Collier Business Workout Guide

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CHAPTER 6 Prepackaged Bankruptcies

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P 6.05 Formulating the Prepackaged Plan.

The principal goal of a prepackaged chapter 11 is assumed to be the restructuring of public debt that could not be restructured, or restructured as efficiently, in an out-of-court workout. Generally, this goal can be best served if additional matters that could prolong and possibly disrupt the chapter 11 case are addressed only when the benefits of doing so outweigh likely detrimental effects on the process. The prepackaged plan should be formulated with these considerations in mind.

[1] Who Needs to File?

An initial determination may be required in order to select the member or members of a multi-entity corporate group that should be included in the prepackaged bankruptcy. Generally, there are three reasons for a member of the group to join the chapter 11 case: (i) it is an obligor with respect to an obligation being restructured under the prepackaged plan;n1 (ii) it may require the protection of the bankruptcy court in connection with cross-defaults under significant contractual obligations triggered by the participation of related entities in the prepackaged bankruptcy; and (iii) it may seek to facilitate the financing of its own operations or the operations of related entities during the chapter 11 case.

[a] All Obligors.

Generally, in addition to direct obligors, all guarantors of obligations to be restructured must be included in the prepackaged bankruptcy. This is necessary both to effect the restructuring of their guarantee obligations and to preclude actions on the guarantee during the prepackaged bankruptcy by creditors dissenting from the prepackaged plan. A guarantor that has no direct obligations to be restructured may not need to join the prepackaged bankruptcy if the holders of the guaranteed obligations unanimously consent to the prepackaged plan. This consent must be reliably assured prior to the actual solicitation of votes, so that the prepackaged plan can be structured to exclude the guarantor. If the corporate entity is a guarantor of widely held public debt, unanimity is generally assumed to be impossible and the corporation will be required to join the prepackaged chapter 11.n2

[b] Protection.

The bankruptcy filing of one entity can trigger cross-defaults under loan agreements, leases and other contractual obligations of related entities. In such cases, an entity that otherwise has no obligations to be restructured may need to join the prepackaged bankruptcy to protect itself from the exercise of remedies under defaulted loan agreements and to

preserve essential leases and contracts. Accordingly, existing contractual obligations of related entities proposed to be left out of a prepackaged bankruptcy should be carefully reviewed.

[c] Postpetition Financing.

An entity that would otherwise be left out of the prepackaged bankruptcy may depend for financing on related entities that will join the prepackaged bankruptcy or may participate in a consolidated cash management system with such entities. The continued flow of cash from the debtor entities to the nondebtor entity would require the approval of the bankruptcy court. Whether and on what terms such approval would be granted cannot be assured in advance.n3

When an entity has its own sources of financing, the continued availability of these sources needs to be assured. Contractual lines of credit must be reviewed for vulnerability to cross-defaults triggered by the anticipated bankruptcy filing of related entities. In addition, adverse publicity surrounding the bankruptcy filing of related entities could have a detrimental effect on operations and threaten continued availability of trade credit and other uncommitted financing. If, in light of these considerations, continued adequate financing cannot be assured, the entity may have to join the prepackaged bankruptcy in order to avail itself of DIP financing.

If DIP financing is to be obtained, prospective postpetition lenders may require filing by all entities with substantial assets, whether or not they would otherwise join the prepackaged bankruptcy, in order to facilitate the grant of superpriority liens on such assets.n4

[2] The Prepackaged Plan: Basic Principles.

The Bankruptcy Code imposes a number of requirements on a plan of reorganization, including a prepackaged plan.n5 Some of these requirements are technical.n6 Other more fundamental requirements are in line with the "common sense" of a restructuring plan and should follow almost automatically from negotiations. However, they must be borne in mind since a prepackaged plan is subject to attack if deficient in any of these regards.n7

[a] Classification of Claims and Interests.

