Bankruptcy Court for the District of Maryland (J. Catliota) held that the Fourth Circuit's decision in Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704 (4th Cir. 2011) provided sufficient guidance on whether a court should approve a release for which there was insufficient affirmation of consent, regardless if the release was said to be "nonconsensual" or based on "implied consent." The approval of releases in the absence of a vote in favor of a plan or some other express affirmation of consent should be allowed "cautiously and infrequently" and only under "unusual circumstances". Specifically, as to the Neogenix decision, now that the Class 5 shareholders had the ability to opt out of giving the release, the releases of the members of Class 3 given by the members of Class 5 would be allowed pending a final determination after the supplemental voting by the members of Class 5.

In re Neogenix Oncology, Inc., 2015 Bankr. Lexis 3343 (Bankr. D. Md. Sept. 30, 2015)

Summary by Kristen M. Siracusa, Miles & Stockbridge P.C.

The Debtor and the Equity Committee sought approval of a supplemental solicitation of the Debtor's Chapter 11 plan. The supplemental solicitation was intended, among other things, to provide clear and conspicuous notice of the releases to Class 5 shareholders and an opportunity for them to opt out from granting a release to members of Class 3. Now that the Class 5 shareholders had the ability on the ballot to opt out of granting the release, the issue before the court was whether the releases of the members of Class 3 given in the plan by Class 5 members who either accept the plan or do not return a ballot should be allowed. The court determined that releases by the Class 5 shareholders would be allowed in those circumstances, pending a final determination after the supplemental voting by Class 5.

The only voting classes under the plan were Class 3 (officers and directors) and Class 5 (shareholders). Class 3 consisted of thirteen former and current officers and directors of the Debtor, each of whom timely filed a proof of claim for contingent, unliquidated, and unsecured claims for indemnification. Pursuant to the terms of the proposed plan, the Class 3 members were to give up their indemnification claims and were to be released from any claims by Class 5 shareholders. There was overwhelming support for the plan, with all Class 3 members and 99.59% of Class 5 voting in favor.

The releases at issue were releases by the Class 5 shareholders against the Class 3 members. The Court had previously ruled that all elements for plan confirmation had been met except for whether the plan met the requirements of section 1129(a)(10) and whether the plan could be confirmed with the third-party release and exculpation provisions. Even though the members of Class 5 supported confirmation of the plan and there were no objections to the plan filed by any shareholders, the court found that they had not received adequate notice of the release, or the ability to opt out of the release.

The Debtor and the Equity committee sought approval of supplemental solicitation to provide adequate notice of the releases sought. Objections were filed by the U.S Trustee's Office, the SEC, and various shareholders.

The proposed supplemental ballot for Class 5 contained three boxes which could be checked by voters as follows: i) a box accepting the amended plan; ii) a box rejecting the amended plan; iii) a box indicating that the voter is opting-out of the release of Class 3 members. The supplemental ballots also put the voters on notice of the following ramifications of their votes or failure to return the ballot:

> (i) A vote to accept the amended plan constitutes consent to the release of the Class 3 members; (ii) A vote to reject the amended plan, but not checking the opt-out box, constitutes consent to the release of the Class 3 members; (iii) An unmarked supplemental ballot, without checking the opt-out box, constitutes consent to the release of the Class 3 members; (iv) A failure to return the supplemental ballot constitutes consent to the release of the Class 3 members; (v) A supplemental ballot which does not vote to accept or reject the amended plan but which checks the opt-out box, constitutes a rejection of the release of the Class 3 members; and (vi) A vote to reject the amended plan and checking the opt-out box constitutes a rejection of the release of the Class 3 members.

In re Neogenix Oncology, Inc., 2015 Bankr. LEXIS 3343, at *9 (Bankr. D. Md. Sept. 30, 2015).

The issue of express consensual third-party releases and the rejection of non-consensual third party releases, absent unique and unusual circumstances, is well settled amongst the various circuits, notwithstanding that they disagree in their conclusions. The Fifth, Ninth and Tenth Circuits interpret Section 524(e) of the Bankruptcy Code to prohibit non-consensual third party releases. On the other hand, the Second, Third, Fourth, Sixth, Seventh and Eleventh Circuits do not interpret Section 524(e) to limit a bankruptcy court's authority to grant non-consensual releases in limited, unusual and unique circumstances.

