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The Eleventh Circuit's Second Shot at Getting It Right: Nonconsensual Nondebtor Releases in Bankruptcy Court

*Pierce G. Hand, IV**

Introduction

In 1996, the Eleventh Circuit Court of Appeals encountered the issue of nonconsensual nondebtor releases in Chapter 11 bankruptcy seemingly for the first time in *In re Munford, Inc.*[1] Nonconsensual nondebtor releases[2] are provisions within a reorganization plan confirmed by the court that operate to "enjoin a non-consenting party who has participated fully in . . . bankruptcy proceedings but who has objected to the non-debtor release barring it from making claims against the non-debtor that would undermine the operations of the reorganized entity."[3] These provisions essentially operate to give a nondebtor, a person or entity that has not filed for bankruptcy, the protection of bankruptcy laws by releasing the nondebtor from future claims by creditors in order to ensure the success of an actual debtor in Chapter 11 bankruptcy. In *Munford*, the Eleventh Circuit held that 11 U.S.C. § 105(a)(3) gave bankruptcy courts authority to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code, including such nondebtor releases.[4]

Before *Munford*, the District of Columbia and First Circuit Courts of Appeals reached similar decisions, while the Ninth and Tenth Circuit Courts of Appeals held that bankruptcy courts lack this authority under the reasoning that 11 U.S.C. § 524(e) permitted the release of

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1. Munford v. Munford (*In re* Munford, Inc.), 97 F.3d 449 (11th Cir. 1996).

2. The Eleventh Circuit also refers to "nondebtor releases" as "bar orders." SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1076 n.2 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015) ("Previous decisions of this Circuit have referred to non-debtor releases as 'bar orders.'").

3. *Id.* at 1077.

4. *In re Munford, Inc.*, 97 F.3d at 455.

only the debtor, not co-liable third parties.[5] After *Munford*, only the Fifth Circuit Court of Appeals sided with the Ninth and Tenth Circuits, while a majority of circuit courts (the Second, Third, Fourth, Sixth, and Seventh Circuit Courts of Appeals) sided with the Eleventh Circuit's holding in *Munford*.[6]

While the United States Supreme Court has yet to resolve this circuit split, the Eleventh Circuit recently encountered the issue of nondebtor releases again in *In re Seaside Engineering & Surveying, Inc.* under a different set of facts.[7] The Eleventh Circuit could have taken this opportunity to arrive at a different holding in light of the minority circuit courts' decisions. However, it chose to remain with the majority of circuit courts and uphold its initial ruling—although using different reasoning—that bankruptcy courts have authority to issue nondebtor releases.[8] Is there merit to the minority circuit courts' reasonings and decisions? What reasoning by sister circuits did the Eleventh Circuit consider in reaching its decision? Most importantly, did the Eleventh Circuit apply the most appropriate standards and reach an outcome that the United States Supreme Court should adopt?

In answering these questions through analysis of the Eleventh Circuit's recent decision, this Article argues that the United States Supreme Court should adopt a plain reading of § 105(a) that permits bankruptcy courts to issue temporary nonconsensual nondebtor releases. By addressing this issue, the Supreme Court would resolve a multi-circuit split and prevent creditors' claims from being permanently barred while still providing protection to the debtor's reorganization process. Part I of this Article reviews the pertinent language of § 105(a) and § 524(e) of the Bankruptcy Code and provides a historical account of the case law development on nondebtor releases from

5. *See* Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394 (9th Cir. 1995); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995); *In re* W. Real Estate Fund Inc., 922 F.2d 592 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991)); *In re* AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986); *see also* Eric W. Anderson & Jay Basham, *Please Release Me, Let Me Go: Eleventh Circuit Embraces Third-Party Release Standards*, 34-6 AM. BANKR. INST. J. 20 (2015).

6. *See* Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704 (4th Cir. 2011); Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009); *In re* Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009); Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640 (7th Cir. 2008); Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 205 (3d Cir. 2000).

7. *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1074.

8. *Id.* at 1076-77.

pre-*Munford* to *Seaside*.[9] Part II analyzes the Eleventh Circuit's recent approach and holding in *Seaside* within the context of the different approaches and holdings reached by the majority and minority of circuit courts.[10] Part III proposes that the United States Supreme Court adopt the Seventh Circuit's approach in reasoning that bankruptcy courts have equitable authority to issue nondebtor releases, adopt the Sixth Circuit's seven-factor test to ensure such releases are only issued within the boundaries of the Bankruptcy Code, and make the nondebtor releases temporary and inclusive of all claims against nondebtors.[11]

I. BACKGROUND

A. *The Bankruptcy Code: Sections 105(a) and 524(e)*

Section 105(a) of the Bankruptcy Code provides in relevant part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[12] In reaching the conclusion that bankruptcy courts have authority to issue nondebtor releases under the Code, § 105(a) is often read in conjunction with Federal Rule of Civil Procedure 16, which is incorporated in adversary proceedings under Bankruptcy Rule 7016.[13] Bankruptcy Rule 7016 states in pertinent part: "At any [settlement] conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."[14]

