



AMERICAN
BANKRUPTCY
INSTITUTE

Southwest Bankruptcy Conference

Business

Ninth Circuit-Confirmed Plans with Third-Party Releases

Hon. Daniel P. Collins

U.S. Bankruptcy Court (D. Ariz.) | Phoenix

Tobias S. Keller

Keller Benvenutti Kim LLP | San Francisco

Frank A. Merola

Paul Hastings, LLP | Century City, Calif.

Genevieve G. Weiner

Sidley Austin LLP | Los Angeles

SOUTHWEST BANKRUPTCY CONFERENCE



FOUR SEASONS LAS VEGAS
LAS VEGAS, NEVADA

SEPTEMBER 8-10, 2022



SOUTHWEST BANKRUPTCY CONFERENCE
SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

Ninth Circuit-Confirmed Plans with Third-Party Releases

September 9, 2022

Judge Daniel P. Collins, United States Bankruptcy Court District of Arizona

Tobias S. Keller, Keller Benvenuti Kim LLP

Frank Merola, Paul Hastings, LLP

Genevieve G. Weiner, Sidley Austin LLP



Disclaimer

This presentation has been prepared for informational and educational purposes only and is not legal advice. The views expressed herein and by today's panelists are those of the individual speakers and not their respective firms. Nothing should be construed as representing a speaker's view on any pending or future case in which they are involved.



Topics of Discussion

‣ Third-Party Releases Generally	5
‣ Circuit Split	10
‣ Minority Approach	11
‣ Majority Approach	12
‣ Unclear or Disputed Circuits	13
‣ Third-Party Releases in the Ninth Circuit	14
‣ Confirmed Plans with Third-Party Releases	16
‣ Third-Party Releases in Mass Tort Cases	18



SOUTHWEST BANKRUPTCY CONFERENCE

SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

Tackling a Spiny Subject: What Are Third-Party Releases



SOUTHWEST BANKRUPTCY CONFERENCE

SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

What Is (and Is Not) a Third-Party Release

- ψ Releases the **direct, personal liability** of the non-debtor third party to creditor or shareholder
- ψ Causes of action released do not belong to and cannot be brought by the debtor's estate

A third party release is **not**...





ψ **Release of Claims Belonging to the Estate** – 11 U.S.C. § 1123(b)(3)

- ψ Avoidance Actions
- ψ Counterclaims / Defenses
- ψ Breach of Fiduciary Duty (including Derivative Actions)

ψ **In Rem Releases / Injunctions**

- ψ Insurance / Channeling Injunctions
- ψ Successor Liability / Free and Clear Sales

ψ **Consensual Releases for Separate Consideration**

- ψ *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986)



Releases Can Come In Many Forms

ψ **Exculpation**

- ψ Generally limited in time and scope
- ψ Elevates standard of liability
- ψ Courts are split on who can benefit

ψ **Third-Party Releases**

- ψ Consensual third-party releases are generally approved
- ψ How “consent” can be obtained is the subject of divergent views
- ψ Nonconsensual third-party releases are permissible in certain jurisdictions



SOUTHWEST BANKRUPTCY CONFERENCE

SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

Authority for Nonconsensual Third-Party Release

ψ **Constitutional Authority**

ψ *Stern v. Marshall*, 564 U.S. 462 (2011)

ψ **Statutory and Residual Authority**

ψ 11 U.S.C. § 105(a)

ψ 11 U.S.C. § 1123(b)(6)

ψ **But see 11 U.S.C. § 524(e)**



SOUTHWEST BANKRUPTCY CONFERENCE

SEPTEMBER 8-10, 2022 • FOUR SEASONS LAS VEGAS

Focus on the Fissure: How Different Circuits Approach the Issue



Minority of Circuits Prohibit

ψ The Fifth, Ninth, and Tenth Circuits all prohibit the inclusion of third-party releases in a plan:

- ψ *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1991)
- ψ *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995)
- ψ *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)



Majority of Circuits Allow

ψ The Fourth, Sixth, Seventh, and Eleventh Circuits all permit the inclusion of third-party releases in a plan:

- ψ *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989)
- ψ *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002)
- ψ *In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009)
- ψ *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015)



Remainder of Circuits Have Equivocated or Failed to Address

ψ The Second and Third Circuits have equivocated on the issue of third-party releases:

- ψ *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005)
- ψ *In re Continental Airlines, Inc.*, 203 F.3d 203 (3d Cir. 2005)
- ψ *In re Purdue Pharma*, 635 B.R. 26 (S.D.N.Y. 2021)



Navigating the Needles: Third-Party Releases in the Ninth Circuit



Ninth Circuit Black Letter Law

- ψ Typically prohibited.
- ψ Pre-*Lowenschuss*
 - ψ *Commercial Wholesalers v. Investors Commercial*, 172 F.2d 800 (9th Cir. 1949).
 - ψ *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985).
 - ψ *In re Am. Hardwoods*, 885 F.2d 621 (9th Cir. 1989).
- ψ Post-*Lowenschuss*
 - ψ *In re Maxtile*, 237 F. App'x 274 (9th Cir. 2007).
 - ψ *Decampo v. Potts*, 836 F.3d 1134 (9th Cir. 2016).