However, the Fourth Circuit has not expressly faced the issue presented in Neogenix, as to whether a consensual third-party release must be express or whether implied consent is sufficient. For example, various courts conclude that the validity of the release depends on principles of contract law, and thus affirmative consent is required. Id. at *14 citing In re Congoleum Corp., 362 B.R. 167 (Bankr. D.N.J. 2007); In re Arrowmill Development Corp., 211 B.R. 497 (Bankr. D.N.J. 1997). Other courts have determined that a third-party release is only effective with respect to creditors who vote in favor of a plan. Id. at *15 citing Matter of Speciality Equip. Co., Inc., 3 F.3d 1043 (7th Cir. 1993); In re Washington Mutual, Inc., 443 B.R. 314 (Bankr. D. Del. 2011) (opt-out mechanisms are not sufficient and there must be affirmative consent); In re Coram Healthcare Corp., 315 B.R. 321 (Bankr. D. Del. 2014)(same).

Some courts have determined that failure to return a ballot constitutes consent where creditors have received notice of the ramifications of doing so. Id. citing In re Indianapolis Downs, LLC, 486 B.R. 286 (Bankr. D. Del. 2013) (finding that implied consent to releases was permissible in the case of unimpaired creditors who were being paid in full and therefore receiving consideration for the releases). The Southern District of New York has allowed implied consent releases when there was adequate notice of the release and the releasing parties had the

opportunity to opt out of the release. Id. citing In re DBSB North America, 419 B.R. 179 (Bankr. S.D.N.Y. 2009); In re Calpine Corp., 2007 Bankr. LEXIS 4390 (Bankr. S.D.N.Y. Dec. 19, 2007); In re Conseco, Inc., 301 B.R. 525 (Bankr. N.D. Ill 2003) (Failure to vote on a plan that contained opt out for third party releases deemed implied consent).

In Neogenix, the court determined that it did not need to adopt either approach, but rather could rely on Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704 (4th Cir. 2011), which provided sufficient guidance for the approval "of a release for which there is insufficient affirmation of consent." Behrmann focused on consideration of non-consensual releases, and in Neogenix the court found that the same factors should be considered for implied consensual releases, because the distinction between implied consent and non-consent was a matter of semantics.

The court undertook an analysis of the Behrmann factors, and determined that the addition of the opt-out provision for Class 5 shareholders, together with the other Berhmann factors and the additional testimony by the Equity committee concerning the value (or lack thereof) of claims against the Class 3 members, supported approval of the supplemental solicitation.

The court noted that the role of the equity committee was critical to approval of the supplemental solicitations. At the hearing on approval of the supplemental solicitation procedures, the chairman of the Equity Committee testified that the release of the Class 3 members was a "no brainer." Counsel to the Equity Committee also testified that after undertaking a thorough investigation of potential claims against the Class 3 members, those claims would be extremely difficult and likely unsuccessful.

Ultimately, the court approved the supplemental ballot with the following modifications for purposes of determining the 3% of acceptance or rejection of the release by the Class 5 shareholders:

> (i) A vote to accept the amended plan will be counted as an acceptance of the release for purposes of determining the percentage of outstanding shares that accept or reject the release, provided the opt-out box is not checked; (ii) A vote to reject the amended plan, whether or not the opt-out box is checked, will be counted as a rejection of the release for purposes of determining the percentage of outstanding shares that accept or reject the release; (iii) A failure to return the supplemental ballot shall be counted an as acceptance of the release for purposes of determining the percentage of outstanding shares that accept or reject the release; (iv) A supplemental ballot that does not vote to accept or reject the amended plan but on which the opt-out box is checked, will be counted as rejection of the release for purposes of determining the percentage of outstanding shares that accept or reject the release; and (v) An unmarked supplemental ballot, without checking the opt-out box, will not be counted as a rejection or acceptance of the plan and will not be counted as acceptance or rejection of the release for purposes of determining the percentage of outstanding shares that accept or reject the release.

In re Neogenix Oncology, Inc., 2015 Bankr. LEXIS 3343 at *27-8.