Section 524(e) provides in relevant part, "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."[15] This provision has been used by circuit courts to contradict the notion that § 105(a) permits the release of nondebtor liability and support the notion that it only permits release of debt belonging to the debtor.[16] However, a prior version of this statute, repealed in 1979, provided "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such

9. *See infra* Part I.
10. *See infra* Part II.
11. *See infra* Part III.
12. 11 U.S.C. § 105(a) (2012).
13. *Id.*
14. FED. R. CIV. P. 16(c)(2)(I); *see, e.g.*, Munford v. Munford (*In re* Munford, Inc.), 97 F.3d 449, 454-55 (11th Cir. 1996).
15. 11 U.S.C. § 524(e) (2012).
16. *E.g.*, Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 251-52 (5th Cir. 2009).

bankrupt."[17] This repealed language raises implications about whether drafters of the Code went from being staunchly against altering debt of nondebtors to possibly open to the idea under unique circumstances.

B. *The Case Law*

1. Pre-Munford Case Law Development

Likely one of the first circuits to address the issue, the District of Columbia (D.C.) Circuit Court of Appeals ruled on nondebtor releases in 1986 in *In re AOV Indus., Inc.*[18] This case involved alleged violations of § 524(e) due to the confirmation of a Chapter 11 reorganization plan of a debtor company engaged in coal mining, processing, exporting, and trading companies.[19] The reorganization plan included two creditors renouncing over $51 million in claims and agreeing to contribute over $4.5 million to satisfy the outstanding claims against the debtor.[20] In addition to receiving all of the debtor's stock and a $2.6 million security interest in the debtor's assets, the creditors also required the unsecured creditors of the debtor to release all of their pending claims[21] against the creditors if the creditors made "a total of $3 million of the $4.5 million fund available to the unsecured creditors."[22] The D.C. Circuit found that this "on its face was entirely reasonable" and reasoned that the creditors "could not have been expected to commit millions of dollars to a reorganization plan and still remain liable to individual creditors for the full amount of their claims."[23]

Years later in 1990 and 1995, the Tenth Circuit and Ninth Circuit, respectively, reached opposite conclusions and found nondebtor releases impermissible. In *In re W. Real Estate Fund, Inc.*, an attorney's proof of claim for attorney's fees from services rendered under a prepetition contract with the debtor was enjoined from collecting the re-

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17. Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640, 656 (7th Cir. 2008) (quoting the repealed statute) (emphasis added).

18. *In re* AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986).

19. *Id.* at 1142.

20. *Id.* at 1143.

21. Derivative claims totaling $25 million had been brought against one of the creditors by the debtor and intervenors, the Creditors' Committee, alleging "that an agency or joint-venture relationship existed between [the debtor] and [the creditor], and plaintiffs sought the nullification of transfers to [the creditor] as well as contract and tort damages." *Id.* at 1152.

22. *Id.* at 1143.

23. *Id.* at 1152.

mainder of the claimed fee from a third party in state court.[24] The Tenth Circuit found that the bankruptcy court had relied on its broad equitable power under § 105(a)[25] and found that a temporary injunction was "warranted during pendency of [the] bankruptcy proceeding" concerning funds from the third-party that were subject to indemnification by the debtor. This limited temporary stay would serve to "protect [the debtor] during preparation and confirmation of a reorganization plan."[26]

The Tenth Circuit further held, however, that a permanent injunction that continued after post-confirmation of the plan, in essence, discharged the third-party's liability for unpaid portions of the attorney's fees and was improper.[27] The court reasoned that § 524(a) was a broad "fresh start" injunctive provision for the debtor who has "invoked and submitted to the bankruptcy process;" the court observed, "Congress did not intend to extend such benefits to third-party bystanders."[28] Most importantly, the court emphasized that the specific provisions of § 1141(d)(1)(A), which provides that "the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation," and § 524(e), which provides that a discharge "does not affect the liability of any other entity," are significant to the use of § 105(a), "since a bankruptcy court's supplementary equitable powers thereunder may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code."[29] In the end, the Tenth Circuit held that the stay could not be extended post-confirmation as a permanent injunction.[30]

The Ninth Circuit, in *In re Lowenschuss*, also held that a nondebtor release within a Chapter 11 debtor's reorganization plan was impermissible because the bankruptcy court lacks the power to confirm plans that do not comply with the Bankruptcy Code under § 1129(a)(1).[31] The Ninth Circuit relied on the language in § 524(e) that specifically discharges debtors and looked to the circuit court's

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24. *In re* W. Real Estate Fund, Inc., 922 F.2d 592, 594 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991). The state statute involved recognizes the concurrent liability of the nonpaying client under common law and the settling adverse party. *Id.* at 598.

25. *Id.* at 598-99.

26. *Id.* at 599, 600.

27. *Id.* at 600.

28. *Id.*; *see also In re* Bracy, 449 F. Supp. 70, 71 (D. Mont. 1978) ("[I]t is the policy of the law to discharge the bankrupt but not to release from liability those who are liable with him.").

29. *In re W. Real Estate Fund, Inc.*, 922 F.2d at 601 (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

30. *Id.* at 601-02.

31. Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401 (9th Cir. 1995).

past holding in *In re Am. Hardwoods, Inc.*, albeit under different facts, that "§ 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors."[32]

Following these circuits' decisions, the First Circuit in *Monarch Life Ins. Co. v. Ropes & Gray* upheld a nondebtor release but mainly because the creditor opposed to the release "failed to object to the confirmation order and/or appeal from the section 105(a) injunctive provision included in it."[33] The court determined that the ambiguity of § 105(a)'s broad powers was litigated within the bankruptcy proceeding, and without an objection, the creditor's claims of compensatory damages against the nondebtor for alleged concealment of financial information was barred.[34]

2. In re Munford, Inc.

In 1996, the Eleventh Circuit decided *In re Munford, Inc.*, a case involving an adversary proceeding in bankruptcy court by a debtor in possession, Munford, Inc., seeking monetary damages for a total of $60 million and other remedies as a result of a leveraged buyout in 1988 that allegedly forced it into bankruptcy.[35] Of the many defendants, Valuation Research Corporation (VRC), a valuation and consulting firm, denied liability but offered to settle claims against it for $350,000 of its $400,000 liability insurance policy, leaving $50,000 for attorney's fees.[36] The settlement was conditioned, however, upon the bankruptcy court issuing a protective order that permanently enjoined the "nonsettling" defendants from pursuing contribution or indemnification claims against VRC.[37] After Munford agreed and the proposed settlement was submitted for approval under Federal Rule of Bankruptcy Procedure 9019(a), the bankruptcy court "found that the insurance policy represented VRC's only substantial asset," approved the settlement, and "enjoin[ed] the nonsettling defendants from asserting contribution and indemnification claims against VRC pursuant to 11 U.S.C. § 105(a) and Federal Rules of Civil Procedure 16."[38] On appeal, the district court affirmed.[39]

Reviewing the bankruptcy court's decision, the Eleventh Circuit reasoned that § 105(a) permits the bankruptcy court to enter "any or-

32. *Id.*
33. Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983 (1st Cir. 1995).
34. *Id.* at 976, 983.
35. Munford v. Munford (*In re* Munford, Inc.), 97 F.3d 449, 452 (11th Cir. 1996).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

der necessary or appropriate to carry out the provisions of the Bankruptcy Code" and Rule 16 permits "use of special procedures to assist the parties in reaching a settlement."[40] Taken together, the court reasoned, they "provide ample authority for the bankruptcy[ ] court['s] action."[41] The court concluded that nondebtor releases were issuable "where the settling defendant provided funds for the bankruptcy estate, but would not have entered into the settlement in the absence of such bar order, and where the bankruptcy court found that the bar order was fair and equitable."[42] Three additional reasons given by the court in support of its decision include: (1) public policy favors pretrial settlement, (2) litigation costs burden a bankrupt estate, and (3) bar orders play an integral part in facilitating settlement.[43]

3. Post-Munford Case Law Development

From 2000 to 2011, the Second, Third, Fourth, Sixth, and Seventh Circuits all ruled in favor of bankruptcy courts having the authority to issue nondebtor releases within debtor reorganization plans.[44] Most notable and unique are the approaches taken by the Fourth and Sixth Circuits. *In re Dow Corning Corp.* was a 2002 Sixth Circuit case in which the court held that bankruptcy courts could issue nondebtor releases because § 105(a) was a statutory grant of power that did not confine the bankruptcy court to traditional equity jurisprudence.[45] The court relied on two Supreme Court cases: *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.* and *United States v. First National City Bank*.[46] In *Grupo Mexicano*, the Court "vacated an injunction preventing a toll road operator from dissipating, transferring, or encumbering its only assets to the prejudice of an unsecured note holder because traditional equity jurisprudence [under the Judiciary Act of 1789] did not allow such remedies until a debt had been estab-

40. *Id.* at 455 (internal quotations omitted).

41. *In re Munford, Inc.*, 97 F.3d at 455.

42. SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1078 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015) (citing *In re Munford, Inc.*, 97 F.3d at 455).

43. *In re Munford, Inc.*, 97 F.3d at 455.

44. *See* Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704 (4th Cir. 2011); *In re* Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009); Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640 (7th Cir. 2008); Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 205 (3d Cir. 2000).

45. *In re Dow Corning Corp.*, 280 F.3d at 658.

46. *Id.* at 657-58; Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999); United States v. First Nat'l City Bank, 379 U.S. 378 (1965).

lished."[47] *Grupo Mexicano*, however, distinguished its holding from *First National* where the Court approved an injunction against a third-party bank concerning a taxpayer's assets because the case "involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing tax injunctions."[48] Since *In re Dow Corning Corp.* involved an injunction issued pursuant to a statutory provision of the Bankruptcy Code, the Sixth Circuit reasoned that the bankruptcy court was not confined to traditional equity jurisprudence.[49]

The court then identified seven factors to be evaluated when determining whether a nondebtor release is permitted in an "unusual circumstance:"

> (1) There is an identity of interests between the debtor and the third party, usually an Indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.[50]