Recently Confirmed Plans: Consensual Releases

- ψ Several cases have recently confirmed plans with third-party releases in the Ninth Circuit:
 - ψ *In re PG&E*, 617 B.R. 671 (Bankr. N.D. Cal. 2020)
 - ψ *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021)
 - ψ *In re Wave Computing, Inc.*, Case No. 20-50682 (Bankr. N.D. Cal. 2021)
- ψ Approval of the release is based on its “consensual” nature.
- ψ Consent is presumed based on opt-in (or sometimes, opt-out) option contained in the ballot.



Recently Confirmed Plans: Expanded Exculpation

✦ In addition, courts are confirming plans that exculpate non-estate fiduciaries and/or expand the time period being exculpated:

- ✦ *Blixeth v. Suisse*, 961 F.3d 1074 (9th Cir. 2020)
- ✦ *In re Wave Computing, Inc.*, Case No. 20-50682 (Bankr. N.D. Cal. 2021)
- ✦ *In re PG&E*, 617 B.R. 671 (Bankr. N.D. Cal. 2020)
- ✦ *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021)



Recently Confirmed Plans: Mass Torts Generally

- ✦ Third parties receive benefit of exculpation provision, release, and/or channeling injunction as a result of their significant financial contribution to the plan.
- ✦ Claimants have no ability to opt out of release or exculpation.
- ✦ Worst offenders are specifically exempted from the exculpation or release and may still be subject to claims from claimants.



Recently Confirmed Plans: Mass Torts (Cont'd)

- ✦ *Diocese of Tucson, AZ* (Case No. 04-04721) – Confirmed 8/1/05
- ✦ *Archdiocese of Portland, OR* (Case No. 04-37154) – Confirmed 4/13/07
- ✦ *Oregon Province of the Jesuits* (Case No. 09-30938) – Confirmed 7/29/11
- ✦ *Diocese of Spokane, WA* (Case No. 04-08822) – Confirmed 4/24/07
- ✦ *Diocese of Fairbanks, AK* (Case No. 08-00110) – Confirmed 2/17/10
- ✦ *Diocese of Helena, MT* (Case No. 14-60074) – Confirmed 3/5/15
- ✦ *Diocese of Great Falls-Billings, MT* (Case No. 17-60271) – Confirmed 8/22/18
- ✦ *Diocese of Stockton, CA* (Case No. 14-20371) – Confirmed 1/10/17
- ✦ *Archdiocese of Agaña, GU* (Case No. 19-00010) – Pending Confirmation



Compare with Fed. R. Civ. P. 23

- ✦ Rule 23(e) – The claims, issues, or defenses of a certified class – or a class proposed to be certified for purposes of settlement – may be settled, voluntarily dismissed, or compromised only with the court’s approval.
 - ✦ 23(e)(4) – Limited right to opt out
- ✦ Use in bankruptcy?
 - ✦ See *In re Fox Ortega Enters., Inc.*, Case No. 16-40050 (Bankr. N.D. Cal. 2016) and *Podolsky v. Kasolas*, Case No. 16-04033 (Bankr. N.D. Cal. 2016) (Rule 23 class action adversary relating to primary bankruptcy case)

Ninth Circuit-Confirmed Plans with Third-Party Releases

1. What Isn't a Third-Party Release
 - a. Release of claims belonging to the Estate (§1123(b)(3))
 - i. Avoidance actions
 - ii. Counterclaims / defenses
 - iii. Breach of Fiduciary Duty (incl. Derivative Actions)
 - b. *In rem* releases / injunctions
 - i. Insurance / channeling injunctions – Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) (pre §524(g)(4))
 - ii. Successor liability / free and clear
 - c. Consensual release for separate consideration – In re AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986)
2. What is a Third-Party Release
 - a. Direct claims of creditor or shareholder against a non-debtor third party
 - i. Officers, directors, sponsors, other principals
 - ii. Guarantors, co-debtors, insurers
 - iii. Non-debtor affiliates
 - iv. Other creditors / shareholders
 - b. For direct personal liability
 - c. Cause of action does not belong to and cannot be brought by the Estate
3. Circuit Split
 - a. Fifth, Ninth and Tenth Circuits prohibit
 - i. In re Zale Corp., 62 F.3d 746 (5th Cir. 1995)
 - ii. In re Lowenschuss, 67 F.2d 1394 (9th Cir. 1995)
 - iii. In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1991)
 - b. Fourth, Sixth, Seventh and Eleventh Circuits allow
 - i. In re A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989)
 - ii. In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002)
 - iii. In re Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009)
 - iv. In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070 (11th Cir. 2015)
 - c. Second and Third Circuits have equivocated
 - i. In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005) (Non-consensual third-party releases should be granted “only in rare cases.”)
 - ii. In re Continental Airlines, Inc., 203 F.3d 203 (3d Cir. 2005)
 - iii. In re Purdue Pharma, 635 B.R. 26 (S.D.N.Y. 2021)
4. Ninth Circuit Black Letter Law
 - a. Lowenschuss