A plan of reorganization is required to divide all claims and equity interests into classes, identify those classes that will be left unimpaired and those that will be restructured and specify the treatment that will be accorded each impaired class.n8 There are three fundamental requirements with respect to classifications designed to preserve equality of treatment of similarly situated impaired parties: (i) each class must consist only of claims or interests that are substantially similar to the other claims or interests in that class;n9 (ii) each claim or interest within a class must be treated alike, unless the holder of that particular claim or interest consents to a less favorable treatment of such particular claim or interest;n10 and (iii) claims or interests that are substantially similar should not be placed in separate classes with the result that they receive unequal treatment.n11

There are no precise rules for determining proper classification. Generally, in the case of debt and equity securities, classification may follow lines of contractual priority and, in the case of secured debt, differentiation may be made on the basis of the assets securing the claims.

[b] Minimum Treatment.

Perhaps the most important feature of a prepackaged plan is the ability to bind dissenting holders by a class vote. However, to be bound, a dissenting holder in an accepting class must receive or retain under the prepackaged plan at least the value that would be received by that holder in a liquidation under chapter 7 of the Bankruptcy Code.n12

A disclosure statement used to solicit votes on a prepackaged plan should include a liquidation analysis comparing recoveries under the plan with those in liquidation to demonstrate that the "best interests" test is satisfied. Disclosure

materials used in traditional exchange offers have historically avoided taking a position on valuation.n13

[c] Feasibility.

The prepackaged plan must be a reasonably "permanent" solution that is not likely to be followed by the need for further financial restructuring.n14 In determining feasibility, the bankruptcy court will consider the capital structure, projected earnings, capabilities of management, the probability of their continued tenure and other relevant matters. This will include some evaluation of contingent, disputed and unliquidated liabilities.

[3] Treatment of Claims or Interests: Impaired or Unimpaired.

Any class that is impaired is entitled to vote on the prepackaged plan. The plan cannot be confirmed if an impaired class has voted against it, except through a "cramdown" of the dissenting class.n15 Accordingly, impaired treatment of a class will have a significant effect upon the acceptance and confirmation of the prepackaged plan. Generally, the multiplication of impaired classes will increase the burdens of solicitation, reduce the chances of receiving the necessary votes and provide more opportunity for dispute in the chapter 11 case.

The Bankruptcy Code explains the concept of impairment by defining when a claim or interest is not impaired.n16 The two treatments that are deemed to leave a claim or interest unimpaired are: (i) leaving unaltered the legal, equitable, or contractual rights to which its holder is entitled; and (ii) with respect to a claim or interest that has come due prepetition upon the occurrence of some event of default, curing such default (other than any default under an *ipso facto,* or bankruptcy, clause or any default not required to be cured pursuant to *11 U.S.C. § 365(b)(2)*),n17 reinstating the original maturity of such claim or interest, compensating the holder of such claim or interest for certain damages arising from reliance upon the contractual provisions of such claim or interest or for any actual pecuniary losses incurred due to the failure to perform certain nonmonetary obligations and otherwise leaving unaltered the legal, equitable and contractual rights to which its holder is entitled.n18

[4] Ordinary Course Contingent or Disputed Claims.

Most restructuring companies will face a number of contingent or disputed claims arising in the ordinary course of their operations. These claims are difficult to treat as impaired for two reasons. First, they will generally fall into the class of the company's general unsecured obligations, which often are left unimpaired in a prepackaged plan. This is the broadest class of claims, which will include, among others, claims of trade suppliers, customers and employees. All claims within a class must receive similar treatment. For example, customer warranty claims may not be discounted while supplier claims receive full payment. Second, even if a certain class of contingent or disputed claims could be distinguished from other general obligations so as to justify dissimilar treatment, solicitation may be impracticable or impossible in the context of a pre-packaged plan.

