Great Debates!

Richard M. Meth, Moderator
Fox Rothschild, LLP; Roseland, N.J.

A. Absolute Priority Rule in Individual Chapter 11s

John A. Anthony
Anthony & Partners, LLC; Tampa

Michael C. Markham
Johnson, Pope, Bokor, Ruppel & Burns, LLP; Clearwater

B. Lifestyle Issues in Individual Chapter 11s

David S. Jennis
Jennis & Bowen, P.L.; Tampa

Frank P. Terzo
GrayRobinson, PA; Miami

C. Exculpation of Professionals in Chapter 11 Plans

Charles A. Postler
Stichter, Riedel, Blain & Prosser, P.A.; Tampa

Joseph Samet
Baker & McKenzie; New York

Individual Chapter 11 Cases Regarding the "Lifestyle" Issue

Inclusion of Post-Petition Wages as Property of the Estate

In re Baker, 2013 WL 7044696 (Bankr. M.D. Fla. Dec. 10, 2013).
Judge Glenn converted chapter 7 case to chapter 11. Physician debtor was medical director for pain management and addiction center and generated income from her ownership interest in the entity. It is unclear whether Judge Glenn made any determination as to whether the income from the medical practice was exempt, but indicates that the income would be available to creditors as property of the estate under Section 1115.

In re Clemente, 409 B.R. 288 (Bankr. D.N.J. 2009).
To avoid ruling on the constitutionality of Section 1115 of the Bankruptcy Code which was added through the BAPCPA amendments and arguably requires a debtor to fund a plan with future wages, the bankruptcy court permitted a chapter 11 debtor to convert his case to chapter 7, even though a chapter 11 trustee had been appointed, to eliminate Thirteenth Amendment concerns.

Wages vs. Distributions

In re Im, 495 B.R. 46 (Bankr. M.D. Fla. 2013).
Judge Glenn determined that funds chapter 7 debtor received from corporation of which he was the president and director did not qualify as exempt wages or earnings under the Florida Statute and were properly characterized as profits from the operation of a business.

In re McDermott, 425 B.R. 848, 851 (Bankr. M.D. Fla. 2010).
Distributions from closely held corporation in which debtor was president and general manager and controlled timing and amount of paychecks did not constitute exempt wages.

In re Pettit, 224 B.R. 834, 839 (Bankr. M.D. Fla. 1998).
Bankruptcy court concluded debtor's commission and bonuses were exempt earnings under Section 222.11 of the Florida Statutes where debtor's activities as an independent contractor were not in the nature of running a business and debtor historically received regular compensation based on an arm's length, verbal employment agreement.

In re Harrison, 216 B.R. 451, 454-55 (Bankr. S.D. Fla. 1997).
The bankruptcy court determined that a dentist's income did not constitute exempt wages under Section 222.11 of the Florida Statutes because the dentist, along with the other shareholder in the professional association, occasionally received larger than their usual salary paychecks when their dental practice had excess cash. The court focused on the fact that the dentist and the other

shareholder had complete autonomy to make all business related decisions and that the employment agreement was not an arms length negotiated contract because it was between the debtor dentist as an individual and as a partner in the professional association.

In re Zamora, 187 B.R. 783, 784-85 (Bankr. S.D. Fla. 1995).
Court determined income from attorney's legal practice were not wages because he had complete control over the amount of his compensation and terms of employment.

In re Manning, 163 B.R. 380, 382 (Bankr. S.D. Fla. 1994).
Debtor's income from general contracting corporation was not wages where the debtor did not have a written, arms length employment agreement setting forth his compensation.

Use of Property of the Estate by Chapter 11 Debtor

In re Seely, 492 B.R. 284 (Bankr. C.D. Cal. 2013).
Individual chapter 11 case converted to chapter 7. Chapter 7 trustee sought turnover of non-exempt cash used by the debtors post-petition and non-exempt cash obtained by the debtors after the petition date and to surcharge their exempt assets. The Court denied the trustee's request for turnover, finding that the debtors were authorized to use estate property in the ordinary course of business (even the absence of a specific order authorizing the debtors to use non-exempt property), and absent wrongdoing, there was no basis for surcharge.

