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Persuasive Authority: Compelled Third-Party Releases

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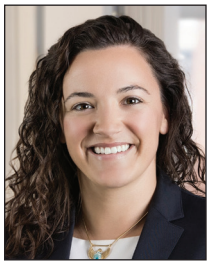

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Editor's Note: *For further discussion on this topic,* see *Jason W. Bank, "Nuts and Bolts of Evaluating Third-Party Releases in Chapter 11 Plans," XXXVII* ABI Journal *9, 12-13, 77-78, September 2018,* available at *abi.org/abi-journal.*

Compelled third-party releases have been a controversial element of chapter 11 plans for some time. Parties have challenged the appropriateness of such releases on their merits, bankruptcy courts' subject-matter jurisdiction to consider them, and bankruptcy courts' constitutional authority to grant them. The District of Delaware recently affirmed the bankruptcy courts' constitutional authority to confirm plans containing compelled third-party releases. Despite an apparent initial inclination that the bankruptcy court in the case lacked constitutional authority to confirm such plans because doing so was akin to adjudicating the state law claims that the plan purported to release, the District of Delaware was ultimately persuaded by the bankruptcy court's opinion on remand that the only matter over which the bankruptcy court needed constitutional authority was the plan-confirmation proceeding itself.[1] In addition, the Southern District of New York recently affirmed a bankruptcy court order on an appeal raising a similar question.

This article explores the reasoning of the two district court decisions, and it predicts that plan proponents will be on stronger footing in the future when seeking, in bankruptcy court, confirmation orders approving compelled third-party releases. Also discussed are inquiries into whether the nexus between the claims being released and the success of the reorganization should be analyzed only in the context of whether to approve the releases on the merits — not in the context of a subject-matter-jurisdiction or constitutional-authority analysis.

An Introduction to Releases in Chapter 11 Plans

There are generally three types of "releases" contemplated in the context of plan confirmation: debtor releases, whereby the debtor itself releases claims (including derivative claims) against non-debtor third parties; exculpation, whereby estate fiduciaries are released from any liability (typically other than willful misconduct or gross negligence) arising by virtue of their roles in the chapter 11 process; and third-party releases, whereby nondebtor third parties release claims against other nondebtor third parties.[2] Debtor releases and exculpation, if properly drafted, now generate little controversy.

As to this last category of releases, *compelled* (*i.e.*, nonconsensual) third-party releases have been the subject of much controversy for some time, although for varying reasons. The Fifth, Ninth, Tenth (with some uncertainty) and the District of Columbia Circuits have held that the Bankruptcy Code prohibits third-party releases absent consent.[3] The Second, Third, Fourth, Sixth, Seventh and Eleventh Circuits have held that third-party releases may be given consensually and, in limited circumstances, without consent.[4] Lower courts in the First and Eighth Circuits have also endorsed approval of compelled third-party releases in plans.[5]

Courts in all circuits that permit compelled third-party releases use some variation of a nonexclusive, multi-factor analysis to gauge the *appropriateness* of the proposed releases, although all tests require some nexus between the claims being released and the success of the reorganization.[6] Compelled third-party releases were the ones at issue in *Millennium Lab*.

1 Ironically, the bankruptcy court actually predicted that its bench ruling might "not even be persuasive in other cases," given the short timeline within which the court had to consider the decision. *See In re Millennium Lab Holdings II LLC*, No. 15-12284 (Bankr. D. Del. Dec. 11, 2015), D.E. 206 (the "*Millennium* Bench Ruling") at 5.

2 *See, e.g., In re Washington Mut. Inc.*, 442 B.R. 314, 346-56 (Bankr. D. Del. 2011) (differentiating among releases granted by debtors, exculpation of fiduciaries for actions taken during chapter 11 proceedings, and releases granted by nondebtor third parties to other nondebtor third parties).