Accordingly, it will generally be necessary to treat these claims as unimpaired. This may be accomplished by leaving these liabilities undischarged under the prepackaged plan, to be paid as they become fixed by the passage of time or resolved through litigation. The economic effect of these liabilities is left uncertain under this treatment, which raises a feasibility issue that may have to be addressed in order for the prepackaged plan to be confirmed.n19 Alternatively, the bankruptcy court has the power under *section 502(c) of the Bankruptcy Code* to fix the amount of contingent or unliquidated claims.n20 This option allows such liabilities to be resolved and discharged expeditiously when the amount as liquidated can be paid in full upon consummation of the prepackaged plan. However, the litigation involved in the estimation procedure may prolong and disrupt the prepackaged bankruptcy.

Impaired parties may be unwilling to commit to a prepackaged plan that provides for unimpaired treatment of significant contingent or disputed liabilities, the value of which cannot be known at the time of voting. In order to win acceptance, it may be necessary to provide in the disclosure statement that the company will seek estimation of all

significant contingent or disputed liabilities and to set a cap for the amount of such liabilities that would be a condition to plan confirmation and, if exceeded, would require a resolicitation of acceptances.

[5] Burdensome Contracts and Leases.

The power under *section 365(a) of the Bankruptcy Code* to reject executory contracts and unexpired leases should be used cautiously in a prepackaged bankruptcy. Rejection may not necessarily be economically advantageous. A prepetition claim for damages is created,n21 and this claim must be paid in its full liquidated amount either at consummation or when finally resolved in order for it to be considered unimpaired.n22 Absent an individually negotiated settlement, it will generally not be possible to impair rejection claims.n23 However, certain above-market employment contracts and real property leases might be advantageously terminated without being treated as impaired. The allowable amount of a claim arising upon the rejection of an employment contract or real property lease is limited by the Bankruptcy Code: in the case of employment contracts, one year's compensation;n24 and in the case of non-residential real property leases, the greater of (i) one year's rent or, (ii) 15 percent of the rent reserved for the remaining term (not to exceed three years' rent).n25

[6] Securities Litigation Claims.

Many highly leveraged companies facing a need to restructure must address a common type of contingent liability: securities litigation claims arising from the original leveraging transactions. Such claims generally are amenable to treatment as class actions, which allows them to be treated *en bloc* in prepetition litigation and settlements. However, time and other circumstances may not permit a prepetition settlement with a certified plaintiff class, and these claims must be dealt with in the prepackaged plan.

Offering claimants some consideration in settlement under the prepackaged plan requires treating the class as impaired. The class must be solicited and will have the opportunity to reject the plan.n26 In addition, claimants that no longer hold securities of the company may be difficult to identify for adequate prepetition solicitation. Subject to economic constraints and objections by impaired classes, securities litigation claims may be estimated and discharged or left for resolution in subsequent litigation.n27

[7] Bank Debt.

Generally, restructurings of bank debt continue to be fully negotiated and based on unanimous consent. Banks may become more willing to restructure on the basis of a class vote in a prepackaged bankruptcy as holdouts become more of a problem in large bank groups, especially those with non-bank participants.

If restructured bank financing includes post-confirmation lending commitments, dissenting lenders cannot be forced to participate.n28 However, outstanding prepetition debt could be treated separately from commitments to make new advances post-confirmation. In such cases, repayment obligations with respect to the prepetition debt, which would ordinarily require unanimous consent to alter, could be restructured by a class vote under a prepackaged plan.

A restructuring of bank debt that is fully negotiated outside the prepackaged plan can be implemented in one of two ways: either a new bank agreement can be executed prepetition to become effective on consummation of the prepackaged plan and the banks can be treated as unimpaired; or the banks can be treated as impaired and "vote" on the prepackaged plan, including the restructured bank agreement, which has already been agreed to and becomes effective on consummation.

Banks are likely to be reluctant to commit to restructured credit terms with an entity whose financial condition on effectiveness cannot be predicted due to the unknown effect of the intervening prepackaged bankruptcy. Banks may insist on conditioning effectiveness upon the company's meeting certain financial tests at consummation. These tests

would be in addition to the feasibility test under the Bankruptcy Code, and they pose an additional risk to the company at the very end of the process. However, a bank group, unlike the holders of public securities, would be in a position to waive such conditions in a timely fashion when deemed appropriate.

