No. 26-

IN THE

Supreme Court of the United States

OFFICIAL COMMITTEE OF TALC CLAIMANTS,

Petitioner,

v.

WHITTAKER, CLARK & DANIELS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION APPENDIX

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APPENDIX
TABLE OF CONTENTS

Page

APPENDIX
TABLE OF CONTENTS

Page

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 24-2210 & 24-2211

In re: WHITTAKER CLARK & DANIELS, INC,

Debtor

PETER PROTOPAPAS,

Appellant in No. 24-2210

OFFICIAL COMMITTEE OF TALC CLAIMANTS

Appellant in No. 24-2211

On Appeal from the United States District Court for
the District of New Jersey
(D.C. Nos. 3:23-cv-04151; 3:23-cv-04156)
District Judge: Honorable Zahid N. Quraishi

No. 25-1044

In re: WHITTAKER CLARK & DANIELS, INC,

Debtor

WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (f/k/a Brenntag Specialties, Inc., and as Mineral and Pigment Solutions, Inc.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000

Official Committee of Talc Claimants,

Appellant

On Appeal from the United States Bankruptcy Court for the District of New Jersey
(Bankr. Ct. Adv. Pro. No. 23-01245)
Bankruptcy Judge: Honorable Michael B. Kaplan

Argued on April 1, 2025

Before: KRAUSE, MATEY, and AMBRO, *Circuit Judges*

(Opinion filed: April 27, 2026)

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OPINION OF THE COURT

AMBRO, *Circuit Judge*

Plagued by tort claims related to their historical production, storage, and distribution of asbestos-laden talc, Whittaker, Clark & Daniels, Inc. ("Whittaker") and three of its affiliates—Brilliant National Services, Inc. ("Brilliant"), L.A. Terminals, Inc. ("L.A. Terminals"), and Soco West, Inc. ("Soco," and jointly and severally with Whittaker, Brilliant, and L.A. Terminals, the "Debtors")—filed for bankruptcy in 2023. However, as is often the case in mass-tort bankruptcies, their proceedings were contested from the start.

On appeal, Appellants—the receiver appointed for Whittaker by a South Carolina Court (the "South Carolina Receiver" or "Receiver") and the Official Committee of Talc Claimants (the "Committee")—contest whether we should be here at all because, in their view, Whittaker's Chapter 11 petition was improperly filed. If the Debtors rightly entered bankruptcy, the Committee further contends certain successor liability claims that have been or could be asserted against a third-party purchaser belong exclusively to its constituent talc creditors.[1] We conclude that Whittaker properly filed for bankruptcy, and the successor liability claims the talc creditors seek to assert against the purchaser are property of the Debtors' bankruptcy estates. Accordingly, we affirm.

I. BACKGROUND

A. The Debtors' Corporate History.

The Debtors were in the business of processing, manufacturing, storing, and distributing various industrial chemicals and minerals, including asbestos-laden talc. Over time, however, their talc products prompted a tsunami of personal injury claims by consumers who developed, among other things, mesothelioma—a form of cancer affecting the protective lining of the lungs. To make matters worse, federal, state, and private parties brought environmental claims alleging the Debtors produced and handled hazardous materials that contaminated property in at least fourteen separate states.

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[1] Throughout the discussion that follows, we refer to the Committee's constituents as talc plaintiffs, talc creditors, and tort creditors interchangeably.

In the face of those liabilities, the Debtors took action. First, L.A. Terminals, which operated a chemical storage and distribution facility at the Los Angeles Harbor, ceased operations in 1994 and began to resolve its liabilities through ordinary-course claims management. Then, in 2004, Whit-taker, Brilliant, and Soco sold substantially all of their operating assets to certain subsidiaries of Brenntag North America through a series of corporate transactions too tortured to recount in full (collectively, the "2004 Transactions").

Whittaker, Brilliant, and Soco collectively received approximately $200 million in cash consideration in exchange for their operating assets. However, in an effort to limit their exposure, Brenntag North America and its affiliates (collectively, "Brenntag") expressly contracted to exclude all pre-sale asbestos and environmental liabilities from the scope of the 2004 Transactions. For their part, Whittaker, Brilliant, and Soco took on the obligation to indemnify Brenntag for any liabilities it accrued from asbestos and environmental tort claims. Thus, in the aftermath of the 2004 Transactions, the Debtors continued to exist as shell companies holding limited assets to satisfy their pending and future tort claims.

Over the next few years, National Indemnity Company, a subsidiary of Berkshire Hathaway Inc., acquired Brilliant and L.A. Terminals. It thereby acquired both Whittaker and Soco indirectly, as subsidiaries of Brilliant. In the process, however, National Indemnity assigned its acquisition rights to another Berkshire affiliate, Ringwalt & Liesche Co., which remains the ultimate parent of the Debtors. And, through a chain of indemnity agreements and obligations, National Indemnity currently backstops certain asbestos-related successor liability claims against Brenntag.

B. Proceedings in South Carolina.

In advance of their bankruptcy cases, the Debtors were engulfed in litigation. Roughly 2,700 plaintiffs had asserted claims alleging asbestos-related injuries as a result of the Debtors' talc products. Plaintiff Sarah Plant brought one such claim against Whittaker in the South Carolina Court of Common Pleas after she was diagnosed with mesothelioma as a result of exposure to asbestos-contaminated talc manufactured by Whittaker. And in March 2023, a jury awarded Plant a $29 million verdict.

Days later, Plant moved the South Carolina Court to place Whittaker into receivership. The Court granted Plant's motion and entered an order (the "Receivership Order" or "Or-der") appointing Peter Protopapas as the South Carolina Receiver. Among other things, the Receivership Order vested him "with the power and authority [to] fully administer all assets of [Whittaker], accept service on behalf of [it], engage counsel on behalf of [it] and take any and all steps necessary to protect [its] interests." Appellants' Consolidated J.A. 217.

Whittaker promptly moved the South Carolina Court to reconsider. It held a hearing on Whittaker's motion, during which, in response to counsel's suggestion that Whittaker had the "authority to enter into voluntary bankruptcy," the Court stated:

> I'm well aware, that was the main factor in my signing the order so quickly is that I wanted to be sure that something other than [a] kind of amorphous organization I wasn't quite sure about in terms of asset picture, control[,] or

> anything else[,] would not simply declare bankruptcy and that entity would still be controlling things. I wanted a receiver that I knew would take it seriously, to look at the asset picture and see what was going on.

Id. at 423. The Court denied Whittaker's motion and directed the parties to submit a proposed form of order to memorialize its ruling.

C. The Debtors Petition for Bankruptcy.

With more than 1,000 asbestos claims still pending, the Debtors promptly filed Chapter 11 petitions in the United States Bankruptcy Court for the District of New Jersey. Before they did so, Whittaker's board passed a resolution authorizing its filing without consulting or gaining approval from the South Carolina Receiver. He promptly moved in the Bankruptcy Court to dismiss Whittaker's bankruptcy as an unauthorized petition, arguing the Receivership Order "divested [its] board of the authority to approve a bankruptcy filing on [its] behalf and instead gave such authority to the Receiver alone." Appellants' Consolidated Opening Br. 13.

The Bankruptcy Court denied the Receiver's motion, concluding the Receivership Order did not divest Whittaker's board of the authority to file a petition for bankruptcy because the Order's terms did not demonstrate that the Receiver displaced the board. He appealed to the District Court, which affirmed the Bankruptcy Court's ruling for substantially the same reasons. The Receiver timely appealed to our Court while the Debtors' bankruptcy proceedings continued in parallel. And in light of the Debtors' substantial asbestos liabilities, the United States Trustee appointed the Committee to represent the talc creditors' interests before the Bankruptcy Court.

With their proceedings well underway, the Debtors sought to shore up funding for an exit from bankruptcy. However, they possessed few meaningful assets in the aftermath of their 2004 Transactions. Further complicating matters, the Debtors lacked one of the most obvious tools to centralize and distribute assets because most fraudulent transfer claims they might have asserted under the Bankruptcy Code in connection with the 2004 Transactions were time-barred.[2] So, in lieu of any avoidance actions, the

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[2] Sections 548 and 544 of the Bankruptcy Code "allow[] a trustee to avoid a transaction if it lacked reasonably equivalent value" and left the debtor with "unreasonably small capital." 5 COLLIER ON BANKRUPTCY ¶ 548.05 (16th ed. 2025). So, for example, a trustee may seek to avoid a transfer when "the debtor is left solvent, but just barely so, and in a condition that bankruptcy or liquidation is substantially likely." *Id.* And—as our precedents demonstrate—fraudulent transfer claims are commonly asserted against third-party purchasers like Brenntag. *See*, *e.g.*, *In re Wilton Armetale, Inc.*, 968 F.3d 273, 278 (3d Cir. 2020) (considering fraudulent transfer claims asserted by creditors against a third-party purchaser of the debtor's assets); *In re Emoral, Inc.*, 740 F.3d 875, 877 (3d Cir. 2014) (noting that the bankruptcy trustee asserted a fraudulent transfer claim against a third-party purchaser that creditors sought to hold liable on a "mere continuation" theory of liability). The trouble is that Section 548 addresses transfers that occurred within two years of the petition date. 11 U.S.C. § 548(a). Likewise, state-law avoidance claims asserted on behalf of creditors under Section 544 typically expire four years from the date of the challenged transfer or obligation. *See* 5 COLLIER ON BANKRUPTCY ¶ 548.01A (considering statutes of limitation under the Uniform Fraudulent Transfer Act and Uniform Voidable Transfer Act).

Debtors wielded other successor li-ability claims as leverage in their negotiations with Brenntag.[3]

Their approach spurred a settlement (the "Settlement"), subject to Bankruptcy Court approval, under which Brenntag will pay approximately $535 million to the Debtors in exchange for, among other things, a release of all successor li-ability claims against it. The only problem was that certain of the talc plaintiffs represented by the Committee had already asserted successor liability claims against Brenntag before the Debtors filed for bankruptcy. As a result, the Debtors needed to resolve their competing claims to proceed with the Settlement.

To do so, the Debtors filed an adversary proceeding against, among others, Brenntag and hundreds of individual talc plaintiffs represented by the Committee. They sought an order enjoining the talc plaintiffs from pursuing successor liability claims against Brenntag, as well as a declaratory judgment determining that all of those claims are property of their respective bankruptcy estates under Section 541(a)(1) of the Bankruptcy Code. The Committee intervened in the adversary proceeding, and the Debtors moved for summary judgment over its objection.

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[3] Successor liability claims form a list of exceptions to the general rule of corporate successor nonliability. *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 815 (N.J. 1981). In that sense, the term refers to a collection of different causes of action that can be asserted against a successor corporation at common law. *Id.* (discussing successor liability claims—including those based on alter-ego, mere continuation, product-line, and actual or constructive fraudulent transfer theories—recognized under New Jersey law). The roster of cognizable claims varies from one jurisdiction to another. *See*, *e.g.*, *id.* at 815–20.

In support of their motion, the Debtors relied on our decision in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014). According to the Committee, however, that decision narrowly concluded that successor liability claims asserted on a "mere continuation" theory under New Jersey law constitute property of the estate.[4] So, the Committee explained, other successor liability claims available to certain talc plaintiffs in a small minority of states belong to those plaintiffs individually, as opposed to the Debtors. More specifically, the Committee focused its objection on the subset of successor liability claims its constituents had or could have asserted on a "product-line" theory of liability (collectively, the "Product-Line Claims").

That theory imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturer's assets and undertakes essentially the same operation and production practices. *Ramirez*, 431 A.2d at 820. Only a handful of state courts have recognized this "controversial" theory of liability. David Hunt, *Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma—Niccum v. Hydra Tool Corp.,* 438 N.W.2d 96 (Minn. 1989), 16 WM. MITCHELL L. REV. 581, 581–91 (1990). New Jersey and California courts are among the minority. *See*, *e.g.*, *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 819–22 (N.J. 1981)

[4] As mentioned in footnote 3 above, the mere continuation theory of liability is part of the traditional list of successor liability claims recognized under New Jersey law. To assert a mere continuation claim thereunder, a plaintiff must establish sufficient "continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following [an] asset acquisition." *Ramirez*, 431 A.2d at 816.

(recognizing the product-line theory); *Ray v. Alad Corp.*, 560 P.2d 3, 7–11 (Cal. 1977) (same). And although the parties briefed their choice-of-law positions before the Bankruptcy Court, it made no decision on the issue. *In re Whittaker, Clark, & Daniels*, 663 B.R. 1, 26 (Bankr. D.N.J. 2024). Thus, it is unclear precisely how many of the Committee's constituents have or could have asserted Product-Line Claims. *Id.* at 26 n.13.

After rounds of unsuccessful mediation, the Bankruptcy Court granted summary judgment to the Debtors. *Id.* at 7. Following *Emoral*, it agreed that the Product-Line Claims are property of the Debtors' estates under Section 541. *Id.* at 25. In the alternative, it held that Sections 541(a)(7) and 544(a)(1) drew those claims into the Debtors' respective estates. *Id.* at 14-21.[5] Recognizing the uncertainty of the law governing

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[5] Under the former provision, property of the estate includes "[a]ny interest in property the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). The latter provision vests the trustee—or debtor in possession—with the rights and powers of a hypothetical lien creditor who extended credit at the time of the debtor's petition. 11 U.S.C. § 544(a)(1). In the Bankruptcy Court's view, Section 544(a)(1) authorized the Debtors—as debtors in possession bearing the rights of a trustee—to pursue the Product-Line Claims after their petitions were filed. *Whittaker*, 663 B.R. at 21–22. Thus, it concluded the Product-Line Claims constitute after-acquired property of the estate under Section 541(a)(7). *Id.* Several circuit courts, however, have cast doubt on this analysis. *See*, *e.g.*, *In re Icarus Holding, LLC*, 391 F.3d 1315, 1319 n.5 (11th Cir. 2004); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222, 1226 (8th Cir. 1987); *but see In re Kwok*, _F.4th _, 2026 WL 922975, at *4–5 (2d Cir. Apr. 6, 2026) (narrowing *Wagoner*'s limitations on trustee standing under Section 544). And while the parties devoted a portion of their briefs to ad-dressing the Bankruptcy Court's alternate holding, we need not do so because our precedents

its rulings, the Bankruptcy Court certified its order for direct appeal to our Court under 28 U.S.C. § 158(d)(2). We granted the Committee's petition for direct appeal, ordered expedited briefing, and issued a consolidated opinion in September 2025. Following the Committee's petition for, *inter alia*, panel rehearing, we requested supplemental briefing and now issue a revised opinion reaching the same conclusions.

II. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b), and in the South Carolina Receiver's ap-peal, the District Court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d). We review without deference both the Bankruptcy Court's and the District Court's legal conclusions, while our review of their factual findings is for clear error. *In re Trans World Airlines, Inc*., 145 F.3d 124, 131 (3d Cir. 1998).

III. DISCUSSION

Before us are two issues, each with accompanying nuance. First, the South Carolina Receiver and the Committee contend that Whittaker's Chapter 11 petition must be dismissed because the South Carolina Court vested the Receiver with exclusive authority to file it. Second, the Committee argues that the Bankruptcy Court incorrectly concluded that the Product-Line Claims belong to the Debtors' bankruptcy estates. We review each in turn.

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require us to conclude the Product-Line Claims are property of the estate under Section 541(a)(1).

A. Is Whittaker Properly in Bankruptcy?

In order to determine whether Whittaker's Chapter 11 petition must be dismissed, we consider whether the South Carolina Court divested its board of authority to file for bankruptcy. Before doing so, however, we address a predicate question: Does the validity of a Chapter 11 petition affect a court's subject matter jurisdiction? We conclude it does not and that Whittaker's petition was duly filed in any event.

1. A Chapter 11 Petition is Not Jurisdictional.

The Bankruptcy Code provides that, except in narrow circumstances, "on request of a party in interest, and after no-tice and a hearing, the court shall . . . dismiss a case under [Chapter 11] . . . for cause." 11 U.S.C. § 1112(b)(1). "Cause" typically includes things like "gross mismanagement of the estate," "failure to comply with an order of the court," and "material default by the debtor with respect to a confirmed plan." *Id.* § 1112(b)(4)(B), (E), (N). But it also includes occasions when a debtor "did not have the proper authority to commence the . . . bankruptcy proceeding." *In re 3P Hightstown, LLC*, 631 B.R. 205, 209 (Bankr. D.N.J. 2021). In those cases, the court "has no alternative but to dismiss the petition." *Price v. Gurney*, 324 U.S. 100, 106 (1945).

The Supreme Court previously described this necessary component of the bankruptcy case as a limitation on courts' "jurisdiction," stating, in interpreting the predecessor statute to the Bankruptcy Code, "nowhere is there any indication that Congress bestowed on the bankruptcy court *jurisdiction* to determine that those who in fact do not have the authority to speak for the corporation . . . should be empowered to file a petition on behalf of the corporation." *Id.* at 107 (emphasis added).

"Jurisdiction," however, "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Some courts have taken Price's mention of "jurisdiction" to mean a limitation on bankruptcy courts' subject matter jurisdiction. *See, e.g., In re Parks Diversified, L.P.,* 661 B.R. 401, 415–20 (C.D. Cal. 2024) (collecting cases); *In re Mach I Aviation, Inc.*, No. 10-01225, 2011 WL 5838520, at *4 n.11 (B.A.P. 9th Cir. Sep. 15, 2011). Following that understanding, the absence of a properly filed petition would extinguish "a court's power to hear a case," leaving it no choice but to dismiss it for lack of jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

But in recognition of jurisdictional limitations' "unique potential to disrupt the orderly course of litigation," recent Supreme Court cases are more precise about hanging the "juris-dictional label" on a statutory provision. *Wilkins v. United States*, 598 U.S. 152, 157–58 (2023). Today the standard for concluding a statute limits federal courts' subject matter jurisdiction is an exacting one. While Congress need not employ any specific formulation or "incant magic words," "the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.'" *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 203 (2022) (first quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); then quoting *United*

States v. Kwai Fun Wong, 575 U.S. 402, 410 (2015)). Anything short of a clear indication will not do.

The statutes granting federal courts jurisdiction over bankruptcy cases do not attach jurisdictional significance to the propriety of a debtor's petition. The governing provision, 28 U.S.C. § 1334(a), provides only that, absent exceptions not relevant here, "the district courts shall have original and exclusive jurisdiction of all cases under title 11." In addition, "district court[s] may provide that any or all cases under title 11 . . . shall be referred to the bankruptcy judges for the district" who "may hear and determine all cases under title 11 . . . and may enter appropriate orders and judgments." *Id.* § 157(a), (b)(1). These statutes establish the jurisdictional grant for district and bankruptcy courts over bankruptcy cases, and neither they, nor any other provision, condition that grant on a properly filed petition.

Code Section 301(a), which does deal with bankruptcy petitions, provides only that a voluntary bankruptcy "is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301(a). This provision focuses on the commencement of a bankruptcy case by a *debtor*, not on the power of the *court*. Simply put, Section 301(a) "does not speak in jurisdictional terms," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), and we "will not lightly apply" the jurisdictional label to a provision absent a "clear statement" to the contrary, *Wilkins*, 598 U.S. at 158.

Accordingly, we hold that an improperly filed bankruptcy petition constitutes "cause" to dismiss a bankruptcy case, 11 U.S.C. § 1112(b)(1), but it does not strip bankruptcy courts of subject matter jurisdiction. In doing so, we note that our conclusion is consistent with the decisions of at least two other circuits. *See In re Parks Diversified, L.P.*, 168 F.4th 1188, 1193 (9th Cir. 2026) ("Corporate authority to file for bankruptcy—while important and mandatory—is not jurisdictional."); *In re Martin-Trigona*, 760 F.2d 1334, 1340 (2d Cir. 1985) (concluding that a debtor corporation's authority to file for bankruptcy does not implicate subject matter jurisdiction).

2. Whittaker Properly Filed Its Chapter 11 Petition.

The Supreme Court has long held that, "[i]n [the] absence of federal incorporation," "local law" governs a corporate debtor's authority to petition for bankruptcy. *Price*, 324 U.S. at 106. As corporations act through agents, "local law" is the non-federal rule that gives a corporation's agents—typically its board of directors—the "authority . . . to act." *Id*. And because "[c]orporations are creatures of state law," *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)), "it is state law which is the font of corporate directors' powers," *id*. So we look to governing state law to determine the propriety of a corporation's bankruptcy petition. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 206 (5th Cir. 2018).

But which state's law governs? More precisely, in a situation such as this, where a South Carolina court has putatively exercised authority over the assets of a New Jersey corporation, do we assess the authority of Whittaker's board to file for bankruptcy with reference to New Jersey or South Carolina law?

The parties make answering this question easy. They agree that New Jersey law governs the authority of Whittaker's board over its internal affairs, like petitioning for bankruptcy. Appellants' Second Supp. Br. 1; Appellees' Second Supp. Br. 2, 11; *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 317 (3d Cir. 2014) (noting that where parties do not dispute governing law, we need not conduct a choice-of-law analysis). So the question becomes whether, under New Jersey law, the Receivership Order stripped Whittaker's board of the authority to file for bankruptcy. It did not.

While we stand far removed in time from the zenith of equity receiverships in this country, *see* David A. Skeel, Jr., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 56–60 (2001) (describing the rise of equity receivership in the late nineteenth century as a device for resolving corporate insolvency), this case proves that state courts retain the traditional equitable authority to appoint receivers for insolvent corporations. But that authority is not without limits, as this case also proves.

New Jersey law recognizes that "comity requires that [a foreign receiver] should be acknowledged and aided" to the extent that doing so is not "to the disadvantage of creditors resident [in New Jersey]." *Stone v. N.J. & H. R. Ry. & Ferry Co.*, 66 A. 1072, 1073 (N.J. 1907). For that reason, where a foreign court appoints a receiver, New Jersey courts generally "will appoint an ancillary receiver, [and] the assets will be so administered that creditors in [New Jersey] and in the foreign jurisdiction shall fare alike." *Id.*; *accord Clark v. Painted Post Lumber Co.*, 104 A. 728, 729 (N.J. Ch. 1918) (recognizing that "after the appointment of the receiver in New York, [an ancillary receiver] was appointed" by a New Jersey court); *Ware* *v. Supreme Sitting of Order of Iron Hall*, 28 A. 1041, 1043 (N.J. Ch. 1894) (recognizing that an ancillary receiver was appointed in New Jersey and "should be regarded as auxiliary to the [foreign] receiver").

New Jersey law authorizes its Superior Court to appoint receivers for New Jersey corporations. *See* N.J. Stat. Ann. § 14A:14-2(3) ("The court . . . shall have power to appoint and remove one or more receivers of the corporation"). That provision also permits the court to "enjoin the corporation, its officers and agents, from exercising any of its privileges and franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its property, except to a receiver, and except as the court may otherwise or-der." *Id.* This statute suggests that New Jersey has licensed its courts to exercise broad authority over domestic corporations consistent with its corporate law. Thus, on our reading, New Jersey law permits its courts to recognize foreign receivership orders and appoint an ancillary receiver to aid in the execution of foreign judgments, including by enjoining the corporation and its board from taking specific actions and exercising specific powers.

The Restatement (Second) of Conflict of Laws supports as much. In recognizing that courts may appoint a receiver over a foreign corporation, the Restatement observes that "[w]hen a principal receiver of a corporation has been appointed by a court of a state other than the state of incorporation, and it is intended to dissolve the corporation, an ancillary receiver should be appointed for those purposes by a court of the state of incorporation." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 367 cmt. d (A.L.I. 1971). This is so because "only a receiver appointed by a court in the state where the corporation was incorporated can institute action to dissolve a corporation." *Id.*[6]

Accordingly, under New Jersey law and settled choice-of-law principles, the South Carolina Receiver needed to move for—and be granted—recognition in New Jersey and the appointment of an ancillary receiver to displace Whittaker's board's control over, *inter alia*, the company's privileges, franchises and assets. It did not do so. Whittaker's board thus retained authority over those corporate decisions reserved to it by New Jersey law, including the decision whether to reorganize by filing for bankruptcy.

Appellants respond by invoking one of our Nation's oldest laws—the Full Faith and Credit statute, 28 U.S.C. § 1738. They contend that, under obligations imposed by that provision, "New Jersey would not ignore the Receivership Order, just as the Bankruptcy Court could not ignore it." Appellants' Second Supp. Br. 6–7. This argument falters on three fronts.

First, on its face, the Receivership Order does not reach as far as Appellants insist. Rather than extending to displace Whittaker's board's authority over corporate affairs, it purports only to give the

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[6] Of course, neither New Jersey law nor the Restatement contemplates a state's authority over domestic corporations in instances of bankruptcy, as that power is an area of exclusive federal competence. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) ("The framers of the Constitution . . . granted plenary power to Congress over the whole subject of 'bankruptcies.'"). But the scenarios these authorities posit are sufficiently analogous in character to bankruptcy—as they involve fundamental changes to a corporation's structure (or, in the in-stance of dissolution, existence)—that their precepts apply to the same extent when a board seeks to enter bankruptcy.

South Carolina Receiver control of Whittaker's "assets" and the power and authority to "take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217. Nowhere does the Order speak to Whittaker's corporate affairs, including the board's authority under New Jersey law to decide whether to file for bankruptcy.[7] And in the absence of anything to the contrary in the Order, the default rule discussed above governs—namely, Whittaker's board controls the entity's corporate affairs, subject to lawful displacement under New Jersey law. Thus, because the Receivership Order on its own terms does not dictate the result Appellants assert, affording it full faith and credit under Section 1738 does not lead to a different outcome.

Second, even if we assume the Receivership Order ex-tends to corporate affairs, Appellants still did not attempt to enforce it against Whittaker. While an order rendered by a foreign court may warrant recognition and enforcement under Section 1738, "[e]nforcement measures do not travel with the sister state judgment," and full faith and credit "does not

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[7] Appellants have also argued that this type of interpretation is effectively an appeal of the Receivership Order and thus barred by the *Rooker-Feldman* doctrine, which essentially prohibits federal courts, save the Supreme Court, from reviewing final state court judgments. But if an order is interlocutory, the *Rooker-Feldman* doctrine applies only to those that are "effectively final" because, among other things, the parties have abandoned further litigation. *Cf. Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 459 (3d Cir. 2019). And what we have here is not "effectively final" because state-court litigation over the Order is not abandoned—it is merely stayed. *See* 11 U.S.C. § 362(a). In fact, Appellants indicated they would continue to litigate the Order if the stay were to be lifted.

mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998). Even spotting Appellants the enforceability of the Order, they needed to employ the enforcement mechanisms pro-vided under New Jersey law outlined above. They did not do so.[8] Consequently, their Section 1738 argument fails on this basis too.

Third, and more fundamentally, even if the South Carolina Court issued an order purporting to place control of Whittaker's corporate affairs in the hands of the South Carolina Receiver, we doubt its ability to do so. Our system of federalism embodies "the fundamental principle of equal sovereignty" among the states. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Implicit in that foundational organization of co-equal sovereigns is "the usual legislative power of a State to act upon persons and property within the limits of its own territory," permitting "different communities to live with different local standards." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023) (citation modified).

[8] The Receiver contends that he should not have been required to seek appointment of an ancillary receiver in New Jersey be-cause Whittaker "itself made [doing so] impossible" by "filing for bankruptcy before the South Carolina Court could even is-sue a written order memorializing its denial of [Whittaker]'s motion for reconsideration," and characterizing Whittaker's position as "Kafka-esque." Appellants' Consolidated Reply Br. 21. But without an order lawfully preventing it from doing so, Whittaker's board was free to exercise its authority under New Jersey law to enter bankruptcy. The fact that the Receiver lost the race to the courthouse does not render the results invalid.

But states' power to exercise control over actors within their respective borders is not without limits. Indeed, the Constitution has a great deal to say about the relations between states, their authority to decide the rights of foreign parties, and the application of their laws in instances of conflict. For instance, courts have long construed the Due Process Clause of the Fourteenth Amendment to impose limitations on state courts' authority to determine non-resident parties' rights. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 723–43 (1877); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). Likewise, the dormant Commerce Clause prohibits, among other things, "the enforcement of state laws 'driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Ross*, 598 U.S. at 369 (omission in original) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)).

It is no surprise that the Constitution places limits on the authority a state court can exercise over companies that are incorporated in a sister state. Those limitations are as intuitive as they are sensible. A corporation's state of incorporation or principal place of business determines its domicile. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).[9] And domicile has

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[9] Whittaker's principal place of business is in Connecticut. We take no position on the authority a state in which a corporation has a principal place of business may exert over that corporation when it is incorporated in a different state. Neither party has argued that Connecticut is the proper forum to enforce the

long carried with it great significance for states' authority. *See id.*; *Pennoyer*, 95 U.S. at 723. Among the many powers they exert over their domiciliaries, states may deter-mine "'any and all claims' brought against a [resident] defend-ant." *Ford Motor Co.*, 592 U.S. at 358 (quoting *Goodyear Dun-lop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). But "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). Thus, when it comes to control over corporate decision-making, a state "has no interest in regulating the internal affairs of foreign corporations." *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982).

As Appellants would have it, that is precisely what the South Carolina Court did in this case. They contend that the Receivership Order, properly construed, "divest[ed]" Whit-taker's board of authority to conduct the internal affairs of the corporation—including the authority to file for bankruptcy. Oral Arg. Tr. 15:17.[10] However, as we explained above, the

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Receivership Order or that its law governs. Accordingly, we limit our discussion to New Jersey and South Carolina laws.

[10] Appellants seemingly take the position that the Receivership Order did far more than merely attempt to prevent Whittaker from filing for bankruptcy. At oral argument, when asked whether, in their view, the Receivership Order authorized the South Carolina Receiver "to amend the bylaws of the corporation, to enter into mergers," or to "[c]hange domicile," counsel for Appellants neither disavowed those actions nor offered a limiting

Order, reasonably interpreted, does not extend so far. And if it did, it would be an unprecedented exertion of power over a foreign corporation whose internal affairs are governed by the laws of a sister state, as well as a radical intrusion into the province of a co-equal sovereign.

These constitutional infirmities provide an independent basis to reject Appellants' appeal to Section 1738. Rendering full faith and credit to foreign judgments does not entail blind deference in the face of constitutional limitations. Just as "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, . . . other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) (footnote omitted). Where, as here, the parties did not litigate the constitutionality of the state-court judgment, Section 1738 does not require New Jersey to acquiesce in the enforcement of the Receivership Order without assessing its (doubtful) constitutionality.

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"Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). While bound together in this federal union, certain powers remain the province of a particular state. The state of incorporation, for example, enjoys exclusive authority to govern the internal affairs of its corporations. Thus, consistent with relevant

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principle for their interpretation of the Order. Oral Arg. Tr. 14:1–3.

constitutional constraints, New Jersey law governs and sanctions the authority of Whittaker's board to petition for bankruptcy.

B. Are the Product-Line Claims Property of the Debtors' Estates?

As Whittaker properly entered bankruptcy, we now turn to consider whether the Product-Line Claims are property of the Debtors' bankruptcy estates. We conclude that they are under both *Emoral* and *Armetale*. To that end, we begin with a summary of the doctrinal landscape.[11]

Under Section 541 of the Bankruptcy Code, the filing of a bankruptcy petition automatically creates an "estate" comprised of "all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1). This provision captures such interests "wherever located and by whomever held." *Id.* At the same time, the Supreme Court has explained that "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). The basic idea is that state law defines a debtor corporation's property interests, whereas federal law governs whether those interests are swept into its bankruptcy estate. H.R. Rep. No. 95-595, at 367–68 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95-989, at 82–83 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5869.[12]

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[11] For the sake of clarity, we refer to "claims" and "causes of action" interchangeably throughout the discussion that follows. Additionally, we generally use the term "debtor corporation" in reference to the applicable prepetition entity.

[12] Courts frequently use the term "state law" because property interests are ordinarily defined by the states. But federal law may establish property interests, and this is particularly true with

There is no dispute that causes of action may constitute property of the estate. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983). However, it is often difficult to apply Section 541 to causes of action because applicable non-bankruptcy law sends mixed signals. In particular, it establishes a variety of so-called derivative actions in which "the named plaintiff 'is only a nominal plaintiff'" and "[t]he substantive claim belongs to the corporation." *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 219 (2024) (quoting 2 J. Macey, Corporation Laws § 13.20[D], p. 13–140 (2020–4 Supp.)).[13] As a result, claims held by a debtor corporation's creditors under applicable non-bankruptcy law must undergo substantive scrutiny to ensure they are not misappropriated from the debtor's bankruptcy estate. *See, e.g.*, *Emoral*, 740 F.3d at 879 (instructing courts to consider the theory of liability); *cf. Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) (noting that "the prime purposes" of bankruptcy include "bring[ing] about a ratable distribution among creditors of a bankrupt's

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respect to causes of action. *See, e.g.*, *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168–69 (3d Cir. 2002) (considering whether claims arising under federal law constitute property of the estate). Thus, applicable non-bankruptcy law is the more apt term.

[13] We note that "the term 'derivative' has multiple meanings." *In re TPC Grp. Inc.*, No. 22-10493, 2023 WL 2168045, at *9 (Bankr. D. Del. Feb. 22, 2023). However, with respect to our inquiry under Section 541, derivative claims are those "based on an injury to the debtor's estate that creates a secondary harm to all creditors regardless of the nature of their underlying claims against the debtor." *Armetale*, 968 F.3d at 283 (citation modified); *see also Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348–49 (3d Cir. 2001) (explaining that derivative claims are predicated on an injury to the debtor corporation).

as-sets" and "protect[ing] the creditors from one another").

The stakes of this exercise are significant. That is because Section 323 of the Bankruptcy Code gives the trustee exclusive statutory authority to pursue claims that constitute property of the estate under Section 541. *In re Wilton Armetale, Inc.*, 968 F.3d 273, 280 (3d Cir. 2020).[14] And the corollary of this rule proves especially troubling for interested parties: creditors—like the Committee's constituents—lack the authority to prosecute, settle, and/or release any claim that constitutes property of the estate unless the trustee relinquishes his or her statutory authority over it. *Id.* at 284.[15]

Courts have attempted to fix straightforward rules for the classification of claims in light of these stakes. And in do-ing so, they looked to the Supreme Court's decision in *Caplin v. Marine Midland Grace Tr. Co. of N.Y.*, 406 U.S. 416 (1972). Its facts are straightforward: A trustee appointed under Chapter X of the Bankruptcy Act[16] asserted misconduct claims

[14] Under 11 U.S.C. § 1107(a), a debtor in a Chapter 11 case—technically called a debtor in possession—has essentially the rights of a trustee appointed by the bankruptcy court. But trustees are seldom appointed in Chapter 11 cases. Thus, a debtor's rights are, with certain exceptions, coextensive with those of a trustee, and we use the terms interchangeably.

[15] This consequence rests at the heart of the Committee's appeal. It contends the Product-Line Claims belong exclusively to the talc creditors in order to ensure the proceeds of those claims are not shared with the full creditor constituency under the ordinary rules of priority. In that sense, this case lays bare the conflicting interests of the tort plaintiffs' bar and the bankruptcy bar.

[16] *Caplin* focused on provisions of the Bankruptcy Code's predecessor—the Bankruptcy Act of 1938. The Bankruptcy Act was replaced by the Bankruptcy Reform Act of 1978, which is

against a non-debtor indenture trustee on behalf of estate bondholders after concluding the latter trustee had either willfully or negligently breached its obligations under the indenture. *Id.* at 418–20. In response, the indenture trustee contended that the bankruptcy trustee lacked authority to assert those claims on behalf of the bondholders. *See id.* at 420–21.

On appeal, the Supreme Court determined that a provision of the Bankruptcy Act analogous to Section 544 of the modern Code did not authorize the bankruptcy trustee to assert the misconduct claims on behalf of bondholders. *Id.* at 422–28; *see also Koch Refin. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1347 n.11 (7th Cir. 1987) (indicating that Section 544 supplanted the Bankruptcy Act provision considered by *Caplin*); *supra* note 5 and accompanying text (explaining that the Bankruptcy Court relied on Section 544 in connection with its alternate holding in this case). Instead, the bankruptcy trustee's statutory authority was limited to asserting causes of action that were property of the estate. *Caplin*, 406 U.S. at 428–29. But the Supreme Court concluded that the misconduct claims did not belong to the estate because, *inter alia*, they sought recovery on account of a direct injury to certain bondholders, and the debtor corporation could not have asserted those claims before its bankruptcy case began. *Id.* at 428–30.

Following *Caplin*, courts considered the same factors to determine whether causes of action were property of the estate under Section 541 of the Bankruptcy Code. *See*, *e.g.*, *Koch*, 831 F.2d at 1347

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commonly referred to as the Bankruptcy Code. Many Code provisions grew out of analogous sections under the Act. As a result, judicial decisions and scholarship concerning the Bankruptcy Act often inform our understanding of the Code.

n.11; *In re Educators Grp. Health Tr.*, 25 F.3d 1281, 1285 n.4 (5th Cir. 1994). And, as the law developed, many courts adopted the basic rule that a claim is property of the estate when applicable non-bankruptcy law authorized the debtor corporation to assert it prior to bankruptcy, and the claim vindicates an injury to the debtor corporation that created a secondary injury to all creditors. *See, e.g.*, *In re Icarus Holding, LLC*, 391 F.3d 1315, 1319–20 (11th Cir. 2004), *certified question answered sub nom. Baillie Lumber Co. v. Thompson*, 612 S.E.2d 296 (Ga. 2005) ("[M]ost courts require that (1) the [disputed claim] be a general claim that applies equally to all creditors, and (2) state law allows the [debtor] entity to bring [the disputed claim].").

Over time, however, the basic rule proved unworkable with respect to successor liability claims that were nominally vested with creditors on account of secondary harms derived from prepetition injuries to the debtor corporation. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700–02 (2d Cir. 1989) (explaining that "*Caplin* is not controlling" where claims vindicate derivative injuries to the full creditor constituency). Those claims presented a contradiction because the derivative-injury aspect favored concluding the claim at issue was property of the estate, whereas the debtor corporation's inability to assert the claim outside of bankruptcy supported the conclusion that it belonged to the individual creditors. *See id.* (discussing both factors).[17]

[17] This phenomenon makes sense in context. Successor liability claims frequently target an injury to the debtor corporation by a controlling entity. *See, e.g.*, *Walensky v. Jonathan Royce Int'l, Inc.*, 624 A.2d 613 (N.J. App. Div. 1993). However, as a practical matter, the debtor corporation is unlikely to assert those claims

We have considered two such cases, and we held the claims at issue were property of the estate in both.[18] The first was *Emoral*. 740 F.3d 875. Before its bankruptcy, the debtor in that case manufactured diacetyl, a chemical used in the food flavoring industry that was found to cause various lung ailments. *Id.* at 877. Through a complicated procedural history, a group of plaintiffs eventually sued a third-party purchaser that acquired certain of the debtor's assets for diacetyl-related per-sonal injuries caused by the debtor's products. *Id.* They proceeded against the purchaser on the theory that it was liable for their diacetyl-related tort claims as the "mere continuation" of the debtor. *Id.* at 876–77; *see also supra* note 4 (discussing the mere continuation theory of liability). But the purchaser contended the tort claimants could

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against a controlling entity. *See*, *e.g.*, *In re Buildings by Jamie, Inc.*, 230 B.R. 36, 42 (Bankr. D.N.J. 1998) (noting that "principals of a solvent debtor will not be compelled to pierce the veil of the very entity they use as a conduit for their personal business" because doing so would "effectively extinguish their limited liability and expose them to the personal liability that the corporate form is employed to avoid"); *In re W. World Funding, Inc.*, 52 B.R. 743, 784 (Bankr. D. Nev. 1985), *aff'd in part and rev'd in part on other grounds sub nom.*, *Buchanan v. Henderson*, 131 B.R. 859 (D. Nev. 1990), *rev'd,* 985 F.2d 1021 (9th Cir. 1993) (explaining that "defendants who so completely dominate [a] corporation as to constitute its alter egos are not likely to institute an action to determine their own liability for corporate debts"). Accordingly, state law nominally vests successor liability claims with creditors to ensure they can be asserted.

