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Current Issues Relating to the Use of Structured Dismissal in Bankruptcy Cases

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For at least the past 10 to 15 years, much of the Chapter 11 practice has been defined by the use of the process to sell of the estate's assets pursuant to Section 363 of the Bankruptcy Code. Numerous examples exist in cases large and small to demonstrate the point that the Chapter 11 process is used to effectuate a sales transaction, often on an expedited basis. In many cases, those sales are for the benefit of the secured creditor and the courts may impose on the secured creditor the obligation to fund administrative expenses as the "price" for using Chapter 11 to liquidate the debtor's assets. This process has the potential for maximizing the value of the assets in contrast to the use of a state law foreclosure process under the Uniform Commercial Code and applicable real estate law.

The issue in question becomes the disposition of the bankruptcy estate once the sale is accomplished. Of course, the more typical approach is to attempt to confirm a liquidating plan. What may be problematic, however, is the presence of significant priority claims that may impact the ability to confirm and effectuate a plan. Moreover, new priority claims, such as section 503(b)(9) claims may impact this analysis as well. [1] Parties may well find that the assets available to satisfy administrative and priority claims are insufficient. Accordingly, the parties are left with two options: (1) conversion of the case to Chapter 7 and (2) dismissal of the case. Obviously, conversion is problematic and not particularly palatable. A Chapter 7 trustee is appointed, avoidance actions are asserted, and control over the process is lost. Moreover, to the extent that any value is available for unsecured creditors, the process could well become elongated for a number of years as the Chapter 7 trustee administers the bankruptcy estate.

Structured dismissals have become a potentially useful alternative in this context to avoid some of the concerns arising in the context of a Chapter 7 case and to avoid some of the costs and risks of a Chapter 11 liquidating plan. The actual dismissal orders often have significant relief in addition to simply dismissing the case. [2] As discussed below, there are a number of issues that are present in the context of structured dismissals that may lead to subsequent litigation, including the validity of any sale (if an appeal is pending), the validity of third-party releases and the ability to direct value to junior creditors in violation of the absolute priority rule. As a further cautionary word, the case law upholding such provisions is evidenced mostly by unreported orders granting such relief. [3] The purpose of this discussion is to articulate certain of these tensions and issues in the context of currently available case law. One interesting aspect is that there is very little published authority on the point, and many of the decisions rendered in the context of a roughly consensual process.

I. What Is a Structured Dismissal?

Through a structured dismissal order, a bankruptcy court may implement relief beyond the mere dismissal of the case. Increasingly, structured dismissals are emerging as a potential course of action following a sale of substantially all assets of the estate pursuant to section 363 of the Bankruptcy Code. Structured dismissals provide parties with an expedited means to distribute the sale proceeds to creditors and dispose of the bankruptcy case following the sale. Along with establishing distribution procedures to satisfy creditor claims, these dismissal orders also typically include various additional relief

provisions, including the retention of the bankruptcy court's jurisdiction following dismissal, [4] conditions precedent to dismissal such a certification of counsel, [5] the survival of all final orders entered in the Chapter 11 case, [6] and, in certain situations, nondebtor releases [7] and the "gifting" of funds carved-out from the recovery of senior secured lenders. [8]

II. Statutory Bases for Dismissal

Bankruptcy courts have statutory authority to grant unadorned or "plain vanilla" dismissal orders pursuant to sections 1112(b) and 305(a) of the Bankruptcy Code. The legislative history of section 1112(b) affords bankruptcy courts a wide degree of discretion in determining whether to dismiss a bankruptcy case. [9] This section provides that a bankruptcy court may dismiss a Chapter 11 case after notice and a hearing if "cause" is adequately pled by a petitioning party in interest. [10] If cause is established, the court must either dismiss or convert the case into a Chapter 7 liquidation, unless such action is not in the best interest of creditors and the estate. [11] Section 1112(b) provides a nonexhaustive list of grounds for cause. [12] Movants most commonly establish cause under this section by alleging a substantial or continuing loss to the estate evidenced by sustained negative cash flow and depreciation of estate assets. [13] The absence of a reasonable likelihood of rehabilitation of the debtor is also an off-cited justification for dismissal under this section. [14]

Section 305(a) provides another, though less often employed, avenue for the dismissal of a bankruptcy case. [15] This section allows the bankruptcy court to abstain from the case in certain instances. In relevant part, it provides that "(a) The court may dismiss a case … if … the interests of creditors and the debtor would be better served by such dismissal or suspension." [16] The test applied under section 305(a) is similar to that of section 1112(b) in that the bankruptcy court must weigh the potential benefits of dismissal to parties in interest. However, the non-appealability of dismissal orders entered pursuant to § 305(a) makes relief through abstention appropriate only in extraordinary circumstances. [17]

While parties seeking structured dismissal orders cite to sections 1112(b) and 305(a) as statutory support for the requested relief, neither of these sections explicitly affords bankruptcy courts the authority to approve or implement any additional provisions beyond the dismissal of the case itself. Indeed, there is no provision in the Bankruptcy Code that expressly sanctions the procedural relief contained within the orders. The proponents of the structured dismissal typically rely on the penumbral authority of the bankruptcy court under Code sections 105, 305, and 1112 and Fed. R. Bankr. P. 9019. Often these orders are granted in the absence of any serious objection and there may be situations where individual creditors may utilize these issues to negotiate for greater recoveries.

III. Consequences of Dismissal Orders

A. Statutory Provisions

By statute, a dismissal order in a Chapter 11 bankruptcy case returns the interests of a debtor and its creditors to their status before the filing of the case. Unless otherwise ordered, section 349(b) provides that dismissal of a bankruptcy case reinstates any proceeding or custodianship superseded by the commencement of the case, reinstates any transfer or lien avoided under any of the bankruptcy avoiding powers and revests the property of the estate in the entity in which such property was vested immediately before the Chapter 11 filing. [18] Simply put, "to the extent possible a dismissal of a petition reverses what has transpired during a bankruptcy." [19] Accordingly, much of the issue here involves the adjudication of issues that might otherwise be obviated by virtue of a dismissal order. As described below, there are a number of issues that may arise in the context of a bankruptcy case that may be "law of the case" or may otherwise be subject to collateral estoppel and/or res judicata.

B. Effect on Appeals and Related Matters

Additionally, dismissal of an underlying bankruptcy proceeding often results in the dismissal of related proceedings, as "federal jurisdiction is premised upon the nexus between the underlying bankruptcy case and the related proceedings." [20] However, this general rule is not without exceptions. "[S]ection 349 of the Bankruptcy Code lists the various effects of dismissal of the underlying bankruptcy case; conspicuously absent from that list is automatic termination of jurisdiction of related cases." [21] As a result, in many instances, the dismissal of the underlying bankruptcy petition may not automatically result in the dismissal of a pending appeal.

The dismissal of the underlying bankruptcy will only result in the dismissal of a pending appeal where the matter on appeal is entirely dependent on the existence of the bankruptcy. [22] For example, in *In re Income Property Builders, Inc.*, [23] the matter on appeal was whether the automatic stay had been properly lifted in the underlying bankruptcy case. Because the dispute regarding the automatic stay was entirely dependent upon the underlying bankruptcy case, the dismissal of the Chapter 11 case by the bankruptcy court entirely mooted the matter on appeal, mandating its dismissal as well. [24] In contrast, however, where dismissal of an underlying bankruptcy case does not bring about a full resolution of all disputes between the parties or otherwise moot a pending appeal, the matter pending on appeal may not be properly dismissed. [25]

Likewise, in the case of adversary proceedings, numerous courts have ruled that jurisdiction is not automatically terminated with the dismissal of the underlying bankruptcy case, and that bankruptcy courts have discretion to retain jurisdiction over adversary proceedings. [26] As the Ninth Circuit has explained, "[i]f Congress wished to terminate bankruptcy jurisdiction over related cases when the underlying bankruptcy case is dismissed, it presumably would have said so in section 349 or elsewhere." [27] In particular, courts have held that the retention of jurisdiction over an adversary proceeding may be necessary in cases that "have progressed so far that judicial interference is needed to unravel or reserve the rights of parties." [28]

C. Other Effects of Dismissal

In general, the dismissal of a Chapter 11 bankruptcy case is without prejudice, meaning that the debtor retains the right to receive a discharge in a subsequent bankruptcy filing of debts that were dischargeable in the dismissed case. [29] Section 349(a) provides:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title. [30]

Despite this general rule of dismissal without prejudice, section 349 does allow for the bankruptcy court to dismiss a case with prejudice in certain instances, thereby preventing the debtor from obtaining a discharge with regard to the debts existing at the time of the dismissed case. Similarly, for good cause found, bankruptcy courts may also enter an order denying the debtor access to the bankruptcy courts for some period of time in the future, usually six months. [31]

Dismissal with prejudice and dismissal with injunctions against future filings are both drastic sanctions, however, and are only invoked in extreme situations. [32] Courts typically resort to these remedies only where there is evidence of egregious conduct demonstrating bad faith on the part of the debtor. [33] The courts often dismissed consumer cases with prejudice under the rubric that the debtor had filed multiple bankruptcies in order to stay a foreclosure proceeding without any possibility of a successful

rehabilitation under Chapter 13. This was a fairly common practice until modification of the Bankruptcy Code to explicitly provide for such relief in the 2005 Amendments. Obviously, this is less of an issue in the context of the commercial debtor.

IV. Remedial Provisions in Structured Dismissals

As mentioned, structured dismissals offer an array of options to parties in interest beyond the consequences contemplated by Congress in the Code's dismissal provisions outlined above. The remedial provisions in structured dismissal orders include certain releases of non-debtors, "gifting" provisions that allow junior classes to recover some value and claims adjudication procedures for certain administrative expense claims as well as, in certain circumstances, prepetition unsecured claims.

