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PERMISSIBILITY OF THIRD-PARTY RELEASES IN NON-ASBESTOS CASES

The courts have generally approved third-party releases when there is consent, but without consent only in limited or “extraordinary” circumstances. The author discusses the general standard for approval, the type of consent required, multi-factor tests used by some courts, and the jurisdiction of the bankruptcy court. He then turns to the minority of jurisdictions that have held third-party releases are impermissible as a matter of law, and closes with a discussion of two major recent cases of interest.

By William P. Weintraub *

For purposes of this article, a third-party release is defined as the release of a claim held by a non-debtor against a party that is not the debtor. Not included in this definition are “debtor releases,” which cover the release of claims and causes of action owned or controlled by the debtor, such as avoiding actions, claims that arose prepetition that belong to the debtor and that are property of the estate, and derivative actions such as claims against officers and directors for breach of duty. Nor does the definition include “exculpation provisions” that shelter plan-related conduct by professionals and others involved in the chapter 11 case in the development of the plan of reorganization. Perhaps a suitable but imperfect description would be claims for independent misconduct or wrongdoing by a creditor of the debtor, or by an officer or director of the debtor, that has injured the creditor of the debtor in a particularized way that is unique to that creditor.¹

¹ This article focuses on non-asbestos cases for two reasons. First, third-party releases in asbestos cases are covered by a specific section of the Bankruptcy Code -- section 524(g). Section 524(g) has its own specific requirements. Therefore, the third-party release issues in asbestos cases are a bit more circumscribed and the case law has developed more uniformly

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MAJORITY APPROACH: THIRD-PARTY RELEASES ARE PERMISSIBLE IN CERTAIN LIMITED CIRCUMSTANCES

The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits have permitted third-party releases, but only in limited circumstances.²

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across the circuits than for non-asbestos cases. Second, non-asbestos cases far outnumber asbestos cases and, because there is no specific Code section for third-party releases in non-asbestos cases, the case law is more varied across the circuits.

² *S.E.C. v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (“a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor’s reorganization plan.”); *Gillman v. Cont’l Airlines (In re Cont’l Airlines)*, 203 F.3d 203, 212-14 (3d Cir. 2000) (non-consensual releases by a non-debtor of non-debtor third parties are to be granted only in “extraordinary cases” and there must be evidentiary findings that the release was “necessary” to confirm