[18] Counting our decision in *Foodtown*, we have applied Section 541 to causes of action in at least three cases. *See* 296 F.3d at 170–71. But that decision is not applicable because it concerned federal pension withdrawal liability claims that did not exist until the debtor filed for bankruptcy. *Id.* at 170. And in our case, there is no dispute that the Product-Line Claims existed prior to the Debtors' bankruptcy cases.

not assert the mere continuation claims because they were property of the debtor's bankruptcy estate. *See id.* at 878.

Notably, our approach resembled the basic rule. We explained at the outset that a claim is property of the estate if it (1) existed at the time the debtor corporation filed its bankruptcy petition, (2) could have been asserted by the debtor corporation outside of bankruptcy under applicable state law, and (3) is a general claim "with no particularized injury arising from it." *Id.* at 879 (quoting *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 170 (3d Cir. 2002)). As in this case, the parties did not dispute the first prong, so we focused on the latter two.

The second prong was challenging to apply because it was "difficult to imagine" that the debtor corporation "would or could bring a claim for successor liability" outside of bankruptcy. *Id.* at 881. That is because debtor corporations are—as a practical matter—generally unable to assert certain successor liability claims even when state law authorizes them to do so. *Id.* (citing *In re Buildings by Jamie, Inc.*, 230 B.R. 36, 42 (Bankr. D.N.J. 1998)); *see also supra* note 17 and accompanying text (explaining that debtor corporations ordinarily refrain from asserting successor liability claims). At the same time, we noted that courts have classified successor liability claims as property of the estate notwithstanding the practical considerations that prevent their assertion by debtor corporations. *See Emoral*, 740 F.3d at 881 (discussing cases). So, with respect to the dispute before us, we expressed doubt that the debtor corporation's inability to assert the mere continuation claims outside of bankruptcy would be dispositive. *See id.*

The third prong was also challenging because the tort claimants emphasized their underlying tort injuries in an effort to demonstrate particularized harms. *See id.* at 879 (explaining that the tort claimants "focus[ed] on the individualized nature of their personal injury claims against [the debtor]" to obfuscate the derivative nature of the mere continuation theory of liability). Indeed, the tort claimants had asserted personal injury claims against the debtor to recover for the direct injuries they sustained from products manufactured by the debtor. *Id.* at 877. And according to the tort claimants, the mere continuation claims they asserted against the third-party purchaser were predicated on the same product-related injuries. *Id.* at 877–78.

We disagreed. As noted above, the mere continuation theory of liability turns on "continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following [an] asset acquisition." *Id.* at 880 (quoting *Ramirez*, 431 A.2d at 816). So, although the tort creditors "focus[ed] on the individualized nature" of their underlying claims, *id.* at 879, they "fail[ed] to demonstrate how any of the factual allegations that would establish their cause of action based on successor liability [were] unique to them," *id.* at 880. Likewise, the tort creditors could not "demonstrate how recovery on their successor liability cause of action would not benefit all creditors." *Id.* From that perspective, their theory of liability was "based on a general injury suffered by a corporate debtor prior to its bankruptcy filing," *id.* at 882 (quoting *Foodtown*, 296 F.3d at 171), as opposed to "any direct injury" inflicted by the purchaser they sought to hold liable, *id.* at 879. We thus concluded the mere continuation claims were property of the estate. *Id.* at 882. And in doing so, we cautioned courts to "ex-amine the nature of the cause of action" to avoid misclassifying successor liability claims on the basis of tort injuries inflicted by the debtor. *Id.* at 879–80.

We decided *Armetale* next. 968 F.3d 273. In that case, the former owner of Wilton Armetale, Inc. engineered a series of transactions involving the sale of corporate assets for less than fair value in exchange for a kickback from the purchaser. *Id.* at 278. Eventually, however, one of Armetale's creditors discovered the scheme and asserted fraudulent transfer claims against the colluding parties. *Id.* Armetale subsequently filed for bankruptcy, which prompted a dispute as to whether those fraudulent transfer claims belonged to the bankruptcy estate or to the creditor that asserted them.

We explained that claims are property of the estate where the theory of liability is "based on an injury to the debtor's estate that creates a secondary harm to all creditors regardless of the nature of their underlying claim[s] against the debtor." *Id.* at 283 (quoting *In re Tronox Inc.*, 855 F.3d 84, 104 (2d Cir. 2017)). Such is the case where the theory of liability is "based on facts generally available to any creditor, and recovery would serve to increase the pool of assets available to all creditors." *Id.* (quoting *Emoral*, 740 F.3d at 881). In contrast, we stated that claims are personal to creditors "[o]nly when a particular creditor suffers a direct, particularized injury that can be 'directly traced' to the defendant's conduct." *Id.* (quoting *Tronox*, 855 F.3d at 100). The disputed fraudulent transfer claims, however, vindicated the prepetition depletion of corporate assets, which "lower[ed] the odds that the [debtor corporation] w[ould] repay its creditors." *Id.* at 277. In that sense, the claims "rel[ied] on a general theory of recovery derivative of harm done to [the debtor corporation]." *Id.* at 283. We therefore determined they were property of the estate. *Id.*

Against this backdrop, the Committee argues the Product-Line Claims are not property of the Debtors' estate for three reasons.[19] We address and reject them in turn.

1. Claims May Constitute Property of the Estate Notwithstanding Whether the Debtor Corporation Could Assert Them Outside of Bankruptcy.

The Committee contends that the Debtors cannot satisfy *Emoral* because state law does not establish "an independent right" for them to assert the Product-Line Claims outside of bankruptcy. Appellant Committee's Opening Br. 32.[20] For this assertion, it

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[19] The Committee also claims that classifying the Product-Line Claims as property of the estate would violate the Supreme Court's decision in *Purdue Pharma*. That decision held that bankruptcy courts lack the power to extinguish creditor claims against third parties absent consent from the affected creditors. 603 U.S. at 227. So, the Committee argues, treating the Product-Line Claims as property of the estate—and thus permitting the Debtors to settle them—would result in a non-consensual third-party release. But this contention places the cart before the horse. Our inquiry focuses on the antecedent question of whether the Product-Line Claims substantively belong to the tort creditors or to the estate under Section 541. *See id.* at 219 ("[N]o one questions that [a debtor] may address in its own bankruptcy plan claims . . . derivatively asserted by an-other on its behalf.").

[20] In an effort to bolster its position, the Committee repeatedly emphasizes that the Product-Line Claims are vested with, and

points to a line from *Emoral* explaining that a cause of action is property of the estate "if . . . the debtor could have asserted the claim on [its] own behalf under state law." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 169 n.5). In short, the Committee asks us to consider this aspect of the basic rule a necessary, rather than sufficient, condition.

The problem is that this request is inconsistent with our precedents. For example, we concluded the mere continuation claims at issue in *Emoral* were property of the estate irrespective of whether the debtor could assert them outside of bankruptcy. *See id.* at 881. Similarly, *Armetale* held that fraudulent transfer claims are property of the estate, 968 F.3d at 283, yet state law vests those claims exclusively with the creditors of a debtor corporation outside of bankruptcy, *see*, *e.g.*, *In re Cybergenics Corp.*, 226 F.3d 237, 242 (3d Cir. 2000) ("[O]utside of the context of bankruptcy, it is clear that a fraudulent transfer claim . . . belongs to [the debtor corporation's] creditors . . . ."); *In re Global Grounds Greenery, LLC*, 405 B.R. 659, 662 (Bankr. D. Ariz. 2009) ("There is no dispute that the Uniform Fraudulent Transfer Act, as adopted in Arizona and elsewhere, only creates causes of action for creditors of the transferor."); *In re ShengdaTech, Inc.*, 519 B.R. 292, 303–04 (D. Nev. 2014) (holding that, under Nevada's Uniform Fraudulent Transfer Act, a

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inure to the benefit of, tort creditors alone. In any event, that may not be the case. *See Mettinger v. Globe Slicing Mach. Co.*, 709 A.2d 779, 786 (N.J. 1998) (holding that "distributors and retailers may use the product-line exception to seek indemnification from corporations that purchased all or substantially all of the original manufacturer's assets and undertook essentially the same manufacturing operation as that corporation").

creditor is the only party with standing to bring a claim).

Furthermore, the Committee's request would subvert the goals that Congress sought to advance through the Bankruptcy Code. As we have repeatedly explained, Section 541 safeguards property to enable orderly administration and equitable distribution to all creditors of the bankrupt entity's estate. *See*, *e.g.*, *Emoral*, 740 F.3d at 879, 881. These aims are particularly germane where the Committee's approach would invite any number of states to endow certain creditors with a windfall recovery by vesting causes of action predicated on an injury to the debtor corporation exclusively with those creditors. Accordingly, consistent with our analysis in both *Emoral* and *Armetale*, we conclude that a claim may constitute property of the estate notwithstanding whether the debtor corporation was authorized to assert it outside of bankruptcy.[21]

2. The Product-Line Claims Are Not Based on Particularized Injuries Directly Traceable to the Conduct of Brenntag.

The Committee also argues that the Product-Line Claims cannot constitute property of the estate because they are "specific claims" that "arise from harms unique to [the tort claimants] . . . based on [the] conduct of [Brenntag]." Appellant Committee's Opening Br. 33. However, we have already explained that successor liability claims are property of the

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[21] For the sake of clarity, we agree that a debtor corporation's ability to assert a claim under applicable non-bankruptcy law is sufficient—but not necessary—for that claim to constitute property of the estate.

estate because the facts on which successor liability depends—the successor's relationship with the manufacturer—do not im-plicate a claim that is "specific to the creditor." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 170).

The same principle applies here. The product-line theory of liability pressed by the Committee turns on the successor's relationship with the manufacturer, for it is the successor's acquisition and continuation of the "same manufacturing operation and practices" that seeds its potential liability to in-dividual claimants. Appellant Committee's Opening Br. 33 (citing *Ramirez*, 431 A.2d at 820). In contrast, the asbestos in-juries endured by the tort claimants do not stem from the facts underlying Brenntag's status as a successor to the Debtors. They trace only to their exposure to asbestos-contaminated products manufactured by the Debtors before Brenntag came into the picture. This precludes them from being "directly traced" to Brenntag. *Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100).

To be sure, the Committee correctly observes that its constituents have each suffered "harms unique to [them]." Appellant Committee's Opening Br. 33. But this argument simply echoes the dissent in *Emoral*, which would have held that the mere continuation claims at issue were based on a particularized injury "[b]ecause the [tort creditors'] underlying allegations are clearly individualized in nature." *Emoral*, 740 F.3d at 883 (Cowen, J., dissenting). The *Emoral* majority rejected that focus on "the nature of the [underlying tort] injury" in favor of analyzing the theory of liability and the facts on which it relies. *Armetale*, 968 F.3d at 282 (citing *Emoral*, 740 F.3d at 879). And that analysis controls even though the harm suffered by some creditors "might be worse in degree than that suffered by other creditors." *Id.* at 283.

3. The Product-Line Claims Are Based on A Prepetition Injury to the Debtors that Resulted in Secondary Harm to All Creditors.

Finally, the Committee notes that the Debtors "did not suffer the injuries endured by mesothelioma victims." Appellant Committee's Petition for Rehearing 13. So, unlike the fraudulent transfer claims we considered in *Armetale*, the Committee contends that the Product-Line Claims at issue do not involve a theory of recovery "derivative of harm that [the debtor] suffered directly." *Id.* at 8 (quoting 968 F.3d at 282). We disagree. In our view, they are akin to fraudulent transfer claims in two critical respects.

First, the product-line theory of liability serves the same general purpose. As we explained above, the product-line theory imposes liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same operations and practices. *Ramirez*, 431 A.2d at 820. But it grew out of the traditional corporate view that successor liability claims apply in "the absence of adequate consideration for [a] sale or transfer." *Ramirez*, 431 A.2d at 815, 819 (citation omitted). Unsurprisingly, then, it serves to prevent the destruction of creditor remedies based on complex commercial transactions involving the transfer of corporate assets that would otherwise be available to creditors of the transferor. *Id.* at 820 (citing *Ray v. Alad Corp.*, 560 P.2d 3, 9 (Cal. 1977)); *see also Ray*, 560

P.2d at 10 (justifying liability based on the depletion of corporate resources available to satisfy liabilities). Fraudulent trans-fer claims are no different. They apply in the absence of "reasonably equivalent value" for a transfer or sale. 5 *Collier on Bankruptcy* ¶ 548.05 (16th ed. 2025). They serve "to ensure that the debtor does not engage in transactions that diminish the pool of assets available to creditors." Douglas G. Baird, *Fraudulent Transfer Law's Forgotten Foundations*, 5 U. CHI. BUS. L. REV. 53, 56 (2026). And they do so to prevent debtor corporations from "evad[ing] ordinary creditor remedies." *Id.* at 75.

Second, fraudulent transfer claims turn on the same generally available facts as the product-line theory. A fraudulent transfer is voidable if, among other things, "the debtor was in-solvent at that time or the debtor became insolvent as a result of the transfer." N.J. Stat. Ann. § 25:2-27(a). On the other hand, the product-line theory requires proof that the non-debtor defendant's "purchase of the product line destroyed the plaintiff's available remedies." Appellant Committee's PFR, at 11 (citing *Ramirez*, 431 A.2d at 824–25). But these elements overlap such that the generalized findings in support of one claim could be asserted to establish the other. Suppose, for example, that the Bankruptcy Court determined Brenntag's acquisition of the Debtors' manufacturing assets rendered them insolvent. The tort creditors could assert that finding in state court to establish that Brenntag's acquisition destroyed their available remedies. And "[i]f [that] generalized finding[] would benefit their [product-line] case[s], then their claims are no less generalized than the fraudulent-conveyance claims." *Tronox*, 855 F.3d at 107; *see also In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 91

(2d Cir. 2014) (concluding conspiracy-based claims were property of the estate where the factual allegations made by tort claimants echoed fraudulent transfer allegations made by the trustee).

Our point is straightforward. The Committee readily concedes that fraudulent transfer claims are property of the estate. Appellant Committee's PFR, at 10 (citing *Armetale*, 968 F.3d at 283). But the Product-Line Claims it challenges on ap-peal are similar in object and purpose to the fraudulent transfer claims we considered in *Armetale*. Indeed, as we have explained, both theories of liability address derivative injuries to the full creditor constituency that resulted from the prepetition diversion of corporate assets. And "[b]ecause [those] claims depend on harm suffered directly by [the debtor corporation] and only indirectly by [creditors], [the] theory of recovery is not personal, but derivative of harm to the estate." *Armetale*, 968 F.3d at 283; *see also Emoral*, 740 F.3d at 879 (instructing courts to focus on the theory of liability to prevent creditors from obfuscating prepetition harm to the debtor corporation). Such claims belong squarely to the estate.

Contrary to the Committee's assertion, our conclusion is hardly anomalous. Other courts have adopted the same view when creditors asserted successor liability claims predicated on the prepetition diversion of corporate assets. For example, in *National American Ins. Co. v. Ruppert Landscaping Co., Inc.*, the Fourth Circuit held that creditors lacked standing to assert successor liability claims because they were "so similar in object and purpose to [fraudulent transfer] claims that the trustee could bring in bankruptcy court." 187 F.3d 439, 441 (4th Cir. 1999) (Wilkinson, J.). In that case, Ruppert Landscaping

Company entered a series of contracts under which it agreed to purchase certain of Green Thumb Enterprise's notes and assets. *Id.* at 440. But Green Thumb was pushed into bankruptcy when it defaulted on various agreements bonded by sureties. *Id.* Thereafter, the sureties asserted, *inter alia*, successor liability claims against Ruppert. *Id.* at 440–41.

On appeal, the Fourth Circuit noted that "the [s]ureties rel[ied] heavily on exposing the Ruppert/Green Thumb trans-action to be fraudulent." *Id.* at 441. And "[a]lthough the [s]ureties' claims and the trustee's fraudulent conveyance claim [did] not contain identical elements, they all share[d] this same underlying focus." *Id.* For that reason, "[a]ll creditors, not simply the [s]ureties, ha[d] a stake in exposing any impropriety in the Ruppert/Green Thumb transaction." *Id.* at 442. Moreover, "allow[ing] selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process" and prompt "a multijurisdictional rush to judgment whose organizing principle could only be first-come-first-served." *Id.* (citations omitted). The Court thus concluded the successor liability claims were property of the estate in an effort to "maintain[] the integrity of the bankruptcy proceeding and ensure[] that individual creditors [did not] hijack the bankruptcy process." *Id.*

The Second Circuit likewise held in *Tronox* that successor liability claims predicated on the prepetition depletion of a debtor corporation's assets were property of its bankruptcy estate. *See* 855 F.3d at 106–07. Prior to the insolvency proceedings that prompted the dispute, Kerr-McGee Corporation underwent a series of transactions that split the company into two distinct entities: New Kerr-McGee and Tronox. *Id.* at

88. The former maintained control of Kerr-McGee Corporation's oil and gas assets, whereas Tronox was left a corporate shell saddled with Kerr-McGee Corporation's environmental and tort liabilities. *Id.* And in order to manage the claims of several thousand tort creditors, Tronox filed for bankruptcy in the Southern District of New York. *Id.* at 91.

Shortly after the petition date, Tronox asserted fraudulent transfer claims against New Kerr McGee to recover the assets that were transferred to the latter through the spinoff transactions. *Id.* at 88. Tronox ultimately prevailed on those claims, but New Kerr-McGee agreed to an approximately $5 billion settlement before the court entered a final judgment on damages. *Id.* at 92. And, as part of the settlement agreement, Tronox agreed to release New Kerr-McGee from various claims that belonged to its bankruptcy estate. *Id.* However, believing the scope of the estate did not extend to successor liability claims, the tort creditors sought to hold New Kerr-McGee liable "as the alter ego and successor to the liabilities of the former parent of the actual alleged tortfeasor." *Id.* at 106.

Consistent with our approach in *Emoral*, the Second Circuit explained that claims are property of the estate if they vindicate an injury to the full creditor constituency "based upon a secondary effect from harm done to the debtor." *Id.* at 100 (citation modified). On the other hand, they belong to in-dividual creditors if they vindicate an injury that can be "directly traced to the third party's conduct." *Id.* (citation modified). And insofar as the Court was concerned, the successor liability claims constituted property of the estate because the tort creditors failed to "trace their harm to New Kerr-McGee." *Id.* at 106.

Crucially, the Court emphasized that "plaintiffs often try, but are not permitted, to plead around a bankruptcy." *Id.* at 100. And in its view, the tort creditors had attempted to do just that. *See id.* at 103–06. Indeed, they sought an opinion and or-der permitting them "to sue third-party successors of [Tronox] for claims that are truly aimed at recovering estate assets." *Id.* at 104 (discussing *Emoral* with approval). But "[e]very creditor ha[d] a similar claim for the diversion of assets." *Id.* at 103. And "[t]he exact same claim advanced by the trustee on behalf of the estate would be a win for all creditors of the estate." *Id.* at 104. Accordingly, the Court rejected the tort creditors' request.

So too here. As in both *Ruppert Landscaping* and *Tronox*, the tort claimants in our case have attempted to plead their way around the Debtors' bankruptcy proceedings by asserting the Product-Line Claims against Brenntag. They have pursued those claims to recover from, among other things, the operating assets that Brenntag acquired from the Debtors. And they seek this recovery in satisfaction of asbestos injuries they trace to talc products manufactured exclusively by the Debtors. In that context, the Product-Line Claims are predicated on a prepetition injury to the Debtors (from Brenntag's diversion of substantially all operating assets the Debtors possessed) that resulted in a secondary injury to all creditors (by rendering those assets unavailable for distribution on account of their claims against the Debtors). The Product-Line Claims thus constitute property of the estate.

In summary, claims are personal to creditors when the theory of liability is based on a particularized injury directly traceable to the conduct of the defendant. *Armetale*, 968 F.3d at 283; *Emoral*, 740

F.3d at. 879. They are property of the debtor's bankruptcy estate if the theory of liability is instead based on an injury to the debtor corporation that resulted in secondary harm to all creditors. *See*, *e.g.*, *Armetale*, 968 F.3d at 283. And in many cases, claims in the latter category are easy to identify because applicable non-bankruptcy law authorizes the debtor corporation to assert them outside of bankruptcy. *See*, *e.g.*, *Emoral*, 740 F.3d at 879 (explaining that property of the estate "includes" claims "the debtor could have asserted . . . on his own behalf under state law"); *In re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1152 (5th Cir. 1987) (concluding alter-ego claims were property of the estate where the debtor corporation was authorized to assert them).

Nonetheless, certain states might seek to authorize a subset of creditors to vindicate secondary harms derived from the depletion of estate assets through successor-liability claims vested exclusively with that subset. Courts must therefore scrutinize the theory of liability to prevent nominal plaintiffs from commandeering the bankruptcy process. *See*, *e.g.*, *Emoral*, 740 F.3d at 879 (focusing on the theory of liability—as opposed to underlying tort injuries caused by the debtor—to prevent creditors from obfuscating a general injury to the estate); *Purdue Pharma*, 603 U.S. at 219 (explaining that derivative claims are property of the estate because "[t]he substantive claim belongs to the corporation") (citation omitted).

To be sure, we "look to state law to determine if a property right exists and to stake out its dimensions." *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991) (citing *Butner*, 440 U.S. at 54–55). But "[t]he whole point of channeling claims through bankruptcy is to . . . promote an equitable distribution of debtor assets."

Tronox, 855 F.3d at 106 (citing *Koch*, 831 F.2d at 1343). And "[t]o allow selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process and undermine an ordered distribution of the bankruptcy estate." *Ruppert Landscaping*, 187 F.3d at 442. We decline to permit that result. Indeed, the Supreme Court cautioned in *Butner* that property interests should be analyzed in accordance with state law "[u]nless some federal interest requires a different result." 440 U.S. at 55.

IV. CONCLUSION

Whittaker filed for bankruptcy after its board exercised its power to authorize the petition. The South Carolina Court could not unilaterally divest Whittaker's board of that authority, and, once appointed, the South Carolina Receiver had to convince a New Jersey court to displace the board. Because that did not occur, Whittaker properly entered bankruptcy. And, once there, Section 541(a)(1) of the Bankruptcy Code brought the Product-Line Claims into the Debtors' estates. For these reasons, we affirm the judgments of the District and Bankruptcy Courts.

AMBRO, *Circuit Judge*, concurring

The *Erie* doctrine—taken from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny—is the North Star for determining whether federal or state law should apply in federal court. The answer is state law unless the matter is governed by superseding federal law, such as the Constitution, a congressional enactment, or federal common law. *See* Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, 19 *Federal Practice and Procedure* § 4501 (3d ed. 2025). *Erie* questions occur most often when federal courts sit in diversity-of-citizenship jurisdiction because those disputes usually involve only state substantive law. State law, however, includes more than just the underlying substantive law. The Supreme Court told us in *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), that it includes choice-of-law rules as well.

What force, if any, does *Klaxon* have in bankruptcy, where the parties' primary rights and interests are often governed by state law? We need not answer that question in a holding, as the parties agree on the law that governs: New Jersey's. *See* Wright, Miller & Cooper § 4506 (collecting cases for the proposition that courts need not determine which state's choice-of-law regime applies when the parties do not dispute that question).

Though "a pretty good reason for having 'skimmed over the conflicts problem as if none existed' was that none did exist," Henry Friendly, *In Praise of Erie – And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401 (1964) (citation omitted), the question whether *Klaxon* applies in bankruptcy has spawned interesting academic debate. Answers span the spectrum.

Compare, e.g., Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 PA. L. REV. 2193, 2203–06 (2021) (*Klaxon* applies without exception), *with* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 PA. L. REV. 1847 (2017) (*Klaxon* applies only in diversity actions). Our concurring colleague has staked out her position that *Klaxon* always applies in bankruptcy, no exceptions. Because I am uncomfortable with that view, I instead take the opportunity to make some nonbinding observations about *Erie* and choice of law.

I. *ERIE* AND *KLAXON*

A brief refresher on the *Erie* doctrine. Despite the almost mystical fascination that has long surrounded *Erie*, it stands for three basic propositions.

First, "[t]here is no federal *general* common law." *Erie*, 304 U.S. at 78 (emphasis added). "[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). When the Constitution *does* authorize Congress or courts to do so, however, *Erie* has no application, and federal law displaces contrary state law through the Supremacy Clause.

Second, without a federal statute or constitutionally authorized federal common-law rule, the Rules of Decision Act, 28 U.S.C. § 1652, commands federal courts to apply the rules of decision of their forum states "in cases where they apply." The Supreme Court has developed a framework for determining when a state law falls within the scope of the Rules of Decision Act. *See Gasperini v. Ctr. For*

Humanities, Inc., 518 U.S. 415, 427–28 (1996); *Hanna*, 380 U.S. at 468. The specifics of that framework are irrelevant for our purposes.

Third, when a Federal Rule (*e.g.*, the Federal Rules of Civil Procedure) conflicts with state law, then the Rules Enabling Act, 28 U.S.C. § 2072, not the Rules of Decision Act as construed by *Erie* and other cases, determines which law applies. *See Hanna*, 380 U.S. at 463–64; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987). The Rules Enabling Act is also irrelevant for our purposes.

Klaxon followed *Erie* and held that a federal court sitting in general diversity-of-citizenship jurisdiction is required to use the choice-of-law rules of its forum state. *Klaxon*, 313 U.S. at 496–97. The Court's reasoning was sparse, but its decision is best understood as falling into the *Erie* doctrine's second bucket—absent some constitutionally authorized federal law, the Rules of Decision Act kicks in. State choice-of-law rules are state rules of decision under that statute. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other ...."). But if Congress or federal courts invoke some source of constitutional authority to promulgate federal choice-of-law rules, then federal courts would instead find themselves in the first bucket. The Rules of Decision Act, and thus *Klaxon*, would no longer apply.

II. FEDERAL COMMON LAW AFTER *ERIE*

Although *Erie* ended the *general* federal common law, the Supreme Court has been unequivocal in recognizing that the *Erie* doctrine does not entirely displace federal common law. As Justice Brandeis acknowledged in a decision released on the same day as *Erie*, federal courts may still formulate special federal common law on issues of uniquely federal interest. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (concluding that interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests").

For example, federal courts may still generate common-law rules when "the policy of the law is so dominated by the sweep of federal statutes and doctrines developed under them that the legal relations they affect must be deemed governed by federal law." Wright, Miller, & Cooper § 4514. Likewise, it can sometimes "be inferred from congressional or constitutional intent that the federal courts should supply the necessary rule of decision by pronouncing common law to fill the interstices of a pervasively federal substantive framework." *Id.*

To be sure, the "cases in which judicial creation of a special federal rule would be justified … are … 'few and restricted.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). Before federal courts develop common-law rules, "a significant conflict between some federal policy or interest and the use of state law must first be specifically shown." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petrol.*, 384 U.S. 63, 68 (1966)). But when that happens, federal courts no doubt have the power to create special federal common law, including choice-of-law rules.

To recap: When Congress or federal courts validly promulgate some federal rule of decision under a source of constitutional authority, then federal law displaces contrary state law. Absent that kind of federal law, then the Rules of Decision Act applies, which commands federal courts to apply state rules of decision. Even after *Erie*, federal courts retain the power to promulgate special federal common-law rules when a strong federal interest requires such rules. Those cases, however, are rare.

III. WHAT CHOICE-OF-LAW RULES GOVERN WHEN FEDERAL COURTS SIT IN BANKRUPTCY?

This leaves our main questions: (1) Does *Klaxon* apply in federal bankruptcy litigation, and if so, (2) may federal courts ever use special federal common-law choice-of-law rules instead?

The circuits are split. The Ninth Circuit limits *Klaxon* to diversity cases, and thus federal courts must apply federal choice-of-law principles in bankruptcy cases. *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995).[1] The Eighth Circuit has arguably held that *Klaxon*

[1] The Fifth Circuit at one time took a similar view but seems more recently to have second-guessed whether it conclusively settled the question. *Compare Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972) ("In this federal bankruptcy case the District Court is not obliged to use the choice-of-law methodology of the forum state, Louisiana."), *with Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) ("[I]t is an open question in this circuit as to whether courts exercising bankruptcy jurisdiction should apply forum or federal choice-of-law rules.").

applies categorically in federal bankruptcy cases without exception. *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000). I say "arguably" because that decision passes on the issue in a single conclusory sentence with no further analysis. It is thus hard to conclude that the Eighth Circuit contemplated and rejected the possibility of exceptions. Finally, the Second and Fourth Circuits have held that *Klaxon* applies in federal bankruptcy proceedings unless a strong federal interest justifies creating federal choice-of-law rules as a matter of federal common law. *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); *In re Gaston & Snow*, 243 F.3d 599, 605–06 (2d Cir. 2001).

I believe that the Second and Fourth Circuits have it right. The Ninth Circuit is wrong because *Erie*, and thus *Klaxon*, is not limited to federal diversity jurisdiction. Whenever federal courts encounter an issue whose resolution is not a matter of federal law, the Rules of Decision Act compels them to use state substantive law, which includes choice-of-law rules. If the Eighth Circuit held that *Klaxon* applies without exception in federal bankruptcy cases, it is wrong as well. Federal courts after *Erie* retain constitutional power to promulgate special federal common-law rules, including choice-of-law rules, when strong federal interests justify doing so. "*Erie* did not fence off a 'local law field' constitutionally immune to federal influence; it was quite clear that exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARVARD L. REV. 693, 705 (1974).

A. *Erie* and *Klaxon* Apply Outside General Diversity Jurisdiction.

I believe it is wrong to conclude that *Erie* applies only in federal diversity cases. It applies to any "questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206; *see also Fagin v. Gilmartin*, 432 F.3d 276, 285 n.2 (3d Cir. 2005) (Ambro, J.) (invoking *Erie* to apply New Jersey law in a federal securities-law case brought under federal-question jurisdiction). Given the three-bucket framework I described above, this makes sense. Without on-point federal law, the Rules of Decision Act governs. And that statute does not turn on the basis of federal jurisdiction. *Erie* applies just as much when a court is sitting in its federal-question or bankruptcy jurisdiction as it does in general diversity. *See, e.g.*, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (applying *Erie* in pendent jurisdiction cases); *Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (applying *Erie* in interpleader cases).[2]

If we accept that *Erie* applies whatever the basis of federal jurisdiction, then it does not take much more

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[2] *Vanston Bondholders Protective Comm. v. Green* suggests that federal courts have wide latitude to devise common-law choice-of-law rules in bankruptcy. 329 U.S. 156, 161–62 (1946). When the Court decided that case, however, the Rules of Decision Act covered only common-law claims, and so it would not have applied to claims created by federal bankruptcy law. Clopton, *supra*, at 2205 n.76 ("For those who believe that the Rules of Decision Act plays an important role in *Erie* cases, that statute exclusively referred to common[-]law claims until two years after *Vanston* …."). The Court's mature *Erie* cases came only later. *See, e.g.*, *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Hanna,* 380 U.S. 460; *Byrd v. Blue Ridge Rural Elec., Inc.*, 356 U.S. 525, 537 (1958).

analysis to conclude that the same is true for *Klaxon*. Both *Erie* and *Klaxon* "make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206. That includes in bankruptcy. As the Fourth Circuit explained, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *Id.*

B. Federal Courts May Still Apply Federal Common-Law Choice-of-Law Rules in Bankruptcy Cases When Strong Federal Interests Warrant Doing So.

Klaxon applies in bankruptcy proceedings when addressing state-law questions; that much we agree on. The sole remaining wrinkle is whether federal courts sitting in bankruptcy must *always* apply the forum state's choice-of-law rules when the underlying issue is governed by state law. That is where I part with our concurring colleague. In Judge Krause's view, federal courts sitting in bankruptcy jurisdiction can *never* create federal common-law choice-of-law rules for some combination of five reasons.[3]

First, the Bankruptcy Code generally absorbs state laws to define the parties' property interests, and so it follows that state choice-of-law rules must also apply.

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[3] To avoid confusion on what follows, Judge Krause in part offers numbered reasons to extend *Klaxon* to the bankruptcy context. Those numbered reasons do not correspond to the numbered reasons I note below for why she believes federal courts in bankruptcy can never create special federal choice-of-law rules.

Conc. Op. 4–6. *Second*, the Bankruptcy Code is intended to facilitate the orderly resolution of competing creditors' claims without significantly affecting their underlying entitlements, and federal choice-of-law rules, if allowed, could change the outcome. *Id.* at 6–9. *Third*, federal courts have limited power to make federal common law. *Id.* at 19–20. *Fourth*, if there were some reason to create a federal rule of decision in bankruptcy, federal courts would be better off creating a rule of decision rather than a choice-of-law rule. *Id.* at 19–21. And *fifth*, any federal interest strong enough to generate a federal choice-of-law rule would be explicit in the Bankruptcy Code itself; the absence of choice-of-law rules in the Code means there is never any such interest. *E.g.*, *id.* at 21.

None of the first four arguments supports the claim that federal courts can never create choice-of-law rules in bankruptcy—they support only the lesser claim that state choice-of-law rules will almost always apply. As noted, I agree with that conclusion. My colleague's fifth argument, however, is where we part, as the Supreme Court has recognized that even when bankruptcy otherwise looks to state law, sufficiently strong federal interests may warrant creating special federal common law.

1. Bankruptcy typically absorbs state law.

Our concurring colleagues observes, rightly, that federal courts sitting in bankruptcy "regularly look to governing non-bankruptcy law—often 'state law'—to determine parties' 'rights and obligations when the Code does not supply a federal rule.'" Conc. Op. 4 (citation omitted). If federal courts in bankruptcy used special federal choice-of-law rules that differed from those of the forum state, then the parties' choice of forum (or even the basis of federal jurisdiction) could change their primary rights.

This is true, but it does not establish more than we already know—*Klaxon* should ordinarily apply in bankruptcy. That federal courts confronted with state-law questions should use state choice-of-law rules to avoid jurisdiction-shopping is not an interest unique to bankruptcy. Yet even federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying act-of-state doctrine in diversity case). And when courts do so, neither *Erie* nor *Klaxon* prevents them from using those rules instead of state law.

At most, that bankruptcy ordinarily absorbs state substantive law supports a background presumption that federal courts in bankruptcy will rarely have a good reason to create federal choice-of-law rules. It does not support the broader argument that federal courts can never create special choice-of-law rules in bankruptcy.

2. Bankruptcy should rarely alter the parties' underlying entitlements.

Our concurring colleague next cites "renowned scholars" endorsing the "'creditors'[-]bargain' theory," which "conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law." Conc. Op. 6. On this view, bankruptcy ordinarily should not alter the parties' underlying entitlements.

I take no position on whether the creditors'-bargain theory is the best interpretation of the Bankruptcy Code as a whole. But even if it were, it would not provide an argument in support of the claim that federal courts sitting in bankruptcy lack the power to create federal choice-of-law rules. As above, this argument at most suggests that the circumstances are rare under which federal courts could justifiably create federal common law that affects the parties' underlying rights and entitlements. Rare is not never. There may be times when the purpose of the Bankruptcy Code may be best served by special federal choice-of-law rules. It may be unlikely that such a circumstance would arise, but it strikes me as overconfident and unnecessary to disclaim the possibility once and for all.

3. Federal common law is rare.

Judge Krause next observes, again correctly, that "the creation of federal common law is appropriate only in 'situations where there is a significant conflict between some federal policy or interest and the use of state law.'" Conc. Op. 20 (quoting *O'Melveny*, 512 U.S. at 87). "'[S]uch a conflict [is] a precondition for' federal common law-making." *Id.*

Once again, the premise is true, but it does not support the conclusion. If anything, Judge Krause acknowledges that federal courts *can* create federal common-law rules when there is a sufficiently strong federal interest threatened by state law. As with her argument that bankruptcy should rarely change the parties' underlying rights and interests, this argument mistakes rareness for impossibility. For common lawmaking to be rare, rather than impossible, courts must be able to do it in at least some cases.

Judge Krause also appeals at times to separation-of-powers principles and cautions against leaving courts "to divine untold rules from some brooding cloud of federal interests." Conc. Op. 10. But this misses the point. No one has suggested that federal courts can or should exercise freewheeling lawmaking power or identify federal interests without congressional guidance. *See generally CoreCivic, Inc. v. Governor of N.J.*, 2025 WL 2046488 (3d Cir. July 22, 2025) (Ambro, J., dissenting) (rejecting that view). But *Congress* may express federal interests through statute—for example, the Bankruptcy Code—and *courts* may, in rare circumstances, create federal common law to give effect to those congressionally endorsed interests, particularly when applying state law would undermine Congress's objectives.

4. Federal courts should create substantive rules of decision instead of choice-of-law rules.

Next, Judge Krause claims that it is hard to imagine a case involving a federal interest strong enough to justify federal common law, but not strong enough to justify a substantive rule of decision rather than a choice-of-law rule. In her view, "for the Second and Fourth Circuits' approach to be correct, … a federal interest has to fall into the goldilocks zone." Conc. Op. 20–21. Maybe so, but it will not surprise the reader to hear that this also is not an argument against the power of federal courts to create federal choice-of-law rules in bankruptcy. It is an argument for the claim that the circumstances when courts would need to do so are "few and restricted."

O'Melveny, 512 U.S. at 87 (quoting *Wheeldin*, 373 U.S. at 651). Judicial humility cautions against making the sweeping claim, in the absence of a case or controversy before us, that no such interest can exist just because one has not presented itself.

5. The Bankruptcy Code contains all relevant federal interests, and a choice-of-law rule is not among them.

The only argument my colleague makes that theoretically supports her claim that federal courts can never develop choice-of-law rules in bankruptcy is that the Bankruptcy Code is a comprehensive and reticulated statutory regime whose text exhausts all potential federal interests that could justify federal common-law rules. The lack of special choice-of-law rules in the Code means, in her view, that there is no such interest.

That premise is faulty because it would apply with equal strength to the power of federal courts to create substantive common-law rules in bankruptcy. Yet the Supreme Court has rejected that argument: "Property interests are created and defined by state law … [*u*]*nless some federal interest requires a different result*." *Butner v. United States*, 440 U.S. 48, 55 (1979) (emphasis added). If the Supreme Court has recognized that strong federal interests can sometimes allow federal courts to devise special rules of decision governing the parties' underlying property interests, I do not know why those interests could not also justify special choice-of-law rules.

