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A REVISED PERSPECTIVE ON NON-DEBTOR RELEASES

*Joshua M. Silverstein**

I. INTRODUCTION

"Non-debtor releases" are bankruptcy orders that extinguish claims against a party other than a bankrupt debtor over the objection of the creditor. Also known as "third-party releases," such orders are comparable in operation to a bankruptcy discharge. However, releases are typically narrower in scope than a discharge, eliminating only selected claims against the non-debtor rather than providing a "fresh start."

The legality of non-debtor releases is one of the most important and controversial issues in bankruptcy law specifically and business law generally.[1] Even though the Bankruptcy Code contains express authorization for third-party releases only in the asbestos context,[2] non-debtor releases are now regularly added to Chapter 11 plans of reorganization.[3] Such releases have extinguished the claims of millions of creditors, including numerous mass tort claimants suffering from serious physical injuries.[4] The federal courts have been split on the propriety of non-debtor releases for 35 years.[5] And the practice of shielding persons and corporations from liability who have not themselves declared bankruptcy has received extensive attention beyond specialist circles, including from Congress and the editorial page of *The New York Times*.[6]

I wrote two law review articles on non-debtor releases in the 2000s. The first was entitled *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Dispute Over Non-Debtor Releases in Chapter 11 Reorganizations* (hereinafter "*HIPV*").[7] In that paper, I made three broad arguments. First, courts may use the general equitable powers granted by §§ 105(a)[8] and 1123(b)(6)[9] of the Bankruptcy Code to issue third-party releases.[10] Second, § 524(e)[11] of the Code does not prohibit such releases.[12] And third, non-debtor releases are only permissible in very narrow circumstances.[13] The most important aspect of my third argument was this: Under the best interests of creditors test set forth in § 1129(a)(7),[14] it is permissible to extinguish the liabilities of a third party over the objection of claimants only when the plan of reorganization promises payment in full on the released claims.[15]

The second article was entitled *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies* (hereinafter "*OTCBI*").[16] That piece focused

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IN THIS ISSUE:

on the contours of § 524(g) of the Code, the statute expressly allowing the release of claims against third-parties relating to asbestos liability.[17] But *OTCBI* also greatly expanded my argument that the best interests test requires that claims subject to a non-debtor release be paid in full—whether the release is granted under § 524(g) in an asbestos case or under 105(a) or 1123(b)(6) in other types of reorganizations.[18]

In the years since I wrote *HIPV* and *OTCBI*, my views have evolved in two critical respects. First, I no longer believe that §§ 105(a) and 1123(b)(6) license non-debtor releases. Courts issue two basic types of orders under these statutes. The first category is orders that enforce another specific provision of the Code—i.e., orders that are "tethered" to a specific Code section. The second category is orders that implement general bankruptcy policies—i.e., orders that are "untethered." Sections 105(a) and 1123(b)(6) permit untethered/policy orders that conflict with non-bankruptcy law only when the relief provided is *procedural* or *temporary* in nature. Untethered orders granting *substantive* or *permanent* relief that conflicts with non-bankruptcy law are beyond the scope of the two statutes. Non-debtor releases are untethered, permanent orders that conflict with non-bankruptcy law. Therefore, such releases are not authorized by the Code.[19]

Second, even if §§ 105(a) and 1123(b)(6) allow courts to issue permanent relief, § 524(e) bars non-debtor releases. Admittedly, the specific language of that provision only references the impact of the debtor's discharge on claims against co-liable third parties: "[T]he 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."[20] As a result, when the statute is read in isolation, it does not appear to regulate a separate order releasing a non-debtor. That is the argument I advanced in *HIPV*, building on the reasoning of pro-release courts and prior commentators.[21] But § 524(e) should not be construed in isolation. Instead, it ought to be interpreted together with § 523, which provides that certain claims against bankrupt debtors are non-dischargeable.[22] Critically, the language of § 523 is narrower than the wording of § 524(e). Yet no decision has held that courts may use the equitable powers statutes to extinguish non-dischargeable claims. And several have explicitly ruled such relief is barred by § 523. If the narrow language of § 523 disallows the release of non-dischargeable claims, then the broader language of § 524(e) *must* prohibit the release of non-debtor claims.[23]

I have been working on a law review article tentatively entitled *A General Theory of Bankruptcy Equitable Power* (hereinafter "*Equitable Power*") in which I plan to comprehensively address the scope of authority granted by §§ 105(a) and 1123(b)(6). Among other subjects, the paper will contain a detailed explanation of my revised perspective on third-party releases, including my new argument regarding the importance of § 523.[24] However, the United States Supreme Court recently granted cert in the Purdue Pharma bankruptcy to address the propriety of non-debtor releases.[25] Purdue Pharma's plan of reorganization contains such a release for the Sackler family that ran the company.[26] Unfortunately, I cannot complete *Equitable Power* before the Supreme Court is scheduled to address whether third-party releases are legally valid.[27] I thus put the larger article on hold in order to publish something immediately that can guide the Court (and hopefully the litigating attorneys) in the Purdue Pharma case. That is the purpose of the current piece.

Part II provides a brief overview of non-debtor releases and comparable forms of bankruptcy relief.

Part III summarizes my revised position on the scope of authority granted by §§ 105(a) and 1123(b)(6). The contours of bankruptcy equitable power are complicated. Accordingly, this section only presents a sketch of the analysis I hope to include in *Equitable Power*.

Part IV sets forth my new argument that § 524(e), when

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construed in light of § 523, prohibits non-debtor releases. Because the argument is straightforward, section IV is intended to present a relatively complete statement of my position as to the meaning of 524(e).

Part V recaps and updates my argument that *if* non-debtor releases are permissible under the law, the debtor's plan of reorganization must promise payment in full on the extinguished claims under the best interests of creditors test. This argument is worth revisiting for three reasons. First, my previous discussion of the payment-in-full requirement was spread across *HIPV* and *OTCBI*. This article consolidates my argument into a single location. Second, the bulk of my analysis of the best interests test was contained in *OTCBI*, which is primarily concerned with releases in the asbestos context. Attorneys and judges involved in the Purdue Pharma case might not recognize the relevancy of the material in that paper because the release granted to the Sacklers was not issued under § 524(g). Third, while many (and perhaps most) courts that approve of non-debtor releases mandate that dissenting creditors be promised payment in full on claims extinguished by the release,[28] some have rejected this requirement. In fact, Purdue Pharma's plan of reorganization does not promise full satisfaction of the claims subject to the Sackler's non-debtor release,[29] yet the bankruptcy court confirmed the plan,[30] and that order was affirmed by the Second Circuit.[31] Moreover, courts issuing third-party releases in asbestos bankruptcies have almost universally ignored the requirements of the best interests test.[32]

Part VI concludes.[33]

II. NON-DEBTOR RELEASES: THE BASICS

As noted in the introduction, non-debtor releases are orders extinguishing a creditor's claim against a non-debtor over the creditor's objection. Third-party releases typically take the form of provisions in a plan of reorganization stating that certain claims are "released" and that the creditors are permanently enjoined from prosecuting the claims against the shielded third party.[34] Releases vary in scope, but most eliminate claims against a non-debtor (1) relating to the debtor, or (2) concerning a particular mass tort.[35] Third-party releases are often justified on the ground that the benefitting non-debtor is making a financial contribution to the debtor's estate—a contribution found to be necessary for the success of the debtor's reorganization.[36]

The federal courts have been divided over the propriety of non-debtor releases for more than three decades.[37] The Code does not expressly authorizes the release of claims against third parties[38] unless the claims relate to a debtor's liability for asbestos injuries.[39] However, "pro-release" courts contend that the general equitable powers granted by §§ 105(a)[40] and 1123(b)(6)[41] allow for this type of relief.[42] Disagreeing, most "anti-release" courts have concluded that non-debtor releases violate § 524(e).[43] They read the language of that statute, and the bankruptcy policies underlying it, to prohibit third-party releases.[44] Pro-release courts have responded by arguing that § 524(e) does not expressly address releases; it only limits the impact of the debtor's discharge. Therefore, the statute is no bar to a separate order extinguishing claims against a third party.[45] A second group of anti-release authorities contend that even if § 524(e) is not an obstacle, §§ 105(a) and 1123(b)(6) simply do not grant sufficient power to permit non-debtor releases. The bulk of these courts have adopted the position that § 105(a) may only be used to enforce other provisions in the Bankruptcy Code; it does not authorize orders implementing general bankruptcy policies such as the policy favoring reorganization over liquidation. Accordingly, since no other Code section permits non-debtor releases outside the asbestos context, § 105(a) cannot be used to grant that form of relief.[46]

Pro-release authorities have employed a number of different tests to determine whether a given release is authorized.[47] In *HIPV*, I argued for a four-element test.[48] First, the debtor and any released third parties must share an "identity of interest" to establish subject matter jurisdiction over the claims eliminated by the release.[49] Second, the release must be "essential" to the debtor's reorganization to justify invoking §§ 105(a) and 1123(b)(6).[50] This standard will usually be satisfied by demonstrating that contributions from third parties are necessary to the debtor's reorganization and are contingent upon the third parties receiving a release.[51] In addition, the second element of my test mandates that the debtor in fact be reorganizing rather than liquidating.[52] Third, it is not "fair and equitable" to "cram down" a plan containing a non-debtor release. Therefore, the class of creditors impacted by the release must have "accepted" the plan under § 1126(c).[53] Fourth, the debtor's plan of reorganization must promise payment in full for dissenting creditors whose claims are extinguished by the non-debtor release because of the best interests of creditors test.[54] Full payment need not be *guaranteed* to satisfy the test; it must only be *promised*. Accordingly, if the debtor defaults under the plan, the creditor bears the loss because its claim against the third party was extinguished by the release.[55]

Third-party releases that are part of reorganization plans promising payment in full on the barred claims are referred to as "channeling" releases.[56] Releases in plans that do not provide for payment in full are known as "actual" releases.[57]

Because a non-debtor release *extinguishes* a *creditor's* claims against a non-debtor *over the creditor's objection*, the term does *not* refer to: (1) releases granted *consensually* by a creditor; (2) releases of claims that are *property of the debtor's estate*; (3) *pre*-confirmation *temporary* limits on lawsuits against non-debtors; or (4) *post*-confirmation *temporary* limits on lawsuits against non-debtors.

The legitimacy of *voluntary* releases—e.g., reorganization provisions stating that creditors can obtain additional payment from a non-debtor if they agree to release their claims against the third party—is uncontroversial.[58] Similarly, the Code expressly permits the compromise of claims *belonging to the* *estate*.[59] It is thus well established that bankruptcy courts may override creditor and shareholder rights to assert estate causes of action after the debtor has settled the claims.[60] *Pre*-confirmation, *temporary* restrictions on lawsuits against non-debtors—known as "non-debtor stays"—are also generally permissible, if a showing of necessity is made.[61]

Post-confirmation *temporary* restrictions, while more controversial than voluntary releases, settlements of estate claims, and non-debtor stays,[62] are also distinguishable from third-party releases because they do not *eliminate* the creditor's rights. Instead they either (i) suspend the creditor's claim for a specific period of time,[63] or (ii) condition the creditor's right to sue the third party on the debtor's failure to pay the creditor in full through the plan of reorganization.[64] Thus, if the debtor does not completely satisfy the creditor's claim—whether by design or because the debtor was unable to comply with a plan that, by its terms, provided for full compensation—the temporary or conditional bar on recovery is lifted and the creditor may then seek its shortage from the previously-shielded non-debtor.[65] The bankruptcy judge who presided over the Dow Corning bankruptcy called such orders "provisional injunctions,"[66] and I adopted that term in my previous work.[67] The critical difference between provisional injunctions and channeling non-debtor releases is that the former places the risk of plan failure—the risk that the debtor will default on its plan obligations—on the non-debtor, while the latter places the risk on the creditor.[68]

III. PROLOGUE TO A GENERAL THEORY OF BANKRUPTCY EQUITABLE POWER

Courts sitting in bankruptcy—both Article I bankruptcy courts and Article III district courts—possess general equitable power to manage bankruptcy cases.[69] Section 105(a) of the Bankruptcy Code is the primary source of this authority.[70] That law provides as follows: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[71] Courts have used this statute to issue countless different types of orders, including those that temporarily prevent litigation against non-debtors (i.e., non-debtor stays and provisional injunctions), recharacterize debt as equity, grant substantive consolidation, marshal estate assets, and, of course, extinguish claims against third parties (i.e., non-debtor releases).[72]

Another important source of bankruptcy equitable power is § 1123(b)(6), which states that a Chapter 11 plan may "include any other appropriate provisions not inconsistent with the applicable provisions of this title."[73] Courts have used this statute to uphold many types of provisions in Chapter 11 plans, such as reporting requirements, debt retirement schedules, and, again, non-debtor releases.[74]

In *HIPV*, I argued that §§ 105(a) and 1123(b)(6) enable courts to grant third-party releases.[75] I no longer believe that to be the case. I still embrace my claim from *HIPV* that courts may use the two equitable statutes to issue orders that implement general bankruptcy policies.[76] When such orders conflict with non-bankruptcy law, however, I now contend that the relief provided must be *temporary* in nature. Non-debtor releases are policy orders that provide permanent relief and contravene non-bankruptcy law. Therefore, §§ 105(a) and 1123(b)(6) do not authorize releases.

My arguments with respect to the scope of bankruptcy equitable powers—and especially the interplay of policy orders with non-bankruptcy law—are complicated. Part III thus contains only a summary of the points I intend to present in *Equitable Power*.