In re Osbourne, 2013 WL 2385136 (Bankr. E.D.N.C. May 30, 2013).
Notwithstanding the absence of any objection by unsecured creditors (and the corresponding inapplicability of Section 1129(a)(15)), the court determined that the individual chapter 11 debtors' case was not confirmable for lack of good faith under Section 1129(a)(3). The court's analysis focused heavily on the debtors' income and post-petition expenditures. The husband debtor was a real estate broker who made over $300,000 a year. The debtors proposed to retain their homestead and a second vacation home, with total mortgage payments of over $6,000. The debtors spent over $1,000 per month on clothes on several occasions, dined out excessively, and took a vacation to Disney. The debtors spent over $600 on a car payment, and $1,400 per month on their son's tuition. The plan proposed to pay approximately $20,000 to unsecured creditors.

U.S. v. Villalobos (In re Villalobos), 2011 WL 4485793 (B.A.P. 9th Cir. Aug. 19, 2011).
Debtor filed motion to approve budget, which included large mortgage payment made on several pieces of real property, payments on at least 5 luxury vehicles, and payment of grandchildren's college expenses. The bankruptcy court approved the budget based on historic expenditures, but the bankruptcy appellate panel reversed because the bankruptcy court did not make appropriate factual findings. The bankruptcy appellate panel made no findings as to the appropriate standard for evaluating whether the expenditures are within the ordinary course of business, but suggested evaluating whether they would be allowable under the test used in chapter 13.

Calculating Projected Disposable Income

In re Pfeifer, 2013 WL 5687512 (Bankr. S.D.N.Y. Oct. 18, 2013).
Court appears to apply same test used in chapter 13 for calculating projected disposable income or some formulaic approach to calculating projected disposable income.

In re Baker, 2013 WL 7044696 (Bankr. M.D. Fla. Dec. 10, 2013).
Judge Glenn held that Section 1129(a)(15) corresponds to the means test.

U.S. v. Villalobos (In re Villalobos), 2011 WL 4485793 (B.A.P. 9th Cir. Aug. 19, 2011).
Section 1325(b)(2) applies the same test used in chapter 13 cases to individual chapter 11 cases.

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

How Disposable Is Your Individual Chapter 11 Debtor's Income?

Written by:
David S. Jennis
Jennis & Bowen PL; Tampa, Fla.
djennis@jennisbowen.com

Kathleen L. DiSanto
Jennis & Bowen PL; Tampa, Fla.
kdisanto@jennisbowen.com

About the Authors

David Jennis is a founding partner and managing member, and Kathleen DiSanto is an associate, at Jennis & Bowen PL in Tampa, Fla.

An important change brought about by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was the inclusion of an individual chapter 11 debtor's post-petition earnings as property of the estate under § 1115. While chapter 13 debtors' future earnings have long been treated as estate property, the inclusion of post-petition income in the chapter 11 context raises many new issues not sufficiently addressed by existing case law. The inclusion of post-petition income or earnings as property of the estate has a significant impact at several stages during the life of an individual chapter 11 case, most crucially in connection with confirmation.

Wages as Property of Estate


David S. Jennis

Section 1115(b) now provides that in addition to property specified under § 541, "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted to a case under chapter 7, 12, or 13" are included in property of the estate. Prior to BAPCPA, an individual debtor's wages, earnings or income would generally be excluded from property of the estate pursuant to § 541(a)(6).

The inclusion of post-petition earnings as property of the estate has thus changed the landscape of individual chapter 11 cases. In an individual chapter 11, issues concerning a debtor's claims of exemption are typically much more critical and contested because of their impact on the ability to successfully confirm a plan. The inclusion of earnings as property of the estate also implicates § 363, which governs the circumstances under which a debtor can use wages to fund business operations, pay secured debt and meet lifestyle needs. Finally, in newly added § 1129(a)(15), Congress added a confirmation requirement for individual chapter 11 debtors. Now, debtors must distribute an amount equal to five years of their projected disposable income under a reorganization plan.

Early commentary and case law examined whether the BAPCPA amendments were constitutional given the possibility of involuntary servitude issues presented by the Thirteenth Amendment.[1] When the U.S. Supreme Court allowed individuals to be debtors under chapter 11, the Court specifically noted that the concern about involuntary servitude was not at issue because there was no provision in chapter 11 requiring a debtor to pay future wages for the benefit of creditors.[2] At least one court has addressed some of the Thirteenth Amendment concerns raised by § 1115 in the context of the debtor's motion to dismiss.[3] In the *Clemente* case, a trustee had been appointed, preventing the debtor from being able to convert the case to chapter 7. The court sidestepped the involuntary servitude issue presented by § 1115, but recognized the differences between chapter 13 cases and individual chapter 11 cases. The court focused on the ability of a chapter 13 debtor to dismiss or convert his or her case, while a chapter 11 debtor may be unable to dismiss or convert in some situations.


