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Shelter from the Storm: Examining Chapter 11 Plan Releases for Directors, Officers, Committee Members, and Estate Professionals

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I was in another lifetime, one of toil and blood

When blackness was a virtue, and the road was full of mud

I came in from the wilderness, a creature void of form

'Come in' she said 'I'll give you shelter from the storm. [FN1]

I. Introduction

A Chapter 11 discharge is an involuntary release arising by operation of law that relieves a debtor from liability existing at plan confirmation. [FN2] This discharge represents a powerful and sweeping equitable tool. Therefore, it generally is limited only to those entities which file for Chapter 11 protection and make their assets available to creditors. [FN3] It is becoming increasingly prevalent, however, for Chapter 11 plans to attempt to expand the scope of the discharge provided by the Bankruptcy Code [FN4] to encompass releases for nondebtor third parties. [FN5]

Substantial debate persists over the propriety of a Chapter 11 plan releasing nondebtors from claims of third parties, such as a debtor's directors and officers, committee members or estate professionals. Existing jurisprudence on this topic lacks uniformity among jurisdictions as courts have attempted to craft flexible standards to suit the array of circumstances that arise in Chapter 11 cases. This inconsistency in approach creates the unintended byproduct of uncertainty for Chapter 11 actors, specifically directors and officers, as to the protection from liability which will be available upon confirmation.

This article canvasses the existing state of the law concerning nondebtor releases in Chapter 11 plans, with a particular focus on the permissible scope of such releases for directors, officers, committee members, and estate professionals. The recent decision from the Delaware Bankruptcy Court in *In re Washington Mutual, Inc.*, which denied or restricted proposed releases for a debtor's directors, officers, committee members, and estate professionals is discussed in-depth. The *Washington Mutual* decision provides a modicum of guidance as to the extent to which such releases will be approved in the Chapter 11 plan context. Due to the conflicting authority and case specific nature of such determinations, however, this issue largely remains a hotbed of uncertainty for bankruptcy practitioners.

II. Legality of Nondebtor Releases

Three interrelated but distinct types of nondebtor releases are available in the context of a Chapter 11 plan.

The first category is a release of claims or causes of action held by a debtor against a nondebtor third party, i.e., “estate releases.” The second type is a release of claims or causes of action held by a nondebtor third party against another nondebtor third party, i.e., “third party releases.” The third form of release available in a Chapter 11 plan is a release of claims by both the debtor and nondebtor third parties of claims against professionals and other fiduciaries of the bankruptcy estate, termed an “exculpation.” An exculpation is unique from estate releases and third-party releases because it provides qualified immunity to committee members and other estate professionals for actions taken within a Chapter 11 restructuring but specifically excludes claims based on gross negligence or willful misconduct. It is necessary to distinguish between these types of releases because courts apply differing standards depending upon the type of release sought in the plan. [FN6]

An understanding of the jurisprudence regarding nondebtor releases requires examination of the relevant provisions of the Bankruptcy Code. The discharge provided by section 1141(d) [FN7] and the corresponding injunction of section 524(a) [FN8] render all outstanding debts against a debtor unenforceable upon plan confirmation, except as otherwise provided by section 1141(d) or by the terms of the confirmed plan. [FN9] Section 524(e) instructs that a discharge will not affect a creditor's right to enforce a debt with respect to a third party, providing in pertinent part: “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.” [FN10] Section 105(a), however, vests a court with broad equitable power “to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” [FN11] Courts have seized upon this language to enjoin creditors from pursuing their rights against nondebtors postconfirmation.

The crux of the debate over the permissibility of nondebtor releases centers around the apparent statutory conflict between section 105(a) and section 524(e) of the Bankruptcy Code. While the grant of equitable power under section 105(a) is broad, it can only be exercised within the confines of the Bankruptcy Code. [FN12] Therefore, while section 105(a) confers the equitable power to issue injunctions in general, it cannot be used to authorize relief that is inconsistent with an express provision of the Bankruptcy Code. The question which then arises is whether the specific limitation on the scope of the discharge provided by section 524(e) restricts the general equitable power of the courts to grant injunctions when necessary to the reorganization. [FN13]

To further muddy the waters, Congress amended section 524 to add subsection 524(g), which provides for an injunction and channeling of personal injury claims to a trust. [FN14] Section 524(g) was enacted to address mass asbestos Chapter 11 cases and expressly authorizes a bankruptcy court to impose a channeling injunction for nondebtor parties notwithstanding section 524(e). [FN15] Section 524(g) is the only section of the Bankruptcy Code to explicitly authorize the release and permanent injunction of claims against nondebtor entities. However, the legislative history of section 524(g) suggests that Congress intended to negate any inference that this express grant curtails a bankruptcy court's power to enjoin creditors from pursuing claims against nondebtors in a nonasbestos Chapter 11 case. [FN16]

Against this backdrop, courts have split regarding the statutory conflict between section 105(a) and section 524(e). [FN17] One faction of courts concludes that these sections are reconcilable and that section 105(a) permits nondebtor releases where the debtor is able to establish that such releases are necessary to effectuate the purposes of Chapter 11. Courts in the opposite camp refuse to allow nondebtor releases in any context based on the view that section 524(e) directly conflicts with any interpretation of section 105(a) that would allow such nondebtor releases. The majority of the federal circuits, including the Second, Third, Fourth, Sixth, and Seventh, have adopted the view that a Chapter 11 plan can release nondebtors in appropriate limited circumstances. [FN18] In contrast, the Fifth, Ninth, and Tenth Circuits adhere to the minority view that section 105(a) cannot be

employed to extend releases to nondebtors in contravention of section 524(e)'s express language. [FN19] The First, Eleventh, and D.C. Circuits have not addressed directly the propriety of nondebtor releases in light of the statutory conflict between section 105(a) and section 524(e). These courts, however, have issued decisions aligning themselves with the pro-release courts. [FN20]

Even with respect to courts which hold that nondebtor releases are not proscribed by section 524(e), there is difficulty in ascertaining the appropriate standard for evaluating what circumstances must be present to merit such releases. Despite the inconsistency that has emerged among courts in addressing the issue of nondebtor releases, a basic framework has emerged from the case law through which estate releases and third-party releases can be examined.

A. Releases by the Debtor's Estate Against Third Parties

An estate release relinquishes all claims held by the debtor against specified nondebtor third parties as part of the plan of reorganization. Two avenues exist for a debtor to effectuate an estate release under a plan. First, a debtor is permitted to release claims in a plan pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, [FN21] provided that the bankruptcy court finds that the decision to grant such an estate release is a valid exercise of the debtor's business judgment, is fair and reasonable, and in the best interests of the estate. [FN22] Therefore, section 1123(b)(3) permits a debtor to include a settlement of any claim it might own as a discretionary provision in its plan. The scope of a release available under section 1123(b)(3) generally is limited, however, as it generally requires some showing that tangible potential claims are being settled rather than merely an attempt to provide a backdoor nondebtor release. [FN23]

B. Releases of Third Parties' Claims Against Other Nondebtor Third Parties

Courts which allow third-party releases under section 105(a) have not developed a uniform standard as to when such releases are appropriate. [FN24] In analyzing requests for third-party releases, most courts have identified the following five-factor test, originally articulated by the bankruptcy court in *In re Master Mortg. Inv. Fund, Inc.*, [FN25] to determine whether an involuntary release by a nondebtor of another nondebtor's claims is appropriate:

(1) the identity of interest between the debtor and nondebtor such that a suit against the nondebtor will deplete the estate's resources;

(2) a substantial contribution to the plan by the nondebtor;

(3) the necessity of the release to the reorganization;

(4) the overwhelming acceptance of the plan and release by creditors and interest holders; and

(5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan. [FN26]

In applying these factors, courts have recognized that this *Master Mortgage* test is neither an exclusive or conjunctive list of requirements. [FN27] Instead, courts have used this factor test as a guide in considering the specific facts and equities that exist in each case. [FN28]

The Third Circuit Court of Appeals in the *Continental Airlines* decision established the baseline standard

that specific factual findings must be made that the releases are both fair and necessary to the proposed plan of reorganization under the circumstances of the case. [FN29] Most courts allowing third-party releases adhere to this minimum guiding principle and abide by the edict that third-party releases constitute the exception rather than rule. [FN30] An important consideration that has emerged in some cases is whether third-party releases are deemed consensual because certain courts hold that the Bankruptcy Code does not vest them with authority to authorize nonconsensual third-party releases regardless of the facts and circumstances of the case.

