ON A "RELATED" POINT: RETHINKING WHETHER BANKRUPTCY COURTS CAN "ORDER" THE INVOLUNTARY RELEASE OF NON-DEBTOR, THIRD-PARTY CLAIMS

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INTRODUCTION

Although controversial, chapter 11 plans frequently include non-consensual third-party releases (i.e., the involuntary extinguishment of a non-debtor, third-party's claim against another non-debtor, third-party). To the extent such releases are contained in a chapter 11 plan, they are given legal effect through an order confirming the plan.[1] When parties challenge a chapter 11 plan's inclusion of third-party releases, they often argue, *inter alia*, that a bankruptcy court lacks subject matter jurisdiction to release the underlying claims. The success of these jurisdictional attacks often depends on whether the third-party claims fall within the bankruptcy court's "related to" jurisdiction conferred by 28 U.S.C. §§ 1334(b) and 157(c)(1).

This Article examines an underutilized—yet potent—procedural weapon available to plan objectors even if "related to" jurisdiction is established over the third-party claims. The tactic stems from the unassailable statutory edict that a bankruptcy court exercising "related to" jurisdiction *cannot* issue final "orders" or "judgments" but is instead limited to issuing "proposed findings of fact and conclusions of law," which are subject to mandatory, de novo review by the district court.[2] Invoking this statutory directive, plan objectors can forcefully argue that a bankruptcy court cannot order the release of third-party claims on a final basis when it confirms a chapter 11 plan. Instead, such an order can only be entered, if at all, by the district court "after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."[3] As discussed below, such an argument is difficult to grapple with and its practical impact is significant. To preserve such arguments, however, plan objectors must not fall victim to complacency.

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[1] *See* 11 U.S.C. § 1141(a) (2012) (stating the binding effect of a confirmed plan).

[2] *See* 28 U.S.C. § 157(c)(1) (2012).

[3] *Id.*

I. BANKRUPTCY COURTS' SUBJECT MATTER JURISDICTION & ADJUDICATORY AUTHORITY

Federal bankruptcy jurisdiction is set forth in 28 U.S.C. § 1334, which provides that "district courts shall have original and exclusive jurisdiction of all cases under title 11,"[4] and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[5] The authority of bankruptcy courts—as opposed to district courts—to handle bankruptcy matters stems from 28 U.S.C. § 157(a), which provides that "[e]ach district court may provide for any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[6] Notwithstanding the general referral of bankruptcy matters from the district courts, the extent of a bankruptcy court's adjudicatory authority depends on the type of proceeding before it.[7] Bankruptcy courts are only permitted to issue "orders" and "judgments" in "cases under title 11" and more specifically, "all *core proceedings* arising under title 11, or arising in a case under title 11."[8] Section 157(b)(2) of title 28 sets forth non-exhaustive examples of such "core proceedings" including, among others, the "allowance or disallowance of claims against the estate[;]" "orders to turn over property of the estate;" and "confirmations of plans."[9]

With respect to proceedings that are not "core" but are otherwise "related to" a bankruptcy case, bankruptcy courts are permitted only to "hear" such proceedings and

> submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.[10]

In reviewing the bankruptcy court's proposed findings of fact and conclusions of law, the district court "may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions."[11] Objecting parties are also afforded further

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[4] *Id.* § 1334(a).
[5] *Id.* § 1334(b).
[6] *Id.* § 157(a).
[7] *See generally id.* § 157 (outlining the types of proceedings a bankruptcy judge has jurisdiction over).
[8] *Id.* § 157(b)(1) (emphasis added).
[9] *Id.* § 157(b)(2)(B), (E), (L).
[10] *Id.* § 157(c)(1). An exception to this limitation applies where all of the parties to the proceeding consent to the bankruptcy court's entry of final orders in the proceeding. *See id.* § 157(c)(2). *See also infra* note 40.
[11] FED. R. BANKR. P. 9033(d).

opportunity to present their arguments to the district court.[12] Thus, when a bankruptcy court exercises "related to" jurisdiction, the need to file an appeal does not arise until after the district court's review and ruling (i.e., because there is not yet an "order" or "judgment" to appeal from).