A. THE "NARROW" AND "BROAD" VIEWS OF BANKRUPTCY EQUITABLE POWER

There are two basic positions in the case law regarding the types of orders courts may issue under § 105(a), the principal equitable powers statute.

Relying upon the Supreme Court's statement in *Norwest Bank Worthington v. Ahlers* that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code,"[77] a number of courts have strictly construed § 105(a). According to this "narrow view," § 105(a) "does not authorize bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."[78] Instead, the statute may only be used to enforce other, specific provisions in the Code.[79] As one court phrased it, "[e]xercise of § 105 powers must be *linked* to another specific Bankruptcy Code provision."[80] Orders implementing general bankruptcy policies, by contrast, are impermissible.[81] In *HIPV*, I referred to this as the "tethering" requirement.[82] To illustrate, when a court enjoins a third party from prosecuting a derivative claim that was settled as part of the debtor's plan of reorganization,[83] the court is using § 105(a) to enforce § 1123(b)(3)(A), which declares that a Chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or the estate."[84] Similarly, when a debtor sells an asset "free and clear" of other interests pursuant to § 363(f) of the Code,[85] the bankruptcy court may permanently enjoin a creditor from attempting to enforce any interest it previously possessed in the property, such as a lien.[86] In that situation, § 105(a) is employed as an adjunct to § 363(f).

The other school of thought endorses an expansive interpretation of the equitable powers available under § 105(a). According to this "broad view," it is permissible to issue orders under § 105(a) without tying the order to a specific code provision. The order may instead implement a general bankruptcy policy,[87] most typically, the policy favoring successful reorganizations.[88] To illustrate, courts have relied upon § 105(a) to marshal assets, issue provisional injunctions, allow early payment of prepetition claims to creditor-vendors who threaten to withhold goods and services essential to the debtor's business operations, and partially discharge student debts, even though nothing in the Code expressly authorizes these orders.[89]

Some anti-release courts and commentators have justified their opposition to non-debtor releases by adopting the narrow view of §§ 105(a) and 1123(b)(6). They assert that third-party releases are not tethered to any specific section of the Code; they only serve to advance the reorganization policy. Therefore, releases fall beyond the powers afforded by the two equitable statutes.[90] Most pro-release authorities, in contrast, have implicitly or expressly adopted the broad view of §§ 105(a) and 1123(b)(6) in holding that these laws authorize the issuance of third-party releases.[91]

There are two primary arguments in favor of the narrow view in the case law and secondary literature. First, § 105(a) provides that courts may issue orders that are "necessary or appropriate to carry out the *provisions* of this title," rather than the "policies," "purposes," or "objectives" of the Bankruptcy Code. This suggests that § 105(a) may only be used in conjunction with another Code "provision," and not to implement general policies.[92] Second, the legislative history for § 105(a) established that the statute was intended to be "similar in effect to the All Writs Statute."[93] The latter provides that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law."[94] The language concerning "jurisdiction" indicates that the All Writs Act is rather limited in scope, supporting the same conclusion with respect to § 105(a).

Courts and scholars have also articulated three main arguments in favor of the broad view. First, "certain goals of the Bankruptcy Code are implied but not stated in the statutory language."[95] As a result, § 105(a) should be read to grant bankruptcy courts the authority to "fill the gaps left by the statutory language" in effectuating the Code's overarching purposes.[96] Second, the legislative history notes that § 105(a) was intended to codify "any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute."[97] The former law should thus be read more expansively than the latter. Third, § 105(a) contains broader language than its predecessor. Section 2a(15) of the Bankruptcy Act provided that bankruptcy courts may "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided, as may be *necessary* for the enforcement of the provisions of this Act; provided, however, that an injunction to restrain a court may be issued by the judge only."[98] Section 105(a) authorizes orders that are "necessary *or appropriate* to carry out the provisions of this title."[99] The shift from "necessary" to "necessary or appropriate" establishes that Congress intended "that bankruptcy courts be able to deal comprehensively with bankruptcy cases."[100]

The Supreme Court adopted the broad view of §§ 105(a) and 1123(b)(6) in *United States v. Energy Resources*.[101] There, the High Court concluded that the equitable powers statutes enable bankruptcy courts to order the IRS to allocate payments to the debtor's trust-fund-tax liabilities (which are personally guaranteed by the debtor's officers) before its other tax liabilities (which are not so guaranteed), if such an order is necessary to the success of the debtor's Chapter 11 plan.[102] This is so even though the "Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve of reorganization plans designating tax payments as either trust fund or nontrust fund."[103] *Energy Resources* thus holds that courts may use §§ 105(a) and 1123(b)(6) for the general purpose of facilitating a reorganization; orders issued under those two laws need not be tethered to specific sections of the Code.[104]

I think the Supreme Court was correct to endorse the broad view of §§ 105(a) and 1123(b)(6). In addition to the three arguments discussed above,[105] I offer three more in favor of the broad view. First, § 105(a) contains much more expansive language than does the All Writs Act. The latter is principally concerned with orders "in aid of . . . jurisdiction." Section 105(a) makes no reference to jurisdiction, and instead authorizes orders "necessary or appropriate to *carry out the provisions*" of the Bankruptcy Code. My second point is a response to the observation made by some defenders of the narrow view that § 105(a) permits orders that carry out the "provisions" of the Code rather than the Code's "policies."[106] The word "provisions" does not offer nearly as much support for a tethering requirement as those favoring the narrow view contend. The natural way to draft a tethering requirement is to use singular wording: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out *any provision* of this title." The plural wording—"*provisions* of this title"—suggests that § 105(a) allows for orders that implement title 11 *as a whole*, including its underlying policies, not just orders that enforce specific sections in the Code. Third, § 1123(b)(6), which also grants general equitable powers, contains no language like the "carry out" clause of § 105(a) that is the textual basis for the tethering requirement. Section 1123(b)(6) states that a Chapter 11 plan may "include any other appropriate provisions not inconsistent with the applicable provisions of this title."[107] As a result, even if the narrow view applies to § 105(a), there are no linguistic grounds for reading a tethering requirement into § 1123(b)(6).[108]

If the narrow view were correct, then non-debtor releases would clearly fall beyond the scope of bankruptcy equitable power.[109] But even if the broad view governs, that does not establish authorization for third-party releases. For example, in *HIPV*, I addressed the argument that channeling releases are inequitable and thus beyond the power conferred by §§ 105(a) and 1123(b)(6) because such releases place the risk of plan failure on the *creditor* rather than the non-debtor. According to this position, bankruptcy courts may only grant provisional injunctions because, with such an injunction, the risk of plan failure is allocated to the *non-debtor*.[110] I ultimately rejected this claim in *HIPV* in light of the Supreme Court's reasoning in *Energy Resources*.[111] But there is another argument that non-debtor releases are beyond the scope of bankruptcy equitable power: sections 105(a) and 1123(b)(6) may not be used to contravene non-bankruptcy law, something non-debtor releases clearly do. The next section addresses that position.

B. UNTETHERED ORDERS ISSUED UNDER SECTIONS 105(a) AND 1123(b)(6) THAT CONFLICT WITH NON-BANKRUPTCY SUBSTANTIVE LAW ARE INVALID

In *Energy Resources*, the Supreme Court explained that "[e]ven if consistent with the Code . . . a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion."[112] The Court thus addressed whether tax allocation orders contravene § 6672 of the Internal Revenue Code.[113] Even though the High Court held that no discord exists between that statute and an allocation order,[114] the opinion raises an important question: May bankruptcy courts use their equitable power to override non-bankruptcy law?[115] This inquiry is pertinent to the validity of third-party releases because such releases eliminate liability that non-debtors would otherwise face under federal and state law.[116]

It is critical to note, preliminarily, what is *not* at issue here. There is little doubt that § 105(a) and § 1123(b)(6) orders enforcing more specific provisions of the Bankruptcy Code may override non-bankruptcy law. Because such "tethered" orders are merely implementing other enactments, the bankruptcy statute being enforced is the one prevailing over contrary federal or state law, *not* §§ 105(a) and 1123(b)(6).[117] Properly understood, then, the critical issue is this: may *untethered* § 105(a) and § 1123(b)(6) orders—orders implementing general bankruptcy policies—override non-bankruptcy law?

In *HIPV*, I explained that the caselaw is split on this question.[118] I also argued that *Energy Resources* sides with those courts that take a more permissive approach. *Energy Resources* is best construed as standing for the proposition that untethered orders may override non-bankruptcy law.[119] But even if my reading of the decision is correct, I now maintain that untethered orders issued under §§ 105(a) and 1123(b)(6) are barred to the extent that they conflict with non-bankruptcy *substantive* law.

The distinction I am drawing between "substance" and "process" is not the one used in the context of choice of law under *Erie*. Instead, "substantive" orders are those that place *permanent* limits on the exercise of non-bankruptcy rights. "Procedural" orders, by contrast, only place *temporary* limits on the exercise of non-bankruptcy rights. Using this framework, non-debtor releases are substantive because they extinguish causes of action, a type of permanent restriction. Provisional injunctions are procedural because they only temporarily prevent creditors from asserting claims against third parties.

My principal argument for drawing the line between substantive and procedural orders is the Supreme Court's decision in *Butner v. United States*.[120] In that case, the Court explained that state law governs the establishment of property rights in bankruptcy absent clear preemption by a federal bankruptcy statute.[121] Sections 105(a) and 1123(b)(6) do not constitute such preemption. The language in each provision is too generic to establish that Congress intended those statutes to authorize relief that overrides substantive non-bankruptcy law.[122] But orders that merely suspend non-bankruptcy rights temporarily do not substantively alter those entitlements.[123] And a bankruptcy court in an anti-release circuit expressly relied on this principle to distinguish provisional injunctions from non-debtor releases, leading it to uphold the provisional injunction in the debtor's plan of reorganization.[124]

As I explained in the introduction, I plan to develop this argument more fully in *Equitable Power*.

IV. SECTION 524(e) BARS NON-DEBTOR RELEASES

Upon emerging from bankruptcy, a debtor is generally entitled to a "discharge" of all of its liabilities, other than certain, specified claims.[125] Section 524 of the Code sets forth the precise impact of a discharge. Pursuant to that statute, the discharge of a debt "voids any judgment" based on the claim[126] and "operates as an injunction" against any attempt to collect upon the claim from the debtor personally.[127]

Section 524(e) contains an important limitation on the scope of the discharge. It provides that, aside from a minor exception, the "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."[128] Courts have universally interpreted this language to mean that the discharge of a debtor does not, by itself, affect the liability of a co-debtor on a discharged obligation.[129] In essence, then, a bankruptcy discharge "does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt."[130] This leaves creditors free to obtain any deficiency from a co-obligor.[131] Without § 524(e), the discharge of the debtor might automatically extinguish claims against guarantors and other co-debtors under the common law of suretyship, which provides that the release of a primary obligor discharges any party that is secondarily liable.[132]

Courts and commentators are split over whether § 524(e) prohibits non-debtor releases.[133] If the anti-release authorities are correct, then bankruptcy courts may not issue releases under §§ 105(a) and 1123(b)(6) even under an expansive understanding of the equitable powers granted by those statutes. That is because § 105(a) may not be used in a manner that is inconsistent with another provision of the Bankruptcy Code.[134] And the text of § 1123(b)(6) expressly imposes a similar restriction on the use of that law.[135] In *HIPV*, I sided with pro-release decisions on the meaning of § 524(e).[136] But I now contend that when § 524(e) is read together with § 523, the former statute does indeed bar third-party releases.

The arguments in the existing debate over § 524(e) are relatively straightforward. Anti-release authorities observe that a discharge is the signature benefit bankruptcy affords to debtors. Section 524(e) states that the elimination of the debtor's personal liability via discharge does not alter the obligations of any co-obligors. The provision thus reflects a fundamental policy choice that only parties who have submitted in full to the bankruptcy process are entitled to have their debts extinguished. Non-debtor releases grant such relief to individuals and artificial persons who have not declared bankruptcy, in violation of that policy.[137] And since third-party releases bar claims without affording the non-debtor's obligees the complete array of protections in the Code, they upset the balance between debtor and creditor rights struck by Congress in designing our bankruptcy system.[138]

Pro-release authorities respond that § 524(e) only provides that the debtor's discharge does not, "by itself, affect the liability of other parties."[139] The statute contains no language explicitly prohibiting courts from granting a *separate order* releasing non-debtors. Reading § 524(e) to bar releases thus contravenes the Supreme Court's admonishment that statutes should be given a plain-meaning construction, and creates a conflict with § 105(a) where there need not be one. Finally, given § 524(e)'s clear terms, any policies underlying the provision are irrelevant.[140]

In *HIPV*, I argued that *Energy Resources* supports the pro-release construction of § 524(e). There, the IRS claimed that tax allocation orders issued under §§ 105(a) and 1123(b)(6) are inconsistent with §§ 507(a), 523(a)(1)(A), and 1129(a)(9)(C) of the Bankruptcy Code, particularly given the policies underlying those laws. The Supreme Court rejected this argument because the three statutes the government cited, by their express terms, do not address tax allocation orders.[141] *Energy Resources* thus stands for the proposition that the Supreme Court's plain-meaning approach to statutory interpretation applies when determining whether a § 105(a) or § 1123(b)(6) order conflicts with another provision of the Bankruptcy Code. The language of § 524(e) only specifies the impact of a discharge: the discharge of the debtor, *by itself*, does not "affect the liability" of any third party. The statute contains no wording that purports to regulate orders, *independent* of the discharge, that *otherwise* affect the liability of non-debtors. Therefore, I concluded that § 524(e) places no limit on the power of bankruptcy courts under §§ 105(a) and 1123(b)(6) to extinguish claims against third parties.[142]

The reason I have changed my position on the meaning of § 524(e) is that the argument I defended in *HIPV* logically entails that bankruptcy courts possess the authority to release claims against debtors that § 523 makes non-dischargeable. That is almost certainly incorrect. As a result, my previous argument must be defective. The rest of part IV explains this *reductio ad absurdum*.

