Nos. 22-2006, 22-2007 & 22-2008

In the United States Court of Appeals For the Third Circuit

IN RE: LTL MANAGEMENT, LLC

JAN DEBORAH MICHELSON-BOYLE, KATHERINE TOLLEFSON, EVAN PLOTKIN, AND GIOVANNI SOSA,
Petitioners-Appellants,

V.

LTL MANAGEMENT, INC.
Respondent-Appellee.

On Direct Appeal from the
United States Bankruptcy Court for the District of New Jersey

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BRIEF FOR APPELLANTS (AD HOC COMMITTEE OF MESOTHELIOMA CLAIMANTS)

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INTRODUCTION AND SUMMARY

The bankruptcy court granted a sweeping injunction prohibiting thousands of terminally ill plaintiffs from prosecuting their claims against Johnson & Johnson and hundreds of other companies in state and federal courts nationwide. The court justified its unprecedented injunction as necessary for the "successful reorganization" of LTL—a two-day-old shell company that J&J created, already insolvent, for the express purpose of absorbing tort liability and filing for Chapter 11 protection. The other appellants' briefs explain in depth why LTL's contrived financial distress is not a good-faith basis for invoking bankruptcy protections—a point we won't repeat.

But this case isn't really about LTL. The real reason for the bankruptcy—the "entire purpose of this case," LTL's counsel told the court—was to protect J&J *itself* from liability on claims that its talc-based baby powder causes cancer. JA4219. J&J sought to do so with an injunction that caps its liability by limiting future claims to a fund established in bankruptcy court. As LTL's counsel admitted: "We're not going to have a bankruptcy case of any sort if everybody can go sue J&J." JA1489.

That illegitimate end goal—limiting the liability of a highly solvent parent corporation—itself demonstrates LTL's lack of good faith. Bankruptcy courts are Article I tribunals with limited statutory powers that must "be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). The good-faith requirement enforces that limited authority by requiring Chapter 11 filings to

have a valid reorganizational purpose. J&J's desire to limit its exposure to state tort claims is a plainly invalid purpose under Chapter 11. J&J argued, and the bankruptcy court agreed, that an injunction was necessary to end a string of jury verdicts against it, which the company viewed as "unfair." JA418. But the Bankruptcy Code gives bankruptcy courts no authority to enjoin jury trials to aid disappointed litigants, much less to do so based on dissatisfaction with the system of civil justice that the Framers saw fit to guarantee in the Seventh Amendment.

Nearly a century ago, the Supreme Court rejected a scheme eerily similar to this one in *Shapiro v. Wilgus*, 287 U.S. 348 (1932)—the source of the good-faith doctrine. The debtor in *Shapiro* created a new corporation to take on his debts and, three days later, put that shell company into receivership and obtained an injunction against his creditors. *Id.* at 352-53. As Justice Cardozo explained, the debtor did not act in good faith because he designed the receivership to put his debt "in such a form and place that levies would be averted." *Id.* at 354. The same is true here. As in *Shapiro*, J&J created LTL not for a "normal business purpose," but "for the very purpose of being sued." *Id.* at 355. J&J's creation of an insolvent entity, LTL's Chapter 11 filing, and the injunction sought were "parts of a single scheme" to "hinder and delay creditors in their lawful suits." *Id.* at 353. Consequently, the entire bankruptcy is in bad faith.

By acceding to this scheme, the bankruptcy court exceeded its authority. Congress has put sharp limits, rooted in constitutional principles, on the power that

bankruptcy courts may exercise over Article III and state courts. The court here blew right past those limits, halting claims against hundreds of non-debtors—claims that even an Article III court couldn't unilaterally extinguish consistent with the Seventh Amendment and due process. Nothing authorizes the court's unprecedented action.

The Bankruptcy Code, in Section 105, authorizes bankruptcy courts to enter injunctions only in cases within the scope of their limited jurisdiction. State-law tort claims against non-debtors fall outside that jurisdiction because LTL has not shown that litigating those claims would have any real effect on its assets or the bankruptcy estate. And even if it could make that showing, this Court has rejected the extension of bankruptcy jurisdiction to third parties based on independent tort liability outside the bankruptcy. *See In re W.R. Grace & Co.*, 591 F.3d 164, 171-74 (3d Cir. 2009).