[8] Third Party Releases.

The bankruptcy discharge, once granted, forever enjoins a creditor from seeking from the debtor any recovery in respect of its claims, except as provided for in the plan.n29 The discharge does not, however, have the same effect on possible third party sources of recovery.n30 Accordingly, creditors may seek to collect deficiency or other additional claims from officers and directors of the debtor, or from other third parties. These tactics frequently are grounded in theories of breach of fiduciary duty (as with many securities litigation claims) or statutory interpretation (as with claims for payment of wages under some state laws). As a result, reorganization plans often contain release and exculpation provisionsn31 that purport to inure to the benefit of these third parties. However, the validity of such provisions is a matter of significant dispute, and the likelihood of procuring court approval of such provisions appears to vary considerably from jurisdiction to jurisdiction.

Section 524(e) of the Bankruptcy Code provides that the discharge of a debt of the debtor will not affect the liability of any third party in respect of that debt, but it does not expressly prohibit the release of third-party liabilities as a part of a plan of reorganization.n32 Several circuit courts have adopted the view that Section 524(e) does not create a per se rule barring the inclusion of third-party releases.n33 However, in order to be approved, plan proponents must make substantial factual showings in support of such releases.n34 Courts in other jurisdictions have taken an even less accommodating view, holding that a bankruptcy court simply lacks the power to issue permanent releases and injunctions for the benefit of non-debtor third parties.n35

Release provisions may be structured to operate solely as a contractual matter between the third-party releasees and the voting parties who affirmatively elect to approve the releases. There can be no assurance, however, that such provisions will not be successfully challenged.n36

FOOTNOTES:

(n1)Footnote 1. Similarly, an entity might be party to certain types of burdensome contracts or leases that can be advantageously terminated in a chapter 11 case, *see P 6.05[5] infra*, or have a variety of disputed, contingent, or unliquidated liabilities that can be expeditiously resolved in a chapter 11 case, *see P 6.05[4] infra*. However, these matters generally require litigation in the chapter 11 case and this introduces additional delays, costs and uncertainty.

(n2)Footnote 2. The bankruptcy court may have the power under *section 105 of the Bankruptcy Code* to enjoin actions on the guarantee of a nondebtor guarantor. Such an injunction can best be justified when the action against the nondebtor would adversely affect the debtor, as when the debtor is financially dependent upon the nondebtor. *See Lahman Mfg. Co. v. First Nat'l Bank of Aberdeen (In re Lahman Mfg. Co.), 9 C.B.C.2d 621, 33 B.R. 681 (Bankr. D.S.D. 1983)* (bank preliminarily enjoined from action on personal guarantees of nondebtor officers and shareholders of corporate debtor that would eliminate funding for reorganization); *Mahaffey v. E-C-P of Arizona, Inc., 40 B.R. 469, 473 (Bankr. D. Colo. 1984)* (injunction denied where guarantor was not a stockholder and there was no evidence of his intention to contribute funds to a plan). *But see TRS, Inc. v. Peterson Grain & Brokerage Co. (In re TRS, Inc.), 76 B.R. 805, 808-09 (Bankr. D. Kan. 1987)* ("irreparable injury" requirement for protecting non-debtor guarantor should be based on all the facts, not just on whether guarantor is contributing assets to the reorganization).

(n3)Footnote 3. *See P 9.08[7] infra.*

(n4)Footnote 4. *See P 6.06[2] infra.*

(n5)Footnote 5. *See P 1.09[1][b] supra* for a description of the elements of a plan.

(n6)Footnote 6. For example, the company's charter must be amended pursuant to the plan to prohibit the issuance of non-voting equity securities. *11 U.S.C. § 1123(a)(6)*.

(n7)Footnote 7. To be confirmed, a plan must comply with all applicable provisions of the Bankruptcy Code. *11 U.S.C. § 1129(a)(1)*.