Suppose that an individual debtor in Chapter 11 inserts a provision into his plan of reorganization that states the following: (1) a non-dischargeable claim against the individual is released; (2) the creditor who holds the released claim is permanently enjoined from pursuing the debtor for payment on the claim other than as provided for in the plan; and (3) the non-dischargeable claim will be paid on the same terms and in the same time frame as the other claims dealt with in the plan. The immediate objection should be that my hypothetical provision is inconsistent with § 523. But that's not true—*if* we apply the same interpretive methods to § 523 that I (and other pro-release authorities) have applied to § 524(e).

Recall the essence of my prior claim that § 524(e) does not ban non-debtor releases: the language of the statute only addresses the impact of the debtor's discharge; it does not reference in any way a separate order extinguishing claims against third parties. The same is true of § 523. Here is the pertinent language of § 524(e): "[D]ischarge 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." Compare that to § 523(a): "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt [identified in this section]."[143] By their precise terms, both statutes do nothing more than establish the impact of the debtor's discharge. Section 524(e) provides that the discharge does not "affect" claims against third parties; section 523(a) provides that the discharge does not "discharge" claims against the debtor enumerated in that statue. But that's all. *Neither* statute contains *any* language restricting *independent orders* that (a) extinguish claims against third parties (in the case of § 524(e)), or (b) extinguish non-dischargeable claims against the debtor (in the case of § 523(a)).[144] Section 523(a) does not state, for example, that "the *bankruptcy* of the debtor does not discharge an individual debtor from any debt [identified in this section]." Instead, it refers only to the debtor's "discharge." Therefore, employing the reasoning I advanced in *HIPV*, § 523(a) does not bar my hypothetical release of a non-dischargeable claim.

Critically, however, I am aware of no case that has ruled that §§ 105(a) and 1123(b)(6) enable courts to extinguish claims exempted from the debtor's discharge. Indeed, the courts are split over whether the equitable powers statutes may be used to *temporarily* bar creditors from seeking to recover on non-dischargeable claims post confirmation—the non-dischargeable-claim analog to a provisional injunction—given the language in § 523(a).[145] Some decisions approve of such orders,[146] at least when the plan promises payment in full on the non-dischargeable claim.[147] Others reject them.[148] But even the courts in the first group are clear that non-dischargeable claims may only be *stayed* post-confirmation, never *extinguished*.[149]

Moreover, the language of § 524(e) is considerably more restrictive than the text of § 523(a). The latter only provides that the discharge of the debtor does not "discharge" non-dischargeable claims. The former states that the discharge may not even "affect" third-party claims (let alone discharge them). And a non-debtor release clearly "affects" the liability of the benefiting party. The release *eliminates* the non-debtor's obligation to the creditor.[150]

Accordingly, if § 523(a) prevents the release of *non-dischargeable* claims, then § 524(e) *must* prohibit the release of *non-debtor* claims.

One might respond by contending that all of the decisions construing § 523(a) are wrong—that courts may extinguish liability on non-dischargeable claims using §§ 105(a) and 1123(b)(6). But is that plausible? Could the courts *all* be wrong? And is that reading of § 523(a) logical? Would Congress really have exempted claims from discharge only to authorize their elimination through a bankruptcy court's general equitable powers?

The Supreme Court often states that "Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.' "[151] Releasing non-dischargeable claims is most certainly an elephant. And the two equitable statutes are exceptionally "vague," qualifying them as mouseholes. Accordingly, §§ 105(a) and 1123(b)(6) do not authorize the release of non-dischargeable claims; and even if they did, § 523(a) would block the exercise of such power. Releasing non-debtor claims is an even larger elephant. And the text of § 524(e) is more limiting than the terms of § 523(a). This means that the equitable statutes do not authorize non-debtor releases; and again, even if they did, § 524(e) would block the exercise of such power.

V. PAYMENT IN FULL OF CLAIMS EXTINGUISHED BY A NON-DEBTOR RELEASE IS REQUIRED BY THE BEST INTERESTS OF CREDITORS TEST

In *HIPV* and *OTCBI*, I argued that non-debtor releases are only permissible when the debtor's plan of reorganization promises payment in full on all claims subject to the release.[152] I explained that this requirement is derived from the best interests of creditors test set forth in § 1129(a)(7). Part V presents my argument in a somewhat restructured and updated form to more clearly delineate why a promise of payment in full for any released claims is mandated by the best interests test. Note that for purposes of this section, I assume that non-debtor releases are permissible under §§ 105(a), 1123(b)(6), and 524(e)—i.e., that my legal analysis in parts III and IV is incorrect.

Before turning to my argument, which builds on the work of Professor Ralph Brubaker,[153] a very brief overview of the non-debtor-release caselaw is in order. Many (and perhaps most) pro-release courts assess the propriety of non-debtor releases using the framework adopted by the Sixth Circuit in the Dow Corning bankruptcy. That framework contains seven elements, one of which is that all dissenting creditors whose claims are extinguished by a release must be promised full payment on those claims under the plan of reorganization.[154] Authorities following *Dow Corning* thus implicitly endorse my understanding of the best interests test.[155] And some pro-release decisions expressly do so.[156] But not all cases approving of non-debtor releases require full payment for dissenting creditors,[157] including the bankruptcy court and the Second Circuit in the Purdue Pharma Bankruptcy.[158]

A. THE BASIC ARGUMENT

Section 1129(a)(7) provides as follow:

> (a) The court shall confirm a plan only if all of the following requirements are met: . . .
>
> (7) With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; . . .[159]

Under this language, a court may confirm a Chapter 11 plan of reorganization only if the plan provides each dissenting,[160] impaired[161] creditor at least as much as the claimant would receive if the debtor liquidated under Chapter 7.[162] In deciding whether the best interests of creditors test is satisfied in a given case, the court must "conjure up a hypothetical chapter 7 liquidation that would be conducted on the effective date of the plan. The court then makes an independent finding, based on the evidence and arguments presented, whether creditors will receive as much under the plan as they would in the hypothetical Chapter 7 liquidation."[163] To facilitate this process, courts typically review a "liquidation analysis" that summarizes how much creditors would receive if the debtor liquidated under Chapter 7, and compares the analysis to the payments contemplated by the debtor's Chapter 11 plan.[164]

Non-debtor releases are impermissible in Chapter 7 cases.[165] A creditor may thus recover any deficiency from a solvent co-obligor in a Chapter 7 proceeding if the liquidation distribution does not completely satisfy the creditor's claim.[166] Accordingly, since the dissenting creditor would receive payment in full on its claim in a Chapter 7 bankruptcy—from either the debtor, the co-obligor, or a combination of the two—the dissenting creditor *must* receive full payment under the debtor's Chapter 11 plan of reorganization if the co-debtor third party receives a release. Otherwise, the plan violates the best interests test.[167]

The same analysis applies if the debtor and the third party are not co-debtors—i.e., where the debtor has no personal liability for the claim against the third party. Clearly, the creditor would receive compensation in full on such a claim from the non-debtor if the debtor liquidated. Therefore, when a debtor's Chapter 11 plan purports to extinguish an independent claim against a third party, the best interests test mandates payment in full for the claimholder.[168]

The best interests of creditors test does not apply to creditors who vote to accept the plan.[169] Moreover, a release of claims held by such creditors is voluntary and thus legitimate, whether the creditors receive full satisfaction on their claims or not.[170] Therefore, as a technical matter, only dissenting creditors must be paid in full on claims subject to a non-debtor release. However, in the real world, it is a virtual certainty that all creditors subject to a third-party release would demand equal treatment and object to any plan of reorganization that paid only some of them in full. Such opposition would doom the release. Recall that it is not "fair and equitable" to "cram down" a plan releasing claims against non-debtors. The class of creditors impacted by the release must therefore "accept" the plan under § 1126(c).[171] Accordingly, for all practical purposes, a non-debtor release is permissible only if the debtor promises payment in full on *all* extinguished claims—those held by both dissenting and consenting creditors.[172]

In sum, the best interests test and the cram down provisions of the Bankruptcy Code, working in conjunction, entail that only channeling releases are permissible; actual releases are forbidden.

Critically, full payment need not be *guaranteed* to satisfy the best interests test. A plan of reorganization is confirmable as long as the plan is "feasible"—confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."[173] If the plan obligates the debtor to satisfy the creditor's claim, and the court finds that the plan is feasible, the court may confirm it with the non-debtor release. And upon any default, the creditor bears the loss because its claim against the third party is gone.

The rest of Part V addresses three premises underlying my argument that the best interests test requires payment in full on claims barred by a non-debtor release.

B. PREMISE 1: NON-DEBTOR RELEASES ARE IMPERMISSIBLE IN CHAPTER 7 BANKRUPTCIES

The first premise is that non-debtor releases are prohibited when the debtor is in Chapter 7. If this premise is correct, then creditors of a liquidating, insolvent debtor may recover their deficiencies from any co-liable third parties, resulting in full payment. And if a creditor would receive complete satisfaction in a Chapter 7 case, it must be promised the same in a Chapter 11 proceeding under the best interests of creditors test.

Suppose instead that non-debtor releases are allowed in Chapter 7 bankruptcies. This would mean that courts may block creditors from recovering from co-obligors of liquidating debtors, resulting in the creditors not receiving payment in full on their claims. And if a creditor would *not* receive full payment in a hypothetical Chapter 7 of the debtor, then the best interests test does *not* require that the debtor's reorganization plan completely satisfy the creditor's claim. As a result, when a court finds that the parties shielded by a non-debtor release in a Chapter 11 proceeding would have obtained comparable relief had the debtor declared Chapter 7, the plan of reorganization need not promise payment in full on the claims extinguished by the release.

However, my first premise is a correct statement of the law; third-party releases are not allowed in Chapter 7 bankruptcies. Corporations and other artificial persons liquidating via Chapter 7 do not receive a discharge.[174] Neither do debtors liquidating under Chapter 11.[175] The absence of discharge protection in liquidation cases reflects a fundamental bankruptcy policy: When an entity is not reorganizing, the elimination of liability does not serve the ends of bankruptcy.[176] And it would be strikingly anomalous if the Code authorized the extinguishing of *non*-debtor obligations in circumstances where it denies any such relief to the *debtor itself*. Accordingly, even if §§ 105(a) and 1123(b)(6) permit courts to issue orders implementing general Code policies—and that violate substantive non-bankruptcy law—granting a non-debtor release in a Chapter 7 case actually *contravenes* bankruptcy policy rather than advancing it.[177] Therefore, non-debtor releases are prohibited in Chapter 7 (and Chapter 11) liquidations.[178]

Ralph Brubaker has offered a somewhat different basis for concluding that non-debtor releases are prohibited in Chapter 7 cases, a basis that I endorsed in my prior work. When a debtor is reorganizing through Chapter 11, a third-party release can advance the "conventional purposes of the reorganization policy," such as preserving jobs for employees, supporting suppliers and customers, and preventing economic damage to the broader community where the debtor operates.[179] In a liquidation, by contrast, the most a third-party release can accomplish is an increase in the assets available for distribution to creditors of the debtor. But a release only achieves this effect by coercively redistributing value from creditors who hold claims against the protected third parties to creditors who do not.[180] While maximizing the debtor's estate for payment to creditors is a goal of bankruptcy in the abstract, doing so by forcibly shifting value between groups of creditors without providing any of the Code's usual protections is inconsistent with the purposes of bankruptcy.[181] As a result, the Code bars third-party releases when the debtor is in Chapter 7.[182]

C. PREMISE 2: WHEN A PLAN OF REORGANIZATION CONTAINS A NON-DEBTOR RELEASE, THE BEST INTERESTS TEST OBLIGATES THE COURT TO COMPARE THE CREDITOR'S CHAPTER 11 DISTRIBUTION WITH WHAT THE CREDITOR WOULD RECEIVE FROM BOTH THE DEBTOR AND ANY CO-OBLIGORS IF THE DEBTOR LIQUIDATED IN CHAPTER 7

The best interests test requires courts to compare what a dissenting creditor will receive under the plan of reorganization with what the creditor would receive if the debtor instead liquidated through Chapter 7. The second premise is this: When a Chapter 11 plan contains a non-debtor release, the best interests comparison is between (a) the creditor's promised distribution under the plan, and (b) the creditor's *full complement of legal entitlements* had the debtor gone through Chapter 7. The latter includes both the liquidation distribution from the debtor *and* any rights the creditor holds against the third parties shielded by the release.

Section 1129(a)(7) provides, in pertinent part, that a court may confirm a plan only if "each holder of a claim . . . will receive or retain under the plan on account of such claim . . . property of a value . . . that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7."[183] This language firmly supports my understanding of the best interests test.

First, the word "amount" in § 1129(a)(7) means "amount of property." The statute requires a comparison between the "property . . . receive[d] or retain[ed]" in the Chapter 11 proceeding with the "amount . . . receive[d] or retain[ed]" if the debtor were to declare Chapter 7 instead. Given (1) the parallel usage of "receive or retain" in both the Chapter 11 and Chapter 7 clauses, and (2) the fact that "amount" is juxtaposed with "property" in the two clauses, it is clear that the Chapter 7 clause should be read as if it states "not less than the amount [of property] that such holder would so receive or retain if the debtor were liquidated under chapter 7." Causes of action are a type of property.[184] The word "amount" thus encompasses liquidated and unliquidated rights of action.