Kathleen L. DiSanto

§§ 1115 and 522 Interplay

The inclusion of post-petition earnings as property of the estate will likely spawn litigation regarding exemptions. In addition to the wage exemption provided under federal law, a number of states have statutes exempting some or all of a debtor's "wages" from the reach of creditors.[4] Presumably, at least in "opt-out" states, an individual chapter 11 debtor could declare whatever portion of his or her future earnings exempt under applicable state or federal law, exempt under § 522 of the Code, notwithstanding the inclusion of post-petition earnings in property of the estate by § 1115.[5]

1 *See* Robert J. Keach, "Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?," 13 *Am. Bankr. Inst. L. Rev.* 483 (Winter 2005).
2 *See Toibb v. Radloff*, 501 U.S. 157, 165, 111 S.Ct. 2197, 2202, 115 L.Ed.2d 145 (1991).
3 *In re Clemente*, 409 B.R. 288, 290-91 (Bankr. D. N.J. 2009).
4 *See, e.g.*, 15 U.S.C. § 1673 (2006); Fla. Stat. 222.11 (2011); Kan. Stat. Ann. § 60-2310 (2010); Md. Code Ann., Com. Law § 15-601.1 (2011); Tex. Civ. Prac. & Rem. Code Ann. § 63.004 (2011).

No court has specifically addressed whether property exempt under state law may be claimed exempt in the context of an individual chapter 11 case. However, for the purposes of this article, the authors will assume that the exemptions can be properly claimed, as § 1115 does not reference § 522(c), and there is no policy reason why an individual chapter 11 debtor would be barred from claiming exemptions like any other individual debtor. Accordingly, exemption disputes could arise as to characterization of earnings as wages, distributions or other form of assets.

Sometimes, it is clear that an individual chapter 11 debtor's biweekly paycheck constitutes wages, but what if the debtor was a partner in a professional organization and a component of his or her compensation for services rendered was contingent upon the performance of the office, as clearly defined in his or her partnership agreement? While factually more complicated than the situation involving a standard biweekly paycheck, so long as the compensation structure is clearly defined, and other than performance, the debtor exercises minimal control over the timing and amount of such compensation, the income should be considered wages.[6]

To the extent that the individual chapter 11 debtor controls his or her income and can manipulate shareholder distributions by more than just performance, such income should not constitute wages. The latter is distinguishable from the former, as a debtor who controls his or her income is often a sole shareholder, while a debtor who exercises minimal control over income is not the sole shareholder and compensation is controlled by multiple individuals at various levels of the business entity.

To further complicate the issue of whether compensation constitutes wages that may be claimed exempt in an individual chapter 11 case, some creative lawyers suggest that a debtor may be compensated for services as a debtor in possession (DIP), and at least one court has even concluded that compensation could be paid for services as a DIP, and such wages would be exempt under applicable state and federal exemptions. However, such compensation of the DIP is contrary to § 1107, which specifically provides that a DIP shall have all rights of a trustee, other than the right to compensation under § 330.[7]

Use of Wages by the Debtor

Assuming that any portion of a debtor's earnings could not be claimed exempt, the next obvious issue would be the debtor's ability to use such estate property during the pendency of the chapter 11 case. Once property is considered property of the estate, it can only be used by a DIP pursuant to some authority in the Code or order of the bankruptcy court. Such authority would typically be found within § 363. Section 363(c) generally authorizes the DIP to use property of the estate other than cash collateral in the ordinary course of business without a hearing. Conversely, under § 363(b)(1), property of the estate can only be used "other than in the ordinary course of business" after notice and a hearing, with approval of the bankruptcy court.