II. BANKRUPTCY COURTS HAVE ONLY "RELATED TO" JURISDICTION TO PERMANENTLY RELEASE THIRD-PARTY CLAIMS AND THUS HAVE LIMITED ADJUDICATORY AUTHORITY

Absent subject matter jurisdiction over claims between third-parties, a bankruptcy court is powerless to permanently release such claims.[13] As courts have explained, the only jurisdictional basis for a bankruptcy court to permanently extinguish third-party claims is through an exercise of "related to" jurisdiction.[14] This conclusion follows because a non-debtor's pre-bankruptcy claim against another non-debtor does not "aris[e] under title 11" and does not "aris[e] in a case under title 11."[15] As such, when a bankruptcy court purports to permanently release third-party claims, its adjudicatory authority is limited to making "proposed findings of fact and conclusions of law" and it cannot issue final "orders" or

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[12] *See* FED. R. BANKR. P. 9033(b) (providing objecting party may file its specific objections to the bankruptcy court's findings and conclusions).

[13] *See* Johns-Manville Corp. v. Chubb Indem. Ins. Co. (*In re* Johns-Manville Corp.), 517 F.3d 52, 60–61, 65 (2d Cir. 2008), *rev'd & remanded on other grounds sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009), *aff'd in part & rev'd in part sub nom.* Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (*In re* Johns-Manville Corp.), 600 F.3d 135 (2d Cir. 2010) (holding that a bankruptcy court cannot permanently "enjoin claims over which it had no jurisdiction" and that the bankruptcy court here lacked subject matter jurisdiction to permanently enjoin third-party claims at issue because they were beyond the bounds of federal bankruptcy jurisdiction conferred under 28 U.S.C. § 1334).

[14] *See, e.g.*, *In re* Combustion Eng'g, Inc., 391 F.3d 190, 224, 233 (3d Cir. 2005) (holding that chapter 11 plan could not permanently enjoin third-party claims because "related to" jurisdiction did not exist over such claims); Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 753 (5th Cir. 1995) ("Those cases in which courts have upheld 'related to' jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create 'related to' jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate.") (footnotes omitted); *In re* Medford Crossings N., LLC, No. 07-25115, 2011 WL 182815, at *14 (Bankr. D.N.J. Jan. 20, 2011) ("[T]his court has 'related to' jurisdiction to consider the appropriateness of the Plan and the Third Party Releases and Injunctions contained therein.") (emphasis omitted); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) ("[W]hatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court 'related to' jurisdiction under 28 U.S.C. § 1334 . . . ."); *In re* Congoleum Corp., 362 B.R. 167, 190–91 (Bankr. D.N.J. 2007) ("[E]stablish[ing] that this Court has 'related to' jurisdiction to release non-debtor parties" is the "first hurdle" to approval of such a release); 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, 20 n.38 (2006) ("A bankruptcy court's jurisdiction over disputes between non-debtors, the type involving claims extinguished by third-party releases, flows from its 'related to jurisdiction.'").

[15] 28 U.S.C. § 157 (b)(1).

"judgments" absent the consent of the parties.[16] Based on the foregoing, a strong argument can be made that a bankruptcy court's order confirming a chapter 11 plan cannot finally order the involuntary release of third-party claims.[17] Rather, a bankruptcy court's confirmation order can only make proposed findings of fact and conclusions of law to this effect.[18] Any final order approving the permanent release of the third-party claims would need to be entered by the district court.[19]

If successful, it is difficult to overstate the strategic significance of such an argument. Indeed, mandatory district court review of a plan's third-party release provisions: (i) obviates the need for objectors to appeal the bankruptcy court's approval of the releases (or to obtain a stay of that approval pending appeal);[20] and

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[16] *E.g.*, § 157(b)(1), (c)(1).