Judge Krause claims that *Butner* stands only for the limited proposition that a strong federal interest can justify a federal substantive rule, "not that this federal interest [could] favor[] one state law over others." Conc. Op. 22. But *Butner* does not turn on the difference between substantive law and choice-of-law rules. It supports the broader principle that the selection of state rules of decision in bankruptcy must yield to overriding federal interests. On Judge Krause's view, a sufficiently strong federal interest could warrant a federal substantive rule, but never a choice-of-law rule. The unstated assumption seems to be that there could not be a strong federal interest that would justify a federal choice-of-law rule that ultimately selects state substantive law instead of a federal substantive rule. But that assumption is also faulty. Federal courts can and do develop federal rules that select state substantive law. *See, e.g.*, *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991) (formulating federal common-law rule for demand futility in federal derivative actions that incorporates the corporate law of the state of incorporation); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (formulating federal common-law rule for preclusion in general diversity actions and "adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits").

Judge Krause insists that cases like *Kamen* and *Semtek* are distinguishable because they involved "federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law." Conc. Op. 23 n.10. But it is unclear how that distinction defends her central claim, which I understood to be that any federal interest strong enough to authorize federal common law can justify nothing less than a uniform substantive rule. If federal courts can sometimes formulate a rule of decision whose content absorbs the law of the defendant's state of incorporation, then I do not understand why, at least in theory, they could not also formulate a choice-of-law rule that selects the law of the defendant's state of incorporation.

* * *

It is worth stepping back to get a clear view of my concurring colleague's argument. As I understand her, she does not believe *Erie*'s constitutional rule prohibits federal courts from developing special federal common law when the Constitution or federal statute authorizes them to do so. Nor does she believe that federal courts properly exercising their limited common-lawmaking authority lack the power to create a rule of decision that always incorporates the contents of state substantive law. At its core, her argument is merely that she cannot imagine a case in which a federal court would need to create a federal choice-of-law rule in bankruptcy. As she rightly notes, I cannot think of such a case either. Conc. Op. 27 n.11. But this is not an argument that federal courts lack the authority to make choice-of-law rules in bankruptcy.

IV. CONCLUSION

We should not succumb to the "beguiling tendency" to make "[c]onflict-of-law problems … more complicated than they are." *Vanston*, 329 U.S. at 169 (Frankfurter, J., concurring). If *Klaxon*'s application in bankruptcy becomes an issue, then I would endorse the sensible, never-say-never approach of the Second and Fourth Circuits: Absent an "overwhelming federal policy [that] requires us to formulate a choice of law rule as a matter of independent federal judgment, we adopt the choice of law rule of the forum state." *Merritt Dredging*, 859 F.2d at 206; *see also Gaston*, 243 F.3d at

607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.").

KRAUSE, *Circuit Judge*, concurring.

I join the majority opinion in full. As it persuasively explains, New Jersey law governs the authority of Whittaker's board to exercise corporate authority, and the South Carolina Court did not—and likely could not—unilaterally divest the board of that authority. Once in bankruptcy, moreover, our decisions in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), and *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020), straightforwardly dictate that the Product-Line Claims are property of the estate under 11 U.S.C. § 541(a)(1). I write separately, however, to address which choice-of-law rules govern in bankruptcy—an issue that both looms in the background of this case and that has divided courts for decades.

Both parties ultimately agree that New Jersey law governs Whittaker's authority to petition for bankruptcy protection, but they also recognize that there are two distinct paths to that choice of law—the "forum state" rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), on the one hand, and a federal common law choice of law rule, incorporating the internal affairs doctrine, on the other. Here, because the forum state is New Jersey and because Whittaker is a New Jersey corporation, those paths converge. But, as highlighted in the parties' briefing and argument on this question, each rule involves a different analysis and is capable of producing a different outcome. And confusion about how to resolve this conflict-of-laws question in bankruptcy cases will persist in our Circuit absent guidance from our Court. I write here with an eye towards that eventual resolution. As it turns out, the answer lies in established doctrine. For the reasons explained more thoroughly below, the Bankruptcy Code; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act; and the grant of bankruptcy jurisdiction to federal courts all support employing the choice-of-law rules of the state in which the bankruptcy court sits.

I. THE PUZZLE: CHOICE OF LAW IN BANKRUPTCY

Federal courts are most often called on to resolve choice-of-law questions while exercising diversity jurisdiction. In those cases, non-federal law (usually state law) provides the rule of decision, *Erie*, 304 U.S. 64, and diverse parties might dispute which law governs their claims. When those candidate laws conflict, courts must decide which one controls. To answer that question, a federal court sitting in diversity uses the choice-of-law rules of the state in which it sits. *Klaxon*, 313 U.S. at 496.

Our Court has not previously determined whether the same rule applies in bankruptcy proceedings.[1] But some of our sister circuits have entered this fray, coming to differing conclusions. The Eighth Circuit applies *Klaxon* in bankruptcy cases, directing that "bankruptcy court[s] appl[y] the choice of law rules of the state in which it sits," *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000), and that "when some

[1] *See In re Abeinsa Holding Inc.*, No. 20-3333, 2021 WL 3909984, at *3 (3d Cir. Sept. 1, 2021) (noting that our Court has "not yet precedentially resolved the choice-of-law rules applicable in bankruptcy proceedings").

federal interest requires a different result," the "appropriate question" is not choice-of-law but rather rule of decision, i.e., "whether the state [law] can trump the federal [law]," which it obviously cannot, *In re Schriock Constr., Inc.*, 104 F.3d 200, 201–02 (8th Cir. 1997) (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)).[2] The Ninth Circuit (and possibly the Fifth), on the other hand, have rejected *Klaxon* in bankruptcy cases and instead require a federal common law choice-of-law rule. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995); *Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972). *But see Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) (describing *Klaxon*'s application in bankruptcy as "an open question"). Finally, the Second and Fourth Circuits take a hybrid approach—applying *Klaxon* "in the absence of a compelling federal interest which dictates otherwise." *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1989); *see also In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (applying *Klaxon* unless "significant federal policy, calling for the imposition of a federal conflicts rule, exists"). In other words, in contrast to the Eighth Circuit, which would accommodate any overriding federal interest by applying a federal rule of decision, these courts would reach the same result but under the auspices of a choice-of-law rule.

This tripartite circuit split has persisted for decades and created disparities in how bankruptcy courts determine which law governs parties' rights and obligations. As I explain below, however, there is no basis to depart from the established rule from

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[2] To be sure, the Eighth Circuit adopted *Klaxon*'s rule in bankruptcy without much reasoning. *See In re Payless Cashways*, 203 F.3d at 1084.

Klaxon, and, consistent with the Eighth Circuit's approach, any conflict-of-laws issue is properly resolved as a matter of rule of decision, not choice of law.

II. THE AFFIRMATIVE CASE FOR APPLYING KLAXON IN BANKRUPTCY

The reasons for extending *Klaxon* to bankruptcy are many and exceedingly strong. All relate to the structure of the Bankruptcy Code, the purposes the Code serves, and *Erie* and the Rules of Decision Act. I consider them in turn.

First, while bankruptcy provides an "orderly and centralized" process to restructure the debts of the honest but unfortunate debtor, 1 *Collier on Bankruptcy* ¶ 1.01[1] (16th ed. 2025), it does not create substantive property rights. Instead, consistent with the Rules of Decision Act, 28 U.S.C. § 1652, it is non-bankruptcy law that defines parties' property interests,[3] *Butner*, 440 U.S. at 55; *accord In re Boy Scouts of Am.*, 137 F.4th 126, 164 (3d Cir. 2025). Accordingly, courts exercising bankruptcy jurisdiction regularly look to governing non-bankruptcy law—often "state law"—to determine parties' "rights and obligations when the Code does not supply a federal rule." *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007) (Easterbrook, J.). And in doing so, those courts frequently encounter the same dilemma they do when sitting in diversity: conflicting laws that purport to govern parties' rights and interests.

[3] While "property" generally conjures images of real property or tangible items, in bankruptcy (and elsewhere), various intangibles, such as causes of action, similarly constitute property. *See, e.g.*, *In re Kane*, 628 F.3d 631, 637 (3d Cir. 2010).

As bankruptcy law takes parties' property rights as it finds them, *Butner*, 440 U.S. at 55; *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381 (2019), the fact that parties find themselves wound up in a bankruptcy case should not work to alter the law that would otherwise govern their rights, *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) (rejecting notion that participation in a class action changes the substantive law governing individual plaintiffs' disputes). But adopting a choice-of-law rule unique to bankruptcy risks just that and would subject identically situated parties to different governing laws simply by virtue of one dispute occurring in bankruptcy court while the other unfolds in run-of-the-mill civil litigation.[4] Our bankruptcy system does not

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[4] In addition to diversity cases, *Klaxon* governs choice-of-law questions where jurisdiction is anchored on other bases, including federal questions under 28 U.S.C. § 1331, *Shields v. Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987) (ancillary (now supplemental) jurisdiction); *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) ("Although *Klaxon* was a diversity jurisdiction case, the same principle holds true with respect to pendent jurisdiction claims."); *accord Elliott v. Cartagena*, 84 F.4th 481, 496 n.14 (2d Cir. 2023); *Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017); *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999); *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997); *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996); *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989); *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), and interpleader under 28 U.S.C. § 1335, *Griffin v. McCoach*, 313 U.S. 498, 503 (1941). Moreover, outside of federal court, state courts employ the forum's choice-of-law rules, *see* Restatement (Second) of Conflict of L. § 5 cmt. b (A.L.I. 1971) ("A court applies the law of its own state, as it understands

demand—and, indeed, militates against—such a disparity. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544–45 (1994) (absent a clear and manifest conflict, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law"). And nothing in the text of the Code or the statutes granting bankruptcy jurisdiction warrants a departure from the ordinary rule of *Klaxon*. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Courts*, 169 U. Pa. L. Rev. 2193, 2212 (2021).

Second, influential bankruptcy scholarship buttresses this conclusion. As renowned scholars have advocated, the bankruptcy system in many ways "mirror[s] the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position." Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982). This view, coined the "creditors' bargain" theory, conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law, inefficiently picking the debtor apart and "destroying value for the collective body of creditors." Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. Chi. L. Rev. 1557, 1564 (2013). Without bankruptcy's centralization, "[a]n unsecured creditor who seizes the debtor's assets early enough in time, when the debtor has enough to pay, will receive full

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it, including its own conception of Conflict of Laws.")—the practice that *Klaxon* aims to mirror.

payment," while "[l]ate-arriving creditors are left out in the cold when the assets are not sufficient to pay the firm's debts." *Id.*

Viewed through this lens, among its other features, bankruptcy facilitates the orderly resolution of competing creditor entitlements that exist under governing non-bankruptcy law. Such a system takes as a given creditors' preexisting property interests and "does not . . . justify the implementation of a different set of relative entitlements, unless doing so is necessary as a part of the move from the individual remedies system" that exists outside of bankruptcy. Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21 (1986).

True, the Bankruptcy Code does change parties' "relative entitlements" in some circumstances in aid of debtor rehabilitation. *See, e.g.*, 11 U.S.C. §§ 364(d); 365(e), (i); 502(b); *see also* Daniel J. Bussel et al., *Bankruptcy* 33 (11th ed. 2021). But among the Code's voluminous rules, these provisions fall in the minority.[5] And as the creditors' bargain theory

[5] To be sure, bankruptcy does not have to work this way. The Constitution reserves to Congress the authority to legislate for "the entire 'subject of Bankruptcies,'" *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006) (quoting U.S. Const. art. I, § 8, cl. 4), which encompasses "nothing less than . . . the relations between . . . [a] debtor, and [its] creditors," *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513–14 (1938) (internal quotation marks omitted). Congress could enact legislation that impairs any number of entitlements created by non-bankruptcy law. In this way, *Butner* is merely descriptive of the bankruptcy system that Congress has chosen to enact: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. at 54. It does not stand for the proposition that our Nation's bankruptcy laws *cannot* determine parties' relative entitlements, as scholars have pointed out. *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework*

advances, non-bankruptcy entitlements generally should endure within bankruptcy, *see* Ayotte & Skeel, *supra*, at 1564–65 ("The second element of the Creditors' Bargain theory is the claim that resolution of common-pool problems may require altering the procedural rights of creditors, but that it typically does not require altering the substantive values of those rights as established by nonbankruptcy law."); *see also* 7 *Collier on Bankruptcy* ¶ 1100.01 (16th ed. 2025) (noting the importance of "preserv[ing] creditors' and stakeholders' existing legal rights to the greatest extent possible"), counseling in favor of adopting *Klaxon* to preserve parity with parties' pre-bankruptcy positions vis-à-vis one another.

Third, extending *Klaxon* to the bankruptcy context is fully consistent with—and supported by—*Erie* and the Rules of Decision Act. *Klaxon* is a product of *Erie*, which announced "[t]here is no federal general common law." 304 U.S. at 78. Instead, where federal law does not govern, "[t]he laws of the several states" are "regarded as rules of decision . . . in cases where they apply." 28 U.S.C. § 1652. While *Erie* itself was a diversity case, it "reflects the principle now well established that federal courts should apply state law to legal issues, unless there is some definable federal interest sufficient to justify applying corresponding and possibly inconsistent federal rules of decision." 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update). *Klaxon* reflects the same

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and the Purpose of Corporate Bankruptcy, 120 Colum. L. Rev. 1709, 1751 (2020) (advancing a theory of Chapter 11 that "support[s] a soft version of *Butner*" positing that, "[i]n the absence of any evidence of hold up, nonbankruptcy provisions should remain intact . . . simply because in the absence of hold up there is no role for bankruptcy law").

principle, for "[a] choice-of-law rule is no less a rule of state law than any other." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995); *see also* Russell J. Weintraub, *The* Erie *Doctrine and State Conflict of Laws Rules*, 39 Ind. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."). Thus, it would seem that wherever *Erie* travels, *Klaxon* ought to follow. *See* Clopton, *supra*, at 2198 ("In short, *Klaxon* all the way down.").

In the bankruptcy arena, the Bankruptcy Code supplies the federal rules of decision that Congress has deemed necessary to effectively govern the relationship between the debtor and its creditors. Even a cursory review of the Code's "hundreds of interlocking rules," *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024), reveals that Congress took care to include many provisions that aim "to protect [] national" interests, *In re Trib. Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 94 (2d Cir. 2019); *see, e.g.*, 11 U.S.C. §§ 362(a) (automatic stay of collection of prepetition debts, including state-court litigation); 365(e) (invalidating *ipso facto* clauses); 546(e) (safe harbor for certain pre-petition securities transactions); 555–56, 559–61 (protections for post-petition securities, commodities, repurchase, swap, and netting transactions); 1110 (providing preferred rights to aircraft and vessel lessors).

As these provisions illustrate, Congress identified and manifested in the Code the specific federal interests it wished to protect; it did not leave readers to divine untold rules from some brooding cloud of federal interests hanging over bankruptcy. As we invariably do when construing federal statutes, we look to its text to discern meaning, *In re Imerys Talc*

Am., Inc., 38 F.4th 361, 375 (3d Cir. 2022), and we "presume that [Congress] says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). So while "the Bankruptcy Clause confers broad authority on Congress," *Siegel v. Fitzgerald*, 596 U.S. 464, 476 (2022), to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, Congress has not dictated a particular choice-of-law rule to govern in bankruptcy cases.

This is a glaring omission in a sea of provisions relating to bankruptcies and not one we should presume Congress simply overlooked. To the contrary, we must respect the presumption that state law governs "until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979). It is not the role of federal courts to extend federal interests beyond those Congress has prescribed. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring); *cf. Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (concluding that, when an exception to foreign sovereign immunity applies under the Foreign Sovereign Immunities Act, federal courts must apply *Klaxon* because the statute already protects the unique federal interest of foreign relations). Instead, "the issue of whether to displace state law . . . is primarily a decision for Congress," *Miree v. Dekalb Cnty.*, 433 U.S. 25, 32 (1977), and "[w]e should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act . . . so intimately related to state law," *Richards v. United States*, 369 U.S. 1, 11 (1962). In these circumstances, with a "federal statutory regulation [so] comprehensive and detailed," the usual rule applies that "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," negating the need to "adopt a court-made rule to supplement" the Code. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

Accordingly, there is no need to craft a choice-of-law rule unique to bankruptcy to preserve some "undefined federal interests" that do not appear in the Code.[6] *CoreCivic, Inc. v. Governor of N.J.*, No. 23-2598, 2025 WL 2046488, at *10 (3d Cir. July 22, 2025) (Ambro, J., dissenting). Rather, when a provision of the Bankruptcy Code governs, the Supremacy Clause obviates any choice-of-law analysis, for federal law always trumps conflicting state law. U.S. Const. art. VI, cl. 2; *see also infra* Section IV. And when the Code or other federal law does not supply the rule of decision, the Rules of Decision Act commands that governing non-federal law fills the gap. 28 U.S.C. § 1652. Outside of bankruptcy, that means *Klaxon* controls, and nothing about the bankruptcy context warrants departing from that rule.

Of course, *Erie*, and consequently *Klaxon*, arose in the context of diversity jurisdiction, so the extension of the policies those cases embody to other contexts is not

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[6] This is not to say that the Bankruptcy Code can never embody federal rules that do not appear in its specific provisions. Indeed, the Code can, and does, provide such rules of decision, such as where "pre-Code practice" has not been expressly abrogated by statute, *In re Hertz Corp.*, 120 F.4th 1181, 1198 (3d Cir. 2024), or where a rule "has long been considered fundamental to the Bankruptcy Code's operation," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

obvious. And that uncertainty has caused some of our sister circuits to either reject *Klaxon* in bankruptcy cases or hedge on its application. *See, e.g.*, *In re Lindsay*, 59 F.3d at 948; *In re Gaston & Snow*, 243 F.3d at 601–02; *In re Merritt Dredging*, 839 F.2d at 206. To be sure, that hesitation is not unfounded. As scholars have noted, "[p]art of the explanation for the departures from *Klaxon* can be found in Supreme Court dicta" in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946). Clopton, *supra*, at 2204; *see also* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. Pa. L. Rev. 1847, 1875–78 (2017). There, the Supreme Court considered whether, and to what extent, an insolvent debtor must pay interest on delinquent interest payments due under a prepetition bond indenture under Chapter X of the Bankruptcy Act. *Vanston*, 329 U.S. at 159. In doing so, the Supreme Court admonished:

> [O]bligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits.

Id. at 161–62. And it is this language upon which some courts have seized to conclude *Klaxon* has no application in bankruptcy cases because it is inconsistent with some amorphous federal interest.

See, e.g., *In re SMEC, Inc.*, 160 B.R. 86, 91 (M.D. Tenn. 1993); *In re McCorhill Publ'g, Inc.*, 86 B.R. 783, 792 (Bankr. S.D.N.Y. 1988).

But on closer inspection, *Vanston* says nothing about what choice-of-law rule a court should employ in bankruptcy cases when non-federal law provides the rule of decision. Rather than rejecting *Klaxon*'s application in favor of fashioning a bespoke federal choice-of-law rule for bankruptcy cases, the Supreme Court concluded that the bankruptcy courts "administer and enforce the Bankruptcy Act . . . in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles," whereas "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by *federal law*." *Vanston*, 329 U.S. at 162–63 (emphasis added). Thus, *Vanston* did not resolve the question of what choice-of-law rule courts employ when non-federal law governs a dispute in a bankruptcy case. Instead, it merely determined that when federal law provides a rule of decision that conflicts with state law, federal law controls—a proposition that flows directly from the Constitution. U.S. Const. art. VI, cl. 2; *see also In re Gaston & Snow*, 243 F.3d at 607 (interpreting *Vanston* in this way). *Vanston*, then, embodies nothing more than foundational and uncontroversial principle that federal law reigns supreme.

In sum, the structure of the Bankruptcy Code, the purposes of our bankruptcy system, and federal courts' obligation to respect the application of state law under *Erie* and the Rules of Decision Act all support *Klaxon*'s extension to bankruptcy cases.

III. NOTHING REQUIRES A FEDERAL CHOICE-OF-LAW RULE IN PLACE OF *KLAXON*

Aside from seemingly the Eighth Circuit, no other Court of Appeals has extended *Klaxon*—without reservation—to the bankruptcy context. The Ninth Circuit, as well as the Second and Fourth Circuits, have also addressed the question, taking different approaches but each evincing an unwarranted suspicion of *Klaxon*'s relevance beyond diversity cases. I address each approach in turn.

The Ninth Circuit has long eschewed *Klaxon*'s rule in favor of federal choice-of-law rules. *In re Lindsay*, 59 F.3d at 948. In doing so, it stated that "the risk of forum shopping which is avoided by applying state law has no application [in bankruptcy cases], because [they] can only be litigated in federal court," and instead "[t]he value of national uniformity of approach" on this question prevails over a patchwork of state choice-of-law regimes. *Id.* Thus, "[i]n federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *Id.*

There are two flaws in this reasoning. First, it confuses the basis for federal jurisdiction with the question of governing law. A "federal jurisdictional grant . . . is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). Instead, as is by now clear, "it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." *Maternally Yours v. Your Maternity Shop*, 234

F.2d 538, 540 n.1 (2d Cir. 1956).[7] In other words, the observation that federal courts possess exclusive jurisdiction over bankruptcy cases is correct as far as it goes, but it merely identifies a potential choice-of-law question—it does nothing to resolve it. Instead, the existence of federal jurisdiction begets the downstream question of which law governs the dispute and how to decide that question in instances of conflict. That is a question of parties' *rights*, not federal courts' *jurisdiction*. *See Shutts*, 472 U.S. at 818. But by reflexively employing a federal common law choice-of-law rule, the Ninth Circuit's approach risks altering parties' rights by selecting different law than would govern outside of bankruptcy.

That points up the second problem with the Ninth Circuit's approach. The *Lindsay* court touts a federal choice-of-law rule as carrying a great deal of "value" without greater explanation, seemingly elevating "national uniformity" for uniformity's sake. 59 F.3d at 948. But uniformity at what cost? Even accepting the premise that national uniformity has inherent value,[8]

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[7] *See also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) ("[W]here Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so."); 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update) ("[T]he law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction. In other words, the choice of applicable law turns upon the source or genesis of the right or issue being adjudicated.").

[8] In *Gaston & Snow*, the Second Circuit gestured at the notion that "an interest in uniformity can justify the creation of federal common law," 243 F.3d at 606, and cited the Supreme Court's decision in *Kimbell Foods* for that proposition. But *Kimbell Foods* does not speak to whether a federal choice-of-law rule should govern in bankruptcy. There, the Supreme Court determined that "the priority of liens stemming from federal lending programs

the value in uniformity does not outweigh the significant incongruities a bespoke bankruptcy choice-of-law rule portends. A federal choice-of-law rule in bankruptcy cases risks altering parties' substantive rights. State law governs many issues in bankruptcy cases, but none arises more frequently than property interests. *See, e.g.*, *Butner*, 440 U.S. at 55. And the fact that a dispute turns up "in the context of a federal bankruptcy" proceeding "doesn't change much." *Rodriguez v. FDIC*, 589 U.S. 132, 137 (2020). So "[s]ince state, rather than federal, substantive law is at issue there is no need for a uniform federal rule." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Indeed, as the Fourth Circuit rightly noted, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *In re Merritt Dredging*, 839 F.2d at 206. But that disparity is exactly what the Ninth Circuit's approach invites, and it does so with no basis in the Code or the statutes granting federal courts jurisdiction over bankruptcy cases. Parties' property

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must be determined with reference to federal law," *Kimbell Foods*, 440 U.S. at 726, which obviates the need of a choice-of-law inquiry because the Supremacy Clause requires application of federal rules of decision. Having concluded that federal law, rather than state law, provides the governing rule, the Court went on to define the content of that federal common law rule. And at that second step, the Court noted that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules" before "reject[ing] generalized pleas for uniformity" in favor of a federal common law rule that "adopt[s] the readymade body of state law as the federal rule of decision." *Id.* at 727–28, 730, 740.

rights do not depend on the basis for a court's jurisdiction.

The approaches of the Second and Fourth Circuits are flawed as a doctrinal matter, though difficult to distinguish from the Eighth Circuit's in practice. Those courts have rightly observed that, in the ordinary course, the fact that a choice-of-law question arises in bankruptcy does not provide sufficient reason to depart from *Klaxon* because state law generally provides the substantive law governing a dispute, so *Erie* and the Rules of Decision Act control. *See In re Gaston & Snow*, 243 F.3d at 607; *In re Merritt Dredging*, 839 F.2d at 206.

They also theorize, however, that there may be exceptional cases when a "compelling federal interest," *In re Merritt Dredging*, 839 F.2d at 206, would require the application of a federal common law choice-of-law rule. Thus, they purport to adopt a safety valve by applying *Klaxon* only "in the absence of a compelling federal interest which dictates otherwise." *Id.*; *see also In re Gaston & Snow*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists."). In positing that carveout, these courts hypothesize a scenario where some federal interest compels abandonment of *Klaxon*. Though this rule may appear on its face to conflict with the rule from *Klaxon*, in practice, it does not. Tellingly, neither court has actually identified—much less confronted—such a situation. And the prospect of them ever doing so seems fanciful because their hypothesis runs headlong into the presumption against, and stringent criteria for, the making of federal common law.

At the outset, it is not clear whether the federal interest the Fourth and Second Circuits hypothesize would need to conflict with a state's choice-of-law rule or the substantive law that choice-of-law rule selects. If the former, it is particularly difficult to imagine what federal interest would conflict with the use of a specific choice-of-law rule given the absence of a federal choice-of-law rule provision in the Bankruptcy Code and the Code's indifference to the law that determines parties' rights and interests. *See infra* pp. 21–23. If it is the latter, then the real problem is not the use of a state's choice-of-law rule at all. Rather, as the Eighth Circuit has properly characterized it, the problem is the incompatibility between the non-bankruptcy law chosen to govern a dispute and the federal interest, because permitting a state law to "trump" the federal interest expressed in the Bankruptcy Code "would effectively convert the [] choice of law [question] to an 'anti-preemption' [question]." *In re Schriock Constr.*, 104 F.3d at 202. In short, the resolution to that conflict is application of a federal rule of decision and its priority over state law pursuant to the Supremacy Clause, not abandonment of *Klaxon*.

Even moving past this ambiguity, embracing the alternative to *Klaxon*—a federal choice-of-law rule—must "begin[] with the recognition that federal choice of law rules are a species of federal common law." *In re Gaston & Snow*, 243 F.3d at 605. But "those cases in which judicial creation of a special federal rule would be justified . . . [are] 'few and restricted.'" *O'Melveny*, 512 U.S. at 87 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). Crucially, the creation of federal common law is appropriate only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Indeed, "such a conflict [is] a precondition for" federal common law-making. *Id.* But where none exists, federal law "supplies no rule of decision," leaving non-bankruptcy law to govern the controversy. *Rodriguez*, 589 U.S. at 138.

In order to justify the Second and Fourth Circuits' approach that departs from *Klaxon*, yet requires a choice-of-law analysis—i.e., employing a federal common law choice-of-law rule—two conditions must be true: (1) there must be a sufficiently weighty federal interest in conflict with otherwise governing non-federal law to warrant fashioning a federal rule of decision to resolve conflicts among non-bankruptcy law, but (2) that interest must not be sufficiently weighty to justify fashioning a federal common law rule of decision. The former must be true to justify the "[j]udicial lawmaking" involved in crafting federal common law rules—lawmaking that "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress." *Id.* at 136 (quoting U.S. Const. art. I, § 1). The latter must be true in order to preserve any choice-of-law question at all, for if the federal interest is sufficiently important to justify creation of a federal rule of decision, then there is no "choice" among laws because the Constitution invariably resolves such conflicts in favor of federal law. U.S. Const. art. VI, cl. 2. In other words, for the Second and Fourth Circuits' approach to be correct—as opposed to the Eighth Circuit's, which accounts for an overriding federal interest as a matter of rule of decision, *see In re Schriock Constr.*, 104 F.3d at 202—a federal interest has to fall into the goldilocks zone: not too strong, yet not too weak.

Yet a review of the Bankruptcy Code and its policies establishes neither condition. The Code is agnostic about which body of non-bankruptcy law governs parties' rights—it simply "takes the [interest] as it finds it." *Bartenwerfer v. Buckley*, 598 U.S. 69, 82 (2023). That is to say, the Bankruptcy Code embodies no federal interest that favors the application of any particular non-bankruptcy law over another. And this makes good sense. It is "the basic federal rule" that "entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the . . . obligation." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000). Sometimes, federal non-bankruptcy law will control that issue. *See, e.g.*, *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168 (3d Cir. 2002). Other times, it may be state or foreign law that does. Either way, the Bankruptcy Code directs courts to consider parties' interest under whichever law governs outside of bankruptcy, and it then establishes a collection of rules to deal with those interests.

The Supreme Court's decision in *Butner* is not to the contrary. There, the Court famously held that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55. At first glance, this passage might seem to support the Second and Fourth Circuits' approach—after all, the Supreme Court included the proviso "[u]nless some federal interest requires a different result." *Id.* But on closer inspection, this line from

Butner cannot be read as suggesting the possibility of a different choice-of-law rule to apply in bankruptcy.

Butner addressed whether "the right to the rents collected during the period between [a] mortgagor's bankruptcy and the foreclosure sale of the mortgaged property . . . is determined by a federal rule of equity or by the law of the State where the property is located." *Id.* at 49. In other words, the Supreme Court considered which body of law—state or federal—supplies the rule of decision for allocation of rents. It concluded, as a general matter, "[p]roperty interests are created and defined by state law." *Id.* at 55. But it also recognized that, while uncommon, federal law can sometimes define parties' property interests, especially where the United States is a party.[9] *See, e.g.*, *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943). For this reason, the Court acknowledged that where federal law does govern property rights, that law controls. But *Butner* cannot reasonably be read to suggest that federal law provides the choice-of-law rule to decide among conflicting non-federal laws when it is those laws that provide the rule of decision. That is because *Butner* posits a scenario in which state property law is displaced due to "some federal interest [that] requires a different result," 440 U.S. at 55, not that this federal interest favors one state law over others. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007) (juxtaposing *Butner* and *Vanston* to illustrate this point). Put another way, reading *Butner* to license creation of a federal common law choice-of-law rule renders the

[9] The scenario is far from hypothetical, as the federal government is "one of the Nation's largest lenders," *Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 45 (2024), and is a frequent creditor in bankruptcies.

proviso meaningless because, read in such a way, state law still governs the substantive property interest while federal law simply chooses among conflicting state laws. That plainly is not the dichotomy *Butner* envisioned. Instead, *Butner* stands for the far more straightforward proposition that state law generally governs parties' property interests except in the unusual case where federal law provides the rule of decision. It offers no insight, however, into how to choose among conflicting laws when non-federal law governs.[10]

This result does not derogate those federal interests that do exist. To be sure, there are many areas of law in which Congress has legislated extensively. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*; Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64; Lanham Act, 15 U.S.C. § 1051 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* Perhaps none is a greater expression of a

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[10] My concurring colleague disagrees, asserting that "[f]ederal courts can and do develop federal choice-of-law rules that select state substantive law." Concurring Op. 15. But the cited cases do not support that proposition; they merely recognize that courts can create federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107–09 (1991) (creating a rule of decision for derivative actions that incorporates the contents of state law rather than "displac[ing] state law in this area"); *Semtek*, 531 U.S. at 508–09 (describing the issue as "a classic case for adopting, as the federally prescribed *rule of decision*, the law that would be applied by state courts," rather than creating "a contrary federal rule" (emphasis added)); *see also infra* note 13.

federal interest than those statutory provisions that completely preempt state law, i.e., those where a federal interest "is so powerful," *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23 (1983), that "federal law does not merely preempt a state law to some degree" but instead "substitutes a federal cause of action for the state cause of action," 14C Wright & Miller's Federal Practice & Procedure § 3722.2 (Rev. 4th ed. May 2025 update). Those instances are few, but important. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968) (Section 301 of the Labor Management Relations Act); *Metro. Life. Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (Section 502(a) of the Employee Retirement Income Security Act); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) (Sections 85 and 86 of the National Bank Act).

But again, in these instances—and all others where federal law supplies the rule of decision—there is no choice-of-law question, making *Klaxon* inapplicable. That is because the Constitution resolves vertical choice-of-law questions in absolute terms: "[I]f a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). In all other cases, non-federal law enjoys the usual presumption against "displacement." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). So it is only in the absence of a federal rule of decision—that is, in the absence of a federal interest warranting displacement of non-federal law—that a choice-of-law question arises. And at that juncture, the Bankruptcy Code is agnostic about which law governs, leaving "no reason [for] such interests [to] be analyzed differently" than if they had arisen outside of bankruptcy. *Butner*, 440 U.S. at 55.

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The daylight between these positions—especially between those of the Eighth Circuit and the Second and Fourth Circuits—can be elusive, and the debate can easily be labeled esoteric. Relative to the number of questions governed by state law that arise in bankruptcies across the country, those that present genuine choice-of-law questions are admittedly few. And those whose outcome would change depending on the application of *Klaxon* versus a federal choice-of-law rule are likely fewer still. But apart from doctrinal clarity, which carries its own virtue, resolution of this question in the manner I have proposed serves two important purposes.

First, federal courts exercise limited powers. Perhaps nowhere is that power more at its nadir than in the area of fashioning federal common law. As the Supreme Court has admonished since *Erie*, those contexts that necessitate a federal common law rule are fleeting, and the criteria for recognizing such a rule are exacting. It is incumbent on us to candidly recognize the limits of our authority as a function of the Constitution's separation of powers. After all, "[t]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (omission in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)). Acknowledging that the federal courts' role in crafting common law is necessarily "modest," *Rodriguez*, 589 U.S. at 136, does much to guard against encroachment upon Congress's authority to legislate on the subject of bankruptcies.

Second, with doctrinal clarity and the acknowledgment of federal courts' limited authority comes clearer notice to litigants as to what rule they can expect to govern their rights. As discussed, the Ninth Circuit's departure from *Klaxon* is misguided. As for the Second, Fourth, and Eighth Circuits, their approaches in practice always have, and always will, lead to the same result—*Klaxon* applies in bankruptcy, but federal law necessarily provides the rule of decision "when some federal interest requires a different result." *In re Schriock Constr.*, 104 F.3d at 202. But by framing the question as choice-of-law instead of rule-of-decision and leaving the door open for a different choice-of-law rule in theory, the Second and Fourth Circuits invite needless litigation over *Klaxon*'s applicability and leave lingering uncertainty about which law will govern parties' disputes. They hypothesize a category of cases that, in reality, is a null set. No federal interest exists that will displace a state's choice-of-law rule without simultaneously requiring displacement of state substantive law in favor of a federal rule of decision. Instead of perpetuating the uncertainty surrounding the choice-of-law rule that governs in bankruptcy, we should recognize what practice teaches and give courts and litigants alike notice of the governing framework: The rule from *Klaxon* extends to bankruptcy cases.[11]

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[11] My concurring colleague agrees that "state choice-of-law rules will almost always apply" in bankruptcy but insists that "[r]are is not never." Concurring Op. at 10–12. It is telling, however, that the concurrence does not identify a single instance—even a hypothetical one—that would require the application of a federal common-law choice of law rule, but would not result, in any event, in the application of federal law as the rule of decision.

IV. IDIOSYNCRATIC STATE CHOICE-OF-LAW RULES DO NOT LICENSE ABANDONING *KLAXON*

For their part, among the options in this three-way circuit split, the parties urge us to adopt the Second and Fourth Circuits' hybrid approach to *Klaxon*, cautioning that we "should not adopt a rule that would require bankruptcy courts to follow idiosyncratic state choice-of-law rules even when doing so would create conflicts, encourage forum-shopping, or undermine significant federal interests." Appellees' Second Supp. Br. 11; *see also* Appellants' Second Supp. Br. 4. And to illustrate their point, Appellees pose the example of "a hypothetical forum state . . . reject[ing] the internal-affairs doctrine [to] allow its own idiosyncratic rules to dictate who speaks for a foreign corporation." Appellees' Second Supp. Br. 10. They insist that in such a scenario, "the federal interest in preserving the internal-affairs doctrine and orderly bankruptcy filings would warrant a federal choice-of-law rule vindicating the internal affairs doctrine."[12] *Id.* at 11.

But choice of law is not a panacea, nor need we make it one. Instead, among other constraints, the Constitution places limits on the extent to which states may exert regulatory authority over parties' disputes and that resolve many of the concerns the parties raise here. Four constitutional provisions in particular—the Supremacy Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause,

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[12] Apart from the reasons I describe below, I agree with the majority that such a scenario is fanciful because it would violate the Constitution. Maj. Op. 29 ("[W]hen it comes to control over corporate decision-making, a state 'has no interest in regulating the internal affairs of foreign corporations.'" (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982)).

and the Due Process Clause of the Fourteenth Amendment, each of which is discussed below—provide a federal backstop to permissible state choice-of-law regimes.

First, and most intuitively for choice-of-law purposes, is the Supremacy Clause. U.S. Const. art. VI, cl. 2. In "split[ting] the atom of sovereignty" for our federal union, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), the Framers "provide[d] 'a rule of decision' for determining whether federal or state law applies in a particular situation," *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)). The Supremacy Clause supplies a bright-line rule to resolve "vertical" choice-of-law questions, i.e., those that implicate a conflict between federal and state law. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691 (2006). When federal and state law are "in conflict or at cross-purposes," the Supremacy Clause embodies the "clear rule" that federal law prevails. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

Thus, when state courts consider which law governs a dispute, the existence of a controlling federal rule resolves any choice-of-law question, "[f]or the policy of the federal [law] is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393 (1947). In this way, the Supremacy Clause protects the federal authority to enact federal rules of decision to control in circumstances "necessary to protect uniquely federal interests." *Rodriguez*, 589 U.S. at 136 (quoting *Radcliff Materials*, 451 U.S. at 640).

Often, those federal interests will be embodied in a federal statute. But in few, yet important, contexts, federal courts have recognized the need to fashion "federal common law—substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress—that supplant state law," 19 Wright & Miller's Federal Practice & Procedure § 4514 (3d ed. May 2025 update), often when the controversy's subject matter closely relates to the federal government or falls within an area of exclusive federal competence, *see, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004) (admiralty); *Boyle*, 487 U.S. at 505–06 (civil liabilities of contractors under federal procurement contracts); *Clearfield Tr.*, 318 U.S. at 366 (rights and duties of the United States under federally issued commercial paper); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (apportionment of water rights between states).

