By Nir Maoz

Extending the Automatic Stay: Nothing Unusual About Nondebtors

Editor's Note: *ABI conducted its Eleventh Annual Bankruptcy Law Student Writing Competition during the first semester of 2019. Law students from around the nation submitted papers that focused on such topics as bankruptcy fraud exception, livestock in bankruptcy and applying undue hardship to aging debtors. All papers were judged by a panel of bankruptcy experts on style, substance and relevance.* ***Nir Maoz****, a third-year student at the University of California, Berkeley School of Law, won first place in the competition. He received a $2,000 cash prize (sponsored by Blank Rome LLP), a one-year ABI membership and publication of the paper in the* ABI Journal.

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The automatic stay[1] is perhaps the most powerful provision in the entire Bankruptcy Code.[2] It operates as an *ex parte* injunction against collection efforts, binding upon the world, without a need to show the elements ordinarily required for the issuance of a temporary restraining order, including irreparable injury.[3] The stay applies upon the filing either of a voluntary or involuntary case,[4] is effective with regard to a debtor's property situated inside and outside the U.S.,[5] and prohibits creditors from taking actions that would inevitably have an adverse effect on property of the estate.[6] Although the stay shields a debtor and its property from collection efforts, it does not extinguish or discharge any debt[7] and creates no greater rights for a debtor than those it has outside of bankruptcy.[8]

Section 362 only stays actions, broadly defined, against a debtor and its property.[9] It does not prevent creditors from asserting claims against nondebtors that do not implicate the property of the estate.[10] The class of nondebtor entities ordinarily not protected by the § 362 automatic stay might include legal entities that could be part of a debtor's business enterprise directors, officers and employees, or other affiliates of the debtor. However, in certain limited circumstances, courts have found a way to extend the automatic stay to protect nondebtor parties.[11] Jurisprudence in this regard has been inconsistent across circuits, ambiguously defined and excessively broad in application.

Rules that solely and selectively benefit the debtor are poorly designed. A set of well-designed rules should provide a debtor with breathing space and, if possible, increase value for creditors. To increase predictability without limiting the flexibility of the courts to craft appropriate remedies when necessary, a two-step test could be applied to determine whether to extend the stay to a nondebtor.

First, the court must find related-to jurisdiction over the third party under 28 U.S.C. § 1334, then the court should impose a third-party stay only if the traditional preliminary-injunction tests are satisfied. This two-pronged approach is grounded in statutory text, legislative history and case law. It avoids the superfluous approaches that some courts take and prevents the sort of unbounded discretion that risks overly broad injunctions.

Extending the Automatic Stay to Nondebtors

Debtors often seek to extend their automatic stay to various types of nondebtors. These include parents and subsidiaries,[12] guarantors,[13] insurers,[14] key personnel[15] and business affiliates.[16] Staying actions against these nondebtor parties might be necessary in order to protect the debtor's estate or to ensure an orderly and fair reorganization. When the Code was first written, Congress anticipated that certain actions would not be covered by the automatic stay. Thus, Congress provided bankruptcy courts with broad injunctive powers to enable effective administration and reorganization beyond the strict statutory language of the automatic stay. The Senate Report accompanying the Bankruptcy Reform Act of 1978

