the dispute away from the bankruptcy tribunal, one should distinguish between the claim to the estate and the additional recovery. Only the former lies within the exclusive jurisdiction of the bankruptcy

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ruptcy tribunal's exclusive authority over the estate because it is that authority which creates an inherent conflict with the FAA. Still, *Langenkamp* is yet another in the long line of Supreme Court precedents that hold the claims allowance is an integral part of the bankruptcy process. *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (holding a creditor did have a jury trial right where the creditor had not filed a claim).

[150]*See id.*

[151]*See Katchen*, 382 U.S. at 330-31 (citing § 57(g) of the Bankruptcy Act of 1898).

tribunal and as such is nonarbitrable. Helpfully, an objection to a claim that contains a demand for relief must be brought as an adversary proceeding such that it should be not practically difficult to specify what goes to arbitration and what does not.[152]

Whether the creditor has a claim to the estate implicates the court's exclusive jurisdiction over the bankruptcy estate and thereby all the claimants to that res. Having an arbitrator decide the claim inherently conflicts with the bankruptcy tribunal's power to divide up that estate. It is logically impossible for the estate to be divided up in different ways, and because third parties have an interest in the estate, it is the bankruptcy tribunal that must have the exclusive power to bind them. These same third parties certainly have an interest in whether the estate grows because of a nonbankruptcy cause of action. The issue of nonbankruptcy actions is explored more fully below leading to the conclusion they are arbitrable.[153] For now, it is enough to observe that it should not matter to arbitrability whether procedurally the nonbankruptcy recovery is sought in conjunction with a claim objection.

This section has explored the primary question posed by the FAA. Does that statute require the bankruptcy tribunal to enforce a pre-dispute, prebankruptcy agreement arbitration, stripping the bankruptcy tribunal of the power to hear a claim objection it otherwise would have authority to hear? As demonstrated the answer is "no." A separate question remains. Are there times a bankruptcy tribunal can exercise its exclusive authority to permit a claim objection to be decided by an arbitrator? The answer to that question is "yes."

First, a bankruptcy tribunal could approve arbitration of a claim objection as part of a settlement. Other parties would have a chance to appear and be heard as part of the court's approval of the settlement.[154] The bankruptcy rules specifically provide for a settlement by arbitration "on stipulation of the parties."[155] The plan confirmation process might direct claims determination through an alternative dispute resolution procedure.[156] No one appears to

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[152]*See* FED. R. BANKR. P. 3007(c).

[153]*See infra* Part IV.G.

[154]*See* FED. R. BANKR. P. 9019(a) (requiring "notice and a hearing" of a settlement, with notice to all creditors, the U.S. Trustee, the debtor, indenture trustee and such other entities as the court may direct). The phrase "notice and a hearing" has a special meaning in bankruptcy cases. *See* 11 U.S.C. § 102(1) (specifying the phrase "means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances); *see also* FED. R. BANKR. P. 9001 (stating that the definitions and rules of construction in the Bankruptcy Code also apply to the Federal Rules of Bankruptcy Procedure).

[155]*See* FED. R. BANKR. P. 9019(c).

[156]Several provisions of the Bankruptcy Code provide authority. For example, a chapter 11 plan may contain any provision not "inconsistent with applicable provisions" of the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(6). Also, a bankruptcy tribunal has broad authority to estimate unliquidated or contingent claims. *See id.* § 502(c). There are many examples, especially in the mass-tort context. *See e.g.*, *In re* Boy

have contested the power of the court to determine how the claim is liquidated for purposes of collection from the bankruptcy estate. (The court's power to enjoin recoveries from nondebtor parties outside the bankruptcy process is another matter.) Such uses of arbitration are different than the usual posture of an FAA claim in a bankruptcy case. These are post-dispute agreements to arbitrate and could be used in any bankruptcy matter but are outside the scope of this article.

In a limited circumstance, a bankruptcy tribunal may cite a pre-dispute agreement as supporting arbitration of claim allowance. This limited circumstance is the bankruptcy tribunal's authority to abstain from certain matters "in the interest of justice."[157] To call this an "abstention" power is a bit of a misnomer as federal court abstention is generally a matter of respect for state procedures. In the context of arbitration, it is a limited abstention power albeit one defined by the vague concept of "the interest of justice."