The bankruptcy court's sweeping injunction was also based on a fundamental legal misconception. The point of the injunction is to globally resolve cancer patients' cases against J&J by channeling them into a bankruptcy-claims process established under section 524(g) of the Code. But this Court has already held that bankruptcy courts lack authority under section 524(g) to resolve claims asserting the independent liability of non-debtors. *In re Combustion Eng'g*, 391 F.3d 190, 236-37 (3d Cir. 2004). And the Constitution would require nothing less. Because the bankruptcy court thus cannot resolve the enjoined claims, its injunction froze the cases of thousands of critically ill and dying plaintiffs for no reason at all. This Court should reverse.

STATEMENT OF THE CASE[1]

A. Factual background

As early as 1957, reports commissioned by J&J described asbestos in its talc—the main ingredient in its signature product, Johnson's Baby Powder. Girion, *J&J knew for decades that asbestos lurked in its Baby Powder*, Reuters, Dec. 14, 2018, https://perma.cc/48DC-9GK2. Talc that contains asbestos "is generally accepted as being able to cause cancer if it is inhaled." Am. Cancer Soc'y, *Talcum Powder & Cancer*, https://perma.cc/L6CT-JRUT. Unaware of the contamination, the appellants here used J&J's products for years before being diagnosed with mesothelioma—an aggressive, deadly cancer that is a hallmark of asbestos exposure. Nat'l Cancer Inst., *Asbestos Exposure & Cancer Risk,* https://perma.cc/YBX5-55SP.

Although it "knew of the asbestos danger" in its products, J&J worked for decades to conceal it from regulators and the public. *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 721 (Mo. Ct. App. 2020). By the mid-2010s, however, internal documents uncovered in litigation revealed "compelling evidence" of J&J's intentional wrongdoing, which began turning juries and courts against it. *Id.* at 718. In the two years before LTL's bankruptcy filing, all seven mesothelioma plaintiffs who proceeded to trial against J&J prevailed. JA4707. Some of these verdicts were against

[1] We adopt the statements of jurisdiction, issues, related cases, and standard of review in the Official Committee's brief. Fed. R. App. P. 28(i).

J&J Consumer Inc. (Old JJCI), the J&J subsidiary charged with the company's baby-powder business. *Id.* But the evidence showed that J&J "engaged in reprehensible conduct of its own" beginning "long before JJCI was spun off as a separate entity." *Ingham*, 608 S.W.3d at 723. Juries and courts typically found the companies jointly liable, assessing most of the damages against J&J. JA4707.

In response, J&J began looking for ways to get "out of courts." JA2980. "One scenario" it considered was "to capture the liability in one subsidiary" and "then basically bankrupt that subsidiary." JA1901. That way, it believed, it could "cap" its talc liability and "be done with it." JA7115. In October 2021, J&J carried out that plan, announcing that it would permanently free itself from talc litigation using a trick called the "Texas Two-Step." JA4-5, 9. In a "labyrinthine" process, J&J created or dissolved seven corporate entities over two days. *Id.* In the end, Old JJCI was dissolved and replaced with two new entities. *Id.* The first was a new incarnation of J&J Consumer Inc. ("New JJCI")—essentially identical to Old JJCI but without its talc liability. *See* JA450-52. The second was LTL, a shell that received all Old JJCI's talc liabilities but none of its assets. *Id.* With only token assets of its own, LTL was insolvent on creation. *Id.* And that was the point: Within 48 hours, it filed for bankruptcy under Chapter 11, leaving J&J, New JJCI, and other affiliates out of the process. JA4.

B. Procedural background

1. LTL's Chapter 11 filing didn't contend that J&J's solvency was threatened by talc liability. Nor could it: J&J is one of the world's most financially stable corporations, with a market capitalization of nearly half a trillion dollars and a credit rating better than the United States. JA1888. To be sure, the liability that J&J faced was substantial, as befits its "outrageous conduct" of intentionally marketing carcinogenic products for use on babies. *Ingham*, 608 S.W.3d at 715. But that liability didn't come close to threatening the liquidity of one of the world's richest companies. In the fall of 2021, Standard & Poor's estimated a "worst-case scenario" of of $7.5 billion for J&J's total talc liability—an amount S&P considered "barely material." JA3453. Even while J&J publicly bemoaned the jury verdicts against it, its revenue and stock price continued to rise, and it increased shareholder dividends to more than $1 billion per quarter. J&J, *Dividend History*, https://perma.cc/4TBY-YA9J.

2. The bankruptcy court denied motions by talc claimants to dismiss LTL's filing for lack of good faith. JA1-2. Although this inquiry turns on "whether the petition serves a valid bankruptcy purpose," the court saw as "far more significant" the policy question of "the merits of the competing judicial systems"—that is, the civil-justice system versus bankruptcy. JA12-13. The court expressed its "strong conviction that the bankruptcy court is the optimal venue." JA19.