A. Nondebtor Releases

The propriety of third-party releases has long been a contentious issue in Chapter 11 cases. There is a well-defined split in authority concerning whether bankruptcy courts have the appropriate jurisdiction and authority to permanently enjoin claims against nondebtors in proceedings beyond the immediate Chapter 11 case before the court.

28 U.S.C.A. § 1334(b) provides that bankruptcy courts have jurisdiction over all claims "related-to" the bankrupt estate. [34] The Third Circuit's seminal case of *Pacor, Inc. v. Higgins* [35] established the dominant standard used to determine whether claims against nondebtor third parties are "related to" the estate. Under *Pacor*, "related to" jurisdiction exists if the outcome of litigation against a nondebtor could "conceivably have any effect on the estate being administered in bankruptcy." [36]

If the requisite jurisdiction is found to issue nondebtor releases, the question still remains whether bankruptcy courts have the authority to do so under the Code. Several circuits, including the Fifth, Ninth, and Tenth, have construed Bankruptcy Code section 524(e), which provides that the "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," [37] and courts in these circuits have concluded that nondebtor releases are therefore violative of explicit mandates of the Code. [38]

A more permissive approach has however been adopted by courts in other circuits. These courts have generally concluded that, on its face, Code section 524(e) does not set forth a per se rule prohibiting permanent injunctions as to non-debtors. [39] As the plain language of the Code does not explicitly establish a statutory bar from such releases, these courts have held that bankruptcy courts indeed have the authority to mandate the release of claims against non-debtors when appropriate based on the particular facts of a case. [40]

Even the most permissive approach to nondebtor releases still does not afford courts with an "unfettered discretion to discharge a non-debtor from liability" in reorganization plans. [41] The Bankruptcy Court for the Western District of Missouri, in *In re Master Mortgage Investment Fund, Inc.*, [42] first promulgated the now well-accepted five-part test to evaluate the propriety of a proposed nondebtor release in a reorganization plan. The factors informing the court's analysis in that case included: (i) the identity of interest between the debtor and the nondebtor third party, such that a suit against the nondebtor is, in essence, a suit against the debtor; (ii) whether the reorganization hinges on the debtor being free from such derivative liability; (iii) the third party's substantial contribution of assets to the reorganization; (iv) the overwhelming support of the proposed release by substantial majority of the creditors; and (v) payment of all, or substantially all, of the claims of the impacted creditor class. [43] These elements all factored into the courts' central inquiry of whether the nondebtor release was essential to the success of the reorganization. [44]

While the majority of circuits have embraced the flexible *Master Mortgage* rubric, the courts have still been careful to narrowly construe this criteria and have only granted nonconsensual nondebtor releases in "rare instances" and with findings of "unusual circumstances." [45] All circuits considering the issue have deemed nondebtor releases to be the exception, rather than the norm. [46] Pro-release circuits therefore require a strict evidentiary showing before such relief is granted in a reorganization plan. [47] Absent the hallmarks identified in the *Master Mortgage* test, including specific factual findings of fairness and necessity to the reorganization, courts have held that a plan containing nondebtor releases cannot be confirmed. [48]

For example, in *In re Continental Airlines*, the Third Circuit considered the validity of a provision in a reorganization plan that purported to enjoin future lawsuits against the debtor's present and former directors and officers who were not themselves parties to the bankruptcy proceeding. The court ultimately rejected this provision, holding that the bankruptcy court had not made sufficient "specific findings regarding … [its] factual basis to justify this provision." [49] Among other things, the court noted that the debtors had not adequately demonstrated that the releases in favor of the directors and officers were in any way a "key element" of the reorganization. As the court explained, there was nothing in the factual record to support the conclusion that the "success of the Continental Debtors' reorganization bore any relationship to the release and permanent injunction." [50]

In context of structured dismissals, however, a number of courts have granted nondebtor releases despite the absence of such specific factual findings. [51] The structured dismissal order granted in In re TLG Liquidation LLC serves as a useful example. In that case, the debtors petitioned the bankruptcy court for the District of Delaware for approval of a broad release provision that would "forever discharge any and all Claims and Defenses against [the senior secured lender], each of the Lenders and their respective shareholders, partners, members, officers, directors, managing members, employees, representatives, agents, professionals, successors and assigns." [52]

In the *TLG* dismissal motion, which was largely unopposed, the debtors offered only the conclusory statement that such relief was "in the best interest" of the estate but did not support this assertion with reference to any specific facts satisfying the purposes of the *Master Mortgage* test. The bankruptcy court granted the motion without any of the "specific findings" required by the Third Circuit in *Continental*, thereby affording relief to the parties beyond that available under applicable law in the context of a reorganization plan. [53]

Moreover, the lack of factual allegations supporting any of the *Master Mortgage* criteria in the *TLG* motion seems to underscore the point that it would be difficult to demonstrate the necessary facts in the context of a dismissal. As noted above, in the pro-release circuits, an analysis of the propriety of nondebtor releases primarily focuses on whether such relief is necessary for the success of the reorganization effort. [54] Courts in these circuits specifically stress the relationship between the requested relief and success of the reorganization process. "This is because a reorganizing debtor, as opposed to a liquidating debtor, needs to be protected from [derivative] suits that may deplete its assets so that it can, in fact, reorganize." [55] The rationales for a release in a structured dismissal, which would include the enhancement of the value of the estate and/or the consideration given by the released parties to junior classes, do not implicate the reorganization rationale adopted by many of the circuit courts. [56]

Often the structured dismissal construct is negotiated with the creditors' committee and with significant constituents in the bankruptcy case. Those constituents will find it in their interest to grant a release to a particular third parties (including, particularly, the secured lenders) as a condition to receiving some benefit in the bankruptcy case. Of course, those secured lenders want relief not only with respect to the parties at the bargaining table, but also with respect to all other creditors in the case and the structured dismissal orders are a means to that end. That being said, the particularly interesting aspect here is the use of the compressed notice process of a structured dismissal to obtain relief that is extraordinary in the context of a bankruptcy plan. One can view this as the result of the creditors not focusing on the precise relief requested or understanding the impact on

their rights. Obviously, many of these orders have been entered in the context of notice having been given (albeit perhaps in a short time frame) and no objections having been filed. In that circumstance, creditors may well find themselves bound by the terms of the order (see *Espinosa* discussion below) [57] and without further recourse against the third parties subject to the relief.

B. Gifting Provisions and "Carve-Out" Funds

The use of "gifting"—or the allocation of funds to junior lenders carved-out from the recovery of senior creditors—has had a similarly controversial history in reorganization proceedings. Courts remain divided over the validity of such provisions within reorganization plans.

One of the earlier decisions addressing the gifting doctrine was the decision in *In re SPM Manufacturing Corp.* [58] The senior secured creditor in that case was a bank holding a perfected, first priority interest in substantially all of the debtor's assets. As the bank's secured claim exceed the total value of the collateral, all junior classes of creditors stood to receive nothing on account of their claims. At issue in *SPM* was an agreement through which the bank proposed to divert a portion of its recovery for the benefit of unsecured creditors in exchange for the creditors' committee support prior to conversion. The arrangement however, did not provide for any distribution on account of an intervening Internal Revenue Service priority claim. The debtor, remaining liable on the priority tax claim, objected to the proposed agreement on the grounds that the bank's gift to unsecured creditors afforded recovery to a junior creditor class before the satisfaction of a priority claim in violation of the Bankruptcy Code's distribution scheme.

The absolute priority rule, which is codified in section 1129(b), mandates that a nonconsensual plan may only be confirmed if it is "fair and equitable" and does not "discriminate unfairly" against any impaired class of claimants. [59] Simply stated, the absolute priority rule generally requires that all claims of senior creditor classes be satisfied in full before payment to junior creditor classes. [60]

However, in rejecting the debtor's challenge to the proposed distribution, the *SPM* court noted that because the bank's security interest exceeded the value of the debtor's estate, all proceeds from the sale of the assets of the estate rightfully belonged to the bank. [61] The court therefore approved the distribution, reasoning that the proceeds from the sale of the collateral were the exclusive property of the bank, and that nothing in the Bankruptcy Code constrains a creditor from allocating its recovered funds as it sees fit. As the First Circuit explained:

> The Code does not govern the rights of creditors to transfer or receive nonestate property. While the debtor and the trustee are not allowed to pay nonpriority creditors ahead of priority creditors, … creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including to share them with other creditors. [62]

Numerous courts have adopted the First Circuit's approach when considering the propriety of Chapter 11 gifts plans that stray from the statutory bankruptcy priority scheme. [63] For example, in *In re Journal Register Co.*, [64] the Bankruptcy Court for the Southern District of New York approved a reorganization plan containing a gifting arrangement through which the debtor's secured lenders agreed to distribute a portion of their recovery to a particular group of unsecured trade creditors in exchange for a release of claims against the secured parties and support of the proposed plan. [65] A pension fund holding an intervening unsecured claim objected to the plan, arguing, among other things, that the treatment violated the absolute priority rule of section 1129(b). [66] In upholding the "gift," the bankruptcy court cited *SPM* with approval and further reasoned that if it "excised the gift provision from the Plan, the recoveries of the 'disfavored' … creditors would not be increased." [67]

However, the Second Circuit has recently taken a different approach. In *In re DBSD North America, Inc.*, [68] the Second Circuit reversed the bankruptcy court's approval of a reorganization plan in which a senior secured creditor class agreed to allocate a portion of its recovery to junior stakeholders (the old equity), while bypassing distribution to an intervening claimant (an unsecured creditor). The bankruptcy court in that case relied on *SPM*, explaining that:

> The gifting doctrine permits creditors, if they wish, to "gift" part of the distributions to which they'd otherwise be entitled to junior classes or interests, even if that gift results in unequal distributions to classes that would otherwise be *pari passu*, or if the gift makes distributions to a class when a more senior class has not been paid in full. [69]

In an opinion issued on February 7, 2011, the Second Circuit rejected the bankruptcy court's application of the *SPM* approach. As the court explained, "[m]ost fatally, this interpretation does not square with the text of the Bankruptcy Code." [70] Pulling from the plain language of section 1129(b)(2)(B), the court held that because a senior claimant would not receive "property of a value … equal to the allowed amount" of its claim, the proposed plan could not be confirmed unless the junior stakeholders do "not receive or retain" "any property" "under the plan on account of such junior … interest." [71] Importantly, the court stressed that the "[t]he Code extends the absolute priority rule to '*any property*,' not 'any property not covered by a senior creditor's lien.'" [72] Therefore, the distributional scheme of the Code is not altered solely owing to the fact that estate assets are insufficient to fully satisfy secured claims.