To be sure, federal courts' common law-making authority "plays a necessarily modest role," and the Supreme Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." *Rodriguez*, 589 U.S. at 136, 138. But in the narrow circumstances that command a federal rule of decision absent constitutional or statutory authority, the Supremacy Clause ensures that federal courts may still fashion such a rule and that contrary state law will yield.[13] *See*

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[13] When adopting a federal common law rule, federal courts must assess both "(1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point." *McVeigh*, 547 U.S. at 692. So in some circumstances, federal courts may "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation," and state law yields only in the sense that it is supplanted by an identical federal rule. *Kimbell Foods*, 440 U.S. 740.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (recognizing the preemptive force of federal common law), *superseded on other grounds by statute*, Pub. L. 88-633, 78 Stat. 1013, *as recognized in*, *Fed. Republic of Ger. v. Philipp*, 592 U.S. 169, 179 (2021). After all, "exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 705 (1974). So that vertical choice-of-law rule, enshrined in our Constitution, does much to ensure that state choice-of-law rules do not unduly "undermine significant federal interests." Appellees' Second Supp. Br. 11.

Second, the Full Faith and Credit Clause occupies a modest, but important, position among the constitutional provisions bearing on choice of law. In relevant part, it provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1, cl. 1. As the Supreme Court has recognized, the Clause's purpose "was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935); *see also Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

In modern jurisprudence, much of the Full Faith and Credit Clause's function—and that of the statute with which it shares a name, 28 U.S.C. § 1738—occurs in the recognition of judgments rendered by foreign states. *See, e.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). But as the Supreme Court has recognized, the Full Faith and Credit Clause continues to have an enduring role in the regulation of "credit owed to [foreign] laws." *Id.* at 232. Indeed, "where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is . . . apparent." *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935).

Apart from its other commands, the Full Faith and Credit Clause, at a minimum, requires that a forum state confronting a horizontal choice-of-law question have "some rational basis" for applying its law over that of a sister state. *Id.* at 547–48. That basis must be above and beyond mere favoritism toward forum law, for a state does not have a legitimate interest in discriminating against another state's law simply by virtue of its foreign origin. *See First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 398 (1952); *Hughes v. Fetter*, 341 U.S. 609, 613 (1951); *cf. Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (holding that a state does not have a legitimate interest purely in favoring domestic economic interests over foreign ones).

Of course, the Full Faith and Credit Clause "does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939). And no doubt, in many cases, forum states will have rational, nondiscriminatory reasons for applying their law over that of others. *See, e.g.*, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947). But the Full Faith and Credit Clause does "set[] certain minimum requirements which each state must observe when asked to apply the law of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953), and it "requires that a state base its assertion of legislative jurisdiction on a claim that its interests are superior," not simply that conflicting law is foreign, Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2505 n.240 (1999). This constitutional floor provides yet another constraint on state choice-of-law regimes.

Third, the Privileges and Immunities Clause protects out-of-staters from discrimination on the basis of their foreign citizenship.[14] *See Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 285 (1985); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (grounding the protection "against rank discrimination against citizens of other States" in the Privileges and Immunities Clause). In full, it provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Much like the Full Faith and Credit Clause, the Privileges and Immunities Clause was intended "to help fuse into

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[14] This rule may sound identical to the constraint provided by the Full Faith and Credit Clause discussed above. But the two clauses play distinct roles. The Full Faith and Credit Clause concerns the respect owed by one state to the laws and judgments of another, while the Privileges and Immunities Clause concerns states' treatment of citizens of foreign states. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. art. IV, § 2, cl. 1 ("The *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in *the several States*." (emphasis added)).

one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

The Clause does not guarantee that citizens of each state are entitled to all of the same rights and benefits of citizens in other states, *see Piper*, 470 U.S. at 284, but only those that are "fundamental" to "the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382–83 (1978) (quotation omitted). It does, however, "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396.

The Supreme Court has recognized that access to a state's courts is among the privileges and immunities protected by the Constitution. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920). And implicit in that guarantee is the constituent promise that a state may not withhold the application of its law to a citizen of another state in a situation in which it would extend that law to one of its own citizens solely by virtue of the out-of-stater's foreign citizenship. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (the Privileges and Immunities Clause "secures to [citizens of a foreign state] in other States the equal protection of their laws"); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 265–66 (1992). Thus, the Privileges and Immunities Clause "place[s] the citizens of each State upon the same footing with citizens of other States," thereby demanding citizens of foreign states derive the same benefit from a state's law that it would extend to its own citizens and prohibiting discrimination against out-of-staters because of their foreign citizenship. *Paul*, 75 U.S. at 180.

Fourth, and finally, the Due Process Clause of the Fourteenth Amendment substantively limits to which disputes states may extend their law.[15] In providing that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, the Clause requires "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality). Thus, where a state does not have sufficient contacts with a dispute, it lacks legitimate interests warranting extension of its law to the dispute, rendering application of its law "sufficiently

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[15] The Supreme Court's articulation of the Fourteenth Amendment Due Process Clause's limitations on state choice-of-law rules has been subject to nearly universal criticism. *See, e.g.*, Roosevelt, *supra*, at 2506–07; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 460–63 (1982). In comparing choice of law with the Court's personal jurisdiction jurisprudence, Professor Linda Silberman famously quipped, "[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, Shaffer v. Heitner, *The End of an Era*, 53 N.Y.U. L. Rev. 32, 88 (1978). I do not take a side in this debate here. My point, rather, is that wherever the constitutional boundaries lie, so long a states' choice-of-law regimes fall within them, federal courts have no authority under the Bankruptcy Code, Rules of Decision Act, or statutes granting bankruptcy jurisdiction to supplant state choice-of-law rules in favor of federal ones.

arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822; *accord John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930). And in doing so, the Due Process Clause protects litigants against "unfair surprise or frustration of legitimate expectations" of the law governing their dealings.[16] *Allstate*, 449 U.S. at 318 n.24.

By recounting these well-trodden constitutional constraints, I do not seek to "embark upon the enterprise of constitutionalizing choice-of-law rules." *Sun Oil*, 486 U.S. at 727–28. Rather, these constitutional safeguards demonstrate that by extending the rule of *Klaxon* to bankruptcy cases, federal courts are not bound to reflexively apply impermissibly parochial state choice-of-law rules as Appellees warn. *See* Appellees' Second Supp. Br. 9–11. But absent running afoul of the limitations imposed by the Constitution, I find no basis (or authority) in federal bankruptcy law to constrain a state's authority to prescribe the choice-of-law rules that shall govern

[16] The Supreme Court has somewhat collapsed the inquiries under the Full Faith and Credit Clause and the Due Process Clause for choice-of-law purposes. *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 n.3 (1988); *see also* Herma Hill Kay et al., *Conflict of Laws* 381 (10th ed. 2018) (noting the convergence in the two analyses). Yet each imposes a different command: As explained above, the Full Faith and Credit Clause governs the respect owed to laws among states, while the Due Process Clause confers an individual right to be free from application of a state's law when that state has no meaningful connection to the dispute. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. amend. XIV, § 1 ("No *State* shall . . . deprive any *person* of life, liberty, or property, without due process of law." (emphasis added)).

in its courts. Indeed, it is a feature of our federal system that it "leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors," and "it is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon*, 313 U.S. at 496.

Where states do not transcend constitutional barriers, *Klaxon*'s rule best serves the purposes of the Bankruptcy Code consistent with *Erie*, the Rules of Decision Act, and the presumption against federal common law-making. So just as *Klaxon* and *Erie* aim to preserve the substantive law governing a dispute notwithstanding the "accident of diversity,"[17] *Klaxon*, 313 U.S. at 496 (citing *Erie*, 304 U.S. at 74–77), extending *Klaxon* in this manner avoids altering the substantive law governing a dispute simply because of the "happenstance of bankruptcy," *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961).

* * *

The question of *Klaxon*'s applicability to bankruptcy has persisted for nearly 80 years. This

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[17] Of course, *Klaxon*'s interest in diminishing forum-shopping incentives between state and federal courts, *see* 313 U.S. at 496, does not neatly map onto bankruptcy, as federal courts possess original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334(a). But just as plaintiffs may choose their favored forum in non-bankruptcy cases, consistent with proper venue, to gain a favorable choice-of-law rule, *see Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964), debtors too may choose a forum for purposes of a specific choice-of-law regime in bankruptcy cases where venue properly lies. And that sort of horizontal forum shopping incentive is "attributable to," and an irreducible component of, "our federal system." *Klaxon*, 313 U.S. at 496.

case, just as with others our Court has encountered, permits us to elide the question of which choice-of-law methodology to employ. But we have the responsibility not to perpetuate this uncertainty. I hope that, in the appropriate case, we will resolve this question and give guidance to bankruptcy and district courts in our Circuit in a way that is consistent with the Bankruptcy Code, *Erie* and the Rules of Decision Act, and the policies underlying the grant of bankruptcy jurisdiction to federal courts.

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 24-2210 & 24-2211

In re: WHITTAKER CLARK & DANIELS, INC,

Debtor

PETER PROTOPAPAS,

Appellant in No. 24-2210

OFFICIAL COMMITTEE OF TALC CLAIMANTS

Appellant in No. 24-2211

On Appeal from the United States District Court for the District of New Jersey
(D.C. Nos. 3:23-cv-04151; 3:23-cv-04156)
District Judge: Honorable Zahid N. Quraishi

No. 25-1044

In re: WHITTAKER CLARK & DANIELS, INC,

Debtor

WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (f/k/a Brenntag Specialties, Inc., and as Mineral and Pigment Solutions, Inc.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000

Official Committee of Talc Claimants,

Appellant

On Appeal from the United States Bankruptcy Court for the District of New Jersey
(Bankr. Ct. Adv. Pro. No. 23-01245)
Bankruptcy Judge: Honorable Michael B. Kaplan

Argued on April 1, 2025

Before: KRAUSE, MATEY, and AMBRO, *Circuit Judges*

(Opinion filed: September 10, 2025)

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OPINION OF THE COURT

AMBRO, *Circuit Judge*

Plagued by tort liability claims for distributing asbestos-contaminated talc, Whittaker, Clark & Daniels, Inc. ("Whit-taker") and its debtor affiliates filed for bankruptcy in 2023 seeking to dispose finally of those claims. Like many mass-tort bankruptcies, counsel contested Whittaker's from the beginning. On appeal, Appellants—the receiver appointed for Whittaker by a South Carolina Court and the Official Committee of Talc Claimants—raise two fundamental questions about Whittaker's bankruptcy: Should we be here at all given that, in their view, Whittaker's petition was improperly filed, and if rightly in bankruptcy, do its assets include certain tort claims relating to asbestos liability?

We conclude that Whittaker properly filed for bankruptcy and the Bankruptcy and District Courts correctly declined to dismiss its petition. We also determine that successor liability claims Appellants seek to assert against a nondebtor belong to the bankruptcy estates rather than individual creditors. Therefore, Whittaker may pursue those claims for the benefit of the estates. Accordingly, we affirm.

I. BACKGROUND

A. The Debtors' Corporate History.

Whittaker and its three affiliated debtors—Brilliant National Services, Inc., L.A. Terminals, Inc., and Soco West, Inc. (collectively with Whittaker, the "Debtors")—were processors, manufacturers, and distributors of various industrial chemicals and minerals, including talc. Through a series of corporate transactions—too tortured to recount in full here—the Debtors sold substantially all of their operating assets in 2004 to subsidiaries of Brenntag North America. As part of that transaction, the Debtors ceased to be operating entities, and Whittaker and Soco were left as shell companies to manage asbestos liability from the Debtors' operating businesses. Whittaker, Brilliant, and Soco also took on the obligation to indemnify Brenntag and its affiliates for any liabilities it accrued from asbestos-related tort claims.

Three years later, National Indemnity Company—a subsidiary of Berkshire Hathaway Inc.—acquired Brilliant and L.A. Terminals, thereby indirectly acquiring Whittaker and Soco.[1] Through a chain of indemnity agreements and obligations, National Indemnity now backstops asbestos-related successor liability claims against Brenntag.

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[1] National Indemnity assigned its acquisition rights to another Berkshire affiliate, Ringwalt & Liesche Co., who is now the Debtors' ultimate parent.

B. Proceedings in South Carolina.

Prior to the Debtors' bankruptcy, plaintiffs across the country filed approximately 2,700 suits against the Debtors for asbestos-related torts. Our case concerns Sarah Plant's lawsuit in the South Carolina Court of Common Pleas. The suit followed Plant's diagnosis of mesothelioma (a form of cancer affecting the protective lining of the lungs) from asbestos-contaminated talc produced by Whittaker. In March 2023, a jury awarded her a $29 million verdict against it.

Days later, Plant moved the South Carolina Court to place Whittaker into receivership. The Court granted Plant's motion and entered an order (the "Receivership Order" or "Order") appointing Peter Protopapas (the "South Carolina Receiver") as Whittaker's receiver. The Receivership Order, among other things, vested the South Carolina Receiver "with the power and authority [to] fully administer all assets of [Whittaker], accept service on behalf of [it], engage counsel on behalf of [it] and take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217.

Whittaker promptly moved the South Carolina Court to reconsider. It held a hearing on Whittaker's motion, during which, in response to counsel's suggestion that Whittaker had the "authority to enter into voluntary bankruptcy," the Court stated:

> I'm well aware, that was the main factor in my signing the order so quickly is that I wanted to be sure that something other than [a] kind of amorphous organization I wasn't quite sure about in terms of asset picture, control[,] or anything else[,] would not simply declare

> bankruptcy and that entity would still be controlling things. I wanted a receiver that I knew would take it seriously, to look at the asset picture and see what was going on.

Id. at 423. The Court denied Whittaker's motion and directed the parties to submit a proposed form of order to memorialize its ruling.

C. The Debtors Petition for Bankruptcy.

The Debtors soon thereafter filed for bankruptcy in the United States Bankruptcy Court for the District of New Jersey. Whittaker's board passed a resolution beforehand authorizing the filing without gaining the approval of the South Carolina Receiver or consulting him. He promptly moved in the Bankruptcy Court to dismiss Whittaker's bankruptcy as an unauthorized petition, arguing that the Receivership Order "divested [its] board of the authority to approve a bankruptcy filing on [its] behalf and instead gave such authority to the Receiver alone." Appellants' Consolidated Opening Br. 13.

The Bankruptcy Court denied the South Carolina Receiver's motion, concluding that the Receivership Order did not remove the authority of Whittaker's board to file a bankruptcy petition because its terms did not demonstrate the South Carolina Receiver displaced the board. He appealed to the District Court, which affirmed the Bankruptcy Court's ruling for substantially the same reasons. A timely appeal to our Court followed.

Parallel with the South Carolina Receiver's appeal, Whittaker's bankruptcy proceeded in the Bankruptcy Court. In light of the substantial talc-related asbestos liability the Debtors face, the United States Trustee appointed the Official Committee of Talc Claimants (the "Committee") to represent that constituency's interests during the bankruptcy proceedings.

In September 2023, the Debtors began an adversary proceeding—naming as defendants Brenntag, related entities, and hundreds of individual talc plaintiffs—seeking a declaratory judgment that successor liability claims against Brenntag premised on a "product line" theory of liability[2] (the "Successor Liability Claims") are property of the Debtors' estates under 11 U.S.C. § 541(a)(1).[3] The Committee intervened in the adversary proceeding, and the Debtors moved for summary judgment. In their briefing, the Debtors argued that our decision in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), requires treating the Successor Liability Claims as property of the Debtors' bankruptcy estates.

After rounds of unsuccessful mediation, in August 2024 the Bankruptcy Court granted summary

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[2] The "product line" theory of liability "imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation and practices." Appellant Committee's Opening Br. 33 (citing *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 820 (N.J. 1981)).

[3] In the Bankruptcy Court, the Committee distinguished between claims premised on the "product line" theory generally and those claims governed by California law. The latter, the Committee contended, cannot be property of the estate because the "Debtors are precluded by California law from bringing successor liability claims against Brenntag." *In re Whittaker, Clark, & Daniels*, 663 B.R. 1, 12 (Bankr. D.N.J. 2024). As the "California Claims" comprise a subset of the Successor Liability Claims, and the parties place no meaningful significance on the distinction between the two on appeal, we refer simply to the Successor Liability Claims.

judgment to the Debtors. It agreed that, under *Emoral*, the Committee's Successor Liability Claims are property of the Debtors' estates and alternatively held that 11 U.S.C. § 544(a)(1) provides an additional basis for drawing those claims into the estates.[4] Recognizing the uncertainty of the law governing its decision, the Bankruptcy Court certified its decision for direct appeal to our Court under 28 U.S.C. § 158(d)(2). The Committee timely sought a direct appeal, and we granted its petition to do so on December 2, 2024. Given the Receiver's pending appeal and the importance of the issues raised in the Committee's appeal, we ordered expedited briefing and consolidated the two. We now consider both appeals together.[5]

II. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b), and in the South Carolina Receiver's appeal the District Court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d). We review without deference both

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[4] Section 544(a) vests a trustee with the rights and powers of a hypothetical lien creditor who extended credit at the time of the debtor's petition, and under 11 U.S.C. § 1107(a), a debtor in a Chapter 11 case (technically called a debtor in possession) has essentially the rights of a trustee ordered to be appointed by the bankruptcy court. Hence here the Debtors' rights are coextensive with those of a trustee.

[5] In the meantime, the Debtors have sought approval from the Bankruptcy Court to settle the Successor Liability Claims for approximately $535 million. That settlement amount includes $50 million in debtor-in-possession financing provided by Berkshire Hathaway, which the Bankruptcy Court approved on October 15, 2024. The Bankruptcy Court held a trial the week of March 3, 2025, on, *inter alia*, the Debtors' settlement motion. A decision remains pending.

the Bankruptcy Court's and the District Court's legal conclusions, while our review of their factual findings is for clear error. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

III. DISCUSSION

Before us are two issues, each with accompanying nuance. First, the South Carolina Receiver and the Committee contend that Whittaker improperly filed for bankruptcy because the South Carolina Court vested that authority exclusively in the South Carolina Receiver, meaning Whittaker's bankruptcy must be dismissed. Second, the Committee argues that the Bankruptcy Court incorrectly concluded that the Successor Liability Claims belong to the Debtors' bankruptcy estates under our decision in *Emoral*. We review each in turn.

A. A Properly Filed Petition Is Not a Jurisdictional Prerequisite.

Before considering whether Whittaker properly entered bankruptcy, we encounter a predicate question: Does a properly filed petition affect a court's subject matter jurisdiction? Or is a valid petition instead a non-jurisdictional—but nonetheless integral—component of a bankruptcy case? We conclude it is the latter.

The Bankruptcy Code provides that, except in narrow circumstances, "on request of a party in interest, and after notice and a hearing, the court shall . . . dismiss a case under [Chapter 11] . . . for cause." 11 U.S.C. § 1112(b)(1). "Cause" typically includes things like "gross mismanagement of the estate," "failure to comply with an order of the court," and "material default by the debtor with respect to a confirmed plan." *Id.* § 1112(b)(4)(B), (E), (N). But it also includes occasions when a debtor "did not have the proper authority to commence the . . . bankruptcy proceeding." *In re 3P Highstown, LLC*, 631 B.R. 205, 209 (Bankr. D.N.J. 2021). In those cases, the court "has no alternative but to dismiss the petition." *Price v. Gurney*, 324 U.S. 100, 106 (1945).

The Supreme Court previously described this necessary component of the bankruptcy case as a limitation on courts' "jurisdiction," stating, in interpreting the predecessor statute to the Bankruptcy Code, "nowhere is there any indication that Congress bestowed on the bankruptcy court *jurisdiction* to determine that those who in fact do not have the authority to speak for the corporation . . . should be empowered to file a petition on behalf of the corporation." *Id.* at 107 (emphasis added).

"Jurisdiction," however, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). And some courts have taken *Price*'s mention of "jurisdiction" to mean a limitation on bankruptcy courts' subject matter jurisdiction. *See, e.g.*, *In re Parks Diversified, L.P.*, 661 B.R. 401, 415–420 (C.D. Cal. 2024) (collecting cases); *In re Mach I Aviation, Inc.*, No. 10-01225, 2011 WL 5838520, at *4 n.11 (B.A.P. 9th Cir. Sept. 15, 2011). Following that understanding, the absence of a properly filed petition would extinguish "a court's power to hear a case," leaving it no choice but to dismiss it for lack of jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

But in recognition of jurisdictional limitations' "unique potential to disrupt the orderly course of litigation," recent Supreme Court cases exercise greater care before hanging the "jurisdictional label" on a statutory provision. *Wilkins v. United States*, 598 U.S. 152, 157–58 (2023). Today the standard for concluding a statute limits federal courts' subject matter jurisdiction is an exacting one. While Congress need not employ any specific formulation or "incant magic words," "the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.'" *Boechler, P.C., v. Comm'r*, 596 U.S. 199, 203 (2022) (first quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013); then quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015)). Anything short of a clear indication will not do.

The statutes granting federal courts jurisdiction over bankruptcy cases do not attach jurisdictional significance to the propriety of a debtor's petition. The governing provision, 28 U.S.C. § 1334(a), provides only that, absent exceptions not relevant here, "the district courts shall have original and exclusive jurisdiction of all cases under title 11." In addition, "district court[s] may provide that any or all cases under title 11 . . . shall be referred to the bankruptcy judges for the district" who "may hear and determine all cases under title 11 . . . and may enter appropriate orders and judgments." *Id.* § 157(a), (b)(1). These statutes establish the jurisdictional grant for district and bankruptcy courts over bankruptcy cases, and neither they, nor any other provision, condition that grant on a properly filed petition.

Code § 301(a), which does deal with bankruptcy petitions, provides only that a voluntary bankruptcy "is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." This provision focuses on the commencement of a bankruptcy case by a *debtor*, not on the power to decide of the *court*. Simply put, § 301(a) "does not speak in jurisdictional terms," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), and we "will not lightly apply" the jurisdictional label to a provision absent a "clear statement" to the contrary, *Wilkins*, 598 U.S. at 158.

Accordingly, an improperly filed bankruptcy petition constitutes "cause" to dismiss a bankruptcy case, 11 U.S.C. § 1112(b)(1), but it does not strip bankruptcy courts of subject matter jurisdiction.

B. Whittaker Properly Filed Its Bankruptcy Petition.

The Supreme Court has long held that, "[i]n the absence of federal incorporation," "local law" governs a corporate debtor's authority to petition for bankruptcy. *Price*, 324 U.S. at 106. As corporations act through agents, "local law" is the non-federal rule that gives a corporation's agents—typically in those circumstances its board of directors—the "authority . . . to act." *Id.* And because "[c]orporations are creatures of state law," *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)), "it is state law which is the font of corporate directors' powers," *id.* So we look to governing state law to determine the propriety of a corporation's bankruptcy petition. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 206 (5th Cir. 2018).

But which state's law governs? More precisely, in a situation such as this, where a South Carolina court has putatively exercised authority over the assets of a New Jersey corporation, do we assess the authority of

Whittaker's board to file for bankruptcy with reference to New Jersey or South Carolina law?

Fortunately, the parties make answering this question easy. They agree that New Jersey law governs the authority of Whittaker's board over its internal affairs, like petitioning for bankruptcy. Appellants' Second Supp. Br. 1; Appellees' Second Supp. Br. 2, 11; *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 317 (3d Cir. 2014) (where parties do not dispute governing law, we need not conduct a choice-of-law analysis). So the question becomes whether, under New Jersey law, the Receivership Order stripped Whittaker's board of the authority to file for bankruptcy. It did not.

While we stand far removed in time from the zenith of equity receiverships in this country, *see* David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* 56–60 (2001) (describing the rise of equity receivership in the late nineteenth century as a device for resolving corporate insolvency), this case proves that state courts retain the traditional equitable authority to appoint receivers for insolvent corporations. But that authority is not without limits, as this case also proves.

New Jersey law recognizes that "comity requires that [a foreign receiver] should be acknowledged and aided" to the extent that doing so is not "to the disadvantage of creditors resident [in New Jersey]." *Stone v. N.J. & H. R. Ry. & Ferry Co.*, 66 A. 1072, 1073 (N.J. 1907). So where a foreign court appoints a receiver, New Jersey courts generally "will appoint an ancillary receiver, [and] the assets will be so administered that creditors in [New Jersey] and in the foreign jurisdiction shall fare alike." *Id.*; *accord Clark* *v. Painted Post Lumber Co.*, 104 A. 728, 728 (N.J. Ch. 1918) (recognizing that "after the appointment of the receiver in New York, [an ancillary receiver] was appointed" by a New Jersey court); *Ware v. Supreme Sitting of Order of Iron Hall*, 28 A. 1041, 1043 (N.J. Ch. 1894) (recognizing that an ancillary receiver was appointed in New Jersey and "should be regarded as auxiliary to the [foreign] receiver").

New Jersey law authorizes its Superior Court to appoint receivers for New Jersey corporations. *See* N.J. Stat. Ann. § 14A:14-2(3) ("The court . . . shall have power to appoint and remove one or more receivers of the corporation."). That provision also permits the court to "enjoin the corporation, its officers and agents, from exercising any of its privileges and franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its property, except to a receiver, and except as the court may otherwise order." *Id.* This statute suggests that New Jersey has licensed its courts to exercise broad authority over domestic corporations consistent with its corporate law. Thus, on our reading, New Jersey law permits its courts to recognize foreign receivership orders and appoint an ancillary receiver to aid in the execution of foreign judgments, including by enjoining the corporation and its board from taking specific actions and exercising specific powers.

The Restatement (Second) of Conflict of Laws supports as much. In recognizing that courts may appoint a receiver over a foreign corporation, the Restatement observes that "[w]hen a principal receiver of a corporation has been appointed by a court of a state other than the state of incorporation, and it is intended to dissolve the corporation . . . , an ancillary receiver should be appointed for those purposes by a court of the state of incorporation." Restatement (Second) of Conflict of Laws § 367 cmt. d (Am. L. Inst. 1971). This is so because "only a receiver appointed by a court in the state where the corporation was incorporated can institute action to dissolve a corporation."[6] *Id.*

Accordingly, under New Jersey law and settled choice-of-law principles, the South Carolina Receiver needed to move for, and be granted, recognition in New Jersey and the appointment of an ancillary receiver to displace Whittaker's board's control over, *inter alia*, the company's privileges, franchises and assets. It did not do so, meaning Whittaker's board retained authority over those corporate decisions reserved to it by New Jersey law, including the decision whether to reorganize by filing for bankruptcy.

Appellants respond by invoking one of our Nation's oldest laws—the Full Faith and Credit statute, 28 U.S.C. § 1738. They contend that, under obligations imposed by that provision, "New Jersey would not ignore the Receivership Order, just as the Bankruptcy Court could not ignore it." Appellants' Second Supp. Br. 6–7. This argument falters on three fronts.

[6] Of course, neither New Jersey law nor the Restatement contemplates a state's authority over domestic corporations in instances of bankruptcy, as that power is an area of exclusive federal competence. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) ("The framers of the Constitution . . . granted plenary power to Congress over the whole subject of 'bankruptcies.'"). But the scenarios these authorities posit are sufficiently analogous in character to bankruptcy—in that they involve fundamental changes to a corporation's structure (or, in the instance of dissolution, existence)—that their precepts apply to the same extent when a board seeks to enter bankruptcy.

First, on its face, the Receivership Order does not reach as far as Appellants insist. Rather than extending to displace Whittaker's board's authority over corporate affairs, it purports only to give the South Carolina Receiver control of Whittaker's "assets" and the power and authority to "take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217. Nowhere does the Order speak to Whittaker's corporate affairs, including the board's authority under New Jersey law to decide whether to file for bankruptcy.[7] And in the absence of anything to the contrary in it, the default rule discussed above controls—namely, Whittaker's board controls the entity's corporate affairs, subject to lawful displacement under New Jersey law. Thus, because the Receivership Order on its own terms does not dictate the result Appellants assert, affording it full faith and credit under § 1738 does not lead to a different outcome.

Second, even if we assume the Receivership Order extended to corporate affairs, Appellees still did not attempt to enforce it against Whittaker. While an order rendered by a foreign court may warrant

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[7] Appellants have also argued that this type of interpretation is effectively an appeal of the Receivership Order and thus barred by the *Rooker-Feldman* doctrine, which essentially prohibits federal courts, save the Supreme Court, from reviewing final state court judgments. But if an order is interlocutory, the *Rooker-Feldman* doctrine applies only to those that are "effectively final" because, among other things, the parties have abandoned further litigation. *Cf. Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 459 (3d Cir. 2019). And here, state-court litigation over the Order is not abandoned—it is merely stayed. *See* 11 U.S.C. § 362(a). Indeed, Appellants expressed their intention to continue to litigate the Order if the stay were lifted.

recognition and enforcement under § 1738, "[e]nforcement measures do not travel with the sister state judgment," and full faith and credit "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998). So even spotting Appellants the enforceability of the Order, they needed to employ the enforcement mechanisms provided under New Jersey law outlined above, which they did not do (e.g., not securing the appointment of an ancillary receiver in New Jersey),[8] meaning their § 1738 argument fails on this basis too.

Third, and more fundamentally, were the South Carolina Court to issue an order purporting to place the control of Whittaker's corporate affairs in the hands of the South Carolina Receiver, we doubt its ability to do so. Our system of federalism embodies "the fundamental principle of equal sovereignty" among the states. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Implicit in that foundational organization of co-equal sovereigns is "the usual legislative power of a State to act upon persons and property within the limits of its own territory," permitting "different communities to live

[8] The Receiver contends that he should not have been required to seek appointment of an ancillary receiver in New Jersey because Whittaker "itself made [doing so] impossible" by "filing for bankruptcy before the South Carolina Court could even issue a written order memorializing its denial of [Whittaker]'s motion for reconsideration," characterizing Whittaker's position as "Kafka-esque." Appellants' Consolidated Reply Br. 21. But without an order lawfully preventing it from doing so, Whittaker's board was free to exercise its authority under New Jersey law to enter bankruptcy. The fact that the Receiver lost the race to the courthouse does not render the results invalid.

with different local standards." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023) (cleaned up).

But states' power to exercise control over actors within their respective borders is not without limits. Indeed, the Constitution has a great deal to say about the relations between states, their authority to decide the rights of foreign parties, and the application of their laws in instances of conflict. For instance, the Due Process Clause of the Fourteenth Amendment is long understood to impose limitations on state courts' authority to determine non-resident parties' rights. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 723–43 (1877); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). Likewise, the dormant Commerce Clause prohibits, among other things, "the enforcement of state laws 'driven by . . . economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Ross*, 598 U.S. at 369 (omission in original) (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008)).

So it is no surprise that the Constitution limits the authority a state court can exercise over a corporation incorporated in a sister state. Those limitations are as intuitive as they make good sense. A corporation's state of incorporation or principal place of business determines its domicile.[9] *See Daimler AG v. Bauman*,

[9] Whittaker's principal place of business is in Connecticut. We take no position on the authority a state in which a corporation has a principal place of business may exert over that corporation when it is incorporated in a different state. Neither party has argued that Connecticut is the proper forum to enforce the

571 U.S. 117, 137 (2014). And domicile has long carried with it great significance for states' authority. *See id.*; *Pennoyer*, 95 U.S. at 723. Among the many powers over their domiciliaries, states may determine "'any and all claims' brought against a [resident] defendant." *Ford Motor Co.*, 592 U.S. at 358 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). But "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). Thus, when it comes to control over corporate decision-making, a state "has no interest in regulating the internal affairs of foreign corporations." *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982).

But as Appellants would have it, that is precisely what the South Carolina Court did in this case. They contend that the Receivership Order, properly construed, "divest[ed]" Whittaker's board of authority to conduct the internal affairs of the corporation—including the authority to file for bankruptcy.[10] Oral

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Receivership Order or that its law governs. Accordingly, we limit our discussion to New Jersey and South Carolina laws, as the parties have framed this case.

[10] Appellants seemingly take the position that the Receivership Order did far more than merely attempt to prevent Whittaker from filing for bankruptcy. At oral argument, when asked whether, in their view, the Receivership Order authorized the South Carolina Receiver "to amend the bylaws of the corporation, to enter into mergers," or to "[c]hange domicile," counsel for Appellants neither disavowed those actions nor offered a limiting

Arg. Tr. 15:17. As explained above, the Order, reasonably interpreted, does not extend so far. And if it did, it would be an unprecedented exertion of power over a foreign corporation whose internal affairs are governed by the laws of a sister state, and a radical intrusion into the province of a co-equal sovereign.

These constitutional infirmities provide an independent basis to reject Appellants' appeal to § 1738. Rendering full faith and credit to foreign judgments does not entail blind deference in the face of constitutional limitations. Just as "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, . . . other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) (footnote omitted). So where, as here, the parties did not litigate the constitutionality of the state-court judgment, § 1738 does not require New Jersey to acquiesce in the enforcement of the Receivership Order without assessing its (doubtful) constitutionality.

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"Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'" *Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). But while bound together in a federal union, certain powers are reserved to states' respective provinces to the exclusion of sister states. Among others, the state of incorporation enjoys the exclusive

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principle for their interpretation of the Order. Oral Arg. Tr. 14:1–3.

authority to govern the internal affairs of its corporations. Thus, consistent with constitutional constraints, New Jersey law governs and sanctions the Whittaker board's authority to petition for bankruptcy. And in any event, the Receivership Order did not purport to divest that body of the authority to seek bankruptcy protection, as the Bankruptcy and District Courts correctly concluded.

C. Successor Liability Claims Are Property of the Debtors' Estates.

As Whittaker properly entered bankruptcy, we now turn to consider whether the Successor Liability Claims belong to the Debtors' estates. We conclude they do.

At the outset of a bankruptcy case, Code § 541(a)(1) establishes an estate comprised of "all legal or equitable interests of the debtor in property," including causes of action, "wherever located and by whomever held." This feature of bankruptcy law can have significant repercussions, for "once a cause of action becomes the estate's property, the Bankruptcy Code gives the trustee, and only the trustee, the statutory authority to pursue it."[11] *In re Wilton Armetale, Inc.*, 968 F.3d 273, 280 (3d Cir. 2020). So whether a claim is in or out of the estate determines who can pursue (and recover on) that claim—a difference, as this case demonstrates, with significant consequences.

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[11] As mentioned already, *supra* note 4, in Chapter 11 cases (where there is seldom a trustee) the debtor in possession enjoys "all the rights . . . and powers . . . of a trustee," save for exceptions not relevant here. 11 U.S.C § 1107(a).

In order for a claim putatively held by a creditor to belong to the estate, two conditions must be met: (1) it must have existed at the outset of the bankruptcy, and (2) it must be a "general" claim, meaning one "with no particularized injury arising from it." *Emoral*, 740 F.3d at 879 (quoting *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002)). Whether a claim is "general" to all creditors or "personal" to a specific creditor calls for an "examin[ation of] the nature of the cause of action itself." *Id.* In doing so, "we focus not on the nature of the injury, but on the 'theory of liability.'" *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879).

"General" claims are ones "based on facts generally available to any creditor, and [for which] recovery would serve to increase the pool of assets available to all creditors." *Emoral*, 740 F.3d at 881. Contrast this with "personal" claims, which are "specific to the creditor" and in which "other creditors generally have no interest." *Id.* at 879 (quoting *Foodtown*, 296 F.3d at 170). A claim is "personal" when the creditor's injury can be "directly traced" to wrongful conduct committed by the defendant, whether that be the debtor or a third party. *Wilton Armetale*, 968 F.3d at 283 (quoting *In re Tronox Inc.*, 855 F.3d 84, 100 (2d Cir. 2017)). A claim is "general" if the creditor's theory of liability depends on facts concerning the relationship between the defendant and another party—that is, "facts generally available to any creditor." *Emoral*, 740 F.3d at 881.

In *Emoral*, we applied this standard to a case that shares many similarities with this one. The debtor (Emoral) manufactured diacetyl, a chemical used in the food flavoring industry that was later found to cause various lung ailments. *Id.* at 877. Through a complicated procedural history, a group of plaintiffs eventually sued Aaroma Holdings LLC—a company that bought some of Emoral's assets and assumed some of its liabilities in the bankruptcy case—for diacetyl-related injuries they suffered from Emoral's products. *Id.* The plaintiffs proceeded against Aaroma on the theory that it was the "mere continuation" of Emoral and thus liable for the plaintiffs' diacetyl-related personal injury and product liability claims as Emoral's successor. *Id.*

We held that the plaintiffs' successor liability claims against Aaroma were "general" claims and belonged to Emoral's bankruptcy estate rather than individual creditors. *Id.* at 880. Because they had not alleged "any direct injury" caused to them by Aaroma, the plaintiffs "fail[ed] to demonstrate how any of the factual allegations" were "unique to them as compared to other creditors of Emoral." *Id.* at 879–80. While the plaintiffs "focus[ed] on the individualized nature of their personal injury claims against Emoral," the same could not be said about their claims against Aaroma. *Id.* at 879. Their only theory of liability as to those claims depended on Aaroma's status as Emoral's successor, not its relationship with or conduct toward the plaintiffs.

This case mirrors *Emoral*, and that sounds the death knell for the Committee's argument.[12] Start from the beginning: The Committee's theory of liability against Brenntag depends exclusively on the latter's relationship with the Debtors, not on any

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[12] All agree the Successor Liability Claims existed as of the Debtors filing bankruptcy, so *Emoral*'s first prong is satisfied and we focus on the second. *See* Appellant Committee's Opening Br. 25 (not disputing this element); Appellees' Answering Br. 20.

interaction with the individual claimants themselves. It attempts to hold Brenntag liable under a "product line" tort theory, which, to repeat note 2 above, "imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation and practices." Appellant Committee's Opening Br. 33. While that theory of liability is distinct from the "mere continuation" theory advanced in *Emoral*, the Committee here—just as the plaintiffs in *Emoral*—seeks to impose the Debtors' liability onto Brenntag solely due to its status as the Debtors' successor, not because of any "particularized injury that can be 'directly traced' to [its] conduct." *Wilton Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100). So the Successor Liability Claims against Brenntag belong to the Debtors' estates, meaning they are for the Debtors to pursue or settle, not the Committee.

The Committee challenges this logic on two fronts. It contends that "[t]he absence of an independent right under state law for the Debtors to bring on their own behalf at least a subset of the Successor Liability Claims . . . demonstrates that the Debtors cannot satisfy the first part of the *Emoral* test." Appellant Committee's Opening Br. 32 (quoting *Emoral*, 740 F.3d at 879). For this assertion, the Committee calls out language from a footnote in *Foodtown* that "[a] cause of action is considered property of the estate if [1] the claim existed at the commencement of the filing and [2] the debtor could have asserted the claim on his own behalf under state law." 296 F.3d at 169 n.5 (citing *Butner v. United States*, 440 U.S. 48, 54 (1979)). From this statement, the Committee seeks to add a third prong to that property-of-the-estate test, namely that a debtor must have a state cause of action to assert before filing for bankruptcy in order for a claim to be property of the estate.

