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Archer v. Warner: Circuit Split Resolution or Contractual Quagmire?

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Archer v. Warner: Circuit Split Resolution or Contractual Quagmire?

Jennifer R. Belcher*

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I. Introduction

The Supreme Court's recent holding in *Archer v. Warner (In re Warner)*¹ is an anticontractual decision that threatens the autonomy of parties to create valid settlement agreements that have lasting effect within bankruptcy courts. The linchpin of contract law is the freedom of parties to bargain for beneficial provisions. Thus, the public policy in favor of encouraging settlements not only recognizes the importance of encouraging contractual settlements but also the enforcement of valid agreements:² "Because contract law presumes that parties will not consensually enter into a contract unless each party perceives a net benefit, courts enforce contracts absent good reason not to do so."³

Instead of upholding the basic tenets of contract law, *Archer* stated that bankruptcy courts should "look behind" privately contracted settlements to determine if the underlying and completely-released original debt was

1. *Archer v. Warner (In re Warner)*, 538 U.S. 314 (2003). For a discussion of the *Archer* case, see Parts III–V.

2. See *infra* notes 176–84 and accompanying text (describing the public policy encouraging settlement).

3. Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 545 (1999). Schwarcz notes the following reasons that cause courts to override contracts: violation of statute, "if the contract harms the contracting parties[,] or impinges on the rights of noncontracting parties." The latter reasons are "expressed in contract law defenses based on unconscionability . . . duress or information asymmetry." *Id.* at 545–47. None of these defenses are at issue in *Archer*.

obtained by fraud.⁴ The factual scenario in *Archer*, however, did not involve any of the circumstances that typically cause courts to override a contract, such as unconscionability or duress. Yet the Supreme Court has crafted a decision that ultimately discards release provisions to which both parties have agreed. Thus, the question presented is whether *Archer* offers a compelling reason for allowing a bankruptcy court to derail the fundamental core of contract law, or if *Archer* only creates a contractual quagmire for creditors and debtors who desire to settle an alleged fraud claim.

Consider a situation in which *A* (a buyer) files suit against *B* (a seller) for fraudulent activity relating to a sale. Prior to litigation of the state court claim, *A* and *B*, both represented by counsel, agree to a settlement in which *B* agrees to pay a fixed sum in exchange for the buyer's complete release of all claims relating to the state court action. *B* makes a significant cash payment, and the rest of the settlement is secured by a promissory note. Neither an admission of liability nor a mention of fraud is included in the agreement. *A* dismisses the state fraud claim with prejudice. *A*'s only source of remedy is the enforcement of the note because the settlement agreement expressly released all other claims relating to the state litigation. *B* defaults on the settlement payments. *A* attempts to enforce the settlement by using the released fraud claims. Although *B* objects to the resurrection of the claims, the court examines the circumstances behind the settlement agreement to determine if the original debt was fraudulent.

Under state contract law, examining the released original debt and underlying circumstances would be an outrage to the basic concept of novation,⁵ which is "[t]he act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces the original party with a new party."⁶ A novation immediately extinguishes the prior obligation, and "the obligee, therefore, has no right to enforce the original duty, even on breach by the obligor of the substituted contract."⁷ If the obligor breaches the novation, then the obligee is limited to "its remedies under the substituted contract that has replaced that duty."⁸

4. See Parts III–V (discussing the *Archer* decision and analyzing the Supreme Court's reasoning).

5. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 21.8 (5th ed. 2003) ("The word 'novation' is used in a variety of senses. Courts frequently use it as synonymous with 'substituted contract.'").

6. BLACK'S LAW DICTIONARY 1091 (7th ed. 1999).

7. E. ALLAN FARNSWORTH, CONTRACTS § 4.24 (3d ed. 1999).

8. *Id.*

In the hypothetical, the settlement agreement is a novation because it completely substituted the earlier alleged tort debt with a new contractual obligation. Upon breach of the settlement, A no longer has the option to seek enforcement on the alleged tort debt. The prior obligation is nonexistent, and a proper state court decision would bar further litigation of the released fraud claim. Under the terms of the novation, A's remedy is limited to the enforcement of the promissory note as a contractual obligation.

Now, consider this revision to the hypothetical. B defaults on the payment of the settlement and files for bankruptcy. B seeks to discharge this debt in bankruptcy. The bankruptcy discharge relieves the debtor by "operat[ing] as an injunction against all efforts to recover debts owed prior to the filing of the bankruptcy case as a personal liability of the debtor."⁹ A objects to the dischargeability of the debt, alleging that the debt is nondischargeable because it was obtained by fraud and thus falls under the exception to discharge in Section 523(a)(2)(A) of the Bankruptcy Code.¹⁰ This situation raises several questions. Should the bankruptcy outcome be the same as the state court outcome? Does the state contract concept of novation apply in bankruptcy? How should the creditor respond to this possible loss of the settlement in bankruptcy? The Supreme Court recently addressed this set of circumstances in *Archer*, a decision that attempted to reconcile the divisive circuit split concerning these questions.¹¹

The two approaches advocated by the circuit split exemplify the above mentioned hypothetical and the two proposed outcomes. The majority

9. Terrence L. Michael & Michael R. Pacewicz, *Settling Objections to Discharge in Bankruptcy Cases: An Unsettling Look at Very Unsettled Law*, 37 TULSA L. REV. 637, 639 (2002). According to Michael and Pacewicz:

In *Local Loan Co. v. Hunt*, the United States Supreme Court coined the oft-cited phrase that bankruptcy laws exist to provide "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."

Id. at 638–39. The discharge relief offered by bankruptcy is not absolute, and the Bankruptcy Code includes exceptions to this general rule. This Note focuses on the exception to discharge covered by § 523(a)(2)(A), which prevents discharge for those debts obtained by fraud.

10. See 11 U.S.C. § 523(a)(2)(A) (2000) (stating that the Bankruptcy Code does not permit a discharge under this section for "debt[s] . . . obtained by . . . false pretenses, a false representation, or actual fraud"); see also Katherine S. Kruis, *Is Your Prepetition Judgment Worth Anything? Prebankruptcy Planning for the Litigator*, 27 CAL. BANKR. J. 5, 5 (2003) (noting that "[a]ll prepetition debts are discharged under Bankruptcy Code . . . Section 727(a), unless one of the Section 523(a) exceptions applies").

11. *Archer v. Warner (In re Warner)*, 538 U.S. 314 (2003). For a discussion of the *Archer* case, see Parts III–V.

approach claims that a bankruptcy court has a duty to conduct the fullest inquiry into the nature of a debt for dischargeability purposes.¹² Therefore, the bankruptcy court should examine the circumstances underlying a settlement agreement to determine if the original debt had been obtained by fraud.¹³ In contrast, the minority approach favors a contractual perspective that enforces a novation as the replacement of a tortious debt with a contractual obligation that is dischargeable in bankruptcy.¹⁴ The minority approach relies heavily on the public policy supporting settlements and the enforcement of valid settlement agreements, no matter the nature of the underlying debt that led to the settlement.¹⁵ According to the minority approach, the incentive to settle is gone if the settlement agreement is not enforced within bankruptcy.¹⁶

Applying the majority approach, *Archer* permitted a bankruptcy court to look behind the settlement agreement to determine if the underlying debt had been obtained by fraud and thus was nondischargeable in bankruptcy under Section 523(a)(2)(A) of the Bankruptcy Code.¹⁷ *Archer* agreed with the lower court's holding that the *Archer* settlement agreement completely released all state claims and may have created a novation.¹⁸ But the Court's inquiry did not end at this point because the next question was whether this debt could also be a debt obtained by fraud, as described within the exceptions to discharge in bankruptcy.¹⁹

Archer relied heavily on *Brown v. Felsen (In re Brown)*,²⁰ the foundation case for the majority approach, and this Note argues that *Brown* is not the proper governing precedent for the circumstances in *Archer*.²¹ *Brown* is a res judicata case that concerns a debt embodied in a consent judgment that lacks any type of release provisions.²² In comparison, *Archer* includes a novation,

12. See *Brown v. Felsen (In re Brown)*, 442 U.S. 127, 138–39 (1979) (discussing the broad inquiry intended by Congress for debts that are supposed to survive bankruptcy).

13. Elizabeth Warren & Jay L. Westbrook, *Settling into Bankruptcy*, AM. BANKR. INST. J., May 22, 2003, at 16, 16.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 321–23 (2003).

18. *Id.* at 323.

19. *Id.* at 319.

20. *Brown v. Felsen (In re Brown)*, 442 U.S. 127 (1979). For a discussion of the *Brown* case, see *infra* notes 45–54 and accompanying text.

21. See *infra* notes 152–75 and accompanying text (discussing whether *Brown* was the proper governing precedent for the Supreme Court's decision in *Archer*).

22. *Brown*, 442 U.S. at 128–31.

which replaced the allegedly tortious debt with a contractual obligation dischargeable in bankruptcy.²³

This Note also argues that *Archer* includes inconsistencies and creates confusion rather than a definitive resolution to the divisive circuit split.²⁴ For example, the Supreme Court first stated that the *Archer* settlement agreement may have created a novation, but then the Court ignored the novation theory to discuss *Brown*, a res judicata case.²⁵ *Archer* agreed that the settlement released all underlying state claims but then stated that the fraud issue had not been resolved.²⁶ Perhaps one of the most telling inconsistencies is that *Archer* maintained one aspect of the contractual arrangement, the promissory note, while discarding the release provisions.²⁷

Another issue this Note addresses is *Archer*'s apparent disregard for the public policy encouraging settlements.²⁸ Courts have long adhered to the policy supporting settlements, which in turn promotes judicial efficiency and certainty between parties.²⁹ This policy serves an important role within novation theory.³⁰ *Archer*, however, did not discuss the importance of settlements or consider the effect that the decision may have on future settlements. What incentive does a debtor have to settle if the debtor's fate will be subject to a fixed settlement in bankruptcy but will not receive the benefits of the bargained-for releases? This Note suggests that *Archer* may have a detrimental effect on settlements.³¹

In addition, this Note examines *Archer* in light of the underlying principles in *Butner v. United States*³² and the possible effect *Archer* may have

23. *Archer v. Warner (In re Warner)*, 283 F.3d 230, 237 (4th Cir. 2002), *rev'd*, 538 U.S. 314 (2003).

24. See Part V (analyzing *Archer* and the underlying issues that were not addressed in the decision).

25. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 319–21 (2003).

26. *Id.* at 318–19.

27. *Id.* at 328 (Thomas, J., dissenting).

28. See *infra* notes 176–84 and accompanying text (discussing the public policy to encourage settlements and questioning whether *Archer* discourages debtors from seeking settlement of fraud claims).

29. See *infra* notes 177–78 and accompanying text (describing the importance of the public policy to encourage settlements between conflicted parties).

30. See *infra* notes 179–81 and accompanying text (stating that novation emphasizes the importance of settlement).

31. See *infra* notes 183–84 and accompanying text (suggesting that *Archer* may discourage debtors from settling fraud claims with creditors because the release provisions will not be maintained in bankruptcy, whereas the settlement will be considered the debt for bankruptcy purposes).

32. *Butner v. United States*, 440 U.S. 48 (1979). For a discussion of the *Butner* case, see

on forum shopping.³³ *Butner* essentially stated that the federal bankruptcy courts have a responsibility to ensure that parties receive the same protection within bankruptcy that they would have received in state proceedings if no bankruptcy had occurred.³⁴ Accordingly, bankruptcy courts should implement nonbankruptcy law unless a federal interest demands otherwise.³⁵ In a state court proceeding, *B* (the debtor) would have received the benefits of the novation. Yet in bankruptcy under *Archer*, *B* loses the bargained-for release provisions while *A* (the creditor) maintains the promissory note.³⁶ This Note proposes that *Archer*'s inequitable implementation of a contractual agreement would not have occurred outside of bankruptcy. The *Butner* principle stresses the need for uniform outcomes to combat forum shopping within bankruptcy.³⁷ *Archer*, however, appears to provide a strong incentive for creditors to file involuntary bankruptcy petitions so that they can avoid release provisions while maintaining the fixed settlement payments. Thus, this Note asserts that *Archer* exacerbates forum shopping.³⁸

The Supreme Court had the opportunity in *Archer* to craft an opinion that evaluated the novation theory and effectively resolved the circuit split surrounding this issue. This Note argues that *Archer* did not address the vital issues in this conflict. *Archer* overlooked the importance of settlements and the *Butner* principle. Moreover, *Archer* did not deliver a definitive position on the novation theory. Because the parties bargained for the provisions in the settlement agreement, which in turn created a novation, *Archer* should have limited the buyer's remedies to the provisions of the settlement agreement or substituted obligation, which explicitly released all state claims other than the promissory note.

This Note proposes that a variety of options exist to prevent the creation of a novation in the *Archer* settlement agreement. These options

infra notes 188–91 and accompanying text.

33. See *infra* notes 185–208 and accompanying text (discussing the forum shopping problem within bankruptcy and arguing that *Archer* will heighten this problem).

34. *Butner*, 440 U.S. at 56.

35. *Id.* at 55.

36. See *Archer v. Warner (In re Warner)*, 538 U.S. 314, 328 (2003) (Thomas, J., dissenting) (stating that the majority opinion in *Archer* upheld the settlement as the proper measure of damages but ignored the release provisions also included in the settlement agreement).

37. *Butner*, 440 U.S. at 55.