Second, § 1129(a)(7) is concerned with the property that the creditor would "receive or retain" were the debtor to liquidate under Chapter 7. A creditor subject to a non-debtor release in the Chapter 11 case would "retain" its right to pursue the third party for any deficiency if the debtor were in Chapter 7 because third-party releases are prohibited in Chapter 7 bankruptcies.[185]

Third, the Chapter 7 clause of § 1129(a)(7) is generic in nature. It refers to the property the claimholder would receive or retain "if the debtor were liquidated under chapter 7," not to what the claimant would receive *from the debtor*. The Chapter 11 clause, by contrast, is specific. It refers to the property the claimholder "would receive or retain *under the plan*"—meaning from the debtor. Congress easily could have included specific language like this in the Chapter 7 clause had it wished to do so. For example, the Chapter 7 clause could have referred to "the amount [of property] distributed under § 726"[186] or to "the amount [of property] that such holder would so receive from the trustee." In fact, Congress *did* employ such language in the Chapter 7 clause of the Chapter *13* best interests test. Section 1325(a)(4) provides for confirmation of a plan of reorganization if "the value . . . of property to be distributed under the [Chapter 13] plan on account of each allowed unsecured claim is not less than the amount *that would be paid on such claim* if the estate were liquidated under chapter 7."[187] Reading the two best interests statutes together establishes that § 1325(a)(4) requires the court to compare the creditor's actual Chapter 13 distribution from the debtor with the creditor's hypothetical Chapter 7 distribution from the trustee, while § 1129(a)(7) requires the court to compare the creditor's *specific* entitlements against the debtor "under the [Chapter 11] plan" with the creditor's *general* entitlements "were the debtor liquidated under chapter 7."

One might respond to my third point by observing that the word "so" in the Chapter 7 clause refers back to the language "on account of such claim" in the Chapter 11 clause. Thus, the Chapter 7 clause should be read to state "the amount [of property] that such holder would receive or retain [on account of its claim] if the debtor were liquidated." And "claims" in bankruptcy are against debtors, not third parties.[188] However, the Code does not restrict "claim" to rights against the debtor. The term is defined simply as a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[189] Even if "claim" typically means obligations of the debtor in the context of the Bankruptcy Code, there is no reason to construe the term narrowly when a plan of reorganization extinguishes "claims" against third-parties, as happens when the plan includes a non-debtor release.

In sum, my three points together establish that rights with respect to non-debtors, including both liquidated and unliquidated causes of action, are part of the "amount [of property]" the creditor would "receive or retain [on account of its claim] if the debtor were liquidated under chapter 7."

Professor Brubaker has interpreted § 1129(a)(7) in a comparable manner. He argued that the statute "requires a comparison of what a holder would receive under the plan on account of an abstract 'claim' with the amount the holder would receive if the debtor were liquidated under Chapter 7."[190] Thus, "the best interests equation also properly mandates consideration of creditors' comparative recoveries on non-debtor claims, to the extent the plan is treating those non-debtor claims by release."[191]

To be sure, courts analyzing whether a reorganization plan satisfies the best interests test normally restrict the hypothetical Chapter 7 component to what the creditor would obtain directly from the debtor. "In other words, a court does not ask whether the creditor . . . would be better off overall if the debtors were to liquidate, but only compares the bankruptcy distributions in chapter 7 versus chapter 11."[192] That makes sense in the usual case where the Chapter 11 plan does not contain a non-debtor release. But if a third party is receiving a release, the language of § 1129(a)(7) mandates a broader comparison.

Moreover, there is at least one other context in which collection rights against non-debtors are part of the best interests analysis: partnership reorganizations. Section 723(a) provides that if the estate of a bankrupt partnership cannot pay all claims in full, the trustee may pursue general partners for any deficiency to the extent permitted under non-bankruptcy law.[193] Under this statute, the assets that a trustee would recover from non-debtor general partners in a Chapter 7 liquidation must be included when conducting the Chapter 11 best interests analysis.[194] And considering what the trustee would obtain from non-debtor general partners in a hypothetical Chapter 7 is quite similar to considering what creditors would receive from third parties that are co-liable with the debtor if the debtor liquidated.

Only a few decisions explicitly address the appropriate best interests comparison when a plan contains a non-debtor release. But it appears that a majority have adopted my view that the best interests analysis must take into account distributions the releasing creditors would receive from the Chapter 7 debtor *and their entitlements against the protected third parties*.[195]

D. PREMISE 3: IN ASSESSING WHETHER A CHAPTER 11 PLAN WITH A NON-DEBTOR RELEASE SATISFIES THE BEST INTERESTS TEST, COURTS MUST ASSUME THAT THE CREDITORS WOULD RECEIVE PAYMENT IN FULL FROM THE SHIELDED THIRD PARTIES OUTSIDE OF BANKRUPTCY

Suppose a group of creditors in a mass torts bankruptcy holds claims of questionable validity against the third parties shielded by a non-debtor release. In a Chapter 7 liquidation, the plaintiffs would likely receive only pro rata payments from the debtor, who is usually insolvent, and nothing from the third parties.[196] Or suppose that a debtor's Chapter 7 filing, combined with the crush of tort claims, would cause the third parties protected by the release to file for bankruptcy themselves. Perhaps both the debtor and the shielded non-debtors are insolvent when the debtor's tort liabilities are taken into account. Under either the "weak-third-party-claims" scenario or the "insolvent-non-debtor" scenario, may a court find that the Chapter 11 plan need not completely satisfy the released claims under the best interests test because the tort claimants would *not* receive payment in full if the debtor proceeded with a Chapter 7 bankruptcy? My third premise is that the answer to this question is "no." When conducting the best interests analysis, the court must assume that the creditors restrained by a non-debtor release would receive complete satisfaction if the debtor went through Chapter 7.

It is first necessary to point out the limited nature of any argument challenging my third premise. The two hypothetical scenarios raise an issue about the applicability of the full-payment requirement *only* when a liquidation analysis of the debtor demonstrates (1) that the non-debtor claims are genuinely questionable, or (2) that the released third parties are truly insolvent. Either point will be established in merely a subset of bankruptcies involving non-debtor releases. The claims against the third parties will often be meritorious. And those persons will frequently be solvent.[197]

Nonetheless, there are plausible grounds for contesting my third premise, and a few courts have expressly or implicitly done so.[198] For example, in assessing whether a plan meets the best interests test, courts consider the solvency of non-debtors in the partnership context, where they must assess the financial status of general partners of a debtor-partnership.[199] If the partners are solvent, a Chapter 7 trustee will recover the entire deficiency from them.[200] The Chapter 11 plan must therefore pay the partnership's creditors in full.[201] Where the partners are insolvent, however, the best interests test arguably no longer requires complete satisfaction of creditor claims. Likewise, courts sometimes assess the validity of claims in performing best interests analysis.[202] To illustrate, one court held that, although the best interests test requires taking into account that the trustee would seek disallowance of certain claims under § 502(d),[203] it is not necessary to adjudicate a § 502(d) objection or reach a definitive conclusion as to whether the trustee would be successful. Rather, because the court considers only a hypothetical Chapter 7 liquidation in performing best interests analysis, it is entitled to "speculate" about the likely outcome of the adjudication.[204]

On the validity question, there is authority to the contrary. Some courts have ruled that it is inappropriate to consider the soundness of claims in the best interests context because it is impractical to estimate the prospects of collectability.[205] But all this indicates is that the issue is an open one.

I take no position as to what courts should consider when conducting the best interests analysis in bankruptcies *generally*. I am willing to assume that, if the circumstances warrant, it *is* sometimes appropriate to analyze the solvency of non-debtors (e.g., of general partners) and the legitimacy of claims and objections (e.g., § 502(d) disallowance) when applying the best interests test. Instead, my argument applies only to a narrow set of circumstances: Assessing non-debtor solvency or the validity of claims against the non-debtor for best interests purposes is inappropriate when such assessment *is a prelude to a non-debtor release*.[206]

If a co-obligor of the debtor is genuinely insolvent, it should commence its own bankruptcy (or perhaps jointly file with the debtor). The elimination of liability is one of the signature benefits offered by the Code. To achieve this coveted relief, a party almost always has to submit to the full jurisdiction of the bankruptcy court. As explained by judges and commentators alike, it is such submission, combined with the party's insolvency, that justifies the bankruptcy court's extraordinary power to compel creditors to accept partial recovery.[207] Sections 105(a), 1123(b)(6), and 524(g), at most, create narrow exceptions to these principles, permitting the court to extinguish the liabilities of non-debtors who have not directly invoked the bankruptcy system. Where a non-debtor proffers sufficient assets to enable the plan to promise payment in full to all claimants subject to a third-party release, the danger in protecting the non-debtor via a release is rather limited. But when a third party contributes insufficient funding for complete resolution of the debtor's obligations because the non-debtor is purportedly insolvent—yet still receives the benefit of a release—the absolved third party escapes its liability without ever having to accede to the bankruptcy process. If the non-debtor desires the type of relief generally reserved for debtors—if the non-debtor is seeking an *actual* release, a release of claims that will *not* be paid in full—it should consent fully to the bankruptcy court's jurisdiction. Only then can a proper assessment of the third party's financial status take place. Review of a liquidation analysis when applying the best interests test is too narrow a proceeding.

Admittedly, my argument does not find support in the explicit language of § 1129(a)(7) or elsewhere in the Code. And we must be mindful of the Supreme Court's admonishment to employ a textualist approach to the interpretation of federal statutes,[208] an approach the Court regularly follows with respect to the Bankruptcy Code.[209] But third-party releases outside the asbestos context (and a significant number of releases in asbestos cases) are granted pursuant to §§ 105(a) and 1123(b)(6). When a court issues a non-debtor release under those provisions, the court is implementing a general Code policy—the preference for reorganization over liquidation. Any time a court employs §§ 105(a) and 1123(b)(6) to advance a broad Code policy, it is obligated to consider any countervailing bankruptcy policies. After all, § 105(a) and § 1123(b), as the primary sources of the bankruptcy court's general equitable powers, are concerned with *equity*. How is equity served by only considering bankruptcy policies on one side of the ledger? It isn't. And while the reorganization policy is fundamental to Chapter 11, it does not override the even broader Code policy that parties seeking protection from liability due to insolvency must submit fully to the bankruptcy process. Accordingly, when assessing whether a plan of reorganization with a non-debtor release satisfies the best interests test, the solvency of the parties shielded by the release must be presumed.[210]

The same reasoning applies with respect to the validity of non-debtor claims a plan proposes to extinguish. If the debtor and an allied third party contend that a claim against the latter is baseless, the third party must submit to the jurisdiction of the court for adjudication on the merits. Creditors holding claims against third parties are equitably entitled to either a promise of payment in full in the plan of reorganization or a chance to litigate their case, the same as all other claimants in bankruptcy.[211] Moreover, if the rights against the third party genuinely are weak, the party ought to be able to settle with the creditors for a modest amount,[212] converting the requested relief from an equitably problematic involuntary release into a wholly legitimate *voluntary* one. Speculating about the merits of non-debtor claims, even when the speculation is reasonably well informed, is inconsistent with bankruptcy policy and thus not allowed as part of the best interests analysis.[213]

VI. CONCLUSION

The Bankruptcy Code is grounded on the principle that a party seeking permanent protection from its creditors must declare bankruptcy to receive that privilege—must become a debtor. *Non*-debtors obviously have not filed for bankruptcy, yet at least some of their liabilities are eliminated when the courts approve of a third-party release. To the extent the reader finds any of my specific linguistic arguments in this article to be strained, one reason might be that the Bankruptcy Code was not written with third-party releases in mind.[214] Textualist modes of statutory construction are less useful when courts are operating at the edges of a comprehensive regulatory scheme like the Code. Structural and purposive interpretation thus ought to play a larger role when addressing forms of relief that fall beyond the classical role of bankruptcy. Accordingly, even if there are doubts regarding the manner in which I have parsed the wording of §§ 524(e), 105(a), 1123(b)(6), and 1129(a)(7), my structural arguments should tilt the balance against the propriety of both channeling and actual non-debtor releases, and especially against actual releases.

Pro-release authorities, commentators, and members of the bankruptcy bar often claim that non-debtor releases are an essential tool in complex Chapter 11 cases, especially those involving mass torts. Such releases promote "global peace"—a comprehensive resolution of the mass tort with respect to the debtor and other potentially liable parties. The debtor may then successfully reorganize, maximizing recoveries for all creditors and protecting the interests of other stakeholders. Without third-party releases, the argument goes, debtors (and possibly non-debtors) will be forced to liquidate in Chapter 7, while the injured creditors and potentially liable non-debtors continue litigating in the tort system, all to the detriment of every interested constituency.

Maybe so. But that doesn't justify adopting the weaker interpretation of the pertinent sections of the Bankruptcy Code.

Moreover, I think the pro-release narrative is wrong. Provisional injunctions are still available in mass tort bankruptcies and otherwise.[215] Chapter 11 plans may therefore offer non-debtors temporary, post-confirmation protection to incentivize the contribution of critical resources to the estate. To be sure, a provisional injunction is not as valuable to the protected third parties as a non-debtor release. Under a provisional injunction, the risk of plan failure falls on the third parties; with a non-debtor release, the creditors bear the risk. But the shielding provided by a provisional injunction is still extremely valuable. In a mass tort bankruptcy, for example, such an injunction channels all claims to the resolution process contained in the plan of reorganization. The protected third parties receive a temporary reprieve from litigation. And if the tort creditors are paid in full through implementation of the Chapter 11 plan, then the third parties' shield changes from temporary to permanent as a result of the bar on double recovery.

