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A *Second* Look at a *Fifth* Circuit Take on *Third* Party Releases

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I. INTRODUCTION

In the context of a chapter 11 plan, the "third party release" is a provision that, on the effective date of the plan, triggers the release of all claims and causes of action that a creditor or interest holder has against persons or entities other than the debtor. Thus, it is a release *by* third parties and *of* third parties. Such provisions commonly read something like the following (albeit typically less succinctly):

> Except as otherwise expressly provided in the plan, as of the effective date, each holder of an allowed claim or interest against the debtor shall be deemed to have released and discharged the debtor *and the Released Parties* from any and all claims and causes of action that that such holder would have been legally entitled to assert…

For a debtor, language such as this may simply duplicate the legal effect of a debtor's discharge under § 1141.[1] Entities other than the debtor, on the other hand, typically enjoy no such privilege unearned. Unsurprisingly, attempts to extend broad release protections to "Released Parties"—including officers, directors, affiliates, advisors, plan support parties and other related entities—that never submitted to the bankruptcy process as debtors are often met with strong resistance in courts as controversial.[2]

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[1] 11 U.S.C. § 1141(d)(1)(A) ("…the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation…").

[2] Distinguished from such broad-brush release provisions are the more narrowly-tailored exculpation provision that relieve debtors, official committees, and their members and advisors from liability for any acts taken in connection with the chapter 11 case or the plan confirmation process. *See In re Pacific Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009) (holding that § 1103(c) implies that official committees and their members, but not debtors and their principals, have qualified immunity for actions taken within the scope of their duties under the Bankruptcy Code); *but see In re Pilgrim's Pride Corp.*, 2010 WL 200000 (Bankr. N.D. Tex. Jan. 14, 2010) (suggesting that, as bankruptcy trustees and their professionals are entitled to broad immunity for actions taken in that capacity, the same should be extended to a debtor in possession and its principals).

Section 524(e)[3] succinctly states: "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[4] Yet from this brief phrase have emerged two divergent views on the authority of the bankruptcy court to confirm a plan containing language that purports to release prepetition claims against parties other than the debtor. In the beginning, these two lines of thought could be termed "pro-release" and "anti-release."[5] "Anti-Release" circuits, including the Ninth[6] and Tenth[7] Circuits, saw the plain language of § 524(e) as an absolute bar that § 105(a) could not overcome.[8] "Pro-release" circuits, such as the Second, Third, and Fourth Circuits, found authority for such releases in the bankruptcy court's general equitable powers under § 105(a).[9]

By contrast, the Fifth Circuit was a relative latecomer to the fray, with arguably no *directly* pertinent body of case law to address the question developed prior to 2009. By that time, the decisions in the Second and Third Circuits had begun to take a more restrictive view on third party releases, suggesting that the relative favor shown to such provisions in those circuits has its limits.[10] In these more recent decisions, so-called "pro-release" circuits, despite remaining open to the use of third party releases in limited circumstances, began to blur the lines between their "anti-release" sister courts.[11] Nevertheless, courts in the Second and Third

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[3] Unless otherwise noted, section (§) references are to the United States Bankruptcy Code, 11 U.S.C. § 101, et seq. (the "***Bankruptcy Code***").

[4] 11 U.S.C. § 524(e).

[5] *See* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 17 [hereinafter "***Silverstein***"] (characterizing the relative willingness of "pro-release" and anti-release" circuits to permit third party releases based on the circuits' view of the applicability of § 105(a)).

[6] *In re Am. Hardwoods, Inc.*, 885 F.2d 621 (9th Circ. 1989).

[7] *Andsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990).

[8] These circuits, in fact, are not so much "anti-release" as they are "anti-use-of-§ 105(a)-to-override-§ 524," but that doesn't roll off the tongue quite the same way.

[9] *See*, *e.g.*, *In re Cont'l Airlines*, 203 F.3d 203 (3d Cir. 2000); *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc.* (*In re Drexel Burnham Lambert Grp., Inc.*), 960 F.2d 285 (2d Cir. 1992); *see also See Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694 (4th Cir.1989).

[10] *See*, *e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005); *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004); *In re Washington Mut., Inc.*, 442 B.R. 314, 349 (Bankr. D. Del. 2011). *See also* Harlin D. Hale, et al., *Set Me Free: Shared Policy Concerns on Nonconsensual Third-Party Releases*, 35 Amer. Bankr. Inst. J. 26, 59 (September 2016) [hereinafter "***Hale***"] (observing that "the growing number of bankruptcy decisions dealing with nonconsensual third party releases in has reflected a breakdown in the general characterization of the Fifth, Second and Third Circuits within a flexible and non-flexible dichotomy").

[11] *See*, *e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236-37 (3d Cir. 2004) ("The general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g)…").

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