38. See *infra* notes 197–208 and accompanying text (asserting that *Archer* violates the *Butner* principle and exacerbates forum shopping).

include accord agreements,³⁹ the addition of liability and fraud admissions by the debtors in settlements,⁴⁰ and the formal adjudication of fraud claims to final judgment.⁴¹ Parties can avoid the creation of a novation by careful and thoughtful settlement construction. Competent counsel would have negotiated for a settlement agreement that would meet the needs of the client rather than constructing a settlement agreement with broad general releases that provides little or no protection in bankruptcy. Thus, the proper course of relief for the creditors in *Archer* was a malpractice action against their counsel, rather than filing suit against the debtors who had fairly bargained for the provisions within the settlement agreement.

This Note presents an in-depth analysis of the recent Supreme Court decision in *Archer* and proposes that the Court improperly reversed the Fourth Circuit decision. Part II outlines the circuit split surrounding this issue prior to *Archer*. Part III describes the Fourth Circuit's decision in *Archer*. This Part explains the Fourth Circuit's reliance on the novation theory and the emphasis placed on the public policy in favor of encouraging settlements. Part IV discusses the Supreme Court's reversal in *Archer* and the reasoning that focused on *Brown* as the governing precedent. Part V presents an analysis of the Supreme Court's decision in *Archer* and questions the Court's choice in governing precedent. This Part asserts that *Archer* failed to address the public policy in favor of settlements and the *Butner* principle, which emphasizes the necessity of uniform outcomes in state and bankruptcy court proceedings to avoid forum shopping. This Part also discusses whether either party's counsel should be held responsible for either the failed settlement or the Supreme Court reversal of *Archer*. Part VI states that the *Archer* decision was not the only means to protect the creditor as a victim of fraud and focuses on the alternative actions available to the creditors to protect the settlement while preventing the creation of a novation. This Note concludes by explaining why the Supreme Court's reversal in *Archer* was improper and how the creditors could have received

39. See *infra* notes 262–67 and accompanying text (discussing the accord agreement as a settlement agreement option that would have allowed the creditors in *Archer* to maintain the nondischargeable nature of the settlement without creating a novation).

40. See *infra* notes 257–61 and accompanying text (describing provisions of liability and statements of a *prima facie* fraud case that might be included in a settlement agreement to prevent the creation of a novation and to maintain the nondischargeable character of a settlement).

41. See *infra* notes 251–56 (stating that the most effective method of maintaining the nondischargeable nature of a debt obtained by fraud is to seek final judgment within a state court proceeding).

relief without pressing the courts to override contractual release provisions and the creation of a novation.

II. The Circuit Split Prior to *Archer v. Warner*

The prior case law concerning the applicability of the novation theory versus the bankruptcy courts' alleged right to look behind a settlement agreement created a splintered background for the Supreme Court's decision in *Archer*.⁴² Thus, an understanding of the circuit split is essential to a thorough analysis of the *Archer* decision. The starting point for this discussion is the majority approach, which is heavily influenced by *Brown v. Felsen (In re Brown)*⁴³ and endorses the bankruptcy court's ability to look behind the settlement agreement to determine if the underlying debt is fraudulent.⁴⁴

A. *Brown v. Felsen: Establishing the Majority Approach*

In *Brown*, the debtor and the creditor reduced a fraud suit in state court to a consent judgment.⁴⁵ The terms of the consent judgment included a stipulation that the debtor pay the creditor a fixed sum; however, neither the judgment nor the stipulation referred to the underlying fraud claim from the original lawsuit.⁴⁶ The debtor later filed for bankruptcy, and the creditor objected to the dischargeability of the debt, alleging that the debt arose from the debtor's fraud, one of the Bankruptcy Code's exceptions for discharge.⁴⁷

The debtor argued that *res judicata* barred further litigation on the underlying debt.⁴⁸ Pursuant to the debtor's argument, the bankruptcy court would be limited to the evidence in the state court record, which did not include any findings of fraud.⁴⁹ The debtor also asserted that the creditor had failed to

42. *Archer v. Warner (In re Warner)*, 538 U.S. 314 (2003). For a discussion of the *Archer* case, see *infra* notes 118–37 and accompanying text.

43. *Brown v. Felsen (In re Brown)*, 442 U.S. 127 (1979). For a discussion of the *Brown* case, see *infra* notes 45–54 and accompanying text.

44. Warren & Westbrook, *supra* note 13, at 16.

45. See *Brown*, 442 U.S. at 128 (discussing the state suit in which Felsen alleged that Brown had fraudulently induced Felsen to sign a loan guarantee).

46. *Id.*

47. *Id.* at 128–29.

48. *Id.* at 128–31.

49. *Id.* at 130 ("The bankruptcy court . . . confined its consideration to . . . the state-court record The [Court of Appeals for the Tenth Circuit] noted that neither the stipulation nor the judgment mentioned fraud").

obtain a stipulation in the consent judgment concerning fraud and that, due to this failure to act, the creditor should be barred from litigating issues that should have been decided in the state consent judgment.⁵⁰

Although the lower courts had upheld the dischargeable nature of the debt, the Supreme Court stated that "careful inquiry reveals that neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by foreclosing petitioner from submitting additional evidence to prove his case."⁵¹ The Court found that the bankruptcy policy interests in "honest dealing and honest conduct" required that the bankruptcy court have access to extrinsic evidence beyond the state court record to make an accurate determination of the nature of the debt.⁵² *Brown* also stated that the creditor was not attempting to bypass the consent judgment but was only responding to the new defense of bankruptcy, which the debtor had injected between the creditor and the repayment due.⁵³ The Court in *Brown* reversed the findings of the lower courts and permitted the bankruptcy court to consider extrinsic evidence concerning the underlying debt.⁵⁴

B. United States v. Spicer: Defining the Majority Approach in the D.C. Circuit

*United States v. Spicer (In re Spicer)*⁵⁵ provides a more in-depth and recent analysis of the majority approach. *Spicer* analyzed the nature of a settlement agreement between the United States (creditor) and Spicer (debtor), a real estate broker who had defrauded the government by misrepresenting realty down payments and helping buyers improperly qualify for FHA-insured mortgages.⁵⁶ After the debtor's criminal conviction for interstate transportation of money obtained by fraud and prior to the litigation of the civil fraud claim, the two

50. *Id.* at 132.

51. *Id.*

52. *Id.* at 138–39.

53. *Id.* at 133.

54. *Id.* at 138–39. Commenting on the majority opinion in *Brown*, Robert J. D'Agostino states, "Brown did not address the issue of whether the substitution of a contract debt for a debt sounding in tort, which would be nondischargeable under 11 U.S.C. § 523 (a)(2) created a novation." Robert J. D'Agostino, *Archer v. Warner: A Clarification*, NORTON BANKR. L. ADVISER 1, 2–3 (2003).

55. *United States v. Spicer (In re Spicer)*, 57 F.3d 1152 (D.C. Cir. 1995). For a discussion of the *Spicer* case, see *infra* notes 56–71 and accompanying text.

56. *Spicer*, 57 F.3d at 1154.

parties reached a settlement agreement.⁵⁷ The debtor agreed to pay the creditor \$339,000 as set forth in two promissory notes included in the settlement, and in return, the creditor released all civil fraud claims.⁵⁸ The settlement agreement did not contain any admission of liability by the debtor.⁵⁹

Two years after the execution of the agreement, the debtor filed for bankruptcy, and in turn, the creditor objected to the discharge of the debt.⁶⁰ The creditor claimed that the debt was nondischargeable because it had been obtained by fraud, an exception to discharge presented in Section 523(a)(2)(A) of the Bankruptcy Code.⁶¹ In response, the debtor argued that pursuant to *West v. Oltman (In re West)*,⁶² the settlement agreement served as a novation that released the original debt while creating a new contractual obligation.⁶³ Accordingly, the debtor claimed that the settlement agreement created a purely contractual obligation, and "ordinary contractual obligations, unlike debts for money or property obtained by fraud, are dischargeable in bankruptcy."⁶⁴

Although the *Spicer* court agreed that *West* supported the debtor's argument, it declined to follow the novation approach.⁶⁵ The novation theory "improperly elevates legal form over substance."⁶⁶ Indeed, the *Spicer* court claimed that "[s]ettlement makes the dishonest debtor no more honest, and no more entitled to the relief Congress intended to reserve for the honest debtor."⁶⁷ The court concluded that a bankruptcy court should analyze the circumstances behind the settlement agreement and focus on the "substance" of the original obligation to make an accurate determination as to whether the debt had been obtained through fraud.⁶⁸

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *West v. Oltman (In re West)*, 22 F.3d 775 (7th Cir. 1994). For a discussion of the *West* decision, see *infra* notes 81–94 and accompanying text.

63. *United States v. Spicer (In re Spicer)*, 57 F.3d 1152, 1155 (D.C. Cir. 1995).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1156.

68. *Id.* at 1157. The *Spicer* court stated that "a fraudulent debtor may not escape nondischargeability . . . merely by altering the *form* of his debt through a settlement agreement, whether or not the agreement includes an express release or waiver of the fraud claim." *Id.* at 1156. Thus, *Spicer* suggests that an express waiver or release is not determinative, which disregards the value of any expressed release or waiver in a contractual agreement.

The majority approach, heavily influenced by *Brown*, endorses the bankruptcy court's ability to look behind the settlement agreement to determine if the underlying debt is fraudulent and thus nondischargeable.⁶⁹ An accurate determination, according to *Brown*, requires an examination of the circumstances underlying a settlement agreement and the original debt.⁷⁰ *Spicer* reiterated the *Brown* holdings and further asserted that a change in the form of a debt does not permit the dishonest debtor to receive the benefits of discharge, which are limited to the "honest but unfortunate debtor."⁷¹

C. *The Minority Approach: Maryland Casualty Co. v. Cushing*

The minority approach, herein referred to as novation,⁷² stems from the Seventh Circuit's decision in *Maryland Casualty Co. v. Cushing*.⁷³ In *Maryland Casualty*, the court analyzed a promissory note in which the defendant agreed to make installment payments on a \$14,970 debt.⁷⁴ In exchange, the plaintiff expressly released all tort claims stemming from the defendant's original embezzlement debt.⁷⁵ At issue in the case was whether the promissory note debt was dischargeable in bankruptcy as a contractual obligation, or if the promissory note had retained the antecedent tort character of the embezzlement debt and, as such, was nondischargeable.⁷⁶

Maryland Casualty affirmed that "the general rule is that a promissory note is but evidence of indebtedness and does not discharge the debt for which it was given."⁷⁷ On the other hand, if the promissory note is expressly given and received as a release of the original debt—in this case, a waiver of the tortious debt claims—and the parties agree that the note serves as a new and substituting

69. Warren & Westbrook, *supra* note 13, at 16.

70. *Id.*

71. United States v. Spicer (*In re Spicer*), 57 F.3d 1152, 1155–56 (D.C. Cir. 1995).

72. The minority approach was originally referred to as the *Maryland Casualty* approach; however, more recent cases refer to the new promissory note as a "novation." For purposes of this Note, the minority approach will be labeled as novation throughout the discussion. See Kristopher Aungst, *Warner Splits the Circuits*, NORTON BANKR. L. ADVISER 12, 13 (2003) (stating that the Ninth Circuit "labeled this new note a novation," which discharged all claims arising out of the original obligation).

73. *Md. Cas. Co. v. Cushing*, 171 F.2d 257 (7th Cir. 1948). For a discussion of the *Maryland Casualty* case, see *infra* notes 74–80 and accompanying text.

74. *Maryland Casualty*, 171 F.2d at 258.

75. *Id.*

76. *Id.*

77. *Id.*

obligation for the original debt, then the promissory note "discharge[s]" the original debt.⁷⁸ *Maryland Casualty* concluded that the parties' acceptance of the note extinguished the "antecedent tort action" that had existed prior to the acceptance of the promissory note.⁷⁹ Thus, the court affirmed the holding of the lower court that the note served as a contractual obligation dischargeable in bankruptcy.⁸⁰

D. *West v. Oltman: Reaffirming the Novation Approach*

The Seventh Circuit refined the novation approach in *West v. Oltman* (*In re West*).⁸¹ The debtor in *West* signed a promissory note for \$75,000 in exchange for the creditor's general release of all claims against the debtor for any obligations other than the note.⁸² Thus, the creditor released the right to sue the debtor based on the obligations of the original debt, which was an embezzlement claim for over \$100,000.⁸³ Ten months later, the debtor filed for bankruptcy and attempted to discharge the promissory note as an unsecured debt.⁸⁴ The creditor objected to the discharge, alleging that the note was obtained by fraud and constituted a nondischargeable debt under the Bankruptcy Code.⁸⁵

Responding to the creditor's claims that the novation approach had been overruled, the *West* court made several important observations regarding *Maryland Casualty* and its relation to the growing number of opposition cases from other circuits.⁸⁶ First, *West* stated that the novation approach was consistent with *Greenberg v. Schools*,⁸⁷ a majority approach case, because the

78. *Id.* at 258–59.

79. *Id.*

80. *Id.*

81. *West v. Oltman* (*In re West*), 22 F.3d 775, 777–78 (7th Cir. 1994). For a discussion of the *West* case, see *infra* notes 82–94 and accompanying text. Describing the novation approach, Elizabeth Warren and Jay Westbrook state that the minority novation approach is a "contracts-rule-all" method, in which the underlying state contract law controls the determination of whether a voluntary settlement agreement and release create a novation and completely release the original tortious debt. Warren & Westbrook, *supra* note 13, at 16.

82. *West*, 22 F.3d. at 777.