To shape the contours of the concept, the appropriate place is the courts' development of the twelve so-called *Sonnax* factors to decide when to lift the automatic stay "for cause" to allow a party to proceed elsewhere.[158] Absten-

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Scouts of America & Delaware BSA, LLC, No. 20-10343 (LSS), 2022 WL 3030138, at *93 (Bankr. D. Del. July 29, 2022) (favorably describing claims settlement process by a trust using a matrix of determined harm to victims of sexual abuse); *In re* National Gypsum, 257 B.R. 184, 186-94 (Bankr. N.D. Tex. 2000) (describing resolution of claims by a settlement trust for asbestos claimants).

[157]*See* 28 U.S.C. § 1334(c)(1). The same section authorizes a bankruptcy tribunal to abstain "in the interest of comity with State courts or respect for State law." The former does not apply to an arbitration because an arbitrator is not a state court. The latter does not apply because an arbitrator has no particular interest in determining state law and is indeed not even required to render decisions based on law.

One commentator posited the entire conflict between the FAA and the Bankruptcy Code should be understood through references to abstention under section 1334. *See* Birney, *supra* note 32, at 668-76. The problem with this analysis is that the statute gives no guidance on when to abstain. Providing content to the rule ends up in a place very similar to where this article comes out. It is not clear what is gained by calling that analysis "abstention" as opposed to going directly to the "inherent conflict" inquiry directed by the Supreme Court. In any event, the "inherent conflict" inquiry is the one required by binding precedent, which is the point of departure for this article's analysis.

A different commentator argued that section 1334 is an express or implicit repeal of the FAA as it relates to bankruptcy law. *See* John R. Hardison, *Express Preclusion of the Federal Arbitration Act for All Bankruptcy-Related Matters*, 93 ST. JOHN'S L. REV. 627 (2019). At its base, section 1334 authorizes a forum other than the bankruptcy tribunal. The FAA requires another forum when an arbitration clause applies. It is difficult to understand how a law permissively authorizing another forum is an express repeal of a law requiring another forum. As to an implicit repeal, that would be a sweeping conclusion about the arbitrability of many proceedings that are only "related to" a bankruptcy case but over which a bankruptcy may exercise jurisdiction. *See* 28 U.S.C. § 1334(a)-(b).

[158]*See* Sonnax Indus., Inc. v. Tri Component Prods. Corp. (*In re* Sonnax Indus., Inc.), 907 F.2d 1280 (2d Cir. 1990). This article will refer to this list as the *Sonnax* factors consistent with what appears to be the conventional attribution. In fact, the *Sonnax* court was simply listing twelve factors from a bankruptcy court decision:

> These are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a

tion is a necessary, concomitant part of the decision to lift the stay. To say that a party can proceed is only half of the required action. It also is necessary to specify where the party can proceed, and abstention is the bankruptcy tribunal's direction to another forum, even if it is not always expressly so stated in the lift stay order. Although developed in the context of abstention to another court, the *Sonnax* factors can fill out what it means to abstain "in the interest of justice" to an arbitrator.[159] For example, a paradigm case would be a pending arbitration at the time of bankruptcy. In the "interests of judicial economy and the expeditious and economical resolution of litigation," a bankruptcy tribunal might allow a claim to be liquidated in the pending arbitration rather than starting anew in the bankruptcy tribunal.[160] Or, an arbitration agreement might contemplate "a specialized tribunal with the necessary expertise . . . to hear the cause of action."[161] Application of the *Sonnax* factors to allow an arbitration to proceed should be a possible but not a common scenario.

The abstention analysis laid out here is not required by the FAA and should not be analyzed using the "inherent conflict" framework dictated by *McMahon*.[162] As discussed above, that framework leads to the conclusion that an arbitrator's allowance of claims inherently conflicts with the bankruptcy tribunal's exclusive control over the estate.[163] It does not offend that exclusive control over the estate for the bankruptcy tribunal to decide the estate's best interest will be served by a more expeditious or economical de-

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> specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

See id. at 1286 (acknowledging *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984), as the progenitor of the twelve factors); *see also* Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990) (laying out a similar list of factors in a case roughly contemporaneous with *Sonnax*); 9 COLLIER ON BANKRUPTCY ¶ 5011.2[1] (Richard Levin & Henry J. Sommer eds., 16th ed.) (itemizing similar factors gleaned from various cases).