In 2011, the Fourth Circuit, in *Behrmann v. Nat'l Heritage Found., Inc.*, looked to its earlier ruling in *In re A.H. Robins Co., Inc.*, which reiterated the Fifth Circuit's statement that "[a]lthough section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization."[51] The *A.H. Robins* court understood this to mean that the section should not be literally applied in every circumstance to limit the power of bankruptcy courts.[52] To ensure that the case constituted an unusual circumstance, the Fourth Cir-

47. *In re Dow Corning Corp.*, 280 F.3d at 657 (citing *Grupo Mexicano*, 527 U.S. at 318-19).
48. *Id.* (quoting *Grupo Mexicano*, 527 U.S. at 326) (internal quotations omitted).
49. *Id.* at 658.
50. *In re Dow Corning Corp.*, 280 F.3d at 658; *see also* George W. Kuney, *"All Writs" in Bankruptcy and District Courts: A Story of Differing Scope*, 34 REV. LITIG. 255, 267 (2015).
51. Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704, 710 (4th Cir. 2011) (citing Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) (quoting Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987))).
52. *Id.*

cuit held that the Sixth Circuit's seven factors should be considered or the following four-factor test in *In re Railworks Corp.*:

> (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction.[53]

Ironically just two years before the Fourth Circuit's decision, the Fifth Circuit found nondebtor releases impermissible in *In re Pac. Lumber Co*.[54] The court found "little equit[y] about protecting the released non-debtors from negligence suits arising out of the reorganization."[55] The court reiterated its past holdings that § 524(e) only releases the debtor, not co-liable third parties, and held that "[t]hese cases seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions."[56]

3. In re Seaside Engineering & Surveying, Inc.

In 2015, the Eleventh Circuit revisited the issue of whether bankruptcy courts had the authority to issue nondebtor releases under the Bankruptcy Code in *In re Seaside Engineering & Surveying, Inc*.[57] This case involved a civil engineering and surveying firm, Seaside, whose five principal shareholders started two companies for the purpose of real estate investments.[58] The companies, with personal guaranties from the principals, borrowed money from SE Property Holdings, LLC and affiliated entity Vision–Park Properties, LLC, (collectively, "Vision").[59] The companies defaulted and Vision sought to recover under the guaranties in a filed suit.[60] Three of the principals filed for Chapter 7 bankruptcy protection, and Vision won the Seaside shares of one of the principals at an auction by a Chapter 7

53. *Id.* at 712 (citing Hoge v. Moore (*In re* Railworks Corp.), 345 B.R. 529, 536 (Bankr. D. Md. 2006)).

54. Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009).

55. *Id.*

56. *Id.*; *see also* Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV (*In re* Vitro SAB De CV), 701 F.3d 1031, 1061 (5th Cir. 2012) (citing *In re Pac. Lumber Co.*, 584 F.3d at 252) ("This conclusion was consistent with prior rulings from this circuit that 'seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions.'").

57. *See generally* SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015).

58. *Id.* at 1074.

59. *Id.*

60. *Id.*

trustee.[61] Soon after, Seaside filed for Chapter 11 bankruptcy and "proposed to reorganize and continue operations as the entity Gulf Atlantic, LLC," a company managed by the three bankrupt principals.[62] Under the plan, outside equity holders, like Vision, would not gain interest in Gulf but exchange their interests in Seaside for promissory notes with a 4.25% interest rate.[63] Additionally, the reorganization plan included the following releases of nondebtors that the bankruptcy court confirmed over the objection of Vision:

> [N]one of the Debtor, . . . Reorganized Debtor, Gulf Atlantic . . . (and any officer or directors or members of the aforementioned [entities]) and any of their respective Representatives (the "Releasees") shall have or incur any liability to any Holder of a Claim against or Interest in Debtor, or any other party-in-interest . . . for any act, omission, transaction or other occurrence in connection with, relating to, or arising out of the Chapter 11 Case, the pursuit of confirmation of the Amended Plan as modified by the Technical Amendment, or the consummation of the Amended Plan as modified by this Technical Amendment, except and solely to the extent such liability is based on fraud, gross negligence or willful misconduct.[64]

In response to Vision's objection on appeal to the bankruptcy court's issuance of these nondebtor releases, the Eleventh Circuit began by stating that the previous holding in *Munford* was controlling and stood for the proposition that the Eleventh Circuit permitted nondebtor releases under some circumstances.[65] Noting that the facts in *Munford* were different and concerned a settlement context while the present *Seaside* case concerned "claims against non-debtors that would undermine the operations of, and doom the possibility of success for, the reorganized entity," the circuit court looked to sister circuit decisions for guidance.[66]

After broadly reviewing the other circuits' precedents, the Eleventh Circuit disagreed with and addressed the minority circuits' reasonings that § 524(e) "foreclose[d] non-consensual non-debtor releases in permanent injunctions."[67] The court sided with the reasoning of the Seventh Circuit in *In re Airadigm Communications, Inc.* stating that while the "'discharge of a debt of the debtor does not affect the liability of another entity on . . . such debt', . . . § 524(e) says nothing about the

61. *Id.* at 1074-75.
62. *Id.* at 1075.
63. *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1075.
64. *Id.* at 1076.
65. *Id.* at 1076-77.
66. *Id.*
67. *Id.* at 1077.