83. *Id.*

84. *Id.*

85. *Id.*

86. See *id.* at 777–78 (addressing the distinctions and similarities between the *Maryland Casualty* approach and the reasoning in *Brown*, *Greenberg*, and *Spicer*).

87. *Greenberg v. Schools*, 711 F.2d 152 (11th Cir. 1983). In *Greenberg*, the Eleventh Circuit Court of Appeals considered whether a promissory note arising out of the settlement of a

creditor in *Greenberg* did not release the prior obligation, unlike the creditors in *Maryland Casualty* and *West*.⁸⁸ According to *West*, the "same is true of most of the lower court decisions upon which Mr. Oltman relies: because there was no release, the original debt was not extinguished by settlement."⁸⁹ *West* stated that the *Brown* decision was "immaterial" because it "addressed the preclusive effect of a state court judgment, not a creditor's voluntary release of a debtor."⁹⁰ The *West* court noted that only the *Spicer* case supported the creditor's position, but the court refused to follow the unpersuasive reasoning in *Spicer*.⁹¹

The *West* court asserted that the novation approach encourages settlement because a tortious debtor may be more likely to pay the injured party a greater sum in settlement if the settlement agreement includes a general release from all present and future claims arising from the tortious conduct at issue.⁹² Moreover, the enforcement of the contractual note instead of the tort claim did not create an "inequitable result in the bankruptcy context" because the creditor, *not the debtor*, "discharge[d]" the prior obligation.⁹³ Thus, *West* upheld the dischargeability of the promissory note because "no allegations of

civil action involving alleged fraud is a dischargeable debt in bankruptcy. *Id.* at 153. In the 1970s, *Greenberg* (the creditor) and *Schools* (the debtor) formed a corporation; however, *Greenberg* later sued *Schools* for fraud and misappropriation of corporate funds. *Id.* at 153–54. In a settlement agreement executed prior to trial, the debtor agreed to pay the creditor \$100,000, including a payment of \$10,000 immediately, with the rest secured by a promissory note. *Id.* at 154. After paying approximately half of the settlement agreement debt, the debtor defaulted on his payments, and the creditor brought suit on the promissory note. *Id.* Again, the parties reached a settlement agreement. *Id.* Shortly thereafter, the debtor filed for bankruptcy, and the creditor filed an objection to the discharge of the promissory note debt. *Id.* The debtor claimed that the valid settlement agreement extinguished the alleged fraud claim and that any type of relief granted to the creditor should be limited to the enforcement of the settlement agreement. *Id.* Furthermore, the debtor asserted that the exceptions to discharge should not apply because the debt in question flowed from the settlement agreement terms and not the original obligation. *Id.* In response to this argument, *Greenberg* stated that this type of approach would allow a debtor to simply alter the form of a fraudulent debt to receive the discharge relief granted by the Bankruptcy Act, and neither the Act nor the "cases construing the reach of the statute" support this type of outcome. *Id.* at 154–55. Thus, *Greenberg* declared that the bankruptcy court should evaluate the circumstances behind the settlement to determine whether the debt had been obtained from actual fraudulent conduct, and if so, then the bankruptcy court should hold the debt nondischargeable as a debt obtained by fraud. *Id.*

88. *West v. Oltman (In re West)*, 22 F.3d 775, 777 (7th Cir. 1994).

89. *Id.*

90. *Id.* at 778.

91. *Id.*

92. *Id.*

93. *Id.*

fraud surround the note, and the note substituted a contractual obligation for a tortious one."⁹⁴

III. Archer v. Warner: The Fourth Circuit Takes a Stand

The Fourth Circuit faced a divided field of circuit opinions when it heard *Archer v. Warner (In re Warner)*,⁹⁵ and as expected, the *Archer* case forced the Fourth Circuit to determine which approach to use. In *Archer*, Arlene and Leonard Warner sold a manufacturing corporation to the Archers, and later that year, the Archers sued the Warners for fraudulent misrepresentation during the sale.⁹⁶ The Archers later amended the complaint to include fraud and emotional distress, among other claims.⁹⁷ Prior to litigation of these state claims, the parties reached a settlement agreement, which provided that the Warners would give the Archers a lump cash payment and a \$100,000 promissory note.⁹⁸ In exchange, the Archers signed both a "general and mutual release of all pending and future claims" arising out of the settled litigation.⁹⁹ The settlement agreement expressly stated that nothing in the agreement, including the money settlement, should be interpreted as an admission of wrongdoing or liability.¹⁰⁰

Although the Archers received the initial cash payment from the Warners, the Warners later defaulted on the promissory note and filed for bankruptcy.¹⁰¹ In response, the Archers objected to the dischargeability of the promissory note, alleging that the debt had been obtained by fraud and was thus nondischargeable under Section 523(a)(2)(A) of the Bankruptcy Code.¹⁰² To provide grounds for the adversary complaint, the Archers "incorporated by reference" in the complaint the various allegations raised in the state court suit.¹⁰³ Arlene Warner¹⁰⁴ asserted that the Archers could not resurrect the

94. *Id.* at 777.

95. *Archer v. Warner (In re Warner)*, 283 F.3d 230 (4th Cir. 2002), *rev'd*, 538 U.S. 314 (2003). For a discussion of the *Archer* decision, see *infra* notes 96–117 and accompanying text.

96. *Archer*, 283 F.3d at 233.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Perhaps of less importance, "[t]here was no mention of bankruptcy in the settlement package." *Id.*

101. *Id.* at 233–34.

102. *Id.* at 234.

103. *Id.*

104. *Id.* at 235 n.5. According to the *Archer* court, "Arlene Warner contested this issue of

fraud claims from the original state suit because all state claims had been completely settled.¹⁰⁵ The bankruptcy court upheld Warner's affirmative defense and denied the Archers' objections to discharge of the note.¹⁰⁶ The district court affirmed the bankruptcy court's holdings and "concluded that the releases and settlement agreement created a novation, substituting a dischargeable contract debt for a fraud-based tort claim."¹⁰⁷

In its analysis of the prepetition settlement agreement, the Fourth Circuit discussed the circuit split and outlined the opposing viewpoints.¹⁰⁸ The Fourth Circuit stated that the novation approach "favors the basic principle of encouraging settlements by way of freedom to enter into settlement agreements, regardless of the nature of the claim subject to the settlement agreement."¹⁰⁹ Without this type of contractual freedom the "incentive to settle is gone."¹¹⁰ Thus, the novation approach presents the "better reasoned decisions" because Congress did not "intend . . . to discourage the settlement of claims."¹¹¹

The Fourth Circuit chose to apply the novation theory¹¹² and examined the terms of the settlement agreement to determine whether the creditors' nondischargeability claims had been released.¹¹³ The creditors urged the court to examine the underlying basis for the debt, but the court insisted that the novation theory only requires that a court analyze the "validity and completeness of the bargained for agreement and release."¹¹⁴ The court determined that the release provisions in the settlement had released every state law claim.¹¹⁵ Therefore, the prepetition settlement "extinguished the

nondischargeability in the bankruptcy court[.]" but her husband, Leonard Warner, did not. *Id.* This factor did not affect the outcome of the case. *Id.*

105. *Id.* at 235.

106. *Id.*

107. *Id.*

108. *Id.* at 236.

109. *Id.*

110. *Id.*

111. *Id.*

112. Commenting on the novation theory, the Fourth Circuit stated that "[w]hile novation is sometimes interpreted to mean the replacement of a third party to an existing contract . . . we, like the Ninth Circuit, use the term in the context of § 523(a)(2)(A) to express the substitution of a contract claim for a tort claim through a settlement agreement." *Id.* at 236 n.8.

113. *Id.* at 236.

114. *Id.*

115. The general release stated that the Archers "do hereby release and forever discharge the [Warners] from any and every right, claim, or demand . . . arising out of or relating to the matter in Guilford County Superior Court, excepting only obligations under a Note and deeds of

Archers' subsequent nondischargeability claim under Section 523(a)."¹¹⁶ The Fourth Circuit affirmed the lower courts and upheld the dischargeable character of the note.¹¹⁷

IV. The Supreme Court Reversal in Archer

Seeking to unify the split circuit opinions, the Supreme Court accepted the *Archer* issue and handed down its *Archer*¹¹⁸ decision in March 2003. The Supreme Court agreed with the Fourth Circuit that the settlement agreement released all state law claims except for the debt promised in the promissory note; however, the Court stated that this finding did not end the inquiry.¹¹⁹ The Court further agreed that the creditor's settlement may have created a novation.¹²⁰ On the other hand, *Archer* stated that this possibility of novation should not prevent the creditors from proving that the promissory note in the settlement agreement arose out of fraud and was nondischargeable.¹²¹ The *Archer* Court further stated that the main question was whether the settlement note could also be a debt obtained by fraud, as described within the exceptions for discharge in bankruptcy.¹²²

Analyzing the nondischargeability question, the Court stated that *Brown* was the controlling precedent and, indeed, discussed at great length the similarities between the two cases.¹²³ The primary difference, according to *Archer*, was that the debt in *Brown* was embodied in a consent judgment rather than a settlement agreement.¹²⁴ This difference in form was not "determinative" because a debt contained in a consent judgment is no less obtained by fraud than a debt contained in a settlement agreement.¹²⁵

trust executed contemporaneously herewith." *Id.* at 237.

116. *Id.*

117. *Id.*

118. *Archer v. Warner (In re Warner)*, 538 U.S. 314 (2003). For a discussion of the *Archer* case, see *infra* notes 119–37 and accompanying text.

119. *Archer*, 538 U.S. at 318–19.

120. *Id.* at 323.

121. *Id.*

122. *Id.* at 319.

123. *Id.* at 319–22. Commenting on the *Archer* decision, Warren and Westbrook state that, "Justice Breyer is not deeply engaged by this fundamental tension [in the split circuit opinions]. He relies heavily on *Brown v. Felsen*, a 1979 case that chews up about 90 percent of his brief discussion in *Archer*." Warren & Westbrook, *supra* note 13, at 16.

124. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 321 (2003).

125. *Id.* "The dischargeability provision applies to all debts that 'aris[e] out of' fraud. A

The *Archer* Court simply stated that the validity of the *Brown* holding meant that the novation theory embraced by the Fourth Circuit was wrong.¹²⁶ The Court stated that the stipulation in *Brown*'s consent judgment created the same kind of "novation" at issue in *Archer*; however, the Court in *Brown* held that the bankruptcy court should examine the circumstances behind the consent judgment to determine whether the original debt presented a valid fraud claim.¹²⁷ The Court in *Archer* found that if the Fourth Circuit's novation theory had been correct, then the debt in *Brown* would have been dischargeable.¹²⁸

Moreover, the *Archer* decision stated that the policy language in *Brown* favored the Archers' claims for nondischargeability.¹²⁹ In particular, the Court referred to the following statement from *Brown*: "[T]he mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt."¹³⁰ The *Archer* Court asserted that the substitution of "settlement" for "judgment" in this statement aptly described the *Archer* case.¹³¹ In addition, *Archer* embraced *Brown*'s reasoning that the substitution of the word "judgments" for "liabilities" in the Bankruptcy Code meant that Congress intended the broadest range of inquiry concerning potentially nondischargeable debts.¹³² This determination should occur in the bankruptcy court because the bankruptcy and dischargeability issues "are not directly in issue [in state litigation] and neither party has a full incentive to litigate them."¹³³ *Archer* did not address the additional grounds

debt embodied in the settlement of a fraud case 'arises' no less 'out of' the underlying fraud than a debt embodied in a stipulation and consent decree." *Id.* (citations omitted); see *infra* notes 154–60 and accompanying text (comparing consent judgments and voluntary settlement agreements and discussing whether the differences are "determinative" in *Archer*).

126. *Archer*, 538 U.S. at 320. Explaining why the *Brown* decision invalidates the novation theory, the Court stated:

The reduction of *Brown*'s state-court fraud claim to a stipulation (embodied in a consent decree) worked the same kind of novation as the "novation" at issue here Yet, in *Brown*, this Court held that the Bankruptcy Court should look behind that stipulation to determine whether it reflected settlement of a valid claim for fraud.

Id.

127. *Id.*

128. *Id.*

129. *Id.* at 320–21.

130. *Id.* (quoting *Brown v. Felsen*, 442 U.S. 127, 138 (1979)).

131. *Id.* at 321.

132. *Id.*

133. *Id.* (quoting *Brown*, 442 U.S. at 134).

of judgment raised by Warner because "the Court of Appeals did not determine the merits of either argument, both of which are, in any event, outside the scope of the question presented and insufficiently addressed below."¹³⁴ The Court reversed and remanded the case, permitting the Fourth Circuit to determine whether the alternative grounds for judgment raised by Warner were meritorious.¹³⁵

The remaining question is whether *Archer* successfully resolves the heavily debated novation issue and circuit split, or if *Archer* creates a contractual quagmire for parties seeking to settle a fraud-related claim. According to Elizabeth Warren and Jay Westbrook, both critics of *Archer*, the "Supreme Court has now settled an important (and hotly disputed) question about the binding effect of settlements—and they came out with a distinctly not-binding tilt."¹³⁶ Other scholars have noted that the Supreme Court "waffled" in this decision because the Court "soundly rejected the novation theory as applied by the Fourth Circuit, but then acknowledged that the settlement agreement and releases 'may have worked a kind of novation.'"¹³⁷

134. *Id.* at 322. Warner raised the following alternative arguments, which the Supreme Court refused to address:

[Warner] says that the settlement agreement and releases not only worked a novation by converting potential tort liabilities into a contract debt, but also included a promise that the Archers would not make the present claim of nondischargeability for fraud. She adds that, in any event, because the Archers dismissed the original fraud action with prejudice, North Carolina law [jurisdiction of the original state fraud claim] treats the fraud issue as having been litigated and determined in her favor, thereby barring the Archers from making their present claim on grounds of collateral estoppel.