[17] *See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Callaway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 50 (1998) ("[A] nondebtor release . . . effectively adjudicates the released nondebtor action. The release operates as an adjudication on the merits, fully binding for res judicata/preclusion purposes. By any analysis, the nondebtor actions that are 'adjudicated' through nondebtor releases are, at best, noncore, 'related to' actions, beyond the jurisdiction of a bankruptcy judge to finally adjudicate, without consent of the litigants."). Here it is important to distinguish the permanent release of third-party claims from a bankruptcy court's temporary stay of such claims during the pendency of a chapter 11 case. Bankruptcy Code section 105(a) allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (2012). Temporary stays of third-party claims are often sought under section 105(a) to prevent third-party actions from interfering with the debtor's reorganization proceedings. *See* Brubaker, *supra* at 10 ("For example, when creditors assert liability on the part of the debtor *and* individual members of the debtor's management, continuing litigation against individual officers, directors, and employees may unduly divert such individuals' time and energies away from the debtor's reorganization efforts."). As the U.S. Supreme Court has explained, a bankruptcy court's assertion of "related to" jurisdiction to *temporarily* enjoin third-party actions does not require the intervention of a district court because the imposition of a temporary injunction "is only an interlocutory stay" rather than a final "order" or "judgment" as those terms are used in 28 U.S.C. § 157(c)(1). Celotex Corp. v. Edwards, 514 U.S. 300, 309 n.7 (1995) (emphasis omitted). By contrast, "[a] release or permanent injunction, contained in a confirmed plan . . . has the effect of a judgment—a judgment against the claimant and in favor of the non-debtor . . . ." *In re* Digital Impact, Inc., 223 B.R. 1, 13 n.6 (Bankr. N.D. Okla. 1998).

[18] *See In re Digital Impact, Inc.*, 223 B.R. at 14 n.8 (holding that bankruptcy court lacked "related to" jurisdiction to approve chapter 11 plan's third-party release provisions and that "[e]ven if the Court assumed 'related to' jurisdiction over such actions, all parties must consent to a bankruptcy judge rather than an Article III judge entering judgment. Without such consent, this Court's role is limited to proposing findings of fact and conclusions of law to the District Court.") (citations omitted); Silverstein, *supra* note 14, at 78–79 n.357 ("A non-debtor release is effectively a final judgment . Accordingly, any such release issued by the bankruptcy court—whether set forth in a confirmed plan of reorganization or contained in proposed findings and conclusions in a related proceeding—is subject to de novo review by the district court . . . .") (internal citations omitted).

[19] *See supra* note 18.

[20] Obtaining a discretionary stay of a confirmation order pending appeal is often essential to preventing the appeal from being mooted. *See infra* note 21 and accompanying text. The granting of such a stay, however, may be conditioned on the posting of an appropriate appellate bond. FED. R. BANKR. P. 8005 ("The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court."). Such a bond could be cost-prohibitive and therefore thwart any meaningful appeal. *See, e.g.*, *In re* Tribune Co., 477 B.R. 465, 469 (Bankr. D. Del. 2012) (granting a motion for stay pending appeal of a plan confirmation order subject to plan objectors posting a $1.5 billion supersedeas bond).

(ii) disables a plan proponent from attempting to moot district court review of the third-party releases by quickly consummating the plan.[21] It is therefore surprising that such arguments are not raised more frequently by plan objectors, particularly in light of the renewed scrutiny of bankruptcy courts' adjudicatory authority following the U.S. Supreme Court's decision in *Stern v. Marshall*.[22]

III. DEALING WITH THE STATUTORY ENUMERATION OF "CONFIRMATIONS OF PLANS" AS "CORE PROCEEDINGS"

In response to the argument outlined above, one might argue that in the plan confirmation context, a bankruptcy court can issue final orders with respect to the release of third-party claims. That is, because "confirmation[] of plans" is expressly included in the statutory list of "core proceedings" in 28 U.S.C. § 157(b)(2), it might be argued that a bankruptcy court has "arising in" or "arising under" jurisdiction to issue a final order confirming a chapter 11 plan, including any third-party releases contained therein.[23] This argument, however, is both unpersuasive and proves too much. The most obvious weakness of this reasoning is that it would treat a chapter 11 plan as a jurisdictional and adjudicatory blank check. For example, third-party claims beyond the scope of the bankruptcy court's broadest

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[21] *See, e.g.*, Deutsche Bank v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 143–45 (2d Cir. 2005) (concluding that bankruptcy court did not make sufficient findings to warrant approval of third-party release but dismissing appeal under the doctrine of "equitable mootness" because chapter 11 plan had been substantially consummated and appellants did not seek a stay of plan confirmation order pending appeal); *see also* R^2 Invs. v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 486 (2d Cir. 2012) (dismissing plan objectors' appeal of chapter 11 plan's third-party release provisions as "equitably moot" where objectors were unsuccessful in obtaining a stay of the confirmation order pending appeal and the plan had been substantially consummated).