authority of the bankruptcy court to release a non-debtor from a creditor's claims."[68] The court noted that Congress would have limited the powers of the bankruptcy courts if it desired to do so in a clear manner as it has done in other instances of the Code.[69] The Eleventh Circuit also agreed that such "bar orders" should not be issued "lightly," and applied the Sixth Circuit's seven-factor test to ensure such injunctive orders would be issued only in unusual circumstances "in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances."[70]

The Eleventh Circuit found that *Seaside* satisfied all of these factors: (1) further voluminous litigation would deplete the assets of Gulf, and released former principals of Seaside as key employees of the reorganized entity would expend their time in litigation instead of focusing on the reorganized entity; (2) the released principals' services are the very "life blood of the reorganized debtor" and constitute contributed substantial assets; (3) litigation would likely continue without a bar order and doom a successful reorganization; (4) all creditors, except Vision (and two trustees), voted in favor of the plan; (5) Vision would be paid in full for its Seaside shares; (6) Vision would get full value of its equity interest in the debtor and its identification of any other claims was considered vague; and (7) the bankruptcy court's extensive findings were "amply supported by the evidence."[71] Furthermore, the court found that fairness and equity existed in the additional requirements that the debtor cease pursuing its claims for sanctions against Vision and the release narrowly bar claims arising out of the Chapter 11 case and not fraud, gross negligence, or willful misconduct.[72]

II. ANALYSIS

This part of the Article will analyze the Eleventh Circuit's approach and holding in *Seaside* within the context of the different approaches and holdings reached by the majority and minority of circuit courts on the question of authority to issue nondebtor releases under the Bankruptcy Code.

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68. *Id.* at 1078; Airadigm Commc'ns., Inc. v. FCC (*In re* Airadigm Commc'ns., Inc.), 519 F.3d 640, 656 (7th Cir. 2008).

69. *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078.

70. *Id.* at 1078-79.

71. *Id.* at 1079-81.

72. *Id.* at 1081.

A. *What the Eleventh Circuit Got Right*

1. The Seventh Circuit's Statutory Analysis of § 524(e) Was Reasonable.

The Eleventh Circuit reasonably relied on the Seventh Circuit's statutory analysis of § 524(e) in determining that the section did not foreclose nonconsensual nondebtor releases. Other than a plain reading of the section suggesting so, the Seventh Circuit's reasoning that Congress did not intend to limit bankruptcy courts' powers in this manner was supported by inferable legislative intent.[73] First, a previous version of § 524(e) that was repealed in 1979 contained the language that "liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall* not be altered by the discharge."[74] However, the current language after the amendment omits "shall" and states that "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."[75] The purposeful removal, and not simply the absence of, "shall" from the section by Congress strongly suggests that it did not intend to limit the equitable power of bankruptcy courts to order that a discharge affect the liability of a third-party.[76]

Second, Congress affirmatively limits the powers of bankruptcy courts elsewhere in the Bankruptcy Code.[77] For example, § 105(b) states that the "a court may not appoint a receiver in a case under this title" and § 1129(a) sets out requirements for plan confirmation.[78] Congress, if it desired to limit the equitable power of bankruptcy courts to release nondebtors from creditors' claims, would have likely stated this clearly or at least included some form of anti-third party release requirement in the already established list of requirements for plan confirmation under § 1129(a).

2. The Eleventh Circuit Bypassed the Fourth and Fifth Circuits' Poor Reliances and Unsound Reasonings.

The Eleventh Circuit, rightly so, did not "hang its hat" on many of the other circuits' analyses for permitting or prohibiting nondebtor releases. Some of these circuits' arguments appear to be supported by misplaced reliance on other courts' jurisprudences that contain distin-

73. *See In re Airadigm Commc'ns., Inc.*, 519 F.3d at 656.
74. *Id.* (emphasis added).
75. 11 U.S.C. § 524(e) (2012).
76. *In re Airadigm Commc'ns., Inc.*, 519 F.3d at 656.
77. *Id.*
78. *Id.* (discussing bankruptcy courts' limitations established by Congress); 11 U.S.C. § 105(b); *see* 11 U.S.C. § 105(a); 11 U.S.C. § 1129(a)(1)-(16).

guishable facts. For example, although the Eleventh Circuit agrees with the Fourth Circuit's use of the Sixth Circuit's extensive seven-factor test to establish an "unusual circumstance" in which a nondebtor release should be issued, the Eleventh Circuit noticeably does not rely on the Fourth Circuit's reasoning for whether bankruptcy courts have authority to issue these releases.[79] This is likely because the Fourth Circuit's reasoning is ironically based on a case, *Republic Supply Co. v. Shoaf*, from the Fifth Circuit.[80] This reliance by the Fourth Circuit is misguided for two reasons: (1) *Republic Supply Co.* contained distinguishable facts in comparison to the Fourth Circuit case, *In re A.H. Robins Co., Inc.*, and (2) the Fifth Circuit had already ruled against nondebtor releases of this type two years prior in *In re Pac. Lumber Co.*[81]

The Fifth Circuit in *Republic Supply Co.* held that "[a]lthough section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been *accepted and confirmed* as an integral part of reorganization."[82] "Accepted and confirmed" means that the creditor neither objected, nor appealed, the confirmation by the bankruptcy court—this is not a decision on the authority of the bankruptcy court to issue nondebtor releases but a ruling in favor of *res judicata* preventing a creditor from seeking claims after essentially waiving the claims.[83] The debtor in *In re A.H. Robins Co., Inc.*, however, had objected. The Fourth Circuit used poorly reasoned its decision.[84]

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79. *See generally* SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015).