The court went on to distinguish *SPM* by stressing that Chapter 7 liquidation plans are not constrained by the "rigid absolute priority rule" that attaches in the context of reorganization. [73] The court's central focus on the express language of section 1129(b)(2)(B) may suggest that Second Circuit has not entirely foreclosed the ability of parties to "gift" portions of their recovery to junior creditors in situations arising outside of the reorganization context. While the full reach of the *DBSD* decision remains to be seen, presently, it seems that the Second Circuit has embraced the general rejection of the "gifting doctrine" in the Chapter 11 context as held by the Third Circuit in *In re Armstrong World Industries, Inc.* [74]

In *Armstrong World*, the Third Circuit concluded that *SPM* and its progeny "do not stand for the unconditional proposition that creditors are generally free to do whatever they wish with the bankruptcy proceeds they receive," and that any distribution to equity holders prior to the full satisfaction of all creditors' claims clearly violated the absolute priority rule. [75] Adopting the reasoning of the district court, the Third Circuit concluded that "no amount of legal creativity or counsel's incantation of general notions of equity or to any supposed policy favoring reorganizations … supports judicial rewriting of the Bankruptcy Code." [76]

The gifting doctrine is still a developing area of law. Courts continue to reach divergent conclusions regarding the validity of distribution schemes involving "gifts" to junior creditors. Yet, despite reaching differing conclusions, the fact remains that all courts considering the issue have analyzed the facts of the proposal within the framework of the absolute priority rule. [77]

In the absence of objection, however, in the context of structured dismissal orders, the courts have allowed "gifted" reserves to be set up for junior classes (typically out of the proceeds of the sale and with the consent of the senior secured lender). [78] For example, in *In re Wickes*, the Bankruptcy Court for the District of Delaware approved and implemented a gifting provision through a structured dismissal order without any evaluation, or even mention, of the priority requirements of the Code. [79] In that case, the proceeds from the sale of the debtors' various assets were insufficient to satisfy all of the debtors' obligations to secured and priority creditors. As a result of negotiations with the creditors' committee, the debtor's senior secured lender agreed

to carve out certain funds from its recovery under the debtor in possession agreement for the benefit of the general unsecured creditors. The bankruptcy court approved the arrangement, concluding the distribution was in "the best interest of the creditors and the Debtors' estates." [80] *Wickes* represents another example of a negotiation with the committee resulting in a distribution outside the strict contours of the Bankruptcy Code. In the absence of an objection with requisite notice, the court may well grant this type of relief as there is some economic benefit to the unsecured creditors.

Proponents of gifting provisions within structured dismissal orders are likely to assert that an analysis of the Bankruptcy Code's priority scheme is only mandated in confirmation proceedings and is therefore inapplicable in structured dismissal orders, which clearly arise outside of the plan context-usually pursuant to settlement agreements under Fed. R. Bankr. P. 9019. [81] While certainly a colorable argument, case law suggests that the Code's priority requirements set forth in § 507 are similarly applicable even beyond the reorganization context.

Bankru[tcy Rule 9019 does not provide any formal standards governing the approval of proposed settlement agreements. [82] Yet case law has established that there are "two distinct requirements that must be satisfied before a bankruptcy court approves a settlement: it must be fair in the sense that it is reasonable in relation to the merits of the litigation, and it must be 'fair and equitable,' in the sense that it [satisfies] the priority rule." [83] "Because 'fair and equitable' translates to the absolute priority rule, in order for a settlement to meet that test it must be consistent with the requirement that dissenting classes of creditors must be fully satisfied before any junior creditor receives anything on account of its claim." [84] To ensure that motions to compromise are not used as a means to circumvent the Bankruptcy Code's absolute priority rule, adherence to the priority scheme of the Code remains a central factor conditioning the approval of gift provisions, even if such provisions are proposed outside of plan confirmation proceedings. [85]

In *In re Iridium Operating LLC*, [86] the Second Circuit Court of Appeals adopted this approach, concluding that parties may not use settlement agreements as a device for frustrating the absolute priority rule. [87] "[I]in the chapter 11 context, whether a pre-plan settlement's distribution plan complies with the Bankruptcy Code's priority scheme will be the most important factor for a bankruptcy court to consider in approving a settlement under Bankruptcy Rule 9019." In *Matter of AWECO, Inc.*, [88] the Fifth Circuit similarly extended the absolute priority analysis beyond the plan context, proclaiming that "a bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." [89]

These cases require the bankruptcy courts to scrutinize even those gift provisions proposed outside of the plan context with the same absolute priority analysis applied in confirmation proceedings. [90] *Wickes* and other cases demonstrate that creative lawyers can, in the absence of any objection, obtain relief that might not be fully consistent with the requirements of the Bankruptcy Code.

Moreover, regardless of whether a proposed gift provision arises within a reorganization plan or pursuant to a settlement agreement, all courts that have approved distributions that stray from the Bankruptcy Code's priority scheme have only done so after an explicit finding of a strong business justification for such action, such as the preservation of the debtor as a going concern in these cases. [91] In the context of structured dismissal, the reorganization rationale is absent. The primary focus, then, of the proponents should be to demonstrate the benefits to the estate, and to the enhancement of value and recoveries for all parties concerned through the use of a gifting mechanism that may not be fully consistent with the absolute priority rule. Obviously, the courts will review this on a case-by-case basis, and if adequate notice is given and no objections are raised, the courts may well approve such a provision.

C. Claims Reconciliation Procedures

A few structured dismissal orders will contain some type of claims reconciliation procedures. In some cases, the claims are allowed in the amounts submitted in the dismissal motion in the absence of an objection.[92] In others, creditors have been required to object to the amount stated in the dismissal motion and pay the costs associated with contesting any such objection.[93] Yet another case has incorporated an omnibus claim objection in to the dismissal motion that purported to bind creditors who failed to object.[94]

These reconciliation procedures are problematic on a number of levels. To start, they do not appear to comport with the claim objection procedures set forth in Bankruptcy Rule 3007 and also may well violate local bankruptcy rules regarding the use of "omnibus" objections.[95] Moreover, putting aside the procedural issues, where there has been a sale of all the assets of the debtor, and the case is being dismissed, the jurisdictional basis for the bankruptcy court is in questions, as well. In a number of cases, the appellate courts have looked very scrupulously at the continuing subject matter jurisdiction of the bankruptcy court where the bankruptcy estate is not affected by the disposition of a particular litigation.[96] Accordingly, this may be another situation where the absence of an objection will be held to be res judicata and/or law of the case as against the non-objecting creditors. There are numerous objections that could be raised to this process by a dissenting creditor.

V. Equitable Authority

The approval of nondebtor releases and gifting provisions in structured dismissal orders underscores the same concern—the ability of parties to obtain remedies through structured dismissals without adherence to otherwise applicable bankruptcy law governing such relief. Parties routinely cite to Bankruptcy Code section 105(a) as the statutory basis supporting the grant of these addition provisions in dismissal orders.[97] Section 105(a), in relevant part, provides that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title."[98] This section is often characterized by courts and practitioners as a source of supplemental authority. "Parties in interest in bankruptcy often call upon 105 … as a means of enlisting the aid of judicial authority whenever the Bankruptcy Code does not expressly address a particular situation."[99]

The law is well-settled that the courts' power under section 105(a) is broad but not boundless.[100] The plain language of section 105(a) limits the courts' equitable authority to the execution of explicit "provisions" of the Code.[101] The provisions of the Code represent the fixed set of specific remedies contemplated by Congress, and bankruptcy courts "cannot legislate to add to them."[102] "Even if § 105(a) constitutes a direct, fresh grant of supplemental power to the bankruptcy courts … it can only implement powers already expressed in the provisions of the Bankruptcy Code."[103]

In other words, any use of section 105(a) must be directly in conjunction with another specific section of the Code and must only implement the specific relief considered thereunder.[104] As the Fifth Circuit Court of Appeals aptly stated in *United States v. Sutton*,[105] section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."[106] One judge considering additional relief provisions proposed pursuant to a dismissal motion acknowledged this concern, explaining, "I don't think 105(a) helps. All that gives me is the right to have an equitable remedy but I need a basis in the Code. There is no basis in the Code for the type of relief being sought."[107]

VI. Appellate Issues in the Context of Structured Dismissals

As noted previously, most of the decisional authority in this context is unpublished, and most of the examples of structured dismissals involve roughly consensual situations where no party has objected (or any such objections have been resolved outside the court). Accordingly, "live objections" have not been the subject of any appellate consideration. This dynamic engenders the type of "sausage making" for which bankruptcy is (fairly or unfairly) famous. The threat of an appeal is a significant issue and is leverage for a junior creditor to challenge the relief in the context of a structured dismissal. In this context, then, litigants should be mindful of the current approach to equitable or jurisprudential mootness.