- i. §524(e)
 - ii. Limitation on court's equitable power
 - b. Pre-Lowenschuss
 - i. Commercial Wholesalers v. Investors Commercial, 172 F.2d 800 (9th Cir. 1949) (The Ninth Circuit stated that "[t]he bankruptcy court has no power to relieve other parties than [the debtor] of their debts or obligations.")
 - ii. Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985) (The Ninth Circuit interpreted section 524(e) as a reenactment of section 16 of the 1898 Act which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." In addition, the Court also cited the Bankruptcy Act of 1898, which provided that a corporation's discharge in bankruptcy "shall not release its officers, the members of its board of directors or trustees or of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States" in support of its position.)
 - iii. In re American Hardwoods, 885 F.2d 621 (9th Cir. 1989) (The Ninth Circuit held that it was not within the bankruptcy court's general equitable powers to discharge non-debtor liabilities, as section 105 does not authorize relief inconsistent with the more specific law proscribed by section 524(e) of the Bankruptcy Code.)
 - c. Lowenschuss Progeny
 - i. In re Maxtile, 237 F. App'x 274 (9th Cir. 2007) (The Ninth Circuit denied relief sought in the reorganization plan because it contained ambiguous language on whether claims against third parties could be enjoined.)
 - ii. Decampo v. Potts, 836 F.3d 1134 (9th Cir. 2016) ("[W]e have 'repeatedly held, without exception,' that, in a Chapter 11 proceeding, '§ 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.'" (quoting Lowenschuss, 67 F.3d at 1401))
5. Confirmed Plans with Third-Party Releases
- a. Consensual releases
 - i. In re PG&E, 617 B.R. 671, 683–84 (Bankr. N.D. Ca. 2020) (approving Plan that provided for creditors to "opt-in" to release when voting on the Plan. Ruling, "[c]onsensual third-party releases do not run afoul of section 524(e) or governing Ninth Circuit law such as *Resorts Int'l v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394, 1401–02 (9th Cir. 1995)." In support of this ruling, the court reasoned that *Lowenschuss* and its progeny applied only to those cases where voting creditors did not affirmatively opt to discharge non-debtors—i.e., in those cases where they were deemed to have consented to the release simply by voting in favor of the plan or by not voting at all. By contrast, where the creditor opts into the release, the legal principles underlying *Lowenschuss* do not apply.) (citing *In re Station Casinos, Inc.*, Case No. 09-52477, 2011 WL 6813607 (Bankr. D. Nev. June 8, 2011) ("A release of non-debtor third

parties voluntarily and knowingly given by a creditor or equity holder in connection with a chapter 11 plan does not implicate the concerns regarding third party releases discussed by the Ninth Circuit Court of Appeals in *Lowenschuss*.”)

- ii. *In re Astria Health*, 623 B.R. 793, 802–03 (Bankr. E.D. Wash. 2021) (approving non-debtor third party releases where ballot allowed creditors to opt out of the release when voting. Release provided if creditor either voted affirmatively in favor of plan or separately did not opt out. In affirming the propriety of this release, Judge Whitman narrowed the applicability of § 524(e) to say it prevents releasing only the claims of creditors against non-debtors that relate specifically to the debt discharged in the bankruptcy proceeding. The court reasoned that “[b]ased on this crucial distinction, then, section 524(e) prevents a chapter 11 plan from releasing a nondebtor co-obligor of the debtor from liability on a common claim, but is inapplicable to the release of other claims against the nondebtor. Accordingly, “release of these other claims is therefore permissible using the bankruptcy court’s residual reorganizational powers if appropriate under the circumstances.”
- iii. *In re Wave Computing, Inc.*, Case No. 20-50682 (Bankr. N.D. Cal. 2021) (approving plan that contained a non-debtor, third-party release where release granted when creditors either voted affirmatively in favor of the plan or elected not to vote on the plan or reject the plan, but otherwise opted-in to the release)