1 11 U.S.C. § 362.
2 11 U.S.C. §§ 101, *et seq.*
3 *See Hudson Valley Cablevision Corp. v. Route 202 Developers Inc.*, 169 B.R. 531 (S.D.N.Y. 1994).
4 *See In re Delta Air Lines*, 359 B.R. 454, 459 (Bankr. S.D.N.Y. 2006); *Interpool Ltd. v. Certain Freights of the M/Vs Venture Star, Mosman Star, Fjord Star, Lakes Star, Lily Star*, 878 F.2d 111, 112 n.4 (3d Cir. 1989).
5 *See In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996).
6 *See In re Prudential Lines Inc.*, 119 B.R. 430 (S.D.N.Y.), *aff'd*, 928 F.2d 565 (2d Cir.), *cert. denied*, *PSS S.S. Co. Inc. v. Unsecured Creditors*, 502 U.S. 821 (1991).
7 *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (quoting *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990)).
8 *See In re Synergy Dev. Corp.*, 140 B.R. 958 (Bankr. S.D.N.Y. 1992).
9 *See* 11 U.S.C. §§ 362, 363, 541.
10 *See* 11 U.S.C. § 362.
11 *See* 11 U.S.C. § 105.
12 *See, e.g., Residential Capital LLC v. Fed. Hous. Fin. Agency (In re Residential Capital LLC)*, 529 Fed. App'x 69 (2d Cir. 2013) (holding that automatic stay under § 362(a) might apply to litigation against nondebtor corporate parent or nonsubsidiary affiliate if such litigation would have immediate adverse consequence on debtor's bankruptcy estate).
13 *See* 3 *Collier on Bankruptcy* ¶ 362.03[5][b] (16th 2017); *see, e.g., ACandS Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (holding that "insurance policies are considered part of the property of a bankruptcy estate").
14 *See McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 514 (3d Cir. 1997).
15 *See* 3-362 *Collier on Bankruptcy* ¶ 362.04 (16th 2017); *see, e.g., In re Phila. Newspapers LLC*, 407 B.R. 606, 617 (E.D. Pa. 2009) (upholding stay extension to enjoin fraud action against newspaper debtor's CEO).
16 *See, e.g., A.H. Robins Co. v. Piccinin*, 788 F.2d 994,1016 (4th Cir. 1986).

states that "the court has ample other powers to stay actions not covered by the automatic stay. Section 105 ... grants the power to issue orders necessary or appropriate to carry out the provisions of title 11."[17]

Lack of Consistent Procedural Application

The analytical framework employed by bankruptcy courts across the nation when determining whether to extend the automatic stay to nondebtors has been inconsistent. Some courts use only the language of § 362(a) to extend the stay to nondebtors by interpreting actions against debtor employees or affiliates as actions against the debtor itself, while others rely on the general equitable powers of the courts under § 105 to issue an injunction separate from the automatic stay to protect debtor employees or affiliates. When weighing interests of the parties, some courts (such as those in the Third Circuit) look at "unusual circumstances,"[18] while others (such as those in the Second Circuit) look at "immediate adverse economic consequences."[19]

Most courts currently rely on *A.H. Robins Co. v. Piccinin* for guidance when considering a request to extend an automatic stay to one or more nondebtors. The *A.H. Robbins* court, arguably incorrectly, found four independent grounds on which bankruptcy courts may enjoin suits against nondebtors: (1) by applying § 362(a)(1) when "unusual circumstances" exist; (2) through § 362(a)(3) by holding that certain assets are part of the estate, such as an insurance policies;[20] (3) that § 105 permits an injunction barring actions against a nondebtor;[21] and (4) that 28 U.S.C. § 1334 might be sufficient in itself to give the courts power to issue an injunction against nondebtor third-party actions.[22]

Notwithstanding their reliance on *A.H. Robbins*, the courts do not follow a uniform analytical framework, but rather adopt individualized tests that stem from the reasoning in *A.H. Robbins*. This differing view among the circuits (with respect to extending the stay to nondebtors) has been one factor in selecting a venue for bankruptcy.[23]

Irrespective of the analysis of issuing injunctions, all courts say that they must first find related-to jurisdiction over the third-party suits in question pursuant to 28 U.S.C. § 1334(b) to consider extending the automatic stay. While the case law uniformly accepts *Pacor Inc. v. Higgins* as the seminal case for related-to jurisdiction, courts have differed in the substantive importance of the jurisdictional analysis *vis-à-vis* extending the stay to nondebtors.