A dismissal order is certainly an order that can be the subject of an appeal. In the absence of a stay, however, an appeal may become moot if parties have changed their positions and taken action in reliance on a structured dismissal order. The judicially-created doctrine of mootness authorizes an appellate court to decline review of an otherwise viable appeal where, due to substantial consummation or reliance upon the underlying order, the relief requested by appellant would be inequitable to grant. As the Fifth Circuit explained, it is "a kind of appellate abstention that favors the finality" and protects "interrelated multi-party expectations." [108] Although recent decisions in the Fifth and Tenth circuits have suggested a narrower application, equitable mootness remains a viable doctrine still firmly rooted in bankruptcy jurisprudence. [109] By constraining the right to review, equitable mootness may present a substantial hurdle to litigants seeking to challenge the relief provisions in structured dismissal orders.

Moreover, the issue of jurisdiction and the res judicata effect of an order that might violate the Bankruptcy Code should be considered by practitioners. For example, *Republic Supply Company v. Shoaf*, [110] demonstrates that in the absence of a timely appeal (that is not dismissed as being moot), even orders that effectuate relief outside the structure of the Bankruptcy Code may become res judicata and may be binding on parties in the context of a subsequent collateral attack on such orders. In *Shoaf*, for example, the Fifth Circuit reviewed and enforced a reorganization plan containing a release of nondebtor guarantors. [111] Notwithstanding appellant's contention that the bankruptcy court lacked authority to approve such a release, the court ultimately concluded that appellant's failure to timely object to the provision or appeal plan confirmation foreclosed any subsequent challenge to the propriety of the release. [112]

The recent Supreme Court decision in *United Student Aid Funds, Inc. v. Espinosa* [113] is also instructive on this point. In *Espinosa*, the Supreme Court narrowed the ability of parties to obtain relief from even clearly erroneous final orders. The facts involved in *Espinosa* are straightforward. Between 1988 and 1989, United Student Aid Funds, Inc. awarded four federally guaranteed student loans to Francisco J. Espinosa, totaling $13,250. In 1992, Espinosa filed a Chapter 13 bankruptcy petition, seeking discharge of accrued interest on the federal loans after payment in full of the principal amount. In approving Espinosa's proposed plan, the bankruptcy court failed to follow the procedures contemplated by Congress for the release of debt in a Chapter 13 case. Pursuant to section 523(a)(8), student debt may only be released after the movant alleges, and the court makes specific factual findings, of "undue hardship." [114] Rule 7001(6) further provides that the bankruptcy court must make this undue hardship determination through an adversary proceeding, initiated by the party seeking the relief through service of a summons and complaint on the adverse party. [115]

Espinosa failed to furnish his lender with the requisite summons and adversary complaint. Moreover, in his petition to the court, Espinosa did not make or support any allegations of undue hardship to justify the discharge of the student debt. Despite these violations of the Chapter 13 process, the bankruptcy court still confirmed Espinosa's Chapter 13 plan in 1993 in the absence of an objection from United. By 1997, Espinosa completed all payments owed under the plan, and the remainder of his debt obligations was subsequently discharged by the court. Several years later, United filed a motion requesting that the bankruptcy court set aside its order discharging the student debt. In its motion, United correctly asserted that Espinosa had failed to comply

with the statutory requirements of Chapter 13 and that therefore the discharge was granted in error. United moved to have the discharge declared void pursuant to Civil Procedure Rule 60(b). [116]

In a unanimous decision, the Supreme Court ultimately upheld the discharge of the debt. Acknowledging that "[t]he bankruptcy court's failure to find undue hardship before confirming Espinosa's plan was a legal error," the Court concluded that the order remained effective. As the Court explained, a final judgment is only void in instances of a jurisdictional error, where the court "lacked even an 'arguable basis' for jurisdiction," or a violation of due process depriving a party of notice or the opportunity to be heard in a matter. [117] Although Espinosa plainly failed to meet his burden in the case in respect to providing the proper notice and summons to initiate the required adversary proceeding, the Court stressed that United ultimately did receive notice of the proposed plan from the clerk of the bankruptcy court. The discharge was therefore "enforceable and binding on United because United had notice of the error and failed to object or timely appeal" [118]

In finding the discharge valid and enforceable, the Court stressed United's delay in challenging the order. Even glaring legal errors within a final order do not provide a "license for litigants to sleep on their rights." [119] The Supreme Court's ruling suggests that untimely collateral attacks against structured dismissal orders will not be met with success merely because the relief granted pursuant to those orders was unwarranted. [120] The onus is therefore on dissenting parties to remain vigilant and proactive when confronted with motions for structured dismissal.

Although the Court's ruling in *Espinosa* was narrowly tailored to the facts and circumstances present in that case, it is still instructive when considering the recourse available to parties challenging any legally erroneous final order. Applying the lessons of *Espinosa* in the context of structured dismissals, it seems that parties seeking review of such orders will face an uphill, and likely unsuccessful, battle if they delay action. The strong policies in favor of finality will have an impact on the ability of parties to seek appellate relief other than through a direct appeal of a structured dismissal order. Absent a timely appeal, or a timely motion under Civil Rules 59 or 60 (as incorporated by the Bankruptcy Rules), a litigant may well find itself bound by the provisions of the order notwithstanding the arguable lack of jurisdiction for the bankruptcy court to have entered such an order.

VII. Conclusion

Despite the cautionary example of *Espinosa*, given the absence of memoranda decisions on the subject of structured dismissals, it remains to be seen how appellate courts will tackle the issues outlined above. Even if an appeal is timely pursued, it still remains unclear what relief, if any, will be available to objecting parties. Despite the questionable aspects of structured dismissals, as this trend persists, there will be continued incentive among practitioners to regard structured dismissals as a viable addition to the Chapter 11 toolbox.

Footnotes

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1 For example, in the *Global Home Products* bankruptcy case, the debtor had insufficient funds to confirm a Chapter 11 plan as it did not have the monies available to pay the section 503(b)(9) claims. The plan proposed to pay those claims at 35 cents on the dollar with the provision that if any of the claims objected, the case would be converted to Chapter 7. This is because, as opposed to class acceptance binding consenting creditors, each individual section 503(b)(9) claimant was entitled to payment in full under section 1129(a)(9)(A) and each individual claimant was required to accept disparate treatment. The plan was confirmed and went effective. See In re Global Home Products, LLC, No. 06-10340 (Bankr. D. Del. Feb. 13, 2008) [Dkt. No. 1946] (Order).

2 For example, in a number of cases, the Bankruptcy Court for the District of Delaware has authorized a dismissal of a Chapter 11 case and has authorized the continuation of the prior effectiveness of the prior orders, as well as set forth claims procedures for the resolution of prepetition claims. See In re New Weathervane Retail Corp., No. 04-11649 (Bankr. Del. Aug. 4, 2005)) [Dkt. No. 566]; In re Magnolia, No. 06-11069 (Bankr. D. Del. Feb. 12, 2007) [Dkt. No. 196] (Order); In re CFM U.S. Corp., No. 08-10668 (Bankr. D. Del. Feb. 1, 2010) [Dkt. No. 1282]. See also In re Wickes Holdings LLC, Case No. 08-10212 (Bankr. D. Del. May 11, 2009) [Dkt. No. 1418] (Order). No objections were raised to many of these orders. In other cases, objections were withdrawn or resolved through the execution of a stipulation between the parties. Accordingly, appellate authority is scant. There is little discussion on the use of structured dismissals. One recent article does address the viability of structured dismissals as an alternative and discusses a number of issues relating to the types of orders obtained in that context. See Pernick and Dean, Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales, 29-Jun Am. Bankr. Inst. J. 1 (June 2010).

3 See, e.g., cased cited in notes 78, 90, 92, and 97 infra.

4 See, e.g., In re CFM U.S. Corp., No. 08-10668 (Bankr. D. Del. Feb. 1, 2010) [Dkt. No. 1282]; In re Princeton Ski Shop Inc., No. 07-26206 (Bankr. D.N.J. 2008) [Dkt. No. 472] (Motion to Dismiss Order).

5 The certification of counsel procedure provides for the dismissal of the case upon debtor's counsel's certification that all conditions have occurred or been waived. See, e.g., In re Magnolia, No. 06-11069 (Bankr. D. Del. Feb. 12, 2007) [Dkt. No. 196] (Order).

6 In re Magnolia, No. 06-11069 (Bankr. D. Del. Feb. 12, 2007) [Dkt. No. 196] (Order).

7 See, e.g. In re TLG Liquidation LLC, No. 10-10206 (Bankr. D. Del. April 30, 2010) [Dkt. No. 275] (Motion to Approve).

8 See, e.g. In re Wickes Holdings LLC, No. 08-10212 (Bankr. D. Del. 2008) [Dkt. No. 1418] (Order). See also In re KB Toys, Inc., Case No. 08-13269 (KJC) (Order dated Feb. 16, 2010) (authorizing structured dismissal and procedures by which certain claims were to be resolved including "stub rent claims" and section 503(b)(9) claims).

9 See H.R. Rep. No. 95-595 at 405 (1997); *see also* Toibb v. Radloff, 501 U.S. 157, 165, 111 S. Ct. 2197, 115 L. Ed. 2d 145, 21 Bankr. Ct. Dec. (CRR) 1296, 24 Collier Bankr. Cas. 2d (MB) 1179, Bankr. L. Rep. (CCH) P 73994 (1991) ("the Code gives bankruptcy courts substantial discretion to dismiss a Chapter 11 case"); In re Bartle, 560 F.3d 724, 730, 51 Bankr. Ct. Dec. (CRR) 113, 61 Collier Bankr. Cas. 2d (MB) 844, Bankr. L. Rep. (CCH) P 81453, 103 A.F.T.R.2d 2009-1507 (7th Cir. 2009) ("The decision to dismiss a Chapter 11 proceeding pursuant to section 1112(b) is one committed to the court's discretion"); In re Owens, 552 F.3d 958, 61 Collier Bankr. Cas. 2d (MB) 943 (9th Cir. 2009) (court of appeals review only for abuse of discretion in a bankruptcy court's decision to dismiss a Chapter 11 case).