Id.

135. *Id.* at 322–23. If the Supreme Court has remanded the case for the Fourth Circuit to make a determination about the collateral estoppel argument and whether the settlement had preclusive intent, then the creditors are still in danger of losing the settlement. According to Rebecca Callahan and Lisa Mathaisel:

[B]ecause the Court declined to address the collateral estoppel argument raised by the debtor with respect to the legal effect of a dismissal with prejudice filed in connection with the settlement of a fraud claim, and gave the Fourth Circuit free reign, on remand, to determine this issue if properly raised and preserved, it is not clear whether the ability to maintain a Section 523 action will be meaningful in terms of a creditor's ability to ultimately have the settlement obligation excepted from discharge.

Rebecca Callahan & Lisa Mathaisel, *Contracting Around the Debt Discharge Under Section 523(a)(2)(A)*, 27 CAL. BANKR. J. 40, 51 (2003).

136. Warren & Westbrook, *supra* note 13, at 16.

137. Callahan & Mathaisel, *supra* note 135, at 50. Discussing the effects of the *Archer* decision, Callahan and Mathaisel note the following:

The Supreme Court in *Archer* left unanswered a variety of questions and raised other concerns, such as the freedom to create lasting and effective contractual releases, which the following Part discusses.

V. Analyzing *Archer*: Did the Supreme Court Make the Right Choice?

This Part explores the issues in *Archer* and the unanswered questions raised by this decision. The dissenting opinion in *Archer* is the starting point for this discussion, and the dissent asserted that the majority overlooked the critical difference between *Archer* and *Brown*. This Part asserts that *Brown* was not the proper governing precedent and that the Court ignored the important public policy that encourages settlements. In addition, *Archer* failed to address the *Butner* principle, which requires a uniform outcome in bankruptcy and state court proceedings to prevent forum shopping. This Part also suggests that counsel for both parties may be at fault for the failed settlement agreement and the Supreme Court's reversal of the Fourth Circuit's decision. This analysis concludes that *Archer* failed to create a lasting circuit split resolution and may have created a contractual quagmire for settled fraud claims in bankruptcy.

A. The Dissent Speaks Out

In responding to the arguments of the majority opinion, the dissent (Justices Thomas and Stevens) focused on the factors that set *Archer* apart from *Brown* and asserted that the Court should have reached a different outcome given the contractual arrangement in *Archer*.¹³⁸ The majority claimed that "no significant difference" existed between *Brown* and *Archer*; however, the dissent argued that "the blanket release" in *Archer* was a

The *Archer* decision offers little guidance as to what the creditor must do to obtain a judgment for nondischargeable debt other than to suggest that the simple inclusion of a statement in the settlement agreement that the debtor's obligations thereunder arise from settlement of a fraud claim might be enough to bring the obligations within the exception provisions of Section 523(a)(2)(A) *Archer* also leaves unanswered the question as to what legal effect should be given to settlement agreements which resolve fraud claims but are silent on issues of fraud and debt discharge or how the lower courts should deal with those issues once the Section 523 action is filed.

Id. at 50–51.

138. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 323–25 (2003) (Thomas, J., dissenting).

"critical difference" between *Archer* and the consent judgment at issue in *Brown*.¹³⁹ Indeed, the *Archer* release clearly illustrated that the parties intended to settle not only issues relating to alleged fraud but also any other claims relating to the state litigation except for the promissory note embodied in the agreement.¹⁴⁰ The dissent stated that the circumstances in *Archer* aligned with *West* and the novation theory.¹⁴¹ Thus, according to the dissent, *Brown* was not the proper governing precedent for the particular set of circumstances in *Archer*.¹⁴²

Building upon this argument, the dissent stated that a creditor must present a "causal nexus between the fraud and debt" to prove that a debt is

139. *Id.* at 324 (Thomas, J., dissenting). In addition, Justice Thomas stated, "[b]ased on the sweeping language of the general release, it is inaccurate for the Court to say that the parties did not 'resolve the issue of fraud.'" *Id.* at 325 (Thomas, J., dissenting).

140. *Id.* (Thomas, J., dissenting). In contrast, the consent judgment in *Brown* did not include an express release of the all claims arising from the original obligation. *Brown v. Felsen (In re Brown)*, 442 U.S. 127, 128 (1979).

Moreover, the right to object to the dischargeability of a debt under § 523(a)(2) is a right that creditors may waive. Respondent's Brief at 31–32, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). According to the Bankruptcy Code, a creditor has sixty days after the first meeting of creditors to request a dischargeability hearing. 11 U.S.C. § 523(c)(1) (2000). If the creditor does not request the hearing within that time period, the creditor forfeits the claim. *Id.* The creditor does not forfeit the right to object to dischargeability for all debts under this provision. Instead, the forfeiture described in § 523(c)(1) applies only to the dischargeability exceptions described in §§ 523(a)(2), (4), (6), and (15). *Id.* Given this guideline in the Bankruptcy Code, "presumably, creditors may choose . . . to forgo an assertion of nondischargeability. There is no suggestion anywhere in the Code that the bankruptcy court has either the power or the duty to override that choice." Respondent's Brief at 31–32, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). The dissent in *Archer* asserted that "petitioners [Archers] have failed to point to any provision of the Bankruptcy Code that specifically bars a creditor from entering into an agreement that impairs its right to contest dischargeability." *Archer*, 538 U.S. at 327 n.2 (Thomas, J., dissenting). Thus, the releases in *Archer* were not inconsistent with the Bankruptcy Code because, as noted in the *West* decision, the creditor—not the debtor—has voluntarily discharged the prior obligation. See *supra* notes 78–90 (describing the *West* court's reasoning and decision).

141. Referring to *West*, the dissent stated the following:

The parties here executed a blanket release, rather than entered into a consent judgment. And in my view, "if it is shown that [a] note was given and received as payment or waiver of the original debt and the parties agreed that the note was to substitute a new obligation for the old, the note fully discharges the original debt, and the nondischargeability of the original debt does not affect the dischargeability of the obligation under the note." That is the case before us, and, accordingly, *Brown* does not control our disposition of this matter.

Archer, 538 U.S. at 324 (Thomas, J., dissenting) (quoting *West v. Oltman (In re West)*, 22 F.3d 775, 778 (7th Cir. 1994)).

142. *Id.* (Thomas, J., dissenting).

nondischargeable in bankruptcy.¹⁴³ The causal nexus can be severed by "certain intervening events—otherwise called superseding causes" that in turn "cut off all liability,"¹⁴⁴ and the settlement agreement served as such a superseding event.¹⁴⁵ As a result, the only debt left to bankruptcy had not been obtained by fraudulent conduct but rather was the result of an informed and voluntary action by the parties.¹⁴⁶

The creditors' actions throughout the litigation process further supported this conclusion.¹⁴⁷ The creditors relied on the fixed sum in the settlement agreement as their stated recovery, rather than the significantly higher amount of damages that had been alleged during the state fraud proceedings.¹⁴⁸ The dissent asserted that "this crucial fact demonstrates that petitioners [the creditors] seek to recover a debt based only in contract, not in fraud."¹⁴⁹ The majority did not explain why it permitted the creditors to use the promissory note amount for the "debt they seek to recover but not for the character of the debt."¹⁵⁰ The dissent stated that neither precedent nor the Bankruptcy Code sanctions such a discriminatory implementation of a contractual agreement.¹⁵¹

143. *Id.* at 325 (Thomas, J., dissenting).

144. *Id.* at 326 (Thomas, J., dissenting) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).

145. *Id.* at 327 (Thomas, J., dissenting).

146. *Id.* (Thomas, J., dissenting). In support of this argument, the dissent noted:

Petitioners' own actions in the course of this litigation support this conclusion. Throughout the proceedings below and continuing in this Court, petitioners have sought to recover only the amount of the debt set forth in the settlement agreement, which is lower than the total damages they allegedly suffered as a result of respondent's alleged fraud.

Id. (Thomas, J., dissenting).

147. *Id.* (Thomas, J., dissenting).

148. *Id.* (Thomas, J., dissenting).

149. *Id.* (Thomas, J., dissenting).

150. *Id.* at 328 (Thomas, J., dissenting).

151. *Id.* (Thomas, J., dissenting). Discussing this point, Warren and Westbrook state that the situation might be described in the following manner:

The majority opinion suggests that someone may pay \$50 for a dog and his bowl, but discover that the law says that all he bought was the bowl. So someone settling a claim may believe that he is settling both the kind of claim and the dollar value, only to discover that the court says only the dollar value was settled. The majority in *Archer* says the dog (dischargeability) is never for sale. People who like to do everything by contracts would think that is a pretty lousy outcome. In that sense, Justice Breyer's opinion is very important. It suggests that those bankruptcy principles are bedrock—and that they override contractual arrangements to the contrary.

B. Is *Brown* the Proper Governing Precedent?

As the *Archer* dissent noted, the use of *Brown* as the governing precedent in *Archer* is not a decision immune from criticism.¹⁵² One of the primary differences between *Archer* and *Brown* is that *Brown* focused on a debt embodied in a consent judgment and the principles of res judicata, as opposed to the expressed mutual and general releases included in the *Archer* settlement agreement.¹⁵³ Thus, a central question is whether the consent judgment and the settlement agreement are synonymous. If the two are synonymous, how can the majority reconcile the general and mutual releases in *Archer* with the expressed lack thereof in *Brown*?

A consent judgment is entered by a court with the mutual agreement of the parties to execute the settlement of an action.¹⁵⁴ Despite the contractual characteristics of a consent judgment, it is not "simply a contract entered into between private parties seeking to effectuate parochial concerns," but a "judicial act."¹⁵⁵ The Supreme Court has recognized that "consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes."¹⁵⁶ Furthermore, parties may prefer to settle their conflicts by consent judgment rather than by a private settlement agreement because of certain advantages, such as it is "easier to obtain enforcement of a consent decree because it will be unnecessary to prove many facts that would otherwise have to be shown in order to establish the validity of an ordinary contract."¹⁵⁷

Warren & Westbrook, *supra* note 13, at 16.

152. See *supra* notes 138–51 and accompanying text (describing the dissenting opinion in *Archer*).

153. See *supra* notes 124–25 and accompanying text (stating that the Supreme Court in *Archer* found that the primary difference between *Archer* and *Brown* was that the debt in *Brown* was embodied in a consent judgment rather than a settlement agreement).

154. 46 AM. JUR. 2d *Judgments* § 207 (1994). "Although a consent decree embodies or represents an agreement of the parties, and thus in some respects is contractual in nature, it is an agreement . . . that is subject to the rules generally applicable to other judgments and decrees." *Id.*

155. *Id.*

156. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (quoting United States v. ITT Cont'l Baking Co., 420 U.S. 223, 235–37 (1975)).

157. *Id.* at 524 n.13 (quoting Brief for National League of Cities *et al.* as *Amici Curiae* 25). In addition, the following advantages stem from a consent judgment as opposed to a private settlement agreement:

A court that maintains continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures. And it is likely to be easier to

As a hybrid of judgments and contract settlements, the consent judgment is not interchangeable with a settlement agreement.¹⁵⁸ Indeed, the consent judgment or decree "has the attributes of a judicial order because it is entered by a court, is enforceable by citation for contempt of court and may be modified in certain circumstances even over the objections of a party."¹⁵⁹ Despite the dissimilarities in creation, enforcement, and modification of the two types of agreements, the Court in *Archer* stated that the difference in form was not "determinative."¹⁶⁰

Warren and Westbrook state that a distinction between settlement agreements and consent judgments may be "sustained on the policy ground that we trust state court process, but we do not trust state courts to be careful about the bankruptcy implications of a state consent judgment or settlement contract."¹⁶¹ The state courts may have sufficient cause to be cautious about the settlement of an alleged fraud claim, but "the settlement recitals that would preclude discharge under § 523 are largely irrelevant under state law, so we can't expect state judges to police the process for the protection of debtors or of creditors like the Archers."¹⁶² Indeed, the intricacies of a settlement agreement that would protect a creditor or debtor in bankruptcy present a complex matter that can be handled more effectively in a private settlement agreement. Because contracting parties may possess a greater deal of expertise with these types of issues and may place greater care into the creation of a settlement agreement, the courts may properly view the settlement agreement in a different light than the consent judgment.¹⁶³

channel litigation concerning the validity and implications of a consent decree into a single forum—the court that entered the decree—thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations.

Id. (quoting Brief for National League of Cities *et al.* as *Amici Curiae* 25).

158. *See id.* at 519 (describing the "hybrid nature" of consent judgments and discussing whether consent judgments require the same treatment as judicial orders).

159. Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL FORUM 327, 334.

160. *See supra* notes 124–25 and accompanying text (discussing the *Archer* Court's statement that the differences between a consent judgment and settlement agreement were not "determinative").

161. Warren & Westbrook, *supra* note 13, at 61.

162. *Id.*

163. *See supra* note 156 and accompanying text (stating that consent judgments and settlement agreements have varying characteristics that permit different treatment for different purposes).