1. Let's Make a Deal: Consensual Third-Party Releases

Courts generally are in agreement that third-party releases can be effectuated through an affirmative agreement or consent with the third party affected by the release. [FN31] Courts routinely allow consensual third-party releases to be included in a Chapter 11 plan where the release binds only those creditors voting in favor of the plan. [FN32] The rationale for allowing such consensual third-party releases is that the third parties and the debtor are in engaging in a quasi-contractual arrangement based on the third party's opting to release the covered claims in exchange for receiving property under a plan. [FN33]

The concept of third party consent often is critical in determining whether nondebtor releases will be approved because certain courts have taken the position that the Bankruptcy Code does not authorize nondebtor releases absent consent by the releasing party. [FN34] Therefore, courts closely scrutinize release and voting provisions provided under a plan to determine whether sufficient opt out procedures exist with respect to third-party releases. This issue was recently addressed by the bankruptcy court in *In re DBSD North America, Inc.* [FN35] The plan in *DBSD* provided that third-party releases would bind those parties who were entitled to vote and either voted in favor of the plan or abstained from voting and did not opt out of the release and exculpation provisions. [FN36] The court ruled that creditors who abstained from voting and did not opt out were deemed to have manifested assent to the releases because adequate notice of the release provisions was provided to those parties entitled to vote. [FN37] Thus, the court held that the releases would be deemed consensual as to those creditors who remained silent, i.e., those parties who did not vote against or opt out of the releases. [FN38]

2. Manufacturing Consent: Involuntary Third-Party Releases

Courts have recognized that third-party releases are appropriate in rare cases even absent the consent of the affected third parties. These nonconsensual third-party releases are allowed only where a plan proponent is able to make a specific showing that extraordinary or unusual circumstances justify this form of relief. [FN39] In determining whether such releases are appropriate, courts consider the following seven-factor test (derived from the *Master Mortgage* test) as summarized by the Sixth Circuit in *Dow Chemical*:

(1) Whether the debtor and the third party share an identity of interest, usually an indemnity relationship, such that a suit against the nondebtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(2) Whether the nondebtor has contributed substantial assets to the reorganization;

(3) Whether the injunction is essential to 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;

(4) Whether the impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) Whether the plan provides a mechanism to pay for all, or substantially all, of the class, or classes, affected by

the injunction;

(6) Whether the plan provides an opportunity for those claimants who choose not to settle to recover in full, and;

(7) Whether the bankruptcy court made a record of specific factual findings that support its conclusions. [FN40]

The showing of "unusual circumstances" necessary to justify nonconsensual third-party releases varies. However, a prototypical example is where the nondebtor receiving the release, usually an insurer, provides a significant portion of the fund used to satisfy the claims subject to the release. [FN41]

With respect to a debtor's officers and directors, in order to demonstrate that "unusual circumstances" exist, generally it is necessary that the directors and officers point to a financial contribution upon which the Chapter 11 plan is structured. Directors and officers must demonstrate some significant monetary contribution since courts generally do not recognize the efforts of directors and officers in formulating and negotiating a plan as a sufficient basis to justify a nonconsensual release. [FN42] An example of this quid pro quo is the Second Circuit's decision in *In re Drexel Burnham Lambert*. [FN43] In *Drexel*, the Second Circuit considered whether to approve an injunction issued on behalf of the debtor's senior management with respect to certain securities lawsuits which were duplicative of a civil enforcement action filed by the SEC that the debtor and its management previously had settled. [FN44] Pursuant to the settlement with the SEC, the debtor and its senior management agreed to fund a $300 million settlement to satisfy the claims sought to be released. [FN45] The Second Circuit approved the requested release, finding that the injunction was an "essential element" of the debtor's plan of reorganization. [FN46]

C. Releases and Exculpation of Estate Professionals

Both professionals retained by the debtor's estate and committees appointed pursuant to the Bankruptcy Code generally are entitled to a more limited release in the form of an exculpation. [FN47] Exculpation provides estate professionals and committee members with qualified immunity from claims of a debtor, its creditors and shareholders, and other parties in interest, for liability with respect to actions taken during the Chapter 11 process. The purpose of exculpation was aptly summarized by the bankruptcy court in *DBSD*: "[e]xculpation provisions are frequently included in chapter 11 plans, because stakeholders all too often blame others for failure to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision makers in the chapter 11 case." [FN48]

The qualified immunity provided by such exculpation clauses is grounded in section 1103(c) of the Bankruptcy Code. Section 1103(c) grants a committee broad authority to, *inter alia*, "participate in the formulation of a plan" and "perform such other services as are in the interest of those represented." [FN49] The powers provided by section 1103(c) have been interpreted as imposing a fiduciary duty on a committee member on behalf of the class it represents. [FN50]

Courts have interpreted section 1103(c) to imply a limited grant of immunity to committee members for actions during the Chapter 11 restructuring process that are consistent with their fiduciary duties. [FN51] This concept of qualified immunity has been judicially extended to professionals retained by the debtor's estate as well. [FN52] The scope of this qualified immunity is limited to postpetition conduct and must carve out acts of gross negligence or willful misconduct that contradict the party's fiduciary duty to the estate. [FN53] Importantly, an exculpation provision crafted to meet this standard merely reflects the standard to which such estate fiduciaries generally are held in a Chapter 11 case. Therefore, such exculpation clauses do not implicate section

524(e) and even those courts which follow a per se rule that prohibits nondebtor releases under a strict interpretation of section 524(e) will allow exculpation for these parties. [FN54]

III. *Washington Mutual* Decision

On January 7, 2011, the Delaware Bankruptcy Court issued a decision in *In re Washington Mutual, Inc.* [FN55] addressing the propriety of release and exculpation provisions in the Chapter 11 plan context. In particular, the decision addressed the extent to which a debtor's directors, officers, and estate professionals can obtain immunity through both estate releases and third-party releases.