Over the last two decades, most courts have come to recognize that, unlike *A.H. Robbins*, to extend the stay to a nondebtor, the court must issue an injunction under § 105 rather than merely include the nondebtor within the organic ambit of § 362.[24] When applying § 105(a), most courts use the traditional preliminary-injunction standard, which requires the party seeking the injunction to show (1) a substantial likelihood of success on the merits, (2) that the movant will suffer irreparable injury unless the court issues an injunction, (3) that the threatened injury to the movant outweighs any damage that the injunction might cause the opposing party, and (4) that the injunction would not adversely affect public interest.[25]

However, circuits that have applied the traditional preliminary-injunction analysis have applied it differently. For example, the Seventh Circuit does not require a showing of irreparable harm under § 105,[26] but the Third Circuit has held that if the moving party does not carry its burden as to irreparable harm, then it should deny the motion without considering the last two factors.[27] Further, after finding jurisdiction, the Third Circuit inserts an intermediary step: asking whether it is appropriate to expand protections under § 105 to the nondebtor, which rests on two factors: whether there is an identity of interests, and whether the action in question might have an adverse impact on the debtor's ability to accomplish a reorganization.[28]

Some courts, such as those in the Second Circuit, explicitly do not apply the traditional-injunction analysis.[29] In applying § 105, these courts merely must find that the claims in question "threaten to thwart or frustrate the debtor's reorganization efforts," and "that the injunction is important for effective reorganization."[30]

Therefore, not including the various nuances among the districts, there are at least three primary analytical frameworks being employed by the circuit courts when faced with a request to extend the automatic stay to a nondebtor: (1) the traditional-injunction test; (2) the intermediary-identity-of-interests test; or (3) the more general effective-reorganization test. This lack of consistency is problematic because not only does it result in circuit splits that can lead to over- (or under-) expansion of the stay to nondebtors, it also lacks clear foundation in the Bankruptcy Code.

A Suggested Framework

When asked to extend the automatic stay to a nondebtor, a court should apply a clear and consistent test that removes

17 H.R. Rep. No. 95-595, 342 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298.

18 *See In re Brier Creek Corp. Ctr. Assocs. Ltd. P'ship*, No. 12-01855-SWH, 2013 Bankr. LEXIS 143, *18-19 (Bankr. E.D.N.C. Jan. 14, 2013) (extending stay to nondebtor both under §§ 362(a) and 105).

19 *See Queenie Ltd. v. Nygard Int'l*, 321 F.3d 282, 288 (2d Cir. 2003) (upholding stay under § 362(a) to wholly owned company because adjudication of claim would have immediate adverse economic impact and refusing to extend stay to co-defendant because risk of offensive collateral estoppel was not sufficient to create immediate adverse economic impact).

20 *A.H. Robbins*, 788 F.2d at 1001 (citing broad definition of "property" under § 541(a)(1) as construed by *United States v. Whiting Pools Inc.*, 462 U.S. 198, 205, n.9 (1983)).

21 *Id.* at 1003.

22 788 F.2d at 1003 (stating that "the bankruptcy court under its comprehensive jurisdiction as conferred by § 1334 ... has the inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" (internal quotation and citation omitted)).

23 Craig H. Averch and Brian L. Holman, "When May a Bankruptcy Court Enjoin Proceedings Against a Nondebtor," 4 *Pratt's J. Bankr. L.* 78, 82 (2008).

24 *See In re Phila. Newspapers LLC v. Lane (In re Phila. Newspapers LLC)*, 410 B.R. 404, 412 (Bankr. E.D. Pa. 2009) ("The law is clear that in some circumstances discretionary stays beyond the scope of § 362 are appropriate and that a court's power to issue such injunctions stems from § 105.").

25 *See* 3 *Collier on Bankruptcy* ¶ 362.04[1] (16th ed. 2017).

26 *See In re L & S Indus.*, 989 F.2d 929, 932 (7th Cir. 1993) ("[A] bankruptcy court can enjoin proceedings in other courts when it is satisfied that such proceedings would defeat or impair its jurisdiction over the case before it. In other words, the court does not need to demonstrate an inadequate remedy at law or irreparable harm.").