Another pertinent factor to consider is whether the blanket release in *Archer* creates an irreconcilable chasm between *Brown* and *Archer*.¹⁶⁴ Notably, "a general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution which were within the contemplation of the parties."¹⁶⁵ The *Archer* settlement contained both a mutual and a general release of all claims underlying the state litigation, whereas the consent judgment in *Brown* did not include any type of release.¹⁶⁶ Attempting to synthesize the two cases, the Court stated that res judicata in *Brown* provided the same type of "blanket release" found in the *Archer* settlement agreement.¹⁶⁷

The *Archer* Court further stated that the releases failed to establish that the "parties meant to resolve the *issue* of fraud," even though the Court agreed with the Fourth Circuit that the agreement fully released each and every state claim except for the promissory note.¹⁶⁸ Neither release provision specifically stated "fraud" as a released claim; however, the general release did refer to any "'right[s], claim[s], or demand[s]' related to the state-court litigation 'excepting only obligations under [the] Note and deeds of trust.'"¹⁶⁹ This type of general release includes all claims and demands that are within the contemplation of the parties at the time of execution of the settlement agreement.¹⁷⁰ Subsequently, the *Archer* fraud claim falls into this category of released claims. The *Brown* consent judgment did not contain a similar provision, nor does res judicata sufficiently fulfill the same role as a contractual release.¹⁷¹

164. According to Justice Thomas's dissent in *Archer*, the Supreme Court "fail[ed] to address" the blanket release in the *Archer* settlement agreement, which Thomas viewed as a "critical difference" between *Archer* and *Brown*. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 324 (2003) (Thomas, J., dissenting).

165. 66 AM. JUR. 2d *Release* § 28 (2001). In addition, "[a] 'general release' not only settles enumerated specific differences but claims of every kind or character, known and unknown." *Id.* at n.1 (citing *Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723 (4th Cir. 1997)).

166. See *Archer*, 538 U.S. at 318–22 (discussing the *Archer* settlement agreement and comparing it to the consent judgment in *Brown*).

167. *Id.* at 321.

168. *Id.* at 322.

169. *Id.* at 324 (Thomas, J., dissenting) (quoting the *Archer* settlement agreement, App. 67).

170. See *supra* note 165 and accompanying text (discussing the scope of a general release).

171. Analyzing the general release in the *Archer* settlement agreement, Justice Thomas stated that the release served as the "critical difference" between *Archer* and *Brown*. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 324 (2003) (Thomas, J., dissenting). Furthermore, Justice Thomas found that *Brown* did not "address the question presented in the case—whether a

The *Brown* decision lacks applicability to *Archer*.¹⁷² The contractual aspects of *Archer* have far-reaching consequences that should not be interpreted from the perspective of *Brown*, a *res judicata* decision that circuits adopting the novation approach failed to find controlling or even applicable.¹⁷³ Furthermore, a member of the Court noted in the closing of oral arguments in *Archer* that "there's nobody in the room to defend the position that . . . was taken by the question presented, namely that a novation—a novation is all you need. I think that's, at least, an arguable position, but . . . nobody seems to want to . . . discuss the issue on . . . which we took the case."¹⁷⁴ The matter at issue in *Archer* is novation, and *Brown* does not mention this concept, discuss the approach taken by circuits that apply the novation theory, or even discuss the proper construction of contractual releases within the bankruptcy context.¹⁷⁵ As such, *Brown* is not the proper governing precedent for *Archer*, even though the two situations may possess similarities.

C. Settlement Incentives and Public Policy: What Happens After *Archer*?

The Fourth Circuit's decision in *Archer* emphasized the public policy supporting settlements, but the Supreme Court did not discuss the relevance of this policy or analyze *Archer* under this public policy framework.¹⁷⁶ The law encourages settlement by parties in conflict "in the interests of alleviating discord and promoting certainty . . . first, by enforcing promises made to claimants in settlement of their claims; and second, by foreclosing any action

creditor may, *without the participation of the state court*, completely release a debtor," from all claims arising out of a "state-court fraud action." *Id.* (Thomas, J., dissenting).

172. *Id.* (Thomas, J., dissenting).

173. See, e.g., *Key Bar Invs., Inc. v. Fischer (In re Fischer)*, 116 F. 3d 388, 390–91 (9th Cir. 1997) (stating that "these 'res judicata' cases [referring to *Brown*] do not control our case, which involves a voluntary agreement between two parties that created a novation, releasing either side from liability arising from the original contract").

174. Oral Argument Transcript at 56–57, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). The Archers and Warner both spoke briefly on novation when the Supreme Court Justices asked about the issue; however, Warner relied largely on an issue preclusion argument. Neither party argued that novation alone barred the bankruptcy court from looking behind the settlement agreement. Responding to the Court's statement that no one in the room wanted to discuss novation, the Archers stated, "we agree, as we say in our reply brief, that the principal basis of the decision below has been abandoned by [Warner] here." *Id.* at 57.

175. See *supra* note 54 (noting that *Brown* does not address the issue of novation in which a contractual obligation could completely discharge the original tort debt).

176. The majority opinion in *Archer* did not include any references to the public policy that encourages settlements and the enforcement thereof of valid settlements. *Archer*, 538 U.S. at 316–23.

by the claimant on the claim that has been settled."¹⁷⁷ Settlement also serves a vital role within the bankruptcy process.¹⁷⁸ Furthermore, one of the main considerations underlying the novation line of cases is the public policy in favor of settlement agreements.¹⁷⁹ The novation approach, according to the Fourth Circuit, encourages settlement by supporting the freedom to enter into contractual agreements "regardless of the nature of the claim subject to the settlement agreement."¹⁸⁰ Otherwise, the underlying motivation to settle is gone.¹⁸¹

Given that settlement by disputing parties is encouraged by the courts, why did the Supreme Court not consider this policy in *Archer*? As noted by Reynaldo Valencia, "[s]uch negotiated outcomes save the bankruptcy estate the time and expense of protracted proceedings, perhaps even litigation, regarding the disputed issue or issues."¹⁸² Yet the Court did not analyze how the ineffectiveness of contractual releases in bankruptcy might affect debtors' reactions to settlement offers from creditors in the future.¹⁸³ What incentive

177. FARNSWORTH, *supra* note 7, § 2.12. In addition:

[T]his policy [in favor of settlements] supports the enforceability of a promise made to a claimant that is willing to settle a disputed claim, even if the claim later turns out to be invalid. The same policy suggests that a claimant who has settled a claim should be foreclosed from later pursuing it in violation of the settlement agreement.

Id. § 4.23.

178. See Reynaldo Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425, 430–31 (1999) (discussing the importance of settlement within bankruptcy). Explaining the importance of settlements and compromise in bankruptcy, Valencia states that:

The courts are uniform in their respect, desire, and appreciation of settlements in a bankruptcy case. Indeed, the United States Supreme Court has noted, "[i]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts." The leading bankruptcy treatise, *Collier on Bankruptcy*, similarly notes that "[c]ompromises are favored in bankruptcy . . ."

Id. (citations omitted); see also Michael & Pacewicz, *supra* note 9, at 643 (noting that "[c]ompromise is the linchpin of bankruptcy practice . . . [w]ithout it, the business of the bankruptcy courts would slow considerably, if not come to a screeching halt").

179. See *supra* notes 177–78 and accompanying text (noting the importance of encouraging settlement and compromise).

180. *Archer v. Warner* (*In re Warner*), 283 F.3d 230, 236 (4th Cir. 2002), *rev'd*, 538 U.S. 314 (2003).

181. *Id.*

182. Valencia, *supra* note 178, at 430 (citations omitted).

183. The Court did not expressly say that the releases have no validity in bankruptcy; however, the Court stated that the settlement agreement—including the releases—did not resolve the issue of fraud or show the parties' intent to release the fraud claims. In other words,

does a debtor have to settle with a creditor if the promised release from the creditor fails to protect the debtor from the resurrection of fully released claims?¹⁸⁴ After *Archer*, the creditor might have an added incentive to agree to release all claims in exchange for a fixed sum because the settlement will be upheld in bankruptcy proceedings while the content and purposes of the general releases will be ignored. Has the Court increased the probability that debtors and creditors alike will pursue litigation until final judgment because voluntary contractual agreements have been selectively applied in *Archer*?

D. Does Archer Encourage Forum Shopping?

Another unanswered question that arises from the Supreme Court's decision in *Archer* is whether the Court's decision will increase forum shopping. This problem occurs because bankruptcy provides a separate forum apart from state courts for the enforcement of debt collection and possibly a different outcome than a state collection suit.¹⁸⁵ The concept of forum shopping "is commonly defined as attempting to have one's case heard in the forum where it has the greatest chance of success" and is largely based on the subjective intent of the parties.¹⁸⁶ Thus, if a creditor foresees a more favorable outcome in debt collection proceedings in the federal bankruptcy court versus

the Court may have ruled the broad and general language of the releases ineffective against the fraud claim in the bankruptcy context even though a state court would likely hold that the releases covered all of the state claims, including fraud. According to Warren and Westbrook:

Whether he says so explicitly or not, Justice Breyer [writer of the majority opinion in *Archer*] is taking a position on the role contracts may play to get around the rules of bankruptcy. We wonder if it might work the other way—that is, what if the debtor wants to get out of any pre-bankruptcy deal that affects basic bankruptcy principles?

Warren & Westbrook, *supra* note 13, at 61.

184. See Aungst, *supra* note 72, at 15 (noting that "[i]f the claim remains nondischargeable, despite a clear settlement agreement to the contrary, the nearly bankrupt debtor has little incentive to settle").

185. See Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 824–26 (1987) (examining the problems of forum shopping within bankruptcy and stating that "the existence of the two courthouses [two different forums for enforcement of debt collection] does not mean that substantive legal questions should be treated differently in the two places"); William J. Burnett, *Prepetition Waivers of the Automatic Stay: Automatic Enforcement Equals Automatic Trouble*, 5 J. BANKR. L. & PRAC. 257, 261 (1996) (stating that creditors' rights as created by nonbankruptcy law "should be respected in federal bankruptcies, because failure to do so could lead to forum shopping").

186. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 14.

state court, the creditor may attempt to force the debtor into involuntary bankruptcy to enjoy the benefits of the favorable outcome that was not available in state court proceedings.¹⁸⁷

Forum shopping within bankruptcy is a problem recognized by the courts, as illustrated by *Butner v. United States*.¹⁸⁸ In *Butner*, the Supreme Court held that nonbankruptcy law determines property interests in bankruptcy and stated that "the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued."¹⁸⁹ *Butner* stressed that bankruptcy courts should not deviate from nonbankruptcy rules unless bankruptcy policies demand a different outcome.¹⁹⁰ As a result, bankruptcy courts have a responsibility to follow state substantive law to

187. See *Davis v. Davis (In re Davis)*, 170 F.3d 475, 481 (5th Cir. 1999) (discussing the petitioner's proposed interpretation of § 522(c) of the Bankruptcy Code and stating that "the impact of such a construction would put the preferred creditors in a better position after the debtor has filed bankruptcy than before and may create an incentive for filing involuntary bankruptcies"). In addition, *Davis* stated that the proper interpretation of the Bankruptcy Code section at issue allows creditors "holding such claims to proceed against the property after bankruptcy based on the rights and remedies they would have had under state law if bankruptcy had not been filed." *Id.*

188. *Butner v. United States*, 440 U.S. 48 (1979). In *Butner*, the Supreme Court considered whether a mortgagee's rights to rent and profits from the property of the bankrupt mortgagor's estate should be determined according to state law even though the decision had fallen into the federal bankruptcy court. *Id.* at 49. The dispute arose between the bankruptcy trustee who had been appointed to collect all rents from the property and the mortgagee who claimed the right to the collected funds. *Id.* at 49-51. Analyzing the facts of the case, the Supreme Court asserted that the "minority of courts which have rejected state law have not done so because of any congressional command . . . [r]ather, they have adopted a uniform federal approach to the question." *Id.* at 55. Despite this intention, the Court stated that property interests are "created and defined by state law," and "[u]niform treatment of property . . . within a State serves to reduce uncertainty, to discourage forum shopping." *Id.* Thus, the Court in *Butner* found that the federal bankruptcy court has a duty to "ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued." *Id.* at 56. Furthermore, the federal bankruptcy courts should not analyze the property interests under a guide other than state law unless "some federal interest requires a different result." *Id.* at 55.

189. *Id.* at 56. Supporting this decision, the Supreme Court asserted that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Id.* at 55 (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)); see also *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) (stating that "the 'basic federal rule' in bankruptcy is that state law governs the substance of claims"); *In re Jason Realty*, 59 F.3d 423, 427 (3d Cir. 1995) (noting that a "federal court in bankruptcy is not allowed to upend the property law of the state in which it sits, for to do so would encourage forum shopping").

190. *Butner*, 440 U.S. at 55.

ensure that parties receive the same protection within bankruptcy that they would have received under state law.¹⁹¹

The Court in *Archer* neither discussed the forum shopping problem nor analyzed the settlement as a state-controlled issue; however, the interpretation of the settlement agreement presented contract rights that should have been determined according to state law.¹⁹² Consequently, the Supreme Court should have recognized the general and mutual releases as discharging "all and sundry claims between the parties."¹⁹³ As noted previously, basic contract law favors the settlement of claims and, in turn, the enforcement of promises made within mutual and voluntary agreements, which "suggests that a claimant who had settled a claim should be foreclosed from later pursuing it in violation of the settlement agreement."¹⁹⁴ Moreover, the novation at issue in *Archer* represented a substituted contract that had the effect of discharging the original tort claim and replacing it with a new contractual obligation.¹⁹⁵ The creditor,

191. See G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 239-40 (2000) (stating that "substantive rules must survive across the bankruptcy membrane if the forum shopping problem is to be avoided" and that the *Butner* principle requires that the law that controls rights outside of bankruptcy should also control those rights within bankruptcy).