[159]Another commentator also suggested use of these factors but for determination of arbitrability across all bankruptcy disputes, not just claim allowance. *See* Birney *supra* note 32 at 673-76. The proposal here is to use the factors only in the decision whether to permit an arbitrator to fix a claim.

[160]*See Sonnax*, 907 F.2d at 1286.

[161]*See id.*

[162]*See supra* Part II.A (laying out the Supreme Court's FAA framework, including the seminal decision in *Shearson/Amer. Express v. McMahon*, 482 U.S. 220, 227 (1987)).

[163]*See supra* notes 138-51 and accompanying text (explaining how claims allowance inherently conflicts with arbitration).

termination somewhere else. That analysis is the one offered by *Sonnax*. The opportunity to appear and be heard on the motion to lift stay also protects third-party interests. Indeed, a valid objection might be that the debtor lacks the incentive to protect third-party rights in the arbitration perhaps because the outcome would not have a pecuniary effect on the debtor.[164]

A decision to abstain is generally understood to be within the court's discretion. Earlier, this article concluded the term "discretion" should be stricken from discussions about the arbitrability of a bankruptcy matter.[165] The arbitrability inquiry is whether a court has "discretion" to apply the congressional command in the FAA, to which the obvious answer is "no." The FAA command must be obeyed, but it inherently conflicts with the Bankruptcy Code, which is a competing congressional command. The task is picking one of those two conflicting commands. Supreme Court precedent, as well as fundamental principles of law, picks the Bankruptcy Code. The abstention inquiry is, after determining the Bankruptcy Code controls, is whether to abstain in favor of another tribunal. That inquiry relies on a multifactor test about whether lifting the stay is in the best interest of the estate. "Discretionary" is not an accurate description of the arbitrability inquiry, but it not wrong to call the abstention inquiry "discretionary."

F. Avoidance Actions

This part turns to avoidance actions such as a preference or fraudulent transfer recovery. Such actions are nonarbitrable because they are brought by persons who are not parties to an arbitration agreement. Even when the debtor-in-possession brings such an action, it is acting in its fiduciary capacity for the estate and is not bound by agreements it signed in other capacities.

The trustee represents the estate,[166] not the debtor. As the estate representative, the trustee acts on behalf of all creditors and all other stakeholders. The debtor can no more bind the trustee that it can any other party.

The Supreme Court's decision in *EEOC v. Waffle House, Inc.* provides an analogous example of these basic principles.[167] The EEOC filed an enforcement action under the American with Disabilities Act and requested relief

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[164]The seventh *Sonnax* factor is "whether litigation in the other forum would prejudice the interest of creditors." *Sonnax*, 907 F.2d at 1286. The case from which the 12 *Sonnax* factors sprang cited the example of a court denying to lift the stay to liquidate claims so as to "allow other creditors, the creditors committee and the property owners' creditors committee, and other interested parties to participate in any issue which may affect their interest." *See Curtis*, 40 B.R. at 800 (citing Rupp v. Cloud Nine Ltd. (*In re* Cloud Nine Ltd.), 3 B.R. 202, 204 (Bankr. D.N.M. 1980)).

[165]*See supra* Part III.C.

[166]*See* 11 U.S.C. § 323(a) ("The trustee in a case under this title is the representative of the estate."); *see also* Wiscovitch-Rentas v. Liberty Mut. Ins. Co., 415 F. Supp. 3d 272, 278 (D.P.R. 2019) (stating a trustee and a debtor are not mere alter egos of each other in the context of deciding a trustee was not bound by the debtor's arbitration agreement).

[167]534 U.S. 279 (2002).

that included employee-specific relief such as backpay, reinstatement, and damages.[168] The employee in question had signed an arbitration agreement with the employer, but this agreement did not bind the EEOC:

> "Arbitration under the [FAA] is a matter of consent, not coercion." Here there is no ambiguity. No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty. Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.[169]

The Court emphasized the issue was one to be resolved by the statutory text. It was not the judiciary's role to balance competing policies to second-guess the EEOC's judgment to pursue civil remedies.[170]

To be sure, a bankruptcy trustee is a private individual and not a government agency like the EEOC. Nonetheless, the principles are the same. The trustee is statutorily empowered to bring certain lawsuits. Agreements to which the trustee is not a party do not strip the trustee of the power to bring these suits, even if the trustee is advancing the interests of some parties who are so bound. These principles are foundational—they "go without saying" in the words of the Supreme Court. Their authority is illustrated by the *Waffle House* decision but also do not depend on that decision being a "four-square" precedent for bankruptcy.