80. Menard-Sanford v. Mabey (*In re* A.H. Robins Co., Inc.), 880 F.2d 694, 702 (4th Cir. 1989) ("the Fifth Circuit has stated that '[a]lthough section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization.'").

81. *See* Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252-53 (5th Cir. 2009).

82. *In re A.H. Robins Co., Inc.*, 880 F.2d at 702 (emphasis added); Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 712 (4th Cir. 2011).

83. Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1047 (5th Cir. 1987) ("Republic neither objected to that provision of the Plan nor appealed its confirmation. . . . Shoaf raised the defense of *res judicata* in this suit that seeks to collect on the guaranty."); *In re Pac. Lumber Co.*, 584 F.3d at 252 n.27 (*Republic Supply Co.* "concern[s] the *res judicata* effect of non-debtor releases, not their legality.").

84. *In re A.H. Robins Co., Inc.*, 880 F.2d at 697 ("Robins objected to all the Dalkon Shield Claims.").

The Fourth Circuit further reasoned that § 524(e) did not limit the equitable power of the bankruptcy court "where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor."[85] This reasoning is also flawed because discharge of debt of the debtor already prevents the commencement of any action to collect any debt from the debtor relating to claims discharged in bankruptcy, including the commencement of actions to collect under indemnity provisions.[86]

Another example is the Fifth Circuit's reliance on a past Eleventh Circuit case, *In re Jet Florida Sys., Inc.*, "as being consistent with the minority view that non-consensual, non-debtor releases were prohibited by 11 U.S.C. § 524(e)."[87] The Eleventh Circuit addressed this inappropriate reliance in *Seaside* and distinguished *Jet Florida* as a case that concerned a tort claimant, post-discharge of the debtor, seeking to establish the liability of the debtor in order to obtain recovery against the debtor's insurer, not the debtor.[88] The Eleventh Circuit simply held that this was possible because § 524(a)'s "injunction was designed primarily to protect the debtor and the bankruptcy estate . . . [not] to enjoin a creditor from taking action against another who also might be liable to the creditor."[89] *Jet Florida* simply did not involve a nondebtor release, and the claim at issue did not ultimately seek monetary judgment against the debtor or a reorganized entity of the debtor. The Fifth Circuit's reliance was misplaced.

B. *What the Eleventh Circuit Got Wrong*

1. The Eleventh Circuit's Statutory Analysis of § 105(a) Results in an Injunction That Is Overreaching and Under-inclusive.

A plain reading of § 105(a) supports the argument that permanent nondebtor releases that only allow creditors to pursue claims of "lia-

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85. *Id.* at 702.

86. 11 U.S.C. § 524(a)(2) (2012) (discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor"); *see also In re* W. Real Estate Fund Inc., 922 F.2d 592, 602 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991) ("the discharge injunction provided for in section 524(a) already frees the debtor from potential derivative claims, such as indemnification or subrogation, that might arise from the creditor's post-confirmation attempts to recover the discharged debt from others.").

87. SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1077 n.4 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015); *see* Owaski v. Jet Florida Sys., Inc. (*In re* Jet Florida Sys., Inc.), 883 F.2d 970 (11th Cir. 1989).

88. *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1077 n.4.

89. *In re Jet Florida Sys., Inc.*, 883 F.2d at 973.

bility . . . based on fraud, gross negligence or willful misconduct" violate the boundaries of § 105(a) and are under-inclusive in the type of liability claims that creditors should be enjoined from pursuing.[90] Section 105(a) states that "[t]he court may issue any order, process, or judgment that is *necessary or appropriate* to carry out the provisions of this title."[91] The question should then become: what provision of the title does the bankruptcy court seek to carry out, and is the proposed action necessary and appropriate as a means to that end? *Seaside* involved a Chapter 11 confirmation of a plan of reorganization under § 1129, and the Eleventh Circuit stated that it applied the Sixth Circuit's seven-factor test to ensure that "such bar orders . . . be reserved for those unusual cases in which such an order is necessary for the success of the reorganization."[92]

Thus, the question, once contextualized, becomes: "Are permanent nondebtor releases that only allow creditors to pursue claims of liability based on fraud, gross negligence or willful misconduct 'necessary or appropriate' for successful reorganization?" The answer in regard to necessity and appropriateness is "no." A temporary injunctive relief would be appropriate to achieve this end and be less severe than a permanent injunctive release of creditors' claims. The Eleventh Circuit noted the fear that nondebtors "would expend their time in defense of litigation as opposed to focusing on their professional duties for the reorganized entity."[93] Reorganization plans are not in place forever; they end upon successful repayment of debt. Thus, nondebtors should be able to defend against litigation and without being preoccupied with contributing to the success of the reorganization plan after its completion. In fact, a debtor's own discharge is conditioned upon the successful completion of the reorganization plan.[94] If the plan is not completed, the debtor does not receive a discharge. Here, the court is effectively issuing a permanent discharge to nondebtors on claims without any condition at all. This is better treatment than even a debtor under the Bankruptcy Code who is presumably supposed to be the primary benefactor. A permanent injunction is not necessary. Considering that the court is completely barring creditors' claims against nondebtors without condition, it is not appropriate either.