I believe that non-debtors would find the protection offered by a provisional injunction sufficiently desirable to warrant making the types of contributions needed to facilitate successful reorganizations, especially in the mass tort context. But even if I'm wrong, the solution is to seek new authorization from Congress rather than employ creative methods of statutory interpretation that in fact modify rather than enforce the Code.

The Bankruptcy Code does not authorize non-debtor releases outside the asbestos context. When a bankruptcy court determines that protection for third parties is necessary for a successful reorganization, the most the court can order is a provisional injunction. And even if releases are consistent with the Code, the debtor's Chapter 11 plan must promise payment in full on any claims extinguished by a release.

ENDNOTES:

[1]*See* Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L. J. Forum 960, 962 (Feb. 2022) (calling non-debtor releases "highly controversial").

[2]*See* 11 U.S.C.A. § 524(g).

[3]Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 Fordham L. Rev. 429, 430 (2022).

[4]*See, e.g.,* In re Dow Corning Corp., 280 F.3d 648, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002) (non-debtor release in silicone breast implant mass tort); In re A.H. Robins Co., Inc., 880 F.2d 694, 19 Bankr. Ct. Dec. (CRR) 997, Bankr. L. Rep. (CCH) P 72955 (4th Cir. 1989) (non-debtor release in Dalkon Shield mass tort).

[5]*Compare* In re Sago Palms Joint Venture, 39 B.R. 9, 9 (Bankr. S.D. Fla. 1984) (holding that § 524(e) bars non-debtor releases), *with* In re A.H. Robins Co., 88 B.R. 742, 754-55 (E.D.

Va. 1988) (holding that courts may grant non-debtor releases pursuant to their "equitable and inherent" power under the Bankruptcy Code), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

[6]*See* Brubaker, *supra* note 1, at 961-62 & n.7 (collecting examples); *see, e.g.*, Gerald Posner & Ralph Brubaker, Opinion, *The Sacklers Could Get Away With It*, N.Y. Times (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html [https://perma.cc/9Y6E-5KFZ].

[7]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 (2006).

[8]11 U.S.C.A. § 105(a).

[9]11 U.S.C.A. § 1123(b)(6).

[10]Silverstein, *supra* note 7, at 106-22, 131-36.

[11]11 U.S.C.A. § 524(e).

[12]Silverstein, *supra* note 7, at 122-131.

[13]*Id.* at 71-80.

[14]11 U.S.C.A. § 1129(a)(7).

[15]Silverstein, *supra* note 7, at 76-78.

[16]Joshua M. Silverstein, *Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies*, 78 UMKC L. Rev 1 (2009).

[17]11 U.S.C.A. § 524(g)(4); Silverstein, *supra* note 16, at 61-66.

[18]Silverstein, *supra* note 16, at 75-92.

[19]*See infra* Part III.

[20]11 U.S.C.A. § 524(e).

[21]Silverstein, *supra* note 7, at 44-51, 122-128.

[22]11 U.S.C.A. § 523.

[23]*See infra* Part IV.

[24]I also intend to explain why § 523 supports my general claim that untethered/policy orders that conflict with substantive non-bankruptcy law are not authorized by § 105(a) and § 1123(b)(6).

[25]Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. 2023) ("The parties are directed to brief and argue the following question: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.").

[26]In Re Purdue Pharma L.P., 69 F.4th 45, 63 (2d Cir. 2023), *cert. granted*, 2023 WL 5116031 (U.S. 2023).

[27]Petitioner's brief was due on September 20, 2023, and respondent's brief is due October 20, 2023. See https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-124.html. Oral argument is set for December 2023. Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. 2023).

[28]*See, e.g.*, In re Dow Corning Corp., 280 F.3d 648, 658, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002).

[29]In re Purdue Pharma L.P., 633, B.R. 53, 107 (Bankr. S.D.N.Y. 2021) ("The Sackler settlement does not provide anything close to enough to pay for all or substantially all of the asserted claims of the classes affected by the third-party claims release."), *rev'd*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd*, 69 F.4th 45 (2d Cir. 2023), *cert. granted*, 2023 WL 5116031 (U.S. Aug. 10, 2023).

[30]Purdue Pharma, 633 B.R. at 115.

[31]Purdue Pharma, 69 F.4th at 82.

[32]Silverstein, *supra* note 16, at 4, 81-83. Hence, the title of my second article: "*Overlooking* Tort Claimants *Best Interests* . . . ." *Id*. at 1 (emphasis added).

[33]Note that non-debtor releases in the insurance context are generally beyond the scope of this article. I discussed such releases extensively in *OTCBI*. *See* Silverstein, *supra* note 16, at 16-19, 31-54, 64, 70, 90-92.

[34]*See, e.g.*, In re Dow Corning Corp., 255 B.R. 445, 475 (E.D. Mich. 2000), aff'd and remanded, 280 F.3d 648, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002).

[35]Silverstein, *supra* note 16, at 21; *see, e.g.*, In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (release in the plan of reorganization purported to extinguish all claims against various corporate insiders related to the debtor or its subsidiaries); Dow Corning Corp., 255 B.R. at 475 (non-debtor release barred women injured by Dow Corning's silicone breast implants from suing the debtor's shareholders for their injuries).

[36]Silverstein, *supra* note 16, at 3; *see, e.g.*, In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 938, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994) (finding that without a release, the non-debtors would not have made contributions that enabled the debtor to formulate a workable plan and allowed creditors to recover in full).

[37]*See supra* note 5. For a comprehensive survey of the split in the courts as of 2006, see Silverstein, *supra* note 7, at 44-90.

[38]Silverstein, *supra* note 7, at 17 & n. 21.

[39]*See* 11 U.S.C.A. § 524(g).

[40]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." 11 U.S.C.A. § 105(a).

[41]Section 1123(b)(6) permits a chapter 11 plan to "include any . . . appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C.A. § 1123(b)(6).

[42]*See, e.g.*, Dow Corning Corp., 280 F.3d at 656-58 (explaining that non-debtor releases are permissible pursuant to §§ 105(a) and 1123(b)(6)); A.H. Robins Co., 880 F.2d at 701 (holding that bankruptcy courts may grant a non-debtor release under § 105(a)).

[43]11 U.S.C.A. § 524(e) ("[T]he 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.").

[44]*See, e.g.*, Matter of Zale Corp., 62 F.3d 746, 760, Bankr. L. Rep. (CCH) P 76617 (5th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 601-02, 21 Bankr. Ct. Dec. (CRR) 320, 24 Collier Bankr. Cas. 2d (MB) 1012, Bankr. L. Rep. (CCH) P 73754 (10th Cir. 1990), *opinion modified*, 932 F.2d 898 (10th Cir. 1991); In re American Hardwoods, Inc., 885 F.2d 621, 626, 19 Bankr. Ct. Dec. (CRR) 1354, Bankr. L. Rep. (CCH) P 73130 (9th Cir. 1989).

[45]*See, e.g.*, Dow Corning Corp., 280 F.3d at 657; In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 936, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994).

[46]*See, e.g.*, In re Digital Impact, Inc., 223 B.R. 1, 4-5, 14, 40 Collier Bankr. Cas. 2d (MB) 661 (Bankr. N.D. Okla. 1998); In re Sybaris Clubs Intern., Inc., 189 B.R. 152, 155-56, 159, 28 Bankr. Ct. Dec. (CRR) 263, Bankr. L. Rep. (CCH) P 76842 (Bankr. N.D. Ill. 1995).

[47]Silverstein, *supra* note 7, at 64-71 (describing the various tests proposed by courts and commentators as of 2006).

[48]*Id.* at 71-78.

[49]Silverstein, *supra* note 7, at 72. Note that bankruptcy courts probably lack subject matter jurisdiction to issue non-debtor releases themselves. But federal district courts possess such jurisdiction. Silverstein, *supra* note 7, at 20-21 n.38, 78-79

n.357; Silverstein, *supra* note 16, 72-73 n.450; *see also* Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011). In my view, the dispute over non-debtor releases—at the *statutory* level—concerns whether the Bankruptcy Code provides courts with sufficient *power* to extinguish claims against third parties, not whether courts have *jurisdiction* over such claims. *See also* Silverstein, *supra* note 7, at 20-21 n.38 (explaining the difference between "jurisdiction" and "power" and observing that many anti-release courts have found that they possessed jurisdiction over the claims eliminated by a release that they ultimately invalidated). *Constitutional* objections to non-debtor releases are beyond the scope of my work to date, including this article. For some arguments that third-party releases violate the U.S. Constitution, see Levitin, *supra* note 3.

[50]Silverstein, *supra* note 7, at 72.

[51]*Id.* at 72-73.

[52]*Id.* at 73-74.

[53]*Id.* at 74-75; 11 U.S.C.A. § 1126(c) (defining class "acceptance"); *id.* § 1129(b) (establishing that a plan of reorganization may be confirmed over the objection of a dissenting class—i.e., "crammed down"—if the plan is "fair and equitable" and "does not discriminate unfairly").

[54]Silverstein, *supra* note 7, at 76–78.

[55]Silverstein, *supra* note 16, at 27.

[56]Silverstein, *supra* note 7, at 24.

[57]*Id*.

[58]Silverstein, *supra* note 16, at 28-29 & nn.232-33 (collecting authorities).

[59]*See, e.g.*, 11 U.S.C.A. § 1123(b)(3)(A) (2006) ("[A] plan may . . . provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate . . . .").

[60]Silverstein, *supra* note 16, at 28-29 & n.235 (collecting authorities).

[61]Silverstein, *supra* note 7, at 32-33. Non-debtor stays are typically granted when a creditor's lawsuit against a third party would interfere with the debtor's reorganization. *Id*.

[62]*Id.* at 85-86 n.387 (collecting authorities as of 2006 that are split over the power of bankruptcy courts to issue "provisional injunctions").

[63]*See, e.g.*, In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 612, 615, 23 Collier Bankr. Cas. 2d (MB) 259 (B.A.P. 9th Cir. 1990) (the plan of reorganization restrained creditors from taking legal action against any co-obligors of the debtor for five years).

[64]*See, e.g.*, In re MAC Panel Co., 2000 WL 33673757, at *8 (Bankr. M.D.N.C. 2000) (the debtor's plan of reorganization included an injunction and a release barring a creditor from prosecuting the debtor's shareholders as long as the debtor complied with the plan, under which the creditor was to be paid in full; any deviation from the plan terminated the injunction and voided the release to the extent a deficiency remained).

[65]Silverstein, *supra* note 7, at 29.

[66]In re Dow Corning Corp., 244 B.R. 721, 743 (Bankr. E.D. Mich. 1999) (using the term "provisional injunction" in reference to a hypothetical post-confirmation temporary injunction that would restrain a creditor from pursuing a non-debtor only until the assets available under the plan are exhausted), *rev'd*, 255 B.R. 445, 480 (E.D. Mich. 2000), *rev'd in part*, 280 F.3d 648, 658 (6th Cir. 2002).

[67]Silverstein, *supra* note 7, at 29-30; Silverstein, *supra* note 16, at 29-30.

[68]Silverstein, *supra* note 7, at 30. A provisional injunction still places some risk on the creditor. There is no guarantee that the non-debtor will be available to satisfy any deficiency not paid by the debtor when the provisional injunction expires. In the absence of an injunction, the creditor could collect immediately from the non-debtor, eliminating any such risk. *See* In re Prussia Associates, 322 B.R. 572, 598-99, 44 Bankr. Ct. Dec. (CRR) 160 (Bankr. E.D. Pa. 2005) (observing that because the primary guarantor shielded by the provisional injunction in the debtor's plan was 74 years old, there was a reasonable chance that the guarantor would die before the injunction expired, preventing the creditor from recovering in the event that the debtor defaulted on its plan obligations).

OTCBI also explained the difference between non-debtor releases and "exculpations." *See* Silverstein, *supra* note 16, at 30.

[69]For an overview of these powers, see Silverstein, *supra* note 7, at 31-41.

[70]*See* Johnson v. Home State Bank, 501 U.S. 78, 88, 111 S. Ct. 2150, 115 L. Ed. 2d 66, 21 Bankr. Ct. Dec. (CRR) 1293, 24 Collier Bankr. Cas. 2d (MB) 1171, Bankr. L. Rep. (CCH) P 73993 (1991).

[71]11 U.S.C.A. § 105(a).

[72]Silverstein, *supra* note 7, at 32-36, 59-61 (collecting authorities).

[73]11 U.S.C.A. § 1123(b)(6).

[74]Silverstein, *supra* note 7, at 36, 61 (collecting authorities).

[75]*Id.* at 106-22, 131-36.

[76]*Id.* at 106-11.

[77]Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988).

[78]U.S. v. Sutton, 786 F.2d 1305, 1308, 14 Bankr. Ct. Dec. (CRR) 700, 14 Collier Bankr. Cas. 2d (MB) 681, Bankr. L. Rep. (CCH) P 71109 (5th Cir. 1986); *see also* Silverstein, *supra* note 7, at 38 n.126.