27 *Revel AC Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 571 (3d Cir. 2015) ("[I]f the movant does not make the requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis." (internal quotations and citations omitted)).

28 *In re W.R. Grace & Co.*, 386 B.R.17, 31 (Bankr. D. Del. 2008).

29 *See McHale v. Alvarez (In re 1031 Tax Grp. LLC)*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008) ("Because § 105(a) injunctions are authorized by statute, they do not need to comply with the traditional requirements of Fed. R. Civ. P. 65.").

30 *Id.* at 684 (citing *Goldin v. Primavera Familienstiftung Tag Assocs. (In re Granite Partners LP)*, 194 B.R. 318, 337 (Bankr. S.D.N.Y. 1996)). This overbroad standard is at least guided by five factors: whether the suits in question create (1) threats against debtor's insurance coverage, (2) indemnification liability, (3) inconsistent judgments, (4) risk of collateral estoppel or *res judicata* or (5) a burden and distraction on the debtor's management diverting their attention from the reorganization. *See Drennan v. Certain Underwriters at Lloyd's of London (In re Residential Capital LLC)*, 563 B.R. 756, 774 (Bankr. S.D.N.Y. 2016) (citing *In re 1031 Tax Grp.*, 397 B.R. at 684).

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ambiguities all while promoting the goals of the Code.[31] Here is a proposed framework that courts should use in determining whether to extend the automatic stay to nondebtors: The determination should employ a two-step test of first assessing § 1334(b) related-to jurisdiction, then evaluating the traditional preliminary-injunction test. The incorporation of these two tests is novel in that it encapsulates all necessary considerations without introducing awkward and ambiguous judge-made tests, such as an intermediary step of finding "unusual circumstances."

Related-to Jurisdiction

More than two decades ago, the U.S. Supreme Court held that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[32] Bankruptcy courts have subject-matter jurisdiction over cases that arise under, arise in or are "related to" cases under the Code.[33] While § 105(a) allows a bankruptcy court to issue any order necessary to carry out Code provisions, it "does not provide an independent source of federal subject-matter jurisdiction."[34]

Therefore, before conducting a § 105(a) analysis, a court must establish that it has jurisdiction over the third-party action. *Pacor v. Higgins* stands for the proposition that related-to jurisdiction exists when a proceeding has a "conceivable" effect on the administration of the bankruptcy estate: "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."[35]

In *Federal-Mogul Global Inc.*, the Third Circuit reaffirmed the *Pacor* test and further refined it to explain that the central inquiry is "whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit."[36] This outer bound of the *Pacor* test establishes the fact that a potential common law indemnification claim is not sufficient to establish related-to jurisdiction because it would require another lawsuit before there would be any impact on the bankruptcy proceeding; in other words, there must be a direct effect on the estate.[37]

For example, take a contractor who initiates a suit against its subcontractor to recover costs paid to a plaintiff property owner. An intervening lawsuit is required to establish the subcontractor's liability, absent the existence of a contractual indemnity. Even if a contractual indemnity is in place, the contract between the parties in and of itself might not be sufficient to establish related-to jurisdiction; rather, the determination must be "developed on a fact-specific case-by-case basis."[38]

The Second Circuit has taken a more "flexible approach," holding that contingent contribution claims might be sufficient to establish related-to jurisdiction.[39] In the words of the Second Circuit, a "high degree of interconnectedness" and a "chain of indemnity provisions" can create related-to jurisdiction.[40]

Indemnification is the primary mode of "affect" that courts look for when determining whether the "debtor's rights, liabilities, options, or freedom of action" are affected. However, other bases of jurisdiction exist. One primary focus of the courts has been a debtor's ability to reorganize and whether a litigation matter involving a third party will create a diversion of time and energy from the reorganization efforts.[41] Similarly, courts take into account the risks of collateral estoppel and record taint or prejudice in a subsequent litigation involving the debtor.[42] However, courts should not give undue weight to the debtor's attention on reorganization and the risks of collateral estoppel for purposes of establishing related-to jurisdiction;[43] both of these factors are already considered under the second and third prongs of the traditional preliminary-injunction test for applying § 105(a).