The same outcome obtains if a debtor-in-possession has filed an avoidance action. A debtor-in-possession has the same rights, powers, function, and duties of a trustee.[171] The debtor-in-possession is the estate's fiduciary.[172] It is a fundamental principle of law that actions taken in one capacity do not bind a person when they act in another capacity.[173] Indeed, implicit in the power to assume or reject executory contracts is the recognition the estate and its

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[168]*See id.* at 283-84.

[169]*Id.* at 294 (quoting *Volt Info. Sci., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)).

[170]*See* 534 U.S. at 297.

[171]*See* 11 U.S.C. § 1107(a).

[172]For example, in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the Supreme Court noted that one of the consequences of filing chapter 11 is that a fiduciary is appointed. It then noted that the fiduciary was often the debtor's "existing management team." *See id.* at 978. The Court thus cleaved a distinction between the obligations of the pre- and postbankruptcy debtor. *See also* 372 U.S. 633, 649 (1963) ("But so long as the Debtor remains in possession, it is clear that the corporation bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession.").

[173]RESTATEMENT (THIRD) OF AGENCY § 6.01 (AM. L. INST. 2006) (a person signing in the capacity of an agent for a disclosed principal does not become a party to a contract); RESTATEMENT (SECOND) OF JUDGMENTS § 36 (AM. L. INST. 1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.")

representative are not bound by the debtor's prepetition contracts. Even if all these principles are somehow wrong and the debtor-in-possession is bound by the debtor's contract, the debtor-in-possession's inability to bring a claim could be "cause" for replacement of the debtor-in-possession with a trustee or examiner who could.[174]

The courts have generally denied arbitration of avoidance actions, albeit often not using the reasoning suggested in this article.[175] A contrary example illustrates how the judicial debris around bankruptcy arbitrability can lead courts astray. In *Matson v. Rescue Rangers*, a multicount complaint sought recovery from corporate insiders and corporate alter egos who had drained the debtor's cash.[176] One count sought recovery of professional fees paid to the insiders. The trustee alleged the insider had not performed the services and thus the cash payments were a constructively fraudulent transfer for less than reasonably equivalent value.[177] The court focused on the core/noncore distinction, finding the fraudulent transfer claim was only "statutorily core" such that the bankruptcy court could not enter a final judgment.[178] Apparently as a "lesser" core proceeding, the court believed it should send the matter to arbitration. Neither the court nor the parties noticed the trustee was not a party to the arbitration agreement. Left unexplained was how the trustee was bound by an agreement he had not signed. A better and far simpler analysis would have been that it "goes without saying" that a party who has not signed a contract is not bound by it.[179]

This subpart focuses on "avoidance actions" without (so far) carefully defining what the term means. Most obviously, it includes the remedies provided in subchapter III of chapter 5 of the Bankruptcy Code such as turnover, preference, fraudulent transfer, and lien avoidance. In an arbitrability analysis, some courts have looked to whether the cause of action is "conferred by" the Bankruptcy Code.[180] That formulation is too narrow to the extent it

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[174]*See* 11 U.S.C. § 1104(a)(2).

[175]*See, e.g.*, Wiscovitch-Rentas v. Liberty Mut. Ins. Co., 415 F. Supp. 3d 272, 278 (D.P.R. 2019) (holding trustee not obligated to arbitrate avoidance and equitable subordination claims); Larson v. Swift Rock Fin., Inc. (*In re* Craig), 545 B.R. 47 (D. Colo. 2015) (refusing to send fraudulent transfer claim to arbitration); *In re* EPD Inv. Co., No. CV 13-09023 SJO, 2014 WL 12601025 (E.D. Cal. 2014) (declining to order arbitration of subordination and fraudulent transfer claims based on both federal and state law); Kraken Inv. Ltd. V. Jacobs (*In re* Salander-O'Reilly Galleries, LLC), 475 B.R. 9 (S.D.N.Y. 2012) (finding trustee's exercise of the strong-arm lien avoidance powers of 11 U.S.C. § 544(a) are not subject to arbitration).