[22] In *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594 (2011), the U.S. Supreme Court held that that even though 28 U.S.C. § 157 authorized bankruptcy courts to enter final judgments with respect to a class of bankruptcy-related claims (i.e., counterclaims by the bankruptcy estate against creditors who file proofs of claim), Article III of the Constitution prohibits bankruptcy courts from finally adjudicating those claims to the extent (i) they did not involve matters of "public rights;" (ii) they did not arise under federal bankruptcy law; and (iii) were not necessary to resolve as part of the process for allowing or disallowing the creditor's claim against the bankruptcy estate. *See id.* at 2611. In the aftermath of *Stern*, there has been significant skirmishing in the lower courts regarding the extent of bankruptcy courts' authority to issue final orders or judgments in many different contexts. *See In re* Freeway Foods of Greensboro, Inc., 466 B.R. 750, 767 (Bankr. M.D.N.C. 2012) ("[M]any litigants and courts have struggled to understand . . . *Stern's* reasoning and apply its holding.").

[23] *See* 28 U.S.C. § 157(b)(2)(L); *In re* Wool Growers Cent. Storage Co., 371 B.R. 768, 774 (Bankr. N.D. Tex. 2007) ("The question, then, is whether the Court's clear 'related to' jurisdiction becomes something more—arising-under-or-in jurisdiction—by placement of the release provision in a chapter 11 plan. This question becomes academic [here] because . . . the parties have consented to this Court both hearing and deciding the issue before it.") (internal citation omitted); *see also In re* Charles St. African Methodist Episcopal Church of Bos., 499 B.R. 66, 99 (Bankr. D. Mass. 2013) ("The matter before the Court is a plan of reorganization, the confirmation of which arises under title 11, the Bankruptcy Code . . . . It may or may not be appropriate for a court exercising bankruptcy jurisdiction to confirm a plan containing a third-party release . . . but the court undoubtedly has jurisdiction to adjudicate the plan, even without recourse to its related-to jurisdiction.").

"related to" subject matter jurisdiction could be transformed into "core" matters by the simple expedient of proposing to release the claims through a chapter 11 plan. This statutory alchemy would subject these previously unrelated claims not only to the bankruptcy court's more *narrow* "arising in/arising under" jurisdiction, but also to its *final* adjudicatory authority. Third-party claims over which "related to" jurisdiction did exist could similarly be elevated to "core" proceedings suddenly subject to the bankruptcy court's final adjudicatory authority. As courts have repeatedly explained, this type of jurisdictional and adjudicatory bootstrapping is not permissible.[24] Indeed, as one court pointedly noted:

> It could be argued that because the claims sought to be released are potential civil proceedings against Dickerson [a non-debtor, third-party], and because Dickerson is the Plan Proponent, such proceedings are "arising in" or "related to" a case under title 11. This is *only* true, however, because Dickerson has inserted the Release into the Plan. If proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply including their release in the proposed plan, this Court could acquire infinite jurisdiction. Dickerson could conceivably insert into the Plan a release of his personal tax liabilities or a release of his home mortgage . . . .[25]

Such an argument would also disregard the litany of case law holding that bankruptcy courts' subject matter jurisdiction to permanently release third-party claims—whether through a chapter 11 plan or otherwise—is an exercise of "related to" jurisdiction.[26]

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[24] *See, e.g., In re* Combustion Eng'g, Inc., 391 F.3d 190, 224–25 (3d Cir. 2005) (explaining that even if Bankruptcy Code section 105(a) provides arguable statutory authority for a bankruptcy court to approve a third-party release, "[section] 105 does not provide an independent source of federal subject matter jurisdiction . . . .*'Related to' jurisdiction must therefore exist independently of any plan provision purporting to involve or enjoin claims against non-debtors*.") (emphasis added); *In re* Lower Bucks Hosp., 488 B.R. 303, 312 nn.28 & 30, 313 (E.D. Pa. 2013) (explaining: (i) that although "[t]he third party release issue arose as part of the plan confirmation process, which is considered a 'core proceeding' . . . . the [released] action does not 'arise under' or 'arise in' bankruptcy" and that "the Bankruptcy Court had subject matter jurisdiction only if the [released] claims . . . are 'related to' LBH's bankruptcy[]" and (ii) that when exercising "related to" jurisdiction, a bankruptcy court is limited to issuing proposed findings of fact and conclusions of law), *aff'd*, 571 Fed. Appx. 139 (3d Cir. 2014); *cf. In re* Dreier LLP, 429 B.R. 112, 131 (Bankr. S.D.N.Y. 2010) (explaining, in settlement context, that "[i]n assessing a court's jurisdiction to enjoin a third party dispute, the question is not whether the court has jurisdiction over the settlement, but whether it has jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party").

