NON-CONSENSUAL THIRD-PARTY RELEASES IN A CHAPTER 11 PLAN

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The law concerning non-consensual third-party releases in a chapter 11 plan has been evolving over the last three decades and has become the recent focus of much discussion in large part due to the *Purdue Pharma*[1] chapter 11 case that is on appeal in the United States Court of Appeals for the Second Circuit. The third-party releases of the Sackler family and their related affiliates and entities (the "Sackler Family") at issue in *Purdue* have also spurred discussion in Congress and on Capitol Hill.[2] After numerous days of the confirmation hearing and many amendments to the chapter 11 plan narrowing the releases, Judge Drain, on September 17, 2021, confirmed the plan of reorganization (the "Confirmation Order") proposed by the debtor, Purdue Pharma L.P., and certain associated companies ("Purdue").

Purdue filed for chapter 11 in September 2019 primarily due to the large number of lawsuits filed against it and certain affiliated non-debtors—principally members of the Sackler Family—which had long owned the privately held company. After years of negotiations with various constituencies, the parties drafted a plan that, if implemented, would afford billions of dollars for the resolution of both private and public claims while providing programs that would benefit the public at large.

[1] *In re Purdue Pharma, L.P.*, No. 21 CV 7532 (CM), 2021 WL 5979108, at *1 (S.D.N.Y. Dec. 16, 2021), certificate of appealability granted, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[2] *See, e.g.,* Nondebtor Release Prohibition Act of 2021, H.R. 4777 (S.2497), 117th Cong. (2021-22).

The plan included, among other things, a $4.325 billion contribution from the Sackler Family and ownership in the company in exchange for a broad release of both direct and derivative claims, including claims predicated on fraud, misrepresentation, and willful misconduct of the Sackler Family under various state consumer protection statutes. The members of the Sackler Family would receive the releases despite not filing for bankruptcy themselves.

The plan was approved by a supermajority of the votes cast by members of each class of creditors entitled to vote. The following entities voted against the plan and filed objections to confirmation: eight states, the District of Columbia, certain Canadian municipalities and Canadian indigenous tribes, the City of Seattle, and 2,683 individual personal injury claimants (the "Objectors"). The Office of the United States Trustee and the U.S. Attorney's Office for the Southern District of New York on behalf of the United States joined the Objectors in appealing the Confirmation Order (the "Appellants").

In the Confirmation Order, Judge Drain cited to Second Circuit precedent for approving nonconsensual third-party releases in unusual circumstances. *See*, *e.g.*, *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005), which held that non-debtor releases in a plan should not be approved absent findings that there exist truly unusual circumstances to render the releases important to the success of the plan. In *Metromedia*, the Second Circuit focused on (a) the global settlement of massive liabilities against debtors and co-liable parties, and (b) substantial financial

contributions from non-debtor co-liable parties providing compensation to claimants in exchange for the release of their liabilities, which makes the reorganization feasible.[3]

Specifically, the Second Circuit identified the following factors that a court should consider when evaluating such releases in the future:

(1) the release is important to the plan,

(2) the enjoined claims would be channeled to a settlement fund rather than extinguished,

(3) the estate receives substantial consideration in return,

(4) the released claims would otherwise indirectly impact the debtors' reorganization by way of indemnity or contribution, and

(5) the plan otherwise provided for the full payment of the enjoined claims.

Id. at 141-42. In so stating, the *Metromedia* court cited to the decisions of the courts of appeals of the Second Circuit, Third Circuit and Sixth Circuit (*SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),* 960 F. 2d (2d Cir. 1992), *Gillman v. Cont'l Airlines (In re Cont'l Airlines*, 203 F. 3d 203 (3d Cir. 2000), *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp*.), 280 F.3d 648 (6th Cir. 2002)).