That same day, the court granted LTL's request for an injunction against all pending and future talc litigation against J&J, JJCI, and about 670 other non-debtors—including hundreds of J&J affiliates, unaffiliated retailers, and insurance companies. JA3659-3712. LTL candidly admitted that this injunction was the bankruptcy's ultimate goal: "Without it, talc claimants" would "prosecute the exact same talc-related personal injury claims … against J&J" and its affiliates. JA7629. The injunction was thus "critical to the fundamental purpose of the case—to achieve an equitable, final, and full resolution" of J&J's talc liabilities. JA8088.

ARGUMENT

LTL filed its bankruptcy petition to obtain an injunction for, and to cap the tort liabilities of, a non-debtor: J&J. That is a bad-faith purpose that warrants dismissal. And the injunction that LTL sought and obtained from the bankruptcy court vastly exceeds that court's limited jurisdiction and statutory authority.[2]

I. J&J's desire to enjoin claims against non-debtors—and to use bankruptcy to cap their tort liabilities—is not a good-faith purpose.

A. J&J has made has "no effort to conceal" that it engineered LTL's creation and bankruptcy for one purpose: "to fully resolve talc-related claims" by enjoining all pending talc cases against itself and its affiliates, limiting claimants to an aggregate fund established in bankruptcy court. JA9-10. Without an injunction protecting J&J,

[2] Unless otherwise indicated, we hereby adopt all of the arguments made in the briefs of the Official Committee of Talc Claimants and Arnold & Iktin LLP.

LTL told the bankruptcy court, "the entire purpose of [this] case would be thwarted." JA3909.

That admitted purpose is "classic bad faith." *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 128 (3d Cir. 2004). Whether a bankruptcy petition is brought in good faith turns not on a debtor's "subjective intent," but on whether it serves a "valid reorganizational purpose." *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999). The test "protects the jurisdictional integrity" of bankruptcy courts by ensuring that petitioners "act within the scope of the bankruptcy laws." *Id.* at 161, 165. J&J's desire for an injunction "to protect itself against excessive demands made by plaintiffs" falls well outside that scope. *Id.* at 157. "Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade … liabilities." *Id.* at 165-66. Courts "universally demand more of Chapter 11 petitions than a naked desire to stay pending litigation." *Integrated Telecom*, 384 F.3d at 128.

The Supreme Court held as much in *Shapiro v. Wilgus*, 287 U.S. 348 (1932), the case that originated the "concept of 'good faith' in the context of bankruptcy." *In re Wiggles*, 7 B.R. 373, 375 (Bankr. N.D. Ga. 1980). There, a Pennsylvanian was "unable to pay his debts as they matured," but "believed that he would be able to pay them in full" if given more time. *Shapiro*, 287 U.S. at 352. Because Pennsylvania law didn't permit the appointment of a receiver, he formed a Delaware corporation and, on

the same day, conveyed all his property to the new company for a promise to pay his debts. *Id.* Three days later, a federal court put the company in receivership and enjoined claims by its creditors. *Id.* at 352-53.

The Supreme Court found the debtor's scheme plainly incompatible with equitable principles of good faith. *Id.* at 357. The "aim of this receivership," Justice Cardozo explained, was "not to administer the assets of a corporation legitimately conceived for a normal business purpose," but to put the debt "in such a form and place that levies would be averted"—"a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth." *Id.* at 354-55. It did not matter that the debtor intended only to delay creditors long enough to pay them in full, or that he "acted in the genuine belief" that the plan was "fair and lawful." *Id.* at 357. The receivership was "part and parcel of a scheme" in which the "judicial remedy was to supply a protective cover for a fraudulent design." *Id.* at 355. It thus lacked the "scrupulous good faith" that equity requires, and the creditors' claims could proceed notwithstanding the injunction. *Id.* at 357.

So too here. Like the debtor in *Shapiro*, J&J admits that enjoining creditors' claims is the bankruptcy's primary purpose. There is no dispute that J&J is "highly solvent and cash rich" and therefore could not have attained the injunction by filing its own petition. *Integrated Telecom*, 384 F.3d at 124. The scheme "did not gain validity" when J&J instead created LTL. *Shapiro*, 287 U.S. at 355. As in *Shapiro*, LTL's creation

and bankruptcy filing are "part and parcel of a scheme" of which "hindrance and delay of suitors" were "the very aim[s]." *Id.* at 355-56. To "make a firm that one controls insolvent" to "shield assets from judgment creditors" is "not a proper invocation of bankruptcy law." *In re S. Beach Sec., Inc.*, 606 F.3d 366, 377 (7th Cir. 2010).