10 See 11 U.S.C.A. § 1112(b).

11 11 U.S.C.A. § 1112(b).

12 See 11 U.S.C.A. § 1112(b)(4)(A) (enumerating the most common causes for dismissal or conversation of a Chapter 11 proceeding). The 2005 Amendments to the Bankruptcy Code added certain procedural nuances to the analysis which are not necessary to discuss here.

13 See e.g. *Matter of 3868–70 White Plains Road, Inc.*, Matter of 3868-70 White Plains Road, Inc., 28 B.R. 515, 518 (Bankr. S.D. N.Y. 1983) (continuing loss or diminution illustrated by debtor's continual negative cash flow); Faden v. Faden, 1990 WL 191861 (D.N.J. 1990) (either the demonstration of negative cash flow by the debtor after entry of the order for relief in the Chapter 11 case or the depreciation in value of the debtors' assets are sufficient to satisfy the first element set forth in 1112(b)).

14 See e.g. Loop Corp. v. U.S. Trustee, 379 F.3d 511, 515, 43 Bankr. Ct. Dec. (CRR) 123, Bankr. L. Rep. (CCH) P 80146 (8th Cir. 2004) (finding cause because the "debtors were liquidating and thus had no likelihood of rehabilitation").

15 See e.g. In re Magnolia, No. 06-11069 (Bankr. D. Del. Feb. 12, 2007) [Dkt. No. 196] (Order).

16 11 U.S.C.A. § 503(a).

17 See § 305(c). See also In re South Canaan Cellular Investments, LLC, 420 B.R. 625, 631 (E.D. Pa. 2009) ("The application of§ 305(a) is an extraordinary remedy appropriate only when the interests of the creditor and the debtor are best served by dismissal"). Practitioners should also be aware that structured dismissals sometimes arise in the context of involuntary bankruptcy cases. The authors are aware of situations where an involuntary case is "settled" through certain accommodations being made by the debtors which, in effect, result in the dismissal of the involuntary case prior to the entry of an order for relief.

18 11 U.S.C.A. § 349(b).

19 In re Newton, 64 B.R. 790, 793 (Bankr. C.D. Ill. 1986); see also In re Safren, 65 B.R. 566, 571, 14 Bankr. Ct. Dec. (CRR) 1261, 16 Collier Bankr. Cas. 2d (MB) 315, Bankr. L. Rep. (CCH) P 71478 (Bankr. C.D. Cal. 1986) ("The objective of section 349(b) is to restore all property rights, insofar as is practicable, to their positions when the case was filed"); In re Income Property Builders, Inc., 699 F.2d 963, 965, 7 Collier Bankr. Cas. 2d (MB) 4 (9th Cir. 1982) ("11 U.S.C. § 349, treating the effects of a bankruptcy,

obviously contemplates that on dismissal a bankrupt is reinvested with the estate, subject to all encumbrances which existed prior to the bankruptcy").

20 In re Morris, 950 F.2d 1531, 1534, 22 Bankr. Ct. Dec. (CRR) 804, 26 Collier Bankr. Cas. 2d (MB) 468, Bankr. L. Rep. (CCH) P 74434 (11th Cir. 1992).

21 In re Carraher, 971 F.2d 327, 328, 23 Bankr. Ct. Dec. (CRR) 384, 27 Collier Bankr. Cas. 2d (MB) 358, Bankr. L. Rep. (CCH) P 74765 (9th Cir. 1992).

22 Matter of Statistical Tabulating Corp., Inc., 60 F.3d 1286, 1289, 27 Bankr. Ct. Dec. (CRR) 775, 33 Collier Bankr. Cas. 2d (MB) 1757, Bankr. L. Rep. (CCH) P 76590, 76 A.F.T.R.2d 95-5863 (7th Cir. 1995) ("[Appellee's] argument that the whole case, including pending appeals, falls when the underlying bankruptcy is dismissed has force where the matter on appeal is entirely dependent on the existence of the bankruptcy").

23 In re Income Property Builders, Inc., 699 F.2d 963, 964, 7 Collier Bankr. Cas. 2d (MB) 4 (9th Cir. 1982).

24 Income Property Builders, 699 F.2d at 965.

25 Statistical Tabulating Corp., 60 F.3d at 1290 (finding that because a live controversy still existed between two creditors when the bankruptcy court dismissed the underlying bankruptcy case, the bankruptcy court did not have the power to dismiss the portion of the case pending on appeal).

26 See e.g. In re Porges, 44 F.3d 159, 163, 32 Collier Bankr. Cas. 2d (MB) 1354, Bankr. L. Rep. (CCH) P 76342 (2d Cir. 1995) (holding that dismissal of an underlying bankruptcy case does not automatically terminate jurisdiction over an related adversary proceeding); Matter of Querner, 7 F.3d 1199, 1201–1202, 30 Collier Bankr. Cas. 2d (MB) 231, Bankr. L. Rep. (CCH) P 75619 (5th Cir. 1993) (bankruptcy courts must consider judicial economy, convenience, fairness, and comity in determining whether to retain jurisdiction over related proceedings following dismissal of the bankruptcy case); In re Morris, 950 F.2d 1531, 1535, 22 Bankr. Ct. Dec. (CRR) 804, 26 Collier Bankr. Cas. 2d (MB) 468, Bankr. L. Rep. (CCH) P 74434 (11th Cir. 1992) (explaining that the bankruptcy court has the power to alter the normal effects of the dismissal of a bankruptcy case and retain jurisdiction over adversary proceedings if cause is shown); In re Smith, 866 F.2d 576, 580, Bankr. L. Rep. (CCH) P 72640 (3d Cir. 1989) (finding no abuse of discretion as judicial economy and fairness to the debtor weighed heavily in favor of the bankruptcy court's retention of jurisdiction over the adversary proceeding).

27 In re Carraher, 971 F.2d 327, 328, 23 Bankr. Ct. Dec. (CRR) 384, 27 Collier Bankr. Cas. 2d (MB) 358, Bankr. L. Rep. (CCH) P 74765 (9th Cir. 1992).

28 Morris, 950 F.2d at 1535; see also In re Roddam, 193 B.R. 971, 981, Bankr. L. Rep. (CCH) P 76965 (Bankr. N.D. Ala. 1996). ("[B]ased on considerations of judicial economy, fairness and convenience to the litigants, and the degree of difficulty of the legal issues involved, a bankruptcy court may, by virtue of 11 U.S.C.A. § 349(a), alter the normal effects of the dismissal of a bankruptcy case by retaining jurisdiction over an adversary proceeding after the underlying bankruptcy case has been dismissed.").

29 In re Ray, 46 B.R. 424, 426 (S.D. Ga. 1984) ("the bankruptcy court's order … did not specify that the dismissal is with prejudice, and the appellant is thus free to discharge his debts in a later action under the Code").

30 11 U.S.C.A. § 349(a).

31 See e.g. In re Gonzalez-Ruiz, 341 B.R. 371, 386 (B.A.P. 1st Cir. 2006) (affirming the dismissal of a serial bankruptcy filer's fourth case with prejudice to refiling for 180 days).

32 In re Martin-Trigona, 35 B.R. 596, 601, 11 Bankr. Ct. Dec. (CRR) 357, 9 Collier Bankr. Cas. 2d (MB) 958, Bankr. L. Rep. (CCH) P 69536 (Bankr. S.D. N.Y. 1983); see also In re Faulkner, 187 B.R. 1019, 1023, 34 Collier Bankr. Cas. 2d (MB) 1159 (Bankr. S.D. Ga. 1995) ("Dismissal with prejudice is a severe sanction to which the courts should resort only infrequently").

33 In re Ventura, 375 B.R. 103, 110 (Bankr. E.D. N.Y. 2007); see also In re Grischkan, 320 B.R. 654, 661 (Bankr. N.D. Ohio 2005) (holding that the debtor's serial bankruptcy filings constituted "abuse of the bankruptcy process" and "egregious treatment of the lender" warranting the imposition of an 180-day bar to refiling); In re Leavitt, 171 F.3d 1219, 34 Bankr. Ct. Dec. (CRR) 111, 41 Collier Bankr. Cas. 2d (MB) 1035, Bankr. L. Rep. (CCH) P 77916 (9th Cir. 1999) (egregious dishonesty on the part of debtor throughout the bankruptcy proceedings justified dismissal with prejudice); In re McClure, 69 B.R. 282 (Bankr. N.D. Ind. 1987) (debtor's purposeful delay tactics throughout the bankruptcy proceedings, disregard of court orders and failure to propose a confirmable plan warranted dismissal with prejudice).

34 28 U.S.C.A. § 1334(b).

35 Pacor, Inc. v. Higgins, 743 F.2d 984, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984).

36 Pacor, 743 F.2d at 994 ("An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt

estate"); see also A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1002, 14 Bankr. Ct. Dec. (CRR) 752, 15 Collier Bankr. Cas. 2d (MB) 235, Bankr. L. Rep. (CCH) P 71094 (4th Cir. 1986); Matter of Munford, Inc., 97 F.3d 449, 29 Bankr. Ct. Dec. (CRR) 1087, 36 Collier Bankr. Cas. 2d (MB) 1604, 35 Fed. R. Serv. 3d 1538 (11th Cir. 1996).

37 11 U.S.C.A. § 524(e).

38 *See* Matter of Zale Corp., 62 F.3d 746, 761, Bankr. L. Rep. (CCH) P 76617 (5th Cir. 1995) ("Section 524 prohibits the discharge of debts of non-debtors"); In re American Hardwoods, Inc., 885 F.2d 621, 626, 19 Bankr. Ct. Dec. (CRR) 1354, Bankr. L. Rep. (CCH) P 73130 (9th Cir. 1989); In re Lowenschuss, 67 F.3d 1394, 1401, 34 Collier Bankr. Cas. 2d (MB) 544, Bankr. L. Rep. (CCH) P 76673, 33 Fed. R. Serv. 3d 249 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600, 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).