But this argument divines too much from too little. Elsewhere in *Foodtown* itself, we recited the now-familiar standard noted above governing when claims become property of the estate: "In order for the claim to be the 'legal or equitable interest of the debtor in property,' the claim must be a 'general one, with no particularized injury arising from it.'" *Id.* at 170 (quoting *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)). We reiterated that test in both *Emoral* and *Wilton Armetale*, *see* 740 F.3d at 879 & 968 F.3d at 282, and neither time did we impose an additional, freestanding condition that a debtor be able to pursue the cause of action under state law for it to become property of the estate. So while the ability to "assert[] the claim on his own behalf under state law" is enough to become property of the estate, it is not necessary. *Foodtown*, 296 F.3d at 169 n.5. Thus, any inability by the Debtors to assert the Successor Liability Claims against Brenntag outside of bankruptcy does not affect whether those claims are property of the estate inside bankruptcy.[13]

The Committee also argues that the Successor Liability Claims are not "general" because the theory of liability against Brenntag (the product-line theory)

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[13] In *Emoral* we expressed doubt that such an inability made a difference to whether a claim was properly characterized as "general." 740 F.3d at 881 ("As a practical matter, it is difficult to imagine a factual scenario in which a solvent Emoral, outside of the bankruptcy context, would or could bring a claim for successor liability against Aaroma.").

involves "specific claims exclusively belonging to victims injured by defective products," and "[t]hey arise from harms unique to those victims . . . based on conduct of the successor entity." Appellant Committee's Opening Br. 33. Those claims do not inure to the benefit of all creditors, the Committee asserts, because they are only available to "personal-injury and environmental tort creditors; they do not include, for example, the Debtors' various commercial and contract creditors." *Id.* at 36.

While this argument may have intuitive appeal, our precedent has already rejected it. When assessing whether a claim is "general" or "personal," we "focus not on the nature of the injury, but on the 'theory of liability.'" *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879). As the Committee presses a "product line" theory, we evaluate whether the facts necessary to establish liability under *that theory* are "generally available to any creditor." *Emoral*, 740 F.3d at 881.

The product-line theory depends entirely on the successor's relationship with the manufacturer because it is the successor's acquisition and continuation of the "same manufacturing operation and practices" as the manufacturer that seeds potential successor liability to individual claimants. Appellant Committee's Opening Br. 33 (citing *Ramirez*, 431 A.2d at 820). That sort of pass-through liability—using the manufacturer as a conduit to reach the successor—was rejected in *Emoral* because the facts on which liability depended—the successor's relationship with the manufacturer—do not implicate a claim that is "specific to the creditor." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 170).

So too here. The talc claimants' injuries do not stem from the nucleus of facts that underlay Brenntag's status as a successor to the Debtors. They trace only to the exposure to asbestos-contaminated products manufactured by the Debtors at a time before Brenntag was even in the picture. This obviates their being "directly traced" to it. *Wilton Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100). Those claims are quintessentially "general."[14]

To be sure, the Committee correctly points out that its constituents have each suffered "harms unique to [them]." Appellant Committee's Opening Br. 33. Indeed, this echoes arguments raised in the *Emoral* dissent, which would have held that "[b]ecause the Diacetyl Plaintiffs' underlying allegations are clearly individualized in nature, their claims against Aaroma—which seek to hold this third party liable for their alleged injuries as the 'mere continuation' of Emoral—must also be considered as individualized

[14] At oral argument, the Committee gestured at the prospect of conceiving its constituents' claims as "direct" and stemming from Brenntag's own conduct, namely its status as "a successor who continues to manufacture the product." Oral Arg. Tr. 77:6–7. But this characterization merely repackages the product-line theory and runs into the same problems. True, the Committee's product-line claims depend, in some measure, on Brenntag's conduct. In order to be a successor susceptible to the product-line theory, Brenntag must have actually continued the product line, which it has. But that fact was equally present in *Emoral*, where the diacetyl plaintiffs' "mere continuation" claims depended in part of Aaroma's purchase of Emoral's assets and continuation of its business enterprise. *Emoral*, 740 F.3d at 880. So while successor liability claims at some level depend on actions by the successor, the injuries to the Committee's constituents cannot be "directly traced" to Brenntag's conduct because they stem from *the Debtors'* manufacture and sale of asbestos-contaminated products. *Wilton Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100).

claims." *Emoral*, 740 F.3d at 883 (Cowen, J., dissenting). The *Emoral* majority, however, rejected that focus on "the nature of the [underlying] injury," instead returning to consideration of "the 'theory of liability'" and the facts on which it relies. *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879). And that analysis controls even though the harm suffered by some creditors "might be worse in degree than that suffered by other[s]."[15] *Id.* at 283.

IV. CONCLUSION

Whittaker filed for bankruptcy after its board exercised its power to authorize the petition. The South Carolina Court could not divest Whittaker's board of that authority on its own, and, once appointed, the South Carolina Receiver had to move successfully a New Jersey court to displace the board. That did not occur (indeed, the attempt was not made), and Whittaker properly entered bankruptcy. Once

[15] The Bankruptcy Court held in the alternative that § 544(a)(1), coupled with § 541(a)(7), brought the Successor Liability Claims into the Debtors' estates. Section 541(a)(7) provides that "[a]ny interest in property that the estate acquires after the commencement of the case" becomes property of the estate. So because the debtor in possession enjoys the rights of a trustee under the Code—including the right to pursue estate causes of action, *Wilton Armetale*, 968 F.3d at 282—the Bankruptcy Court reasoned that the post-petition cause of action conferred on the trustee by § 544(a)(1) is after-acquired property of the estate under § 541(a)(7). *See In re Whittaker, Clark, & Daniels*, 663 B.R. at 14. Thus, because, in the Bankruptcy Court's view, the Successor Liability Claims could be asserted by a trustee under § 544(a)(1), § 541(a)(7) drew those claims into the Debtors' estates. While the parties have devoted portions of their briefs and arguments to address this alternative holding, we need not consider it because we conclude that our decision in *Emoral* makes the Successor Liability Claims property of the estate under § 541(a)(1).

there, Code § 541(a)(1) and *Emoral* brought the Successor Liability Claims into the Debtors' estates.[16] For these reasons, we affirm the judgments of the District and Bankruptcy Courts.

KRAUSE, *Circuit Judge*, concurring.

I join the majority opinion in full. As it persuasively explains, New Jersey law governs the authority of Whittaker's board to exercise corporate authority, and the South Carolina Court did not—and likely could not—unilaterally divest the board of that authority. Once in bankruptcy, moreover, our decisions in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), and *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020), straightforwardly dictate that the Successor Liability

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[16] Supplementing note 5 above, we are aware that the Debtors, having prevailed in the Bankruptcy Court, have moved for approval of a settlement of the Successor Liability Claims with Brenntag, National Indemnity, and others. Naturally, our conclusion that the Successor Liability Claims are property of the estate under § 541(a)(1) puts the ball in the Debtors' court, and it is their prerogative to pursue or settle those claims. But we note that the Debtors do not enjoy unbounded discretion. As debtors-in-possession, they owe fiduciary duties to all creditors, including the Committee's constituents, to maximize the value of the estate. *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998). Sometimes the most beneficial course may be to settle claims and avoid the cost and uncertainty of litigation. Other times it may not. For that reason, bankruptcy courts must scrutinize proposed settlements under Bankruptcy Rule 9019 "to determine what course of action will be in the best interest of the estate." *In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996). And that scrutiny is "rigorous[]" when the debtor looks to settle with an insider. *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 412 (3d Cir. 2009) (quotation omitted). We have no doubt the Bankruptcy Court will evaluate the Debtors' proposed settlement with these precepts in mind.

Claims are property of the estate under 11 U.S.C. § 541(a)(1). I write separately, however, to address which choice-of-law rules govern in bankruptcy—an issue that both looms in the background of this case and that has divided courts for decades.

Both parties ultimately agree that New Jersey law governs Whittaker's authority to petition for bankruptcy protection, but they also recognize that there are two distinct paths to that choice of law—the "forum state" rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), on the one hand, and a federal common law choice of law rule, incorporating the internal affairs doctrine, on the other. Here, because the forum state is New Jersey and because Whittaker is a New Jersey corporation, those paths converge. But, as highlighted in the parties' briefing and argument on this question, each rule involves a different analysis and is capable of producing a different outcome. And confusion about how to resolve this conflict-of-laws question in bankruptcy cases will persist in our Circuit absent guidance from our Court. I write here with an eye towards that eventual resolution. As it turns out, the answer lies in established doctrine. For the reasons explained more thoroughly below, the Bankruptcy Code; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act; and the grant of bankruptcy jurisdiction to federal courts all support employing the choice-of-law rules of the state in which the bankruptcy court sits.

I. <u>The Puzzle: Choice of Law in Bankruptcy</u>

Federal courts are most often called on to resolve choice-of-law questions while exercising diversity jurisdiction. In those cases, non-federal law (usually state law) provides the rule of decision, *Erie*, 304 U.S. 64, and diverse parties might dispute which law governs their claims. When those candidate laws conflict, courts must decide which one controls. To answer that question, a federal court sitting in diversity uses the choice-of-law rules of the state in which it sits. *Klaxon*, 313 U.S. at 496.

Our Court has not previously determined whether the same rule applies in bankruptcy proceedings.[1] But some of our sister circuits have entered this fray, coming to differing conclusions. The Eighth Circuit applies *Klaxon* in bankruptcy cases, directing that "bankruptcy court[s] appl[y] the choice of law rules of the state in which it sits," *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000), and that "when some federal interest requires a different result," the "appropriate question" is not choice-of-law but rather rule of decision, i.e., "whether the state [law] can trump the federal [law]," which it obviously cannot, *In re Schriock Constr., Inc.*, 104 F.3d 200, 201–02 (8th Cir. 1997) (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)).[2] The Ninth Circuit (and possibly the Fifth), on the other hand, have rejected *Klaxon* in bankruptcy cases and instead require a federal common law choice-of-law rule. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995); *Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972). *But see Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920

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[1] *See In re Abeinsa Holding Inc.*, No. 20-3333, 2021 WL 3909984, at *3 (3d Cir. Sept. 1, 2021) (noting that our Court has "not yet precedentially resolved the choice-of-law rules applicable in bankruptcy proceedings").

[2] To be sure, the Eighth Circuit adopted *Klaxon*'s rule in bankruptcy without much reasoning. *See In re Payless Cashways*, 203 F.3d at 1084.

F.3d 932, 935 (5th Cir. 2019) (describing *Klaxon*'s application in bankruptcy as "an open question"). Finally, the Second and Fourth Circuits take a hybrid approach—applying *Klaxon* "in the absence of a compelling federal interest which dictates otherwise." *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1989); *see also In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (applying *Klaxon* unless "significant federal policy, calling for the imposition of a federal conflicts rule, exists"). In other words, in contrast to the Eighth Circuit, which would accommodate any overriding federal interest by applying a federal rule of decision, these courts would reach the same result but under the auspices of a choice-of-law rule.

This tripartite circuit split has persisted for decades and created disparities in how bankruptcy courts determine which law governs parties' rights and obligations. As I explain below, however, there is no basis to depart from the established rule from *Klaxon*, and, consistent with the Eighth Circuit's approach, any conflict-of-laws issue is properly resolved as a matter of rule of decision, not choice of law.

II. **<u>The Affirmative Case for Applying Klaxon in Bankruptcy</u>**

The reasons for extending *Klaxon* to bankruptcy are many and exceedingly strong. All relate to the structure of the Bankruptcy Code, the purposes the Code serves, and *Erie* and the Rules of Decision Act. I consider them in turn.

First, while bankruptcy provides an "orderly and centralized" process to restructure the debts of the honest but unfortunate debtor, 1 *Collier on Bankruptcy* ¶ 1.01[1] (16th ed. 2025), it does not create substantive property rights. Instead, consistent with the Rules of Decision Act, 28 U.S.C. § 1652, it is non-bankruptcy law that defines parties' property interests,[3] *Butner*, 440 U.S. at 55; *accord In re Boy Scouts of Am.*, 137 F.4th 126, 164 (3d Cir. 2025). Accordingly, courts exercising bankruptcy jurisdiction regularly look to governing non-bankruptcy law—often "state law"—to determine parties' "rights and obligations when the Code does not supply a federal rule." *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007) (Easterbrook, J.). And in doing so, those courts frequently encounter the same dilemma they do when sitting in diversity: conflicting laws that purport to govern parties' rights and interests.

As bankruptcy law takes parties' property rights as it finds them, *Butner*, 440 U.S. at 55; *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381 (2019), the fact that parties find themselves wound up in a bankruptcy case should not work to alter the law that would otherwise govern their rights, *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) (rejecting notion that participation in a class action changes the substantive law governing individual plaintiffs' disputes). But adopting a choice-of-law rule unique to bankruptcy risks just that and would subject identically situated parties to different governing laws simply by virtue of one dispute occurring in bankruptcy court while the other unfolds in run-of-the-mill civil litigation.[4] Our bankruptcy system does not

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[3] While "property" generally conjures images of real property or tangible items, in bankruptcy (and elsewhere), various intangibles, such as causes of action, similarly constitute property. *See, e.g.*, *In re Kane*, 628 F.3d 631, 637 (3d Cir. 2010).

[4] In addition to diversity cases, *Klaxon* governs choice-of-law questions where jurisdiction is anchored on other bases, including

demand—and, indeed, militates against—such a disparity. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544–45 (1994) (absent a clear and manifest conflict, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law"). And nothing in the text of the Code or the statutes granting bankruptcy jurisdiction warrants a departure from the ordinary rule of *Klaxon*. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Courts*, 169 U. Pa. L. Rev. 2193, 2212 (2021).

Second, influential bankruptcy scholarship buttresses this conclusion. As renowned scholars have advocated, the bankruptcy system in many ways "mirror[s] the agreement one would expect the creditors to form among themselves were they able to

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federal questions under 28 U.S.C. § 1331, *Shields v. Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987) (ancillary (now supplemental) jurisdiction); *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) ("Although *Klaxon* was a diversity jurisdiction case, the same principle holds true with respect to pendent jurisdiction claims."); *accord Elliott v. Cartagena*, 84 F.4th 481, 496 n.14 (2d Cir. 2023); *Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017); *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999); *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997); *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996); *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989); *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), and interpleader under 28 U.S.C. § 1335, *Griffin v. McCoach*, 313 U.S. 498, 503 (1941). Moreover, outside of federal court, state courts employ the forum's choice-of-law rules, *see* Restatement (Second) of Conflict of L. § 5 cmt. b (A.L.I. 1971) ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws.")—the practice that *Klaxon* aims to mirror.

negotiate such an agreement from an *ex ante* position." Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982). This view, coined the "creditors' bargain" theory, conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law, inefficiently picking the debtor apart and "destroying value for the collective body of creditors." Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. Chi. L. Rev. 1557, 1564 (2013). Without bankruptcy's centralization, "[a]n unsecured creditor who seizes the debtor's assets early enough in time, when the debtor has enough to pay, will receive full payment," while "[l]ate-arriving creditors are left out in the cold when the assets are not sufficient to pay the firm's debts." *Id.*

Viewed through this lens, among its other features, bankruptcy facilitates the orderly resolution of competing creditor entitlements that exist under governing non-bankruptcy law. Such a system takes as a given creditors' preexisting property interests and "does not . . . justify the implementation of a different set of relative entitlements, unless doing so is necessary as a part of the move from the individual remedies system" that exists outside of bankruptcy. Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21 (1986).

True, the Bankruptcy Code does change parties' "relative entitlements" in some circumstances in aid of debtor rehabilitation. *See, e.g.*, 11 U.S.C. §§ 364(d); 365(e), (i); 502(b); *see also* Daniel J. Bussel et al., *Bankruptcy* 33 (11th ed. 2021). But among the Code's voluminous rules, these provisions fall in the minority.[5] And as the creditors' bargain theory advances, non-bankruptcy entitlements generally should endure within bankruptcy, *see* Ayotte & Skeel, *supra*, at 1564–65 ("The second element of the Creditors' Bargain theory is the claim that resolution of common-pool problems may require altering the procedural rights of creditors, but that it typically does not require altering the substantive values of those rights as established by nonbankruptcy law."); *see also* 7 *Collier on Bankruptcy* ¶ 1100.01 (16th ed. 2025) (noting the importance of "preserv[ing] creditors' and stakeholders' existing legal rights to the greatest extent possible"), counseling in favor of adopting

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[5] To be sure, bankruptcy does not have to work this way. The Constitution reserves to Congress the authority to legislate for "the entire 'subject of Bankruptcies,'" *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006) (quoting U.S. Const. art. I, § 8, cl. 4), which encompasses "nothing less than . . . the relations between . . . [a] debtor, and [its] creditors," *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513–14 (1938) (internal quotation marks omitted). Congress could enact legislation that impairs any number of entitlements created by non-bankruptcy law. In this way, *Butner* is merely descriptive of the bankruptcy system that Congress has chosen to enact: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. at 54. It does not stand for the proposition that our Nation's bankruptcy laws *cannot* determine parties' relative entitlements, as scholars have pointed out. *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1751 (2020) (advancing a theory of Chapter 11 that "support[s] a soft version of *Butner*" positing that, "[i]n the absence of any evidence of hold up, nonbankruptcy provisions should remain intact . . . simply because in the absence of hold up there is no role for bankruptcy law").

Klaxon to preserve parity with parties' pre-bankruptcy positions vis-à-vis one another.

Third, extending *Klaxon* to the bankruptcy context is fully consistent with—and supported by—*Erie* and the Rules of Decision Act. *Klaxon* is a product of *Erie*, which announced "[t]here is no federal general common law." 304 U.S. at 78. Instead, where federal law does not govern, "[t]he laws of the several states" are "regarded as rules of decision . . . in cases where they apply." 28 U.S.C. § 1652. While *Erie* itself was a diversity case, it "reflects the principle now well established that federal courts should apply state law to legal issues, unless there is some definable federal interest sufficient to justify applying corresponding and possibly inconsistent federal rules of decision." 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update). *Klaxon* reflects the same principle, for "[a] choice-of-law rule is no less a rule of state law than any other." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995); *see also* Russell J. Weintraub, *The* Erie *Doctrine and State Conflict of Laws Rules*, 39 Ind. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."). Thus, it would seem that wherever *Erie* travels, *Klaxon* ought to follow. *See* Clopton, *supra*, at 2198 ("In short, *Klaxon* all the way down.").

In the bankruptcy arena, the Bankruptcy Code supplies the federal rules of decision that Congress has deemed necessary to effectively govern the relationship between the debtor and its creditors. Even a cursory review of the Code's "hundreds of interlocking rules," *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024), reveals that Congress took care to include many provisions that aim "to protect [] national" interests, *In re Trib. Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 94 (2d Cir. 2019); *see, e.g.*, 11 U.S.C. §§ 362(a) (automatic stay of collection of prepetition debts, including state-court litigation); 365(e) (invalidating *ipso facto* clauses); 546(e) (safe harbor for certain pre-petition securities transactions); 555–56, 559–61 (protections for post-petition securities, commodities, repurchase, swap, and netting transactions); 1110 (providing preferred rights to aircraft and vessel lessors).

As these provisions illustrate, Congress identified and manifested in the Code the specific federal interests it wished to protect; it did not leave readers to divine untold rules from some brooding cloud of federal interests hanging over bankruptcy. As we invariably do when construing federal statutes, we look to its text to discern meaning, *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 375 (3d Cir. 2022), and we "presume that [Congress] says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). So while "the Bankruptcy Clause confers broad authority on Congress," *Siegel v. Fitzgerald*, 596 U.S. 464, 476 (2022), to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, Congress has not dictated a particular choice-of-law rule to govern in bankruptcy cases.

This is a glaring omission in a sea of provisions relating to bankruptcies and not one we should presume Congress simply overlooked. To the contrary, we must respect the presumption that state law governs "until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979). It is not the role of federal courts to extend federal interests beyond those

Congress has prescribed. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring); *cf. Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (concluding that, when an exception to foreign sovereign immunity applies under the Foreign Sovereign Immunities Act, federal courts must apply *Klaxon* because the statute already protects the unique federal interest of foreign relations). Instead, "the issue of whether to displace state law . . . is primarily a decision for Congress," *Miree v. Dekalb Cnty.*, 433 U.S. 25, 32 (1977), and "[w]e should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act . . . so intimately related to state law," *Richards v. United States*, 369 U.S. 1, 11 (1962). In these circumstances, with a "federal statutory regulation [so] comprehensive and detailed," the usual rule applies that "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," negating the need to "adopt a court-made rule to supplement" the Code. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

Accordingly, there is no need to craft a choice-of-law rule unique to bankruptcy to preserve some "undefined federal interests" that do not appear in the Code.[6] *CoreCivic, Inc. v. Governor of N.J.*, No. 23-2598,

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[6] This is not to say that the Bankruptcy Code can never embody federal rules that do not appear in its specific provisions. Indeed, the Code can, and does, provide such rules of decision, such as where "pre-Code practice" has not been expressly abrogated by statute, *In re Hertz Corp.*, 120 F.4th 1181, 1198 (3d Cir. 2024), or where a rule "has long been considered fundamental to the

2025 WL 2046488, at *10 (3d Cir. July 22, 2025) (Ambro, J., dissenting). Rather, when a provision of the Bankruptcy Code governs, the Supremacy Clause obviates any choice-of-law analysis, for federal law always trumps conflicting state law. U.S. Const. art. VI, cl. 2; *see also infra* Section IV. And when the Code or other federal law does not supply the rule of decision, the Rules of Decision Act commands that governing non-federal law fills the gap. 28 U.S.C. § 1652. Outside of bankruptcy, that means *Klaxon* controls, and nothing about the bankruptcy context warrants departing from that rule.

Of course, *Erie*, and consequently *Klaxon*, arose in the context of diversity jurisdiction, so the extension of the policies those cases embody to other contexts is not obvious. And that uncertainty has caused some of our sister circuits to either reject *Klaxon* in bankruptcy cases or hedge on its application. *See, e.g.*, *In re Lindsay*, 59 F.3d at 948; *In re Gaston & Snow*, 243 F.3d at 601–02; *In re Merritt Dredging*, 839 F.2d at 206. To be sure, that hesitation is not unfounded. As scholars have noted, "[p]art of the explanation for the departures from *Klaxon* can be found in Supreme Court dicta" in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946). Clopton, *supra*, at 2204; *see also* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. Pa. L. Rev. 1847, 1875–78 (2017). There, the Supreme Court considered whether, and to what extent, an insolvent debtor must pay interest on delinquent interest payments due under a prepetition bond indenture under Chapter X of the Bankruptcy

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Bankruptcy Code's operation," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

Act. *Vanston*, 329 U.S. at 159. In doing so, the Supreme Court admonished:

> [O]bligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits.

Id. at 161–62. And it is this language upon which some courts have seized to conclude *Klaxon* has no application in bankruptcy cases because it is inconsistent with some amorphous federal interest. *See, e.g.*, *In re SMEC, Inc.*, 160 B.R. 86, 91 (M.D. Tenn. 1993); *In re McCorhill Publ'g, Inc.*, 86 B.R. 783, 792 (Bankr. S.D.N.Y. 1988).

But on closer inspection, *Vanston* says nothing about what choice-of-law rule a court should employ in bankruptcy cases when non-federal law provides the rule of decision. Rather than rejecting *Klaxon*'s application in favor of fashioning a bespoke federal choice-of-law rule for bankruptcy cases, the Supreme Court concluded that the bankruptcy courts "administer and enforce the Bankruptcy Act . . . in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles," whereas "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by *federal law*." *Vanston*, 329 U.S. at 162–63 (emphasis added). Thus, *Vanston* did not resolve the question of what choice-of-law rule courts employ when non-federal law governs a dispute in a bankruptcy case. Instead, it merely determined that when federal law provides a rule of decision that conflicts with state law, federal law controls—a proposition that flows directly from the Constitution. U.S. Const. art. VI, cl. 2; *see also In re Gaston & Snow*, 243 F.3d at 607 (interpreting *Vanston* in this way). *Vanston*, then, embodies nothing more than foundational and uncontroversial principle that federal law reigns supreme.

In sum, the structure of the Bankruptcy Code, the purposes of our bankruptcy system, and federal courts' obligation to respect the application of state law under *Erie* and the Rules of Decision Act all support *Klaxon*'s extension to bankruptcy cases.

III. Nothing Requires a Federal Choice-of-Law Rule in Place of *Klaxon*

Aside from seemingly the Eighth Circuit, no other Court of Appeals has extended *Klaxon*—without reservation—to the bankruptcy context. The Ninth Circuit, as well as the Second and Fourth Circuits, have also addressed the question, taking different approaches but each evincing an unwarranted suspicion of *Klaxon*'s relevance beyond diversity cases. I address each approach in turn.

The Ninth Circuit has long eschewed *Klaxon*'s rule in favor of federal choice-of-law rules. *In re Lindsay*, 59 F.3d at 948. In doing so, it stated that "the risk of forum shopping which is avoided by applying state law has no application [in bankruptcy cases], because [they] can only be litigated in federal court," and instead "[t]he value of national uniformity of approach" on this question prevails over a patchwork of state choice-of-law regimes. *Id.* Thus, "[i]n federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *Id.*

There are two flaws in this reasoning. First, it confuses the basis for federal jurisdiction with the question of governing law. A "federal jurisdictional grant . . . is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). Instead, as is by now clear, "it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956).[7] In other words, the observation that federal courts possess exclusive jurisdiction over bankruptcy cases is correct as far as it goes, but it merely identifies a potential choice-of-law question—it does nothing to resolve it. Instead, the existence of federal jurisdiction begets the downstream question of which law governs the dispute and how to decide that question in instances of conflict. That is a question of parties' *rights*, not federal courts' *jurisdiction*. *See Shutts*, 472 U.S. at 818. But by

[7] *See also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) ("[W]here Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so."); 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update) ("[T]he law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction. In other words, the choice of applicable law turns upon the source or genesis of the right or issue being adjudicated.")

reflexively employing a federal common law choice-of-law rule, the Ninth Circuit's approach risks altering parties' rights by selecting different law than would govern outside of bankruptcy.

That points up the second problem with the Ninth Circuit's approach. The *Lindsay* court touts a federal choice-of-law rule as carrying a great deal of "value" without greater explanation, seemingly elevating "national uniformity" for uniformity's sake. 59 F.3d at 948. But uniformity at what cost? Even accepting the premise that national uniformity has inherent value,[8] the value in uniformity does not outweigh the significant incongruities a bespoke bankruptcy choice-of-law rule portends. A federal choice-of-law rule in bankruptcy cases risks altering parties' substantive rights. State law governs many issues in bankruptcy cases, but none arises more frequently than property

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[8] In *Gaston & Snow*, the Second Circuit gestured at the notion that "an interest in uniformity can justify the creation of federal common law," 243 F.3d at 606, and cited the Supreme Court's decision in *Kimbell Foods* for that proposition. But *Kimbell Foods* does not speak to whether a federal choice-of-law rule should govern in bankruptcy. There, the Supreme Court determined that "the priority of liens stemming from federal lending programs must be determined with reference to federal law," *Kimbell Foods*, 440 U.S. at 726, which obviates the need of a choice-of-law inquiry because the Supremacy Clause requires application of federal rules of decision. Having concluded that federal law, rather than state law, provides the governing rule, the Court went on to define the content of that federal common law rule. And at that second step, the Court noted that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules" before "reject[ing] generalized pleas for uniformity" in favor of a federal common law rule that "adopt[s] the readymade body of state law as the federal rule of decision." *Id.* at 727–28, 730, 740.

interests. *See, e.g.*, *Butner*, 440 U.S. at 55. And the fact that a dispute turns up "in the context of a federal bankruptcy" proceeding "doesn't change much." *Rodriguez v. FDIC*, 589 U.S. 132, 137 (2020). So "[s]ince state, rather than federal, substantive law is at issue there is no need for a uniform federal rule." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Indeed, as the Fourth Circuit rightly noted, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *In re Merritt Dredging*, 839 F.2d at 206. But that disparity is exactly what the Ninth Circuit's approach invites, and it does so with no basis in the Code or the statutes granting federal courts jurisdiction over bankruptcy cases. Parties' property rights do not depend on the basis for a court's jurisdiction.

The approaches of the Second and Fourth Circuits are flawed as a doctrinal matter, though difficult to distinguish from the Eighth Circuit's in practice. Those courts have rightly observed that, in the ordinary course, the fact that a choice-of-law question arises in bankruptcy does not provide sufficient reason to depart from *Klaxon* because state law generally provides the substantive law governing a dispute, so *Erie* and the Rules of Decision Act control. *See In re Gaston & Snow*, 243 F.3d at 607; *In re Merritt Dredging*, 839 F.2d at 206.

They also theorize, however, that there may be exceptional cases when a "compelling federal interest," *In re Merritt Dredging*, 839 F.2d at 206, would require the application of a federal common law choice-of-law rule. Thus, they purport to adopt a safety valve by applying *Klaxon* only "in the absence of a compelling federal interest which dictates otherwise." *Id.*; *see also In re Gaston & Snow*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists."). In positing that carveout, these courts hypothesize a scenario where some federal interest compels abandonment of *Klaxon*. Though this rule may appear on its face to conflict with the rule from *Klaxon*, in practice, it does not. Tellingly, neither court has actually identified—much less confronted—such a situation. And the prospect of them ever doing so seems fanciful because their hypothesis runs headlong into the presumption against, and stringent criteria for, the making of federal common law.

At the outset, it is not clear whether the federal interest the Fourth and Second Circuits hypothesize would need to conflict with a state's choice-of-law rule or the substantive law that choice-of-law rule selects. If the former, it is particularly difficult to imagine what federal interest would conflict with the use of a specific choice-of-law rule given the absence of a federal choice-of-law rule provision in the Bankruptcy Code and the Code's indifference to the law that determines parties' rights and interests. *See infra* pp. 21–23. If it is the latter, then the real problem is not the use of a state's choice-of-law rule at all. Rather, as the Eighth Circuit has properly characterized it, the problem is the incompatibility between the non-bankruptcy law chosen to govern a dispute and the federal interest, because permitting a state law to "trump" the federal interest expressed in the Bankruptcy Code "would effectively convert the [] choice of law [question] to an 'anti-preemption' [question]." *In re Schriock Constr.*, 104 F.3d at 202. In short, the resolution to that conflict is application of a federal rule of decision and its priority over state law pursuant to the Supremacy Clause, not abandonment of *Klaxon*.

Even moving past this ambiguity, embracing the alternative to *Klaxon*—a federal choice-of-law rule—must "begin[] with the recognition that federal choice of law rules are a species of federal common law." *In re Gaston & Snow*, 243 F.3d at 605. But "those cases in which judicial creation of a special federal rule would be justified . . . [are] 'few and restricted.'" *O'Melveny*, 512 U.S. at 87 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). Crucially, the creation of federal common law is appropriate only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Indeed, "such a conflict [is] a precondition for" federal common law-making. *Id.* But where none exists, federal law "supplies no rule of decision," leaving non-bankruptcy law to govern the controversy. *Rodriguez*, 589 U.S. at 138.

In order to justify the Second and Fourth Circuits' approach that departs from *Klaxon*, yet requires a choice-of-law analysis—i.e., employing a federal common law choice-of-law rule—two conditions must be true: (1) there must be a sufficiently weighty federal interest in conflict with otherwise governing non-federal law to warrant fashioning a federal rule of decision to resolve conflicts among non-bankruptcy law, but (2) that interest must not be sufficiently weighty to justify fashioning a federal common law rule of decision. The former must be true to justify the "[j]udicial lawmaking" involved in crafting federal common law rules—lawmaking that "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress." *Id.* at 136 (quoting U.S. Const. art. I, § 1). The latter must be true in order to preserve any choice-of-law question at all, for if the federal interest is sufficiently important to justify creation of a federal rule of decision, then there is no "choice" among laws because the Constitution invariably resolves such conflicts in favor of federal law. U.S. Const. art. VI, cl. 2. In other words, for the Second and Fourth Circuits' approach to be correct—as opposed to the Eighth Circuit's, which accounts for an overriding federal interest as a matter of rule of decision, *see In re Schriock Constr.*, 104 F.3d at 202—a federal interest has to fall into the goldilocks zone: not too strong, yet not too weak.

Yet a review of the Bankruptcy Code and its policies establishes neither condition. The Code is agnostic about which body of non-bankruptcy law governs parties' rights—it simply "takes the [interest] as it finds it." *Bartenwerfer v. Buckley*, 598 U.S. 69, 82 (2023). That is to say, the Bankruptcy Code embodies no federal interest that favors the application of any particular non-bankruptcy law over another. And this makes good sense. It is "the basic federal rule" that "entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the . . . obligation." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000). Sometimes, federal non-bankruptcy law will control that issue. *See, e.g.*, *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168 (3d Cir. 2002). Other times, it may be state or foreign law that does. Either way, the Bankruptcy Code directs courts to consider parties' interest under whichever law governs outside of bankruptcy, and it then establishes a collection of rules to deal with those interests.

The Supreme Court's decision in *Butner* is not to the contrary. There, the Court famously held that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55. At first glance, this passage might seem to support the Second and Fourth Circuits' approach—after all, the Supreme Court included the proviso "[u]nless some federal interest requires a different result." *Id.* But on closer inspection, this line from *Butner* cannot be read as suggesting the possibility of a different choice-of-law rule to apply in bankruptcy.

Butner addressed whether "the right to the rents collected during the period between [a] mortgagor's bankruptcy and the foreclosure sale of the mortgaged property . . . is determined by a federal rule of equity or by the law of the State where the property is located." *Id.* at 49. In other words, the Supreme Court considered which body of law—state or federal—supplies the rule of decision for allocation of rents. It concluded, as a general matter, "[p]roperty interests are created and defined by state law." *Id.* at 55. But it also recognized that, while uncommon, federal law can sometimes define parties' property interests, especially where the United States is a party.[9] *See, e.g.*, *Clearfield Tr. Co. v. United States*, 318 U.S. 363,

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[9] The scenario is far from hypothetical, as the federal government is "one of the Nation's largest lenders," *Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 45 (2024), and is a frequent creditor in bankruptcies.

366 (1943). For this reason, the Court acknowledged that where federal law does govern property rights, that law controls. But *Butner* cannot reasonably be read to suggest that federal law provides the choice-of-law rule to decide among conflicting non-federal laws when it is those laws that provide the rule of decision. That is because *Butner* posits a scenario in which state property law is displaced due to "some federal interest [that] requires a different result," 440 U.S. at 55, not that this federal interest favors one state law over others. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007) (juxtaposing *Butner* and *Vanston* to illustrate this point). Put another way, reading *Butner* to license creation of a federal common law choice-of-law rule renders the proviso meaningless because, read in such a way, state law still governs the substantive property interest while federal law simply chooses among conflicting state laws. That plainly is not the dichotomy *Butner* envisioned. Instead, *Butner* stands for the far more straightforward proposition that state law generally governs parties' property interests except in the unusual case where federal law provides the rule of decision. It offers no insight, however, into how to choose among conflicting laws when non-federal law governs.[10]

[10] My concurring colleague disagrees, asserting that "[f]ederal courts can and do develop federal choice-of-law rules that select state substantive law." Concurring Op. 13. But the cited cases do not support that proposition; they merely recognize that courts can create federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107–09 (1991) (creating a rule of decision for derivative actions that incorporates the contents of state law rather than "displac[ing] state law in this area"); *Semtek*, 531 U.S. at 508–09 (describing the issue as "a

This result does not derogate those federal interests that do exist. To be sure, there are many areas of law in which Congress has legislated extensively. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*; Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64; Lanham Act, 15 U.S.C. § 1051 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* Perhaps none is a greater expression of a federal interest than those statutory provisions that completely preempt state law, i.e., those where a federal interest "is so powerful," *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23 (1983), that "federal law does not merely preempt a state law to some degree" but instead "substitutes a federal cause of action for the state cause of action," 14C Wright & Miller's Federal Practice & Procedure § 3722.2 (Rev. 4th ed. May 2025 update). Those instances are few, but important. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968) (Section 301 of the Labor Management Relations Act); *Metro. Life. Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (Section 502(a) of the Employee Retirement Income Security Act); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) (Sections 85 and 86 of the National Bank Act).

But again, in these instances—and all others where federal law supplies the rule of decision—there is no choice-of-law question, making *Klaxon* inapplicable.

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classic case for adopting, as the federally prescribed *rule of decision*, the law that would be applied by state courts," rather than creating "a contrary federal rule" (emphasis added)); *see also infra* note 13.

That is because the Constitution resolves vertical choice-of-law questions in absolute terms: "[I]f a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). In all other cases, non-federal law enjoys the usual presumption against "displacement." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). So it is only in the absence of a federal rule of decision—that is, in the absence of a federal interest warranting displacement of non-federal law—that a choice-of-law question arises. And at that juncture, the Bankruptcy Code is agnostic about which law governs, leaving "no reason [for] such interests [to] be analyzed differently" than if they had arisen outside of bankruptcy. *Butner*, 440 U.S. at 55.

* * *

The daylight between these positions—especially between those of the Eighth Circuit and the Second and Fourth Circuits—can be elusive, and the debate can easily be labeled esoteric. Relative to the number of questions governed by state law that arise in bankruptcies across the country, those that present genuine choice-of-law questions are admittedly few. And those whose outcome would change depending on the application of *Klaxon* versus a federal choice-of-law rule are likely fewer still. But apart from doctrinal clarity, which carries its own virtue, resolution of this question in the manner I have proposed serves two important purposes.

First, federal courts exercise limited powers. Perhaps nowhere is that power more at its nadir than in the area of fashioning federal common law. As the Supreme Court has admonished since *Erie*, those contexts that necessitate a federal common law rule are fleeting, and the criteria for recognizing such a rule are exacting. It is incumbent on us to candidly recognize the limits of our authority as a function of the Constitution's separation of powers. After all, "[t]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (omission in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)). Acknowledging that the federal courts' role in crafting common law is necessarily "modest," *Rodriguez*, 589 U.S. at 136, does much to guard against encroachment upon Congress's authority to legislate on the subject of bankruptcies.

Second, with doctrinal clarity and the acknowledgment of federal courts' limited authority comes clearer notice to litigants as to what rule they can expect to govern their rights. As discussed, the Ninth Circuit's departure from *Klaxon* is misguided. As for the Second, Fourth, and Eighth Circuits, their approaches in practice always have, and always will, lead to the same result—*Klaxon* applies in bankruptcy, but federal law necessarily provides the rule of decision "when some federal interest requires a different result." *In re Schriock Constr.*, 104 F.3d at 202. But by framing the question as choice-of-law instead of rule-of-decision and leaving the door open for a different choice-of-law rule in theory, the Second and Fourth Circuits invite needless litigation over *Klaxon*'s applicability and leave lingering uncertainty about which law will govern parties' disputes. They hypothesize a category of cases that, in reality, is a null set. No federal interest exists that will displace a state's choice-of-law rule without simultaneously requiring displacement of state substantive law in favor of a federal rule of decision. Instead of perpetuating the uncertainty surrounding the choice-of-law rule that governs in bankruptcy, we should recognize what practice teaches and give courts and litigants alike notice of the governing framework: The rule from *Klaxon* extends to bankruptcy cases.[11]

IV. Idiosyncratic State Choice-of-Law Rules Do Not License Abandoning *Klaxon*

For their part, among the options in this three-way circuit split, the parties urge us to adopt the Second and Fourth Circuits' hybrid approach to *Klaxon*, cautioning that we "should not adopt a rule that would require bankruptcy courts to follow idiosyncratic state choice-of-law rules even when doing so would create conflicts, encourage forum-shopping, or undermine significant federal interests." Appellees' Second Supp. Br. 11; *see also* Appellants' Second Supp. Br. 4. And to illustrate their point, Appellees pose the example of "a hypothetical forum state . . . reject[ing] the internal-affairs doctrine [to] allow its own idiosyncratic rules to dictate who speaks for a foreign corporation." Appellees' Second Supp. Br. 10. They insist that in such a scenario, "the federal interest in preserving the internal-affairs doctrine and orderly bankruptcy

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[11] My concurring colleague agrees that "state choice-of-law rules will almost always apply" in bankruptcy but insists that "[r]are is not never." Concurring Op. at 9–10. It is telling, however, that the concurrence does not identify a single instance—even a hypothetical one—that would require the application of a federal common-law choice of law rule, but would not result, in any event, in the application of federal law as the rule of decision.

filings would warrant a federal choice-of-law rule vindicating the internal affairs doctrine."[12] *Id.* at 11.