B. The bankruptcy court held that establishment of a channeling injunction and trust under section 524(g) would serve J&J's valid bankruptcy purpose of "avail[ing] itself of chapter 11 tools" to achieve global resolution of talc claims. JA50. But section 524(g) is a *remedy* available only after a court has entered "an order confirming a plan of reorganization," not a permissible reason to file for reorganization in the first place. *Combustion Eng'g*, 391 F.3d at 234 n.46. The availability of the remedy "assume[s] the existence of a valid bankruptcy, which, in turn, assumes a debtor in financial distress." *Integrated Telecom*, 384 F.3d at 128. Without sufficient financial distress, a debtor's "desire to take advantage of the protections of the Code cannot establish good faith." *In re 15375 Mem'l v. Bepco*, 589 F.3d 605, 622 (3d Cir. 2009). Otherwise, anyone who wanted to discharge a debt would have a valid reason to file. That would "eviscerate any limitation that the good faith requirement places on Chapter 11 filings." *Integrated Telecom*, 384 F.3d at 128.

The court also found the bankruptcy justified based on J&J's "reservations regarding redress through the tort system," which J&J saw as "creating inefficiencies, inequities, and delay." JA10. "The tort system," the court wrote, "has struggled to

meet the needs of present claimants in a timely and fair manner," and talc claimants—despite their uniform opposition—would benefit from a channeling injunction moving their claims into the bankruptcy process. JA24. But even assuming that a bankruptcy process would be "the most efficient way to resolve" talc claims, that isn't "enough to satisfy the good faith inquiry"—particularly where, as here, "the same adjudication could have occurred, and in fact, is currently occurring," elsewhere. *15375 Memorial*, 589 F.3d at 622. Chapter 11 is "not intended to be used as a mechanism to orchestrate pending litigation." *SGL*, 200 F.3d at 165.

As this Court has recognized, companies facing "massive potential liability and litigation costs" often "seek ways to rapidly conclude litigation." *Id.* at 169. But while "the Bankruptcy Code presents an inviting safe harbor for such companies," its "lure creates the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system and the rights of all involved." *Id.* A debtor's "sincere[] belie[f]" that " creditors would be better off" in bankruptcy does not permit a court to "deviate from the procedures specified by the Code." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017). Even if "well founded," such a belief "does not clothe [the debtor] with a privilege to build up obstructions that will hold his creditors at bay." *Shapiro*, 287 U.S. at 354. If there is to be "innovation in the management of mass tort litigation," that "reform must come from the policy-makers, not the courts." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996).

To enjoin thousands of pending claims based on J&J's view that it has been "failed by courts" and treated "unfairly" by juries not only lacks a statutory basis, but offends the constitutional values on which our nation's tort system is based. JA2439. The talc claimants are pursuing common-law claims for damages purely "legal in nature." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 55 (1989). Absent their consent, our Constitution demands that those claims "be adjudicated by an Article III court" in accordance with "the Seventh Amendment's guarantee of a jury trial," or in state court. *Id.* The fact that the civil-justice system may "increase the expense" or "impede swift resolution of bankruptcy proceedings" is "insufficient to overcome" the Constitution's "clear command." *Id.* at 63-64.

LTL's attack on the "abuses that occur in the state court tort system" is equally illegitimate. JA316. "Our system of cooperative judicial federalism presumes federal and state courts alike are competent to apply federal and state law." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020). An Article I court's unilateral decision to move cases from state to federal court based on a debtor's view that the state-court system is too slow or unfair is an extraordinary violation of the respect to which "reasonable state procedural rules are entitled" in "the federal courts." *United States ex Rel. Caruso v. Zelinsky*, 689 F.2d 435, 441 (3d Cir. 1982). That, too, cannot serve as a valid basis for LTL's petition or requested injunction.

II. The bankruptcy court's injunction—halting talc claims against hundreds of non-debtors—vastly exceeds its authority.

Even if this were a good-faith bankruptcy, the court's extraordinary injunction could not stand. The injunction sweeps far beyond talc claims against LTL, covering claims against hundreds of non-debtors for their own liability. No statute authorizes that expansive exercise of power, and this Court's precedents flatly forbid it.