3 These courts relied on 11 U.S.C. § 524(e), which provides (in relevant part) that 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." *See, e.g., Maxtile Inc. v. Jiming Sun (In re Maxtile Inc.)*, 237 Fed. App'x 274, 276 (9th Cir. 2007); *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 251-52 (5th Cir. 2009); *Landsing Diversified Props.-II v. First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund Inc.)*, 922 F.2d 592, 600-02 (10th Cir. 1990) (*per curiam*); *In re AOV Indus. Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986); *but see In re Midway Gold U.S. Inc.*, 575 B.R. 475 (Bankr. D. Colo. 2017) (*Western Real Estate* cannot be read to bar all compelled third-party releases).

4 *See, e.g., SE Prop. Holdings LLC v. Seaside Eng'g & Surveying Inc. (In re Seaside Eng'g & Surveying Inc.)*, 780 F.3d 1070, 1077-78 (11th Cir. 2015); *Nat'l Heritage Found. Inc. v. Highbourne Found.*, 760 F.3d 344, 347-50 (4th Cir. 2014); *In re Lower Bucks Hosp.*, 571 Fed. App'x 139, 144 (3d Cir. 2014) (citing *In re Cont'l Airlines*, 203 F.3d 203 (3d Cir. 2000)); *In re Metromedia Fiber Network Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005); *Airadigm Commc'ns Inc. v. FCC (In re Airadigm Commc'ns Inc.)*, 519 F.3d 640, 655-57 (7th Cir. 2008); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657-58 (6th Cir. 2002).

5 *See, e.g., In re Charles St. African Methodist Episcopal Church of Boston*, 499 B.R. 66, 98-103 (Bankr. D. Mass. 2013); *In re Master Mtg. Inv. Fund Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

6 *See, e.g., Master Mtg.*, 168 B.R. at 935 (listing five nonexclusive factors summarized as whether (1) there exists an "identity of interests" such that a suit against nondebtor will deplete assets of estate; (2) nondebtor has contributed substantial assets to reorganization; (3) injunction is essential to reorganization; (4) substantial majority of creditors (specifically, impacted class) agree to such injunction; and (5) plan provides mechanism for payment of all, or substantially all, of claims of class(es) affected by injunction).

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Delaware Affirms Confirmation of a Plan Containing Compelled Third-Party Releases

In *Millennium Lab*, the chapter 11 debtors proposed a prepackaged plan that included the nonconsensual release of certain creditors' claims against nondebtor equityholders.[7] The would-be-releasing creditors had already filed a complaint against the would-be-released owners in district court, and the creditors objected to confirmation of a plan that would release the claims asserted in that complaint without their consent.[8] In particular, the objectors argued, *inter alia*, that the bankruptcy court lacked subject-matter jurisdiction to grant the compelled third-party releases.[9] Although the objectors did include a "reservation of rights" in their initial objection indicating that they did not consent to the bankruptcy court's entry of a final order, they described the issue as one of *jurisdiction* and not constitutional power,[10] and failed to press that objection in their more detailed supplemental objection.

The bankruptcy court found that it had subject-matter jurisdiction to consider the releases in the context of plan confirmation, but it never reached the issue of whether it had constitutional power to grant them.[11] In particular, the bankruptcy court found that it at least had related-to jurisdiction over the released claims under Third Circuit jurisprudence[12] because each of the nondebtor release beneficiaries had a prepetition contractual-indemnification right against the debtors, thus there was a clear "conceivabl[e]" effect "on the estate being administered in bankruptcy."[13]

The bankruptcy court ultimately disagreed that such releases contravened the Bankruptcy Code and confirmed the plan.[14] The objectors appealed, but they failed to clearly raise the issue of whether the bankruptcy court had the constitutional authority to confirm a plan containing compelled third-party releases (although they did challenge subject-matter jurisdiction generally).[15]