39 See 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) ("a per se rule disfavoring all releases in a reorganization plan would be … unwarranted"); see also In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 938, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994) (concluding that nothing in the Code explicitly prohibits third party injunctions).

40 See e.g. 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, 35 Bankr. Ct. Dec. (CRR) 176 (3d Cir. 2000); 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, 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); 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) ("a Plan may, notwithstanding section 524(e), provide for releases by the debtor against third parties under certain limited circumstances").

41 In re Chateaugay Corp., 167 B.R. 776, 780 (S.D. N.Y. 1994).

42 In re Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 938, 31 Collier Bankr. Cas. 2d (MB) 240 (Bankr. W.D. Mo. 1994).

43 Master Mortgage, 168 B.R. at 935–38; see also Dow Corning, 280 F.3d at 658 (considering the additional factor of whether all claims have been satisfied in full).

44 See, e.g., Master Mortgage, 168 B.R. at 938 (finding that without the nondebtor release, debtor would not have secured sufficient contributions enabling it to formulate a workable plan and allowed creditors to recover in full); 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) (holding that the negative impact of nondebtor suits on the potential success of the reorganization effort supported the exercise of the court's equitable powers to enjoin such suits); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 143, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (nondebtor releases may be approved when the release of the claims is "important" to the reorganization plan); Matter of Munford, Inc., 97 F.3d 449, 455, 29 Bankr. Ct. Dec. (CRR) 1087, 36 Collier Bankr. Cas. 2d (MB) 1604, 35 Fed. R. Serv. 3d 1538 (11th Cir. 1996) (explaining that nondebtor releases must be integral to the reorganization); Cont'l Airlines, 203 F.3d at 215 (reversing the approval of nondebtor releases as there was no evidence that the nondebtors provided critical financial contributions necessary to make the plan feasible in exchange for the releases); In re Zenith Electronics Corp., 241 B.R. 92, 111, 35 Bankr. Ct. Dec. (CRR) 329, 43 Collier Bankr. Cas. 2d (MB) 206, 53 Fed. R. Evid. Serv. 523 (Bankr. D. Del. 1999) (approving release agreements that were integral to the plan and necessary to the continued success of the reorganized debtor); In re American Family Enterprises, 256 B.R. 377, 407 (D.N.J. 2000) (finding that denial of the nondebtor releases would "frustrate and undermine the Debtors' reorganization efforts" and would leave "little likelihood of success"); In re Ingersoll, Inc., 562 F.3d 856, 865, 51 Bankr. Ct. Dec. (CRR) 133, 61 Collier Bankr. Cas. 2d (MB) 1202, Bankr. L. Rep. (CCH) P 81469 (7th Cir. 2009) (upholding nondebtor releases that were "narrowly tailored and critical to the plan as a whole.").

45 See In re Transit Group, Inc., 286 B.R. 811, 820, 40 Bankr. Ct. Dec. (CRR) 158, 49 Collier Bankr. Cas. 2d (MB) 971 (Bankr. M.D. Fla. 2002) ("Non-debtor releases are extraordinary and should be reserved for unusual circumstances"); Metromedia, 416 F.3d at 142 ("such a release is proper only in rare cases). The Bankruptcy Court for the District of Delaware recently denied confirmation in the *Washington Mutual* bankruptcy case, finding that the proposed releases, although authorized (citing *Master Mortgage*), were too broad and were not sustained by consideration on the part of the parties released. See In re Washington Mutual, Inc., Case No. 08-12229 [Dkt. No. 6528] (Order dated January 7, 2011).

46 In re Transit Group, Inc., 286 B.R. 811, 40 Bankr. Ct. Dec. (CRR) 158, 49 Collier Bankr. Cas. 2d (MB) 971 (Bankr. M.D. Fla. 2002) (noting that nondebtor releases are extraordinary form of relief and should therefore only be employed in unusual circumstances).

47 In re Continental Airlines, 203 F.3d 203, 35 Bankr. Ct. Dec. (CRR) 176 (3d Cir. 2000) (declining to grant non-debtor releases after finding an insufficient evidentiary and legal basis to grant such relief under the standards adopted by the courts).

48 Continental Airlines, 203 F.3d at 214.

49 Continental Airlines, 203 F.3d at 205.

50 Continental Airlines, 203 F.3d at 215. See also In re Washington Mutual, Inc., Case No. 08-12229 [Dkt. No. 6528] (Order dated January 7, 2011).

51 See e.g. In re TLG Liquidation LLC, No. 10-10206 (Bankr. D. Del. May 20, 2010) [Dkt. No. 314] (Order); In re Harvey Electronics, Inc., No. 07-14051 (Bankr. S.D.N.Y. Dec. 16, 2008) [Dkt. No. 177] (Order); In re New Weathervane Retail Corp., No. 04-11649 (Bankr. Del. Aug. 4, 2005) [Dkt. No. 566] (Order); In re Cape May Care Ctr., Inc., No. 00-41945 (Bankr. D.N.J. Dec. 23, 2004) [Dkt. No. 318] (Order); In re CFM U.S. Corp., No. 08-10668 (Bankr. D. Del. June 30, 2009) [Dkt. No. 1097] (Order).

52 In re TLG Liquidation Corp., No. 10-10206 (Bankr. D. Del. April 30, 2010) [Dkt. No. 275]. As noted, objections to the motion were resolved by certain stipulations.

53 In re Cont'l Airlines, Inc., 203 F.3d at 205.

54 As one commentator has noted "the authorities are not uniform in their understanding of the [*Master Mortgage*] test. Silverstein, Hiding in Plain View: A Neglected Supreme Court Decision Resolving the Debate over Non-Debtor Releases in Chapter 11 Reorganizations, 23 Emory Bankr. Dev. J. 13, 68 (2006). However, courts considering the issue of nondebtor releases have analyzed the necessity of proposed nondebtor releases to the reorganization. See, e.g., In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (concluding that a nondebtor release should not be approved absent the finding that truly unusual circumstances rendering the release important to the success of the plan); Cont'l Airlines, 203 F. 3d at 216 (a nondebtor release must be supported with facts showing it to be a "key element" of the reorganization); A.H. Robins Co., 880 F.2d at 694 (holding that releases are acceptable only "as an integral part of reorganization"); In re Transit Group, Inc., 286 B.R. 811, 40 Bankr. Ct. Dec. (CRR) 158, 49 Collier Bankr. Cas. 2d (MB) 971 (Bankr. M.D. Fla. 2002) (approving nondebtor release that is fair and necessary).

55 In re SL Liquidating, Inc., 428 B.R. 799, 803 (Bankr. S.D. Ohio 2010); see also In re Quigley Co., Inc., 437 B.R. 102, 106 (Bankr. S.D. N.Y. 2010) (citing Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations, 1997 U. Ill. L. Rev. 959, 992 (1997)) ("In a Chapter 7 liquidation proceeding, creditors retain their rights to pursue non-debtors for full payment, because there is no reorganization to protect by providing non-debtor releases").

56 See Silverstein, 23 Emory Bankr. Dev. J. 13, at *73 ("a non-debtor release that is part of a liquidation does not serve the "conventional purposes of the reorganization policy, such as preserving jobs and protecting broader community interests. Rather, it simply promotes the more narrow bankruptcy policy of maximizing the debtor's estate for distribution to creditors" and is arguably therefore wholly inappropriate in the context of a structured dismissal").

57 See text at n. 113 infra.

58 In re SPM Mfg. Corp., 984 F.2d 1305, 23 Bankr. Ct. Dec. (CRR) 1529, 28 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 75090 (1st Cir. 1993).

59 A modified absolute priority rule was codified in section 1129(b) of the Bankruptcy Code. Pursuant to this section, a plan is fair and equitable with respect to an impaired, dissenting class of unsecured claims if (1) it pays the class's claims in full, or if (2) it does not allow holders of any junior claims or interests to receive or retain any property under the plan "on account of" such claims or interests. 11 U.S.C.A. § 1129(b)(2)(B)(i) to (ii); see also Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 441–42, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) P 77924 (1999).

60 The absolute priority rule has evolved from a series of railway receivership cases in the early 19th century. The roots of the absolute priority rule are found in the pre-Code case of Northern Pac. R. Co. v. Boyd, 228 U.S. 482, 33 S. Ct. 554, 57 L. Ed. 931 (1913). In that case, the Court required that all creditors must be paid before equity holders could retain any interest in the estate. See Northern Pac. R. Co., 228 U.S. at 505 (quoting Louisville Trust Co. v. Louisville, N.A. & C. Ry. Co., 174 U.S. 674, 683, 684, 19 S. Ct. 827, 43 L. Ed. 1130 (1899)) ("[A]ny arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of … creditors comes within judicial denunciation."); see also LaSalle, 526 U.S. at 444 (the absolute priority rule ensures that a reorganization plan will not be "too good a deal" for the debtor's equity holders by unfairly serving their interests at the expense of other creditors of the estate); Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 271 U.S. 445, 46 S. Ct. 549, 70 L. Ed. 1028 (1926) (recognizing the validity of the "fixed principle" of absolute priority established in *Boyd* but introducing the "new value" exception as a means to encourage efficient reorganizations by allowing shareholder participation); Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 121, 60 S. Ct. 1, 84 L. Ed. 110 (1939) (upholding

the absolute priority standard but also concluding that where "necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made").

61 In re SPM Mfg. Corp., 984 F.2d 1305, 1312, 23 Bankr. Ct. Dec. (CRR) 1529, 28 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 75090 (1st Cir. 1993) (concluding that "no one else had any claim of right under the Bankruptcy Code" to the asset sale proceeds).