A. Section 362(a)'s automatic stay does not cover claims against non-debtors.

The bankruptcy court first grounded its injunction in section 362's automatic stay. JA149. The statute's text forecloses this interpretation.

1. Section 362(a)(1) provides that the filing of a bankruptcy petition "operates as a stay" of any accrued action "against the debtor" or "to recover a claim against the debtor." 11 U.S.C. § 362(a)(1). The automatic stay also covers "any act to obtain possession of," or "exercise control over," "property of the estate." *Id.* § 362(a)(3).

By their terms, these provisions do not apply here. "[T]he clear language of section 362(a) stays actions only against a 'debtor.'" *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 509 (3d. Cir. 1997). It is thus "universally acknowledged" that the stay does not include claims against non-debtors for their own liability, like those enjoined here. *Id.* The only time this Court has interpreted the statute to reach a claim against a non-debtor is when prosecuting the claim would have required, by operation of

state law, the debtor's "necessary participation" as a defendant. *Id.* at 511. Because that isn't the case here, section 362(a)(1) does not apply.

Nor does section 362(a)(3). The only "property of the estate" even arguably implicated by third-party litigation are insurance policies shared by LTL and some non-debtors. The existence of these policies, however, does not trigger the automatic stay even for claims against those non-debtors. The bankruptcy court acknowledged that "a court must make adequate factual findings before staying proceedings against nondebtor co-insureds on the theory that asbestos-related personal injury claims against the nondebtors will automatically deplete the insurance proceeds available to the debtor and, thus, reduce the assets available to the bankruptcy estate." JA183 (citing *Combustion Eng'g*, 391 F.3d at 233). Yet the court made no such findings. *Id.* Far from concluding that insurance proceeds would be "automatically" depleted, the court "[a]dmitted[]" that "coverage is disputed" and did not deny that the liabilities had already exceeded any such coverage. JA182-83. It stated only that "no definitive determination has been made as to exhaustion," JA182, and there's a "chance" that LTL "could later prevail with respect to its insurance coverage demands," JA184. That is not enough to bring those claims within section 362(a)(3)'s automatic stay.

2. Acknowledging as much, the bankruptcy court treated the question before it as "whether to extend the stay" *beyond* what section 362(a) provides. JA159. But the statute's text answers this question too. Section 362(a) grants "no authority" to

bankruptcy judges. *In re Canter*, 299 F.3d 1150, 1155 n.1 (9th Cir. 2002). Instead, it describes the *effect* of filing a petition: it "operates as a stay." 11 U.S.C. § 362(a). The stay is an "automatic consequence of the filing of a bankruptcy petition," imposed directly by section 362. *Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). Because it is "automatic" and "self-executing," *Gruntz v. Cnty. of Los Angeles*, 202 F.3d 1074, 1081 (9th Cir. 2000) (en banc), it "differ[s] from a bankruptcy court-ordered injunction, which issues under 11 U.S.C. § 105," *Canter*, 299 F.3d at 1155 n.1.

Contrary to the bankruptcy court's reasoning, section 362(a) contains no exception for "unusual circumstances" that would empower bankruptcy courts to expand its scope. JA155. Instead, as the Eighth Circuit has explained, "where an 'unusual-circumstances' 'exception' would be needed to justify extension of the automatic stay, § 105 is the more appropriate source of authority for assessing the propriety of a stay," and "a stay issued pursuant to that section should be treated as an injunction." *In re Panther Mountain Land Dev., LLC*, 686 F.3d 916, 926-27 (8th Cir. 2012). "It is difficult to see" how "the automatic application of a § 362 stay in a suit against a non-debtor"—rather than the "usual standards, procedures, and burdens of proof for injunctive relief" under section 105—would "further[] the legislative goals." *Id.* at 927. The "use of § 105 rather than a tortured expansion of the automatic stay" also "avoids problematic notice issues." *Id.* Accordingly, it is section 105—not

section 362—that grants bankruptcy courts their own authority to issue injunctive relief.[3]

B. The bankruptcy court lacked jurisdiction to enjoin talc claims against non-debtors under section 105.

Section 105 authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). But it "does not provide an independent source of federal subject matter jurisdiction." *Combustion Eng'g*, 391 F.3d at 224-25. The first question, then, is whether the court had jurisdiction to enjoin claims against non-debtors.

Under this Court's precedents, it did not. Congress has granted bankruptcy courts jurisdiction over only two kinds of proceedings: (1) core proceedings and (2) proceedings "related to" core proceedings. 28 U.S.C. § 1334(b); *id.* § 157(a). The enjoined claims against non-debtors are neither.