(n8)Footnote 8. *11 U.S.C. § 1123(a)*.

(n9)Footnote 9. *11 U.S.C. § 1122(a)*.

(n10)Footnote 10. *11 U.S.C. § 1123(a)(4)*.

(n11)Footnote 11. This is the requirement that the plan not "discriminate unfairly" with respect to any impaired class that has not accepted the plan. *See 11 U.S.C. § 1129(b)(1)*. In other words, a class may consent to a treatment less favorable than that afforded to a substantially similar class. The issue of unfair discrimination arises only when confirmation is sought in a "cramdown" of a dissenting class. *See P 1.09[3][c] supra* and *P 6.08[3] infra* .

(n12)Footnote 12. This is the requirement that the plan be in "the best interests" of creditors. *11 U.S.C. § 1129(a)(7)*.

(n13)Footnote 13. For the SEC's views on valuations in disclosure materials subject to the 1933 Act and 1934 Act, *see* Regulation S-K, Item 10, *17 C.F.R. § 229.10*; Rule 175, *17 C.F.R. § 230.175*.

(n14)Footnote 14. *11 U.S.C. § 1129(a)(11)*.

(n15)Footnote 15. *See P 1.09[3][c] supra* and *P 6.08[3] infra* for a discussion of the requirements of a cramdown of a dissenting class.

(n16)Footnote 16. *11 U.S.C. § 1124*, as amended by Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005, *reprinted in* Vol. E-2 Collier on Bankruptcy, App. Pt. 10(a) (Matthew Bender 15th Ed. Revised).

(n17)Footnote 17. *11 U.S.C. § 365(b)(2)*, as amended by Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005, *reprinted in* Vol. E-2 Collier on Bankruptcy, App. Pt. 10(a) (Matthew Bender 15th Ed. Revised).

(n18)Footnote 18. *11 U.S.C § 1124*, as amended by Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005, *reprinted in* Vol. E-2 Collier on Bankruptcy, App. Pt. 10(a) (Matthew Bender 15th Ed. Revised).

(n19)Footnote 19. *See In re Wheeling-Pittsburgh Steel Corp., 123 B.R. 18, 21 (Bankr. W.D. Pa. 1990)* (finding that while an outcome in which the maximum recovery was granted to the holder of a contingent claim "might force a revision in the reorganized Debtor's operations ... [it] would not require further reorganization or impair consummation of the confirmed Plan."); *In re Pizza of Haw., Inc. 761 F.2d 1374, 12 C.B.C.2d 1277 (9th Cir. 1985)* (possibility of large judgment in pending civil action against debtor calls feasibility into question).

(n20)Footnote 20. *11 U.S.C. § 502(c)*. The bankruptcy court may not have the power to liquidate personal injury and wrongful death claims for the purpose of determining distributions in respect of such claims under a plan. *See 28 U.S.C. § 157(b)(5)*.

(n21)Footnote 21. *11 U.S.C. § 365(g)*. Pursuant to section 365(g), with certain exceptions, rejection of an executory contract or an unexpired lease constitutes a breach of such contract or lease.

(n22)Footnote 22. *See P 6.05[4] supra.*

(n23)Footnote 23. *See id.*

(n24)Footnote 24. *11 U.S.C. § 502(b)(7)*. The limitation does not apply to claims under employment contracts in respect of retiree benefits. *11 U.S.C. § 1114(j)*.

(n25)Footnote 25. *See 11 U.S.C. § 502(b)(6).*

The two calculations of the cap for lease rejection damages (the "one year" calculation versus the "15%" calculation) are best explained by way of example. Assume the debtor rejects 2 non-residential property leases. Both leases call for fixed annual rent payments of $100 and are otherwise identical, except that Lease A expires in 5 years, while Lease B expires in 20 years. Under the "one year" calculation, rejection damages for Lease A would equal $100 (one year of rent), while under the "15%" calculation, the Lease A damages would equal $75 (0.15 * $100 * 5 years = $75). Clearly, the lessor under Lease A benefits more from the "one year" calculation.