But choice of law is not a panacea, nor need we make it one. Instead, among other constraints, the Constitution places limits on the extent to which states may exert regulatory authority over parties' disputes and that resolve many of the concerns the parties raise here. Four constitutional provisions in particular—the Supremacy Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Due Process Clause of the Fourteenth Amendment, each of which is discussed below—provide a federal backstop to permissible state choice-of-law regimes.

First, and most intuitively for choice-of-law purposes, is the Supremacy Clause. U.S. Const. art. VI, cl. 2. In "split[ting] the atom of sovereignty" for our federal union, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), the Framers "provide[d] 'a rule of decision' for determining whether federal or state law applies in a particular situation," *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)). The Supremacy Clause supplies a bright-line rule to resolve "vertical" choice-of-law questions, i.e., those that implicate a conflict between federal and state law. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691 (2006). When

[12] Apart from the reasons I describe below, I agree with the majority that such a scenario is fanciful because it would violate the Constitution. Maj. Op. 24 ("[W]hen it comes to control over corporate decision-making, a state 'has no interest in regulating the internal affairs of foreign corporations.'" (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982)).

federal and state law are "in conflict or at cross-purposes," the Supremacy Clause embodies the "clear rule" that federal law prevails. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

Thus, when state courts consider which law governs a dispute, the existence of a controlling federal rule resolves any choice-of-law question, "[f]or the policy of the federal [law] is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393 (1947). In this way, the Supremacy Clause protects the federal authority to enact federal rules of decision to control in circumstances "necessary to protect uniquely federal interests." *Rodriguez*, 589 U.S. at 136 (quoting *Radcliff Materials*, 451 U.S. at 640).

Often, those federal interests will be embodied in a federal statute. But in few, yet important, contexts, federal courts have recognized the need to fashion "federal common law—substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress—that supplant state law," 19 Wright & Miller's Federal Practice & Procedure § 4514 (3d ed. May 2025 update), often when the controversy's subject matter closely relates to the federal government or falls within an area of exclusive federal competence, *see, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004) (admiralty); *Boyle*, 487 U.S. at 505–06 (civil liabilities of contractors under federal procurement contracts); *Clearfield Tr.*, 318 U.S. at 366 (rights and duties of the United States under federally issued commercial paper); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (apportionment of water rights between states).

To be sure, federal courts' common law-making authority "plays a necessarily modest role," and the

Supreme Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." *Rodriguez*, 589 U.S. at 136, 138. But in the narrow circumstances that command a federal rule of decision absent constitutional or statutory authority, the Supremacy Clause ensures that federal courts may still fashion such a rule and that contrary state law will yield.[13] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (recognizing the preemptive force of federal common law), *superseded on other grounds by statute*, Pub. L. 88-633, 78 Stat. 1013, *as recognized in*, *Fed. Republic of Ger. v. Philipp*, 592 U.S. 169, 179 (2021). After all, "exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 705 (1974). So that vertical choice-of-law rule, enshrined in our Constitution, does much to ensure that state choice-of-law rules do not unduly "undermine significant federal interests." Appellees' Second Supp. Br. 11.

Second, the Full Faith and Credit Clause occupies a modest, but important, position among the constitutional provisions bearing on choice of law. In relevant part, it provides that "Full Faith and Credit shall be given in each State to the public Acts, Records,

[13] When adopting a federal common law rule, federal courts must assess both "(1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point." *McVeigh*, 547 U.S. at 692. So in some circumstances, federal courts may "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation," and state law yields only in the sense that it is supplanted by an identical federal rule. *Kimbell Foods*, 440 U.S. 740.

and judicial Proceedings of every other State." U.S. Const. art. IV, § 1, cl. 1. As the Supreme Court has recognized, the Clause's purpose "was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935); *see also Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

In modern jurisprudence, much of the Full Faith and Credit Clause's function—and that of the statute with which it shares a name, 28 U.S.C. § 1738—occurs in the recognition of judgments rendered by foreign states. *See, e.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). But as the Supreme Court has recognized, the Full Faith and Credit Clause continues to have an enduring role in the regulation of "credit owed to [foreign] laws." *Id.* at 232. Indeed, "where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is . . . apparent." *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935).

Apart from its other commands, the Full Faith and Credit Clause, at a minimum, requires that a forum state confronting a horizontal choice-of-law question have "some rational basis" for applying its law over that of a sister state. *Id.* at 547–48. That basis must be above and beyond mere favoritism toward forum law, for a state does not have a legitimate interest in discriminating against another state's law simply by virtue of its foreign origin. *See First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 398 (1952); *Hughes v. Fetter*, 341 U.S. 609, 613 (1951); *cf. Metro. Life Ins.*

Co. v. Ward, 470 U.S. 869, 878 (1985) (holding that a state does not have a legitimate interest purely in favoring domestic economic interests over foreign ones).

Of course, the Full Faith and Credit Clause "does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939). And no doubt, in many cases, forum states will have rational, nondiscriminatory reasons for applying their law over that of others. *See, e.g.*, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947). But the Full Faith and Credit Clause does "set[] certain minimum requirements which each state must observe when asked to apply the law of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953), and it "requires that a state base its assertion of legislative jurisdiction on a claim that its interests are superior," not simply that conflicting law is foreign, Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2505 n.240 (1999). This constitutional floor provides yet another constraint on state choice-of-law regimes.

Third, the Privileges and Immunities Clause protects out-of-staters from discrimination on the basis of their foreign citizenship.[14] *See Supreme Ct. of*

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[14] This rule may sound identical to the constraint provided by the Full Faith and Credit Clause discussed above. But the two clauses play distinct roles. The Full Faith and Credit Clause concerns the respect owed by one state to the laws and judgments of another, while the Privileges and Immunities Clause concerns

N.H. v. Piper, 470 U.S. 274, 285 (1985); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (grounding the protection "against rank discrimination against citizens of other States" in the Privileges and Immunities Clause). In full, it provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Much like the Full Faith and Credit Clause, the Privileges and Immunities Clause was intended "to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

The Clause does not guarantee that citizens of each state are entitled to all of the same rights and benefits of citizens in other states, *see Piper*, 470 U.S. at 284, but only those that are "fundamental" to "the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382–83 (1978) (quotation omitted). It does, however, "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396.

The Supreme Court has recognized that access to a state's courts is among the privileges and immunities protected by the Constitution. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934); *Canadian N.*

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states' treatment of citizens of foreign states. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. art. IV, § 2, cl. 1 ("The *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in *the several States*." (emphasis added)).

Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920). And implicit in that guarantee is the constituent promise that a state may not withhold the application of its law to a citizen of another state in a situation in which it would extend that law to one of its own citizens solely by virtue of the out-of-stater's foreign citizenship. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (the Privileges and Immunities Clause "secures to [citizens of a foreign state] in other States the equal protection of their laws"); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 265–66 (1992). Thus, the Privileges and Immunities Clause "place[s] the citizens of each State upon the same footing with citizens of other States," thereby demanding citizens of foreign states derive the same benefit from a state's law that it would extend to its own citizens and prohibiting discrimination against out-of-staters because of their foreign citizenship. *Paul*, 75 U.S. at 180.

Fourth, and finally, the Due Process Clause of the Fourteenth Amendment substantively limits to which disputes states may extend their law.[15] In providing

[15] The Supreme Court's articulation of the Fourteenth Amendment Due Process Clause's limitations on state choice-of-law rules has been subject to nearly universal criticism. *See, e.g.*, Roosevelt, *supra*, at 2506–07; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 460–63 (1982). In comparing choice of law with the Court's personal jurisdiction jurisprudence, Professor Linda Silberman famously quipped, "[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, Shaffer v. Heitner, *The End of an Era*, 53 N.Y.U. L.

that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, the Clause requires "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality). Thus, where a state does not have sufficient contacts with a dispute, it lacks legitimate interests warranting extension of its law to the dispute, rendering application of its law "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822; *accord John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930). And in doing so, the Due Process Clause protects litigants against "unfair surprise or frustration of legitimate expectations" of the law governing their dealings.[16] *Allstate*, 449 U.S. at 318 n.24.

Rev. 32, 88 (1978). I do not take a side in this debate here. My point, rather, is that wherever the constitutional boundaries lie, so long a states' choice-of-law regimes fall within them, federal courts have no authority under the Bankruptcy Code, Rules of Decision Act, or statutes granting bankruptcy jurisdiction to supplant state choice-of-law rules in favor of federal ones.

[16] The Supreme Court has somewhat collapsed the inquiries under the Full Faith and Credit Clause and the Due Process Clause for choice-of-law purposes. *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 n.3 (1988); *see also* Herma Hill Kay et al., *Conflict of Laws* 381 (10th ed. 2018) (noting the convergence in the two analyses). Yet each imposes a different command: As explained above, the Full Faith and Credit Clause governs the respect owed to laws among states, while the Due Process Clause confers an individual right to be free from application of a state's law when that state has no meaningful

By recounting these well-trodden constitutional constraints, I do not seek to "embark upon the enterprise of constitutionalizing choice-of-law rules." *Sun Oil*, 486 U.S. at 727–28. Rather, these constitutional safeguards demonstrate that by extending the rule of *Klaxon* to bankruptcy cases, federal courts are not bound to reflexively apply impermissibly parochial state choice-of-law rules as Appellees warn. *See* Appellees' Second Supp. Br. 9–11. But absent running afoul of the limitations imposed by the Constitution, I find no basis (or authority) in federal bankruptcy law to constrain a state's authority to prescribe the choice-of-law rules that shall govern in its courts. Indeed, it is a feature of our federal system that it "leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors," and "it is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon*, 313 U.S. at 496.

Where states do not transcend constitutional barriers, *Klaxon*'s rule best serves the purposes of the Bankruptcy Code consistent with *Erie*, the Rules of Decision Act, and the presumption against federal common law-making. So just as *Klaxon* and *Erie* aim to preserve the substantive law governing a dispute notwithstanding the "accident of diversity,"[17] *Klaxon*,

connection to the dispute. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. amend. XIV, § 1 ("No *State* shall . . . deprive any *person* of life, liberty, or property, without due process of law." (emphasis added)).

[17] Of course, *Klaxon*'s interest in diminishing forum-shopping incentives between state and federal courts, *see* 313 U.S. at 496,

313 U.S. at 496 (citing *Erie*, 304 U.S. at 74–77), extending *Klaxon* in this manner avoids altering the substantive law governing a dispute simply because of the "happenstance of bankruptcy," *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961).

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The question of *Klaxon*'s applicability to bankruptcy has persisted for nearly 80 years. This case, just as with others our Court has encountered, permits us to elide the question of which choice-of-law methodology to employ. But we have the responsibility not to perpetuate this uncertainty. I hope that, in the appropriate case, we will resolve this question and give guidance to bankruptcy and district courts in our Circuit in a way that is consistent with the Bankruptcy Code, *Erie* and the Rules of Decision Act, and the policies underlying the grant of bankruptcy jurisdiction to federal courts.

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does not neatly map onto bankruptcy, as federal courts possess original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334(a). But just as plaintiffs may choose their favored forum in non-bankruptcy cases, consistent with proper venue, to gain a favorable choice-of-law rule, *see Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964), debtors too may choose a forum for purposes of a specific choice-of-law regime in bankruptcy cases where venue properly lies. And that sort of horizontal forum shopping incentive is "attributable to," and an irreducible component of, "our federal system." *Klaxon*, 313 U.S. at 496.

AMBRO, *Circuit Judge*, concurring

The *Erie* doctrine—taken from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny—is the North Star for determining whether federal or state law should apply in federal court. The answer is state law unless the matter is governed by superseding federal law, such as the Constitution, a congressional enactment, or federal common law. *See* Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, 19 *Federal Practice and Procedure* § 4501 (3d ed. 2025). *Erie* questions occur most often when federal courts sit in diversity-of-citizenship jurisdiction because those disputes usually involve only state substantive law. State law, however, includes more than just the underlying substantive law. The Supreme Court told us in *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), that it includes choice-of-law rules as well.

What force, if any, does *Klaxon* have in bankruptcy, where the parties' primary rights and interests are often governed by state law? We need not answer that question in a holding, as the parties agree on the law that governs: New Jersey's. *See* Wright, Miller & Cooper § 4506 (collecting cases for the proposition that courts need not determine which state's choice-of-law regime applies when the parties do not dispute that question).

Though "a pretty good reason for having 'skimmed over the conflicts problem as if none existed' was that none did exist," Henry Friendly, *In Praise of Erie – And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401 (1964) (citation omitted), the question whether *Klaxon* applies in bankruptcy has spawned interesting academic debate. Answers span the spectrum.

Compare, e.g., Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 PA. L. REV. 2193, 2203–06 (2021) (*Klaxon* applies without exception), *with* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 PA. L. REV. 1847 (2017) (*Klaxon* applies only in diversity actions). Our concurring colleague has staked out her position that *Klaxon* always applies in bankruptcy, no exceptions. Because I am uncomfortable with that view, I instead take the opportunity to make some nonbinding observations about *Erie* and choice of law.

I. *ERIE* AND *KLAXON*

A brief refresher on the *Erie* doctrine. Despite the almost mystical fascination that has long surrounded *Erie*, it stands for three basic propositions.

First, "[t]here is no federal *general* common law." *Erie*, 304 U.S. at 78 (emphasis added). "[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). When the Constitution *does* authorize Congress or courts to do so, however, *Erie* has no application, and federal law displaces contrary state law through the Supremacy Clause.

Second, without a federal statute or constitutionally authorized federal common-law rule, the Rules of Decision Act, 28 U.S.C. § 1652, commands federal courts to apply the rules of decision of their forum states "in cases where they apply." The Supreme Court has developed a framework for determining when a state law falls within the scope of the Rules of Decision Act. *See Gasperini v. Ctr. For*

Humanities, Inc., 518 U.S. 415, 427–28 (1996); *Hanna*, 380 U.S. at 468. The specifics of that framework are irrelevant for our purposes.

Third, when a Federal Rule (*e.g.*, the Federal Rules of Civil Procedure) conflicts with state law, then the Rules Enabling Act, 28 U.S.C. § 2072, not the Rules of Decision Act as construed by *Erie* and other cases, determines which law applies. *See Hanna*, 380 U.S. at 463–64; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987). The Rules Enabling Act is also irrelevant for our purposes.

Klaxon followed *Erie* and held that a federal court sitting in general diversity-of-citizenship jurisdiction is required to use the choice-of-law rules of its forum state. *Klaxon*, 313 U.S. at 496–97. The Court's reasoning was sparse, but its decision is best understood as falling into the *Erie* doctrine's second bucket—absent some constitutionally authorized federal law, the Rules of Decision Act kicks in. State choice-of-law rules are state rules of decision under that statute. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other ...."). But if Congress or federal courts invoke some source of constitutional authority to promulgate federal choice-of-law rules, then federal courts would instead find themselves in the first bucket. The Rules of Decision Act, and thus *Klaxon*, would no longer apply.

II. FEDERAL COMMON LAW AFTER *ERIE*

Although *Erie* ended the *general* federal common law, the Supreme Court has been unequivocal in recognizing that the *Erie* doctrine does not entirely displace federal common law. As Justice Brandeis acknowledged in a decision released on the same day as *Erie*, federal courts may still formulate special federal common law on issues of uniquely federal interest. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (concluding that interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests").

For example, federal courts may still generate common-law rules when "the policy of the law is so dominated by the sweep of federal statutes and doctrines developed under them that the legal relations they affect must be deemed governed by federal law." Wright, Miller, & Cooper § 4514. Likewise, it can sometimes "be inferred from congressional or constitutional intent that the federal courts should supply the necessary rule of decision by pronouncing common law to fill the interstices of a pervasively federal substantive framework." *Id.*

To be sure, the "cases in which judicial creation of a special federal rule would be justified … are … 'few and restricted.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). Before federal courts develop common-law rules, "a significant conflict between some federal policy or interest and the use of state law must first be specifically shown." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petrol.*, 384 U.S. 63, 68 (1966)). But when that happens, federal courts no doubt have the power to create special federal common law, including choice-of-law rules.

To recap: When Congress or federal courts validly promulgate some federal rule of decision under a source of constitutional authority, then federal law displaces contrary state law. Absent that kind of federal law, then the Rules of Decision Act applies, which commands federal courts to apply state rules of decision. Even after *Erie*, federal courts retain the power to promulgate special federal common-law rules when a strong federal interest requires such rules. Those cases, however, are rare.

III. WHAT CHOICE-OF-LAW RULES GOVERN WHEN FEDERAL COURTS SIT IN BANKRUPTCY?

This leaves our main questions: (1) Does *Klaxon* apply in federal bankruptcy litigation, and if so, (2) may federal courts ever use special federal common-law choice-of-law rules instead?

The circuits are split. The Ninth Circuit limits *Klaxon* to diversity cases, and thus federal courts must apply federal choice-of-law principles in bankruptcy cases. *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995).[1] The Eighth Circuit has arguably held that *Klaxon*

[1] The Fifth Circuit at one time took a similar view but seems more recently to have second-guessed whether it conclusively settled the question. *Compare Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972) ("In this federal bankruptcy case the District Court is not obliged to use the choice-of-law methodology of the forum state, Louisiana."), *with Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) ("[I]t is an open question in this circuit as to whether courts exercising bankruptcy jurisdiction should apply forum or federal choice-of-law rules.").

applies categorically in federal bankruptcy cases without exception. *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000). I say "arguably" because that decision passes on the issue in a single conclusory sentence with no further analysis. It is thus hard to conclude that the Eighth Circuit contemplated and rejected the possibility of exceptions. Finally, the Second and Fourth Circuits have held that *Klaxon* applies in federal bankruptcy proceedings unless a strong federal interest justifies creating federal choice-of-law rules as a matter of federal common law. *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); *In re Gaston & Snow*, 243 F.3d 599, 605–06 (2d Cir. 2001).

I believe that the Second and Fourth Circuits have it right. The Ninth Circuit is wrong because *Erie*, and thus *Klaxon*, is not limited to federal diversity jurisdiction. Whenever federal courts encounter an issue whose resolution is not a matter of federal law, the Rules of Decision Act compels them to use state substantive law, which includes choice-of-law rules. If the Eighth Circuit held that *Klaxon* applies without exception in federal bankruptcy cases, it is wrong as well. Federal courts after *Erie* retain constitutional power to promulgate special federal common-law rules, including choice-of-law rules, when strong federal interests justify doing so. "*Erie* did not fence off a 'local law field' constitutionally immune to federal influence; it was quite clear that exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARVARD L. REV. 693, 705 (1974).

A. *Erie* and *Klaxon* Apply Outside General Diversity Jurisdiction.

I believe it is wrong to conclude that *Erie* applies only in federal diversity cases. It applies to any "questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206; *see also Fagin v. Gilmartin*, 432 F.3d 276, 285 n.2 (3d Cir. 2005) (Ambro, J.) (invoking *Erie* to apply New Jersey law in a federal securities-law case brought under federal-question jurisdiction). Given the three-bucket framework I described above, this makes sense. Without on-point federal law, the Rules of Decision Act governs. And that statute does not turn on the basis of federal jurisdiction. *Erie* applies just as much when a court is sitting in its federal-question or bankruptcy jurisdiction as it does in general diversity. *See, e.g.*, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (applying *Erie* in pendent jurisdiction cases); *Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (applying *Erie* in interpleader cases).[2]

If we accept that *Erie* applies whatever the basis of federal jurisdiction, then it does not take much more

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[2] *Vanston Bondholders Protective Comm. v. Green* suggests that federal courts have wide latitude to devise common-law choice-of-law rules in bankruptcy. 329 U.S. 156, 161–62 (1946). When the Court decided that case, however, the Rules of Decision Act covered only common-law claims, and so it would not have applied to claims created by federal bankruptcy law. Clopton, *supra*, at 2205 n.76 ("For those who believe that the Rules of Decision Act plays an important role in *Erie* cases, that statute exclusively referred to common[-]law claims until two years after *Vanston* …."). The Court's mature *Erie* cases came only later. *See, e.g.*, *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Hanna,* 380 U.S. 460; *Byrd v. Blue Ridge Rural Elec., Inc.*, 356 U.S. 525, 537 (1958).

analysis to conclude that the same is true for *Klaxon*. Both *Erie* and *Klaxon* "make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206. That includes in bankruptcy. As the Fourth Circuit explained, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *Id.*

B. Federal Courts May Still Apply Federal Common-Law Choice-of-Law Rules in Bankruptcy Cases When Strong Federal Interests Warrant Doing So.

Klaxon applies in bankruptcy proceedings when addressing state-law questions; that much we agree on. The sole remaining wrinkle is whether federal courts sitting in bankruptcy must *always* apply the forum state's choice-of-law rules when the underlying issue is governed by state law. That is where I part with our concurring colleague. In Judge Krause's view, federal courts sitting in bankruptcy jurisdiction can *never* create federal common-law choice-of-law rules for some combination of five reasons.[3]

First, the Bankruptcy Code generally absorbs state laws to define the parties' property interests, and so it follows that state choice-of-law rules must also apply.

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[3] To avoid confusion on what follows, Judge Krause in part offers numbered reasons to extend *Klaxon* to the bankruptcy context. Those numbered reasons do not correspond to the numbered reasons I note below for why she believes federal courts in bankruptcy can never create special federal choice-of-law rules.

Conc. Op. 4–6. *Second*, the Bankruptcy Code is intended to facilitate the orderly resolution of competing creditors' claims without significantly affecting their underlying entitlements, and federal choice-of-law rules, if allowed, could change the outcome. *Id.* at 6–9. *Third*, federal courts have limited power to make federal common law. *Id.* at 19–20. *Fourth*, if there were some reason to create a federal rule of decision in bankruptcy, federal courts would be better off creating a rule of decision rather than a choice-of-law rule. *Id.* at 19–21. And *fifth*, any federal interest strong enough to generate a federal choice-of-law rule would be explicit in the Bankruptcy Code itself; the absence of choice-of-law rules in the Code means there is never any such interest. *E.g. id.* at 21.

None of the first four arguments supports the claim that federal courts can never create choice-of-law rules in bankruptcy—they support only the lesser claim that state choice-of-law rules will almost always apply. As noted, I agree with that conclusion. My colleague's fifth argument, however, is where we part, as the Supreme Court has recognized that even when bankruptcy otherwise looks to state law, sufficiently strong federal interests may warrant creating special federal common law.

1. Bankruptcy typically absorbs state law.

Our concurring colleagues observes, rightly, that federal courts sitting in bankruptcy "regularly look to governing non-bankruptcy law—often 'state law'—to determine parties' 'rights and obligations when the Code does not supply a federal rule.'" Conc. Op. 4 (citation omitted). If federal courts in bankruptcy used special federal choice-of-law rules that differed from those of the forum state, then the parties' choice of forum (or even the basis of federal jurisdiction) could change their primary rights.

This is true, but it does not establish more than we already know—*Klaxon* should ordinarily apply in bankruptcy. That federal courts confronted with state-law questions should use state choice-of-law rules to avoid jurisdiction-shopping is not an interest unique to bankruptcy. Yet even federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying act-of-state doctrine in diversity case). And when courts do so, neither *Erie* nor *Klaxon* prevents them from using those rules instead of state law.

At most, that bankruptcy ordinarily absorbs state substantive law supports a background presumption that federal courts in bankruptcy will rarely have a good reason to create federal choice-of-law rules. It does not support the broader argument that federal courts can never create special choice-of-law rules in bankruptcy.

2. Bankruptcy should rarely alter the parties' underlying entitlements.

Our concurring colleague next cites "renowned scholars" endorsing the "'creditors'[-]bargain' theory," which "conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law." Conc. Op. 6. On this view, bankruptcy ordinarily should not alter the parties' underlying entitlements.

I take no position on whether the creditors'-bargain theory is the best interpretation of the Bankruptcy Code as a whole. But even if it were, it would not provide an argument in support of the claim that federal courts sitting in bankruptcy lack the power to create federal choice-of-law rules. As above, this argument at most suggests that the circumstances are rare under which federal courts could justifiably create federal common law that affects the parties' underlying rights and entitlements. Rare is not never. There may be times when the purpose of the Bankruptcy Code may be best served by special federal choice-of-law rules. It may be unlikely that such a circumstance would arise, but it strikes me as overconfident and unnecessary to disclaim the possibility once and for all.

3. Federal common law is rare.

Judge Krause next observes, again correctly, that "the creation of federal common law is appropriate only in 'situations where there is a significant conflict between some federal policy or interest and the use of state law.'" Conc. Op. 20 (quoting *O'Melveny*, 512 U.S. at 87). "'[S]uch a conflict [is] a precondition for' federal common law-making." *Id.*

Once again, the premise is true, but it does not support the conclusion. If anything, Judge Krause acknowledges that federal courts *can* create federal common-law rules when there is a sufficiently strong federal interest threatened by state law. As with her argument that bankruptcy should rarely change the parties' underlying rights and interests, this argument mistakes rareness for impossibility. For common lawmaking to be rare, rather than impossible, courts must be able to do it in at least some cases.

Judge Krause also appeals at times to separation-of-powers principles and cautions against leaving courts "to divine untold rules from some brooding cloud of federal interests." Conc. Op. 10. But this misses the point. No one has suggested that federal courts can or should exercise freewheeling lawmaking power or identify federal interests without congressional guidance. *See generally CoreCivic, Inc. v. Governor of N.J.*, 2025 WL 2046488 (3d Cir. July 22, 2025) (Ambro, J., dissenting) (rejecting that view). But *Congress* may express federal interests through statute—for example, the Bankruptcy Code—and *courts* may, in rare circumstances, create federal common law to give effect to those congressionally endorsed interests, particularly when applying state law would undermine Congress's objectives.

4. Federal courts should create substantive rules of decision instead of choice-of-law rules.

Next, Judge Krause claims that it is hard to imagine a case involving a federal interest strong enough to justify federal common law, but not strong enough to justify a substantive rule of decision rather than a choice-of-law rule. In her view, "for the Second and Fourth Circuits' approach to be correct, … a federal interest has to fall into the goldilocks zone." Conc. Op. 20–21. Maybe so, but it will not surprise the reader to hear that this also is not an argument against the power of federal courts to create federal choice-of-law rules in bankruptcy. It is an argument for the claim that the circumstances when courts would need to do so are "few and restricted."

O'Melveny, 512 U.S. at 87 (quoting *Wheeldin*, 373 U.S. at 651). Judicial humility cautions against making the sweeping claim, in the absence of a case or controversy before us, that no such interest can exist just because one has not presented itself.

5. The Bankruptcy Code contains all relevant federal interests, and a choice-of-law rule is not among them.

The only argument my colleague makes that theoretically supports her claim that federal courts can never develop choice-of-law rules in bankruptcy is that the Bankruptcy Code is a comprehensive and reticulated statutory regime whose text exhausts all potential federal interests that could justify federal common-law rules. The lack of special choice-of-law rules in the Code means, in her view, that there is no such interest.

That premise is faulty because it would apply with equal strength to the power of federal courts to create substantive common-law rules in bankruptcy. Yet the Supreme Court has rejected that argument: "Property interests are created and defined by state law … [*u*]*nless some federal interest requires a different result*." *Butner v. United States*, 440 U.S. 48, 55 (1979) (emphasis added). If the Supreme Court has recognized that strong federal interests can sometimes allow federal courts to devise special rules of decision governing the parties' underlying property interests, I do not know why those interests could not also justify special choice-of-law rules.

Judge Krause claims that *Butner* stands only for the limited proposition that a strong federal interest can justify a federal substantive rule, "not that this federal interest [could] favor[] one state law over others." Conc. Op. 22. But *Butner* does not turn on the difference between substantive law and choice-of-law rules. It supports the broader principle that the selection of state rules of decision in bankruptcy must yield to overriding federal interests. On Judge Krause's view, a sufficiently strong federal interest could warrant a federal substantive rule, but never a choice-of-law rule. The unstated assumption seems to be that there could not be a strong federal interest that would justify a federal choice-of-law rule that ultimately selects state substantive law instead of a federal substantive rule. But that assumption is also faulty. Federal courts can and do develop federal rules that select state substantive law. *See, e.g.*, *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991) (formulating federal common-law rule for demand futility in federal derivative actions that incorporates the corporate law of the state of incorporation); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (formulating federal common-law rule for preclusion in general diversity actions and "adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits").

Judge Krause insists that cases like *Kamen* and *Semtek* are distinguishable because they involved "federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law." Conc. Op. 23 n.10. But it is unclear how that distinction defends her central claim, which I understood to be that any federal interest strong enough to authorize federal common law can justify nothing less than a uniform substantive rule. If federal courts can sometimes formulate a rule of decision whose content absorbs the law of the defendant's state of incorporation, then I do not understand why, at least in theory, they could not also formulate a choice-of-law rule that selects the law of the defendant's state of incorporation.

* * *

It is worth stepping back to get a clear view of my concurring colleague's argument. As I understand her, she does not believe *Erie*'s constitutional rule prohibits federal courts from developing special federal common law when the Constitution or federal statute authorizes them to do so. Nor does she believe that federal courts properly exercising their limited common-lawmaking authority lack the power to create a rule of decision that always incorporates the contents of state substantive law. At its core, her argument is merely that she cannot imagine a case in which a federal court would need to create a federal choice-of-law rule in bankruptcy. As she rightly notes, I cannot think of such a case either. Conc. Op. 27 n.11. But this is not an argument that federal courts lack the authority to make choice-of-law rules in bankruptcy.

IV. CONCLUSION

We should not succumb to the "beguiling tendency" to make "[c]onflict-of-law problems . . . more complicated than they are." *Vanston*, 329 U.S. at 169 (Frankfurter, J., concurring). If *Klaxon*'s application in bankruptcy becomes an issue, then I would endorse the sensible, never-say-never approach of the Second and Fourth Circuits: Absent an "overwhelming federal policy [that] requires us to formulate a choice of law rule as a matter of independent federal judgment, we adopt the choice of law rule of the forum state." *Merritt Dredging*, 859 F.2d at 206; *see also Gaston*, 243 F.3d at

607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.").

APPENDIX C

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	[SEAL OF THE COURT] **Order filed on September 25, 2024 by Clerk U.S. Bankruptcy Court District of New Jersey**
Caption in Compliance with D.N.J. LBR 9004-2(c)	Case No.: 23-13575
In Re: Whittaker, Clark & Daniels, Inc.	Hearing Date: n/a Adv. No.: 23-1045(MBK) Judge: Michael B. Kaplan
Whittaker, Clark & Daniels, Inc. Plaintiffs(s) v. Brenntag AG, et al. Defendant(s)	

ORDER CERTIFYING DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The relief set forth on the following pages, numbered two (2) through 3 is hereby **ORDERED**.

DATED: September 25, 2024

/s/ Michael B. Kaplan
Honorable Michael B. Kaplan
United States Bankruptcy Judge

This matter comes before the Court pursuant to the Joint Certification to the Court of Appeals by all parties in this case (ECF No. 329) (the "Joint Certification"), filed by appellants the Official Committee of Talc Claimants, Sarah Plant, Shelly Yerkes, Tara Valentine, on behalf of Patricia Krempecki, Deceased, Brian Bradford, Individually and as Personal Representative of the Estate of Eileen Pettijohn, Deceased, and appellees Whittaker, Clark & Daniels, Inc., Brilliant National Services, Inc., L. A. Terminals, Inc., Soco West, Inc., Brenntag Canada, Inc., Brenntag Great Lakes, LLC, Brenntag Mid-South, Inc., Brenntag North America, Inc., Brenntag Northeast, LLC, Brenntag Pacific, Inc., Brenntag Southwest, Inc., Brenntag Specialties, LLC (f/k/a Brenntag Specialties, Inc. and as Mineral and Pigment Solutions, Inc.), Coastal Chemical Co., LLC, Berkshire Hathaway Inc., National Indemnity Company, National Liability & Fire Insurance Company, Columbia Insurance Company, BH Columbia Inc., Ringwalt & Liesche Co., and Resolute Management, Inc., who are all the appellants and all the appellees; and the Court having reviewed the Joint Certification; and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Standing Order of Reference to the Bankruptcy Court Under Title 11 of the United States District Court for the District of New Jersey, dated September 18, 2012 (Simandle, C.J.); (b) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b); (d) notice of the Joint Certification was sufficient under the circumstances and no further notice is necessary; the Court further finds and concludes as follows:

1. A Notice of Appeal (ECF No. 297) was filed in the above-captioned chapter 11 case by the Appellants challenging the *Memorandum Opinion* (ECF No. 268) and *Order Granting Summary Judgment in Favor of the Debtors on Counts I and IV of the Complaint* (ECF No. 292) (together, the "Summary Judgment Order").

2. All of the Appellants and the Appellees agreed in the Joint Certification that a circumstance specified in 28 U.S.C. § 158(d)(2) exists because judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance; and an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

3. The Joint Certification was properly filed pursuant to 28 U.S.C. § 158(d)(2)(A).

4. The Court agrees with the Appellants and Appellees that the conditions of 28 U.S.C. § 158(d)(2) have been met; more specifically, that the Summary Judgment Order involves a matter of public importance and an immediate appeal from the Summary Judgment Order may materially advance the progress of the case or proceeding in which the appeal is taken;

5. Consistent with Rule 8006(c)(2) of the Federal Rules of Bankruptcy Procedure, the Court submits the following statement expressing its agreement that the Summary Judgment Order merits certification: Given the extensive record and briefing produced during hearings on this issue, the

Court finds that there is no need for further development in the district court. Instead, the direct appeal will materially advance the proceeding. The Summary Judgment Order implicates questions of public importance as it impacts the rights of mass-tort litigants.

Accordingly, for good cause, it is hereby

ORDERED that Joint Certification is GRANTED; and it is further

ORDERED that, pursuant to 28 U.S.C. § 158(d)(2)(A) and Rule 8006 of the Federal Rules of Bankruptcy Procedure, the Summary Judgment Order is certified for direct appeal to the United States Court of Appeals for the Third Circuit; and it is further

ORDERED that, following the issuance of this Order Certifying Direct Appeal, the next step is for the parties to file in the Third Circuit a petition for permission to appeal under Federal Rule of Appellate Procedure 5. The circuit court will not open any Third Circuit case until that petition is filed.

APPENDIX D

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	[SEAL OF THE COURT] **Order filed on August 28, 2024** **by Clerk** **U.S. Bankruptcy Court** **District of New Jersey**
Caption in Compliance with D.N.J. LBR 9004-1(b)	Chapter 11 Case No.: 23-13575 (MBK) (Jointly Administered)
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In re:
WHITTAKER, CLARK & DANIELS, INC., *et al.*,

Debtors.[1]

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEBTORS ON COUNTS I AND IV OF THE COMPLAINT

DATED: August 28, 2024

<u>/s/ Michael B. Kaplan</u>
Honorable Michael B. Kaplan
United States Bankruptcy Judge

WHITTAKER, CLARK & DANIELS, INC., BRILLIANT NATIONAL SERVICES, INC., L.A. TERMINALS, INC., and SOCO WEST, INC., Plaintiffs, v. BRENNTAG AG, BRENNTAG CANADA INC., BRENNTAG GREAT LAKES, LLC, BRENNTAG MID-SOUTH, INC., BRENNTAG NORTH AMERICA, INC., BRENNTAG NORTHEAST, INC., BRENNTAG PACIFIC, INC., BRENNTAG SOUTHEAST, INC., BRENNTAG SOUTHWEST, INC., BRENNTAG SPECIALTIES, INC., BRENNTAG SPECIALTIES LLC, COASTAL CHEMICAL CO., LLC, MINERAL AND PIGMENT SOLUTIONS, INC., THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT, and JOHN AND JANE DOES 1-1,000, Defendants.	Adv. Proc. No. 23-01245 (MBK)

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEBTORS ON COUNTS I AND IV OF THE COMPLAINT

The relief set forth on the following pages, numbered three (3) through seven (7), is **ORDERED**.

This matter coming before the Court on the *Debtors' Motion for Summary Judgment With Respect to Counts I, II, and IV of the Complaint* [Adv. Proc. Docket No. 3] (the "**Motion**");[2] and the Court having found and determined that (i) the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b), (ii) this matter is a core proceeding under 28 U.S.C. § 157(b), and (iii) venue is proper in this District pursuant to 28 U.S.C. § 1409; and the Court having considered the submissions of the parties, the Motion, the Meghji Declaration (including the incorporated First Day Declaration), the responses, objections and replies in respect of the Motion, and the evidence submitted by the parties, including declarations, testimony and exhibits filed with or presented to the Court, and *The Official Committee of Talc Claimants' Motion to Strike Hearsay and Other Inadmissible Testimony in the First Day Declaration and the Declaration of Mohsin Y. Meghji* [Adv. Proc. Docket No. 91] (the "**Motion to Strike**") filed by the Official Committee of Talc Claimants (the "**Committee**"), and upon all of the proceedings had before the Court, and the Court having issued an opinion setting forth its reasoning in granting the Motion [Adv. Proc. Docket No. 268] (the "**Opinion**") and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND, DETERMINED AND CONCLUDED THAT:

A. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of

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[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

Bankruptcy Procedure (the "**Bankruptcy Rules**"), made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Order constitutes a final appealable order within the meaning of 28 U.S.C. § 158(a). Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054(a), the Court expressly finds that there is no just reason for delay in the implementation of this Order, and expressly directs entry of this Order as to Counts I and IV of the Complaint as set forth herein without regard to any stay or delay in its implementation.

NOW, THEREFORE, BASED UPON ALL OF THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The findings of fact and conclusions of law set forth in the Opinion are incorporated into this Order by reference as if fully set forth herein.

2. Summary judgment is **GRANTED** in favor of the Debtors with respect to Counts I and IV of the Complaint filed in the Adversary Proceeding for the reasons set forth in the Opinion. All objections to the relief granted herein are **OVERRULED**.

3. The Motion to Strike is hereby **DENIED**.

4. The Court finds and declares that Successor Liability Claims constitute property of the Debtors' estates pursuant to sections 541(a)(1) and 541(a)(7) of the Bankruptcy Code. For purposes of this Order, the term "**Successor Liability Claim**" shall mean,

consistent with the Complaint, Motion and Opinion, any claim against a non-Debtor entity seeking to establish such entity's liability for Tort Claims on any grounds, including, without limitation, that such entities are successors to, or alter egos of, the Debtors. For purposes of this Order, the term "**Tort Claim**" shall mean, consistent with the Opinion: (1) claims alleging injuries resulting from exposure to products containing talc, asbestos, or chemical compounds processed or distributed by the Debtors or their predecessors in interest; and (2) environmental litigation claims against the Debtors relating to the production or handling of hazardous materials which allegedly contaminated certain properties.