A. Facts

Washington Mutual, Inc. (WMI) was the bank holding company which owned Washington Mutual Bank (WMB), which at that time was the nation's largest savings and loan association in control over approximately $188 billion in deposits. [FN56] WMI owned WMB prior to the appointment of the Federal Deposit Insurance Corporation (FDIC) as receiver for WMB on September 25, 2008. [FN57] The same day that the FDIC was appointed as receiver, all of WMB's assets were sold to JP Morgan Chase Bank, N.A. (JPMC) for approximately $1.88 billion plus the assumption of an additional $145 billion of WMB's liabilities. [FN58]

On September 26, 2008, WMI, along with its affiliate WMI Investment Corp. (the Debtors) filed for Chapter 11 protection in Delaware and touched off a host of complex litigation concerning the ownership of certain assets between the Debtors, the FDIC, and JPMC. [FN59] JPMC filed a declaratory judgment action with respect to ownership of certain assets of WMB, including approximately $3.8 billion in deposit funds as well as tax refunds in the estimated amount of $5.5 to $5.8 billion. [FN60] In response, the Debtors filed an answer asserting ownership of these disputed assets and alleging counterclaims seeking to avoid certain prepetition capital contributions to WMB as preferential and fraudulent transfers. [FN61] In addition, the Debtors filed a separate turnover complaint against JPMC with respect to the $3.8 billion in deposit funds, in response to which JPMC filed an answer and cross-claim against the FDIC. [FN62] On March 12, 2010, the parties reached a global settlement regarding ownership of the disputed assets and resolution of the claims pending among the Debtors, JPMC, the FDIC, and the Creditors' Committee (the Settlement). [FN63]

The Debtors proposed a plan of reorganization (the Plan) with the support of those parties to the Settlement, which would result in payment in cash in full (including postpetition interest) for all but the lowest subordinated class of creditors. A confirmation hearing was held on the Plan in December 2010, at which time objections were raised by various constituents with respect to the scope of the release and exculpation provisions provided for in the Plan. [FN64]

B. Analysis of Plan Releases

In addressing the Debtors' request for confirmation of the Plan and the relevant objections to the respective Plan releases, the bankruptcy court first addressed the propriety of the Settlement. The bankruptcy court found that the Settlement was fair and reasonable under Bankruptcy Rule 9019. [FN65] The bankruptcy court then went on to address the propriety of the various releases contained in the Plan. [FN66]

1. Releases Granted by the Debtors

Pursuant to the Plan, the Debtors were releasing all claims against JPMC, the FDIC, WMB, and the Credit-

ors' Committee (along with the committee members). [FN67] The releases provided by the Plan also extended to the current and former officers, directors, financial advisors, attorneys, accountants, and investment bankers for each of the parties being released. [FN68] The bankruptcy court separately examined the Debtors' releases with respect to: (1) JPMC; the FDIC and WMB; (2) the Creditors' Committee and its members; and (3) the directors, officers and other estate professionals.

In scrutinizing the Debtors' releases, the bankruptcy court noted that the Third Circuit Court of Appeals has yet to establish a test for determining when releases by a debtor are appropriate in the plan context. [FN69] The bankruptcy court went on to state that it "continues to believe that the factors articulated in *Master Mortgage* form the foundation for such an analysis, with due consideration of other factors that may be relevant to this case." [FN70]

First, with respect to the releases for JPMC, the FDIC, and WMB, the bankruptcy court found that these releases satisfied the relevant criteria under *Master Mortgage*. [FN71] The bankruptcy court noted that its holding that the Settlement was fair and reasonable under Bankruptcy Rule 9019 lead to the conclusion that the releases being granted to JPMC, the FDIC, and WMB were appropriate under the *Master Mortgage* standard. [FN72] The bankruptcy court concluded that a sufficient identity of interest existed due to the interlocking nature of the asserted ownership of certain assets by the Debtors, JPMC, and the FDIC, and because JPMC and/or the FDIC could be characterized as a successor in interest to WMB. [FN73] Based on the substantial contribution made by JPMC and the FDIC in waiving their respective claims to the disputed assets as well as other proofs of claim estimated to be in excess of $54 billion, the bankruptcy bourt found that the second *Master Mortgage* prong was met. [FN74] The bankruptcy court found that the third *Master Mortgage* factor was satisfied because the releases were necessary to confirmation and implementation of the Plan due to the complex and interrelated nature of the claims among these parties with respect to the Debtors' assets. [FN75] With respect to the fourth and fifth *Master Mortgage* factors the bankruptcy court cited to the overwhelming acceptance of the Plan by creditors, due to the bankruptcy court's recognition of the value provided by JPMC and the FDIC, and the full recovery for all creditor constituencies other than equity holders, in finding that the releases passed muster with respect to these entities. [FN76]

Second, applying the *Master Mortgage* test to the Creditors' Committee and its individual members, the bankruptcy court held that a release by the Debtors was not appropriate. [FN77] The bankruptcy court observed that no unusual facts demonstrated that the Creditors' Committee or its members took any extraordinary action above and beyond fulfilling their required fiduciary duties. [FN78] The bankruptcy court emphasized that the Creditors' Committee did not provide any tangible value or "extraordinary service" with respect to the Plan which would qualify as a "substantial contribution" necessary to justify the releases. [FN79] The bankruptcy court did expressly find, however, that exculpations for the Creditors' Committee and its members for actions taken in their role in the plan process would be approved so long as such exculpations conformed to the applicable standard which excluded willful misconduct or gross negligence. [FN80]

Third, the bankruptcy court reached a similar conclusion that the Debtors' releases for the directors, officers, and estate professionals were impermissible under the *Master Mortgage* test. [FN81] The bankruptcy court specifically rejected the argument that the identity of interest which may have existed due to the Debtors' obligation to indemnify their directors and officers pursuant to their charter or by-laws justified the releases. [FN82] The bankruptcy court explained that while this obligation to indemnify would satisfy the first factor under the *Master Mortgage* test, this alone was insufficient to warrant those releases because "[t]o hold otherwise would eliminate the other four factors and would justify releases of directors and officers in every bankruptcy case [which] is not

the law." [FN83] The bankruptcy court further held that the remaining *Master Mortgage* factors did not militate in favor of those releases because no evidence of a substantial contribution by the directors, officers or professionals was presented; the directors, officers, and professionals covered by the releases were not necessary to the Debtors' reorganization--which was limited to a run-off of the Debtors' insurance business unit; and the substantial support of the creditor constituencies and their payment in full under the Plan was not attributable to any contribution by the directors, officers or professionals. [FN84] Importantly, however, the bankruptcy court reiterated that, as with the Creditors' Committee, the directors, officers and estate professionals would be receiving an exculpation under the Plan. [FN85] Therefore, in light of the exculpation granted by the Plan, the bankruptcy court held that the releases were rendered duplicative, unnecessary or exceeded the limits of what the directors, officers and professionals were entitled to receive. [FN86]

2. Exculpation Clause and Third-Party Releases

With respect to the exculpation clause provided by the Plan, the bankruptcy court held that it was valid with respect to the directors, officers, and estate professionals since it covered only postpetition actions which did not constitute gross negligence or willful misconduct. [FN87] The bankruptcy court, however, did find that the exculpation clause was impermissibly broad as drafted because it sought to extend the release to additional parties, such as affiliates of the Debtors, which were not estate fiduciaries. As the standard for exculpation clauses is grounded in the fiduciary duty to the Chapter 11 estate, the bankruptcy court held that the exculpation clause must be limited to fiduciaries who have served in a Chapter 11 case, namely estate professionals, appointed committees, and their members, and the Debtors' directors and officers. [FN88]

Turning to the third-party releases, numerous parties objected on the ground that the releases were void since they were not obtained through a consensual agreement with the affected third parties. [FN89] As originally drafted, the Plan contained a broad release, which included JPMC, the FDIC, WMB, the Creditors' Committee, the Debtors' directors and officers, and other estate professionals. The Plan further provided an option to allow voting creditors to opt out of the releases. However, the Plan also provided that those parties who opted out would remain bound by the third-party releases. [FN90] The Debtors subsequently modified the Plan to eliminate the language dictating that the releases would be deemed given despite an opt out on the ballot, and modified the releases to exclude willful misconduct or gross negligence other than with respect to JPMC. [FN91] The modifications to the Plan further provided that any party electing to opt out of the releases would forfeit the right to any distribution under the Plan.