The majority of federal circuit courts have allowed and approved, explicitly (First, Third, Fourth, Sixth and Seventh, Eleventh), or implicitly (D.C),

[3] In spite of the ruling, the court in *Metromedia,* however, took no action to invalidate the release because it determined that the appeal was equitably moot. *Metromedia*, 416 F.3d at 145.

nonconsensual third-party releases as part of a chapter 11 plan, although the circuits are splintered on the governing standard.[4] Interestingly, until the December 2021 *Purdue* district court decision, the general consensus was that the Second Circuit followed the majority line of cases allowing third-party releases under certain circumstances.

In addition to the cases cited above from the Second Circuit, the following majority line of cases have addressed the issue:

- *Monarch Life Ins. Co. v Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995) – holding that the bankruptcy court made the requisite predicate finding for a broad "incidental" injunction as enumerated in *A.H. Robins*: (i) the injunction was essential to garner the plan contributors' cooperation in the debtor's reorganization, and (ii) the debtor's creditors overwhelmingly approved the injunctive provisions. Interestingly, the issue arose over the post-confirmation violation of a chapter 11 plan injunction when the debtor's affiliate sued former counsel for legal malpractice in the Massachusetts Superior Court. The issue on appeal was not in the context of the appeal of the confirmation order, but rather a collateral estoppel issue of the plan releases.

- *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000) – holding that nonconsensual releases are allowed only with specific findings of fairness if they are necessary to the reorganization. The court declined to decide whether there is a blanket rule against nonconsensual releases but rather assumed the most flexible standard for testing validity and held that the bankruptcy court findings did not support the releases.[5]

[4] The Eighth Circuit Court of Appeals has not yet ruled on the issue. The bankruptcy court for the Western District of Missouri, in *In re Master Mortgage Investment Fund, Inc.* 168 B.R. 930, 937 (Bankr. W.D. Mo 1994) held that §524(e) did not prohibit the court from issuing a permanent injunction and under the circumstances of the case, allowed the permanent injunction protecting non-debtor third parties who contributed to the plan.

[5] Bankruptcy courts in the Third Circuit have generally held that consent for releases may be implied in the absence of the execution by a creditor or equity holder of an opt-out form (usually contained as part of the plan ballot). *But see*, *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) wherein Judge Owens held that "the Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. Carelessness, inattentiveness, or mistake are three reasonable alternative explanations."

- *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019) – holding that the bankruptcy court has constitutional authority under *Stern v. Marshall*,[6] to confirm a chapter 11 plan containing nonconsensual third-party releases and injunctions because the releases and injunctions were "integral to the restructuring of the debtor-creditor relationship." The Third Circuit did not discuss statutory authority in this case.

- *Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694 (4th Cir. 1989) – holding that the release of directors and officers, the debtor, and the insurer's attorneys was essential to the entire reorganization because the plan hinged upon the debtor being free from indirect claims, such as suits against parties who would have indemnity and contribution claims against the debtor. The court considered the following factors:

    - The parties who benefited from the plan injunction contributed funds sufficient to fully satisfy all claims asserted against the debtor;

    - The plan afforded all parties, including late-filed claims, a chance to be paid in full from the trust res;

    - The plan injunction was necessary to prevent suits against parties whose contribution rights against the debtor would defeat the prospects of a successful reorganization, and

    - The affected class voted overwhelmingly in favor of the plan.

- *Behrmann v. Nat'l Heritage Found., Inc.*, 663 F.3d 704 (4th Cir. 2011) – holding that the bankruptcy court's findings that the release provisions of the plan, which exculpated certain third parties only with respect to claims to be brought by parties-in-interest that had filed a proof of claim or were given notice of debtor's bankruptcy, for acts or omissions arising out of the operations of the debtor's business through the effective date of the plan, did not have the specific factual findings to support such relief.[7] In so holding, the court the found the *Dow Corning* seven-

[6] 564 U.S. 462 (2011).

