



Critical Issues List 2022

Creditors' Rights Section for

Commercial Law League of America

Introduction

This paper contains recommendations from the Creditors' Rights Section for the Commercial Law League of America for proposed legislative and regulatory actions. The proposals are not meant to be definitive positions, but rather are designed to identify issues and areas of concern for further development and appropriate legislative action.

THE CRITICAL ISSUES

1. NO THIRD PARTY RELEASES IN BANKRUPTCY COURT

In the majority jurisdictions, courts have allowed Chapter 11 debtors to include both consensual and nonconsensual third-party releases that preclude certain non-debtors from pursuing claims against other non-debtors as part of a restructuring deal, despite the fact that there is no statutory authority giving judges the power to issue such releases, which modifies a nondebtor's property interest in a claim against another nondebtor. CRS should work with the Bankruptcy Section to lobby in favor of amending the Code to clarify that third party releases are not authorized under the existing Code, which is the law in the Ninth and Tenth Circuit Courts of Appeal.

Even in the Second Circuit, which has allowed such releases, the court recognized that:

“[A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.”

Thus, the CRS should lobby for a complete ban on third party releases given that there is no authority for such releases.

If, however, the bankruptcy section supports third party releases, then the two sections can work towards a joint proposal that limits third party releases to large tort cases and mandates that nondebtor releases must require the consent of every party granting the release (*i.e.*, prohibit courts from permitting debtors to treat creditor votes accepting a Chapter 11 plan as a sufficient showing of consent to the plan's release provisions) and further mandate that claimants affirmatively “opt in” to the releases by returning a



form/ballot that evidences their consent. This would effectively put a ban on nonconsensual releases, including exculpation clauses.

Included in this effort, should be lobbying to prohibit plan provisions that condition a claimant's plan treatment on whether it consents to plan releases and foreclose on the practice of conditioning an enhanced recovery on the creditor's affirmative consent to a release.

2. DEFINING HARDSHIP FOR STUDENT DEBTOR UNDER 11 USC 523(A)(8)

This is a follow up to the 2019 effort to define hardship. This can be another joint effort with the Bankruptcy Section.