While Congress determined that future income is property of the estate unless otherwise exempt, Congress did not provide guidance as to how property could be used during the pendency of an individual chapter 11 case. What is in the ordinary course of business may be straightforward in a corporate chapter 11 reorganization. However, the law is less clear as to what is in the ordinary course of business of an individual chapter 11 debtor. Do payment of the debtor's living and family expenses and payments on nonbusiness related debts (*i.e.*, home mortgage or college tuition) constitute use of estate property during the ordinary course? Some courts have resolved the issue by entering first-day orders that allow an individual debtor to continue to make ordinary living expenses. Absent the entry of such an order, an individual debtor or debtor's counsel may choose to seek approval of an expense budget similar to procedures in connection with seeking cash collateral, to minimize any issues that may arise at confirmation as to the reasonableness of an expense. This analysis could involve a bankruptcy court's examination of the debtor's "lifestyle" and related expenses.

Without legislative guidance, courts appear to have adopted a case-by-case analysis as to whether an individual chapter 11 debtor's expenditures are reasonable. In *In re Draiman*, the bankruptcy court found that the debtor's casino gambling and purchases at women's clothing stores, when he did not have a spouse or other female dependents, demonstrated a "complete lack of regard for repayment of his creditors" and denied confirmation of the debtor's reorganization plan.[8] On the other hand, another bankruptcy court found that large car and mortgage payments are not necessarily indicative that a plan has not been proposed in good faith, noting that if a plan is otherwise confirmable, a debtor does not necessarily need to reduce lifestyle to demonstrate good faith, even if the lifestyle exceeds the lifestyle of average individuals.[9]

Projected Disposable Income

New § 1129(a)(15) has several ambiguities relating to the calculation of projected disposable income. Section 1129(a)(15) states that "the value of property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined under section 1325(b)(2)) to be received during the [five]-year period beginning on the date that the first payment is due under the Plan, or during the period for which the plan provides for payments, whichever is longer." Section 1325(b)(2) defines "disposable income" as current monthly income less amounts reasonably expended "for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation," which sets forth the method for calculating disposable income of below-median-income debtors. However, § 1325(b)(2) is then referenced in § 1325(b)(3), which incorporates the means test proscribed by § 707(b)(2) for above-median-income debtors.

Some creditors have suggested that § 1129(a)(15)'s reference to § 1325(b)(2) must be read in isolation; it requires projected disposable income to be calculated using the method for below-median-income debtors and is essentially based on the debtor's actual expenditures listed on Schedules I and J. However, courts generally agree that based on the plain language of § 1129(a)(15) and its direct reference to § 1325(b)(2), projected disposable income for individual chapter 11 debtors should be calculated in accordance with § 1325(b)(2) using Form B22C instead of based on income and expenses reported on Schedules I and J.[10] If the means test is applied to an

5 Section 1115 provides that future earnings are included as property of the estate, "in addition to the property specified in Section 541," but does not address whether such property could be claimed exempt under § 522.

6 *In re McDermott*, 425 B.R. 848, 851 (Bankr. M.D. Fla. 2010); *In re Zamora*, 187 B.R. 783, 784 (Bankr. S.D. Fla. 1995).

7 *See In re Harloff*, 289 B.R. 770, 773 (Bankr. M.D. Fla. 2002); *but see In re Herberman*, 122 B.R. 273, 281 (Bankr. W.D. Tex. 1990).

8 450 B.R. 777, 806-7 (Bankr. N.D. Ill. 2011).

9 *Oncology Therapeutics Network Corp. v. Norbergs (In re Norbergs)*, Case No. 06-07149, Adv. No. 07-00093, Hearing Transcript, 4:22-25, 5:1-10 (July 18, 2007).

10 *In re Lindsey*, 2011 WL 3444465, at *14 (Bankr. E.D. Tenn. Aug. 5, 2011); *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. 2011); *Oncology Therapeutics Network Corp. v. Norbergs (In re Norbergs)*, Case No. 06-07149, Adv. No. 07-00093, Hearing Transcript, 6:20-25, 7:1-25, 8:1:13 (July 18, 2007).

above-median-income debtor, the debtor is entitled to deduct all secured debt payments to calculate projected disposable income, regardless of whether such expenditures are reasonably necessary, as post-BAPCPA courts no longer have discretion to determine whether such expenses are reasonably necessary and should be included in the calculation of projected disposable income.