While advocating for a two-step approach, related-to jurisdiction followed by the traditional preliminary-injunction analysis, the related-to jurisdiction analysis can be informed by the Third Circuit's intermediary step; it looks for an identity of interests because the test centers the court's attention on the nexus between the debtor and third-party claims. This approach is similar to that taken by the *Takata* court.

Takata's bankruptcy was sparked by lawsuits regarding a defect in their automotive airbag systems, and the court extended the automatic stay to the original equipment manufacturers (OEMs), including Honda and Toyota.[44] The court concluded that there existed an "identity of interests" in a key part of its related-to jurisdiction analysis. Focusing on the relationship between the third-party claims and the debtor, as opposed to merely the effects on the debtor, creates a clear-

31 *See RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) (noting importance of clarity and predictability in light of the fact that Code "standardizes an expansive (and sometimes unruly) area of law").

32 *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

33 11 U.S.C § 1334(b).

34 *See In re Combustion Eng'g Inc.*, 391 F.3d 190, 225 (3d Cir. 2004); *see also Field v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 751 (5th Cir. 1995) ("Subject-matter jurisdiction and power are separate prerequisites to the court's capacity to act.").

35 *Pacor Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (internal citations omitted); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308, n.5 (1995) ("Proceedings 'related to; the bankruptcy include ... suits between third parties [that] have an effect on the bankruptcy estate."); *Arrow Oil & Gas nc. v. J. Aron & Co. (In re SemCrude LP)*, 864 F.3d 280, 289 (3d Cir. 2017) ("All we ask is whether the 'outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'").

36 *In re Federal-Mogul Global Inc.*, 300 F.3d 368, 382 (3d Cir. 2002).

37 *Id.*

38 *W.R. Grace & Co. v. Chakarian*, 591 F.3d 164, 174 n.9 (3d Cir. 2009).

39 *SPV OSUS Ltd. v. UBS AG*, 882 F.3d 333, 341-42 (2d Cir. 2018).

40 *Id.* at 341-42.

41 *See Phila. Newspapers LLC*, 407 B.R. at 614 (holding that "diverting the time and energy of key personnel from the reorganization effort at a critical time in the formulation of a plan would adversely impact the Debtor's ability to promptly and effectively reorganize"); *see also In re W.R. Grace & Co.*, 386 B.R. at 32 ("Such a diversion of resources would retard the administration of the chapter 11 cases.").

42 *See also Phila. Newspapers*, 410 B.R. at 414 ("The Court also remains mindful of the possible effect of collateral estoppel if one-sided litigation is permitted to proceed.").

43 *See Queenie Ltd.*, 321 F.3d at 288 ("We have not located any decision applying the stay to a nondebtor solely because of an apprehended later use against the debtor of offensive collateral estoppel or the precedential effect of an adverse decision. If such apprehension could support application of the stay, there would be vast and unwarranted interference with creditors' enforcement of their rights against nondebtor co-defendants.").

44 *In re TK Holdings Inc.*, No. 17-11375 BLS, Disclosure Statement (Bankr. D. Del. Jan. 5, 2018).

er, more rigorous test that seems to be, at least normatively, more aligned with the Code's purposes.

The clearest instance where a debtor and a third-party defendant share an identity of interest is where the third-party plaintiff could bring the same claim against the debtor (*e.g.*, tort victims bringing injury claim due to airbag malfunction against either Takata or the OEMs). However, independent liability of the third-party defendant reduces the magnitude of shared identity of interest (*e.g.*, tort victims bringing an injury claim against OEMs for the OEMs' own negligence, or the creditor bringing recovery action against a guarantor). Therefore, when applying the *Pacor* standard to determine related-to jurisdiction, judges should look for a conceivable effect on the debtor's estate due to an impact that alters the debtor's rights, liabilities or options, but that analysis should pay special attention to the nexus between the third-party claims and the impact on the debtor.