192. According to Steven L. Schwarcz, the Supreme Court's logic in *Butner* appears to apply not only to property rights but also to state law contract rights, even though there are no cases exactly on point. Schwarcz, *supra* note 3, at 576-77. Furthermore:

[U]niform treatment of contracts likewise would reduce uncertainty and would prevent a debtor from receiving a windfall merely by filing bankruptcy to impair rights under those contracts Furthermore, property is merely a bundle of rights, and it would be inconsistent to treat unbundled rights, such as contract rights, differently from bundled rights for purposes of this analysis.

Id. (citing *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 241 (3d Cir. 1995)); *In re Streets & Beard Farm P'ship*, 882 F.2d 233, 235 (7th Cir. 1989)).

193. *McGladrey, Hendrickson & Pullen v. Sytek Fin. Corp.*, 375 S.E.2d 689, 691 (N.C. Ct. App. 1989) (citing *Merrimon v. The Postal Tel.-Cable Co.*, 176 S.E. 246 (1934)); see also *Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 373 (5th Cir. 2002) (discussing the merits of "plain and simple" statements of release within settlement agreements and the effects thereof). Noting the importance of simple release statements, the *Chaplin* court stated:

[A] rule allowing litigants to settle all claims with a plain and simple statement that the release covers any and all claims reduces transaction costs, puts sophisticated and unsophisticated litigants alike on equal footing, and adds certainty to settlement negotiations and agreements In short, a general release of "any and all" claims applies to all possible causes of action, unless a statute specifically and expressly requires a release to mention the statute for the release to bar a cause of action under the statute.

Id.

194. FARNSWORTH, *supra* note 7, § 4.23.

195. See *id.* § 4.24 (discussing the concept of a substituted contract); see also PERILLO, *supra* note 5, § 21.8 ("A novation is a substituted contract which operates immediately to

therefore, has no right to enforce the original tort claim but is instead limited to the remedies available under the substituted contract.¹⁹⁶

The Archers' available remedies were limited to the enforcement of the promissory note, as explicitly stated in the settlement agreement.¹⁹⁷ Both the general and mutual releases barred further litigation of any fraud allegations arising from the original debt—sale of the manufacturing company.¹⁹⁸ The Supreme Court's failure to implement state substantive law in *Archer* produced a result that would not have occurred in a state court forum and illustrated a clear violation of the *Butner* principle.¹⁹⁹

On the other hand, *Butner*, while emphasizing the importance of uniform outcomes in the state and bankruptcy forums, authorizes bankruptcy courts to override state law if a "federal interest" necessitates a different outcome.²⁰⁰ The federal interest standard, however, is vague and presents the perplexing question of what constitutes a federal interest sufficient to override the *Butner* principle.²⁰¹ *Davis v. Davis (In re Davis)*²⁰² suggested that parties may have difficulty satisfying the federal interest, short of federal pre-emption.²⁰³ According to the *Davis* court, the

discharge an obligation.").

196. PERILLO, *supra* note 5, § 21.8.

197. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 317 (2003).

198. *Id.*

199. See *supra* Part IV (discussing the Supreme Court's decision and treatment of the contract issues in *Archer*).

200. *Butner v. United States*, 440 U.S. 48, 55 (1979).

201. See Schwarcz, *supra* note 3, at 577–78 (stating that the *Butner* principle allows bankruptcy courts to override state property law if a federal interest exists, although the Supreme Court did not define this standard, and noting that the Bankruptcy Code's "policy of equality of distribution surely should qualify").

202. *Davis v. Davis (In re Davis)*, 170 F.3d 475 (5th Cir. 1999). In *Davis*, the Fifth Circuit considered whether § 522(c)(1) pre-empted Texas exemption statutes or could be interpreted to override the exemption provision to satisfy a nondischargeable child support and alimony judgment. *Id.* at 477. The debtor in *Davis* filed for bankruptcy and claimed his Texas home as an exemption. *Id.* The creditor objected to the exemption of the Texas homestead and argued that § 522(c)(1) of the Bankruptcy Code pre-empted the Texas exemption statute. *Id.* The *Davis* court stated that exemption of property plays an important role within the bankruptcy context and, as such, is a "closely guarded" right that is largely defined by state law. *Id.* at 478–79. The court rejected the creditor's interpretation of § 522(c)(1) because that interpretation would place preferred creditors in a better position after the debtor had filed for bankruptcy than before that point. *Id.* at 481. The *Davis* court further held that § 522(c)(1) did not directly conflict with the Texas exemption statute and that the creditor's policy argument (enforcement of family support obligations) did not provide sufficient evidence of implied preemption. *Id.* at 482. Thus, *Davis* upheld the debtor's homestead exemption under Texas law. *Id.* at 483.

203. See *id.* at 481–83 (discussing the difficulty of reaching the federal interest standard). According to the *Davis* court, the argument asserted by the creditor fails for a number of

traditional areas of state police power, such as property law, are presumptively reserved to the states unless Congress acts with a "clear and manifest purpose" to override the state law or the state law irreconcilably conflicts with federal law.²⁰⁴ The court denied the petitioner's pre-emption argument because the Bankruptcy Code did not directly conflict with the Texas exemption statute.²⁰⁵ The *Davis* court stated that giving effect to the creditor's interpretation of Section 522(c)(1) would have denied the debtor the exemptions permitted outside of bankruptcy and possibly deterred a debtor from seeking relief in bankruptcy.²⁰⁶ Analyzing this possible effect, *Davis* stated that "Congress surely would not have reached this consequential result without legislating more explicitly."²⁰⁷

The circumstances in *Archer* do not present a pre-emption argument or a federal interest of such weight to override the *Butner* principle. Issuing a decision adverse to a possible state holding on the same issue, the Supreme Court in *Archer* created a contractual quagmire that fails to provide debtors the same protection they would have received outside of bankruptcy. The Court created an incentive for creditors involved in the settlement of alleged fraud claims to petition for involuntary bankruptcy. Under *Archer*, creditors may be able to take advantage of a fixed payment from the settlement in bankruptcy while proving nondischargeability of settlements with previously released state claims.²⁰⁸ *Archer* exacerbates the forum

reasons, including that: "In effect, Sandra's [creditor] proffered construction of § 522(c) does not merely withhold any special protection offered by bankruptcy law, but overrides nonbankruptcy law and has the effect of denying the debtor even exemptions that would have been available outside of bankruptcy." *Id.* at 481.

204. *Id.* at 481-82.

205. *Id.* at 482.

206. *Id.* at 481.

207. *Id.*

208. See LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS § 2.08 (3d ed. 1997) (describing the "strategic implications" of involuntary bankruptcy, including the possible benefits of controlling venue). Although creditors have the option of pursuing an "involuntary" bankruptcy claim, LoPucki states that "it is seldom in their interests to do so." *Id.* Moreover, an unsuccessful involuntary bankruptcy petition can result in liability for damages against the petitioning creditors. *Id.* Despite these risks, LoPucki states that "there are strategic uses of involuntary bankruptcy that may justify the risks," and one such strategic use is "controlling venue." *Id.* Indeed, LoPucki notes that "the statutes governing venue of bankruptcy cases are highly permissive and forum shopping is rampant." *Id.* On the other hand, the percentage of "bankruptcy proceedings" that are "commenced by creditors" is about "one half of 1 percent." *Id.* § 2.08 n.120. For an example of a bankruptcy case in which the court entered a judgment for damages against a creditor for filing an involuntary bankruptcy petition in bad faith, see *In re John Richards Homes Building Co.*, 298 B.R. 591 (Bankr. S.D. Mich. 2003). In *John Richards Homes Building Co.*, the bankruptcy court entered damages

shopping problem rather than addressing the issue or recognizing the necessity of uniform outcomes between state and bankruptcy courts.

E. How Does the "Honest But Unfortunate Debtor" Policy Affect Archer?

The "honest but unfortunate debtor" policy within bankruptcy, as defined by *Spicer*, means that the "fresh start" offered to the debtor through the discharge of debts is not absolute, but is limited to the "honest" debtor.²⁰⁹ Indeed, the *Spicer* court stated that Section 523(a)(2)(A) effectuates this policy by denying discharge to all debts obtained by fraud, a position supported by other statutory exceptions that bar discharge in bankruptcy for wrongful conduct.²¹⁰ The *Brown* Court, using a similar argument, stated that when seeking discharge of their debts, debtors place their prior dealings "squarely in issue" because the Bankruptcy Code limits relief to the honest but unfortunate debtor.²¹¹ Because the Supreme Court relied on *Brown* as the governing precedent in *Archer*, a thorough analysis of *Archer* and the novation theory requires a discussion of this bankruptcy policy.²¹²

The first question is whether the Fourth Circuit's decision in *Archer* is consistent with the honest debtor policy. The fraud claims against the Warners were not established.²¹³ The Warners and Archers voluntarily settled the claims of fraud and expressly agreed not to raise any further

against the creditor for over \$6,000,000. *Id.* at 593.

209. *United States v. Spicer (In re Spicer)*, 57 F. 3d 1152, 1156–57 (D.C. Cir. 1995).

210. *Id.*; see also 11 U.S.C. § 523(a)(4) (2000) (providing that debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" are nondischargeable); 11 U.S.C. § 523(a)(6) (2000) (stating that debts incurred by "willful and malicious injury by the debtor to another entity" are nondischargeable).

211. *Brown v. Felsen (In re Brown)*, 442 U.S. 127, 128 (1979); see also Anthony Michael Sabino, *Preventing an Alchemy of Evil: Preserving the Nondischargeability of a Debt Obtained by Fraud*, 12 J. BANKR. L. & PRAC. 99, 99–100 (2003) (describing the "paramount" importance of the "honest" debtor policy to bankruptcy and claiming that the discharge exceptions in the Bankruptcy Code are "precepts . . . cemented in even firmer ground; the dictates of fairness and common sense").

212. Commenting on the *Archer* decision, Gordon Bermant states that "[i]n moral terms, the Court decided that bankruptcy law will protect values that the parties at one time had been willing to compromise." Gordon Bermant, *What's Stigma Got To Do With It?*, AM. BANKR. INST. J., Aug 22, 2003, at 22, 22 n.1.

213. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 317 (2003).

assertions of fraud, which at "face value" does not offend the honest debtor policy.²¹⁴

In contrast, cases such as *Grogan v. Garner (In re Garner)*²¹⁵ have relied upon this principle, but in those cases the plaintiff had previously established fraud.²¹⁶ As such, *Grogan* does not deal with the "antecedent question, presented in this case [*Archer*], of whether a bankruptcy court fraud inquiry is proper in the first place."²¹⁷ Moreover, the enforcement of the novation and the release provisions does not create "inequitable results" in bankruptcy because the creditor *and not the debtor*, according to *West*, released the original debt by accepting the settlement.²¹⁸ *Archer* does not

214. See Respondent's Brief at 30–32, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418) (discussing the reasons that the honest but unfortunate debtor principle is not offended in this case and consequently does not require a nondischargeability ruling by the bankruptcy court).

215. *Grogan v. Garner (In re Garner)*, 498 U.S. 279 (1991). In *Grogan*, the Supreme Court considered whether Section 523(a) of the Bankruptcy Code required proof of fraud by clear and convincing evidence or by a preponderance of the evidence. *Id.* at 281–82. In this matter, the creditor had received a judgment of fraud against the debtor, and when the debtor entered bankruptcy, the creditor admitted the state court findings to object to dischargeability of the debt under Section 523(a) (debt obtained by fraud). *Id.* The Bankruptcy Court utilized the doctrine of collateral estoppel to hold the debt nondischargeable. *Id.* The debtor agreed that the evidence had been sufficient to prove fraud in the state court; however, the debtor claimed that the Bankruptcy Code required clear and convincing evidence, which is a higher evidentiary standard than the preponderance standard used in the state judgment. *Id.* at 282. Thus, the debtor argued that collateral estoppel should not apply in the bankruptcy proceeding. *Id.* The Bankruptcy Code is silent on the standard of evidence for proof of fraud under Section 523(a). *Id.* *Grogan* stated that the fresh start policy in bankruptcy did not require a more searching evidence standard because that right is not absolute but limited to the honest but unfortunate debtor. *Id.* at 286–87. The Court stated: "We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Id.* at 287. Thus, the Court in *Grogan* stated that preponderance of the evidence was the proper standard for Section 523(a) because it provided the proper balance between the fresh start policy for debtors and the limitation of this policy to the honest but unfortunate debtor. *Id.*

216. Respondent's Brief at 31, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). For example, in *Grogan*, the creditor had received a judgment of fraud against the debtor, and when the debtor entered bankruptcy, the creditor admitted the state court findings to object to dischargeability of the debt. *Grogan*, 498 U.S. at 281–82.

217. Referring to the *Grogan* decision, the respondent's [Warner] brief stated that "neither case suggests that the 'honest but unfortunate debtor' policy forces" the bankruptcy court to nullify a voluntary contractual agreement in which the creditor agrees to release all claims of fraud. Respondent's Brief at 31, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). In addition, the respondent's [Warner] brief also stated that the petitioners [*Archers*] did not present any case in which the courts have invalidated or barred a prebankruptcy contractual agreement in which a specific release bars the creditor from later asserting fraud claims against the debtor. *Id.* at 31 n.8.