A more contentious issue is whether § 1129(a)(15) imposes a temporal requirement on individual chapter 11 debtors, mandating a minimum five-year plan. The plain language of § 1129(a)(15) only set forth a formula for calculating the dollar amount of payments that must be made under the plan. Congress knew how to create temporal limits on plans, and it did so in §§ 1322 and 1325 of the Code. Unlike § 1129(a)(15), § 1322(d)(1) clearly and unambiguously states that "the plan may not provide for payments over a period that is longer than [five] years," and § 1322(d)(2) provides that "the plan may not provide for payments over a period that is longer than [three] years." While the BAPCPA amendments have in some ways attempted to transform individual chapter 11 debtor cases into glorified chapter 13 cases for debtors whose debt exceeds the limits of chapter 13, the temporal requirements as to the duration of chapter 13 plans is one element that was not translated into chapter 11, as no minimum temporal requirement is proscribed by § 1129(a)(15).[11] ■

Reprinted with permission from the ABI Journal, Vol. XXX, No. 8, October 2011.

[11] 7 *Collier on Bankruptcy* ¶ 1129.02.

Great Debates

Exculpation of Professionals in Chapter 11 Plans

Under Section 1121, the debtor has the exclusive right to file a plan and, there is no reason why a debtor in its reasonable business judgment should not be permitted, as part of its own plan, to propose to release whomever it chooses. *In re Quincy Med. Ctr., Inc.,* No. 11–16394–MSH, 2011 WL 5592907 * 2 (Bankr. D.Mass. Nov. 16, 2011).

Charles A. Postler, Esq.
Stichter, Riedel, Blain & Prosser, P.A.
110 E. Madison Street, Suite 200
Tampa, Florida 33602
Telephone: (813) 229-0144
Facsimile: (813) 229-1811
Email: cpostler@srbp.com

Cases Cited in Favor of Exculpation Clauses

Reported Decisions

- *In re South Edge LLC,* No. 2:11–CV–01963–PMP–PAL, 2012 WL 3262880, at *10 (D.Nev. Aug. 8, 2012) (finding that the exculpation provision did not affect the liability of third parties, but instead stated the standard of liability under the Code, and thus did not come within the meaning of § 524(e))

- *In re National Heritage Foundation, Inc.,* 478 B.R. 216 (Bankr. E.D. Va. 2012) (approving exculpation provision and stating that exculpation provisions "generally are permissible, so long as they are properly limited and not overly broad")

- *In re Wash. Mut., Inc.,* 442 B.R. 314, 350–51 (Bankr. D.Del. 2011) (approving exculpation provision but limiting it to "fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers")

- *In re Yellowstone Mt. Club, LLC,* 460 B.R. 254 (Bankr. D.Mont. 2011) (finding that "the exculpation clause does not implicate § 524(e)")

- *In re Firstline Corp.,* 2007 WL 269086 (Bankr. M.D.Ga. 2007) (approving exculpation provision for the debtor, trustee, the committee and its members, and their respective advisors, attorneys, consultants or professionals with exception for gross negligence, willful misconduct, and breach of fiduciary duty)

- *In re Winn Dixie Stores, Inc.*, 356 B.R. 239, 261 (Bankr. M.D. Fla. 2006) (approving exculpation provision for the debtors, their subsidiaries, the committee, a lender, the indenture trustee, and any of their present or former members, officers, directors, employees, advisors, professionals, and agents with exception for fraud, willful misconduct, and gross negligence)

- *In re Enron Corp.*, 326 B.R. 497, 500 (S.D.N.Y. 2005) (approving exculpation provision in favor of debtors, creditors' committee, employee committee, trustees, and their respective officers, employees, attorneys, and agents with exception for gross negligence and willful misconduct)

- *In re Friedman's, Inc.,* 356 B.R. 758, 763-764 (Bankr. S.D. Ga. 2005) (approving exculpation provision for the debtors, creditors' committee and its members, lenders, and any of their officers, directors, attorneys, advisors, agents or other representatives with exception for gross negligence and willful misconduct)

- *In re WCI Cable, Inc.,* 282 B.R. 457 (Bankr. D.Or. 2002) (approving exculpation provision with exception for willful misconduct and gross negligence, but also requiring exception for breach of fiduciary duty and gross negligence)

- *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (approving exculpation provision releasing debtors, reorganized debtors, committee, and their officers, directors, employees, advisors, professionals or agents from liability except from willful misconduct or gross negligence, and noting that § 524(e) does not apply to exculpation provisions)