b. Expanded exculpation

- i. *Blixeth v. Suisse*, 961 F.3d 1074 (9th Cir. 2020) (Contrary to the customary disfavored treatment of third-party releases in the Ninth Circuit, the *Blixeth* court upheld the bankruptcy court’s decision to confirm a chapter 11 plan including what the court described as a “narrow exculpation clause” negotiated by the debtor and various creditors that shielded listed parties from liability relating to or arising out of the bankruptcy cases, including for compromises reached between the petition and effective date such as those memorialized in the plan itself. The court explained that the exculpation clause did not run afoul of section 524(e) because it was narrow in scope and time, and that the clause allows parties to “to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent litigation over any potentially negligent actions in those proceedings.”)
- ii. *In re PG&E*, 617 B.R. 671 (Bankr. N.D. 2020) (Bankruptcy court concluded that the Bankruptcy Code does not prohibit an exculpation clause protecting various parties who participated in the approval process, provided that any such exculpation clause should relate only to that process. Court cited *Blixeth* in support of upholding the exculpation provision and noted that *Lowenschuss* does not bar voluntary opt-in releases.)
- iii. *In re Arista Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021) (The bankruptcy court followed the *Blixeth* reasoning and confirmed Astria’s reorganization plan, which included a provision exculpating key participants in the plan process,

including non-debtor parties, from any post-petition liability relating to the bankruptcy cases and the plan, except with regard to gross negligence or willful misconduct. The bankruptcy court relied on Blixseth to uphold the exculpation provision because it was appropriately limited to the post-petition acts of parties who actively participated in and contributed to the bankruptcy process, while carving out gross negligence and willful misconduct. It also expanded on the Ninth Circuit's reasoning, expressly holding that non-debtor releases need not be limited to parties owing a fiduciary duty to the bankruptcy estate because any such limitation would conflict with the analogous protections under Bankruptcy Code section 1125(e), which limits the liability of a broad array of non-debtor parties for acts related to the solicitation of votes.)

- iv. In re Wave Computing, Inc., Case No. 20-50682 (Bankr. N.D. Cal. 2021) (approving exculpation clause that released limited prepetition activity— negotiations surrounding the DIP. Court reasoned that, with the restrictions in the exculpation clause as to gross negligence, bad faith, and willful misconduct, the provisions were acceptable as presented).

c. Mass torts

- i. Generally – Mass tort cases seem to take a fairly consistent approach with respect to exculpation clause and non-consensual third party release. In exchange for their settlement and contribution, certain third parties are able to essentially buy their way into the exculpation clause and/or release. Claimants have no ability to opt out and proceed against the settling parties. Instead, channeling injunction provides that claim must proceed against the fund created by the various settlements. Worst offenders, such as the abusing priests, are often specifically excepted from the exculpation or release and may still be open to claims from claimants.
- ii. Diocese of Tucson AZ (9/20/04)¹ - The confirmed plan contained a exculpation clause releasing the Debtor and participating third parties for any act or omission in connection with, relating to, or arising out of the Reorganization Case, except for willful misconduct.

“Debtor” was defined as the Roman Catholic Church of the Diocese of Tucson, including but not limited to: (a) the Estate of the Diocese, and (b) the Diocese as the representative of the Estate. “Participating Third Parties” Sec 2.80 refers to any Co-Defendant or any other Person, including but not limited to Parishes, who contribute funds to the Estate in exchange for the channeling injunction in Section 18.5 Participating Third Parties are also included in the definition of “Settling Parties” (Sec 2.111).

Any Settling Insurer, in exchange for the Settling Insurers’ contribution to the Fund as agreed upon between the Diocese and such Settling Insurer and approved by the court obtained the benefit of an injunction against prosecution of claims against the Insurance Company. Settling Parties was defined as Participating Third Parties and Settling Insurers (Sec. 2.11).

¹ Case Number: No. 04-04721, Docket Entry: #567, Date Confirmed: 08/01/2005, Judge James Marlar.

With respect to the release / injunction, the plan provides all persons who have held, hold, or may hold Channeled Claims or Claims against the Diocese, any Participating Third Party, and Settling Insurer, any Settling Party or any Release Party, whether known or unknown, shall be permanently enjoined from bringing the claim (Sec. 18.4).

“Ballot” (Sec. 2.9) is defined as the ballot accompanying the Plan. Creditors are to vote to accept or reject the plan, pursuant to which any Creditors will elect to have their Claims treated as General Unsecured Convenience Claims, and pursuant to which any Tort Claimants will make the election to opt out of the Settlement Trust and into the Litigation Trust. Thus, creditors do have the opportunity to opt out of the third-party releases which are a part of the settlement trust.