In district court, the debtors moved to dismiss on the basis that the appeal was equitably moot, and the appellants raised the constitutional argument (for the first time, at least comprehensively) in opposition.[16] Determining that it could not consider the motion to dismiss without first determining whether there had been a constitutional defect in the decision below, the district court remanded for the bankruptcy court to determine whether it had the constitutional authority, as an Article I court, to confirm a plan containing compelled third-party releases.[17] In so doing, the district court recapped the Constitution's "limitation on the power of an Article I court to enter final orders or judgments on state law claims without the parties' consent."[18]

The district court was persuaded (although it did not decide) that the appellants' purportedly released claims were "between two private parties based on state common law or statutes that are not closely intertwined with a federal regulatory program,"[19] and that the "extinguish[ment]" of those claims was "tantamount to resolution of those claims on the merits."[20] As such, the district court seemed persuaded that the bankruptcy lacked constitutional authority to release the objectors' claims.[21]

On remand, the bankruptcy court found that it had such constitutional authority.[22] As a threshold matter, the bankruptcy court ruled that no interpretation of *Stern*[23] — which applied only in the context of "a state law cause of action filed by a trustee"[24] — affected a bankruptcy court's ability to confirm a plan, which is a quintessential feature unique to federal bankruptcy law.[25] As such, *Stern*'s so-called "disjunctive test" — "whether the action at issue stems from the bankruptcy itself *or* would necessarily be resolved in the claims-allowance process"[26] — need not even be applied.[27]

The bankruptcy court rejected the objectors' view that the confirmation context was irrelevant and that the bankruptcy court should instead analyze whether it had constitutional authority to adjudicate the merits of the underlying claims being affected by confirmation.[28] Rather, consideration of the factors "against which a third-party release is measured ... do[es] not ask the bankruptcy judge to examine or make rulings with respect to the many claims that may be released by virtue of the third party releases. An order confirming a plan with releases ... does not rule on the merits of the state law claims being released."[29]

The bankruptcy court went on to find that even if *Stern* governed its analysis, the "action at issue" under the disjunctive test was confirmation of a plan, not the claims articulated in the district court complaint.[30] In support, the bankruptcy court cited a Third Circuit decision for the proposition that "*Stern* does

7 *See In re Millennium Lab Holdings II LLC*, No. 15-12284 (Bankr. D. Del. Dec. 14, 2015), D.E. 195.
8 *See Millennium* Bench Ruling at 12.
9 *See In re Millennium Lab Holdings II LLC*, No. 15-12284 (Bankr. D. Del. Dec. 4, 2015), D.E. 122 (the "Initial Objection") at 17-26; No. 15-12284 (Bankr. D. Del. Dec. 9, 2015), D.E. 174 at 4-10.
10 *See* Initial Objection at ¶ 75; *see also Opt-Out Lenders v. Millennium Lab Holdings II LLC (In re Millennium Lab Holdings II LLC)*, 242 F. Supp. 3d 322, 331 (D. Del. 2017) (the "District Court Remand") (observing perfunctory reference to constitutional authority issue and objectors' apparent conflation of that issue with jurisdictional issue).
11 *See* District Court Remand at 332.
12 *See Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984) (overruled in part on other grounds).
13 *Millennium* Bench Ruling at 13-14 (citing *Pacor*, 743 F.2d at 994; *Lower Bucks Hosp.*, 488 B.R. 303 (E.D. Pa. 2013), *aff'd*, 571 Fed. App'x 139 (3d Cir. 2014)). The bankruptcy court disregarded the objectors' argument that the causes of action articulated in the district court's complaint sounded in fraud and intentional conduct, which fell outside the scope of the indemnification obligations — finding that even a suit sounding in fraud would have a "conceivable effect" because plaintiffs could amend their complaints to include non-fraud causes of action, and because the defendants would be entitled to fee reimbursement against the estate regardless of their entitlement to indemnification for any judgment obtained. *See Millennium* Bench Ruling at 14-15.
14 *Millennium* Bench Ruling at 12, 16. *See also id.* at 16-30 (detailed ruling on satisfaction of applicable factors).
15 *See* District Court Remand at 330-31.
16 *Id.* at 325, 339.
17 *Id.* at 325, 338-39.
18 *Id.* at 325-26 (quoting *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1938-39 (2015)).
19 *Id.* at 339 (quoting *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 2614 (2011)) (quotations omitted).
20 *Id.* (citing *In re Digital Impact Inc.*, 223 B.R. 1, 13 n.6 (Bankr. N.D. Okla. 1998)) (additional cites omitted).
21 *Id.* at 340 ("*Notwithstanding the seeming merits of [the] Appellants' arguments*, the Court will not rule on an issue [*i.e.*, the constitutional power issue] that the Bankruptcy Court itself may not have ruled upon.") (emphasis added).
22 *In re Millennium Lab Holdings II LLC*, 575 B.R. 252 (Bankr. D. Del. 2017) (the "Second Bankruptcy Decision").
23 *Stern*, 131 S. Ct. 2594.
24 *See* Second Bankruptcy Decision at 274.
25 *Id.* at 271-72.
26 *Stern*, 131 S. Ct. at 2618 (emphasis added).
27 *Cf.* Second Bankruptcy Decision at 274 ("Assuming that it is ever appropriate to import the Disjunctive Test into a context other than a state law cause of action filed by a trustee...."), 275 ("But, if I were going to import the *Stern* Disjunctive Test into *Millennium*'s plan confirmation proceeding....").
28 *Id.* at 273-74.
29 *Id.* at 272-73 (internal citations omitted).
30 *Id.* at 274.