For Lease B, the opposite is true. Under the "one year" calculation, rejection damages are capped at $100 (the same as for Lease A), while under the "15%" calculation, the lessor's claim is for $300 (0.15 * $100 * 20 years = $300). Note, however, that if the remaining term under Lease B was 21 years (or more), the lessor would not be entitled to any additional benefit, since in no event can the capped portion of its claim exceed the value of 3 years' rent (in this case, 3 * $100 = $300).

(n26)Footnote 26. The Bankruptcy Code provides some leverage over claims of this sort, which are statutorily subordinated to claims in respect of the underlying security, unless such security is common stock, in which case the litigation claims have an equal priority. *11 U.S.C. § 510(b)*.

(n27)Footnote 27. *See P 6.05[4] supra.* Even when a prepetition settlement can be concluded, it may not be a final solution to the extent that class members "opt out." Opt outs do not participate in, and are not bound by, the settlement. However, their claims, because fewer in number, are likely to be more readily dealt with than the claims of the entire class through estimation in the chapter 11 case or resolution in post-confirmation litigation.

(n28)Footnote 28. To the extent commitments to make future advances are contained in prepetition lending documents, such commitments constitute an executory contract to make a loan that cannot be assumed by the debtor. *11 U.S.C. § 365(c)(2)*. A new contractual undertaking of a lending group to make post-confirmation advances as part of a negotiated restructuring plan cannot be imposed on a dissenting member as a matter of contract law.

(n29)Footnote 29. *See 11 U.S.C. §§ 524(a)*, *1141*, as amended by Pub. L. No. 109-8 (2005), effective in cases commenced on or after October 17, 2005, *reprinted in* Vol. E-2 Collier on Bankruptcy, App. Pt. 10(a) (Matthew Bender 15th Ed. Revised).

(n30)Footnote 30. *See 11 U.S.C. § 524(e).*

(n31)Footnote 31. Plans frequently contain separate sections providing for court-ordered third-party releases (purporting to release claims against third parties) and court-ordered exculpation of third parties (finding and determining that certain third parties have no liability for certain acts). As a practical matter, the legal effect of these provisions often is indistinguishable. In jurisdictions that generally permit such third party protections, the exculpation provisions are supposed to be a simple statement of the law that does not confer additional protections on the exculpated party. *See, e.g., In re PWS Holding Corp., 228 F.3d 224, 246 2000 U.S. App. LEXIS 23393, 44* C.B.C.2d1647 (3d Cir. 2000). However, even the form of exculpation that was approved in the *PWS Holding* case (the so-called "Bruno's release") protected whole categories of agents, advisors, professionals and employees that might not otherwise have been entitled to such protections. *Id.*

(n32)Footnote 32. *11 U.S.C. § 524(e).*

(n33)Footnote 33. *See In re PWS Holding Corp., 228 F.3d 224, 2000 U.S. App. LEXIS 23393, 44 C.B.C.2d 1647 (3d Cir. 2000)* ; *Gillman v. Continental Airlines (In re Continental Airlines, Inc.), 203 F.3d 203, 211-14, 2000 U.S. App. LEXIS 1263 (3d Cir. 2000)* (surveying case law regarding third-party releases in other circuits, but declining to establish a "blanket rule"); *Munford v. Munford, Inc. (In re Munford, Inc.), 97 F.3d 449* ; *36 C.B.C.2d 1604, 1996 U.S. App. LEXIS 26466 (11th Cir. 1996)* ; *In re Drexel Burnham Lambert Group, 960 F.2d 285, 293, 26 C.B.C.2d 1413, 1992 U.S. App. LEXIS 5513 (2d Cir. 1992)* ("a [bankruptcy] court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan"); *In re Metromedia Fiber Network, Inc. 416 F.3d 136 (2d Cir. 2005)* (release of nondebtors is appropriate only in rare cases); *Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989)* (section 524(e) does not limit equitable powers of bankruptcy court to enjoin permanently actions against third parties that could give rise to indemnity or contribution claims against the debtor and threaten reorganization), *cert. denied*, *493 U.S. 959, 110 S. Ct. 376, 107 L. Ed. 2d 362 (1989)* ; *see also LTV Corp. v. Back (In re Chateaugay Corp.), 36 C.B.C.2d 1488, 201 B.R. 48, 1996 Bankr. LEXIS 1232 (Bankr. S.D.N.Y. 1996)* (citing § 105(a) as a basis to release a non-debtor from liability to third parties where such a step was necessary to prevent collateral attack from undermining plan and the integrity of the chapter 11 process); *In re Dow Corning Corp., 255 B.R. 445, 479 2000 U.S. Dist. LEXIS 16385 (E.D. Mich. 2000)* (concluding that the Bankruptcy Court can exercise its equitable powers under § 105(a) to issue permanent injunctions where "unusual circumstances" are present).