5. The Debtors have exclusive standing to prosecute and seek to compromise Successor Liability Claims, absent further order of this Court.

6. Pursuant to the automatic stay set forth in section 362(a)(3) of the Bankruptcy Code, the commencement, continued prosecution, or settlement of any Successor Liability Claims, or any amendment or alteration of any Successor Liability Claims in an attempt to circumvent this Order, by a party other than the Debtors is expressly prohibited during the pendency of the Chapter 11 Cases, absent further order of this Court.

7. The Debtors and/or any Protected Party that is a party to an action asserting a Successor Liability Claim are authorized to file this Order on the docket in such action.

8. In the event of a dispute as to whether a claim in an action outside this Court constitutes a Successor Liability Claim or whether any action or conduct is otherwise prohibited by the automatic stay, any party

in interest may file and serve a motion seeking this Court's resolution of such dispute on counsel for each of the Debtors, the Committee, the FCR, the Protected Parties, the United States Trustee, and the applicable Tort Claimant. Any further proceedings against any Protected Party in such action shall be prohibited while such dispute is pending.

9. In the event of an appeal of this Order, the Debtors, the Committee, the Berkshire Entities, the Orange County Water District, and Brenntag shall negotiate and file an agreed upon joint certification for a direct appeal to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A) and Rule 8006(c) of the Federal Rules of Bankruptcy Procedure in connection with such appeal. If the parties cannot reach an agreement on a form of certification, the Court shall resolve the parties' dispute(s) upon the filing of an appropriate pleading.

10. The Debtors shall cause a copy of this Order to be served via e-mail or first class mail on counsel for the known Defendants, counsel for the Committee, counsel for the Protected Parties, the Office of the United States Trustee, and the parties listed on the Core Service List (as defined in the Case Management Order entered in the Chapter 11 Cases [Docket No. 67]) within three business days of its entry on the Court's docket.

11. The requirement set forth in D.N.J. LBR 9013-1(a)(3) that any motion be accompanied by a memorandum of law is hereby deemed satisfied by the contents of the Motion or otherwise waived.

12. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

13. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of the Bankruptcy Rules and the Local Rules are satisfied by such notice.

14. The terms and conditions of this Order shall be effective immediately upon its entry.

15. This Court shall have exclusive jurisdiction over this Order and any and all matters arising from or relating to the implementation, interpretation, or enforcement of this Order, including, without limitation, any and all determinations as to whether a claim constitutes a Successor Liability Claim and whether an action in respect of a Successor Liability Claim is subject to the automatic stay.

APPENDIX E

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY **Caption in Compliance with D.N.J. LBR 9004-1(b)**	
In re: Whittaker, Clark, & Daniels, et al. Debtors.	Case No.: 23-13575 (MBK) Chapter 11
WHITTAKER, CLARK & DANIELS, INC., et al., Plaintiffs, v. Brenntag AG, et al., Defendants.	Adv. Proc. No. 23-01245 (MBK) Hearing Date: December 5, 2023

All Counsel of Record

MEMORANDUM DECISION

This matter comes before the Court by way of a Motion (the "Motion," ECF No. 3[1]) filed by Whittaker, Clark & Daniels, Inc. and its affiliates ("Debtors") in Adv. Pro. No. 23-01245, seeking summary judgment in their favor with respect to Counts I and IV of the

[1] Unless otherwise specified, all ECF Nos. will refer to docket entries in the instant adversary proceeding, Adv. Pro. No. 23-01245.

Complaint. Specifically, Debtors seek a determination that certain claims brought by third parties against non-debtors in outside litigation ("Successor Liability Claims"), as defined in the Complaint, are property of the Debtors' estates. The Orange County Water District ("OCWD") and the Official Committee of Talc Claimants (the "Committee" or " Talc Committee") oppose Debtors' motion (ECF Nos. 86 & 90, respectively). The Debtors filed replies to the Talc Committee's and OCWD's opposition (ECF Nos. 99 & 100, respectively). Additionally, the future claimants' representative ("FCR")—appointed by the Court to serve as legal representative to represent and protect the rights of future claimants—filed a statement to apprise the Court of her views on the Motion.[2] The Court has fully considered the parties' submissions, as well as the arguments, evidence and testimony presented during the hearing on December 5, 2023. For the reasons set forth below, the Court grants the Debtor's motion for summary judgement on Counts I and IV.

I. Jurisdiction

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all bankruptcy cases to the bankruptcy court. As explained in detail below, this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A). Venue is proper in this Court pursuant to 28 U.S.C. § 1408 and § 1409.

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[2] The FCR has not moved to intervene in the adversary proceeding.

II. Background and Procedural History

The factual and procedural history of this case is well known to the parties and will not be repeated in detail here. In relevant part, Debtors filed for chapter 11 bankruptcy to address and resolve existing and future claims alleging injuries from exposure to products containing talc, asbestos, or chemical compounds processed or distributed by the Debtors or their predecessors in interest. The claims against the Debtors fall into two general categories: (1) claims alleging injuries resulting from exposure to products containing talc, asbestos, or chemical compounds processed or distributed by the Debtors or their predecessors in interest (the "Asbestos Claims," and such claimants, the "Asbestos Claimants"); and (2) environmental litigation claims against the Debtors relating to the production or handling of hazardous materials which allegedly contaminated certain properties (the "Environmental Claims," and such claimants, the "Environmental Claimants"). *See Complaint* ¶ 1, ECF No. 1. As a result of this litigation, Debtors are currently defendants in lawsuits across more than 30 different jurisdictions. Much of the litigation also includes claims against Brenntag North America and its related entities ("Brenntag") who, in 2004, purchased substantially all the Debtors' operating assets, including indemnification rights against certain Debtors. In addition to purchasing all the Debtors' operating assets, Brenntag also assumed certain non-asbestos and non-environmental liabilities related to the transferred assets. *See First Day Decl. of Moshin Y. Meghji* ¶ 21, ECF No. 5 in Case No. 23-13575.

After filing their chapter 11 petition, Debtors commenced the instant adversary proceeding to address the Environmental and Asbestos Claims (collectively, the "Tort Claims"). Debtors contend that the Tort Claims involve actions against certain non-debtor entities—like Brenntag—and seek to establish such entities' liability for Tort Claims on any grounds, including, without limitation, that such entities are successors to, or alter egos of, the Debtors. *Complaint* ¶ 1, ECF No. 1. These are the "Successor Liability Claims." Debtors submit that such Tort Claims, pursued as part of the Successor Liability Claims litigation, give rise to possible indemnification or contribution claims against the Debtors. By way of the adversary proceeding, Debtors seek a determination as to whether the Successor Liability Claims are property of the Debtors' estates, to be pursued by estate fiduciaries on behalf of all creditors. Debtors also ask the Court to determine whether such claims are subject to the automatic stay. In other words, they seek a permanent pause in the litigations that they assert involve estate assets, or so directly impact the estate that they should be protected by the automatic stay. Debtors filed their Summary Judgment Motion seeking such relief on September 8, 2023—one day after the Adversary Complaint was filed.

Shortly thereafter, the Court entered a Case Management Order ("CMO", ECF No. 52), which limited the Motion to Counts I and IV[3], and mostly

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[3] Pertinently, in Count I of the Complaint, Debtors seek a declaration by the Court that the commencement of, continuation of, or settlement of Successor Liability Claims violates the automatic stay imposed by 11 U.S.C. § 362(a)(3). Similarly, in Count IV of the Complaint, Debtors seek declaratory relief resolving that the Successor Liability Claims are property of the applicable Debtors' bankruptcy estate pursuant to 11 U.S.C. § 541(a). *See Complaint*, ECF No. 1.

stayed discovery in this Adversary Proceeding pending a determination on the Summary Judgment Motion, which was scheduled for argument on December 5, 2024. The CMO also directed the parties to engage in good faith settlement discussions through mediation. On November 15, 2023, the Court entered an order appointing the Honorable Robert E. Gerber (Ret.) as Mediator (ECF No. 72). Shortly before the hearing on the Motion, Debtors filed a separate motion seeking entry of an Order: (I) Temporarily Enjoining Certain Actions Against Non-Debtors; and (II) Approving Procedures for Seeking Extensions of Temporary Restraining Order (the "TRO Motion"). The Court granted the TRO Motion in part and enjoined certain actions on a temporary basis. Following oral argument, the Court indicated that it would reserve its decision on the Motion until at least January 31, 2024, pending the outcome of mediation.

The parties have engaged in mediation, and, on consent of all mediation parties, the Court has entered three (3) separate Agreed Orders Regarding Mediation Stipulation (ECF Nos. 137, 148, and ECF No. 1059 in the main bankruptcy case, Case No. 23-13575). Each Stipulation requests that the Court further defer a ruling on the Motion to allow the parties more time to mediate. The most recent Stipulation—entered on May 14, 2024—deferred the Court's ruling through Monday, June 10, 2024. Finally, on June 2, 2024, Debtors submitted a letter (ECF No. 214) requesting issuance of a decision on the Summary Judgment Motion. As the Court prepared to issue its decision, it received additional correspondence; including a Notice of Additional Facts and Letter submitted by the Official Committee of Talc Claimants (ECF No. 215) suggesting the Court should decline to decide the

Summary Judgment Motion; and a letter from the Future Claimants Representative (ECF No. 1114 in Case No. 23-13575) likewise urging the Court to decline the Debtors' request to decide the Summary Judgment Motion. During a hearing on June 17, 2024, the Court explained its basis for concluding that a ruling on the Summary Judgment Motion was appropriate at this juncture. The Court also requested supplemental briefing from the parties, discussed *infra*. Briefing is now complete, and the Court issues its ruling by way of this Opinion and accompanying Order. For the reasons set forth below, the Court concludes that all Successor Liability Claims are estate property.

III. Standard of Review

A. Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). As the Supreme Court has indicated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (citing FED. R. CIV. P. 1). "In deciding a motion for summary judgment, the judge's function is to determine if there is a genuine issue for trial." *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632, 637 (3d Cir. 1993).

The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact. *Huang v. BP Amoco Corp.,* 271 F.3d 560, 564 (3d Cir. 2001) (citing *Celotex Corp.,* 477 U.S. at 323, 106 S. Ct. 2548). In determining whether a factual dispute warranting trial exists, the court must view the record evidence and the summary judgment submissions in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Disputed material facts are those "that might affect the outcome of the suit under the governing law." *Id.* at 248, 106 S. Ct. 2505. A dispute is genuine when it is "triable," that is, when reasonable minds could disagree on the result. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) (citations omitted).

"When opposing summary judgment, the nonmovant may not rest upon mere allegations, but rather must 'identify those facts of record which would contradict the facts identified by the movant.' " *Corliss v. Varner*, 247 F. App'x 353, 354 (3d Cir. 2007) (quoting *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2002)); *see also In re Moran-Hernandez*, 544 B.R. 796, 800 (Bankr. D.N.J. 2016) (quoting *Matsushita,* 475 U.S. at 586, 106 S. Ct. 1348) ("Once the moving party establishes the absence of a genuine dispute of material fact, however, the burden shifts to the non-moving party to 'do more than simply show that there is some metaphysical doubt as to the material facts.'"). A party may not defeat a motion for summary judgment unless it sets forth specific facts, in a form that "would be admissible in evidence," establishing the existence of a genuine dispute of material fact for trial. FED. R. CIV. P. 56(e) (providing that in response to a summary judgment motion the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine [dispute] for trial"); *see also Philbin v. Trans Union Corp.*, 101 F.3d 957, 961 n.1 (3d Cir. 1996); *Fireman's Ins. Co. of Newark, N.J. v. DuFresne,* 676 F.2d 965, 969 (3d Cir. 1982). If the nonmoving party's evidence is a mere scintilla or is not "significantly probative," the court may grant summary judgment. *Liberty Lobby, Inc.,* 477 U.S. at 249–250, 106 S. Ct. 2505. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita,* 475 U.S. at 587, 106 S. Ct. 1348.

B. Property of the Bankruptcy Estate

"After a company files for bankruptcy, 'creditors lack standing to assert claims that are property of the estate.'" *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014) (quoting *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002)) (other citations omitted). In determining what constitutes a debtor's property, courts look to § 541, which broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Causes of action can be property of the estate if certain criteria are satisfied.

With respect to the underlying type of cause of action at issue here—Tort Claims asserted against a third-party non-debtor corporation stemming from the alleged wrongful conduct of a debtor corporation—the seminal case in the Third Circuit is *In re Emoral, Inc.*, 740 F.3d 875 (3d 2014).[4] In that case, the trustee had settled claims described as "belonging to the estate" with the debtors' successor, Aaroma Holdings LLC ("Aaroma"). When plaintiffs filed individual complaints against Aaroma in the state court, Aaroma sought a ruling from the bankruptcy court that those claims, in fact, belonged to the estate and had already been resolved. The court in *Emoral*, thus, had to decide whether claims by creditors against a non-debtor third-party based on a "mere continuation" theory[5] of successor liability under state law were property of the estate. The Third Circuit observed that the facts giving rise to the cause of action were not specific to the plaintiffs, but common to all creditors. The circuit court additionally noted that successful claims against Aaroma would benefit all creditors. Ultimately, Aaroma had not committed directly any wrongs against the plaintiffs, individually. Instead, its liability arose solely due to its relationship with the actual wrongdoer, the debtor. Accordingly, the Third Circuit concluded that plaintiffs' claims constituted estate property and were properly pursued by the trustee on behalf of all creditors—not the individual plaintiffs. *See id.* at 880.

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[4] The Committee asserts that *Emoral* was wrongly decided and should be reconsidered. *See Committee's Opp'n* ¶ 47, ECF No. 90. However, as the Committee acknowledges, "*Emoral* is binding authority, and the Court is required to follow it." *Id.*

[5] Generally, under the "mere continuation" theory of successor liability, plaintiffs seek to impose liability upon a successor company for the predecessor's debt and liabilities where it can be established that the successor entity is merely a continuation of the predecessor. *See Lefever v. K.P. Hovnanian Enterprises, Inc.*, 160 N.J. 307, 734 A.2d 290 (1999).

The *Emoral* decision has been interpreted as establishing a two-prong test. To be estate property: "(1) the claim must be one that both existed at the commencement of the filing and that the trustee could have asserted on his own behalf under applicable state law; *and* (2) the claim must be a general one, with no particularized injury arising from it." *In re Maxus Energy Corp.*, 571 B.R. 650, 658 (Bankr. D. Del. 2017) (citing *In re Emoral*, 740 F.3d at 879); *see also Foodtown*, 296 F.3d at 169 n. 5; *id.* at 170. "The first element is about timing." *In re Wilton Armetale*, 968 F.3d 273,282 (3d. 2020). There is no dispute here that the Successor Liability Claims existed as of the Debtors' petition filings. "The second element hinges on whether the claim is 'general' to the estate or 'personal' to a specific creditor" because "[i]ndividual creditors have the statutory authority to bring only personal claims." *Wilton Armetale*, 968 F.3d at 282 (citing *Emoral*, 740 F.3d at 879). A claim is personal to a creditor and not property of the estate "[o]nly when a particular creditor suffers a direct, particularized injury that can be 'directly traced' to the defendant's conduct." *Id.*

In *Emoral*, the Third Circuit deliberately distinguished between plaintiffs' personal injury claims against the debtor, which were individual to them, and their successor liability claims against the purchaser of the debtor's assets, whom plaintiffs were seeking to hold indirectly liable for the debtor's tortious conduct on a theory that the successor was a "mere continuation" of the debtor. *In re Emoral*, 740 F.3d at 879. The court examined the standard for establishing successor liability based on a mere continuation theory under applicable state law[6] and determined that the factual allegations needed to establish successor liability were general to creditors. *Id.* at 880. The court stated:

> To establish liability based on a "mere continuation" theory . . . a plaintiff must establish that there is continuity in management, shareholders, personnel, physical location, assets, and general business operation between selling and purchasing corporations following the asset acquisition.
>
> The [] Plaintiffs fail to demonstrate how any of the factual allegations that would establish their cause of action based on successor liability are unique to them as compared to other creditors of [debtor]. Likewise, they fail to demonstrate how recovery on their successor liability cause of action would not benefit all creditors of [debtor] given that [successor], as a mere continuation of [debtor], would succeed to all of [debtor's] liabilities. Thus, the [] Plaintiffs' cause of action against [successor] is "general" rather than "individualized."

In re Emoral, 740 F.3d at 879-80 (quotations and citations omitted).

As discussed, the claims at issue in *Emoral* were based on a "mere continuation" theory of successor liability, whereas many of the Successor Liability Claims at issue in the instant case are bottomed on

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[6] The parties in *Emoral* agreed that either New Jersey or New York law applied to the court's property of the estate analysis, which the Third Circuit determined were identical for that purpose. *In re Emoral*, 740 F.3d at 879, n.2.

additional theories—including a "product line exception" theory.[7] Nevertheless, this Court finds the *Emoral* decision instructive[8] and does not view its holding as limited to successor liability claims premised only on a single theory of liability. Indeed, the Third Circuit and other courts have applied *Emoral* to a host of other types of claims.[9]

IV. Discussion

While the parties agree that *Emoral* provides guidance, they disagree as to its scope and application. Debtors assert that, under *Emoral*, the Successor Liability Claims are property of the bankruptcy estate and, summary judgment is appropriate as to Counts I and IV of the Complaint. Debtors contend that all the potential Successor Liability Claims are general to the

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[7] New Jersey—along with several other jurisdictions—has adopted a product line exception under which, by purchasing a substantial part of a manufacturer's assets and continuing to market the goods in the same product line, a corporation may be exposed to tort liability for defects in the predecessor's products. *See Lefever,* 160 N.J. 307.

[8] As noted, the Committee asserts that *Emoral* was wrongly decided and should be reconsidered by the Third Circuit. *See Committee's Opp'n* ¶¶ 47-48, ECF No. 90. As this Court is bound by Third Circuit precedent, this argument does not warrant further discussion.

[9] *See, e.g., Wilton Armetale*, 968 F.3d at 278 (applying *Emoral* to breach of fiduciary duty and fraudulent transfer claims and determining such claims were property of the estate); *In re Tronox*, *Inc.* 855 F.3d 84, 105 (2d Cir. 2017) (applying *Emoral* to indirect-liability claims seeking to hold debtor's alleged successor and alter ego liable for torts of its former indirect subsidiaries and finding that such claims were property of the estate); *In re Mee Apparel, LLC*, 2016 WL 3535805, at *7 (D.N.J. June 28, 2016) (applying *Emoral* to alter ego claims and holding that such claims were property of the estate).

bankruptcy estate because such theories of liability are rooted in the corporate and contractual relationship between the Debtor and certain non-debtor third parties (identified as "Protected Parties" in the Complaint), and thus do not depend upon any facts that are unique to any particular Tort Claimant or creditor. "Successor Liability Claims – whether premised on a theory of mere continuation, *de facto* merger, product line, alter ego, or any other theory of indirect liability – cannot be 'personal' to Tort Claimants because they do not seek to redress injury that such claimants can trace directly to Brenntag" *Debtor's Supp. Br.* ¶ 1, ECF No 233.

The Committee, on the other hand, argues that Debtors "mischaracterize" the ruling in *Emoral*, and suggest that its holding "is limited to 'mere continuation' claims under New Jersey law." *Committee's Opp'n* ¶ 38, ECF No. 90 (quoting *Emoral*, 740 F.3d at 876). While the Committee grants that claims like those pursued in *Emoral* are property of the estate pursuant to § 541(a), the Committee maintains that Debtors wrongly seek to expand the Third Circuit's holding in *Emoral* to the "product line exception" to successor liability—something that was not addressed in *Emoral*. In the Committee's view, the Successor Liability Claims fail *Emoral's* two-prong test. First, the Committee submits that a product line claim "cannot be asserted by a corporation against its own successor" so it did not exist under state law at the time of the filing. *Committee's Opp'n* ¶ 45. Specifically, the Committee contends that Debtors are precluded by California law from bringing successor liability claims against Brenntag (the "California Claims"). Certain states, including California, "[d]o not recognize any general substantive alter ego claim or cause of action that can be asserted by a corporation on behalf of all creditors" *Id.* at ¶¶ 66-68. Because Debtors could not assert these claims under applicable state law, the Committee reasons that the California Claims fail the first prong under *Emoral*. Next, the Committee asserts that a product line claim is particularized—not general—and, as a result, these claims likewise fail *Emoral's* second prong. *Id.* at ¶ 44. Thus, the Committee asserts that not all Successor Liability Claims, in fact, are estate property. Finally, the Committee argues that Debtors failed to establish the absence of material facts; therefore, Debtors are not entitled to summary judgment on this record.

Additionally, after inquiry by this Court, Debtors have supplemented their position by submitting that § 544(a)(1) provides an alternative basis to support the Debtors' efforts to pursue Successor Liability Claims, inasmuch as (i) any hypothetical creditor could bring successor claims based upon traditional theories under applicable state law and (ii) successor claims premised upon the product line theory "factually overlap with, and seek to remedy the same harm as, all other successor claims." *Debtors' Supp. Br.* ¶ 2, ECF No 233. The Committee and FCR have challenged this alternative reasoning and application of § 544(a)(1), on textual, historical, and policy bases.

The Court firmly believes that the Debtors offer the correct application of *Emoral* to the present dispute. Here, as in *Emoral*, the Successor Liability Claims are general to the Debtors' estates by their very nature, as they seek to hold non-debtor entities indirectly liable for the Debtors' tort liabilities, rather than remedy a harm that a Tort Claimant or creditor can directly trace to a non-debtor third party. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc. 3d 643, 677, 965 N.Y.S.2d 284, 311 (Sup. Ct. 2013) ("[T]he successor liability doctrine generally [does] not focus on the conduct of the third-party bringing the successor liability claim. The focus instead is on the relationship between asset buyer and seller and the buyer's post-acquisition conduct with respect to the assets."). There can be little dispute that the bulk of such claims fall within the parameters of estate property under § 541(a)(1). The more challenging inquiry, by far, is whether such claims not expressly considered in *Emoral* can or should be seen through the same lens.

In answering the inquiry in the affirmative, the Court takes a step back and observes that the issue at the heart of this dispute is whether the Successor Liability Claims constitute estate property as defined under the Bankruptcy Code. The parties—like the Third Circuit in *Emoral*—focus on whether the Successor Liability Claims are estate property under § 541(a)**(1)**, which broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). However, property of the estate also encompasses interests defined in § 541(a)**(7)** of the Code, which includes "[a]ny interest in property that the *estate* acquires after the commencement of the case." 11 U.S.C. § 541(a)(7) (emphasis added).

Notably, property of the ***estate*** is different from property of the ***debtor***. *See, e.g.*, *In re Cybergenics Corp.*, 226 F.3d 237, 246 (3d Cir. 2000) ("'[Debtor's] assets' and 'property of the estate' have different meanings[.]"). The bankruptcy court in *Doemling*—a case that has been cited with approval by the Third Circuit—explained that "section 541(a)(7) . . . is limited to property acquired post-petition by the *estate* as opposed to property acquired by the *debtors*." *In re*

Doemling, 127 B.R. 954, 956 (W.D. Pa. 1991). Significantly, the rights and powers acquired by the estate by virtue of a Bankruptcy Code provision, such as § 544, may also constitute property of the bankruptcy estate.[10] *See, e.g.*, *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 512 (Bankr. S.D. Ohio 2021) (collecting cases) ("[J]ust as prepetition claims are property of the estate under § 541(a)(1), post-petition claims are property of the Chapter 11 estate under § 541(a)(7)."); *In re Guillot*, 250 B.R. 570, 598 (Bankr. M.D. La. 2000) ("[W]e conclude that § 544(a), through its creation of the 'rights and powers,' creates estate property as of the commencement of the case, to the extent applicable non-bankruptcy law would provide property interests to the hypothetical ideal lien creditor.").[11] In sum, to the extent the Debtors here possess the right and capacity to pursue recoveries, post-petition, under other Bankruptcy Code provisions, such as § 544(a), these claims constitute estate assets to be litigated,

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[10] For instance, in analyzing § 547, another code section offering a trustee an additional avoidance power, the overwhelming majority of courts have concluded that "preference actions qualify as property of the estate under § 541(a)(7)." *Matter of S. Coast Supply Co.*, 91 F.4th 376, 382 (5th Cir. 2024) (collecting cases); *see also In re Simply Essentials, LLC*, 78 F.4th 1006, 1009 (8th Cir. 2023) (stating that "avoidance actions clearly qualify as property of the estate under subsection (7) [of § 541(a)]").

[11] Numerous courts have held that sections 541(a) and 544(a) are not mutually exclusive. *See, e.g.*, *In re MS55, Inc.*, 2007 WL 2669150, at *11 (D. Colo. Sept. 6, 2007), aff'd on reh'g, 2008 WL 2358699 (D. Colo. June 6, 2008) (holding that a trustee may assert a claim under both section 541(a) and 544(a)); *In re Howland*, 516 B.R. 163 (Bankr. E.D. Ky. 2014), aff'd, 579 B.R. 411 (E.D. Ky. 2016), aff'd, 674 F. App'x 482 (6th Cir. 2017) (same).

settled or otherwise resolved by estate fiduciaries, subject to court-approval after notice and a hearing.

A. 11 U.S.C. § 544(a)(1)

Section 544 of the Code addresses a trustee's rights and powers, and ability to employ the rights and remedies of certain hypothetical creditors. In relevant part, § 544(a)(1) provides:

> A trustee shall have . . . the rights and powers of . . . a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists[.]

11 U.S.C. § 544(a)(1).

Where a trustee has not been appointed, a debtor in possession may exercise these powers. *See In re Wright*, 649 B.R. 625, 628 (Bankr. D.N.J. 2023) (explaining that Congress has explicitly provided for chapter 11 debtors-in-possession to have all the powers of a trustee, including avoiding powers); *see also In re Cybergenics Corp.*, 226 F.3d at 244 ("the [chapter 11] debtor in possession is similarly endowed to bring certain [fraudulent transfer] claims on behalf of, and for the benefit of, all creditors."). Thus, as the result of its chapter 11 filing, Debtors possess the rights and powers of a hypothetical judgment lien creditor under § 544(a)(1). In its research, the Court identified several cases wherein courts held that the rights and powers under § 544(a)(1) includes the ability to pursue claims against non-debtor third parties premised upon alter ego or successor liability claims. *See, e.g. In re Kwok*, 2024 WL 1261803 (Bankr.

D. Conn. Mar. 22, 2024) (relying on the plain text of the provision and concluding that § 544(a) affords a trustee the rights and powers of a hypothetical judicial lien creditor to pursue an alter ego claim); *In re Revlon, Inc.*, 2023 WL 2229352, at *17 (Bankr. S.D.N.Y. Feb. 24, 2023) (finding that plaintiffs lacked standing to assert claims against a third party because, under the Code, the right to bring those claims belonged to the trustee). Accordingly, at the June 17, 2024 hearing, the Court requested additional briefing from the parties. The Debtors, the Talc Committee, and the FCR each submitted simultaneous direct and responsive briefing addressing whether the Successor Liability Claims constitute estate property, by virtue of the "strong arm" powers exercisable by the Debtors under § 544(a).

The parties disagree as to the scope of a trustee's powers under §544(a)(1). Both the Talc Committee and the FCR maintain that such powers are limited to avoidance actions, *see, e.g., Talc Committee's Supp. Br.* ¶ 4, ECF No. 232; *FCR Supp. Br.* ¶ 5, ECF No. 1195 in Case No. 23-13575; *FCR Reply* ¶ 9, ECF No. 1222 in Case No. 23-13575, while Debtors contend that § 544(a)(1) should not be so narrowly construed. The parties also disagree regarding whether the Successor Liability Claims are "particularized" or "general" under the *Emoral* test. The Talc Committee distinguishes "claims arising under California law" and the "product line exception claims," *see, e.g.*, *Committee's Supp. Memo* ¶ 7, ECF No. 232; *Committee's Supp. Reply* ¶¶ 14-24, ECF No. 242, and asserts that both types of claims are "direct" claims that are personal to individual creditors. Thus, the Talc Committee asserts—consistent with *Emoral*—that these Successor Liability Claims cannot be asserted by the Debtors under § 544(a)(1). Debtors disagree. The Court will take these arguments in turn and, like the parties, will apply separately the *Emoral* test to the claims arising under California law and the product line exception claims.

1. The rights and powers under § 544(a)(1) extend beyond avoidance actions

As stated, the parties disagree as to the scope of the powers afforded a trustee under §544(a)(1). In resolving this dispute, this Court begins, as it must, with the plain language of the statute. *United States v. Diallo*, 575 F.3d 252, 256 (3d Cir. 2009) (quoting *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001)) ("The role of the courts in interpreting a statute is to give effect to Congress's intent . . . . Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute."); *see also Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L.Ed.2d 1024 (2004). Here, the statute provides, in relevant part, that: "[t]he trustee shall have . . . the rights and powers of, ***or*** **may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by**– [a hypothetical lien creditor]." 11 U.S.C. § 544(a) (emphasis added). The Talc Committee contends that "the statute's plain meaning does not extend beyond avoidance actions." *Committee's Supp. Br.* ¶¶ 2, 11, ECF No. 232. The Court simply disagrees.

The use of the word "or" between the phrases "shall have . . . the rights and powers of" and "may avoid any transfer" indicates that these abilities should be read in the disjunctive. In other words, under § 544(a), a trustee can engage in either activity: the trustee may avoid a transfer **or** may exercise the rights and powers of a hypothetical lien creditor. The Talc Committee's reading of the statute—that the trustee's powers are limited to avoidance actions—thus ignores the plain statutory language and is at odds with Supreme Court case law interpreting the word "or" in other statutes. For example, in *Encino Motorcars* the Supreme Court examined a statute that exempted a "salesman . . . primarily engaged in selling **or** servicing." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87, 138 S. Ct. 1134, 1141, 200 L. Ed. 2d 433 (2018) (interpreting 29 U.S.C. §213(b)(10)(A)) (emphasis added). The Court ruled that "the use of 'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity." *Id.*; *see also United States v. Woods*, 571 U.S. 31, 45, 134 S. Ct. 557, 567, 187 L. Ed. 2d 472 (2013) (stating that the ordinary use of the word "or" "is almost always disjunctive"). Likewise, this Court reads the "or" in § 544(a) to mean that a trustee may engage in either activity: a trustee may either avoid a transfer **or** exercise the rights and powers of a hypothetical lien creditor.

The Committee also asserts that "binding Third Circuit law . . . precludes the application of section 544(a) to non-avoidance actions." *Committee's Supp. Reply* ¶ 3, ECF No. 242. Again, the Court respectfully disagrees. As an initial matter, nothing in the Third Circuit's *Emoral* decision precludes application of § 544(a). While the circuit court in *Emoral* analyzed § 541(a) as the basis for the successor liability claims, the court did not rule that § 544(a) was unavailable. The Circuit neither addressed nor considered § 544(a).

In further support of its position, the Talc Committee also cites to *In re CitX Corp., Inc.*, 448 F.3d 672, 677 (3d Cir. 2006). In that case, the Third Circuit reviewed a decision granting summary judgment to a defendant on claims brought by a Chapter 7 bankruptcy trustee alleging malpractice and "deepening insolvency." The circuit court affirmed the district court's decision because it agreed that the trustee had not established a genuine issue of fact to support his allegations. *Id.* at 681. This Court acknowledges that the Third Circuit briefly references § 541 and § 544 in a footnote and "note[s] in passing" that "§ 544 does not authorize a deepening-insolvency tort claim." *Id.* at 677 n.6 (citing *In re Student Fin. Corp.*, 335 B.R. 539, 549 (D. Del. 2005)). However, the analysis in *CitX* focuses on the factual evidence supporting summary judgment—not the trustee's standing or the source of authority under which he brought the claims. Indeed, the Third Circuit neither cited nor discussed either § 544 or § 541 outside of the footnote. Moreover, the Third Circuit's comments in the footnote are specific to "deepening-insolvency claims . . . brought on behalf of the debtor corporation," *id.*, and, thus, should not be expanded to mean that § 544 does not authorize successor liability claims, generally, available to hypothetical lien creditors under state law. Even if such an interpretation were adopted, this Court points out that the Circuit's musings in the *CitX* footnote were clearly intended as *dicta*—as evidenced by the footnote's introductory words "[w]e note in passing." As such, it is not binding on this Court. Again, this Court is guided by the statutory text, and will not—and cannot—adopt an interpretation based on *dicta* that conflicts with a plain reading of the statute.

Next, the Talc Committee cites to *Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001), in which the Third Circuit stated that "[t]he trustee's 'avoiding' powers [under § 544] are not implicated here, as they relate to the trustee's power to resist pre-bankruptcy transfers of property." *Id.* at 356. The context of this statement, however, undercuts the Talc Committee's contention that *Lafferty* dictates that § 544 authorizes *only* avoidance actions. In *Lafferty*, the committee—which had been authorized by stipulation to act as the trustee and assert claims on behalf of the debtor corporations—sought to bring tort claims against debtors and its professionals, including Lafferty. In reviewing the district court's judgment dismissing the claims against Lafferty, the Third Circuit first addressed the committee's standing, concluding that the "deepening insolvency" claims effectively sought recovery for damages to the debtors and thus, properly "belong[ed] to the [d]ebtors, rather than to the creditors." *Id.* at 349. Having established that the committee—with the rights and powers of the trustee—had standing to bring the debtors' claims, the Third Circuit next addressed Lafferty's affirmative defense. This, said the Circuit, required it to consider whether post-petition events affected available equitable defenses. *Id.* at 355. It was in the context of this inquiry that the Third Circuit referenced § 541—for purposes of establishing that "the explicit language of section 541 directs courts to evaluate defenses as they existed at the commencement of the bankruptcy." *Id.* at 356. Thus, the issue discussed in *Lafferty*—the timing and availability of defenses—is distinguishable from the issue before this Court—whether § 544 can serve as a basis for the Successor Liability Claims. Moreover, although the Third Circuit stated in *Lafferty* that

"Section 541 covers [successor claims]," nothing in the opinion establishes that such claims could *not* be brought under § 544. Rather, this Court concludes that—like many courts to address successor liability claims—the *Lafferty* court (and the parties involved in the case) simply did not consider § 544 as a basis for the claims asserted.

The FCR cites to the absence of case law holding that a trustee can bring claims under §544(a) in its opposition. Instead of arguing—as the Committee does—that Third Circuit law precludes application of § 544(a), the FCR takes a slightly different approach and points out that no "precedent [exists] in the Third Circuit that applies section 544(a) as broadly as the Debtors' requested relief." *FCR Supp Br.* ¶ 5, ECF No. 1195 in Case No. 23-13575; *see also FCR Supp. Reply* ¶ 9, ECF No. 1222 in Case No. 23-13575 (stating that "section 544(a) **should** be applied narrowly") (emphasis added). However, this Court will not ignore the plain language of the statute merely because the Third Circuit has not yet directly addressed this precise issue. Instead, the Court is guided by the Third Circuit's reasoning in *Emoral*, which suggests that the analysis therein can, and should, be imputed to other theories of liability so long as their underlying purposes are similar. *See In re Emoral, Inc.*, 740 F.3d at 881 (citing *Phar-Mor, Inc.*, 22 F.3d 1228, and extending rationale used in cases involving veil-piercing causes of action to cases involving successor liability actions).

The Committee also cites *In re Bridge* and explains that, in *Bridge*, the Third Circuit describes § 544 as "simply defining 'the trustee's powers over rival creditors.'" *Committee's Supp. Reply* ¶ 3, ECF No. 242 (quoting *In re Bridge*, 18 F.3d 195, 198 (3d Cir. 1994)).

This Court takes no issue with this characterization. Indeed, § 544(a) defines the rights and powers of a trustee as a hypothetical lien creditor. The Third Circuit made no findings in *Bridge* that limits those rights and powers to solely avoidance rights and powers; thus, it does not support the Committee's position. Moreover, although the circumstances in *Bridge* are factually distinguishable—there the Third Circuit considered a trustee's rights under § 544(a)(3); whereas here, the Court considers a trustee's rights under § 544(a)(1)—this Court is informed by the *Bridge* decision. The *Bridge* court explained that "as of the date of the petition's filing, § 544(a)(1) confers upon the trustee the rights of a hypothetical judgment lien creditor." *In re Bridge*, 18 F.3d at 199. These rights, as the Committee concedes, are determined by state law, *see Committee's Supp.* ¶ 36, ECF No. 232 (citing *In re Bridge*, 18 F.3d at 200), and this Court will examine them accordingly.

Finally, the Committee contends that the Third Circuit's decision in *Nardulli & Sons* limits § 544(a)'s application to avoidance actions. *See Committee's Supp. Br.* ¶4, ECF No. 232; *Committee's Supp. Reply* ¶3, ECF No. 242 (citing *Gen. Elec. Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184 (3d Cir. 1988)). Again, this Court respectfully disagrees. In *Nardulli & Sons*, the Third Circuit held that "§ 544(a) is intended to protect general creditors of the debtor against 'secret' liens, [therefore,] that section should not be construed to provide the trustee with an interest superior to that of creditors whose interests were perfected prior to the commencement of bankruptcy proceedings." *Nardulli & Sons, Inc.*, 836 F.2d at 192. There is nothing in this ruling which suggests that the interests afforded to a trustee under § 544(a) are limited to interests in avoidance actions.

The Committee and the FCR additionally argue that the "overwhelming weight of well-reasoned authority holds that a debtor cannot utilize section 544(a) to prosecute non-avoidance claims." *Committee's Supp. Reply* ¶ 6-12, ECF No. 242; *see also FCR Supp. Reply* ¶¶ 7-8, ECF No. 1222 in Case No. 23-13575. Admittedly, a line of cases exists narrowly interpreting a trustee's authority to pursue creditor claims under § 544(a). *See, e.g.*, *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222, 1226 (8th Cir. 1987). Most of these cases, including *Ozark*, rely on the Supreme Court decision in *Caplin*, in which the High Court interpreted Chapter X of the Bankruptcy Act and concluded that a trustee lacked standing to assert claims on behalf of creditors. *See Caplin v. Marine Midland Grace Tr. Co. of New York*, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972).

As an initial matter, *Ozark*, a decision by the Eighth Circuit Court of Appeals, is not binding on this Court. *Ozark* is also factually distinguishable in that the claims at issue in that case were found to be "personal to the corporate creditors rather than the corporation." *Ozark* 816 F.2d at 1225. Thus, the claims at issue in *Ozark* would likewise fail the *Emoral* test in the Third Circuit. Notably, the *Ozark* decision relies heavily on the Supreme Court's ruling in *Caplin*. However, because *Caplin* pre-dates the modern Bankruptcy Code, it is not determinative as to the scope of § 544. The open-endedness of this issue is evidenced by the competing caselaw: on one hand, those cases cited by the Committee and the FCR limiting § 544(a) to avoidance actions; and on the other hand, those cases cited by the Debtors and discussed *infra*, holding that § 544(a) encompasses more than mere avoidance powers. While this Court is cognizant of the Eighth Circuit's thorough analysis of the legislative history of § 544(a), the statutory text is unambiguous, and accordingly resort to legislative history or underlying legislative intent is not appropriate. *See, e.g., Lamie*, 540 U.S. at 534; *see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004).