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not preclude a bankruptcy judge from entering final orders in statutorily core proceedings *notwithstanding the orders' collateral impact on state law claims*."[31] Rather, the court found that "[t]aking the position that third-party releases in a plan are equivalent to an impermissible adjudication of the litigation being released is, at best, a substantive argument against third-party releases, not an argument that confirmation orders containing releases must be entered by a district court."[32]

The objectors appealed the second bankruptcy decision, arguing that "the relevant inquiry is not whether plan confirmation is core, but whether the other proceedings ... affected by plan confirmation are core."[33] Commentators and practitioners braced for reversal, given the district court's original skepticism on the bankruptcy court's constitutional authority.[34] To much surprise, the district court affirmed, agreeing that "*Stern* did not address, either expressly or by implication, any context other than counterclaims, nor did it announce a broad holding addressing every facet of the bankruptcy process."[35] The district court determined that *Stern* did not require application of the disjunctive test in the confirmation context.[36]

The district court went on to affirm the bankruptcy court's ruling that the confirmation order approving the release of state law claims was *not* an adjudication of the released claims on the merits, favoring the distinction drawn between approval of a *settlement* of claims — which involved the application of a federal bankruptcy standard — and a ruling on the merits.[37] The district court agreed that the *impact* of that "settlement" (the release of claims) went to whether the settlement satisfied the federal standard for approval (*i.e.*, the objectors' contention was an argument as to why the release was *inappropriate*, not a challenge to the bankruptcy court's constitutional authority to approve it in the first place).[38]

SDNY Affirms Confirmation of a Plan Containing Exculpation-esque Releases

After the *Millennium* bankruptcy court issued the second decision (but before issuance of the district court's affirmance), the issue of bankruptcy courts' constitutional authority to confirm plans containing compelled third-party releases had been raised, but not determined, in the Southern District of New York.[39] However, shortly after the district court's affirmance in *Millennium*, the Southern District of New York determined a similar question.

In *Kirwan Offices*,[40] co-investors of the debtor had been sparring over the settlement of certain contingent liabilities of the company.[41] Ultimately, two of the three investors (the "petitioning creditors") commenced an involuntary proceeding against Kirwan without the consent of the third investor (the "objector").[42] The objector moved to dismiss the involuntary petition or abstain from adjudicating it, arguing that the petitioning creditors had filed the case in a bad-faith scheme to circumnavigate his consent rights over the pending litigation.[43] The bankruptcy court denied the motion to dismiss or abstain, finding that abstention would impermissibly interfere with the resolution of matters within its core subject-matter jurisdiction.[44]