Unreported Decisions

- *Earth First Technologies Incorporated,* Case No. 8:08-08639 (Bankr. M.D. Fla.) (J. Williamson) [Transcript of May 15, 2013 Hearing]

- *In re Frances A. Guathier and BRAC of Somerset, Inc.*, Case No. 8:04-07239-8W1 (Bankr. M.D. Fla.) (J. Williamson) [Transcript of May 10, 2006 Hearing]

- *In re TSLC I, Inc., et al.*, Case No. 8:04-bk-24123-MGW (Bankr. M.D. Fla.) (J. Williamson) [Order Confirming Amended Joint Chapter 11 Plan of Liquidation of Debtors]

- *In re Arlington Ridge, LLC*, Case No. 8:08-bk-15678-CED (Bankr. M.D. Fla. March 12, 2009) (J. Delano) [Order Confirming the Debtors' Amended Joint Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code--ECF No. 192]

- *In re Dunkin's Diamonds, Inc.,* Case No. 9:08-bk-17618-ALP (Bankr. M.D. Fla.) (J. Paskay) [Order Confirming Debtors' Revised Joint Plan of Reorganization--ECF No. 341]

- *SMF Energy Corp.,* Case No. 12-19084-RBR (Bankr. S.D. Fla. Dec. 14, 2012) [ECF No. 639]

- *In re HearUSA, Inc.,* Case No. 11-23341-EPK (Bankr. S.D. Fla. May 16, 2012) [ECF No. 788]

- *In re PPOA Holding, Inc.,* Case No. 10-10711-JKO (Bankr. S.D. Fla. Oct. 5, 2011) [ECF No. 586]

- *In re Solar Cosmetic Labs, Inc.,* Case No. 08-15793-LMI (Bankr. S.D. Fla. Mar. 29, 2006) [ECF No. 408]

Cases Cited in Opposition to Exculpation Clauses

- *In re Motors Liquidation Co.*, 447 B.R. 198 (Bankr. S.D. N.Y. 2011) (approving limited exculpation provision; the court stated "[w]ith that said, I recognize the legitimate concerns that prompted the exculpation provisions that I'm trimming. And as in my earlier decisions, I'll approve language that addresses those concerns, so long as it falls short of an impermissible third-party release. Article 12.6 may include language, if Plan supporters wish, requiring third-party claims of the type now covered to be first brought before me, for a threshold inquiry to confirm that they actually belong to the third party, and don't belong, instead, to the Estate. And it may further provide, if Plan supporters wish, that, subject to any applicable subject matter jurisdiction limitations, I'll at least initially have exclusive jurisdiction to be the forum for any covered litigation brought by any creditor or equity security holder, so long as I'm free to abstain and consider whether that litigation would be better conducted elsewhere.")

- *In re Behrman v. National Heritage Foundation*, 663 F.3d 704 (4th Cir. 2011) (approval of non-debtor releases in Chapter 11 plan was unwarranted, absent bankruptcy court making specific factual findings explaining its determinations that release provisions were essential to charity's reorganization and appropriate in light of charity's unique circumstances, were essential means of implementing confirmed plan, were integral element of transactions contemplated in confirmed plan, conferred some material benefit on charity, its bankruptcy estate, or its creditors, were important to plan's overall objectives, and were consistent with applicable provisions of Bankruptcy Code)

- *In re United Artists Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir. 2003) ("Debtors and their professionals cannot exempt themselves from liability to non-consenting parties merely by saying the word")

- *In re Transit Group, Inc*., 286 B.R. 811, 817-18 (Bankr. M.D. Fla. 2002) (non-debtor releases are justified only in unusual circumstances; listing 7 factors for courts to consider:

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

    - Whether the non-debtor has contributed substantial assets to the reorganization;

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

- *In re Dow Corning Corp*., 280 F.3d 648 (6th Cir. 2002) (the record did not support a finding of unusual circumstances)
- *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213 (Bankr. N.J. 2000) (finding that the exculpation clauses were "legally insupportable")
- *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Circ. 1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.")
- *In re Master Mortgage Inv*., Inc., 168 B.R. 930, 934-35 (Bankr. W.D. Mo. 1994) (finding that non-debtor releases are appropriate only in exceptional circumstances: namely, where claims are paid substantially in full, the non-debtor parties contribute property, and the release is essential to the reorganization)