1. LTL has not established core jurisdiction.

The bankruptcy court held that it had jurisdiction over talc claims against non-debtors because LTL "invokes a substantive right under the Bankruptcy Code" and LTL's adversary proceeding, "by its nature, could arise only in the context of a

[3] The bankruptcy court relied on *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), but it is not to the contrary. *Panther Mountain Land*, 686 F.3d at 927. The court also suggested that section 362(a) covers a third-party action if it is "essentially a suit against the Debtor." JA155. But, as a formal matter, a claim against a non-debtor for its own liability is not a claim "against the debtor." 11 U.S.C. § 362(a). And as a functional matter, J&J would ultimately fund any judgment against it regardless.

bankruptcy case," making it a core proceeding. JA153. In other words, the court reasoned that "jurisdiction over the adversary proceeding in [a] Chapter 11 case is sufficient to provide it with a basis for expanding the § 105(a) injunction." *W.R. Grace*, 591 F.3d at 174.

This Court rejected that argument in *W.R. Grace*. The question isn't whether the *adversary proceeding* is a core proceeding, but whether the claims sought to be enjoined are core proceedings. *Id*. Otherwise, "a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *Id.* "The existence of a bankruptcy proceeding itself," however, is not "an all-purpose grant of jurisdiction." *Id.*; *see Stoe v. Flaherty*, 436 F.3d 209, 217 (3d Cir. 2006).

By asking the wrong question, the bankruptcy court got the wrong answer. Talc claims against non-debtors are not "core" proceedings. Hence, there is no basis for exercising core jurisdiction over them.

2. LTL has not established related-to jurisdiction.

That leaves related-to jurisdiction, which encompasses "suits between third parties" only if they "have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). Simply put: "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at 308 n.6.

a. Talc claims against non-debtors for their own liability do not affect the estate. Although LTL points to J&J's agreement to indemnify a previous subsidiary, the agreement covers only liabilities "on the books or records of Johnson & Johnson" in 1979—not future liabilities. JA163. That is the only interpretation that gives this language meaning. *See Wash. Constr. Co. v. Spinella*, 8 N.J. 212, 217-18 (1951). And even if it were ambiguous, as the bankruptcy court believed, ambiguity is construed against indemnification. JA167. Thus, LTL has no legal obligation to indemnify J&J. Its attempt to concede an obligation it does not have is further evidence of bad faith.

As for the hundreds of other non-debtors, LTL didn't even try to show that an agreement exists as to each of them. So it has not overcome the "presum[ption] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

b. Even if it were plausible that LTL might have indemnity obligations to non-debtors, jurisdiction would still be lacking. This Court has "rejected 'related to' jurisdiction over third-party claims involving asbestos or asbestos-containing products supplied by the debtor when the third-party claim did not directly result in liability for the debtor." *Combustion Eng'g*, 391 F.3d at 231; *see W.R. Grace*, 591 F.3d at 171-73. It has done so even when non-debtors might later have indemnity claims against the debtor. *Id.* Whenever hypothetical "indemnification claims against" the debtor "would require the intervention of another lawsuit to affect the bankruptcy

estate," the claims "cannot provide a basis for 'related to' jurisdiction" because their resolution, by itself, does not affect the estate. *Combustion Eng'g*, 391 F.3d at 232. As a result, this Court's "precedent dictates that a bankruptcy court lacks subject matter jurisdiction over a third-party action if the only way in which that third-party action could have an impact on the debtor's estate is through the intervention of yet another lawsuit." *W.R. Grace*, 591 F.3d at 173.[4]

This precedent controls here. The enjoined actions seek to hold non-debtors liable as joint tortfeasors, so any judgment wouldn't bind LTL. Those actions might later give rise to an indemnification claim asserted against LTL by the non-debtor for any judgment it paid, but that possibility isn't enough under this Court's cases.[5]

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[4] The bankruptcy court believed that it could disregard this rule. JA154. But it is the law. *See W.R. Grace*, 591 F.3d at 173; *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 294 (3d Cir. 2012).