62 SPM Mfg. Corp., 984 F.2d at 1313 (citations omitted).

63 See e.g. In re MCorp Financial, Inc., 160 B.R. 941, 960 (S.D. Tex. 1993) (approving "gifting" of assets in a Chapter 11 reorganization plan from senior secured creditor class to junior class of creditors over the objection of an intervening objecting creditor class); In re Genesis Health Ventures, Inc., 266 B.R. 591, 38 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Del. 2001) (approving debtor's proposed reorganization plan that afforded a distribution to equity holders without first satisfying payments due to creditors); In re Union Financial Services Group, Inc., 303 B.R. 390, 423 (Bankr. E.D. Mo. 2003) (finding no unfair discrimination in a carve-out provision awarding proceeds of a senior secured creditor class to unsecured creditors); In re Parke Imperial Canton, Ltd., 177 B.R. 544, 32 Collier Bankr. Cas. 2d (MB) 1507 (Bankr. N.D. Ohio 1994) (same).

64 In re Journal Register Co., 407 B.R. 520 (Bankr. S.D. N.Y. 2009), appeal dismissed, 2010 WL 768942 (S.D. N.Y. 2010).

65 In re Journal Register Co., 407 B.R. 520 (Bankr. S.D. N.Y. 2009), appeal dismissed, 2010 WL 768942 (S.D. N.Y. 2010); see also *WorldCom*, (approving a gifting provision in a reorganization in part because the contributed funds were "not coming from or diminishing the estate" or the recovery of other creditors); In re RCN Corp., No. 04-13638 (Bankr. S.D.N.Y. Dec. 8, 2004) [Dckt. No. 483] (approving an "agreement of holders of [unsecured creditors] to voluntarily allocate a portion of the value that they would otherwise receive" to equity stock holders, despite subordinated claims receiving no distribution).

66 Journal Register Co., 407 B.R. at 533 (similarly rejecting the pension fund's unfair discrimination claim, explaining that because the pension fund and the trade creditors occupied the same class, the unfair discrimination provision of section 1129(b) was not implicated).

67 Journal Register Co., 407 B.R. at 533.

68 In re DBSD North America, Inc., 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011).

69 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, revd 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).

70 In re DBSD North America, Inc., 634 F.3d 79, 97, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011).

71 DBSD North America, Inc., 2010 WL 1223109 at *11.

72 DBSD North America, Inc., 2010 WL 1223109 at *11 (emphasis added).

73 DBSD North America, Inc., 2010 WL 1223109 at *14.

74 In re Armstrong World Industries, Inc., 432 F.3d 507, 45 Bankr. Ct. Dec. (CRR) 222, 55 Collier Bankr. Cas. 2d (MB) 789, Bankr. L. Rep. (CCH) P 80434 (3d Cir. 2005) (reversing the bankruptcy court's approval of a reorganization plan that allowed for the automatic transfer of warrants from an unsecured creditor class to equity interest holders in the event that its co-equal class rejected the plan); see also In re Sentry Operating Co. of Texas, Inc., 264 B.R. 850, 865, 38 Bankr. Ct. Dec. (CRR) 68 (Bankr. S.D. Tex. 2001) (opining that the notion that "a secured lender can, without any reference to fairness, decide which creditors get paid and how much those creditors get paid, is to reject the historical foundation of equity receiverships" and would be "simply to start down a slippery slope that does great violence to history and to positive law").

75 In re Armstrong World Industries, Inc., 432 F.3d 507, 514, 45 Bankr. Ct. Dec. (CRR) 222, 55 Collier Bankr. Cas. 2d (MB) 789, Bankr. L. Rep. (CCH) P 80434 (3d Cir. 2005); see also In re OCA, Inc., 357 B.R. 72, 87, 47 Bankr. Ct. Dec. (CRR) 193, 57 Collier Bankr. Cas. 2d (MB) 422 (Bankr. E.D. La. 2006) (rejecting the *SPM* line of cases, explaining that "that the reasoning and holding of the district court and the Third Circuit in *Armstrong World* is far more persuasive").

76 In re Armstrong World Industries, Inc., 432 F.3d 507, 514, 45 Bankr. Ct. Dec. (CRR) 222, 55 Collier Bankr. Cas. 2d (MB) 789, Bankr. L. Rep. (CCH) P 80434 (3d Cir. 2005).

77 Compare In re OCA, Inc., 357 B.R. 72, 47 Bankr. Ct. Dec. (CRR) 193, 57 Collier Bankr. Cas. 2d (MB) 422 (Bankr. E.D. La. 2006), with In re Parke Imperial Canton, Ltd., 1994 WL 842777 (Bankr. N.D. Ohio 1994).

78 See e.g. In re Harvey Electronics, Inc., No. 07-14051 (Bankr. S.D.N.Y. Dec. 16, 2008) [Dkt. No. 177] (Order); In re Blades Board & Skate LLC, No. 03-48818 (Bankr. D. N.J. June 29, 2004) [Dkt. No. 126] (Order).

79 In re Wickes Holdings LLC, No. 08-10212 (Bankr. D. Del. May 12, 2009) [Dkt. No. 1418] (Order).

80 In re Wickes Holdings LLC, No. 08-10212 (Bankr. D. Del. May 12, 2009) [Dkt. No. 1418] (Order).

81 See e.g. In re Scott Cable Communications, Inc., 227 B.R. 596, 603, 33 Bankr. Ct. Dec. (CRR) 702, 99-1 U.S. Tax Cas. (CCH) P 50288, 83 A.F.T.R.2d 99-1028 (Bankr. D. Conn. 1998) (rejecting a gift provision in a reorganization plan by deeming *SPM* "inapplicable because chapter 7 does not require a plan and, therefore, is not subject to the confirmation requirements of § 1129").

82 Fed. R. Bankr. P. 9019.

83 Cook v. Waldron, 2006 WL 1007489, *2 (S.D. Tex. 2006).

84 In re Mirant Corp., 348 B.R. 725, 738 (Bankr. N.D. Tex. 2006), aff'd, 2006 WL 3780884 (N.D. Tex. 2006); see also,Matter of Cajun Elec. Power Co-op., Inc., 119 F.3d 349, 355–56, 31 Bankr. Ct. Dec. (CRR) 333, Bankr. L. Rep. (CCH) P 77486 (5th Cir. 1997) (noting that the terms "fair and equitable" should be treated as terms of art meaning that "senior interests are entitled to full priority over junior ones"); In re GPR Holdings, L.L.C., 2003 Bankr. LEXIS 1402 (Bankr. N.D. Tex. Oct. 29, 2003) (same); Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 441, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968) (noting that the "fair and equitable" standard "incorporates the absolute priority doctrine").

85 In re High Tech Packaging, Inc., 397 B.R. 369, 373 (Bankr. N.D. Ohio 2008) ("the Trustee may not use its settlement agreement as a means to afford parties a greater distribution of estate assets than what they would have otherwise been entitled to receive under bankruptcy law").

86 In re Iridium Operating LLC, 478 F.3d 452, 47 Bankr. Ct. Dec. (CRR) 243, Bankr. L. Rep. (CCH) P 80874 (2d Cir. 2007).

87 Iridium Operating, 478 F.3d at 455.

88 Matter of AWECO, Inc., 725 F.2d 293, 298, 11 Bankr. Ct. Dec. (CRR) 953, Bankr. L. Rep. (CCH) P 69722 (5th Cir. 1984) (declining to approve a settlement agreement containing a gifting provision as the parties had not adequately demonstrated that sufficient estate assets existed to insure compliance with the rule of priorities).

89 AWECO, 725 F.2d at 298.

90 There is case law to the contrary as well. For example, in In re World Health Alternatives, Inc., 344 B.R. 291, 298, 46 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2006), the Bankruptcy Court for the District of Delaware approved a gift provision that distributed proceeds in violation of the Code's priority scheme. The court in that case reasoned that "[s]ection 1129(b)(2)(B) and the absolute priority rule …, are not implicated here because the settlement does not arise in the context of a plan of reorganization." The Bankruptcy Court for the District of Oregon has similarly declined to adopt the Second Circuit's rule that deems compliance with the absolute priority rule a paramount concern in the approval of a gifting clause pursuant to a settlement agreement. See In re Cascade Grain Products, LLC, 2009 WL 2843365 (Bankr. D. Or. 2009).

91 See, e.g., Journal Register, 407 B.R. at 527 (approving a gifting provision that was "essential to the Debtors' daily operations and long-term survival"); In re Snyders Drug Stores, Inc., 307 B.R. 889, 894–95, 42 Bankr. Ct. Dec. (CRR) 209 (Bankr. N.D. Ohio 2004) (rejecting confirmation of a proposed reorganization plan due in part to insufficient evidence that, in the absence of the gift, the benefited creditors would have ceased doing business with the reorganized debtor and jeopardized the success of the reorganization effort); In re Genesis Health Ventures, Inc., 266 B.R. 591, 618, 38 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Del. 2001) (approving the gifting of proceeds to top executives because it provided "further incentive to them to remain and effectuate the debtors' reorganization"); In re Union Financial Services Group, Inc., 303 B.R. 390, 423 (Bankr. E.D. Mo. 2003) (upholding a distribution to unsecured creditors "where continued relations with those unsecured creditors [was] important to the future business of the reorganized Debtors"). But see In re DBSD North America, Inc., 634 F.3d 79, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011).

92 See In re Wickes Holdings LLC, No. 08-10212 (Bankr. D. Del. May 12, 2009) [Dkt. No. 1418] (Order).

93 See In re New Weathervane Retail Corp., No. 04-11649 (Bankr. D. Del. Sept. 2, 2005) [Dkt. No. 566] (Order).

94 See In re CSI Inc., No. 01-12923 (Bankr. S.D.N.Y. July 24, 2006) [Dkt. No. 284] (Order).

95 See Fed. R. Bankr. P. 3001; see also Del. L. R. Bnkr. P. 3007-1(d) (contrasting "substantive" and "non-substantive" omnibus claim objections and establishing procedure and requirements for each).