Non-settling Tort claimants are defined as every Tort Claimant who affirmatively elects, on the Ballot, to opt out of the Settlement Trust and have his or her Tort Claim liquidated by a jury. Non-settling Tort Claimants will (a) be subject to the terms of the Litigation Trust Agreement, (b) not receive any payment if the Claim is Disallowed pursuant to the litigation procedures constituting Litigation Protocol, and (c) if the Claim is disallowed, the Non-settling Tort claimant will have no further Claim against the Debtor, Reorganized Debtor, any Participating Third Party, and any Settling Party or any Settling Insurer (Sec. 12.8).

Three objections to the plan were filed. The plan was ultimately confirmed as all Impaired Classes who voted on the Plan voted to accept the Plan. One of the objections centered around the third-party release being in violation of Bankruptcy law as well as that the parish had not accurately disclosed its total amount of assets. The third-party release objector colorfully compared it to a father and sons who commit a bank robbery, and upon prosecution only the father is prosecuted while the sons are released from liability for giving back some of the money they stole

- iii. Archdiocese of Portland OR (7/6/2004)² – Confirmed Plan contained exculpation of Debtor and third parties for any actions taken in connection with, relating to, or arising out of the bankruptcy case. Confirmed Plan also contained limited third party release of certain parties, which was presented as an injunction. Only three parties objected to Plan and none were victims of child sexual abuse.

With respect to the exculpation, Section 9.3 of the Plan defined “Released Parties” to include the Debtor, including, without limitation, the Archdiocese, the Parishes, and the Schools. The Plan then defined “Parishes” to include “parish clergy, parish corporations, parish employees, and parishioners.” The exculpation clause released all claims as against these “Released Parties” for actions taken in connection with the case. Provision faced a limited objection at confirmation, with objectors arguing that exculpation clause could not release

² Case Number: No. 04-37154, Docket Entry: #5065, Date Confirmed: 04/13/2007, Judge Trish M. Brown.

debtors from liability for claims that they failed to make certain disclosures required by court order. The Court agreed and approved the exculpation provision with this tweak.

With respect to the release / injunction, Section 9.4 of the Plan provided for a permanent injunction against third parties bringing any “Enjoined Claim” against the “Settling Insurance Companies.” Injunction provided as part of a global settlement with the Settling Insurance Companies and such settlement was approved by the Court prior to confirmation. Notably, the injunction only prevents claims against the Settling Insurance Companies; the rights of holders of claims to assert such claims against any person or entity other than the Settling Insurance Companies were not enjoined.

Importantly, parties were not given the right to opt in or out of these limited third-party exculpations or third-party releases. Instead, the third-party exculpation was provided through artful defining of the term “Debtor” and the limited third-party release negotiated pursuant to a global settlement earlier in the case.

- iv. Diocese of Spokane WA (12/6/04)³ – Confirmed Plan contained optional third-party release mechanism. Although styled as an opt-in release, Plan mechanisms actually made it an opt-out. Exculpation provision slightly broadened to cover Debtors along with other case professionals. Only two objections to confirmation, neither of which were from parties holding a claim.

With respect to exculpation, Section 20.2 of the Plan released all claims against the Debtor, the Reorganized Debtor, the AOP, the Committees, the Future Claims Representative, the Plan Trustee, the TCR, (and their respective members, directors, attorneys, etc.) arising in connection with, relating to, or arising out of the bankruptcy case. Plan originally excepted only willful misconduct from exculpation. Confirmation order added “ultra vires acts” and clarified that nothing limited an attorney’s liability to his client.

With respect to the releases and injunctions, Section 11.1 of the Plan provided for the treatment and election of Class 7 Tort Claims. Claimants had the option of electing into several different claim baskets, with the election to be made at the time of voting. All but one of the claim basket elections required the claimant to execute and return a “Release of Claims,” which released all claims against the Parishes, Catholic Entities (except Morning Star Boys’ Ranch), and the Insurers in exchange for the treatment of such claims according to the Plan. If claimants did not want to execute the release (or if they failed to return the ballot), they could elect to be placed in the Non-Releasing Litigation Tort Claim basket. Such claimants then had 60 days from the effective date of

³ Case Number: No. 04-08822, Docket Entry: #1921, Date Confirmed: 04/24/2007, Judge Patricia C. Williams.

confirmation to file suit on their claims. If no suit was filed, they would be deemed to have elected to different treatment and to have executed and delivered the release. Such deemed determination was irrevocable. Accordingly, even those who initially failed to opt in to the release could find themselves bound by the release if they failed to act on their claims within a set period of time. Section 20.3 then provided a permanent injunction against prosecution of the Released Claims.