[5] This Court has indicated that a "clear contractual right" to indemnity could confer jurisdiction if liability were "automatic." *W.R. Grace*, 591 F.3d at 173; *see Combustion Eng'g*, 391 F.3d at 226. But it hasn't explained why. Even so, the bankruptcy court recognized that no "clear" right exists here. It analyzed just one indemnity clause (the 1979 J&J agreement) and found it "to be ambiguous" about "future liability." JA167. The court then noted that "any ambiguity" is "construed in favor of … the indemnitor"—that is, *against* indemnification. JA167. Although the court tried to overcome this textual barrier by relying on *Bouton v. Litton Indus., Inc.*, 423 F.2d 643 (3d Cir. 1970), and the parties' course of dealing, the contract in *Bouton* involved a far broader transfer of liability, *id.* at 648, while internal allocations are "accounting decision[s]" for "administrative convenience" that do not prove *legal liability* to talc claimants. JA1031-32; JA3963. At the very least, LTL has a legitimate argument against indemnification. As debtor in possession and fiduciary of the estate, it cannot unilaterally forfeit that potential argument in yet another act of bad faith. The court analyzed no other "record evidence of an indemnity obligation" beyond the 1979 agreement. *Combustion Eng'g*, 391 F.3d at 224 n.35.

Moreover, contingent indemnification claims are disallowed in bankruptcy, so they cannot affect the estate. 11 U.S.C. § 502(e)(1)(B). And even if a non-debtor were eventually to pay a judgment, it would still have no effect on the estate. In that scenario, the non-debtor would have a right to take over the plaintiff's separate claim against LTL via subrogation. *Id.* ¶ § 509(a). But swapping one claimant for another has no effect on the estate, much less a "direct and substantial adverse effect." *Celotex*, 514 U.S. at 310; *see* Levitin, *Bankruptcy Markets: Making Sense of Bankruptcy Claims Trading*, 4 Brook. J. Corp. Fin. & Com. L. 64, 74 (2010) (discussing market for claims trading).[6]

C. The bankruptcy court's application of section 105 is premised on a clear legal error—that claims against non-debtors will be resolved in the bankruptcy.

Jurisdiction aside, the injunction must be vacated. Before a court may grant a preliminary injunction under section 105, it must assure itself that the debtor has established, "by a clear showing," *Holland v. Rosen*, 895 F.3d 272, 285 (3d Cir. 2018), a right to this "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The bankruptcy court failed to do that here, and its application of the preliminary-injunction factors rests on a fundamental legal error.

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[6] In lieu of subrogation, the non-debtor could instead pursue a non-contingent indemnification claim in bankruptcy, but the difference between a subrogation claim and an indemnification claim "is relevant only to secured claims." 4 Collier on Bankruptcy ¶ 502.06[2][e] (16th ed. 2022); *see also* 11 U.S.C. § 502(e)(2) (disallowing indemnification claims to the extent that the plaintiff's "claim against the estate is disallowed"); *In re Regal Cinemas, Inc.*, 393 F.3d 647, 650 (6th Cir. 2004). So either way, the estate's liability would be the same.

The court recognized that litigation delays cause real harm to talc claimants—particularly those, like mesothelioma claimants, "whose time is valuable and may be limited due to their illnesses." JA189. Yet it reasoned that this supported *further* delaying their litigation because, in its view, an injunction "ensures that all claims are reconciled through a bankruptcy trust" under section 524(g), rather than in litigation. JA3707. The court believed that such "global" "claim resolution through the bankruptcy process is in the public interest," JA3708, and that there would be no hope for a "successful reorganization" "if everybody can go sue J&J and assert the same claims," JA3675.

The key premise of this reasoning is that claims against non-debtors are likely to be resolved in the bankruptcy. Indeed, LTL itself acknowledged as much in its preliminary-injunction motion. JA3913. But this Court has already rejected that premise. It has held that section 524(g) "provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor," and "the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)." *Combustion Eng'g*, 391 F.3d at 236-37. Interpreting the Bankruptcy Code to allow for such an injunction would also give rise to serious constitutional concerns. *See, e.g.*, Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 Fordham L. Rev. (forthcoming 2022). So even if "some asbestos claimants here may benefit

from an augmented fund, equity does not permit non-debtor affiliated entities to secure the benefits of Chapter 11 in contravention of the plain language of § 524(g)." *Combustion Eng'g*, 391 F.3d at 237.