Section 105 Injunction Standard

Courts should apply the traditional preliminary-injunction standard whenever granting an injunction under § 105. The Senate Report for the Bankruptcy Act stated that "the district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity," and, just as important, that "stays or injunctions issued under these other sections [*i.e.*, § 105] will not be automatic upon the commencement of the case, but will be granted or issued under the *usual rules* for the issuance of injunctions."[45]

Once jurisdiction has been established, rather than inserting an intermediary the court should proceed with the injunction test. The underlying substance of the "unusual circumstances" test as applied in *A.H. Robbins* and its progeny is captured by the related-to jurisdiction and the traditional-injunction test.

The first prong of the preliminary-injunction test — the reasonable likelihood of success on the merits — has been interpreted in the chapter 11 context as the reasonable likelihood of successful reorganization.[46] Success on the merits refers to the outcome of a "later proceeding." Plan confirmation has been construed to be the future proceeding in question,[47] as the bankruptcy court has the mandate to use its equitable powers to "assure the orderly conduct of the reorganization proceedings." Therefore, the success of reorganization is of critical importance in the preliminary-injunction test.[48]

The second prong — irreparable harm — focuses on the debtor's liability that might be created by the enforcement of a contractual indemnity.[49] Absolute contractual indemnity creates an immediate and fixed claim against the estate and requires no further litigation. In addition to liability, the court should also weigh "the risks of collateral estoppel and record taint."[50] Irreparable harm cannot stand alone as to these risks. Nonetheless, collateral-estoppel concerns should be taken into consideration, given that such consequences will encumber the debtor with "additional litigation burdens," which are what the automatic stay generally aims to prevent.[51]

> **"Conceivable effect" is interpreted to mean not a general effect, but rather an impact on a debtor's rights, liabilities or options, with a specific focus on whether the third party and the debtor share an identity of interest.**

Of comparable importance is the calculation of general adverse impact on the reorganization process. Irreparable harm may be discerned "if the action sought to be enjoined would so consume the time, energy and resources of the debtor that it would substantially hinder the debtor's reorganization effort."[52] In *Takata*, the court found that the "task of monitoring hundreds of lawsuits and the prospect of ... record taint including collateral estoppel are material risks for the debtors" giving rise to irreparable harm.[53] With respect to collateral estoppel, but irrespective of its technical application, the fact central to every suit against Takata and the OEMs was the unintended explosion of a Takata airbag system, which would have created a material effect on Takata down the line if the OEMs were found to be liable.[54] No court has yet to point to the minimum facts required to sufficiently show irreparable harm, but this prong should look at the totality of the circumstances and consider whether there is an adverse impact on the reorganization process (such as diversion of resources or reduced leverage in negotiating) and an adverse impact on the debtor's estate (such as added liability).

Such a standard would differ from the traditional conception of irreparable harm in the preliminary-injunction context where ordinary remedies involving mere damages do not rise to the level of irreparable harm.[55] In the bankruptcy context, while remedies are generally monetary in nature, the risk of losing the source of compensation (*i.e.*, the debtor's estate) is an extraordinary circumstance that may merit a finding of irreparable harm.

The third prong, which is intertwined with the second prong, balances the relative harms of the debtor *vis-à-vis* the third-party claimant. The most obvious harm on the claimant is a delay in litigation. Often, this is merely a creditor waiting to recover from a corporate guarantor, but