[79]*See, e.g.*, In re Dairy Mart Convenience Stores, Inc., 351 F.3d 86, 92, 51 Collier Bankr. Cas. 2d (MB) 223 (2d Cir. 2003) (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988)); In re Jamo, 283 F.3d 392, 403-404, 39 Bankr. Ct. Dec. (CRR) 86, 48 Collier Bankr. Cas. 2d (MB) 70, Bankr. L. Rep. (CCH) P 78620 (1st Cir. 2002) ("The authority bestowed [under § 105] may be invoked only if, and to the extent that the equitable remedy dispensed by the court is necessary to preserve an identifiable right preserved elsewhere in the Bankruptcy Code.") (citing Ahlers, 485 U.S. at 206).

[80]In re Myrvang, 232 F.3d 1116, 1125, 45 Collier Bankr. Cas. 2d (MB) 239, Bankr. L. Rep. (CCH) P 78313 (9th Cir. 2000) (emphasis added).

[81]*See, e.g.*, In re 641 Associates, Ltd., 1993 WL 332646, at *8 (Bankr. E.D. Pa. 1993) ("The Debtor's contention that the relief sought would be extremely significant to, if not essential to, its successful reorganization is, in itself, not a sufficient basis for allowing invocation of § 105(a) to provide the relief sought here for several reasons. . . . Secondly, we believe that a debtor, under the Code, must achieve confirmation of a Plan *within* the confines of the Code.").

[82]Silverstein, *supra* note 7, at 38 n.127.

[83]In re Ionosphere Clubs, Inc., 17 F.3d 600, 602-04 (2d Cir. 1994) (affirming an order of the bankruptcy court enjoining the debtor's preferred stockholders from suing certain managers of the debtor for breach of fiduciary duty and tortious interference because the claims were derivative, belonged to the estate, and thus were extinguished as part of a settlement between the debtor and the managers); *see also supra* notes 59-60 and accompanying text.

[84]11 U.S.C.A. § 1123(b)(3)(A).

[85] 11 U.S.C.A. § 363(f).

[86] *See, e.g.*, In re Dow Corning Corp., 198 B.R. 214, 245 (Bankr. E.D. Mich. 1996) (holding that bankruptcy courts may use § 105(a) to issue an injunction barring a creditor from seeking to enforce an interest in property purchased from the debtor under § 363(f) where the injunction is "necessary and appropriate to give the 'free and clear' aspect of § 363(f) meaning").

[87] *See, e.g.*, Matter of Federated Dept. Stores, Inc., 133 B.R. 886, 890 (S.D. Ohio 1991) ("[T]his Court cannot agree with Appellants that the lack of a specific reference in the Bankruptcy Code must preclude equitable authority in the Bankruptcy Court, providing, of course, that the action does not fly in the face of unambiguous language in Title 11."); In re NWFX, Inc., 864 F.2d 593, 595, 19 Bankr. Ct. Dec. (CRR) 176, Bankr. L. Rep. (CCH) P 72601 (8th Cir. 1989) (explaining that the bankruptcy court's "broad equitable powers may only be used to further the *policies and provisions* of the Code" (emphasis added)).

[88] *See, e.g.*, In re Communication Options, Inc., 299 B.R. 481, 482 (Bankr. S.D. Ohio 2003) ("[T]his Court believes it has inherent and express equity powers to take appropriate action necessary to protect a reorganizing debtor's potential for reorganization and the integrity of the bankruptcy system.") (ordering the appointment of a "responsible party to act for the debtor" because the debtor was using "non-productive delay tactics . . . to avoid paying its creditors" and consistently taking action "solely to protect its insiders").

[89] Silverstein, *supra* note 7, at 40-41 & nn.142-45 (collecting authorities).

[90] *Id.* at 51-53 (containing an overview of the anti-release position with respect to §§ 105(a) and 1123(b)(6) as of 2006).

[91] *Id.* at 58-61 (containing an overview of the pro-release position with respect to §§ 105(a) and 1123(b)(6) as of 2006). A few pro-release courts have held that non-debtor releases are authorized even under the narrow view of the two equitable statutes. For some examples and an explanation as to why these courts are mistaken, see *id.* at 52-53 n.213, 60 n.275.

[92] *See, e.g.*, Daniel B. Bogart, *Resisting The Expansion of Bankruptcy Court Power Under Section 105 Of The Bankruptcy Code: The All Writs Act And An Admonition From Chief Justice Marshall*, 35 Ariz. St. L.J. 793, 803-04 (2003); *see also* Silverstein, *supra* note 7, at 39-40 & nn.135-36.

[93] H.R. Rep. No. 95-595, at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274.

[94] 28 U.S.C.A. § 1651 (emphasis added).

[95] 2 Collier on Bankruptcy ¶ 105.01[2], at 105-6 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2019).

[96] *Id*.

[97] H.R. Rep. No. 95-595, at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6274.

[98] 11 U.S.C.A. § 11a(15) (repealed 1979) (emphasis added).

[99] 11 U.S.C.A. § 105(a) (emphasis added).

[100] Peter E. Meltzer, *Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties?*, 71 Am. Bankr. L.J. 1, 13 n.41 (1997); *see also* Silverstein, *supra* note 7, at 31-32 & n.85 (collecting secondary and judicial authorities in accord with Meltzer).

[101] U.S. v. Energy Resources Co., Inc., 1990-2 C.B. 263, 495 U.S. 545, 110 S. Ct. 2139, 109 L. Ed. 2d 580, 20 Bankr. Ct. Dec. (CRR) 840, 22 Collier Bankr. Cas. 2d (MB) 1093, Bankr. L. Rep. (CCH) P 73381, 90-1 U.S. Tax Cas. (CCH) P 50281, 65 A.F.T.R.2d 90-1078 (1990).

[102] *Id.* at 548-49.

[103] *Id.* at 549.

[104] *See* Silverstein, *supra* note 7, at 105-11 (explaining *Energy Resources'* adoption of the broad view of the two equitable statutes); *see also id*. at 111-19 (explaining that *Energy Resources* also established that bankruptcy courts may use §§ 105(a) and 1123(b)(6) to provide relief not available under non-bankruptcy law).

[105] *See supra* notes 95-100 and accompanying text.

[106] *See supra* note 92 and accompanying text.

[107] 11 U.S.C.A. § 1123(b)(6).

[108] Nor does it apply to the comparable Chapter 13 statute. *See* 11 U.S.C.A. § 1322(b)(11) (a Chapter 13 plan may ". . . include any other appropriate provision not inconsistent with this title"). To be sure, if only § 1123(b)(6) authorizes untethered orders, then all such orders must be in plans of reorganization. Section 105(a) permits courts to issue orders outside of the plan context. But since non-debtor releases are almost always provisions in Chapter 11 plans, construing § 105(a) to include the tethering requirement will have no real impact on the enforceability of non-debtor releases.

I may have a fourth new argument supporting the broad view: I believe that courts interpreted § 105(a)'s predecessor statute, § 2(a)15, to authorize untethered orders. "When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute." Bruesewitz v. Wyeth LLC, 562 U.S. 223, 243, 131 S. Ct. 1068, 179 L. Ed. 2d 1, Prod. Liab. Rep. (CCH) P 18580 (2011). Under this canon, if the broad view applied to § 2a(15), then it must also apply to § 105(a), particularly since § 105(a) uses more expansive language than § 2a(15), as noted supra at notes 98-100 and accompanying text. However, I have not completed my research on the judicial construction of § 2a(15), so I do not know whether that statute was consistently interpreted to permit untethered orders.

[109] *See supra* note 91.

[110] *See* Silverstein, *supra* note 7, at 80-86 (presenting this argument more fully); *see also* In re Dow Corning Corp., 244 B.R. 721, 743 (Bankr. E.D. Mich. 1999) (endorsing the argument), *rev'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd in pertinent part*, 280 F.3d 648 (6th Cir. 2002); *supra* note 62-68 (discussing the difference between non-debtor releases and provisional injunctions).

[111] *See* Silverstein, *supra* note 7, at 119-22.

[112] U.S. v. Energy Resources Co., Inc., 1990-2 C.B. 263, 495 U.S. 545, 550, 110 S. Ct. 2139, 109 L. Ed. 2d 580, 20 Bankr. Ct. Dec. (CRR) 840, 22 Collier Bankr. Cas. 2d (MB) 1093, Bankr. L. Rep. (CCH) P 73381, 90-1 U.S. Tax Cas. (CCH) P 50281, 65 A.F.T.R.2d 90-1078 (1990).

[113] *Id.* at 550-51.

[114] *Id*. at 551.

[115] *See* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 1017 n.209 (1997) ("[S]upplementary implementation sections such as § 1123(b)(6) merely beg the question whether non-debtor releases are in fact 'appropriate' provisions of a plan. That question inevitably requires consideration of the fact that non-debtor releases directly contravene nonbankruptcy law that would impose liability on the released non-debtors."); *id.* at 1010 ("Implicit in the idea that a non-debtor release is appropriate where necessary to the debtor's successful reorganization is the assumption that the reorganization policy is supreme, and in furtherance thereof, a bankruptcy judge can unilaterally override legitimate policies embodied in nonbankruptcy law that would place liability upon the released non-debtors.").

[116] Silverstein, *supra* note 7, at 131.

[117] *Id.* at 132 (explaining this point in more detail).

[118] *Id.* at 132-35.

[119] *Id.* at 135-36.

[120] Butner v. U.S., 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d

136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

[121]*Id.* at 54 n.9 ("[S]tate laws are . . . suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.") (decided under the Bankruptcy Act); *id.* at 55 ("Property interests are created and defined by state law."); Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443, 451, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 Collier Bankr. Cas. 2d (MB) 314, Bankr. L. Rep. (CCH) P 80880 (2007) (following *Butner* in a case governed by the Bankruptcy Code).

[122]*See also* Silverstein, *supra* note 7, at 132-33 & n.657-58 (collecting authorities relying upon *Butner* as justification for the proposition that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights).

[123]The line between temporary and permanent is gray. But the precise location of the line is not important to my thesis. To elaborate, I would classify a 20-year provisional injunction as permanent relief, the same as a third-party release. And I would treat a two-year provisional injunction as temporary. But I do not know exactly how long an order must last before it changes from temporary/procedural to permanent/substantive.

[124]*See* In re Regatta Bay, LLC, 406 B.R. 875, 879-82 (Bankr. D. Ariz. 2009) ("But it has long been fundamental, not only to bankruptcy law but also to constitutional law and even the structure of our judiciary, that a mere delay in the enforceability of creditors' remedies is not equivalent to a denial or a 'taking' of their rights."). This decision was reversed on appeal. *See* In re Regatta Bay, LLC, 2009 WL 5730501 (D. Ariz. 2009). The District Court followed precedents within the Ninth Circuit holding that provisional injunctions—like non-debtor releases—are prohibited by § 524(e). *Id.* at *3-*4. For another decision with language that is consistent with my position, see In re Spiers Graff Spiers, 190 B.R. 1001, 1012 (Bankr. N.D. Ill. 1996) (citing the leading § 524(e) cases to support its conclusion that the "authority to enjoin post-confirmation actions against non-debtors under § 105 must . . . be limited to the period in which the Plan is consummated . . . [because] injunctions should not be used to give permanent relief to non-debtors from their possible liability to creditors") (denying a post-confirmation request for a permanent injunction that would have enjoined a creditor of the debtor from prosecuting an action against two non-debtors). Note that some authorities have adopted a narrower understanding of "procedural" orders than I have. *See, e.g.*, In re A.J. Mackay Co., 50 B.R. 756, 762, 13 Bankr. Ct. Dec. (CRR) 557, 13 Collier Bankr. Cas. 2d (MB) 95 (D. Utah 1985) (indicating that non-debtor stays are only "procedural" because they expire *upon confirmation of the reorganization plan*).

[125]*See* 11 U.S.C.A. §§ 523, 524, 727, 944, 1141(d). Individual debtors reorganizing under Chapters 11 and 13 are generally not entitled to a discharge until they complete all payments under their plan of reorganization. *See* 11 U.S.C.A. § 1328(a), (b); *id.* § 1141(d).

[126]11 U.S.C.A. § 524(a)(1).

[127]11 U.S.C.A. § 524(a)(2).

[128]11 U.S.C.A. § 524(e). Section 524(e)'s legislative history "does little more than restate the section." Kenneth M. Lewis, *When are Nondebtors Really Entitled to a Discharge: Setting the Record Straight on* Johns-Manville *and* A.H. Robins, 3 J. Bankr. Law and Prac. 163, 164 (1994). *See* S. Rep. No. 95-989, at 81, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867 ("Subsection [(e)] provides the discharge of the debtor does not affect co-debtors or guarantors."). The legislative history thus "offers little interpretive insight." Peter M. Boyle, Note, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 Fordham L. Rev. 421, 422, 424 (1992).

[129]Silverstein, *supra* note 7, at 42 & n.153 (collecting authorities).

[130]Matter of Edgeworth, 993 F.2d 51, 53, 29 Collier Bankr. Cas. 2d (MB) 306, Bankr. L. Rep. (CCH) P 75291 (5th Cir. 1993).

[131]Silverstein, *supra* note 7, at 42-43 & n.155 (collecting authorities).

[132]*Id.* at 42-43 & n.156 (collecting authorities).

[133]*See supra* notes 43-45 and accompanying text.

[134]2 Collier on Bankruptcy ¶ 105.01[2], at 105-8 to 105-9 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2019).

[135]11 U.S.C.A. § 1123(b)(6) (Chapter 11 plan may "include any other appropriate provision *not inconsistent with the applicable provisions of this title*") (emphasis added).

[136]Silverstein, *supra* note 7, at 122-31.