- v. Diocese of Fairbanks, AK (3/1/08)⁴ – Confirmed Plan contains exculpation clause covering both Debtor and third parties, non-consensual third party release, channeling injunction, and permanent injunction against released or exculpated claims. Provisions approved as being “integral and necessary” to the Debtor being able to meet the obligations of the Plan and otherwise fund the trust used to pay out claims. Only two objections to Plan filed, both of which were withdrawn on the record at confirmation.

With respect to the exculpation provision, Section 21.4 of the Plan provides that none of the “Released Parties” will incur any liability for acts or omissions in connection with, relating to, or arising out of the bankruptcy case, excepting only acts of willful misconduct. Releasing Parties is defined to include the Diocese, the Committee, the Future Claims Representative, and all of their present or former civil law or canon law members. Notably, it excludes a list of persons identified on the attached Exhibit B. This list includes priests or others against whom the Debtor or the Settlement Trustee have determined there are credible allegations of sexual abuse against.

With respect to the third-party release and injunction, Section 21.5 of the Plan provides a release for all Released Parties, which term is defined to include the settling insurers and other “Participating Third Part[ies]” who contributed funds to the Estate / Plan in exchange for the benefit of the release and injunction. Such claims are funneled into the Channeled Claims pool, which is paid out from various funds established in the Plan. Claimants have no ability to opt in or out of the release; their only remedy is to proceed against the funds via their channeled claims.

- vi. Oregon Province of the Jesuits (2/17/09)⁵ – Confirmed plan significantly expanded the exculpation and third-party release provisions otherwise approved in the Archdiocese of Portland case. Plan confirmed in July 2011, which was several years after the Archdiocese of Portland confirmation.

With respect to exculpation, Section 11.4 of the Plan released all claims against the “Exculpated Parties” in connection with, relating to, or arising out of the bankruptcy case. Exculpated Parties was then defined broadly to include the “Participating Parties,” the “Released Parties,” the Settling Insurers, and the

⁴ Case Number: No. 08-00110, Docket Entry: #689, Date Confirmed: 02/17/2010, Judge Donald MacDonald IV.

⁵ Case Number: No. 09-30938, Docket Entry: #1336, Date Confirmed: 07/29/2011, Judge Elizabeth Perris.

Future Claims Representative. The definition for Participating Parties included thirteen third-parties who had provided a portion of the funding for the Plan in exchange for (i) a release of any abuse related contribution or indemnity claim by the debtor against such party and (ii) the benefit of the channeling injunction. The “Released Parties” was defined to include the Debtor, the Reorganized Debtor, and the Participating Parties. Notably, the definition of “Exculpated Parties” and “Released Parties” both contained a carve-out excluding “(i) a Person or Persons having personally committed an act or acts of Abuse resulting in a Claim against the Debtor or a Participating Party, (ii) the Society of Jesus; (iii) the Father General of the Society of Jesus and his predecessors, (iv) the Society of Jesus General Curia; (v) a successor or predecessor of the Debtor to the extent of such successor’s or predecessor’s independent liability for an act or acts of Abuse; (vi) Gonzaga University; (vii) Seattle University; and (viii) the Jesuit High Schools”

In addition to exculpating multiple third parties, Section 11.4 expanded the time frame for the Debtors and Reorganized Debtors release of claims to include any acts or omissions occurring prior to the confirmation date.

With respect to third-party releases / injunctions, Sections 11.5, 11.6, and 11.7 provided permanent injunctions and a release of claims against a host of third-parties, including each of the Settling Insurers (including those insurers who reached a settlement with the trust post-confirmation), the Participating Parties, and the Settling Insurer Other Releasing Parties (as such term was defined in the Settlement Agreements with the Insurers). All claims against these persons or entities were channeled into the “Trust” pursuant to the channeling injunction set forth in Section 11.7 and could not be brought against any of the released third-parties. Like with the exculpation provision, the third-party release and injunction specifically carved-out releases against those eight persons or entities identified above.

The exculpation, third-party release, and injunctions were provided for in a 9019 settlement between the debtors and the insurers, which was separately approved prior to confirmation. Notwithstanding this fact, claimants were not entitled to opt out of the release or exculpation provisions when voting on the Plan. Notably, the confirmation order states that no creditor objected to the exculpation provision third-party releases, or injunctions.

- vii. Diocese of Helena, MT (1/31/14)⁶ – Confirmed Plan includes exculpation of third parties and third-party release. Findings of Fact and Conclusions of Law issued in conjunction with confirmation include statements finding that due to the “unique circumstances” of the case, along with the substantial contributions and settlements made by the parties receiving the benefit, the third-party

⁶ Case Number: No. 14-60074, Docket Entry: #475, Date Confirmed: 03/05/2015, Judge Terry L. Myers.

release and injunctions are appropriate. Statement included that “[r]esolution of this Chapter 11 Case would not have been possible without such releases and injunctions, and the Protected Parties, including the Diocese Parties, Settling Insurers and the Province, would not have made any contribution to the Plan without obtaining such releases and injunctions. Notably, no objections to confirmation were filed.