218. *West v. Oltman (In re West)*, 22 F.3d 775, 778 (7th Cir. 1994).

trigger the honest but unfortunate debtor policy because the fraud claims were not established, and the settlement agreement did not create an inequitable result in bankruptcy that required application of this policy.²¹⁹

In addition, the Warners do not belong to the dishonest debtor category described in *Spicer*, in which the fraudulent debtor sought to escape all obligations by wooing the creditor into accepting a hefty settlement amount in exchange for a general release.²²⁰ In *Spicer*, the court stated that this type of behavior allows any fraudulent debtor to receive the fresh start in bankruptcy simply by changing the form of the original tortious debt.²²¹ Certainly, this classification paints a dismal picture of a debtor that has any connection to an allegation of fraud.²²² On the other hand, the Warners not only presented two deeds of trust to secure the promissory note of \$100,000 but also paid the Archers \$200,000 in cash at the execution of the agreement.²²³ The significant cash settlement serves as a rational defense to the *Spicer* scenario, which suggests that the Warners were merely attempting to change the form of the obligation so that it would become a contractual obligation dischargeable in bankruptcy.²²⁴

219. The question remains as to whether the honest debtor policy should punish even those debtors like the Warners who have only been accused of fraud and have resolved alleged fraud claims with a mutual agreement through which the creditors received a money settlement in return for a voluntary release.

220. *United States v. Spicer (In re Spicer)*, 57 F.3d 1152, 1155–57 (D.C. Cir. 1995). *But see* *Gaimio v. Detrano (In re Detrano)*, 222 B.R. 685, 688 (Bankr. E.D.N.Y. 1998), *rev'd*, 326 F.3d 319 (2d Cir. 2003) (stating that a "tremendous distance" exists "between pleading and proving intentional torts," and until a fraud case has been proven or a debtor has admitted liability, "there is no basis for presuming the defendant is an intentional tortfeasor for purposes of either state law or federal bankruptcy law").

221. *Spicer*, 57 F.3d at 1156–57. According to *Spicer*, the Bankruptcy Code is supposed to maintain a "delicate balance" between the debtor's rights and the rights of creditors that are the victims of fraud. *Id.* Certainly, the "honest but unfortunate debtor" is a policy about fairness and proper behavior that allows the debtor to receive a "fresh start" in bankruptcy; however, the enforcement of a contractual agreement is also a matter of ensuring fairness between the parties by preventing one party from receiving more than he or she bargained for in the agreement. *See* Respondent's Brief at 23–25, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418) (asserting that by "releasing creditors from the burden of their bargain, while allowing them to retain its benefits, petitioners' [Archers] interpretation of the Code would thus undermine state contract law in an important way").

222. The debtor in *Spicer* received a criminal conviction for his fraudulent activity, and the settlement agreement released the civil action for fraud. *Spicer*, 57 F.3d at 1154. In contrast, the allegations against the Warners were not adjudicated nor had liability been admitted by either party. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 317 (2003).

223. *Archer*, 538 U.S. at 317.

224. *See supra* notes 213–14 and accompanying text (asserting that the fraud claims against the Warners had not been adjudicated but were dismissed with prejudice and released in

Although the honest but unfortunate debtor policy is an oft-cited policy consideration within bankruptcy, it is not a controlling element of *Archer*.²²⁵ The debtors were not adjudicated as fraudulent debtors, and more importantly, the creditors had released all state law claims over the debtors.²²⁶ The debtors also do not fit into the extreme group of fraudulent debtors described in *Spicer*.²²⁷ Thus, *Archer* does not trigger the honest but unfortunate debtor policy or operate inconsistently with this bankruptcy policy.

F. Do the Attorneys Involved in Archer Bear Part of the Blame?

A pertinent question in this analysis of *Archer* is whether the counsel for either party is at fault for the failed settlement agreement that led to this lengthy conflict or the Supreme Court's complete reversal of the Fourth Circuit and disregard of the novation theory.²²⁸ According to the Model Rules of Professional Conduct, lawyers have a duty to provide clients with competent representation, which includes "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."²²⁹ A lawyer may be competent in a particular area without having prior experience.²³⁰ Indeed, the lawyer may not have the proper level of competence when accepting a matter but may "acquire the necessary competence, through study, and preparation."²³¹ In *Archer*, the parties were represented by counsel at all points in the conflict, and the attorneys had the duty to approach the negotiation discussions with the "same skill, knowledge,

the settlement agreement).

225. LoPucki states that although "it is sometimes said that a bankruptcy discharge is available only to 'honest debtors,'" this statement is an "exaggeration." LOPUCKI, *supra* note 208, § 1.05. According to LoPucki, debtors who commit certain dishonest acts may be denied a discharge in Chapter 7 cases but will often be eligible for discharge under Chapter 11 or Chapter 13. *Id.*

226. *Archer*, 538 U.S. at 317–19.

227. See *supra* notes 220–24 and accompanying text (describing the fraudulent behavior of the debtor in *Spicer*).

228. See *supra* note 174 and accompanying text (noting the lack of discussion about the novation issue at oral argument).

229. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002); see also RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 2-1 (2000) ("Not only the law of malpractice but the law of ethics requires lawyers to be competent.") (citation omitted).

230. ROTUNDA, *supra* note 229, § 2-1.1.

231. *Id.*

and diligence . . . as that which an attorney must employ in all other litigation tasks."²³²

The logical starting point to this discussion is the negotiation proceedings. The first question is whether the creditors' counsel acted with proper skill and knowledge in constructing the settlement agreement that created a novation and permitted the bankruptcy discharge of the debt in the lower courts. According to Robert J. D'Agostino, "[b]ankruptcy is common. Counsel negotiating settlements cannot credibly claim surprise or nonforseeability that a settling debtor might subsequently file for protection under the Bankruptcy Code."²³³ If the counsel for the creditors knew that the main objective was to ensure payment of the settlement sum, then reasonable knowledge and skill would suggest that the creditors' counsel should have examined the potential effect of the settlement agreement in bankruptcy.²³⁴ A competent attorney has the responsibility to analyze the potential effects of a settlement in more than one context and to ensure that the settlement will meet the clients' needs.²³⁵

The creditors' counsel had a responsibility to be knowledgeable about issues pertinent to the clients' needs during settlement negotiations. Certainly information regarding the circuit split on novation was readily available prior to *Archer*, and the creditors' counsel should have been on notice about this issue. Drafting a settlement agreement for a debt that may be nondischargeable in bankruptcy, "the creditor must take care not to effect a

232. Lynn A. Epstein, *Post-Settlement Malpractice: Undoing the Done Deal*, 46 CATH. U. L. REV. 453, 459 (1997). According to Epstein, "over twenty percent of civil cases will be resurrected in the form of malpractice actions initiated by dissatisfied clients," and every state except Pennsylvania allows a client "to proceed with the theory that his attorney negligently negotiated an agreement despite the fact that the client consented to settlement." *Id.* at 453.

233. D'Agostino, *supra* note 54, at 5; see also Warren & Westbrook, *supra* note 13, at 16 ("When parties get into disputes, bankruptcy often looms at the edge of their negotiations and maneuverings—a little like an exit door that has been left ajar The answer to these questions [concerning a possible bankruptcy] profoundly affects the negotiations.").

234. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 5.1 (1986) (discussing the elements of competence required to meet professional legal standards). Wolfram explains the knowledge and skill components of competence in the following manner:

A lawyer must know at least the basic elements of the law involved in representing a client. A lawyer should carefully investigate the facts and analyze the client's problem in light of applicable law. A lawyer should not have an overdeveloped sense of his or her own competence or capacity for legal work.

Id.

235. See Epstein, *supra* note 232, at 467 (stating that not only the law but also a client's perspective of what is equitable and fair plays a role in the negotiation process, and "[t]o determine what a client perceives to be fair, an effective attorney must begin by determining the needs and objectives of the client").

'novation' that might alter the nondischargeable nature of the debt."²³⁶ Thus, the attorneys "might [have] insist[ed] on a release made conditional on complete payment of the agreed upon settlement or include[d] specific stipulations related to fraud."²³⁷ The creditors might have attributed the loss of the settlement (if the Supreme Court had upheld the Fourth Circuit's ruling) to the negligence of their counsel in failing to fully research the issues and prepare a settlement agreement that would not create a novation and a resulting dischargeable contract debt in bankruptcy.²³⁸ The various options available to the creditors' counsel are discussed in Part VI.

A second factor to consider is the conduct of the debtor's counsel after the Fourth Circuit decision that ruled in favor of the debtors and the novation theory. During oral argument before the Supreme Court, the creditors asserted that the debtor had "abandoned" the novation theory.²³⁹ The debtor's counsel did not abandon the novation theory but definitely de-emphasized the argument during oral argument and within the appellate brief.²⁴⁰ The lead argument in the appellate brief focused on "principles of collateral estoppel and federalism," whereas the novation theory was discussed in only one paragraph.²⁴¹ Discussing the debtor's two main arguments, the creditors' appellate reply brief stated that the lead argument had not even been raised in the court below or in the objection to the petition for certiorari.²⁴² In addition, the debtor's counsel focused on four main points during oral argument, none of which claimed that novation alone was sufficient to create a dischargeable

236. LOPUCKI, *supra* note 208, § 2.10.

237. See D'Agostino, *supra* note 54, at 5–6 (discussing the choices that a creditor may have to preserve a claim of fraud for objection to discharge in bankruptcy and stating that the creditor may "insist on a release made conditional on complete payment of the agreed upon settlement or include specific stipulations related to fraud in any consent judgment").

238. See WOLFRAM, *supra* note 234, § 5.6.1 ("Courts in the United States have recognized from a very early time a common-law right of a client to recover damages from a lawyer whose negligent performance has caused financial loss to the client.").

239. Oral Argument Transcript at 57, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418).

240. See *infra* notes 241–44 (noting that the debtor's counsel de-emphasized the novation argument in the oral arguments before the Supreme Court and in the appellate brief).

241. Respondent's Brief at 10, 24, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418).

242. Petitioner's Reply Brief at 1, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418). The Archers' reply brief claims that Warner's two main arguments were (1) a collateral estoppel argument that "respondent [Warner] did not make . . . below or in her brief in opposition to the petition for certiorari [T]he argument is therefore waived," and (2) an argument based on the idea that the Archers had promised not to raise the issue of fraud. *Id.*

debt in bankruptcy.²⁴³ Indeed, the debtor's counsel only mentioned novation in passing during oral argument.²⁴⁴

If the Supreme Court granted the petition for certiorari on the novation issue,²⁴⁵ and the Fourth Circuit had strongly affirmed the effect of novation in discharging a prior obligation,²⁴⁶ why then did the debtor's counsel de-emphasize the most effective argument Warner had? Malpractice cases have rejected claims based on "mere errors of judgment if the lawyer acted in the 'good faith' belief that the lawyers' advice and other assistance was in the best interest of the client."²⁴⁷ Thus, the question is whether the decision to de-emphasize the novation argument that had succeeded in the lower courts falls within the carefully executed strategy category. The debtor's counsel could have presented a more effective and consistent argument by focusing on the novation concept instead of a collateral estoppel argument that left one member of the Supreme Court "dumbfounded."²⁴⁸ Although the debtor's counsel's behavior may arguably constitute a "mere error of judgment," the fact remains that the decision to de-emphasize the novation argument might have contributed to the Supreme Court reversal in *Archer*.

Certainly, neither party's counsel emerged fault-free from *Archer*, even though the creditors maintained their rights to the promissory note. If the settlement agreement had been properly constructed, then the creditors would not have had to vigorously pursue this matter to the Supreme Court. The agreement could have avoided novation. In contrast, the debtor appeared to have effective counsel during the negotiation process but might have suffered harm when her counsel de-emphasized novation, which was the most effective argument. This de-emphasis of novation might have cost the debtor the

243. See Oral Argument Transcript at 26–54, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418) (presenting the debtor's [Warner] oral argument before the Supreme Court in which Warner wanted to present four main points and only mentioned novation in passing and in relation to the larger argument that state law should control).

244. *Id.*

245. See *Archer v. Warner (In re Warner)*, 538 U.S. 314, 318 (2003) (stating that the Supreme Court granted the petition for certiorari because "different Circuits have come to different conclusions about this matter [referring to novation]").

246. *Archer v. Warner (In re Warner)*, 283 F.3d 230, 236–37 (4th Cir. 2002), *rev'd*, 538 U.S. 314 (2003).

247. WOLFRAM, *supra* note 234, § 5.6.2.

248. See Oral Argument Transcript at 30, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418) ("There's . . . no collateral estoppel here. That argument absolutely dumbfounded me, frankly, because for collateral estoppel, issue preclusion, you must have . . . actually litigated . . .").

Supreme Court decision, while at the same time costing society the current contractual quagmire created by *Archer*.

G. Analysis Summary

Archer fails to fulfill the Supreme Court's goal of unifying the circuit split and, instead, appears to create more questions than answers. Questions arise as to whether *Brown* is the proper governing precedent, or if *Archer* should have recognized the necessity of achieving uniform outcomes in bankruptcy and state court proceedings. Other questions arise as to the effectiveness of the counsel for both parties. This Note argues that *Brown* is not the proper governing precedent. Furthermore, the Supreme Court had a duty to uphold the *Butner* principle and apply state substantive law to the issues in *Archer*. This Note states that the Supreme Court should have addressed the public policy supporting settlements and the enforcement thereof of valid settlements. The Supreme Court should have upheld the novation theory, and the creditors' proper remedy was to seek a malpractice claim against their attorneys for the lost settlement.