[137]*E.g.*, In re Western Real Estate Fund, Inc., 922 F.2d 592, 600-02, 21 Bankr. Ct. Dec. (CRR) 320, 24 Collier Bankr. Cas. 2d (MB) 1012, Bankr. L. Rep. (CCH) P 73754 (10th Cir. 1990), opinion modified, 932 F.2d 898 (10th Cir. 1991); In re Arrowmill Development Corp., 211 B.R. 497, 503, 31 Bankr. Ct. Dec. (CRR) 193, 38 Collier Bankr. Cas. 2d (MB) 938 (Bankr. D. N.J. 1997) ("Since a discharge is an extreme remedy . . . it is a privilege reserved for those entities which file a petition under the bankruptcy code and abide by its rules.").

[138]In re A.J. Mackay Co., 50 B.R. 756, 761-62, 13 Bankr. Ct. Dec. (CRR) 557, 13 Collier Bankr. Cas. 2d (MB) 95 (D. Utah 1985); *see generally* Silverstein, *supra* note 7, at 44-51 (presenting an overview of the anti-release position with respect to § 524(e) as of 2006).

[139]In re Transit Group, Inc., 286 B.R. 811, 816, 40 Bankr. Ct. Dec. (CRR) 158, 49 Collier Bankr. Cas. 2d (MB) 971 (Bankr. M.D. Fla. 2002) (emphasis added); *see also* Silverstein, *supra* note 7, at 61-62 n.278 (collecting authorities in accord with *Transit Group*).

[140]Silverstein, *supra* note 7, at 62-63 & n.281 (collecting authorities). Note that some anti-release decisions concluded that § 524(e)'s antecedents in the Bankruptcy Act and the jurisprudence applying those statutes supports their construction of § 524(e). Pro-release decisions have disagreed, contending that, because § 524(e)'s wording is clear, there is no reason to consider prior statutory history. For more on this aspect of the debate over § 524(e), see Silverstein, *supra* note 7, at 43-45, 63.

[141]U.S. v. Energy Resources Co., Inc., 1990-2 C.B. 263, 495 U.S. 545, 550, 110 S. Ct. 2139, 109 L. Ed. 2d 580, 20 Bankr. Ct. Dec. (CRR) 840, 22 Collier Bankr. Cas. 2d (MB) 1093, Bankr. L. Rep. (CCH) P 73381, 90-1 U.S. Tax Cas. (CCH) P 50281, 65 A.F.T.R.2d 90-1078 (1990).

[142]Silverstein, *supra* note 7, at 106, 122-28; *see also id.* at 128-31 (rejecting the argument that § 524(a) "displaces" any authority under the equitable statutes to grant non-debtor releases).

[143]11 U.S.C.A. § 523(a).

[144]Nor does 11 U.S.C.A. § 1141(d)(2), which states that "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title."

[145]And given the related language in § 1141(d)(2), which is quoted in the prior footnote.

[146]*See, e.g.*, In re Brotby, 303 B.R. 177, 186-91, 42 Bankr. Ct. Dec. (CRR) 91, 51 Collier Bankr. Cas. 2d (MB) 677 (B.A.P. 9th Cir. 2003) ("In this sense, then, it can be argued that the provisions of Chapter 11 allow an injunction in a plan that limits the collection of nondischargeable claims while the debtor makes payments to all creditors, and which will eventually pay the nondischargeable claim in full."); In re Martin, 150 B.R. 43, 46-47, 23 Bankr. Ct. Dec. (CRR) 1542, Bankr. L. Rep. (CCH) P 75143, 71 A.F.T.R.2d 93-1815 (Bankr. S.D. Cal. 1993); In re Mercado, 124 B.R. 799, 801-05, 21 Bankr. Ct. Dec. (CRR) 700, 24 Collier Bankr. Cas. 2d (MB) 1895 (Bankr. C.D. Cal. 1991).

[147]*See, e.g.*, In re Hamilton, 803 Fed. Appx. 123, 124-25, 68 Bankr. Ct. Dec. (CRR) 129 (9th Cir. 2020).

[148]*See, e.g.,* In re Amigoni, 109 B.R. 341, 344-47, 19 Bankr. Ct. Dec. (CRR) 1940, 22 Collier Bankr. Cas. 2d (MB) 468 (Bankr.

N.D. Ill. 1989) (construing §§ 1141, 524, and 523 to entail that a holder of a non-dischargeable claims "is entitled after confirmation to enforce his or her rights as they would exist outside of bankruptcy," and thus striking a proposed plan of reorganization because it contained a term baring recovery on a non-dischargeable claim other than as provided for in the plan, which promised payment in full on the claim over an extended period of time); In re Howell, 84 B.R. 834, 836-37, 17 Bankr. Ct. Dec. (CRR) 459 (Bankr. M.D. Fla. 1988) (same).

[149]*See, e.g.*, Brotby, 303 B.R. at 189 (ruling that §§ 523 and 1141(d)(2) only permit courts to temporarily block recovery on a non-dischargeable claim, not prevent recovery entirely); Mercado, 124 B.R. at 104 (same).

[150]Indeed, a number of courts have found that provisional injunctions, which do not even purport to extinguish claims, improperly "affect" a third-party's liability and thus violate § 524(e). *See, e.g.*, In re Davis Broadcasting, Inc., 176 B.R. 290, 291-92 (M.D. Ga. 1994) (§ 524(e) bars a bankruptcy court from "affecting" the liability of a guarantor in any way, including through a provisional injunction staying creditors' legal actions against certain third parties pending execution of the plan) ("It is thus clear that this is a post-confirmation injunction and violates 11 U.S.C. Section 524(e) and accordingly exceeds the power and authority of the Bankruptcy Court because the section referred to prohibits release or a post-confirmation stay of the obligations of non-party guarantors. . . . Of course, the liability of a guarantor is 'affected' regardless of whether it is released or, as in this case, stayed for a long period of time."); In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 614-16, 23 Collier Bankr. Cas. 2d (MB) 259 (B.A.P. 9th Cir. 1990) (§ 524(e) prohibits any plan provision that "affects the liability of . . . codebtors") (striking a provisional injunction that merely stayed collection efforts against non-debtors for five years after confirmation of the plan and did not release the co-debtors from liability).

[151]Sackett v. Environmental Protection Agency, 598 U.S. 651, 677, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023) (quoting Whitman v. American Trucking Associations, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, 51 Env't. Rep. Cas. (BNA) 2089, 31 Envtl. L. Rep. 20512 (2001)).

[152]Silverstein, *supra* note 7, at 76-78; Silverstein, *supra* note 16, at 26-28, 75-92.

[153]*See* Brubaker, *supra* note 115, at 991-994.

[154]In re Dow Corning Corp., 280 F.3d 648, 658, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 Fed. App. 0043P (6th Cir. 2002) ("The plan provides an opportunity for those claimants who choose not to settle to recover in full."). The *Dow Corning* test is a modestly revised version of the test first articulated in In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 935, 938, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994); *see also* Silverstein, *supra* note 16, at 24-25 (discussing the relationship of the *Master Mortgage* and *Dow Corning* tests). As of 2006, a substantial number of courts had adopted the *Master Mortgage* test, but that test does not include the obligation to promise payment in full to dissenting creditors. Silverstein, *supra* note 7, at 64-68.

[155]*See, e.g.*, In re Mercedes Homes, Inc., 431 B.R. 869, 879, 883 (Bankr. S.D. Fla. 2009).

[156]*See infra* note 195.

[157]*See* Silverstein, *supra* note 7, at 68-71 (collecting authorities as of 2006). Note that some pro-release courts have implicitly rejected the payment-in-full requirement by holding that not all of the pieces in the *Dow Corning* test must be satisfied in each case. *See, e.g.*, Behrmann v. National Heritage Foundation, 663 F.3d 704, 712, 55 Bankr. Ct. Dec. (CRR) 221, 66 Collier Bankr. Cas. 2d (MB) 1282, Bankr. L. Rep. (CCH) P 82124 (4th Cir. 2011); *see also* In re City of Detroit, 524 B.R. 147, 60 Bankr. Ct. Dec. (CRR) 124 (Bankr. E.D. Mich. 2014) (Chapter 9 bankruptcy) (holding that the requirement of full payment to dissenting creditors did not need to be met because the other factors of the *Dow Corning* test "weigh so heavily in favor of approving of the" non-debtor releases at issue).

[158]*See supra* notes 29-31 and accompanying text.

[159]11 U.S.C.A. § 1129(a)(7).

[160]A dissenting creditor is one who votes against the plan of reorganization. 11 U.S.C.A. § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.").

[161]A claim is impaired unless a plan of reorganization "leaves *unaltered* the legal, equitable, and contractual rights" of the claim. 11 U.S.C.A. § 1124(1) (emphasis added); *see also* 7 Collier on Bankruptcy ¶ 1124.03, at 1124-7 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2021) ("Any alternation of these rights constitutes impairment, even if the value of the rights is enhanced.").

[162]7 Collier on Bankruptcy, ¶¶ 1129.02[7], [7][a], [7][b]. For a general overview of the purpose and operation of the best interests test, see Silverstein, *supra* note 16, at 76-77 n.463.

[163]In re Affiliated Foods, Inc., 249 B.R. 770, 787, 36 Bankr. Ct. Dec. (CRR) 89 (Bankr. W.D. Mo. 2000) (citations and internal quotation marks omitted).

[164]Silverstein, *supra* note 16, at 77 n.463.

[165]Silverstein, *supra* note 7, at 73-74; see *infra* Part V.B.

[166]Brubaker, *supra* note 115, at 992; Hydee R. Feldstein, *Reinterpreting Bankruptcy Code § 524(e): The Validity of Third-Party Releases in a Plan*, 22 Cal. Bankr. J. 25, 43 (1994).

[167]Silverstein, *supra* note 7, at 77 & n.351 (citing two concurring secondary authorities); *see also* In re Boyer, 90 B.R. 200, 201 (Bankr. D. S.C. 1988) ("Because unsecured creditors would receive full payment if this were a chapter 7 case, they are entitled to full payment and interest if full payment in the chapter 11 case is not made as of the effective date of the plan.").

[168]Silverstein, *supra* note 7, at 77 n.351.

[169]11 U.S.C.A. § 1129(a)(7).

[170]*See supra* note 58 and accompanying text.

[171]*See supra* note 53 and accompanying text.

[172]Silverstein, *supra* note 7, at 78.

[173]11 U.S.C.A. § 1129(a)(11). This subparagraph of § 1129(a) is known as the "feasibility requirement." Matter of T-H New Orleans Ltd. Partnership, 116 F.3d 790, 801, 31 Bankr. Ct. Dec. (CRR) 114, 38 Collier Bankr. Cas. 2d (MB) 458 (5th Cir. 1997).

[174]11 U.S.C.A. § 727(a)(1) ("The court shall grant the debtor a discharge, unless . . . the debtor is not an individual . . . .").

[175]11 U.S.C.A. § 1141(d)(3) ("The confirmation of a plan does not discharge a debtor if—(a) the plan provides for the liquidation of all or substantially all of the property of the estate; (b) the debtor does not engage in business after consummation of the plan; and (c) the debtor would be denied a discharge under section 727(a) . . . if the case were . . . under chapter 7[.]").

[176]6 Collier on Bankruptcy, ¶ 727.01[3], at 727-9 to 727-10 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018) ("The policy behind the provision [§ 727(a)(1)] is the prevention of trafficking in corporate shells and bankrupt partnerships. A corporation . . . does not need relief if it no longer has any assets."); *id.* at 727-10 to 727-11 ("This provision [§ 1141(d)(3)(A)] prevents corporations and partnerships from proceeding under chapter 11 with a plan that is nothing more than a liquidation in order to circumvent section 727(a)'s prohibition against a discharge of a corporation or partnership in a chapter 7 liquidation case.").

[177]Note that my analysis in the body text does not apply if the debtor in Chapter 11 is an individual since natural persons generally receive a discharge in Chapter 7 bankruptcies. *See* 11 U.S.C.A. 727(a). However, I am not aware of any cases approving of a non-debtor release when the reorganizing debtor is a natural person. And even if such a case were to arise, Professor Brubaker's argument in the next paragraph is sufficient to block third-party releases when an individual is liquidating in either

Chapter 7 or Chapter 11.

[178]For cases holding that non-debtor releases are barred when the debtor is liquidating, see Silverstein, *supra* note 7, at 73-74 n.335; *but see id.* at 74 n.338 (collecting decisions that approved of non-debtor releases in *Chapter 11* liquidating plans).

[179]Brubaker, *supra* note 115, at 1014-16, 1019.

[180]*Id.* at 1019.

[181]*Id.*; *accord* Silverstein, *supra* note 7, at 73-74.

[182]Brubaker, *supra* note 115, at 992.

[183]11 U.S.C.A. § 1129(a)(7).

[184]In re Zawawi, 634 B.R. 11, 21 (Bankr. M.D. Fla. 2021), aff'd, 637 B.R. 663, Bankr. L. Rep. (CCH) P 83744 (M.D. Fla. 2022) ("And it is well established that claims and causes of action also constitute property."); 63C Am. Jur. 2d *Property* § 25 ("Choses in Action") ("A chose in action is intangible personal property[.]").

[185]*Supra* Part V.B.

[186]11 U.S.C.A. § 726(a).

[187]11 U.S.C.A. § 1325(a)(4).

[188]Judge Drain discussed this argument in the Purdue Pharma case, though he did not ultimately endorse it. In re Purdue Pharma L.P., 633 B.R. 53, 110 (Bankr. S.D. N.Y. 2021), *stay pending appeal denied*, 634 B.R. 240 (S.D. N.Y. 2021) and vacated, 635 B.R. 26 (S.D. N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D. N.Y. 2022) and *rev'd and remanded*, 69 F.4th 45 (2d Cir. 2023), *cert. granted*, 2023 WL 5116031 (U.S. 2023) and *aff'd*, 69 F.4th 45 (2d Cir. 2023).