45 S. Rep. 95-989, at 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837 (emphasis added).
46 *See Solidus Networks Inc. v. Excel Innovations Inc. (In re Excel Innovations Inc.)*, 502 F.3d 1086, 1095-96; *see also In re W.R. Grace & Co.*, 386 B.R at 33 (citing *In re Excel Innovations*, 502 F.3d at 1096).
47 *See Excel Innovations*, 502 F.3d at 1095-96.
48 *Baldwin-United Corp. v. Paine Webber*, 57 B.R. 759, 767 (S.D. Ohio 1985).
49 *See In re W.R. Grace & Co.*, 386 B.R at 34 (holding that if third-party action were to continue, debtors would not have opportunity to defend themselves, thereby creating immediate liquidated claim against debtors).
50 *Id.*
51 *Id.*
52 *Baldwin-United Corp. v. Paine Webber*, 57 B.R. 759, 768 (S.D. Ohio 1985); *see, e.g., In re Eagle-Picher Indus. Inc.*, 963 F.2d 855, 860 (6th Cir. 1992) (staying state court action against debtor's officers pursuant to court's power under § 105 and noting that "proceeding with the Texas action will needlessly divert key employees from the debtor's reorganization effort"); *In re A.H. Robins Co. Inc.*, 828 F.2d 1023, 1026 (4th Cir. 1987) (debtor "will inexorably be drawn into this litigation. Because this involvement will put a substantial burden on [the debtor], it will detract from the reorganization process").
53 *In re TK Holdings Inc.*, No. 17-50880 BLS, Bench Ruling, p. 27 (Bankr. D. Del. Aug. 23, 2017).
54 *Id.*
55 *See* 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).

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as seen in *W.R. Grace* and *Takata*, this could also mean injured and dying tort victims who will continue to suffer without compensation.

Another often-overlooked harm to the third-party claimant is the stay with respect to certain discovery orders that might shed light on new disclosures that would increase the debtor's liability.[56] In weighing the harms in *Takata*, the court found that the unremarkable effect of discovery and trial schedules being thrown off did not outweigh the potential negative consequences of a failed restructuring due to the lack of attention on the restructuring process that is required by all stakeholders.[57]

The final prong, which is largely inconsequential in routine restructurings, can become relevant and important in larger restructurings, such as mass tort bankruptcies. When there are thousands of claims across a large jurisdictional spread involving numerous controversies, there is a public interest in resolving all of the claims in a uniform and equitable manner.[58] The confirmation of a restructuring plan provides a vehicle for such resolution.[59] Therefore, when the debtor is confronted with a large volume of third-party actions in which it would be involved, public interest weighs heavily in favor of granting an extension of the stay.

Conclusion

When faced with a motion to extend the automatic stay to a nondebtor, courts should apply a two-step analysis. As a preliminary matter, a court should determine whether related-to jurisdiction exists regarding the third-party claims in question. In analyzing related-to jurisdiction, a court should pay special attention to whether there is a conceivable effect on the estate.

"Conceivable effect" is interpreted to mean not a general effect, but rather an impact on a debtor's rights, liabilities or options, with a specific focus on whether the third party and the debtor share an identity of interest. Once related-to jurisdiction has been determined to exist, the court should apply the traditional preliminary-injunction standard, focusing on whether the debtor is likely to successfully reorganize, whether the debtor will suffer irreparable harm if the third-party stay is not imposed, whether the balances of the harms weigh in favor of imposing the third-party stay, and whether public interest sides with extending the stay.

This two-step analysis is grounded in the Bankruptcy Code and aligned with the purposes of bankruptcy law by balancing the need to provide debtors with a breathing spell and to increase the chances of a successful orderly reorganization, with setting limits on extensions of the automatic stay in order to prevent unwarranted extensions and over-use of the ability of the courts to extend the automatic stay that could serve to alter the substantive rights of parties outside of the bankruptcy process. abi

56 Richard Sobol, *Bending the Law* at 64 ("If Dalkon Shield litigation against co-defendants went forward during the reorganization, there would be pressure for the production of ... document, with possible new damaging disclosure. If it did not, the production of these documents might be avoided altogether by limit[ing] the defendants, the issues, or the scope of discovery in post-bankruptcy litigation. At least, production would be postponed until after Robin's obligation for Dalkon Shield injuries had been fixed.").
57 *Id.*
58 *See In re W.R. Grace & Co.*, 386 B.R. at 36.
59 *Id.*