The bankruptcy court reiterated that although third-party releases are not prohibited under Third Circuit precedent, such releases remain "the exception, not the rule." [FN92] The bankruptcy court held that because it did not have the authority to grant a third-party release of a nondebtor absent consent by the releasing party, the original language in the Plan binding those parties who opted out to the third-party releases was invalid. [FN93] Furthermore, the bankruptcy court held that the opt out mechanism provided by the modified Plan was deficient because it provided that the releases would bind those third parties who did not return a ballot or were not entitled to vote on the Plan in the first place. [FN94] Based on the conclusion that failing to return a ballot constituted an insufficient manifestation of consent for the third-party releases, the bankruptcy court held that the third-party releases would be effective only as to those creditors who affirmatively consented by returning a ballot in favor of the Plan. [FN95]

The bankruptcy court specifically addressed the third-party releases with respect to the Debtors' directors and officers and concluded that no basis existed to extend such releases based on the circumstances of the case.

[FN96] The bankruptcy court relied on the fact that the only "contribution" made by the directors and officers was their involvement in the negotiation of the Plan and Settlement. [FN97] The bankruptcy court reasoned that participation in the negotiation process was nothing more than would be required of directors and officers in any other Chapter 11 case and that the directors and officers had already received compensation and exculpation under the Plan in exchange for their efforts. [FN98] Therefore, the bankruptcy court held that this contribution was insufficient to warrant the broad third-party release for them sought under the Plan. [FN99]

IV. Lessons from Washington Mutual

The *Washington Mutual* decision reinforces that the bar is set high for plan proponents seeking broad nonconsensual releases for directors, officers, committee members and estate professionals. While the holdings are not controversial, the bankruptcy court's decision provides insight into the applicable framework for crafting Chapter 11 plans seeking nondebtor releases.

Washington Mutual reaffirms that courts apply a fluid standard in reviewing nondebtor releases and that the ultimate decision will be guided by the specific circumstances of the case. The bankruptcy court relied on the familiar five-factor *Master Mortgage* test in analyzing the proposed releases, acknowledging however, that these factors only "form the foundation for such an analysis, with *due consideration of other factors that may be relevant*." [FN100] This language signals a willingness to depart from the *Master Mortgage* factors and suggests that a more holistic approach is appropriate rather than a mechanical application of the respective factors. This view is consistent with the admonition of the Second Circuit Court of Appeals that the decision to grant a nondebtor release is by its nature equitable and "not a matter of factors and prongs." [FN101] As such, the standardized factor tests established in *Master Mortgage* and *Dow Chemical* are incongruent with the directive that nondebtor releases represent extraordinary relief that is available only in rare cases. [FN102]

The bankruptcy court's analysis in *Washington Mutual* with respect to the requested releases for the Debtors' directors and officers reveals the principal importance of the contribution made by these parties under the proposed plan. The decision in *Washington Mutual* hinged primarily on the inability to point to a substantial contribution to the Plan other than efforts in negotiating the Plan and accompanying Settlement, characterized by the bankruptcy court as "nothing more than what is required of directors and officers of debtors in possession." [FN103] In this vein, the bankruptcy court also relied on the lack of participation by the directors and officers in the Debtors' business following confirmation to support its conclusion that the proposed releases were unnecessary. [FN104]

The paramount importance of measuring the contribution of the directors and officers, both in terms of contributing financially to the plan and continuing their respective duties postconfirmation, is highlighted by the fact that the bankruptcy court essentially discounted the remaining *Master Mortgage* factors as largely irrelevant. In *Washington Mutual*, the bankruptcy court noted that the "identity of interest" factor was present but that it was of limited import due to the fact that Chapter 11 debtors routinely will be required to indemnify their directors and officers. [FN105] Interestingly, the bankruptcy court acknowledged that there was strong support for the Plan by the creditor constituencies and that creditors, unlike equity, were receiving payment in full but that these factors were inapposite to the requested releases since neither of these results was based on any contribution by the directors and officers. [FN106] As both of these factors were found to favor the releases in favor of JPMC, the FDIC, and WMB under the same circumstances, it can be gleaned from *Washington Mutual* that the critical factor in justifying director and officer releases is demonstrating a tangible financial contribution by

them to the Chapter 11 plan.

Washington Mutual further reveals that absent a financial contribution, plan proponents should focus on the continuing duties of the directors and officers postconfirmation to justify release provisions. A recent decision by the bankruptcy court for the Southern District of New York, *In re Ion Media Networks, Inc.*, [FN107] illustrates this point. In *Ion Media*, the proposed plan of reorganization was conditioned on the debtor obtaining approval of the Federal Communications Commission (FCC) of its FCC licenses, which represented its most valuable assets. [FN108] In order to expedite the debtor's emergence from Chapter 11, the debtor's current board of directors was placed in control of the FCC licenses to allow the debtor to exit bankruptcy while awaiting final approval from the FCC to transfer the licenses. [FN109] The directors sought approval of third-party releases for the directors in exchange for staying in control of the FCC licenses during the interim approval period. The bankruptcy court approved the plan releases on the ground that absent the cooperation of the directors, confirmation of the plan would not have been achieved. [FN110] Both *Washington Mutual* and *Ion Media* demonstrate that requiring the benefitting directors and officers to remain employed by the debtor, particularly where they perform certain unique duties, strengthens the chances for approval of obtaining plan releases.

The focus of *Washington Mutual*'s analysis on the contribution, financial or otherwise, by the Debtors' directors and officers suggests that this factor is of principal importance and largely subsumes the remaining *Master Mortgage* factors. Thus, the paradigm for director and officer releases may best be understood as a quid pro quo in which these parties must establish a tangible contribution to the Chapter 11 plan in order to justify a third-party release.

With respect to committee members and estate professionals, *Washington Mutual*'s holdings are in line with the Bankruptcy Code and existing case law that these parties are entitled to receive a more limited release consistent with their status as estate fiduciaries. Absent some showing of a significant financial contribution to a proposed plan, it is difficult to envision a scenario in which these parties would be entitled to a more general nondebtor release based on their participation in the Chapter 11 process. The bankruptcy court's decision in *Washington Mutual* to restrict the releases for these parties to exculpation shielding them from liability for actions taken during the Chapter 11 process (excluding gross negligence or willful misconduct) is in recognition of the fact that these parties are sufficiently protected by the exculpation standard in discharging their fiduciary duties. [FN111]

V. Conclusion

Chapter 11 cases, and the associated litigation, are becoming increasingly complex. Therefore, obtaining broad releases for those parties actively participating in these cases often is a critical tool in achieving the consensus necessary to reach plan confirmation, as demonstrated by *Washington Mutual*. Despite the magnitude of these releases, a lack of consistency persists among the courts and creates uncertainty for those major actors in the Chapter 11 plan process. Absent clear guidance from the Supreme Court or Congress, practitioners must look to decisions such as *Washington Mutual* for guidance in tailoring releases that give comfort to those parties invested in the case while also conforming to the shifting standards for nondebtor releases.