96 Pacor, Inc. v. Higgins, 743 F.2d 984, 994, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984) (holding that a proceeding is "related to" a case under title 11 and therefore within the jurisdiction of bankruptcy court only "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action … and … in any way impacts upon the handling and administration of the bankrupt estate"); see also In re W.R. Grace & Co., 591 F.3d 164, 52 Bankr. Ct. Dec. (CRR) 155, Bankr. L. Rep. (CCH) P 81656 (3d Cir. 2009), cert. denied, 131 S. Ct. 200, 178 L. Ed. 2d 44 (2010), (finding that bankruptcy courts may have subject matter jurisdiction over actions between nondebtors only if the court determines that the action could conceivably have an effect on the estate being administered in bankruptcy); see also In re Resorts Intern., Inc., 372 F.3d 154, 164, 43 Bankr. Ct. Dec. (CRR) 46 (3d Cir. 2004) ("bankruptcy court jurisdiction must be confined within appropriate limits and does not extend indefinitely, particularly

after the confirmation of a plan and the closing of a case") (citations omitted). Although the claims resolution process is typically at the heart (or core) of the bankruptcy process, this analysis is somewhat undercut in this context as the assets to be distributed are not estate property (under the rubric of *SPM*) but rather the largesse of the secured creditor. See In re SPM Mfg. Corp., 984 F.2d 1305, 23 Bankr. Ct. Dec. (CRR) 1529, 28 Collier Bankr. Cas. 2d (MB) 451, Bankr. L. Rep. (CCH) P 75090 (1st Cir. 1993). Dismissal is conditioned upon the resolution of the claims process. Essentially, the secured creditor is offering value to junior classes to obtain consent (or at least not objection) to a process, and the secured creditor uses its money to create a fund which will be managed by its functional agent in the case: the soon-to-be-dismissed debtor.

97 See, e.g., In re TLG Liquidation LLC., No. 10-10206 (Bankr. D. Del. May 20, 2010) [Dkt. No. 314] (Order); In re CFM U.S. Corp., No. 08-10668 (Bankr. D. Del. June 30, 2009) [Dkt. No. 1097] (Order); In re Wickes Holdings LLC, No. 08-10212 (Bankr. D. Del. May 12, 2009) [Dkt. No. 1418] (Order); In re KB Toys, Inc., No. 08-13269 (Bankr. D. Del. Feb. 12, 2010) [Dkt. No. 872] (Motion to Approve).

98 11 U.S.C.A. § 105(a).

99 Leal, The Power of the Bankruptcy Court: Section 105, 29 S. Tex. L. Rev. 487, 489 (1988).

100 See e.g. In re Nosek, 544 F.3d 34, 44, 60 Collier Bankr. Cas. 2d (MB) 1578, Bankr. L. Rep. (CCH) P 81333 (1st Cir. 2008) ("Despite its broad language, we have recognized important limitations on a court's § 105(a) authority"); In re Ludlow Hosp. Soc., Inc., 124 F.3d 22, 27, 31 Bankr. Ct. Dec. (CRR) 345 (1st Cir. 1997) (citations omitted) ("the equitable discretion conferred upon the bankruptcy court by section 105(a) is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code").

101 11 U.S.C.A. § 105(a).

102 Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 423, 37 Bankr. Ct. Dec. (CRR) 2, 45 Collier Bankr. Cas. 2d (MB) 257, Bankr. L. Rep. (CCH) P 78314, 2000 FED App. 0399P (6th Cir. 2000).

103 In re Owens Corning, 419 F.3d 195, 209, 45 Bankr. Ct. Dec. (CRR) 36, Bankr. L. Rep. (CCH) P 80343 (3d Cir. 2005), as amended, (Oct. 12, 2005) (citations omitted).

104 See e.g. 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) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); see also In re Plaza de Diego Shopping Center, Inc., 911 F.2d 820, 830–31, 20 Bankr. Ct. Dec. (CRR) 1632, Bankr. L. Rep. (CCH) P 73573 (1st Cir. 1990) ("the bankruptcy court's equitable discretion is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code").

105 U.S. v. Sutton, 786 F.2d 1305, 1308, 14 Bankr. Ct. Dec. (CRR) 700, 14 Collier Bankr. Cas. 2d (MB) 681, Bankr. L. Rep. (CCH) P 71109 (5th Cir. 1986); see also Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141, 12 Collier Bankr. Cas. 2d (MB) 762, 23 Env't. Rep. Cas. (BNA) 1223, Bankr. L. Rep. (CCH) P 70352 (3d Cir. 1985) (explaining that section 105(a) "does not authorize the bankruptcy court to create rights not otherwise available under applicable law").

106 U.S. v. Moore, 786 F.2d 1308, 20 Fed. R. Evid. Serv. 671 (5th Cir. 1986). See also In re Combustion Engineering, Inc., 391 F.3d 190, 236, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005) (holding that § 105(a) may not be used to achieve a result inconsistent with the express provisions of § 524(g), as equitable authority is "cabined by the Code"); 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) (concluding that a bankruptcy court cannot use its equitable powers under § 105(a) to confirm a reorganization plan in contravention of the priority rule of § 11129(b)).

107 In *In re BT Holdings III LLC*, the Bankruptcy Court for the District of Delaware ultimately denied debtors' structured dismissal motion. In the hearing on the motion, the court observed that "[d]ismissal is one thing. Dismissal with bells and whistles is another." In re BT Holdings III LLC, No. 09-11173 (Bankr. D. Del. Oct. 5, 2009) [Dkt. No. 354] (transcript at 16).

108 In re Pacific Lumber Co., 584 F.3d 229, 240, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009).

109 For example, in *In re Pacific Lumber*, appellants sought review of a confirmed reorganization plan, arguing (1) that they did not receive the allowed amount of their secured claim, (2) deprivation of a postpetition administrative priority claim, and (3) that nondebtor releases were improper. Pacific Lumber, 584 F.3d at 238. Appellees contended that the appeal was equitably moot due to the parties' reliance on the valuation of the collateral, the distributions made pursuant to creditor classes established in the plan, and the significant financial contributions made by plan proponents in exchange for the releases granted within the plan. Pacific Lumber, 584 F.3d at 240. While acknowledging the significant reliance upon the confirmation order, the Fifth Circuit nevertheless decided the case on the merits, cautioning that the parties' expectations "should not be a shield for sharp or unauthorized practices." Pacific Lumber, 584 F.3d at 244; see also In re Blast Energy Services, Inc., 593 F.3d 418, 428, 52 Bankr. Ct. Dec. (CRR) 156, Bankr. L. Rep. (CCH) P 81672 (5th Cir. 2010) (finding that the district court abused its discretion in dismissing appeals as equitably moot without adequate

explanation and evidence in support of its conclusion); In re Paige, 584 F.3d 1327, 1348, 52 Bankr. Ct. Dec. (CRR) 91 (10th Cir. 2009) (holding that the party seeking to block appellate review bears the burden of showing that the appellate court should not reach the merits of the case); In re C.W. Min. Co., 431 B.R. 307 (B.A.P. 10th Cir. 2009), revd, 636 F.3d 1257, Bankr. L. Rep. (CCH) P 81936 (10th Cir. 2011), petition for cert. filed, 79 U.S.L.W. 3674 (U.S. May 16, 2011) (stressing that the "application of the doctrine is both limited in scope and discretionary in nature").

110 Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050, 16 Collier Bankr. Cas. 2d (MB) 1305, Bankr. L. Rep. (CCH) P 71802 (5th Cir. 1987) (final and unappealed confirmation order including nondebtor release enforced by virtue of res judicata); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983–84, 27 Bankr. Ct. Dec. (CRR) 1039, 34 Collier Bankr. Cas. 2d (MB) 313, Bankr. L. Rep. (CCH) P 76634 (1st Cir. 1995) ("the issue of the bankruptcy court's power to enter its so-called 'incidental' injunction was precluded, having been conclusively resolved in the confirmation order … The proper recourse for addressing these questions was by direct appeal from the order of confirmation"); Trulis v. Barton, 107 F.3d 685, 691, 36 Fed. R. Serv. 3d 1422 (9th Cir. 1995) (confirmation order containing non-debtor release binding on creditors who had not challenged it on direct appeal); Royal Ins. Co. of America v. Quinn-L Capital Corp., 960 F.2d 1286, 1293 (5th Cir. 1992) ("If the parties against whom judgment was rendered did not appeal, the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack").

111 Shoaf, 815 F.2d at 1052.

112 Shoaf, 815 F.2d at 1052.

113 United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 63 Collier Bankr. Cas. 2d (MB) 428, Bankr. L. Rep. (CCH) P 81716, 76 Fed. R. Serv. 3d 364 (2010).

114 11 U.S.C.A. § 523(a)(8).

115 Fed. R. Bankr. P. 7001(6).

116 Espinosa, 130 S.Ct. at 1374; Fed. R. Civ. P. 60(b).

117 Espinosa, 130 S. Ct. at 1377–78.

118 Espinosa, 130 S. Ct. at 1380.

119 Espinosa, 130 S. Ct. at 1380.

120 See Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 51 Bankr. Ct. Dec. (CRR) 210, 61 Collier Bankr. Cas. 2d (MB) 1441, Bankr. L. Rep. (CCH) P 81505 (2009) (disallowing untimely collateral attacks on final orders despite legal error); see also Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 22 Bankr. Ct. Dec. (CRR) 1396, 26 Collier Bankr. Cas. 2d (MB) 487, Bankr. L. Rep. (CCH) P 74513A (1992) (same). *Espinosa* may be read to leave only arguments relating to the lack of an arguable basis for subject matter jurisdiction to collaterally attack the judgment. Espinosa, 130 S.Ct. at 1377–78. This potential opening is a rather risky option for parties in this context.

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