VI. Alternative Actions: The Proper Remedy for *Archer*

The creditors in *Archer* were not faced with the sole option of a settlement agreement complete with broad releases but had a variety of settlement and litigation tools available that would have effectively secured the settlement as a nondischargeable debt in bankruptcy. The creditors in *Archer* could have circumvented the loss of the settlement in bankruptcy without pursuing the extensive litigation that culminated at the Supreme Court.²⁴⁹ This Part discusses the alternative courses of action available prior to *Archer* that could have maintained the nondischargeability of the settlement while also preventing the creation of a novation.²⁵⁰

249. Although the Supreme Court ruled in favor of the creditors in *Archer*, the creditors still have no guarantee that the bankruptcy court will find the original debt nondischargeable upon examining the extrinsic evidence regarding the fraud claim. Furthermore, the Supreme Court remanded *Archer* to the Fourth Circuit for further determinations regarding a collateral estoppel and a preclusive intent argument, either of which may prevent the creditors from maintaining the settlement in bankruptcy. See *supra* notes 134–35 and accompanying text (describing the alternative arguments raised by Warner and remanded to the Fourth Circuit by the Supreme Court).

250. See Petitioner's Brief at 23 n.14, *Archer v. Warner*, 538 U.S. 314 (2003) (No. 01-1418) (claiming that the Fourth Circuit's novation theory and interpretation of § 523(a) is a

A. Litigate to Final Judgment in State Court Proceedings

Perhaps the best, but not the most efficient or cost-effective, method of preventing the discharge in bankruptcy of an alleged fraudulent debt is for the creditor to seek full adjudication of the claim in state court proceedings.²⁵¹ Indeed, "the creditor who follows the 'race-to-the-courthouse' strategy and pursues the defendant to final judgment strengthens its position and bargaining leverage against the defendant should he or she then resort to bankruptcy."²⁵² The burden of proof for a nondischargeability action under Section 523(a)(2)(A) of the Bankruptcy Code is preponderance of the evidence, and a state court judgment must "require at least the same standard of proof in order for preclusive doctrines, such as collateral estoppel . . . to apply in the bankruptcy court."²⁵³ If the state litigation records sufficiently address the required elements under a Section 523(a) claim, "the bankruptcy courts will extend full faith and credit to the state court judgment."²⁵⁴

If the creditors in *Archer* had a viable state fraud suit against the debtors, formal state adjudication would have been an option. A state court fraud judgment in favor of the creditor presents a dependable nondischargeability claim, unlike the novation created by the *Archer* settlement agreement. Furthermore, Rebecca Callahan and Lisa Mathaisel state that creditors should fully adjudicate their fraud claim in state court if the claim involves significant damages or debt, and the creditors "cannot obtain fraud admissions or recitals from the defendant as part of the settlement."²⁵⁵ On the other hand, the decision to adjudicate a claim fully rather than seek settlement is inconsistent with the public policy favoring

"trap for the unwary" because "astute creditor[s]" can "take steps to protect" themselves "in negotiating a settlement agreement, to prevent the debt from being rendered dischargeable"). Discussing this possibility, the Petitioner's Brief recognized that a creditor has the option to create a settlement agreement that includes a conditional covenant not to sue upon full payment of the settlement (later discussed as an accord in this Part) rather than a full release of all claims. *Id.*

251. See LOPUCKI, *supra* note 208, § 2.10 (noting that "many creditors have been successful in litigating bankruptcy discharge issues in state courts before the bankruptcy petition is filed and using the judgment to collateral estop the debtor in the bankruptcy case").

252. Callahan & Mathaisel, *supra* note 135, at 54. Furthermore, Callahan and Mathaisel claim that "[t]here is no 'iron-clad' boilerplate language that creditors or their counsel can use in a settlement agreement or consent decree that compromises a fraud claim to create a nondischargeable debt under Section 523(a)(2)(A)." *Id.* at 53.

253. Kruis, *supra* note 10, at 7.

254. *Id.* at 6.

255. Callahan & Mathaisel, *supra* note 135, at 52. A final factor to consider in the decision to seek formal adjudication rather than settlement of a fraud claim is whether the settlement could be "performed or enforced upon default within a six-year period." *Id.*

settlement.²⁵⁶ The decision to forego settlement will result in increased litigation costs, possible failure of the case at trial, and delay in payment.

B. Include a Fraud Admission in the Settlement Agreement

A second option available to creditors who want to maintain the nondischargeable character of a settlement obligation is to include within the agreement statements of liability from the debtor and facts sufficient to prove a prima facie case of fraud.²⁵⁷ These statements of liability "should be coupled with an acknowledgment and agreement by the defendant that he or she understands that the legal effect of the admissions will preclude him or her from disputing these facts in any subsequent legal proceedings brought to enforce the obligations assumed under the settlement."²⁵⁸ Under this type of settlement agreement, the bankruptcy court would not have to decide whether to look behind a settlement agreement because the agreement would contain a stipulation presenting a prima facie case of fraud sufficient to meet the requirements under Section 523(a), as well as admissions of liability from the debtor.²⁵⁹

A creditor may not be able to obtain a full recital of the elements of fraud or an admission of liability from the debtor to include within the settlement. If the creditor receives only a "naked acknowledgment" from the debtor that the settled debt arises out of fraudulent action, then the creditor can alter this option by "dismissing the underlying action without prejudice, coupled with a

256. See *supra* notes 177–78 and accompanying text (describing the public policy in favor of settlement between parties involved in litigation).

257. See Callahan & Mathaisel, *supra* note 135, at 51–53 (describing the options available to create a nondischargeable settlement obligation by agreement). Moreover, Callahan and Mathaisel also recommend that "[w]here a settlement relates to a fraud claim, the documentation should include a consent decree with a verified statement from the defendant admitting facts of fraud or defalcation, and a stipulation for entry of the consent decree upon default under the settlement agreement." *Id.* at 52.

258. *Id.* at 53.

259. In contrast, a provision setting forth only that the debt is nondischargeable in bankruptcy is unenforceable because it violates public policy, negating the nondischargeable nature of a settlement obligation. See *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (stating that the debtor may not "contract away" the right to discharge a debt in bankruptcy through a provision stating a debt will "not be dischargeable in any bankruptcy or similar proceeding," but emphasizing that a "debtor may stipulate to the underlying facts that the bankruptcy court must examine to determine whether a debt is dischargeable").

Even though waivers to the right of discharge in bankruptcy are unenforceable as against public policy, Callahan and Mathaisel recommend the inclusion of such provisions in settlement agreements because the discharge waivers are "an evolving area of the law" and will serve as support for a nondischargeability claim. Callahan & Mathaisel, *supra* note 135, at 51.

covenant not to sue except under Section 523(a) if the debtor files bankruptcy before paying the settlement obligation in full."²⁶⁰ The creditors' counsel in *Archer* could have protected the creditors' interest in payment by negotiating for these types of provisions. Instead, the resulting settlement agreement in *Archer* explicitly stated that the promissory note was not evidence of either party's liability and included no mention of fraud.²⁶¹

C. Accord and Satisfaction Agreement

Instead of creating a settlement agreement with broad release provisions that extinguish all duties under the former obligation, creditors have the option to create an accord agreement.²⁶² An accord is "a contract under which the obligee promises to accept a stated performance in satisfaction of the obligor's existing duty."²⁶³ For example, a creditor may agree to release the original fraud claim upon complete payment of a fixed amount in damages.²⁶⁴ If the debtor delivers full payment of the fixed amount and, as a result, the creditor releases the original fraud claim, then accord and satisfaction have occurred.²⁶⁵ The effects of an enforceable accord differ from a novation because an accord maintains the creditor's ability to revive the original obligation in the event that the debtor breaches the agreement.²⁶⁶ Lynn M. LoPucki argues that creditors should "preserve the argument that the underlying debt is not replaced by settlement" by creating

260. Callahan & Mathaisel, *supra* note 135, at 52 (emphasis omitted).

261. See *supra* notes 98–100 and accompanying text (discussing provisions of the *Archer* settlement agreement).

262. See FARNSWORTH, *supra* note 7, § 4.24 ("If the obligee is unwilling to give up its rights on the original duty until the obligor has actually performed the new promise, the obligee can make what is called an *accord*, rather than a substituted contract.").

263. *Id.*

264. See D'Agostino, *supra* note 54, at 6 (stating that parties should deal with concerns about potential bankruptcy filings during settlement negotiations and noting that creditors may protect their settlements from discharge in bankruptcy by insisting "on a release made conditional on complete payment of the agreed upon settlement").

265. See PERILLO, *supra* note 5, § 21.6 (describing an accord example in which C promised to discharge D's debt if D delivered his car within a reasonable time).

266. *Id.* § 21.5. "Part performance by the debtor [in an accord], followed by unjustified failure to complete, does not prevent an action by the creditor on the original claim . . ." *Id.* In contrast, a substituted contract [a novation] immediately discharges all duties under the original obligation and replaces them with the substituted obligation. *Id.* A breach of the substituted contract is only subject to the remedies available under the substituted obligation. *Id.*

an accord and "by including in the settlement admissions by the debtor sufficient to establish the nondischargeability of the underlying debt."²⁶⁷

Certainly, the *Archer* creditors might have chosen the accord agreement or one of the other options discussed in this Part as an alternative to creating a novation. Because the creditors were not limited to only a broad settlement with general release provisions, the majority approach's reliance on the need to protect the innocent creditor as a victim of fraud is misplaced.²⁶⁸ There are many alternative actions available to creditors to protect themselves, and the responsibility of choosing the appropriate type of settlement is on the creditors and creditors' counsel.

VII. Conclusion

The Supreme Court accepted *Archer* to resolve the circuit split that surrounded novation and the nondischargeability of bankruptcy claims.²⁶⁹ The Court, however, failed to address the contractual and policy issues within *Archer* and, in turn, created a contractual quagmire for those parties seeking settlement of fraud claims. How can parties negotiating a settlement contract rely upon explicit and bargained-for provisions if *Archer* permits the bankruptcy court to look behind a settlement agreement to determine if the underlying obligation was obtained by fraud?²⁷⁰ The Court's selective implementation of the *Archer* settlement casts doubt on the core concepts of contract law and serves as a detriment to the public policy encouraging settlement and compromise between parties.²⁷¹

This Note argues that *Brown* was not the proper governing precedent and that the majority opinion in *Archer* is riddled with inconsistent language.²⁷² The Court in *Archer* stated that the settlement agreement

267. LoPUCKI, *supra* note 208, § 2.10 n.194 (3d ed. Supp. 2003). LoPucki made this statement prior to the Supreme Court's decision in *Archer* and suggested this option because the circuits had split on the issue of preserving a settlement debt in bankruptcy. *Id.* The conditional agreement or accord suggested by LoPucki is essentially the same as the aforementioned example in the text.

268. See *United States v. Spicer (In re Spicer)*, 57 F.3d 1152, 1156 (D.C. Cir. 1995) (discussing the policy of protecting the innocent creditor from fraudulent debts).

269. See *supra* Part V (analyzing the Supreme Court's decision in *Archer*).

270. See *supra* notes 183–84 and accompanying text (noting *Archer*'s potentially detrimental effect on settlements).

271. See *supra* notes 183–84 and accompanying text (same).

272. See *supra* notes 152–75 and accompanying text (discussing whether *Brown* is the proper governing precedent in *Archer*).

released all the state claims yet the fraud claim had not been resolved.²⁷³ The settlement, according to *Archer*, may have created a novation, but the Court chose to focus on *Brown*, a res judicata case.²⁷⁴ In addition, the *Archer* Court failed to address the *Butner* principle demanding that bankruptcy courts create results similar to state court proceedings.²⁷⁵ Debtors should receive the same benefits in bankruptcy that they would have received outside bankruptcy if bankruptcy had not ensued.²⁷⁶ *Archer*, however, produces a result adverse to a state court proceeding and provides an incentive for creditors to petition for involuntary bankruptcy to take advantage of the more favorable forum.²⁷⁷

This Note concludes that the Supreme Court should have affirmed the Fourth Circuit's decision in *Archer*. The Fourth Circuit's application of the novation approach provided a uniform outcome with state court proceedings, thus satisfying the *Butner* principle. The novation approach also promotes the autonomy of parties to create valid settlement agreements that have lasting effects within bankruptcy courts. Thus, the novation approach, as endorsed by the Fourth Circuit, serves to cure the deficiencies in the Supreme Court's *Archer* decision. This Note further states that the creditors' proper remedy for the loss of their settlement as a dischargeable debt in bankruptcy was a legal malpractice claim against their counsel. The creditors' counsel had alternative settlement and litigation tools available that could have prevented the creation of a novation and thus had a duty to protect the creditors' interest.

273. *Archer v. Warner (In re Warner)*, 538 U.S. 314, 318–19 (2003).

274. See *supra* notes 120–28 and accompanying text (stating the Supreme Court's reasoning in *Archer*).

275. See *supra* notes 192–99 and accompanying text (noting the Court's failure to discuss the *Butner* principle and its relevance to forum shopping).

276. See *supra* notes 189–90 and accompanying text (examining the underlying principles in the *Butner* case).

277. See *supra* note 208 and accompanying text (asserting that *Archer* exacerbates forum shopping because it violates the *Butner* principle and provides an incentive for creditors to petition for involuntary bankruptcy).