[FN1]. Bob Dylan, Shelter from the Storm, on Blood on the Tracks (Columbia Records 1975).

[FN2]. See 11 U.S.C.A. §§ 524; 1141(d)(1); see generally Peter M. Boyle, Non-Debtor Liability in Chapter 11:

Validity of Third-Party Discharge in Bankruptcy, 61 Fordham L. Rev. 421 (1992-1993).

[FN3]. See In re Arrowmill Development Corp., 211 B.R. 497, 507, 31 Bankr. Ct. Dec. (CRR) 193, 38 Collier Bankr. Cas. 2d (MB) 938 (Bankr. D. N.J. 1997) ("Since a discharge is an extreme remedy, stripping a creditor of its claims against its will, it is a privilege reserved for those entities which file a petition under the bankruptcy code and abide by its rules."). In fact, the discharge provided at confirmation epitomizes the fresh start policy embodied in Chapter 11. See Brown v. Felsen, 442 U.S. 127, 128, 99 S. Ct. 2205, 60 L. Ed. 2d 767, 5 Bankr. Ct. Dec. (CRR) 226, 20 C.B.C. 273, 1 Collier Bankr. Cas. 2d (MB) 34, Bankr. L. Rep. (CCH) P 67122 (1979) (explaining that the discharge provides "'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"') (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934)).

[FN4]. Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the U.S. Code.

[FN5]. Dreher and Feeney, Bankruptcy Law Manual § 11:58 (5th ed.) (noting the increased frequency in which broad nondebtor releases are being sought in Chapter 11 plans).

[FN6]. See In re Exide Technologies, 303 B.R. 48, 71-74 , 42 Bankr. Ct. Dec. (CRR) 108 (Bankr. D. Del. 2003) (explaining the different analyses for a debtor's release of a nondebtor third party and a nondebtor's release of other nondebtor third parties).

[FN7]. 11 U.S.C.A. § 1141(d). Section 1141 provides in pertinent part:
(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--
(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502 (g), 502 (h), or 502 (i) of this title, whether or not--
(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
(ii) such claim is allowed under section 502 of this title; or
(iii) the holder of such claim has accepted the plan; and
(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.
11 U.S.C.A. § 1141(d).

[FN8]. 11 U.S.C.A. § 524(a). Section 524 provides:
A discharge in a case under this title--
(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523 (c) and 523 (d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in

the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived. 11 U.S.C.A. § 524(a).

[FN9]. The discharge injunction is subject to certain exceptions as provided for in section 1141(d) and section 524. See 11 U.S.C.A. §§ 1141(d)(2),(3), 524(b).

[FN10]. 11 U.S.C.A. § 524(e).

[FN11]. 11 U.S.C.A. § 105(a).

[FN12]. U.S. v. Pepperman, 976 F.2d 123, 131, 23 Bankr. Ct. Dec. (CRR) 734, Bankr. L. Rep. (CCH) P 74925, Unempl. Ins. Rep. (CCH) P 16858A, 92-2 U.S. Tax Cas. (CCH) P 50465, 70 A.F.T.R.2d 92-5657 (3d Cir. 1992) (section 105(a) does not "create substantive rights that would otherwise be unavailable under the Bankruptcy Code"). Accord Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988) (court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code"); In re Kaplan, 104 F.3d 589, 597, 37 Collier Bankr. Cas. 2d (MB) 421, Bankr. L. Rep. (CCH) P 77253, Unempl. Ins. Rep. (CCH) P 15656B, 97-1 U.S. Tax Cas. (CCH) P 50169, 79 A.F.T.R.2d 97-557 (3d Cir. 1997).

[FN13]. See generally Daniel J. Bussel & Kenneth N. Klee, Recalibrating Consent in Bankruptcy, 83 Am. Bankr. L.J. 663, 725-26 (2009) (explaining the dichotomy between these conflicting statutory interpretations and cataloguing cases applying each approach).

[FN14]. 11 U.S.C.A. § 524(g).

[FN15]. 11 U.S.C.A. § 524(g)(4)(A)(ii).

[FN16]. See Bussel & Klee, 83 Bankr. L.J. at 726, n.289 (citing Pub. L. No. 103-394, 108 Stat. 4106, § 111(b) (1994) (uncodified rule of construction of § 524(g)).

[FN17]. See In re Transit Group, Inc., 286 B.R. 811, 815-17, 40 Bankr. Ct. Dec. (CRR) 158, 49 Collier Bankr. Cas. 2d (MB) 971 (Bankr. M.D. Fla. 2002) (examining the circuit split that has emerged with respect to nondebtor releases); Lawrence P. King , 4 Collier on Bankruptcy ¶ 524.05, p. 524-52 (16th ed. rev. 2009) (hereinafter "Collier") ("Courts have disagreed over whether section 524(e) may be overridden by a provision of a confirmed plan under chapter 11 or under any other rehabilitation chapters.").

[FN18]. See Kyung S. Lee, et al., Revisiting the Propriety of Third-Party Releases of Nondebtors, 18 Norton J. Bankr. L & Prac. 465 (July/Aug. 2009) ("Since the enactment of the Bankruptcy Code in 1978, the majority of federal circuits have found authority for bankruptcy courts to use third-party non-debtor releases and injunctions to deal with unusual and complex cases."). Accord In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 26 Collier Bankr. Cas. 2d (MB) 1413, 22 Fed. R. Serv. 3d 1091 (2d Cir. 1992); In re Continental Airlines, 203 F.3d 203, 211-14, 35 Bankr. Ct. Dec. (CRR) 176 (3d Cir. 2000) (hereinafter "Continental"); In re A.H. Robins Co., Inc., 880 F.2d 694, 19 Bankr. Ct. Dec. (CRR) 997, Bankr. L. Rep. (CCH) P 72955 (4th Cir. 1989); In re Dow Corning Corp., 280 F.3d 648, 657-59, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 FED App. 0043P (6th Cir. 2002) (rejected by, In re PTI Holding Corp., 346 B.R. 820 (Bankr. D. Nev. 2006)); Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043, 1047, 29 Collier Bankr. Cas. 2d (MB) 1215, Bankr. L. Rep. (CCH) P 75398 (7th Cir. 1993) ("[S]ection 524(e) provides only that

a discharge does not affect the liability of third parties.")

[FN19]. See Matter of Zale Corp., 62 F.3d 746, 760, Bankr. L. Rep. (CCH) P 76617 (5th Cir. 1995); In re Lowenschuss, 67 F.3d 1394, 1401-02, 34 Collier Bankr. Cas. 2d (MB) 544, Bankr. L. Rep. (CCH) P 76673, 33 Fed. R. Serv. 3d 249 (9th Cir. 1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.") (citation omitted); In re Western Real Estate Fund, Inc., 922 F.2d 592, 601-02, 21 Bankr. Ct. Dec. (CRR) 320, 24 Collier Bankr. Cas. 2d (MB) 1012, Bankr. L. Rep. (CCH) P 73754 (10th Cir. 1990), opinion modified, 932 F.2d 898 (10th Cir. 1991) (holding that the automatic stay "may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor."). As explained herein, this per se rule as to the unenforceability of nondebtor releases followed by these courts does not apply to channeling injunctions under section 524(g) or exculpations provided to committees and estate professionals.