(n34)Footnote 34. *See, e.g., Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 47 C.B.C.2d 1158 (6th Cir. 2002)* (holding that the bankruptcy court can enjoin a creditor's claims against a non-debtor third party only in "unusual circumstances," when the following factors are present: (1) an "identity of interests" between the debtor and the third party, such as an indemnity relationship; (2) the third party has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization; (4) a large majority of the impacted class or classes of creditors has voted to accept the plan; (5) the plan provides for payment of all, or substantially all, of the claims affected by the injunction; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) the court makes a record of specific factual findings that support its conclusions); *In re Seatco, Inc., 45 C.B.C.2d 716, 257 B.R. 469, 474, 2001 Bankr. LEXIS 24* (Bankr. N.D. Tex., 2001) (*citing In re Master Mortgage Inv. Fund, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)*) ; *see also In re American Family Enters., 256 B.R. 377 (D.N.J. 2000)* (granting a permanent injunction in favor of a non-debtor because the debtor satisfied the five factors enumerated in *In re* Master Mortgage).

(n35)Footnote 35. *Resorts Int'l v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401, 34 C.B.C.2d 544, 1995 U.S. App. LEXIS 28027 (9th Cir. 1995)* , *cert. denied*, *517 U.S. 1243, 116 S. Ct. 2497, 135 L. Ed. 2d 189 (1996)* ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors."); *Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746* ; *1995 U.S. App. LEXIS 25272 (5th Cir. 1995)* (temporary stay of claims against third parties may be necessary to facilitate a debtor's reorganization, but permanent injunction of creditor claims against third parties is improper); *In re Western Real Estate Fund, Inc., 922 F.2d 592, 601-02, 1990 U.S. App. LEXIS 22383, 24 C.B.C.2d (MB) 1012* (10th Cir., 1990) (same), *modified by*, *Abel v. West, 932 F.2d 898 (10th Cir. 1991)* .

(n36)Footnote 36. *See In re AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1986)* (bankruptcy court had jurisdiction to approve a plan of reorganization pursuant to which certain third parties made available funds for distribution to unsecured creditors of the debtor who tendered releases of such third parties from certain liabilities); *In re Specialty Equip. Cos., Inc., 3 F.3d 1043 (7th Cir. 1993)* (provisions of confirmed plan bind all creditors regardless of whether a particular creditor voted to accept plan.). *But see In re Arrowmill Dev. Corp., 38 C.B.C.2d 938, 211 B.R. 497 (Bankr. D.N.J. 1997)* (validity of a release of a nondebtor's liability hinges upon principles of straight contract law or quasi-contract law, rather than upon the bankruptcy court's confirmation order); *In re Digital Impact, Inc., 223 B.R. 1 (Bankr. N.D. Okla. 1998)* (plan may not be confirmed if any party who would be bound by the release did not vote in favor of the plan); *In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999)* (releases of non-derivative third-party claims against nondebtor require the affirmative agreement of the creditor affected).