90. *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1076.
91. 11 U.S.C. § 105(a) (emphasis added).
92. *See In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078.
93. *Id.* at 1080.
94. 11 U.S.C. § 1141(d)(5)(A) ("confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan").

Possibly to balance the inequitable action of barring creditors' claims forever, the Eleventh Circuit makes an exception for claims of fraud, gross negligence and willful misconduct without giving a meaningful reason of necessity or appropriateness. If the purpose is to make sure reorganization is successful, why only bar negligence-like claims? Maybe the court reasoned, as a policy matter, that barring claims of willful misconduct was too drastic just to ensure the success of reorganization. Regardless, the court does not state a meaningful reason. Without making the case for why such an exception is necessary or appropriate to ensure the success of reorganization, the authority to carve out the exception falls outside the scope of § 105(a).

It is notable that claims against members of the creditors' committee receive different treatment since courts interpret § 1103 to give the committee qualified immunity.[95]

2. Seaside Did Not Satisfy the Seven-Factor Test for an Unusual Circumstance.

The Eleventh Circuit's analysis of and justification that Seaside satisfied the seven-factor test is questionable at best. Practitioners have criticized the court's analysis under the factors as flawed.[96] For the first and third factor, the court found that continued litigation could deplete the assets of Gulf; however, Vision's claims against the released Seaside principals would be based on their individual liability for their individual actions and would not lead to liability for Gulf Atlantic.[97] Under the second factor, the finding that the released Seaside principals were contributing substantial assets to the reorganization in the form of labor as engineers and surveyors is absurd. The principals did not contribute anything of value to the reorganization. If anything, their contribution was a promise of future labor, that could be later abandoned, for which they would already be compensated with salaries and benefits.[98] Their labor was not being given in exchange for a release.

For the fourth factor, practitioners also noted that the impacted Class 5, which included Vision, voted to reject the plan.[99] Under the fifth and sixth factors, Vision's claims that might be released under the

95. Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 253 (5th Cir. 2009) (courts that have held that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.).

96. Anderson & Basham, *supra* note 5, at 21.

97. *Id* at 20-21.

98. *Id.*

99. *Id.*

plan were rejected by the bankruptcy court and no mechanism was provided for Vision to "opt out."[100] Further noted by practitioners concerning the realistic justification given by the court for factor seven's requirement of thorough findings to support the court's conclusion, "Seaside apparently managed to operate at a profit" even while handling the litigious "wrangling with Vision pre- and post-petition."[101] It is doubtful that the releases were actually necessary in fear that "Vision might distract the principals of Gulf Atlantic and cause a deterioration of the Gulf Atlantic business, thus jeopardizing the success of the plan."[102] *Seaside* does not appear to have met the requirements of an "unusual case" such that extraordinary relief of nondebtor releases were permitted.

III. PROPOSAL

This part of the Article, in light of the previous section's analysis of the Eleventh Circuit's decision and the various circuits' approaches and decisions, proposes that the United States Supreme Court apply the following approaches, tests, and reasoning in future cases of nondebtor releases.

A. *Adopt the Seventh Circuit's Reasoning and the Sixth Circuit's Seven-Factor Test.*

The Supreme Court should adopt the Seventh Circuit's rationale for why bankruptcy courts can issue nondebtor releases and the Sixth Circuit's seven-factor test to determine appropriate circumstances in which such releases can be granted. Of all the circuit courts' justifications for or against bankruptcy courts having authority to issue non-consensual nondebtor releases during a plan confirmation, the Seventh Circuit's reasoning is most sound. The court takes a plain reading approach, which focuses on § 524(e)'s language concerning discharge of a debtor. The section simply states that discharge of a debtor's debt does not affect co-liable third parties from being liable for the debt. It says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims to effectuate successful reorganization. The Seventh Circuit also hinges its position on inferable congressional intent. If Congress meant to limit the power of bankruptcy courts to issues these types of releases, the words "shall not" in a past version of § 524(e) or another mandatory term

100. *Id* at 21.
101. *Id.*
102. Anderson & Basham, *supra* note 5, at 21.

like "must not" would have been left or added respectively to ensure that discharge of the debt of a debtor did not release a third party from liability.

Additionally, the Sixth Circuit's seven-factor test provides more protection for impacted creditors and limits the circumstances to mandatory and rare instances in which releases would be granted. Unlike the four-factor test recognized by the Fourth Circuit, which only requires an overwhelming approval of the reorganization plan, the seven-factor test requires that the impacted class or classes has overwhelmingly voted to accept the plan.[103] This is important because these parties, and not all parties to the bankruptcy, are the entities that will lose their rights to bring valid claims against nondebtors. Also, the seven-factor test requires the bankruptcy court make a record of specific factual findings that support its conclusions. This requirement should limit the issuances of releases to rare circumstances where facts support the courts' findings under each factor of the test.