[FN20]. Matter of Munford, Inc., 97 F.3d 449, 454-55, 29 Bankr. Ct. Dec. (CRR) 1087, 36 Collier Bankr. Cas. 2d (MB) 1604, 35 Fed. R. Serv. 3d 1538 (11th Cir. 1996) (approving third party nondebtor releases in a settlement agreement in a related adversary proceeding); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 980-81, 27 Bankr. Ct. Dec. (CRR) 1039, 34 Collier Bankr. Cas. 2d (MB) 313, Bankr. L. Rep. (CCH) P 76634 (1st Cir. 1995) (noting support for pro-release courts that in "extraordinary circumstances, a bankruptcy court can grant permanent injunctive relief essential to enable the formulation and confirmation of a reorganization plan"); In re AOV Industries, Inc., 792 F.2d 1140, 1150-54, 14 Bankr. Ct. Dec. (CRR) 816, Bankr. L. Rep. (CCH) P 71190 (D.C. Cir. 1986).

[FN21]. Section 1123(b)(3)(A) of the Bankruptcy Code provides in pertinent part: "[A] plan may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C.A. § 1123(b)(3)(A).

[FN22]. See In re Spansion, Inc., 426 B.R. 114, 143 (Bankr. D. Del. 2010); In re DBSD North America, Inc., 419 B.R. 179, 217 (Bankr. S.D. N.Y. 2009), aff'd, 2010 WL 1223109 (S.D. N.Y. 2010), judgment aff'd in part, rev'd in part, 627 F.3d 496 (2d Cir. 2010), opinion issued, 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011); (approving releases and discharges of claims and causes of action pursuant to section 1123(b)(3)(A) as a valid exercise of debtor's business judgment); In re General Homes Corp., 134 B.R. 853, 861 (Bankr. S.D. Tex. 1991) ("To the extent that the language contained in the plan purports to release any causes of action... the Debtor could assert, such provision is authorized by § 1123(b)(3)(A), subject to compliance with provisions of the code requiring that the plan be fair and equitable as to creditors and that the plan be proposed in good faith."). Estate claims have also been authorized by some courts under the test articulated in In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994), discussed in Section 2.B infra.

[FN23]. As explained in Collier, the approval of a release under section 1123(b)(3)(A) generally requires a bankruptcy court to apply the standard for settlement under Fed. R. Bankr. P. 9019, which obligates the bankruptcy court to examine the probability of success with respect to the settled claims. 7 Collier, ¶1123.02[3], p. 1123-18 n.11 (citations omitted). Cf. Spansion, 426 B.R. at 143 n.48 (approving third-party release pursuant to section 1123(b)(3)(A) and noting that "[a]lthough there is no evidence of any potential claims here, it is not unreasonable for the Debtors to provide a broad release of its claim in return for creditors' agreement to the Plan.").

[FN24]. Transit Group, 811 B.R. at 816 (noting that courts which find that third-party releases are not barred by

section 524(e) have "had difficulty articulating an appropriate standard" for when such releases are permissible).

[FN25]. In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 937, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994). The bankruptcy court in *Master Mortgage* detailed the oft-cited five factor test in addressing an involuntary third-party release for the debtor's largest secured creditor and certain nondebtor affiliates. 168 B.R. at 933-34. Despite the fact that *Master Mortgage* and the majority of the cases relying upon *Master Mortgage* apply these factors in the context of third-party releases, decisions issued by the Delaware bankruptcy court, including the *Washington Mutual* decision discussed herein, have applied this analysis with respect to estate releases as well. See In re Washington Mutual, Inc., 442 B.R. 314, 346 (Bankr. D. Del. 2011); In re Zenith Electronics Corp., 241 B.R. 92, 110, 35 Bankr. Ct. Dec. (CRR) 329, 43 Collier Bankr. Cas. 2d (MB) 206, 53 Fed. R. Evid. Serv. 523 (Bankr. D. Del. 1999); Exide, 303 B.R. at 72.

[FN26]. Master Mortg., 168 B.R. at 937.

[FN27]. See Master Mortg., 168 B.R. at 937 (reciting the relevant factors to be considered but noting that no "rigid test" can be applied in determining whether nondebtor releases are appropriate); Zenith, 241 B.R. at 110-11; Spansion, 426 B.R. at 143, n.47.

[FN28]. See Spansion, 426 B.R. at 143, n.47.

[FN29]. Continental, 203 F.3d at 214 (noting that the "hallmarks" of permissible nonconsensual releases are "fairness, necessity to the reorganization, and specific factual findings to support these conclusions").

[FN30]. Continental, 203 F.3d at 212-13 (recognizing that nondebtor releases have been approved only in "extraordinary cases"); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (holding that third-party releases are allowed but "it is clear that such a release is proper only in rare cases"); Dow Corning, 280 F.3d at 657-58 ("[S]uch an injunction is a dramatic measure to be used cautiously."); Transit Group, 286 B.R. at 817 ("In addition, the courts allowing non-debtor releases hold that the granting of such releases is justified only in unusual circumstances. Routine inclusion of non-debtor releases is not appropriate.").

[FN31]. See In re Wool Growers Cent. Storage Co., 371 B.R. 768, 775-76, 48 Bankr. Ct. Dec. (CRR) 149 (Bankr. N.D. Tex. 2007) (citing Joshua M. Silverstein, Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations, 23 Emory Bankr. Dev. J. 13, 25 (2006)); see also Lee, et al., 18 Norton J. Bankr. L & Prac. at 466 ("Most courts do not find voluntary third-party releases controversial since they represent an agreement between the creditor and the released nondebtor party.").

[FN32]. Specialty Equipment Companies, 3 F.3d at 1047; In re Central Jersey Airport Services, LLC, 282 B.R. 176, 182, 49 Collier Bankr. Cas. 2d (MB) 209 (Bankr. D. N.J. 2002) (noting that voluntary consensual releases are permissible under the Bankruptcy Code); In re Monroe Well Service, Inc., 80 B.R. 324, 334-35, 16 Bankr. Ct. Dec. (CRR) 1077 (Bankr. E.D. Pa. 1987) ("[A] plan provision permitting individual creditors the option of providing a voluntary release to nondebtor plan funders does not violate 11 U.S.C. § 524(e).").

[FN33]. In re Coram Healthcare Corp., 315 B.R. 321, 336, 94 A.F.T.R.2d 2004-6268 (Bankr. D. Del. 2004) ("[A] Plan is a contract that may bind those who vote in favor of it.") (citation omitted); Arrowmill, 211 B.R. at 506 ("When a release of liability of a nondebtor is a consensual provision, however, agreed to by the effected

[sic] creditor, it is no different from any other settlement or contract."); In re West Coast Video Enterprises, Inc., 174 B.R. 906, 911, 26 Bankr. Ct. Dec. (CRR) 417 (Bankr. E.D. Pa. 1994) ("each creditor bound by the terms of the release must individually affirm same"). See In re Adelphia Communications Corp., 368 B.R. 140, 267-68 (Bankr. S.D. N.Y. 2007).

[FN34]. See, e.g., Coram, 315 B.R. at 335 (holding that the bankruptcy court did "not have the power to grant a release of [a non-debtor] on behalf of third parties"); Zenith, 241 B.R. at 111; In re Nickels Midway Pier, LLC, 2010 WL 2034542 at *13 (Bankr. D. N.J. 2010) (finding that third-party releases were impermissible where releasing parties did not receive consideration or otherwise consent).