With respect to exculpation, Section 12.5 provided that no “Exculpated Parties” would incur liability for acts or omissions relating to the chapter 11 case. Exculpated Parties defined to include both the Debtors and the Committee.

With respect to the release / injunction, Section 12.6 provided for a channeling injunction. Pursuant to this injunction, all claims against “Protected Parties” to be channeled to the trust. Protected Parties defined to include Settling Insurers, the Province, and the Diocese Parties, excluding Perpetrators of sexual abuse. Section 12.7 additionally provided the Protected Parties with a permanent injunction enjoining claims brought against them directly.

Releases were “voluntary” in this case. However, pursuant to Section 9.5.1, no Tort Claimant would receive any distribution from the trust on its claim until it had executed a written release of any and all claims against all of the Protected Parties. Release provided with ballot or could be executed separately from vote to accept or reject Plan.

- viii. Diocese of Stockton CA (1/15/14)⁷ – The confirmed plan contained an exculpation clause for “Exculpated Parties” for any act of omission in connection with, relating to, or arising out of the Reorganization Case except for their willful misconduct or gross negligence (Sec 30.3). The confirmation order notes that the protected parties are protected as a result of their contributions into the plan. There is an additional section (Sec. 24.3) which maintains that any indemnification of Members, Managers, Officers, and Employees regarding the debtor are assumed by the reorganized debtor.

All Channeled Claims (Sec. 30.5), including unknown tort claims, were channeled into the Trust and were treated as established under the Plan. All Channeled Claims are permanently enjoined from taking any action to enforce the Channeled Claim against any of the Protected Parties. Channeled Claims were defined as (Sec. 3.21) any claim against the Diocese Parties, Participating Parties, or the Settling Insurers that directly or indirectly, arises out of or relates to any Tort Claim.

The plan is silent as to opt-in/opt-out provisions. “Ballot” is defined (Sec. 3.11) to mean the ballot accompanying the Plan and Disclosure Statement which will be sent to all Creditors entitled to vote on the Plan. The confirmation order indicates that no party filed an objection to the confirmation of the plan.

⁷ Case Number: No. 14-20371, Docket Entry: #757, Date Confirmed: 01/10/2017, Judge Christopher M. Klein.

- ix. Diocese of Great Falls-Billings, MT (3/31/17)⁸ – Confirmed Plan tracks that of Plan in Diocese of Helena. Again, exculpation clause includes certain third parties and third-party releases are provided via a channeling injunction and permanent injunction in light of the “unique circumstances” of this case. Findings of Fact and Conclusions of Law state that releases are “critical components” of the Plan and the settlements embodied therein and are given in exchange for the “substantial contribution” of the Protected Parties” to the Plan and Estate.

Court finds it has the authority to approve the injunctions, release, and exculpatory provisions pursuant to section 105(a). As with the Diocese of Helena case, Release is included with ballot. Tort Claimants are “required” (per section 10.4 of the Plan) to execute the release in order to receive distributions. Perpetrators of sexual abuse again excluded from released parties.

- x. Archdiocese of Agaña, GU (1/16/19)⁹ – Debtors’ reorganization plan has not been confirmed because the case is still pending. This information comes from the 1st Amended Chapter 11 Plan proposed by Archdiocese of Agaña.

None of the Exculpated Parties will incur any liability for any act or omission in or relating to this Case except for willful misconduct or gross negligence (Sec 12.4). The Archdiocese Parties and Reorganized Debtor are discharged from any such liability for such acts or omission occurring prior to the Effective Date. Apparently, some of the church’s insurers, such as The Continental Insurance Company, have reached a settlement.

Exculpated Parties is defined as the “Archdiocese Parties, Settling Insurer Entities, Protected Parties, and Committee (Sec. 2.55). Protected Parties is defined as the “Archdiocese of Agana, the Settling Insurer Entities, and the Archdiocese Parties, excluding Perpetrators. (Sec. 2.87)” Nothing in the plan impairs the liabilities of any Co-Defendant or guarantor that is not a Protected or Exculpated Party (Sec. 3.1).

The Channeling Injunction (Sec. 12.5) is to apply to the Protected Parties. Any Channeled Claim is channeled into the Trust and shall be treated under the Plan. Any Entity with a channeled claim is permanently enjoined from attempting to enforce any Channeled Claim against any of the Protected Parties and the Settling Insurer Entities. Causes of Action is defined to include any and all Claims arising prior to or after the Petition Date of the Estate. Within this is included “any other Claims that may be asserted against third parties or insiders.”