[25] *In re* Digital Impact, Inc., 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998) (internal citation omitted); *see also id.* at 14 n.8 (explaining that even if court had jurisdiction to approve a plan containing third-party releases, it would have, at most, "related to" jurisdiction and would be "limited to proposing findings of fact and conclusions of law to the District Court").

[26] *See supra* note 14.

Furthermore, although Congress recognized that "confirmations of plans" are "core" proceedings, the purpose of a chapter 11 plan is to adjust claims *against the debtor*. Although the involuntary release of *third-party* claims has been authorized by some courts in rare circumstances, there is no express statutory authorization for such releases outside the limited context of plans dealing with asbestos-related liabilities.[27] As such, the enumeration of "confirmations of plans" as "core" proceedings should not be read as a jurisdictional and adjudicatory "catch-all" for whatever extra-statutory relief parties propose to include in a plan.[28] Indeed, in the *one and only* context that third-party releases are expressly permitted by the Bankruptcy Code—i.e., plans dealing with asbestos-related liabilities—bankruptcy courts lack final adjudicatory authority to effect the release of such claims. Instead, the Bankruptcy Code requires approval of such releases "*by the district court* that has jurisdiction over the reorganization case."[29]

Finally, even if Congress' enumeration of "confirmations of plans" as "core" proceedings could be interpreted to give bankruptcy courts both subject matter jurisdiction and final adjudicatory authority to permanently release third-party claims, the delegation of such authority to a non-Article III court might very well be unconstitutional under *Stern v. Marshall* and other U.S. Supreme Court precedent.[30] In *Stern*, the Court concluded that it was unconstitutional for Congress to provide bankruptcy courts—which are not established under Article III of the U.S. Constitution and therefore cannot exercise "judicial power"—with final adjudicatory authority over a bankruptcy estate's defamation counterclaim against an estate creditor.[31] According to the Court, the counterclaim at issue could not be deemed a matter of "public right" subject to final adjudication by a non-Article III court.[32] Rather, the claim arose under state law between private parties and was

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[27] *See* Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 211 (3d Cir. 2000) ("Section 524(e) of the Bankruptcy Code makes clear that the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their liabilities. The Bankruptcy Code does not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here. Section 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code. However, section 105(a) has a limited scope. It does not 'create substantive rights that would otherwise be unavailable under the Bankruptcy Code.'") (footnote and citations omitted).

[28] To be clear, the "core" versus "related to/non-core" determination is not all or nothing. A single proceeding before a bankruptcy court can involve both "core" and "related to/non-core" matters. 1 COLLIER ON BANKRUPTCY, ¶ 3.01[3][e][iii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009). In such "mixed" proceedings, the bankruptcy court can issue final orders as to the "core" matters and proposed findings of fact and conclusions of law as to the "related to/non-core" matters.

[29] *See* 11 U.S.C. § 524(g)(3)(A) (2012) (emphasis added); *see also In re* Flintkote Co., 486 B.R. 99, 106 (Bankr. D. Del. 2012) ("[W]e find that the Plan complies with § 1129 and § 524(g) in all respects *and recommend that the District Court* affirm confirmation of the Plan and the § 524(g) injunction.") (emphasis added).

[30] *See* Stern v. Marshall, 564 U.S. __, 131 S. Ct. 2594 (2011).

[31] *Id.* at 2600–01 (concluding although bankruptcy court had statutory authority to enter judgment, it lacked constitutional authority to render judgment).

[32] *Id.* at 2611. As explained by the Court, "what makes a right 'public' rather than private is that the right is

therefore a matter of "'private right, that is, of the liability of one individual to another[.]'"[33] That the defendant filed a proof of claim in the bankruptcy case did not alter this conclusion because: (i) the counterclaim did not arise from the bankruptcy itself; and (ii) it was not necessary to resolve the counterclaim as part of the process of allowing or disallowing the creditor's proof of claim.[34]