[FN35]. DBSD, 419 B.R. at 217.

[FN36]. See Debtors' Second Amended Joint Plan of Reorganization [Docket No. 231], Art. III(F), at 42, In re DBSD North America, Inc., 419 B.R. 179 (Bankr. S.D. N.Y. 2009), aff'd, 2010 WL 1223109 (S.D. N.Y. 2010), judgment aff'd in part, rev'd in part, 627 F.3d 496 (2d Cir. 2010), opinion issued, 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011). The release issue was not raised on the appeals.

[FN37]. DBSD, 419 B.R. at 218.

[FN38]. DBSD, 419 B.R. at 218 (citing In re Calpine Corp., 2007 WL 4565223 (Bankr. S.D. N.Y. 2007).

[FN39]. See Continental, 203 F.3d at 212-13 (recognizing that nondebtor releases have been approved only in "extraordinary cases"); In re Metromedia., 416 F. 3d at141 (holding that third-party releases are allowed but "it is clear that such a release is proper only in rare cases"); MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93-94, 17 Bankr. Ct. Dec. (CRR) 293, 18 Collier Bankr. Cas. 2d (MB) 316, Bankr. L. Rep. (CCH) P 72180 (2d Cir. 1988).

[FN40]. See Dow Corning, 280 F.3d at 658 (summarizing those factors which courts have considered as relevant in determining whether "unusual circumstances" exist to justify nonconsensual third-party releases).

[FN41]. See, e.g., A.H. Robins, 880 F.2d at 700-01 (debtor's insurer supplied $350 million to a fund from which product liability claimants were paid).

[FN42]. See Continental, 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"), In re Genesis Health Ventures, Inc., 266 B.R. 591, 606-07, 38 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Del. 2001) ("[T]he officers, directors and employee have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of ?assets' to the reorganization."); Spansion, 426 B.R. at 145.

[FN43]. In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293, 26 Collier Bankr. Cas. 2d (MB) 1413, 22 Fed. R. Serv. 3d 1091 (2d Cir. 1992).

[FN44]. Drexel, 960 F.2d at 288-89, 293.

[FN45]. Drexel, 960 F.2d at 288-89.

[FN46]. Drexel, 960 F.2d at 293.

[FN47]. The author notes that the distinction in terminology between third-party releases and exculpation clauses are somewhat muddled within the case law as these concepts are closely related. See DBSD, 419 B.R. at 217 (characterizing third-party releases and exculpation clauses as "first cousins"). For purposes of this article, an exculpation is understood as a release given to third parties, namely estate professionals, with respect to actions taken during the Chapter 11 process.

[FN48]. DBSD, 419 B.R. at 217. The court further noted that although exculpation provisions have a "salutary purpose," that is insufficient standing alone for them to be included in a plan as a general rule. DBSD, 419 B.R. at 217.

[FN49]. 11 U.S.C.A. § 1103(c).

[FN50]. See Collier, ¶ 1103.05[2], p. 1103-25.

[FN51]. See, e.g., In re Pacific Lumber Co., 584 F.3d 229, 253, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009); In re L.F. Rothschild Holdings, Inc., 163 B.R. 45, 49, 25 Bankr. Ct. Dec. (CRR) 223 (S.D. N.Y. 1994); Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514 (S.D. N.Y. 1994); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722, 26 Collier Bankr. Cas. 2d (MB) 1283, Bankr. L. Rep. (CCH) P 74581 (Bankr. S.D. N.Y. 1992), order aff'd, 140 B.R. 347, Bankr. L. Rep. (CCH) P 74620 (S.D. N.Y. 1992); see also Collier, ¶ 1103.05[4], p. 1103-27 ("Although committee members should be liable for breaches of fiduciary duty, they should not be liable for actions taken in their capacity as committee members.").

[FN52]. See, e.g., United Artists Theatre Co. v. Walton, 315 F.3d 217, 229, 40 Bankr. Ct. Dec. (CRR) 182, 49 Collier Bankr. Cas. 2d (MB) 1434, Bankr. L. Rep. (CCH) P 78777 (3d Cir. 2003); In re PWS Holding Corp., 228 F.3d 224, 236-37, 36 Bankr. Ct. Dec. (CRR) 955, 44 Collier Bankr. Cas. 2d (MB) 1647 (3d Cir. 2000). See generally Kurt F. Gwynne, Indemnification and Exculpation of Professional Persons in Bankruptcy Cases, 10 ABI L. Rev. 711 (2002).

[FN53]. See PWS Holdings, 228 F.3d at 245-46 (holding that any exculpation is permissible only to the extent it relates to postpetition activity and provides that parties remain liable for gross negligence, willful misconduct or other ultra vires acts).

[FN54]. See Pacific Lumber, 584 F.3d at 253 (striking all nondebtor releases under section 524(e) except for the exculpation provided to creditors' committee and its members).

[FN55]. In re Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011) (hereinafter "WAMU").

[FN56]. WAMU, 442 B.R. at 322.

[FN57]. WAMU, 442 B.R. at 322. WMB was forced into receivership as a result of the global credit crisis which struck in September 2008; resulting in a bank run of approximately $16 billion in deposits being withdrawn from WMB in a 10-day period beginning September 15, 2008. WAMU, 442 B.R. at 322. The seizure of WMB by the FDIC represented the largest bank failure in U.S. history. WAMU, 442 B.R. at 322.

[FN58]. WAMU, 442 B.R. at 322.

[FN59]. WAMU, 442 B.R. at 322.

[FN60]. WAMU, 442 B.R. at 322-23.

[FN61]. WAMU, 442 B.R. at 323.

[FN62]. WAMU, 442 B.R. at 323. The Debtors subsequently filed a motion for summary judgment in the turnover action, which was joined by the Creditors' Committee. WAMU, 442 B.R. at 323. The Debtors also filed a Fed. R. Bankr. P. 2004 motion to investigate additional claims against JPMC, including tortuous interference with a business expectancy, antitrust and breach of contract. WAMU, 442 B.R. at 323.

[FN63]. WAMU, 442 B.R. at 323. In addition, a group of noteholders of certain of WMB's notes were involved in the litigation and were parties to the Settlement. WAMU, 442 B.R. at 323. The Settlement was incorporated as part of the Debtors' proposed plan of reorganization and amended several times in accordance with certain revisions made to the plan.

[FN64]. WAMU, 442 B.R. at 325.

[FN65]. WAMU, 442 B.R. at 327-45. The bankruptcy court applied the four-factor test established by the Third Circuit in In re Martin, 91 F.3d 389, 393, 36 Collier Bankr. Cas. 2d (MB) 600 (3d Cir. 1996). WAMU, 442 B.R. at 327-28. Applying the *Martin* factors under the circumstances of the case, the bankruptcy court found that: (1) the probability of success with respect to the pending litigation; (2) the attendant difficulties in collection; (3) the complexity, expense and delay that would result from pursuing the litigation; and (4) the interest of the Debtors' creditor constituencies all favored approval of the Settlement. WAMU, 442 B.R. at 328-45.

[FN66]. WAMU, 442 B.R. at 346. Certain of the release provisions were contained in the Settlement and incorporated into the Plan, however, for ease of understanding all releases will be treated as part of the Plan in summarizing the bankruptcy court's analysis.

[FN67]. WAMU, 442 B.R. at 346. The release provisions also released all claims by the Debtors against the indenture trustees for each of the tranches of the Debtors' debt, the liquidating trust created by the Plan, the liquidating trustee appointed by the Plan and those noteholders that were party to the Settlement. WAMU, 442 B.R. at 346.