[176]Matson v. Rescue Rangers, LLC (*In re* Rescue Rangers, LLC), 582 B.R. 669, 674-76 (Bankr. E.D. Va. 2018).

[177]*See id.*

[178]*See id.* at 680-81.

[179]*See* EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002).

[180]*See, e.g.*, Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 495 (5th Cir. 2002) (asking whether the cause of action is "derived entirely from federal rights conferred by the Bankruptcy Code"). Ins. Co. of N.

implies the action needs to be expressly in the text of the Bankruptcy Code. By "avoidance action," this article means a cause of action the estate representative would have regardless of any debtor actions or contracts, or duties owed to the debtor. Thus, the term includes action such as equitable subordination or state fraudulent transfer claims.

In contrast to avoidance actions are rights the estate representative possesses that are derivative of the debtor. In *Rescue Rangers*, for example, the trustee also sought to recover damages for breach of fiduciary duty and legal malpractice.[181] These are rights that the trustee has inherited from the debtor. Courts often speak of them as being "derivative" of the debtor. When the trustee seeks a monetary recovery based on rights the trustee obtains through the debtor, granting a motion to enforce a pre-dispute arbitration agreement will be appropriate. The next part explains why.

G. Recovery of Nonbankruptcy Claims

When the trustee sues for breach of fiduciary duty, legal malpractice, breach of contract, or any other of a host of nonbankruptcy causes of action, there are dueling ways to see the lawsuit.[182] First, the cause of action and any recovery is property of the estate. Any resulting lawsuit implicates the exclusivity of the bankruptcy tribunal's jurisdiction over the bankruptcy estate as discussed through this article. As such, the matter belongs with the bankruptcy and not an arbitrator so as to protect third-party rights of persons who are not bound by the arbitration agreement.

On the other hand, it is a cardinal principle of bankruptcy law that the bankruptcy estate only takes what the debtor had.[183] If the debtor has a life

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Amer. v. NGC Settlement Trust & Asbestos Claim Mgmt. Corp. (*In re* National Gypsum Co.), 118 F.3d 1056, 1069 (5th Cir. 1997); Barkley v. Global Client Solutions, LLC (*In re* McCollum), 621 B.R. 655, 658 & n.10 (Bankr. N.D. Miss. 2020) (quoting and following the *National Gypsum* formulation); Kittay v. Landegger (*In re* Hagerstown Fiber Ltd. P'ship), 277 B.R. 181, 200 (Bankr. S.D.N.Y. 2002) (quoting and following the *National Gypsum* formulation).

[181]*See Rescue Rangers*, 582 B.R. at 671. In fairness to the court, it spoke of the trustee's fraudulent transfer claim as "in the nature of a fee dispute." *Id.* at 681. Thus, even if it was not the expressed reason for its holding, it could be that the court saw the action as a disguised contract claim rather than a fraudulent transfer action.

[182]For shorthand, this article refers to these action as "nonbankruptcy causes of action," recognizing that the dividing line can be fuzzy. For example, a cause of action for breach of a prebankruptcy contract falls clearly on the "nonbankruptcy" side of the line. The cause of action would exist without the bankruptcy filing and does not rest on any rights given by the Bankruptcy Code. An example closer to the line would be a cause of action for malpractice connected with advice to file bankruptcy. Such a cause of action rests in state tort law, but on the other hand, it is also connected with the bankruptcy tribunal's supervisory power over attorneys appearing before it, especially if the action is an individual case and draws upon the debtor protections from "debt relief agencies" in 11 U.S.C. §§ 526-528.

[183]*See In re* Sanders, 969 F.2d 591, 593 (7th Cir. 1992) (describing as a "basic tenet of bankruptcy law that a bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition."); Calvert v. Bongards Creameries (*In re* Schauer), 835 F.2d 1222, 1225 (8th Cir. 1987) ("[N]umerous courts have asserted the general principle that the trustee takes only those

estate in real property subject to a remainder interest, that is what the estate gets. The same principle would seem to apply to the debtor's interest in, for example, a breach of contract. If the debtor has a cause of action that must be arbitrated, that is what the estate gets. Using this reasoning, in debtor-derived causes of action, the estate must arbitrate.