Following the logic of *Stern*, one could persuasively argue that claims of non-debtors against other non-debtors are matters of "private right" not subject to final disposition by a non-Article III tribunal. Thus, even if 28 U.S.C. § 157(b)(2) did provide bankruptcy courts with statutory authority to finally dispose of third-party claims in the plan confirmation context, such a construction would pose serious constitutional problems. A constitutional challenge of this type was recently raised in *In re Charles Street African Methodist Episcopal Church of Boston*.[35] Although the bankruptcy court rejected this argument, its reasoning was not persuasive:

> The matter before the Court is not a suit on the Guaranty; the merits of the Guaranty are not in controversy. To reiterate, the matter before the Court is the confirmation of a plan, a unitary omnibus civil proceeding for the reorganization of all obligations of the debtor and disposition of all its assets. Confirmation of a plan is not an adjudication of the various disputes it touches upon—the Guaranty being here but one of many; it is a total reorganization of the debtor's affairs in a manner available only in bankruptcy. The release may be proposed and approved only as part of a plan and only (if at all) pursuant to powers of adjustment afforded by the Bankruptcy Code, such as in sections 1123(a)(5) and 105(a). Accordingly, the confirmation of a plan—including any third-party release it may propose—is a matter of "public rights" that, under *Stern*, Congress may constitutionally assign to a non-Article III adjudicator. There is no constitutional infirmity in Congress's having provided, in 28 U.S.C. § 157(b)(1) and (b)(2)(L), that

integrally related to particular federal government action." *Id.* at 2613.

[33] *See id.* 2612, 2614 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)).

[34] *See id.* at 2618. In the wake of *Stern*, the U.S. Supreme Court more recently held that under 28 U.S.C. § 157, a bankruptcy court may issue proposed findings of fact and conclusions of law when, as in *Stern*, it would be unconstitutional for the bankruptcy court to issue a final order as statutorily contemplated. *See* Exec. Benefits Ins. Agency v. Arkison, 573 U.S. __, 134 S. Ct. 2165, 2168 (2014) ("We hold today that when, under *Stern*'s reasoning, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court."). That holding does not impact the analysis in this Article.

[35] *In re* Charles St. African Methodist Episcopal Church of Bos., 499 B.R. 66, 99 (Bankr. D. Mass. 2013) ("OneUnited argues that approval of the release is tantamount to adjudication of the guaranty, which, as a two-party dispute that arises under state law between non-debtor parties, cannot constitutionally be adjudicated by a non-Article III judge, even if that controversy is part of a statutorily defined 'core proceeding' in 28 U.S.C. § 157(b).").

> confirmation of a plan, including one of the variety here presented, is a proceeding that a bankruptcy judge may hear, determine, and enter appropriate orders and judgment on.[36]

Although the bankruptcy court concluded that it was not addressing the merits of the third-party claims, the court apparently did not consider the fact that granting the release would nevertheless constitute a final disposition of those claims.[37] Moreover, permanently extinguishing those claims irrespective of their merits actually heightens—rather than minimizes—constitutional concerns.[38] Even more glaring is the court's position that, as a non-Article III court, it can finally dispose of claims between *non-debtors* because reorganizing and adjusting the *debtor's liabilities* is a matter of "public rights."[39] This reasoning appears to improperly conflate the private rights of non-debtor, third-parties with the public rights surrounding a debtor's restructuring. Given these issues with the bankruptcy court's constitutional analysis, the decision is unlikely to discourage similar challenges in the future.

IV. IMPORTANT PRACTICE POINTS

To take full advantage of the arguments set forth in this Article, it is imperative that plan objectors raise them early and often. As explained above, bankruptcy courts are statutorily permitted to finally adjudicate "related to/non-core" proceedings with the parties' consent.[40] Bankruptcy courts have found consent when objections to its adjudicatory authority are not raised until late in the plan

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[36] *Id.* at 99–100 (internal citation omitted). The court ultimately refused to approve the third-party release contained in the plan because it did not meet the applicable standards for approval. *Id.* at 103 ("The Court is left with a release that is not essential to the debt repayment objectives of the Plan, that does not have the assent of the affected creditor, and that does not treat that creditor so well that the release is of virtually no concern.").

[37] *See In re* Digital Impact, Inc., 223 B.R. 1, 12 (Bankr. N.D. Okla. 1998) (explaining that proposed third-party release in chapter 11 plan "is equivalent to issuing a final adjudication of the merits of such claims" in favor of the released party); Silverstein, *supra* note 14, at 78 n.357 (explaining "[a] non-debtor release is effectively a final judgment"); Brubaker, *supra* note 17, at 50 ("[A] nondebtor release effectively adjudicates the released nondebtor action. The release operates as an adjudication on the merits, fully binding for res judicata /preclusion purposes.").