This means that, regardless of what happens with this bankruptcy, non-debtor liability will remain. *See* 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). "Neither the confirmation of a plan nor the creditor's recovery (of partial satisfaction) thereunder bars litigation against third parties for the remainder of the discharged debt." *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600-01 (10th Cir. 1990) (noting "case after case permitting creditors whose claims have been discharged vis-a-vis the bankrupt to recover on the same claims from third parties"). Because the injunction is premised on the opposite, it must be vacated.[7]

D. Under the preliminary-injunction factors, LTL has not shown an entitlement to enjoin third-party litigation.

Section 105 empowers bankruptcy courts to issue orders where "necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code." *In re Jamo*, 283 F.3d 392, 403 (1st Cir. 2002). The power asserted here is especially sweeping. The Anti-Injunction Act requires clear congressional authorization before a federal court may enjoin state-court proceedings, 22 U.S.C. § 2283, and there is reason to

[7] As explained in the TCC's brief and incorporated here, another fundamental error pervades the opinion: It repeatedly flips the burden from LTL to the creditors.

doubt that section 105 authorizes bankruptcy judges to enjoin *any* courts. At a minimum, these principles require that LTL make a particularly strong showing that the injunction is "necessary." 11 U.S.C. § 105(a); *see* JA192 (acknowledging that "the potential for abuse demands stronger scrutiny"). "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Smith v. Bayer Corp.*, 564 U.S. 299, 306 (2011).[8]

LTL came nowhere close to making the required showing. It did not establish any of the traditional equitable factors—let alone all of them, as this Court requires. *See Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014).

The onus was on LTL to show a likelihood of success on the merits, which in this context means a successful reorganization. But if anything, LTL did the opposite: It conceded that the success of the bankruptcy hinges on a global resolution that is impermissible under this Court's cases and is incompatible with basic constitutional principles.

[8] The Supreme Court has never held that section 105 authorizes bankruptcy judges to enjoin other courts. Bankruptcy judges lacked that authority even under the pre-1984 scheme invalidated in *Northern Pipeline*, which also contained section 105. "Given that *Northern Pipeline* required a contraction in the authority of bankruptcy judges, and given that the 1984 amendments regarding the powers of the bankruptcy courts were passed to comply with *Northern Pipeline*," it is implausible that section 105 allows bankruptcy "judges to enjoin proceedings in other courts, thus significantly expanding the[ir] powers." *Celotex*, 514 U.S. at 328 (Stevens, J., dissenting).

Nor did LTL show that the balance of equities supports an injunction. Holland, 895 F.3d at 285. Many talc claimants, and especially mesothelioma claimants, have little time left to live. Freezing their claims against non-debtors will undeniably cause them irreparable harm and likely strip them of their constitutional rights to jury trials and due process.

On the other side of the ledger, LTL has not even articulated how the talc litigation against non-debtors for their own independent liability would be likely to cause irreparable harm to the estate. The bankruptcy court reasoned that "the talc claims have an undeniable impact on Debtor's estate" because of LTL's indemnity agreements and insurance coverage. JA3679-80. But the court's analysis on those points is wrong for the reasons already discussed. Further, whereas the court thought that "the mere possibility of indemnification obligations warrants extension of the automatic stay," JA3690, this Court has held that such "mere possibility" is not enough even to confer jurisdiction over such claims, *W.R. Grace*, 591 F.3d at 171-75.[9]

The bankruptcy court also speculated that "continued litigation against the Protected Parties would divert funds and resources toward defense costs and potentially disrupt the flow of funds and resources to Debtor's trust pursuant to the funding agreement." JA3680. This speculation is unfounded. J&J is jointly and

[9] In contrast, the debtor's indemnification obligations were "undisputed" in *A.H. Robins*, on which the bankruptcy court relied. 788 F.2d at 1008.

severally liable under the funding agreement. JA450, 454. LTL did not even argue that J&J would be unable to cover its obligations without a stay, and J&J itself has made clear that it will be able to. LTL has not shown that this highly conjectural concern is sufficiently likely to constitute irreparable harm.

Finally, the court believed that the injunction would benefit the public, while downplaying concerns about "open[ing] the floodgates" by emphasizing the "unique facts of this case." JA192. But there is nothing about J&J's strategy that cannot be replicated by other deep-pocketed tortfeasors. And "[o]nce the floodgates are opened," "debtors . . . can be expected to make every case that 'rare case.'" *Czyzewski*, 137 S. Ct. at 986. This Court should not let that happen.

CONCLUSION

The bankruptcy court's orders should be reversed in their entirety.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 6,375 words and therefore complies with the June 21, 2022 order of a motions panel of this Court, which restricted the Petitioner-Appellants—alone among the parties to these consolidated proceedings—to a brief containing no more than 6,500 words. *But see* Fed. R. App. P. 32(a)(7)(B)(i) (allowing 13,000 words for the principal briefs of separately represented parties). This brief further complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

June 30, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

June 30, 2022

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