[7] Upon remand, a different bankruptcy court found the releases unenforceable, the district court affirmed the bankruptcy court, and the 4th Circuit affirmed, concluding that the debtor "failed to carry its burden of proving that the circumstances of this case justify the Release Provision," relying upon the debtor's failure to meet more than one of the substantive factors enumerated in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) to justify approval of a third party release provision. *Nat'l Heritage Found., Inc. v Highbourne Found.,* 760 F.3d 344, 347 (4th Cir. 2014).

part test and the *Railworks*[8] four part test instructive, stating that nonconsensual third-party releases could only be upheld if:

- They are "essential" to the debtor's reorganization and appropriate due to debtor's unique circumstance;
- An "essential means" of implementing the plan;
- An "integral element" of the transactions contemplated in the plan;
- They present "material benefit" for the debtor, its bankruptcy estate, and its creditors;
- Important to the confirmed plan's overall objectives; and
- Consistent with applicable provisions of the Bankruptcy Code.

The court also held that § 524(e) does not foreclose bankruptcy courts from releasing and enjoining causes of action against non-debtors.

- *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) – holding that under certain circumstances, a bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor to facilitate a chapter 11 reorganization plan when the following factors are present:
  - There is an identity of interests between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete estate assets;
  - The non-debtor has contributed substantial assets to the reorganization;
  - The injunction is essential to the reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;

[8] *In re Railworks Corp.*, 345 B.R.529, 536 (Bankr. D. Md. 2006) (setting forth factors for a bankruptcy court to analyze when deciding whether to approve non-debtor releases).

- The impacted class(es) has overwhelmingly voted to accept the plan;
- The plan provides a mechanism to pay all, or substantially all, of the class(es) affected by the injunction;
- The plan provides an opportunity for those claimants who choose not to settle to recover in full; and
- The bankruptcy court made a record of specific factual findings that supports its conclusions.

The court ultimately remanded the case because the decision below did not make sufficiently particularized factual findings of the unusual circumstances allowing the injunction.

- *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008) – holding that a bankruptcy court can approve releases of third parties from liability to participating creditors if appropriate under the circumstances and not inconsistent with any provision of the Bankruptcy Code. This "residual authority" is derived from §§ 105(a) and 1123(b)(6), and § 524(e) does not limit the bankruptcy court's powers to release a non-debtor from a creditor's claims. *Id*. at 656-57. The release at issue in *Airadigm* did not include "willful misconduct." *Id*. at 657.[9]

- *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015) – agreeing with *Behrmann, Dow Corning,* and *Airadigm* and stating that bankruptcy courts have discretion to consider a non-exclusive list of factors to be applied flexibly and used "infrequently and cautiously" when evaluating the appropriateness of a bar order.[10] The Court also found that § 524(e) does not limit the bankruptcy court's powers to release a

[9] The following year, the Seventh Circuit decided *In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009), in which the court held that, in "rare" and "unique" circumstances, bankruptcy courts may approve narrowly tailored releases that are critical to the plan. The court emphasized that releases must still meet the criteria set forth in *Airadigm* and must not provide "blanket immunity". Id. at 864-65. Although the release at issue was between non-debtors and non-creditors, the court determined that a party's claim may nonetheless be extinguished if the party received fair notice and an opportunity to object. Id. at 865.

[10] The court cited *In re Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) for the proposition that § 105(a) gives a bankruptcy court authority to approve a release when (i) released parties provided funds to the bankruptcy estate, (ii) the released parties would not have entered into the settlement without the releases, and (iii) the bankruptcy court found that the non-debtor releases are fair and equitable. *Id*. at 1078. In an unpublished decision from November 2021, the court held that *Munford* factors apply to releases in a litigation settlement context and *Seaside* factors apply in a reorganization context. *In re Centro Group, LLC*, 21-11364, 2021 WL 5158001, at *4 (11th Cir. Nov. 5, 2021).

> non-debtor from a creditor's claims. *Id*. The third-party release at issue was narrowly limited in scope to claims arising out of the chapter 11 case and did not include claims arising out of fraud, gross negligence, or willful misconduct.