[38] *In re Digital Impact, Inc.*, 223 B.R. at 13 n.6 ("A release, or permanent injunction, contained in a confirmed plan . . . has the effect of a judgment—a judgment against a claimant in favor of the non-debtor, accomplished *without due process*. Neither the non-debtor, nor the claimant, have *an opportunity* to present their claims or defenses to the court for determination . . . .") (first emphasis added).

[39] *In re Charles St. African Methodist Episcopal Church of Bos*., 499 B.R. at 99 (finding that a non-Article III judge can adjudicate claims between non-debtor parties as a matter of "public right").

[40] 28 U.S.C. § 157(c)(2) (2012). Quelling doubts as to the constitutionality of this procedure following *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594 (2011), the U.S. Supreme Court recently held that: (i) Article III of the Constitution permits such consent-based adjudication by a bankruptcy court; and (ii) consent can either be express or implied through a litigant's conduct so long as the consent is "knowing and voluntary." Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. __, 135 S. Ct. 1932, 1939, 1948 (2015).

confirmation process.[41] In most chapter 11 cases, plan proponents request that the court's confirmation order include a "finding" that all matters addressed in the confirmation order are "core proceedings" subject to the bankruptcy court's final adjudicatory authority.[42] It is crucial that objectors timely take issue with any such "findings" as applied to the permanent release of third-party claims. In addition to raising this argument in a timely objection to plan confirmation, parties are statutorily authorized to move for a mandatory determination by the bankruptcy court of whether a matter is "core" or "related to/non-core."[43] Whatever the procedural vehicle, it is key that parties get this issue before the court at the earliest opportunity.

CONCLUSION

Bankruptcy courts' subject matter jurisdiction over the involuntary release of third-party claims is regularly litigated. Less frequently litigated is the scope of bankruptcy courts' adjudicatory authority once subject matter jurisdiction is established. Many parties (and courts) seem to assume that establishing "related to" jurisdiction is sufficient to empower a bankruptcy court to finally order the release of third-party claims. As explained above, this assumption is not well-founded. Accordingly, parties opposing third-party releases can persuasively argue that even if "related to" jurisdiction does exist over third-party claims, only a federal district court has the adjudicatory authority to finally order the involuntary release of such claims. The implications of this conclusion are more than simply academic. Indeed, mandatory district court review of a chapter 11 plan's third-party release provisions: (i) obviates the need for objectors to appeal the bankruptcy court's approval of the releases (or to obtain a stay of that approval pending appeal); and (ii) disables a plan proponent from mooting district court review of the third-party

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[41] *In re* Seatco, Inc., 259 B.R. 279, 282–83 (Bankr. N.D. Tex. 2001) ("CIT objects to this Court entering any final orders or judgments imposing the injunctions contained in [the chapter 11 plan] . . . . CIT contended that this was a non-core proceeding for the first time in the January 30 Objection, after the Court had spent days hearing all of the evidence and CIT's objections to confirmation, and after the Court had issued the Original Memorandum Opinion in which it found that it had jurisdiction to enter a final judgment in connection with this contested confirmation hearing. As it did on the Original Memorandum Opinion, the Court finds again that this is a core proceeding over which it has jurisdiction to enter a final order. Alternatively, even if this is a non-core proceeding, as a result of its repeated prior admissions, CIT has consented to this Court's jurisdiction to enter a final order.") (footnote omitted).

[42] *See, e.g.*, *In re* Lehman Bros. Holdings Inc., Ch. 11 Case No. 08-13555 (JMP) at 4–5, 22 (Bankr. S.D.N.Y. Dec. 6, 2011) (finding, in plan confirmation order that "each of the releases, and the injunction and exculpation provisions set forth in the Plan . . . is within the jurisdiction of the Bankruptcy Court" and that "[c]onfirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed").

[43] 28 U.S.C. § 157(b)(3) ("The bankruptcy judge *shall* determine . . . on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.") (emphasis added).

releases by quickly consummating the plan. Because parties may be deemed to consent to a bankruptcy court's final adjudication of "related to" proceedings, it is essential that objectors assert these arguments in a timely fashion and not sit on their rights.