Both characterizations are correct, such that it cannot be said either is incorrect. Both are just intellectual constructs that explain how certain results are consistent from case to case. Neither dominates the other as a "correct" answer in the sense that "four" dominates all other answers to the "sum of two plus two." Those observations solve nothing. The courts cannot leave it simply as "it's complicated." Judges must decide cases, and they must pick a resolution. In doing so, we should be clear-eyed about that resolution and not claim that only one choice is logical. They are both logical. Whether an arbitration clause binds the debtor in a debtor-derived action is thus an exercise in practical reasoning.

There are several reasons why the courts should find the estate takes such a cause of action subject to the arbitration clause. The first reason rests in the FAA itself and the Supreme Court cases interpreting it. The previous six sections of this article explain how the enforcement of a pre-dispute arbitration agreement inherently conflict with a bankruptcy case. For example, two different decision makers cannot both divide up the "pie" for claims allowance.[184] The Bankruptcy Code gives the court injunctive powers with the discharge and the automatic stay, and courts enforce their own orders—and so forth.[185] A stark, inherent conflict does not exist for a nonbankruptcy cause of action. As stated above, the FAA and the Bankruptcy Code are statutes of equal dignity. The Supreme Court directs that the court is to apply both statutes in the absence of "inherent conflict" and further directs not to find an "inherent conflict" lightly.

The second reason arbitration clauses should be recognized in debtor-derived disputes is to avoid forum-shopping problems that otherwise might arise. If a trustee or debtor-in-possession could use bankruptcy to avoid otherwise enforceable arbitration clauses in nonbankruptcy litigation, such a rule would create an incentive to file bankruptcy. Forum shopping is not a concern for the other matters discussed above because they are only available in bankruptcy.

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rights that the debtor had under state law."); 5 COLLIER ON BANKRUPTCY ¶ 541.03 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("To the extent an interest is limited in the hands of the debtor, it is equally limited as property of the estate . . . .").

[184]*See supra* notes 138-51 and accompanying text (explaining the inherent conflict between the court's claims allowance process and simultaneously allowing third-party decision making over that process).

[185]*See supra* Part III.B (explaining the court's exclusive authority over the discharge injunction); *supra* notes 115-21 and accompanying text (exploring the arbitrability of automatic stay issues).

The third reason to require arbitration of debtor-derived disputes is the ability of the bankruptcy tribunal to protect the bankruptcy estate's interests in those disputes and, concomitantly, third-party interests in the bankruptcy estate. To be sure, the analysis here sends the dispute to an arbitrator. The bankruptcy tribunal, however, has plenary authority over the estate representatives and can exercise that authority to ensure the estate's interests are being adequately represented. For example, one can imagine appointment of a trustee (or debtor-in-possession) or replacement of a trustee where evidence exists the trustee is not defending the estate's interests in an arbitration.[186] The same reasoning would even apply when a nonbankruptcy dispute is pending elsewhere because the parties can remove it to bankruptcy tribunal.[187]

Having concluded a bankruptcy tribunal may send a true debtor-derived action to arbitration pursuant to a binding arbitration clause, a further question arises. Many bankruptcy disputes are complex and will present both arbitrable and nonarbitrable issues. For example, a trustee might file a lawsuit with counts both for preference liability (nonarbitrable)[188] and for breach of contract (usually arbitrable).

Fortunately, the Supreme Court has given a clear answer in *Dean Witter Reynolds, Inc. v. Byrd*.[189] In that case, the Court rejected the "intertwining doctrine" that some lower courts had developed. Under that doctrine, where arbitrable and nonarbitrable claims were "sufficiently intertwined," the court had "discretion" to deny arbitration.[190] Above, the case was noted for its rejection of the idea that courts had "discretion" to ignore the statutory command of the FAA.[191] Here, we need it for its holding, namely that the arbitrable claims are sent to arbitration, and the nonarbitrable claims are not. There is no potential inconsistency in so doing. Consider again the simple example of a lawsuit with a preference count and a breach of contract count. There is nothing inconsistent in finding the elements of one are met but not the other as would be true across all possible legal theories where the elements are different.