The cases cited as the majority view on third-party nonconsensual releases generally rely upon the equitable principles found in §§ 105(a) and 1123(b)(6) and reject the idea that § 524(e) forbids such releases. Section 105 provides in pertinent part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 1123(b)(6) permits a bankruptcy court to "include any other appropriate provision not inconsistent with the applicable provisions of this title." Under this analysis, the issue is whether there is any provision in the Bankruptcy Code in which the treatment of nonconsensual third-party releases is inconsistent. Section 524(e) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." The majority reasons that the language of § 524(e) is consistent with §§ 105(a) and 1123(b)(6), merely explains the effect of a debtor's discharge, and does not prohibit the release of a non-debtor.

The District of Columbia Circuit, in *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986) implicitly approved non-debtor third party releases under a chapter 11 plan. While the court indicated that it might address whether the third-party release provisions of the debtor's chapter 11 plan violated § 524(e), the court included no direct discussion of § 524(e).[11] Instead, the court determined that the

[11] Other issues on appeal were determined to be equitably moot.

bankruptcy court had jurisdiction to approve the releases but held that the plan violated § 1123(a)(4) because it did not require equal treatment of a member of the unsecured creditor class who failed to settle with the funding non-debtor third parties prior to confirmation of the plan. *Id*. at 1145, 1152. The court was troubled by the requirement that the non-settling creditor had to tender a release of his direct claim to obtain a distribution under the plan and modified the plan provision to exclude from the scope of the release any claims arising from direct guarantees. *Id*. at 1153-54.

In contrast, a minority of the courts of appeal—the Fifth, Ninth, and Tenth Circuits—have held that nonconsensual third-party releases in a plan are impermissible under the Bankruptcy Code.[12] Those cases provide that the equitable powers of § 105(a) do not create "residual authority" that is not expressly found in the statutory language of the Bankruptcy Code and may not be exercised in a manner that is inconsistent with other, more specific, provisions of the Code. These courts generally interpret § 524(e) as precluding bankruptcy courts from discharging the liabilities of non-debtors and prohibit nonconsensual third-party releases as a result. *See In re Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009) (holding that § 524(e) only

[12] Though the Ninth Circuit has historically taken the minority view, a recent opinion may have cracked the door to approval of exculpation clauses in limited instances. *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394, 209 L. Ed. 2d 132 (2021). In *Blixseth*, the Ninth Circuit held that § 524(e) does not preclude a bankruptcy court from approving a very narrow exculpation clause if the clause covers actions taken by "participants in plan approval process and relating only to that process." *Id*.

Since the *Blixseth* decision, a small number of Ninth Circuit bankruptcy courts have approved releases in similarly narrow circumstances. *See In re PG&E Corp.*, 617 B.R. 671, 683-84 (Bankr. N.D. Cal. 2020) (concluding that Ninth Circuit law does not preclude voluntary opt-in releases); *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021).

releases the debtor, not co-liable third parties and determining that only members of the creditors' committee had qualified immunity for actions taken within the scope of their duties pursuant to § 1103(c)); *Ad Hoc Grp. Of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1061 (5th Cir. 2012) (noting that prior 5th Circuit precedent "seem[s] broadly to foreclose non-consensual non-debtor releases and permanent injunctions"); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995) (determining that § 524(e) displaces a bankruptcy court's equitable power under § 105(a) to order permanent relief against a non-debtor, and precluding a bankruptcy court from discharging the liabilities of non-debtors); *Landsing Diversified Props.-II v. First Natl Bank & Trust Co. (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600-01 (10th Cir. 1990), *modified sub nom*. *Abel v. West*, 932 F.2d 898 (10th Cir. 1991) (holding that the supplementary equitable powers of § 105(a) may not be exercised in a manner that is inconsistent with § 524 and determining that a temporary stay during the bankruptcy may be permissible to facilitate reorganization, but a permanent injunction in a plan to insulate non-debtors from actions of other non-debtors post-confirmation is not permitted.).