There is no opt-in/out language in the plan as it sits. “Ballot” is defined as the tool used by a Claimant to accept or reject the plan and make certain elections

⁸ Case Number: No. 17-60271, Docket Entry: #425, Date Confirmed: 08/22/2018, Judge Jim D. Pappas.

⁹ Case Number: No. 19-00010, Docket Entry: #715, Date Confirmed: NOT YET CONFIRMED, Judge Tydingco-Gatewood.

regarding the treatment of such Claimant's Claims as provided in the Plan including releases of the Protected Parties.

On February 26, 2022, Judge Tydingco-Gatewood issued an oral ruling agreeing with the creditors committee to allow the inclusion of school and parish assets into the estate, so they could be used to compensate abuse survivors. This means the Diocese reorganization plan will need to be revised to include significantly more property. The diocese contention was that the archbishop only holds these assets in trust, for the benefit of the schools and parishes. The judge said the diocese was not able to present clear and convincing evidence that such a trust exists between the archbishops, schools, and parishes. As a result of the ruling, what was once listed as "disputed property" will now likely become part of the estate. As the case currently stands, it seems the property issue is a larger barrier to confirmation than the third-party release.

Faculty

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18. Previously, he was a shareholder with the law firm of Collins, May, Potenza, Baran & Gillespie, P.C. in downtown Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins Dan is President-Elect for the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, served on ABI's Board of Directors, is on the board of the Phoenix Chapter of the Federal Bar Association and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Tobias S. Keller is a partner with Keller & Benvenuti LLP in San Francisco, where he counsels clients in a variety of industries dealing with financial distress, advising on dislocations arising from excessive leverage, uncontrolled litigation, or unanticipated employee or vendor problems, and the governance questions that arise in connection with those challenges. He has represented several overleveraged, venture-backed technology clients through out-of-court restructurings and/or bankruptcy preparation projects, and he has advised technology companies of all sorts (hardware, software, e-commerce, semiconductor), biotech and life science companies, and "old economy" companies including a professional consulting company, a nutritional supplement company, various retailers, trucking companies and airlines. He also has advised private-equity funds, parent companies and joint venturers in the restructuring of affiliates and strategies that both minimize legal exposure while maximizing their returns, committees in obtaining substantially increased returns for unsecured creditors, and buyers in acquiring distressed properties. Mr. Keller regularly lectures for organizations on governance, distressed mergers and acquisitions, and various restructuring topics. He is a Fellow in the American College of Bankruptcy and has been recognized as a leading lawyer in *Chambers USA*, *Benchmark Litigation*, *Lawdragon 500*, *Super Lawyers* and *Best Lawyers (US News)*. Mr. Keller received his B.A. *magna cum laude* in 1985 from Harvard College and his J.D. in 1990 from Stanford Law School.

Frank A. Merola is a partner in the Corporate Department of Paul Hastings, LLP in Century City, Calif., and has nearly 30 years of experience in business reorganization and bankruptcy. He advises debtors, creditors, official and ad hoc committees, acquirers and equityholders both in chapter 11 and out-of-court restructurings. Mr. Merola services a broad spectrum of industries, ranging from real estate gaming and leisure to oil and gas, retail, health care, and communications and media. His recent clients include Hagggen Holdings, LLC, BPZ Resources, Inc., the ad hoc group of first lien banks in Caesars Entertainment Operating Co., the ad hoc group of noteholders of 21st Century Oncology, and the official committee of unsecured creditors in MModal Holdings, Inc. Mr. Merola is regularly listed in *Super Lawyers* in the area of Bankruptcy & Creditor/Debtor Rights, as well as in *The Best Lawyers in America*. In 2007, he was co-recipient of the Large Company Transaction of the Year Award from the Turnaround Management Association following his work with USA Capital First Trust Deed Fund, and he was listed in *Chambers USA* for Bankruptcy/Restructuring for 2022. Mr.

Merola received his B.S. *cum laude* in business administration from Georgetown University in 1985 and his J.D. from the University of California at Los Angeles School of Law in 1988.

Genevieve G. Weiner is a member of the Restructuring group at Sidley Austin LLP in Los Angeles and focuses her practice on representing debtors and lenders in various bankruptcy matters, general assignments, receiverships and out-of-court restructurings and workouts. She has represented clients across multiple industries, including health care, retail, hospitality and real estate. Ms. Weiner received her B.A. in rhetoric with a minor in philosophy from the University of California at Berkeley in 2004 and her J.D. *magna cum laude* in 2007 from Pepperdine University, where she served as lead articles editor for the *Pepperdine Law Review*. In 2007, Ms. Weiner was awarded the Outstanding Bankruptcy Law Student Award by the Commercial Law & Bankruptcy Law Section of the Los Angeles County Bar Association.