Sending debtor-derived claims to arbitration is consistent with judicial practice. In the *Hays* case, the Third Circuit sent federal and state securities law cases to arbitration but not causes of action given to the trustee under

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[186]*See* 11 U.S.C. § 324(a) (allowing removal of a trustee for "cause"); *id.* § 1104(a)(2) (allowing appointment of a chapter 11 trustee when it is in "the interests of creditors, any equity security holders, and other interests of the estate.").

[187]*See* 28 U.S.C. § 1452 (providing for the removal of any suit over which the bankruptcy tribunal would have jurisdiction to the judicial district where the bankruptcy is pending).

[188]*See supra* Part IV.F (discussing the nonabritrability of preference actions).

[189]470 U.S. 213 (1985).

[190]*See id.* at 216-17 (describing the intertwining doctrine).

[191]*See supra* notes 67-68 and accompanying text.

section 544.[192] There are other similar examples.[193]

In the end, the "core versus noncore" distinction often ends up in the right place, but it is just coincidence. Most debtor-derived actions—breach of contract, breach of fiduciary duty, negligence, and so forth—are noncore. These actions do not present the stark, inherent conflict with arbitration that most every other aspect of a bankruptcy case does.

V. CONCLUDING THOUGHTS ABOUT THE "REAL WORLD"

This article aims to lay out a comprehensive framework to analyze arbitrability in the context of bankruptcy. With hundreds of thousands of bankruptcies filed each year that bring a multitude of fact settings, it is necessarily incomplete. Part IV goes through most every scenario a court might encounter, but almost certainly fact patterns will emerge that fall between the cracks. This article lays out a workable framework that a court could extend to these gap cases.

Arbitrability is a matter of statutory construction, reconciling the FAA and the Bankruptcy Code. We would have a clear answer if one statute expressly overruled the other, but such is not the case. As is often the case with statutory construction, background principles of law fill in the blanks. A bankruptcy tribunal has exclusive, in rem jurisdiction over the bankruptcy estate. A party cannot be bound by contracts it did not sign. A court has authority to police its own orders. A contract signed in one capacity does not bind a person in another capacity. Put another way, we should assume Congress expected these background principles would apply in enacting both statutes for it did not overrule them in either statute.

As a law review article, written by an ivory-housed academic nonetheless, the analysis put forth in these pages can escape the inconvenience of binding precedent. As an analysis of all case law, this article is bound by none of it. Judges and practitioners who find themselves persuaded are perhaps less fortunate. Stare decisis, however, is a weaker constraint than it might at first appear. Many of the cases reach the same result as suggested by this article even if the analysis is different. Part III of the article calls on courts to shed the core/noncore distinction, to stop weighing vague FAA and bankruptcy "policies," and to cease talking about judicial "discretion" to follow statutory commands. These judicial moves are rhetorical devices, not even necessary to

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[192]Hays v. Merrill Lynch, Pierce, Fenner & Smith, 885 F.2d 1149 (3d Cir. 1989).

[193]*See, e.g.*, Martin v. CitiFinancial, Inc. (*In re* Martin), 387 B.R. 307 (Bankr. S.D. Ga. 2007); (ordering arbitration of tort claims for defamation and infliction of emotional distress but not for bankruptcy challenges to lien validity); Cohen v. Ernst & Young, LLP (*In re* Friedman's Inc.), 372 B.R. 530 (Bankr. S.D. Ga. 2007) (sending contract, misrepresentation, fiduciary duty, and negligence claims to arbitration but not fraudulent conveyance or automatic stay claims).

the holdings of the cases. This rhetoric can be discarded while staying faithful to stare decisis principles.

At its center, this article rests on an optimistic premise. To call the case law about bankruptcy arbitrability a judicial gloss on two statutes is a disservice to shiny things. It is not a gloss but a thick haze. The current rhetoric threatens to turn both statutes into mere caricatures of their original purposes—"arbitration good, bankruptcy bad" or vice versa, depending on one's perspective. This article asks courts and lawyers to return to fundamental principles of law with the assumption that logic and reason best preserve the rule of law, that gives primacy to the legislative directives embodied in both the FAA and the Bankruptcy Code.