RECENT DEVELOPMENTS: DISTRICT COURT DECISIONS IN *PURDUE* (Second Circuit) AND *ASCENA* (Fourth Circuit)

On December 16, 2021, Judge McMahon of the District Court in the Southern District of New York issued her 142-page Decision and Order on Appeal vacating the *Purdue* confirmation order. In reaching that conclusion, the court answered three questions on appeal:

(1) Did the Bankruptcy Court have subject matter jurisdiction to impose a release of non-debtor claims? The district court determined that the bankruptcy court's "related to" jurisdiction over any civil proceedings that "might have any conceivable effect" on the estate included the civil proceedings asserted against the non-debtor Sackler Family. Therefore, the district court found that the bankruptcy court had subject matter jurisdiction to approve the Section 10.7 Shareholder Release (which consisted of direct claims of third-parties against the non-debtor Sackler Family members, as long as the debtor's conduct or the claims asserted against it are a legal cause or a legally relevant factor).[13]

(2) Did the Bankruptcy Court have statutory authority to approve the non-debtor releases of direct claims against the Sackler Family?[14] Relying on the U.S. Supreme Court's holding in *Stern v. Marshall*, the

[13] These direct claims arise out of a separate and independent duty that is imposed by statute on individuals who, by virtue of their positions, personally participated in acts of corporate fraud, misrepresentation and/or willful misconduct. *Id*. at 95.

[14] The release of claims against the Sackler Family that are derivative of the estate's claims against them is provided for in Section 10.6(b) of the Purdue plan of reorganization, which was not challenged on appeal as being beyond the power of the bankruptcy court. *Id*. at 94.

district court found that neither § 105(a) nor § 1123(a)(5) and (b)(6) provide a bankruptcy court with statutory authority to order the non-consensual release of third-party claims against non-debtors in connection with the confirmation of a chapter 11 bankruptcy plan. The district court also determined that bankruptcy courts do not have "equitable authority" or "residual authority," absent a specific, substantive grant of authority in the Bankruptcy Code. Approval of a non-debtor non-consensual third-party release is a non-core proceeding because it relates to a proceeding over which the bankruptcy court merely has "related to" subject matter jurisdiction. In that instance, unless all parties consent to the bankruptcy court's entry of a final judgment disposing of that proceeding, the bankruptcy court is without the constitutional power to enter such a judgment, which the court found included a third party release. Merely including the non-consensual third-party release in a plan of reorganization does not manufacture the constitutional authority for the bankruptcy court to exercise authority over a proceeding involving solely non-debtor third parties.

(3) Did the Bankruptcy Court fail to provide equal treatment between the Canadian Appellants and their domestic unsecured creditor counterparts? The district court determined that Purdue provided disparate treatment to the Canadian appellants, but Purdue proffered legitimate reasons for that differentiation. As a result of that justification, the plan classification of the Canadian appellants did not violate the Bankruptcy Code.

Judge McMahon also provided an extensive survey of federal circuit law on the subject of non-consensual release of third-party claims against non-debtors. The district court then analyzed the various sections of the Bankruptcy Code that Judge Drain relied upon to determine that he had authority to approve the non-debtor releases. Ultimately, the district court determined that neither §§ 1123(a)(5), 1123(b)(6), 1129(a)(1), nor the concept of residual authority confers a substantive right allowing a bankruptcy court to approve a release to enforce that right pursuant to § 105(a). Moreover, Judge McMahon was unable to conclude that congressional silence should be deemed consent to an expansion of the non-debtor releases authorized in asbestos bankruptcy cases under § 524(g).

Judge McMahon was also troubled about the timing of the notice to the releasing parties—many of whom were not named as creditors in the *Purdue* bankruptcy cases. The notice was furnished to those parties months after the claims bar date in *Purdue* had occurred, thereby precluding them from asserting a claim and receiving any consideration for the third-party release that the bankruptcy court sought to impose on them. The district court also focused on the lack of consideration to those releasing parties and the potential legal basis for a bankruptcy court to eradicate a third party claim not asserted against a debtor, especially in light of the district court's interpretation of § 524(e). Judge McMahon interpreted § 524(e) as prohibiting the bankruptcy court from granting a release of claims to a non-debtor under any circumstances, except as expressly contemplated under that subsection.