B. *Do Not Adopt the Eleventh Circuit's Reasoning Under the Seven-Factor Test.*

The Supreme Court should heavily emphasize making a record of specific factual findings that support conclusions under the seven-factor test and denounce the conclusive findings under the test by the Eleventh Circuit in *Seaside*. The Eleventh Circuit stressed repeatedly the care that should be taken in issuing of nondebtor releases only in necessary circumstances:

> such bar orders ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances. . . . [and] should be used "cautiously and infrequently."[104]

Yet, the Eleventh Circuit permitted the bankruptcy court's issuance of a release under unnecessary and inappropriate circumstances, as previously discussed.[105] Making sure that the record actually supports the unusual circumstance guards against nondebtors using *Seaside* as an excuse to be released from liability post-confirmation.

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103. Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704, 712 (4th Cir. 2011); Hoge v. Moore (*In re* Railworks Corp.), 345 B.R. 529, 536 (Bankr. D. Md. 2006).

104. SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1078-79 (11th Cir. 2015), *cert. denied sub nom.* Vision-Park Properties, L.L.C. v. Seaside Eng'g & Surveying, L.L.C., 136 S. Ct. 109 (2015).

105. *See supra* Part II.B.2.

C. *Make Nondebtor Releases Temporary and Inclusive of All Claims Against Nondebtors.*

Last, the Supreme Court should limit nondebtor releases temporally and expand the scope of liability claims enjoined under the release. A temporary injunction until the completion of the reorganization plan upon final repayment of debt or at such time before when the nondebtor can defend against liability claims without dashing the hopes of successful reorganization is sufficiently within the boundaries of § 105(a)'s grant of equitable powers to the bankruptcy court. The Eleventh Circuit highlighted the purpose of the release is to protect the success of the reorganized entity's rehabilitative process after plan confirmation.[106] The nondebtor releases were to enjoin "claims against non-debtors that would undermine the operations of, and doom the possibility of success for, the reorganized entity."[107] A permanent release of nondebtors from liability is not necessary to achieve this goal. The injunction need only be temporary.

The solution of issuing a temporary injunction is supported by the fact that bankruptcy courts already issue temporary injunctions in the form of a stay to permit debtor companies to come up with a plan of reorganization. Additionally, the Supreme Court's holding in *First National*, a case relied on by the Sixth Circuit in holding that nondebtor releases are permitted because actions done pursuant to a statutory provision are not confined to traditional equity jurisprudence, only recognizes the equitable use of temporary injunctions.[108] Beyond the fact that *First National* is not controlling for cases involving permanent nondebtor releases because it only involved a temporary injunction, a permanent injunction on valid claims against a nondebtor that has not filed bankruptcy does not seem equitable.

If the Supreme Court adopts this proposal that temporary injunctions should be issued, the Fifth Circuit in *In re A.H. Robins Co. Inc.* calms any concerns that the statute of limitations on enjoined claims will expire: "seeking the protection of the court under the bankruptcy laws, [debtor] implicitly waives its right to claim that this stay does not toll the state statutes of limitations. Our system of law universally frowns on a party who would use the stay as both a sword and a

106. *See In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 107.

107. *Id.*

108. United States v. First Nat'l City Bank, 379 U.S. 378, 380, 384-85 (1965) ("The District Court, on the basis of the affidavits, issued a temporary injunction enjoining respondent from transferring any property or rights to property."); *see also* Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656-57 (6th Cir. 2002).

shield."[109] Albeit the nondebtor has not filed for or subjected itself to the bankruptcy process, the same implicit waiver should be true for a nondebtor because it seeks the temporary protection of the bankruptcy court from liability via the temporary injunctive release.

CONCLUSION

Since the District of Columbia Circuit Court of Appeal's controversial ruling on nondebtor releases in 1986 in *In re AOV Indus. Inc*, Courts of Appeals have used various approaches and arrived at splitting decisions on bankruptcy court authority and appropriate circumstances for such releases. Based on this Article's analysis of the Eleventh Circuit's recent decision in *Seaside* within the context of the different approaches and holdings reached by the circuit courts, the United States Supreme Court should adopt a plain reading of § 105(a) that permits bankruptcy courts to issue temporary nonconsensual nondebtor releases. More specifically, the Court should adopt the Seventh Circuit's approach in reasoning why bankruptcy courts have equitable authority to issue nondebtor releases, adopt the Sixth Circuit's seven-factor test to ensure such releases are only issued within the boundaries of the Bankruptcy Code, and make nondebtor releases temporary and inclusive of all claims against nondebtors. By addressing this issue, the Supreme Court will resolve a multi-circuit split and prevent creditors' claims from being permanently barred while still providing protection to the debtor's reorganization process.

109. Menard-Sanford v. Mabey (*In re* A.H. Robins Co. Inc.), 828 F.2d 1023, 1026 (4th Cir. 1987).