The petitioning creditors filed a chapter 11 plan that included a nonconsensual third-party release prohibiting the objector from initiating an arbitration in London that was aimed at showing that the involuntary bankruptcy was unauthorized.[45] The objector never appeared at the confirmation hearing.[46] The bankruptcy court did not articulate extensive reasoning on its approval of the third-party release — in particular, there was no discussion of subject-matter jurisdiction or the satisfaction of any factors tending to show that the releases were appropriate — and ultimately confirmed the plan.[47]

Contending that the bankruptcy court lacked subject-matter jurisdiction and constitutional power to enjoin later litigation of nonbankruptcy claims, the objector appealed the confirmation order.[48] The district court affirmed, finding first that a "bankruptcy court acts pursuant to its core jurisdiction when it considers the involuntary release of claims against a third-party nondebtor in connection with the confirmation of a proposed plan of reorganization, which is a statutorily defined core proceeding."[49] Citing the portion of the district court affirmance in *Millennium* pertaining to the *constitutional* analysis, the district court further found that a "confirmed reorganization plan that includes such releases *does not address the merits of the claims being released*; those ... are governed by non-bankruptcy law. Rather, it effectively cancels those claims so as to permit a total reorganization of the debtor's affairs in a manner available only in bankruptcy."[50]

The district court specified that "it [was] of no moment" that the objector's claims "arise under a pre-petition con-

31 *Id.* at 275-76 (citing *In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418 (3d Cir. 2013)) (emphasis added); *see also* Second Bankruptcy Decision at 280 (citing, *inter alia*, *Hart v. S. Heritage Bank (In re Hart)*, 564 Fed. App'x 773 (6th Cir. 2014) (same holding as *Lazy Days'*), *Fisher Island Invs. Inc. v. Solby+Westbrae Partners (In re Fisher Island)*, 778 F.3d 1172, 1192 n.13 (11th Cir. 2015) (bankruptcy judge could enter final order notwithstanding its substantial impact on pending proceedings in other courts)).

32 Second Bankruptcy Decision at 283.

33 *See Opt-Out Lenders v. Millennium Lab Holdings II LLC (In re Millennium Lab Holdings II LLC)*, No. 17-1461-LPS, 2018 WL 4521941, at *11 (D. Del. Sept. 21, 2018) (the "District Court Affirmance") (summarizing objectors' view).

34 *See also* District Court Affirmance at 11, 13 (acknowledging that in District Court Remand, district court had been persuaded by objectors' arguments).

35 *See* District Court Affirmance at 12 (quoting Second Bankruptcy Decision at 274) (internal quotations omitted).

36 *Id.*

37 *Id.* at 14.

38 *Id.* at 13-14.

39 *See In re SunEdison Inc.*, 576 B.R. 453, 457 n.5 (Bankr. S.D.N.Y. 2017) (noting Second Bankruptcy Decision in *Millennium*, but stating that *SunEdison* court had — in an earlier decision — "expressed a third concern: did *Stern* prohibit the Court from entering a final judgment approving the nonconsensual Release? The Second Circuit has interpreted *Stern* narrowly and limited the ruling to its facts.... Since I am not approving the Release, I do not resolve the question." (internal citations omitted)).

40 *Lynch v. Lapidem Ltd. (In re Kirwan Offices S.A.R.L.)*, Nos. 17 Civ. 4339, 17 Civ. 4340 (S.D.N.Y. Oct. 10, 2018) (*slip op.*).

41 *Id.* at 2-4.

42 *Id.* at 5.

43 *Id.* at 5-6.

44 *Id.* at 6 (citing *In re Kirwan Offices S.A.R.L.*, No. 16-22321 (Bankr. S.D.N.Y. July 5, 2016), D.E. 43)).

45 *Id.* at 7.