Based upon this ruling, the district court vacated the bankruptcy court's confirmation order in *Purdue*. Judge McMahon acknowledged that other issues were raised on appeal, which she chose not to address unless her order is reversed on appeal. Given the critical issues at stake in this case, the parties sought, and the district court granted, an interlocutory appeal to the Second Circuit Court of Appeals. On January 27, 2022, the Second Circuit set a briefing schedule and indicated that oral argument will commence on or about the week of April 25, 2022.

Just over a month after Judge McMahon issued her ruling in *Purdue*, Judge Novak of the Eastern District of Virginia issued an opinion vacating the confirmation order confirming Mahwah Bergen Retail Group, Inc. f/k/a Ascena Retail Group, Inc.'s plan of reorganization. *Patterson, et al. v. Mahwah Bergen Retail Grp., Inc.*, No. 3:21cv167 (DJN), 2022 WL 135398, at *1 (E.D. Va. Jan. 13, 2022). The district court determined that the bankruptcy court exceeded its constitutional authority by approving a plan which included extremely broad non-consensual third-party releases. As drafted, the third-party releases appeared to "cover any type of claim that existed or could have been brought against anyone associated with Debtors as of the effective date of the plan." *Id*. at *6. As a result, the district court concluded that the claims constituted non-core claims over which the bankruptcy court had "related-to" jurisdiction. Relying upon the Supreme Court's decision in *Stern v. Marshall*, Judge Novak reasoned that the bankruptcy court lacked constitutional authority to approve the releases, which would have constituted a final determination of the third-party claims. At most, the bankruptcy court could have issued a report

and recommendation with detailed findings justifying approval of the third-party releases. Any such findings would need to comply with the *Dow Corning* factors, which had been adopted by the Fourth Circuit in *Behrmann*. The district court expressly found that the bankruptcy court failed to undertake that analysis.

The district court was extremely troubled by the adequacy of the notice to the debtors' shareholders. The debtors' noticing agent was unable to confirm how many notices were actually received by shareholders, who had to be served, in many cases, through a nominee who held the shares. The district court also determined that the opt-out provision included in the notice was deficient because it failed to provide the requisite notice required under the seven-factor test adopted by the Fourth Circuit in *Behrmann*. According to the district court, merely affording a shareholder the right to opt out of the settlement without simultaneously seeking affirmative consent by the shareholder to the exercise of jurisdiction by an Article I judge over a non-core matter also made the shareholder notice inadequate.[15]

Judge Novak then turned to the consideration for the releases. Though the plan provided for the shareholders to exchange a mutual release with the releasing parties as consideration, Judge Novak characterized that consideration as "illusory" because it was unlikely that the officers, directors, employees, and other beneficiaries of the shareholder third party release could ever assert a valid claim against the shareholders that could provide consideration for the release that the shareholders were being asked to make. *Id.* at *30.

[15] In reaching this conclusion, Judge Novak alluded to the standards for approval of a class action settlement under F.R.C.P. 23, which would have afforded the shareholders the due process to which they were entitled. *Id.* at 29-31.

Ultimately, the district court concluded that a new confirmation order could be entered approving the plan if the shareholder releases were excised and voided. The court likewise found the exculpation provision in the plan to be overly broad and poorly drafted but determined that there was precedent for approving a properly worded exculpation provision predicated on the *Barton* doctrine (which limits exculpation to estate professionals) and § 1103(c) of the Bankruptcy Code (which permits members of an official creditors committee to also receive the benefit of an exculpation provision).

As a final statement regarding what he perceived to be a recurring practice of the bankruptcy judges sitting in the Richmond division of the Eastern District of Virginia approving third-party releases like those in the plan, Judge Novak remanded the bankruptcy case to the chief judge of the bankruptcy court in the Eastern District of Virginia and expressly directed him not to re-assign the case to any bankruptcy judge sitting in the Richmond division. *Id.* at *43. Judge Novak clarified, however, that he held the bankruptcy judge in high regard and directed reassignment to address potential public confidence concerns about the practice of approving third-party releases and forum shopping. *Id.* at *44.