[189]11 U.S.C.A. § 101(5).

[190]Brubaker, *supra* note 115, at 992 n.118.

[191]*Id.* at 992.

[192]Charles J. Tabb & Ralph Brubaker, Bankruptcy Law: Principles, Policies, and Practice 750 (5th ed. 2021).

[193]11 U.S.C.A. § 723(a).

[194]*See, e.g.*, In re Union Meeting Partners, 165 B.R. 553, 575 (Bankr. E.D. Pa. 1994), *subsequently aff'd*, 52 F.3d 317 (3d Cir. 1995) ("Because a bankruptcy court should consider the value of a § 723(a) recovery when calculating the liquidation value needed for the § 1129(a)(7) comparison, . . . a plan proponent should also provide evidence of the net worth of a partnership debtor's general partners.") (citation omitted); *see also* 7 Collier on Bankruptcy ¶ 1129.02[7][c][iv] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) ("Under chapter 7 practice, the trustee of a debtor has recourse to the personal assets of the partners of the debtor in order to satisfy partnership debts. Thus, if the chapter 11 debtor is a partnership, the liquidation analysis will also have to estimate the probable collections from general partners of assets which could be paid to creditors."); Fed. R. Bankr. P. 1007(g) ("The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.").

[195]For cases supporting my position, see, for example, In re Ditech Holding Corporation, 606 B.R. 544, 609-15 (Bankr. S.D. N.Y. 2019) (holding that the best interests test was not satisfied because the creditors would retain their claims against the released third parties if the debtor were to liquidate in Chapter 7 and the liquidation analysis "did not account" for the released claims); In re Washington Mutual, Inc., 442 B.R. 314, 359-60 (Bankr. D. Del. 2011) (disagreeing with the debtor's "assum[ption] that what creditors can recover from other sources should be ignored under section 1129(a)(7)," and stating that "[i]n a case where claims are being released under the chapter 11 plan but would be available for recovery in a chapter 7 case, the released claims must be considered as part of the analysis in deciding whether creditors fare at least as well under the chapter 11 plan as they would in a chapter 7 liquidation"); In re Quigley Co., Inc., 437 B.R. 102, 143-46, 53 Bankr. Ct. Dec. (CRR) 170 (Bankr. S.D. N.Y. 2010) (concluding that the court must consider the Chapter 7 value of claims barred by a non-debtor release, issued under 11 U.S.C.A. § 524(g), when conducting the best interests analysis); *see also* Mercury Capital Corp. v. Milford Connecticut Associates, L.P., 354 B.R. 1, 9 (D. Conn. 2006) (reversing confirmation of debtor's Chapter 11 plan and remanding with instructions to the bankruptcy court to consider whether the plan satisfied the best interests test; the district court's concern was that the plan released a creditor's claim against non-debtor guarantors, and thus the creditor "may be significantly less secured under the debtor's plan than under a Chapter 7 liquidation"); In re Conseco, Inc., 301 B.R. 525, 527-28, 42 Bankr. Ct. Dec. (CRR) 55 (Bankr. N.D. Ill. 2003) (explaining that the debtor's prior plan of reorganization was not confirmable because it violated the best interests test by providing that creditors who were entitled to a Chapter 7 liquidation distribution had to release non-debtors in order to receive *any* payment under the Chapter 11 plan).

For cases opposing my position, see, for example, In re Boy Scouts of Am., 642 B.R. 504, 663-66 (Bankr. D. Del. 2022) ("I conclude that the plain language of the statute [§ 1129(a)(7)] does not appear to require the inclusion in a liquidation analysis of the value of any third-party claims released under the Plan."), *aff'd*, 650 B.R. 87 (D. Del. 2023); In re Plant Insulation Co., 469 B.R. 843, 886-88, 67 Collier Bankr. Cas. 2d (MB) 1198 (Bankr. N.D. Cal. 2012), *aff'd*, 485 B.R. 203 (N.D. Cal. 2012), *stay pending appeal denied*, 2012 WL 13331616 (U.S. 2012) and *aff'd*, 544 Fed. Appx. 669 (9th Cir. 2013) and *rev'd*, 734 F.3d 900, 58 Bankr. Ct. Dec. (CRR) 176, 70 Collier Bankr. Cas. 2d (MB) 1161, 86 A.L.R. Fed. 2d 723 (9th Cir. 2013) (best interests test does not apply to claims subject to a third-party release because the test is only concerned with "claims against the debtor"). In In re Dow Corning Corp., 237 B.R. 380, 34 Bankr. Ct. Dec. (CRR) 982 (Bankr. E.D. Mich. 1999), the court held that when applying the Chapter 11 best interests test, the judge must consider what "the creditor would receive from the chapter 7 trustee—*and only that amount*—for comparison with the dividend available under the plan." *Id.* at 411 (emphasis added). But this decision did not concern the third-party releases involved in the *Dow Corning* bankruptcy. And in *OTCBI*, I explained in detail why the case and the Chapter 13 authorities it relies upon do not undercut my argument regarding the operation of the best interests test. Silverstein, *supra* note 16, at 79-81 n.468; *accord* Quigley, 437 B.R. at 146.

[196]*See* Feldstein, *supra* note 166, at 43 ("Accordingly, if the claims released under the plan *have any real value*, then the best interest test requires realization of that value for the plan to be confirmed." (emphasis added)); *cf.* Sander L. Esserman & David J. Parsons, *The Case for Broad Access to 11 U.S.C.A. § 524(g) in Light of the Third Circuit's Ongoing Business Requirement Dicta in* Combustion Engineering, 62 N.Y.U. Ann. Surv. Am. L. 187, 208 (2006) (suggesting that asbestos claimants will frequently be better off if the debtor reorganizes because third parties shielded by a § 524(g) third-party release are certain to make financial contributions; if the debtor liquidates, the asbestos claimants will have to conduct "speculative and costly litigation" in order to recover from the third parties).

[197]*See, e.g.*, In re Combustion Engineering, Inc., 391 F.3d 190, 237, 238 n. 51, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), *as amended*, (Feb. 23, 2005) (stating that there was no evidence that two affiliates of the debtor, who were seeking the protection of a non-debtor release, needed to reorganize; noting, in particular, that one of non-debtors was clearly solvent).

[198]*See* In re Purdue Pharma L.P., 633 B.R. 53, 93, 107-112 (2021) (considering the probable recovery against the Sacklers given the merits of the tort creditors' claims and the dispersal and level of the Sacklers' wealth); In re Quigley Co., Inc., 437 B.R. 102, 145-46, 53 Bankr. Ct. Dec. (CRR) 170 (Bankr. S.D. N.Y. 2010) (including claims subject to a non-debtor release in the best interests analysis because they were "property," have "value" and are "neither speculative nor incapable of estimation"); In re Ditech Holding Corporation, 606 B.R. 544, 614-15 (Bankr. S.D. N.Y. 2019) (following *Quigley*); *cf.* Howard C.

Buschman III & Sean P. Madden, *The Power and the Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913, 942, 946 (1992) (arguing that non-debtor releases are prohibited by § 524(e) unless they are (1) necessary to the debtor's reorganization and (2) the third party contributes to the estate an amount that reflects its net worth or potential liability).

[199]*See* 7 Collier on Bankruptcy ¶ 1129.02[7][c][iv] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) ("[I]f the chapter 11 debtor is a partnership, the liquidation analysis will also have to estimate the probable collections from general partners of assets which could be paid to creditors.").

[200]*See* 11 U.S.C.A. § 723(a).

[201]*See* In re Grandfather Mountain Ltd. Partnership, 207 B.R. 475, 484 (Bankr. M.D. N.C. 1996) (explaining that, in light of § 723(a), the best interests test mandated that two unsecured creditors receive payment in full under the partnership-debtor's Chapter 11 plan of reorganization because it was "undisputed" that the general partners were solvent); Mark S. Scarberry et al., Business Reorganization in Bankruptcy: Cases and Materials 814 (3d ed. 2006) (noting that because the Chapter 7 trustee of a debtor-partnership with solvent partners may recover sufficient funds from the partners to pay creditors in full under 11 U.S.C.A. § 723(a), the best interests test mandates that any such partnership pay creditors in full if it is reorganizing under Chapter 11) (collecting authorities); *see also* In re Boston Harbor Marina Co., 157 B.R. 726, 732, 24 Bankr. Ct. Dec. (CRR) 912, Bankr. L. Rep. (CCH) P 75407 (Bankr. D. Mass. 1993) ("Indeed, because a chapter 7 trustee of [a] partnership may proceed against the partners individually, 11 U.S.C. § 723 (1988), the best-interest-of-creditors test . . . requires the court to find that creditors will receive at least as much from the partners' contributions to the [partnership's] plan as they would from the assertion of a chapter 7 trustee's rights against the partners," if the plan releases the partners.).

[202]*See* In re Sierra-Cal, 210 B.R. 168, 172, 31 Bankr. Ct. Dec. (CRR) 29, 38 Collier Bankr. Cas. 2d (MB) 562, Bankr. L. Rep. (CCH) P 77467 (Bankr. E.D. Cal. 1997) (stating that the best interests test "requires estimation of disputed and contingent claims and of [C]hapter 7 administrative expenses.").

[203]*Id.* at 174; *see also* 11 U.S.C.A. § 502(d) (providing for the mandatory disallowance of claims filed by creditors holding property recoverable under various avoidance statutes).

[204]Sierra-Cal, 210 B.R. at 174 ("The 'best interests' analysis in plan confirmation being hypothetical, it is not necessary (as would be required in an actual liquidation) to adjudicate the creditor's § 502(d) status before imposing the § 502(d) disability. In computing the hypothetical chapter 7 liquidation, the court is entitled to view the entire record of the case and to engage in rational speculation about what would occur in a chapter 7 liquidation. Among other things, the court can hypothesize that certain claims would evoke the objection of a chapter 7 trustee and can speculate about the likely fate of such objections, bearing in mind the protective purpose of the 'best interests' test.").

[205]*See, e.g.*, In re Syrus, 12 B.R. 605, 607, 4 Collier Bankr. Cas. 2d (MB) 1172, Bankr. L. Rep. (CCH) P 68310 (Bankr. D. Kan. 1981) ("The extent of collectability and the offsetting costs of collection cannot be estimated by the courts."); In re Hurd, 4 B.R. 551, 553, 6 Bankr. Ct. Dec. (CRR) 412, 2 Collier Bankr. Cas. 2d (MB) 190 (Bankr. W.D. Mich. 1980) ("It would also be impractical for the court to place a value on a creditor's right of action against a debtor not discharged; factors such as the speed with which judgment could be obtained, and collectability of the judgment, would have to be considered. Yet, how could the Court fairly and accurately consider these factors?").

[206]Silverstein, *supra* note 16, at 87-90.

[207]*See, e.g.*, In re Arrowmill Development Corp., 211 B.R. 497, 506, 31 Bankr. Ct. Dec. (CRR) 193, 38 Collier Bankr. Cas. 2d (MB) 938 (Bankr. D. N.J. 1997) (quoting Judith R. Starr, *Bankruptcy Court Jurisdiction to Release Insiders from Creditor Claims in Corporate Reorganizations*, 9 Bankr. Dev. J. 485, 498 (1993)).

[208]*See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted) (quoting U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989))).

[209]*See, e.g.*, Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 42 Bankr. Ct. Dec. (CRR) 122, 50 Collier Bankr. Cas. 2d (MB) 1299, Bankr. L. Rep. (CCH) P 80038 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " (quoting Hartford Underwriters, 530 U.S. at 6; construing various provisions of the Bankruptcy Code)).

[210]*Cf.* In re Combustion Engineering, Inc., 391 F.3d 190, 237, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), *as amended*, (Feb. 23, 2005) (noting that "the practical effect" of two proposed § 105(a) non-debtor releases "is to extend bankruptcy relief to two non-debtor companies outside of bankruptcy") (further observing that the releases allow the non-debtors "to cleanse themselves of non-derivative asbestos liability without enduring the rigors of bankruptcy"). My position here is somewhat more aggressive than the one I advanced in *OTCBI*. *See* Silverstein, *supra* note 16, at 88-89 & n.511.

[211]For example, while bankruptcy courts may estimate the *value* of contingent and unliquidated claims against the debtor, 11 U.S.C.A. § 502(c), (c)(1), the *merits* of such claims, if challenged, must be adjudicated by the court, 11 U.S.C.A. § 502(a), (b), (b)(1).

[212]*Cf.* Brubaker, *supra* note 115, at 993 n.122 ("The risk averse non-debtor would be willing to trade a greater certain contribution in exchange for release from a lower projected, but uncertain, liability outside bankruptcy.").

[213]In *OTCBI*, I conceded that my argument with respect to non-debtor solvency and claim validity does not extend to third-party releases issued pursuant to § 524(g). *See* Silverstein, *supra* note 16, at 90. But for reasons of time, I have not yet analyzed whether I should revise my views with respect to asbestos non-debtor releases.

[214]*See* Brubaker, *supra* note 115, at 994 (observing that "non-debtor releases interject discharge of creditors' non-debtor rights into a bankruptcy process designed to restructure only creditor claims against the debtor").

[215]Though in fairness, the courts are split on the legality of provisional injunctions. *See* Silverstein, *supra* note 7, 85-86 n.387 (summarizing the split as of 2006).

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