46 *Id.*

47 *Id.* The court's somewhat cursory treatment likely resulted from the fact that the provision in question was more akin to an exculpation than a compelled third-party release, given that the focus was releasing the plan proponents and related parties from causes of action related to beginning and administering the bankruptcy case. Approving such provisions is squarely within the court's "arising in" and "arising under" jurisdiction, *see* 28 U.S.C. § 157(b), and there has been no serious challenge to bankruptcy courts' constitutional authority to confirm plans containing exculpations.

48 *Id.* at 8.

49 *Id.* at 17-18 (citing 28 U.S.C. § 157(b)(2)(L)).

50 *Id.* (collecting substantial citations, omitted here) (emphasis added).

tract, subject to the laws of another jurisdiction, and were against a nondebtor."[51] It was the fact that their extinction was essential to the "adjudicat[ion] of the proposed corporate reorganization of Kirwan" that brought the releases within the bankruptcy court's core subject-matter jurisdiction.[52]

Next, the district court turned to the "distinct" constitutional analysis,[53] observing that bankruptcy courts' constitutional authority extends only to matters that are "integral to the restructuring of the debtor-creditor relationship."[54] Reiterating the finding it made in its jurisdictional analysis (and adopting the "core" terminology, even in the constitutional context), the district court found that the releases were not an "adjudication of the merits of third-party claims," but rather "merely extinguish those claims as part of [the] core bankruptcy process" of confirming a plan in accordance with federal bankruptcy law.[55]

Continuing its reliance on "core" terminology, the district court explained that "a bankruptcy court's constitutional adjudicatory authority depends, not on the nature of a related claim at issue, but rather on *how resolving that claim relates to a core Article I bankruptcy process*. As a practical matter, resolving claims against a debtor will nearly always be integral to resolving a bankruptcy process, while claims against third parties will be integral only in 'rare cases.'"[56] The district court found that this was one such rare case because the compelled release of claims was "absolutely necessary to the operation of Kirwan's reorganization plan," and that was, in turn, "because [the release] was integral to the 'restructuring of debtor-creditor relations.'"[57] Finally, departing from the district court in *Millennium*, the district court did not disclaim the relevance of *Stern*'s disjunctive test, but found that the releases at bar satisfied that test because they stemmed from the bankruptcy process, as they were subject to 11 U.S.C. §§ 1129, 1123, 105 and 524(e).[58]

Implications of *Millennium Lab* and *Kirwan Offices*

Barring further review, the district court opinions in *Millennium Lab* and *Kirwan Offices* emphatically reaffirm the constitutional authority of bankruptcy courts to enter final orders confirming plans containing compelled third-party releases. Given the extensive analysis in each of the decisions, particularly in *Millennium Lab*, other districts are likely to follow suit.

Critically, both the *Millennium Lab* and *Kirwan Offices* courts concluded that confirming plans containing compelled third-party releases did *not* constitute an adjudication of the underlying dispute, and that the proceeding at issue for a determination of constitutional authority was the plan-confirmation proceeding itself. While the *Stern* constitutional analysis is completely distinct from subject-matter-jurisdiction analysis (*Stern* is *not* about jurisdiction), the conclusion that confirming a plan containing compelled third-party releases does not result in an adjudication of the underlying claims might have implications for jurisdictional analysis.

For example, in the Second Circuit, in light of the *Manville* decisions,[59] the first step in confirming a plan containing compelled third-party releases is determining whether the bankruptcy court has subject-matter jurisdiction *over the released claims*, which turns on whether the claims might have "'any conceivable effect' on the bankruptcy estate."[60] However, if confirming such a plan does not effectively adjudicate such claims, must the bankruptcy court have "related to" jurisdiction over the underlying claims when it has "arising in" and "arising under" jurisdiction over the confirmation process? Why select this issue from the collection of issues — state law and otherwise — implicated by confirmation?[61]

Perhaps the Second Circuit, and others, should reconsider whether related-to jurisdiction over the released claims is a gating issue. The nexus of the released claims to the estate — and their importance or necessity to the plan — would remain a factor in the analysis of whether to approve the compelled third-party releases on the merits and confirm the plan, but the issue would cease to be jurisdictional.