Ultimately, the cases relied on by the Committee and the FCR either do not directly address the issue before this Court, are bankruptcy-level decisions, or are out-of-circuit opinions and, thus, are not dispositive. This Court must be guided by the plain language of the statute, which simply does not place the limitations on a trustee's rights and powers, as advanced by the Committee and FCR. Instead, this Court remains guided by *Emoral* and joins the line of cases—albeit the minority—holding that a trustee can utilize the rights and powers under § 544(a) to pursue available state law remedies. As the Tenth Circuit succinctly stated:

> To understand the full import of § 544, one must first understand the power of a bankruptcy trustee to stand in the shoes of an [sic] hypothetical creditor of the debtor to effect a recovery from a third party. Simply stated, from the reservoir of equitable powers granted to the trustee to maximize the bankruptcy estate, Congress has fashioned a legal fiction. Not only is a trustee empowered to stand in the shoes of a debtor to set aside transfers to third parties, but the fiction permits the trustee also to assume the guise of a creditor with a judgment against the debtor. Under that guise, the

> trustee may invoke whatever remedies provided by state law to judgment lien creditors to satisfy judgments against the debtor.

Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990); *see also, e.g.*, *In re Duffin*, 457 B.R. 820, 828 (B.A.P. 10th Cir. 2011) ("We agree that the powers given to a trustee under §544(a) are not limited to avoidance of transfers but specifically include broader 'rights and powers.' "); *In re MS55, Inc.*, 2007 WL 2669150, at *11 (D. Colo. Sept. 6, 2007), aff'd on reh'g, 2008 WL 2358699 (D. Colo. June 6, 2008) (stating that "the language of section 544(a) supports a finding that trustees are endowed with more than solely avoidance powers"); *In re Guillot*, 250 B.R. 570, 593 (Bankr. M.D. La. 2000) (explaining that "the lien creditor status of the trustee (as of the commencement of the case) . . . is a power set off from the § 544(a) avoidance power").

The Court remains unpersuaded by the Committee's contention that allowing a trustee to bring a non-avoidance action under § 544 would lead to absurd or unworkable outcomes. *See Committee's Supp. Br.* ¶¶ 18-25 (citing *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006) (citations omitted) ("A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results."). The Court holds a differing view. Such an interpretation of § 544 would **not**—as the Committee suggests—permit a trustee to pursue claims that are personal to creditors. Indeed, such efforts would fly in the face of the Third Circuit's directive in *Emoral* mandating that claims rooted in successor liability theories must be general. *See In re Emoral*, 740 F.3d at 879.

The Committee next posits that claims brought under § 544(a)(1) are time limited. *See Committee's Supp. Br.* ¶ 20. Specifically, the Committee quotes a bankruptcy court in the District of Columbia, which asks, "if the hypothetical judgment lien creditor extended credit only on the date of commencement of the bankruptcy case, how can she sue based on a wrong that occurred before the extended credit?" *In re Greater Se. Cmty. Hosp. Corp.*, 333 B.R. 506, 520 (Bankr. D.D.C. 2005). The Court notes that the Committee's argument here is similar to the FCR's argument that § 544(a) is inapplicable because "tort claimants are involuntary creditors—victims injured by the Debtors' products—and not lenders that extended creditor to the Debtors." *FCR Supp. Br.* ¶ 3, ECF No. 1195. Both positions ignore the "legal fiction" created by the strong-arm provision, which allows a trustee to "assume the guise of a creditor with a judgment against the debtor [,] and "invoke whatever remedies provided by state law to judgment lien creditors to satisfy judgments against the debtor." *Zilkha Energy Co.*, 920 F.2d at 1523. The temporal limitations suggested by the Committee ignore the rights and powers afforded to a trustee by virtue of § 544(a), which vest in the trustee "at the time of the commencement of the case" through the bankruptcy filing, itself. *See* 11 U.S.C. § 544(a)(1).

The Committee also argues that "asbestos creditors cannot be bound by any settlement or resolution of the Successor Liability Claims obtained by the Debtors on their behalf without their consent." *Committee's Supp. Br.* ¶ 22, ECF No. 232. This argument is contrary to the holding in *Emoral* in which the Circuit explained that, to the extent claims are general, the trustee is the proper party to bring the claim and the "creditors are bound by the outcome of the trustee's action." *In re Emoral, Inc.*, 740 F.3d at 879 (quoting *St. Paul Fire & Marine Ins. Co.*, 884 F.2d at 701).

The Committee next contends that the rights and powers referenced in § 544(a) "are limited to attaching and seizing the **debtor's** property pursuant to state law[.]" *Committee's Supp. Br.* ¶ 23, ECF No. 232 (emphasis in original). However, to adopt such an interpretation would require this Court to read words into the statute that simply are not there.

Finally, the Committee asserts that the Debtors' interpretation of § 544(a) would render §544(b) superfluous. *Committee's Supp. Br.* at ¶ 25. Subsection (b) of § 544 permits a trustee to "avoid any transfer . . . or any obligation . . . that is voidable under applicable law by a creditor[.]" Subsection (a), on the other hand, affords a trustee the rights and powers of certain hypothetical creditors. The court in *Kwok* succinctly explained the distinction between § 544(a) and (b):

> Section 544(a) stands in contrast with section 544(b). While section 544(a) provides a bankruptcy trustee with general powers to assert certain rights and powers of certain classes of **hypothetical** creditors, section 544(b) provides a bankruptcy trustee with the power to bring actions to avoid transfers, which could be brought by an **actual** creditor. Whereas the limiting principal of section 544(a) is that the rights and powers must be those the creditors at large could bring, rather than the particularized claims belonging to particular creditors, the limiting principal of section 544(b) is that the actions brought must be avoidance actions that a particular creditor could bring.

In re Kwok, 2024 WL 1261803, at *3 (emphasis added). Thus, this Court's interpretation of § 544(a) does not render § 544(b) meaningless or superfluous: each subsection empowers the trustee with unique tools through which recovery can be enhanced for *all* creditors.

This Court acknowledges, as has the Third Circuit, that it "may seem strange" to hold that a cause of action for successor liability against Brenntag or other third parties is property of Debtors' bankruptcy estates. *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 n.20 (3d Cir. 1994); *see also In re Emoral*, 740 F.3d at 881. However, there are policy reasons underlying this "strange" scenario. In *In re Emoral*, the Circuit found that personal injury claims brought by plaintiffs against the debtor's successor, Aaroma, were property of the debtor's estate. The Third Circuit noted that "[a]s a practical matter, it is difficult to imagine a factual scenario in which a solvent Emoral, outside of the bankruptcy context, would or could bring a claim for successor liability against Aaroma." *In re Emoral, Inc.*, 740 F.3d at 881. The Circuit reconciled this glitch in the matrix by referring to the principles underlying the successor liability doctrine, stating that "the purpose of successor liability is to promote equity and avoid unfairness, and it is not incompatible with that purpose for a trustee, on behalf of a debtor corporation, to pursue that claim." *Id.* (citing *Phar–Mor, Inc.*, 22 F.3d at 1240 n. 20). In a similar vein, pursuit of Successor Liability Claims in good faith by the Debtors in this case will result in more efficient and equitable resolutions, thus, maximizing value to creditors.

Indeed, when a company files for bankruptcy, the automatic stay operates to prevent creditors from pursing their own remedies against property of the bankruptcy estate. 11 U.S.C. § 362. And where a cause of action is property of the bankruptcy estate, the trustee (or debtor-in-possession) is the appropriate party to bring such an action. Accordingly, the Debtors in the instant case have standing to assert the Successor Liability Claims and creditors are precluded from pursuing them until they have been abandoned or upon further order of the Court. The Court is compelled to reach this result considering the explicit language of—and the principles underlying—the Bankruptcy Code. *See* 11 U.S.C. § 544(a)(1); *In re Emoral, Inc.*, 740 F.3d 881 (holding that where a cause of action is "based upon preventing inequity or unfairness, it is not incompatible . . . to allow a debtor corporation to pursue a claim based upon such a theory"); *In re Revlon, Inc.*, 2023 WL 2229352, at *16 ("What Plaintiffs are not entitled to do is to usurp the trustee's exclusive role, augmented by the UCC where appropriate, to seek to recover and protect the estate's property, to avoid impermissible pre-bankruptcy transactions, and to administer the estate including by appropriately settling disputes that affect the estate's rights. These are core estate functions."); *In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994) (discussing the policy considerations behind the automatic stay provision and stating that "[w]here bankruptcy creditors are concerned, the race is not supposed to belong to the swift; equality rather than expedition is the governing principle").

This Court finds additional support in the multitude of cases in which courts have ruled that a trustee had standing to bring the general claims of the creditors at large, specifically in the context of veil-piercing, alter ego, and successor liability actions. *See,* *e.g.*, *In re Wilton Armetale, Inc.*, 968 F.3d 273, 283 (3d Cir. 2020) ("The class action plaintiffs that invoke [a claim against a successor corporation for the tort liability of the predecessor] allege a general injury, their standing depends on their status as creditors of [the debtor], and their success would have the effect of increasing the assets available for distribution to all creditors. For the same reasons stated with respect to the piercing claims, claims based upon successor liability should be asserted by the trustee on behalf of all creditors."); *In re Tronox Inc.*, 855 F.3d 84, 99 (2d Cir. 2017) (stating that Congress's intent by enacting the automatic stay provision was "to protect all creditors by making the trustee the proper person to assert claims against the debtor" and explaining that "[t]his reasoning extends to common claims against the debtor's alter ego or others who have misused the debtor's property in some fashion") (quoting *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)); *In re Kwok*, 2024 WL 1261803 (holding that § 544(a) affords a trustee the rights and powers of a hypothetical judicial lien creditor to pursue an alter ego claim); *In re Revlon, Inc.*, 2023 WL 2229352 (finding that plaintiffs lacked standing to assert claims against a third party under alter ego theories because, under the Code, the right to bring those claims belonged to the trustee).

Having determined that § 544(a) can serve as a basis for a trustee's assertion of claims as a hypothetical lien creditor and constitute estate property under § 541(a)(7)—in addition to such claims that assuredly fall under § 541(a)(1)—the Court now addresses whether Debtors may assert the specific claims at issue in this case.

2. Claims Arising Under California Law

Here, the Successor Liability Claims seek to establish a non-debtor's liability bottomed on Debtors' liability, through allegations of successor liability, alter ego, or some similar theory. Pursuant to *Emoral* the question then becomes whether the Successor Liability Claims are general—as Debtors argue—or whether they are particularized or direct—as alleged by the Talc Committee. "[A] general claim 'inures to the benefit of all creditors' by enlarging the estate, and so 'the trustee is the proper person to assert the claim.' " *In re Wilton Armetale, Inc.*, 968 F.3d 273, 282 (3d Cir. 2020) (quoting *In re Emoral*, 740 F.3d at 879) (other citations omitted). "The distinction between general and personal claims 'promotes the orderly distribution of assets in bankruptcy' by funneling all asset-recovery litigation through a single plaintiff: the trustee." *In re Wilton Armetale, Inc.*, 968 F.3d at 282 (quoting *In re Emoral*, 740 F.3d at 879). Where a claim is particularized or "personal," however, the individual creditor has authority to bring it. When distinguishing between general and personal claims, courts must "examine the nature of the cause of action itself" and the theory of liability asserted. *In re Emoral, Inc.*, 740 F.3d at 879.

The Committee contends that the Successor Liability Claims arising under California law are direct and personal claims under the *Emoral* test. *Committee's Supp. Reply* ¶¶ 14-16. As such, the Committee concludes that these claims remain the exclusive property of creditors and cannot be advanced or settled by Debtors. Debtors maintain that these claims are not personal because creditors cannot trace their injuries to Brenntag or any other non-debtor third party. *See Debtors Supp. Reply* ¶ 2, ECF No. 241. The Court agrees with Debtors' characterization.

In reaching this conclusion, this Court is guided by the district court's analysis in *Purdue*. *In re Purdue Pharma, L.P.* 635 B.R. 26 (S.D.N.Y. 2021). In that case, Judge McMahon explained that "direct" or "particularized" claims are those claims that "are not derivative of Purdue's liability, but are based on the Sacklers' own, individual liability, predicated on their own alleged misconduct and the breach of duties owed to claimants other than Purdue." *Id.* at 90. In other words, "'[d]irect' claims are based upon a 'particularized' injury to a third party that can be directly traced to a non-debtor's conduct." *Id.* In applying that definition to the case presently before this Court, it is evident that the Successor Liability Claims brought under California law are general. These claims are not based on any "particularized" injury that can be traced to Brenntag or any other non-debtor party. Rather, the claims are based entirely on Debtors' actions and conduct. Brenntag and other third parties are implicated solely through their business dealings with Debtors; therefore, the California Claims are derivative. *See Purdue*, 365 B.R. at 90 ("'Derivative' claims are those [that] seek to recover from the estate indirectly on the basis of the debtor's conduct, as opposed to the non-debtor's own conduct.") (cleaned up).

Because the California Claims are general, the second prong of the *Emoral* test is satisfied. As to the first prong—which asks whether the trustee could have asserted the claim under applicable state law—it is of no moment that the Debtors do not possess a state law right to pursue certain Successor Liability Claims. Section 544(a)(1) affords the Debtors the opportunity to pursue any such claim that a hypothetical creditor could bring for the benefit of all creditors. Because Debtors can bring the claims by virtue of a hypothetical judgement lien creditor's ability to pursue a judgment against a debtor's alter ego or successor for claims against a debtor which remain unsatisfied, the California Claims satisfy the remaining prong of the *Emoral* test. Accordingly, these claims constitute estate property under § 541(a)(7).[12]

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[12] Relief is available under the substantive laws of all potential, applicable states (New Jersey, New York, Delaware, and California). *See, e.g.*, *Bussell v. De Waft Prod. Corp.*, 259 N.J. Super. 499 504-05 (App. Div. 1992) (judgment creditor could bring action against judgment debtor's alleged successor); *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 341, 431 A.2d 811, 816 (1981) (successor liability doctrine was developed "to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions"); *Arben Corp. v. Durastone, LLC*, 186 A.D.3d 599, 129 N.Y.S.3d 441 (2020) ("[Appellant] may commence a proceeding pursuant to CPLR 5225 (b) seeking to enforce a *600 default judgment against an alleged successor in interest under an alter ego theory"); *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130 (2d Cir. 1997) (New York law recognizes reverse veil-piercing) (citing *State v. Easton*, 169 Misc.2d 282, 647 N.Y.S.2d 904, 908-09 (Sup. Ct. 1995)); *Misik v. D'Arco*, 197 Cal. App. 4th 1065, 1072 (Cal. Ct. App. 2011), *as modified* (Aug. 9, 2011) (judgment creditor is authorized under California Code of Civil Procedure 187 to amend judgment to include alter ego of judgment debtor); *Rubio v. CIA Wheel Grp.*, 63 Cal App. 5th 82, 102, 277 Cal. Rptr. 3d 450, 49 (2021) (citing *Marks v. Minnesota Mining & Mfg.* Co., 187 Cal. App. 3d 1429, 232 Cal. Rptr. 594 (Ct. App. 1986)) (corporate successor succeeds to all of predecessor's liabilities and obligations und *de facto* merger doctrine); *Gadsen v. Home Pres. Co.*, 2004 WL 485468 at *1 (Del. Ch. Feb. 20, 2004) (judgment creditor could pierce corporate veil of corporate judgment debtor); *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, 1994 WL 148269 (Del. Ch. Mar. 31, 1994).

3. Product Line Claims

The product line exception to liability generally "imposes strict liability for injuries caused by defects of a product line on a corporation that acquires all or substantially all of the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation." *Committee's Opp'n* ¶ 41, ECF No. 90 (citing *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (1981)). The Successor Liability Claims at issue in this case include product line claims against Brenntag based on its acquisition of Debtors' assets. The Committee contends that claims premised on this theory are "undisputedly direct claims under *Emoral*" because "they (i) are predicated upon individualized harm suffered by each claimant; (ii) cannot be asserted by a corporation against its own successor; and (iii) are specific to Asbestos Claimants and cannot be brought by all of the Debtors' creditors." *Committee's Supp. Br.* ¶ 7, ECF No. 232.

Debtors concede that these product line claims "are not held by every (or even practically every) hypothetical creditor who extends credit to the debtor. Rather, they are held only by those creditors who are injured by products manufactured by the debtor." *Debtors' Supp. Br.* ¶ 15, ECF No. 233. Accordingly, these claims appear particularized or direct and, as such, arguably would belong to the creditors. However, all Successor Liability Claims—including the product line exception claims—seek, at their core, to hold a non-debtor entity liable for Debtors' tort liabilities. The harms alleged cannot be traced directly to Brenntag or any other non-debtor third party—no matter the theory of liability utilized. And although the product line claims are pleaded in a manner that renders them unique to only those plaintiffs who were injured by the product at issue, they are premised on the same set of facts as any other theory of successor liability asserted. In this respect, they are consistent with all successor liability claims in that a target successor's liability is not grounded upon the underlying injury and the predecessor's activities which created the harm, but rather the subsequent acquisition of assets by the successor and its ensuing operations.

Under New Jersey's version of product line theory, the purchaser of a company's manufacturing assets is strictly liable for defects where the purchaser "undertakes essentially the same manufacturing operation as the selling corporation[.]" *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 358, 431 A.2d 811, 825 (1981). The facts necessary to make such findings are general to the estate and not personal to a specific creditor. The same holds true under California's version of product line theory, which requires an inquiry into the purchaser's acquisition, the purchaser's ability to assume risk, and the fairness in imposing liability upon the purchaser. *Hernandez v. Enter. Rent-A-Car Co. of San Francisco*, 37 Cal. App. 5th 187, 249 Cal. Rptr. 3d 467 (2019). Again, the facts necessary to determine successor liability are general to all creditors. The Court finds no legal or factual justification to carve-out product line claims from the dictates of *Emoral* in treating all successor liability claims as estate property.

Notably, courts have looked beyond the language of the complaints and the theories pleaded to prevent individual creditors from pursuing claims belonging to bankruptcy estates. *See In re Revlon, Inc.*, 2023 WL 2229352 at *12-17 (Bankr. S.D.N.Y. Feb. 24, 2023) (collecting cases where plaintiffs used strategic pleading choices in an effort to transform a derivative claim to a non-derivative one); *see also In re Tronox Inc.*, 855 F.3d 84, 99 (2d Cir. 2017) (explaining that "so-called 'derivative claims'—i.e., claims 'based on rights "derivative" of, or "derived" from, the debtor's'—typically constitute 'property of the estate' ") (quoting *In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 88 (2d Cir. 2014)). "[A] creditor's claim against a third party is not particular simply because the trustee cannot bring the exact claim as the creditor." *In re Port Morris Tile & Marble LP*, 645 B.R. 500, 515 (Bankr. S.D.N.Y. 2022). When examining claims, "[t]he proper analysis . . . involves a comparison between the harms that are subject of the creditors' claim and the harms that are actionable via the trustee's claims." *Id.*

Here, the product line claims are bottomed on the fact that a successor continued to manufacture Debtors' product line. The harms alleged in the product line claims are, thus, the same harms alleged in the Successor Liability Claims premised on other theories of liability: all allege that Debtors' product caused injuries. Significantly, the facts underlying these claims are available to all creditors. *See, e.g.*, *In re Tronox Inc.*, 855 F.3d at 103–04 (agreeing with *Emoral* that the fact that plaintiffs "had an underlying harm specific to them did not put the claims automatically outside the estate" and finding the claims to be general).

The Court is aware that the facts of the instant case are distinguishable from those before other courts that have deemed general claims that were pleaded as particularized. For example, unlike the claims at issue in *Revlon*—which were filed post-petition and analyzed under § 541(a)—the product line claims in this case were filed prepetition. *See In re Revlon, Inc.*, 2023 WL 2229352. Likewise, in *Kwok*, the trustee sought to pursue alter ego and veil piercing claims, whereas the claims at issue here are premised on other theories of successor liability. *See In re Kwok* 2024 WL 1261803. Nevertheless, the analysis remains unchanged. Looking at the nature of the product line claims, *see Emoral, Inc.*, 740 F.3d at 879, this Court resolves that they are indistinguishable from claims brought under other theories of successor liability. Because—for reasons previously discussed—those claims are estate property, pursuit of the product line claims outside of the bankruptcy would interfere with the estate's right and interests and would prevent Debtors from both maximizing the value of its assets and providing a benefit for all creditors. *See In re Revlon, Inc.*, 2023 WL 2229352, at *14 (explaining that "claims can also be derivative if they would usurp estate rights and interests that are conferred by operation of the Bankruptcy Code itself") (citing *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700 (2d Cir. 1989)).

The Court grants that *Emoral* did not specifically address claims asserted under a product line theory and, instead, grappled with liability based on a "mere continuation" theory. Nonetheless, nothing about the *Emoral* decision indicates that the analysis undertaken would not apply similarly to a claim grounded on a different theory—especially when that claim is based on the same facts and alleges the same harms; namely, facts regarding the contractual and transactional relationship between the Debtors and Brenntag and harms stemming from injuries due to Debtors' product. The viability of a Successor Liability Claim will not depend on facts that are unique to any individual Tort Claimant. Rather, it is dependent on the relationship between the initial entity and its successor. *See, e.g.*, *Pub. Serv. Elec. & Gas Co. v. Cooper Indus., LLC,* 678 F. Supp. 3d 611 (D.N.J. 2023) (discussing elements of successor liability under New Jersey law); *Rubio v. CIA Wheel Grp.*, 63 Cal. App. 5th 82, 102, 277 Cal. Rptr. 3d 450, 469 (2021) (discussing elements of successor liability under California law). Although the Third Circuit in *Emoral* analyzed the claims at issue under a theory of successor liability bottomed on "mere continuation," its holding remains instructive, and the Court can conceive of no reason why the general versus personal analysis under one theory of successor liability should differ when a successor liability claim is premised on a different theory. In this Court's view, the same rationale should apply. The Court finds further support for this conclusion in the Third Circuit's reasoning in *Emoral*, which—as discussed earlier—suggests that the analysis used can, and should, be imputed to other theories of liability so long as their underlying purposes are similar. *See In re Emoral, Inc.*, 740 F.3d at 881 (citing *Phar-Mor, Inc.*, 22 F.3d 1228, and extending rationale used in cases involving veil-piercing causes of action to cases involving successor liability actions).

In sum, all Successor Liability Claims seek—in some fashion—to impute Debtors' liability to a non-debtor entity. The harms alleged and the factual allegations necessary to establish a Successor Liability Claim—whether it is based on "mere continuation" theory, "product line exception," or any other legal basis—are not unique to any one creditor. Given the factual overlaps and identical harms alleged, the Court concludes that the Successor Liability Claims are not direct claims under the *Emoral* test, no matter the theory under which they are pursued. As a result, they are property of the estate under § 541(a)(1) and § 541(a)(7) [by way of § 544(a)(1)], and at this juncture, the Debtors are the appropriate parties to bring these claims.

B. The Remaining Objections

Having determined that the Successor Liability Claims are property of the bankruptcy estates, many of the remaining objections to Debtors' Motion are rendered moot. This Court need not address the Talc Committee's arguments that factual disputes exist as to the *type* of claims at issue (i.e. "mere continuation" claims or product line exception claims), or that disputes exist as to which state's laws should govern each claim. Likewise, a choice of law analysis is not required. However, certain other objections raised by the Committee, FCR, and OCWD warrant further discussion. The Court takes this opportunity to address them.

1. No Factual Issues Remain

First, the Committee asserts that genuine issues of fact exist regarding whether each claim listed in Appendix A to the Complaint is a derivative claim. *Committee's Opp'n* ¶¶ 56-60, ECF No. 90. While conceding that "[t]he definition of 'Successor Liability Claims' in the Motion is consistent with" the requirement that the precluded claims must be "derivative claim[s] based on an injury caused by the Debtors," the Committee posits that the Debtors "fail to actually establish through admissible facts or clear descriptions that . . . none of the Appendix A Claims are direct claims against Brenntag." *Id.* at ¶¶ 56, 57. This argument puts the cart before the horse. It is not necessary at this juncture for Debtors or the Court to conduct an exhaustive review of each, individual claim. The Court's adjudication of Counts I and IV of the Complaint does not require a ruling that any particular lawsuit on Appendix A asserts Successor Liability Claims against Brenntag or other third parties. For the same reasons, a claim-by-claim choice of law analysis for all the claims is unnecessary, especially considering the Committee's failure to demonstrate an actual conflict of law warranting a choice of law analysis. Rather, for purposes of this Motion it is sufficient for Debtors to establish a category of claims that belong to Debtors as a matter of law; namely, the Successor Liability Claims as those claims are defined in the Complaint. Debtors have satisfied that burden.[13] If, in applying this Court's ruling to litigation going forward, a dispute arises regarding the characterization of a given claim, this Court retains jurisdiction to determine whether such claim constitutes a Successor Liability Claim.

The Committee also contends that additional discovery is needed to understand the scope of the relief sought by Debtors and to investigate the enforceability of any indemnification claims against Debtors. *Committee's Opp'n* ¶¶ 101-07, ECF No. 90. In rejecting this argument, this Court reiterates that a fact-intensive inquiry into the details of every claim is not necessary to resolve the primarily legal issue before of the Court; namely, whether the Successor Liability Claims as those claims are defined in the

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[13] The uncontroverted record before the Court evidences the existence of at least seventeen (17) complaints introduced at the TRO Hearing and three (3) complaints annexed as exhibits to Mr. Meghji's Declaration, which allege Successor Liability Claims, giving rise to the requested declaratory relief controversy.

Complaint constitute property of the estate. Additional discovery into related issues, such as indemnification obligations, would not alter this Court's analysis under *Emoral*.

2. Declaratory Relief is Appropriate

The Talc Committee asserts that Debtors "may be seeking to stay [the Successor Liability Claims] in order to obtain undue leverage over their creditors for the benefit of a non-party to these Chapter 11 Cases." *Committee's Opp'n* ¶ 74, ECF No. 90. In support of this argument, the Committee relies on *G-I Holdings*. *In re G-I Holdings, Inc.*, 2008 WL 11513187, at *7 (D.N.J. May 30, 2008). However, the Court finds that case distinguishable. In *G-I Holdings*, the court declined to entertain a request for declaratory judgment because it appeared to the court that plaintiffs were attempting to "circumvent the choice of forum" and "influence the law applicable to the successor and alter ego liability issues." *Id.* at *7. Here, however, Debtors have not sought declaratory relief for such improper purposes. Instead, they are pursuing declaratory relief in order to maximize value for the estate and all creditors, and seek a determination governed by federal bankruptcy law.

Although the Committee and FCR argue against declaratory relief sought in the Motion, both parties concede "there is the considerable amount of discretion built into the Declaratory Judgment Act itself." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 646 (3d Cir. 1990) (citing 28 U.S.C. § 2201); *see also FCR Opp'n* ¶ 15, ECF No. 675 in Case No. 23-13575 (conceding that the Court has "substantial discretion" to issue declaratory relief). In determining whether an issue is "ripe" "in the context of a declaratory judgment action, the Third Circuit articulated three principles which should be considered: (i) the adversity of the interest of the parties, (ii) the conclusiveness of the judicial judgment, and (iii) the practical help, or utility, of the judgment." *In re Grand Ct. Lifestyles, Inc.*, 309 B.R. 117, 122 (Bankr. D.N.J. 2004) (citing *Step-Saver*, 912 F.2d at 646-47). "According to the Third Circuit, '[p]arties' interests are adverse where harm will result if the declaratory judgment is not entered." *California Cas. & Fire Ins. Co. v. Montez*, 2024 WL 180822, at *5 (D.N.J. Jan. 17, 2024) (quoting *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995)). Here, permitting individual pursuit of the Successor Liability Claims will result in an effective race to the courthouse and impede the Debtors' ability to bring money into the estate for the benefit of all creditors. That potential harm is "real and substantial" and, thus, the matter is ripe for declaratory relief. *See Travelers Ins. Co. v. Obusek*, 72 F.3d at 1154.

As to the second factor—the conclusiveness of the judicial judgment—courts "must determine whether judicial action at the present time would amount to more than an advisory opinion based upon a hypothetical set of facts." *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1468 (3d Cir. 1994). "Questions that are predominantly legal 'are generally amenable to a conclusive determination in a pre[-]enforcement context.' " *California Cas. & Fire Ins. Co. v. Montez*, 2024 WL 180822, at *5 (quoting *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d at 1468). Once again, here, the question of whether the Successor Liability Claims constitute estate property is predominantly legal in nature and amounts to more than an advisory opinion. Thus, this factor also suggests ripeness.

Finally, the Court addresses the utility of the declaratory relief. Declaratory relief in Debtors' favor will undeniably serve a useful purpose; namely, the promotion of fairness and equity among creditors and the maximization of value to the estate. Given the specificity of this ruling and the concrete definition of Successor Liability Claims in the Complaint, this Court is confident that parties will be able to use the declaratory relief to discern which claims constitute Successor Liability Claims. The Court simply does not accept the contention advanced by the FCR that a ruling in Debtors' favor will provide no useful guidance or that application of this ruling will result in "endless requests for clarification." *FCR Opp'n* ¶ 18, ECF No. 675 in Case No. 23-13575. Because all three factors suggest ripeness, declaratory relief is appropriate.

As to the impact of declaratory relief on future claims, the FCR argues that—because future claimants are not parties to the adversary proceeding—they cannot be bound by any declaratory judgment entered in this adversary proceeding. *FCR Supp. Br.* ¶ 11, ECF No. 1195 in Case No. 23-13575. The impact of the instant ruling on claimants who have not yet sought relief, however, is a question for another day. At this juncture, the Court's ruling is limited to the primarily legal determination that the Successor Liability Claims—as those claims are defined in the Complaint—constitute estate property. To the extent a future claimant files a claim and wishes to challenge the collateral or preclusive effect of the instant ruling, the Court will address the issue at that time. However, such issues are not ripe for decision today.

3. Due Process Concerns

The Committee argues that Debtors' preference to settle the successor liability issues in a single proceeding rather than thousands of individual lawsuits cannot trump plaintiffs' due process rights. *Committee's Opp'n* ¶ 77, ECF No. 90. This argument assumes that Debtors' pursuit of the Successor Liability Claims is merely a strategic choice and not tied to the fact that the Successor Liability Claims are estate property that—in accordance with the Bankruptcy Code—are appropriately pursued by the trustee or debtor-in-possession.

4. Allegations of Improper Purpose and Policy Considerations Do Not Warrant Denial of Summary Judgment

The Committee makes much of the fact that NICO may bear ultimate responsibility for any successor liability exposure that Debtors are unable to satisfy. However, the fact that Debtors may be entitled to indemnification does not eliminate the fact that—prior to receiving indemnification—Debtors must first be exposed to liability. The Debtors' liability is what triggers the impact on the estate and underscores the policy reasons behind the Debtors' rights to step into the shoes of a hypothetical judicial lien creditor. Indeed, the Committee concedes that "[t]he Debtors are certainly entitled to avail themselves of the protections under chapter 11 to bring finality to their own liabilities and facilitate an equitable distribution of their remaining assets to creditors." *Committee's*

Opp'n ¶ 91, ECF No. 90. That is what Debtors are seeking to accomplish here.

Notably, the Committee expresses concern that "Debtors are seeking sole authority to settle Successor Liability Claims in order to obtain Court approval to settle those claims" without proper analysis and "in a manner that is beneficial to NICO to the detrimental to [sic] Tort Claimants, rather than in [a] manner that is truly fair and equitable." *Committee's Opp'n* ¶ 94, ECF No. 90. This concern ignores the role that courts play in the approval of settlements and implies that this Court will rubber-stamp Debtors' proposed settlement, even if it does not meet the standard for approval set forth in binding case law. The Court takes this opportunity to assure the parties that, prior to approving settlements, the Court carefully considers all the *In re Martin* factors, including "the paramount interest of the creditors." *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996). It will undertake this same process should Debtors in the instant case propose a settlement of the Successor Liability Claims.

The FCR also challenges Debtors' attempt to pursue the Successor Liability Claims against non-debtors, arguing that—because the non-Debtors are solvent—claims against them outside of bankruptcy will not reduce claimant recoveries. *FCR Opp'n* ¶ 3-4, ECF No. 1222 in Case No. 23-13575. The FCR specifically focuses on the financial condition of Debtors' ultimate parent company, Berkshire Hathaway, Inc., and suggests that the Tort Claimants may "prefer to accept a modest recovery in these chapter 11 cases by pursuing a Debtor-only plan that does not provide solvent non-Debtor, third parties with releases." *Id.* at ¶ 5. As an initial matter, the issue presently before this Court does not implicate third-party releases but, instead, asks whether the Successor Liability Claims are estate property. Moreover, as this argument raises policy considerations that, in this Court's view, further weigh in favor of deeming the Successor Liability Claims to be property of the estate. The FCR's contends that preserving creditors' ability to pursue claims against solvent non-debtors outside of this bankruptcy "is likely to be the value-maximizing path for claimants[.]" This bald statements ignores the multitude of "collective action problem[s]" highlighted by Justice Kavanaugh in his thorough dissent in *Purdue*. *FCR Opp'n* at ¶ 5; *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 2100 (2024).

Indeed, the FCR focuses solely on the solvent financial condition of the non-debtor entities in support of this argument. This narrow focus disregards the risks, uncertainties, costs, and delays that accompany these litigations. Let's not ignore the obvious: these Debtors have not operated in two decades and hundreds of claimants have already been waiting years and years to have their claims heard. They are deserving of a fair and equitable recovery in the near term, without the risk and delays inherent in the tort system. Moreover, given the collective action considerations discussed in *Purdue*, the Court is unpersuaded that the Tort Claimants' individual pursuit of these claims against non-debtor third parties truly would maximize value; and remains far less confident that such a path maximizes value for *all* claimants. Rather, this Court holds firm that allowing Debtors to pursue the Successor Liability Claims will prevent the proverbial race to the courthouse, will ensure more equitable creditor recoveries, and will enable creditors to avoid "the significant risk, cost and delay (potentially years) that would result from pursuing the [non-debtors] and related parties through litigation." *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. at 2101.

C. Derivative Standing is not before the Court

OCWD requests that—to the extent the Court deems the Successor Liability Claims property of the bankruptcy estate—the Court grant derivative standing to pursue those claims the creditors. *See OCWD's Opp'n* ¶ 4, ECF No. 86. The issue of derivative standing is not presently before the Court. To the extent creditors seek an order granting them authority to pursue the Successor Liability Claims derivatively, an appropriate motion should be filed.

V. Conclusion [sic]

For the foregoing reasons, the Court concludes that the Successor Liability Claims—as that term is defined in the Complaint—are property of the estate under § 541(a)(1) and § 541(a)(7) - by virtue of §544(a)(1). Accordingly, Debtors are entitled to summary judgment on Counts I and IV of the Complaint. Debtors are directed to submit a proposed form of order consistent with this Court's ruling.

/s/ Michael B. Kaplan
Honorable Michael B. Kaplan
United States Bankruptcy Judge

DATED: August 13, 2024

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 24-2210, 24-2211 & 25-1044

IN RE: WHITTAKER CLARK & DANIELS, INC.,

Debtor

WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (f/k/a Brenntag Specialties, Inc., and as Mineral and Pigment Solutions, Inc.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000

Official Committee of Talc Claimants,

Appellant

(Amended Pursuant to Court Order of 4/7/25)

(District Court Nos. 312-3:23-bk-13575; 0312-3:23-cv-04151; 312-3-3:23-cv-04156)

Before: SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, MASCOTT, Circuit Judges and [1]AMBRO, Senior Judge

ORDER

The petition for panel rehearing filed by appellant**, Official Committee of Talc Claimants,** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court, panel rehearing is **granted.** The Clerk is directed to file the amended opinions contemporaneously with this order. The amended majority opinion was revised throughout in response to the arguments set out in Committee's petition. The amended concurring opinions were revised to reflect formatting and internal cross-reference changes throughout. As the revisions to the amended majority opinion do not affect the disposition of the appeal, the judgments will remain as filed.

The petition for rehearing en banc filed by appellant, **Official Committee of Talc Claimants**, in the above-entitled cases having been submitted to all available circuit judges of the circuit in regular active service, and no judge of the circuit in regular active service, asked for rehearing en banc, rehearing en banc is **denied.**

BY THE COURT,

Dated: April 27, 2026
cc: All Counsel of Record

s/ Thomas L. Ambro
Circuit Judge

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[1] Judge Ambro's vote is limited to panel rehearing.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1044

In re: WHITTAKER CLARK & DANIELS, INC,

Debtor

WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (f/k/a Brenntag Specialties, Inc., and as Mineral and Pigment Solutions, Inc.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000; JULIET M. GRAY; KYUNG H. LEE

Official Committee of Talc Claimants,

Appellant

On Appeal from the United States Bankruptcy Court
for the District of New Jersey
(Bankr. Ct. Adv. Pro. No. 23-01245)
Bankruptcy Judge: Honorable Michael B. Kaplan

Argued on April 1, 2025

Before: KRAUSE, MATEY, and AMBRO,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States Bankruptcy Court for the District of New Jersey and was argued on April 1, 2025.

On consideration whereof, it is now hereby

ORDERED and **ADJUDGED** by this Court that the order of the Bankruptcy Court entered on September 25, 2024, be and the same is hereby **AFFIRMED**.

Costs shall be taxed against Appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Patricia S. Dodszuweit
Clerk

DATE: September 10, 2025

[SEAL OF THE COURT]

Certified as a true copy and issued in lieu of a formal mandate on May 19, 2026

Teste: */s/ Patricia S. Dodszuweit*
Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX H

STATUTORY PROVISIONS

11 U.S.C. 541. Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is–

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date–

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include–

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that–

(A) (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B) (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but–

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds–

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $8,575 [originally "$5,000", adjusted effective April 1, 2025][1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but–

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the

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[1] See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $8,575 [originally "$5,000", adjusted effective April 1, 2025][1];

(7) any amount–

(A) withheld by an employer from the wages of employees for payment as contributions–

(i) to–

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions–

(i) to–

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where–

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b);

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made–

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition; or

(10) funds placed in an account of a qualified ABLE program (as defined in section 529A(b) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but–

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds–

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $8,575 [originally "$6,225", adjusted effective April 1, 2025].[1]

(11) [**Repealed**. Pub.L. 116-260, Div. FF, Title X, § 1001(a)(2)(C), Dec. 27, 2020, 134 Stat. 3217]

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c) **(1)** Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law–

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue

Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

11 U.S.C. § 524(g). Effect of Discharge

* * *

(g) (1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2) (A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that–

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization–

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of–

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that–

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan–

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3) (A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan–

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to–

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4) (A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of–

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to–

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means–

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in–

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if–

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term “demand” means a demand for payment, present or future, that–

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

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