[FN68]. WAMU, 442 B.R. at 346. This release for designated “Related Persons” also included all present and former affiliates of the Debtors. WAMU, 442 B.R. at 346.

[FN69]. WAMU, 442 B.R. at 346-47 (citing Continental, 203 F.3d at 214).

[FN70]. WAMU, 442 B.R. at 347.

[FN71]. WAMU, 442 B.R. at 347-48. The bankruptcy court noted that the objections regarding the reasonableness of the releases given by the Debtors to JPMC, the FDIC and WMB basically reiterated the objection that the Settlement was unreasonable and unfair, and therefore the resulting releases must also be unfair. WAMU, 442 B.R. at 347 (noting that the objections to the releases were “largely premised on their opposition to the Global Settlement and their arguments that the Debtors are simply not getting enough under that settlement.”).

[FN72]. See WAMU, 442 B.R. at 347 (“Accepting that the Global Settlement is fair and reasonable, as the Court

concludes above, however, leads the Court to conclude that the releases being granted to JPMC, the FDIC and WMB by the Debtors meet the *Master Mortgage* standards.")

[FN73]. See WAMU, 442 B.R. at 347 (noting that the competing claims resolved by the Settlement and the fact that the lawsuits filed relating to the seizure of WMB, if permitted to continue, would deplete the assets of the Debtors' estates both supported a finding that a sufficient identity of interest was present).

[FN74]. WAMU, 442 B.R. at 347. The bankruptcy court emphasized that this contribution was critical both because it eliminated the largest outstanding claims against the Debtors' estates and also permitted the use of estate property free of JPMC and the FDIC's competing claims of ownership. WAMU, 442 B.R. at 347.

[FN75]. WAMU, 442 B.R. at 347 (noting that it would be "hard to imagine what plan the Debtors' could propose" absent resolving these outstanding claims).

[FN76]. WAMU, 442 B.R. at 348. Although the bankruptcy court acknowledged that equity interest holders were not likely to recover under the Plan, it concluded that this result would not likely change if litigation against JPMC and the FDIC were allowed to continue. WAMU, 442 B.R. at 348.

[FN77]. WAMU, 442 B.R. at 348.

[FN78]. WAMU, 442 B.R. at 348 ("There is nothing unusual about this case that demonstrates that the Committee or its members have done anything other than fulfill their fiduciary duties.").

[FN79]. WAMU, 442 B.R. at 348. The bankruptcy court also held that this same analysis applied with respect to its finding that the releases granted to the indenture trustees for the Debtors' debt were inappropriate, although the bankruptcy court noted that the release was itself duplicative since the members of the Creditors' Committee were the indenture trustees for the various tranches of the Debtors' debt. WAMU, 442 B.R. at 349, n.36. With respect to the releases granted by the Debtors to claims against the Plan's liquidating trust and liquidating trustee, the bankruptcy court found that such releases were wholly unsupported by the circumstances of the case. WAMU, 442 B.R. at 348. The bankruptcy court reasoned that since neither the liquidating trust nor the liquidating trustee will come into existence until after the Plan is confirmed there were no actions for which a release would be required in the first instance. WAMU, 442 B.R. at 348.

[FN80]. WAMU, 442 B.R. at 348 (citing PWS Holding, 228 F.3d at 246). The release provision with respect to these "Related Persons" was modified in an apparent attempt to limit the release only to persons acting on the Debtors' behalf postpetition, however, the bankruptcy court found that the provision as drafted was unclear and that even if the release was limited to postpetition activity, it remained "overly broad or unnecessary." WAMU, 442 B.R. at 349.

[FN81]. WAMU, 442 B.R. at 349 (finding that under *Master Mortgage*, "there is no basis whatsoever for the Debtors to grant a release to directors and officers or any professionals of the Debtors, current or former.").

[FN82]. WAMU, 442 B.R. at 349.

[FN83]. WAMU, 442 B.R. at 349 (citing Continental, 203 F.3d at 216).

[FN84]. WAMU, 442 B.R. at 349-50.

[FN85]. WAMU, 442 B.R. at 350.

[FN86]. WAMU, 442 B.R. at 350.

[FN87]. WAMU, 442 B.R. at 350-51.

[FN88]. WAMU, 442 B.R. at 350-51 (instructing that the fiduciary standard for exculpations "applies only to estate fiduciaries") (citing PWS Holding, 228 F.3d at 246).

[FN89]. WAMU, 442 B.R. at 351.

[FN90]. WAMU, 442 B.R. at 351 ("[T]he Plan provided that because the releases were essential to the Settlement, even parties who thought they were opting out of the releases by checking the box on their ballot would be bound by the releases and would receive whatever distributions the Plan afforded their class.").

[FN91]. WAMU, 442 B.R. at 352.

[FN92]. WAMU, 442 B.R. at 351 (citing Continental, 203 F.3d at 212) ("nonconsensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases"').

[FN93]. WAMU, 442 B.R. at 352 (citations omitted).

[FN94]. WAMU, 442 B.R. at 355 (citing Zenith, 241 B.R. at 111) (finding that a release provision could only bind those parties who actually voted in favor of the plan).

[FN95]. WAMU, 442 B.R. at 355. The bankruptcy court overruled the objection of the U.S. Trustee that the Plan's conditioning a distribution on accepting the third-party releases violated the nondiscriminatory edict of section 1123(a)(4) of the Bankruptcy Code, since providing disparate treatment within a class is permissible where a creditor agrees to settle rather than litigate so long as each claimant within a class has an equal opportunity for such treatment. WAMU, 442 B.R. at 355-56 (citations omitted).

[FN96]. WAMU, 442 B.R. at 354.

[FN97]. WAMU, 442 B.R. at 354.

[FN98]. WAMU, 442 B.R. at 354.

[FN99]. WAMU, 442 B.R. at 354 (citing Spansion, 426 B.R. at 145) (holding that effort by nondebtors to formulate a plan of reorganization did not rise to the level of financial contribution necessary needed to obtain approval of nonconsensual releases).

[FN100]. WAMU, 442 B.R. at 347 (emphasis added).

[FN101]. Metromedia Fiber, 416 F.3d at 142.

[FN102]. Metromedia Fiber, 416 F.3d at 142.

[FN103]. See WAMU, 442 B.R. at 350, 354 (noting that the directors and officers could not point to any "substantial contribution" to the case and were already receiving compensation in exchange for performing these

duties).

[FN104]. WAMU, 442 B.R. at 350.

[FN105]. WAMU, 442 B.R. at 349.

[FN106]. WAMU, 442 B.R. at 350.

[FN107]. In re Ion Media Networks, Inc., 419 B.R. 585, 52 Bankr. Ct. Dec. (CRR) 140 (Bankr. S.D. N.Y. 2009).

[FN108]. Ion Media, 419 B.R. at 601.

[FN109]. Ion Media, 419 B.R. at 601-02.

[FN110]. Ion Media, 419 B.R. at 601-02.

[FN111]. See Transit Group, 286 B.R. at 819 (“While it is understandable that creditor's committee members would like to obtain such a broad release, nothing in the Bankruptcy Code supports this type of request. Members of creditors committees, under current law, have very limited responsibility for their actions, omissions, and decisions made while serving on a creditor's committee. Chapter 11 plans should not be used to alter this legal responsibility.”)

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