Even if other courts were to depart from the holdings in *Millennium Lab* and *Kirwan Offices* and find that bankruptcy courts lack the constitutional power to order third-party releases, it would not mean that bankruptcy courts cannot *facilitate* confirmation of plans containing them; it would just mean that bankruptcy courts could not *themselves* enter final confirmation orders containing such releases. Instead, bankruptcy courts would have to issue recommended findings of fact and conclusions of law to the district courts, altering the "division of labor"[62] as between the bankruptcy and district courts, perhaps to a greater extent than that envisioned by the U.S. Supreme Court in *Stern*.[63] The constitutional authority controversy is just about *which court* can order the third-party release, not whether the release is available in the first instance.

In any event, thanks to *Millennium Lab* and *Kirwan Offices*, plan proponents now have a strong basis to argue that the bankruptcy court presiding over confirmation has the constitutional power to enter a confirmation order including compelled third-party releases. The potential larger implications of the decisions will play out in subsequent decisions. abi

51 *Id.* at 21.

52 *Id.* The district court in *Kirwan* does not appear to have squarely addressed the applicability of *Manville* and its mandate that bankruptcy courts have subject-matter jurisdiction over the claims released. *See infra* n.59. This might be because the release at issue in *Kirwan* appears to be more akin to exculpation rather than to a release of claims held by a nondebtor against unrelated parties. *See also supra* at n.47. In any event, the district court did find that the bankruptcy court had subject-matter jurisdiction over plan confirmation, which was what the district court found to be the relevant touchpoint (not the adjudication of the underlying claim).

53 *Id.* at 25.

54 *Id.* at 27-28 (quoting *Stern*, 131 S. Ct. at 2617) (internal quotations omitted).

55 *Id.* at 29.

56 *Id.* at 28 (quoting *In re Metromedia Fiber Network Inc.*, 416 F.3d 136, 141 (2d Cir. 2005)) (emphasis added).

57 *Id.* (evidently erroneously citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982); correct citation would appear to be to *Stern*, 131 S. Ct. at 2617).

58 *Id.* at 28-29 (citing Second Bankruptcy Decision from *Millennium*, where bankruptcy court had applied disjunctive test in "even if" analysis).

59 *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008), *rev'd and remanded on other grounds sub. nom.*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195 (2009); *In re Johns-Manville Corp.*, 600 F.3d 135, 153 (2d Cir. 2010) (reaffirming threshold determination of subject-matter jurisdiction before approving third-party releases in plans); *see also In re FairPoint Commc'ns Inc.*, 452 B.R. 21, 29 (S.D.N.Y. 2011) ("[A] bankruptcy court has jurisdiction to enjoin third-party nondebtor claims, but only to the extent that those claims 'directly affect' the res of the bankruptcy estate.") (citing *Manville*, 517 F.3d at 66, *reaff'd*, 600 F.3d 135, 153 (2010)).

60 *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 288-89 (Bankr. S.D.N.Y. 2016) (internal citations omitted).

61 As previously noted, the district court in *Kirwan* found subject-matter jurisdiction because the focus was on plan confirmation — clearly within "arising in" and "arising under" jurisdiction — not the underlying cause of action. However, the *Kirwan* court did not address the *Manville* decisions and their progeny in reaching this conclusion. Again, this is likely because the case really dealt with an exculpation rather than a broader, compelled third-party release involving pre-petition tortious activity.

62 *See, e.g., Stern*, 131 S. Ct. at 2620 (finding that Court's holding did not "meaningfully change ... the division of labor" between bankruptcy and district courts).

63 *See, e.g., In re Montreal Maine & Atl. Ry., Ltd.*, No. 1:15-MC-329-JDL, 2015 WL 7302223, at *1 (D. Me. Nov. 18, 2015) (adopting proposed findings of fact and conclusions of law submitted by bankruptcy judge in accordance with Bankruptcy Rule 9033).