

**APPENDIX A:
EXCULPATION V. DEBTOR'S RELEASE V. THIRD-PARTY RELEASE**

Northern District of Texas Bankruptcy Bench/Bar Conference – June 16, 2022

Judge Mark Mullin (Bankr. N.D. Tex.), Ian Peck (Haynes and Boone, LLP, Dallas, Texas) and Audrey Hornisher (Clark Hill PLC, Dallas, Texas)

Type	Exculpation	Debtor's Release	Third-Party Release ¹
Code §	§ 1103(c)	§ 1123(b)(3)(A)	§ 105
Impact	Absolves a party's liability for conduct during the course of the bankruptcy case. Typically excludes acts that were willful misconduct, gross negligence or bad faith.	May release both prepetition and post-petition claims belonging to the debtor against various non-debtors. Typically excludes chapter 5 causes of actions.	Release or limit the liability of non-debtor third parties to other non-debtor third parties.
Purpose	To provide qualified immunity to those constituents and parties who served as fiduciaries during the case or made substantial and critical contributions, without which these key constituents may have been reluctant to participate in these cases.	To provide protection for those parties that substantially contribute to the bankruptcy case from potential prosecution of causes of action, which may otherwise discourage their participation.	Third-party releases are often justified on the basis that they promote an efficient and timely resolution of plan issues that must be resolved to favorably resolve the affairs of the estate.
Whom	Debtor, debtor's officers and directors, members of an official committee, lenders, asset purchasers and professionals retained by the foregoing.	Various non-debtor third parties.	Non-debtor third parties.
Issues	Objections may arise when the provision is drafted too broadly, the scope of the exculpation goes beyond activities that occurred during the pendency of the case or were not sufficiently related to case activities.	Usually noncontroversial but may raise an objection when the debtor attempts to release a claim that a third party is entitled to assert such as a derivative action or fraudulent transfer.	(1) are not explicitly authorized in the Bankruptcy Code, except in asbestos cases; (2) can be potentially abused by non-debtors to shield themselves from liability to third parties, which effectively operates as a bankruptcy discharge without a filing and without the safeguards of the Bankruptcy Code; (3) some bankruptcy courts (incl. N.D. Tex.) have discussed having an opt-out option, similar to a class-action settlement, eases the concerns of a third-party release.
Test	Whether the proposed exculpation is reasonably limited to protect estate and court approved actions?	Whether the proposed releases of the debtor's claims constitute an exercise of the debtor's reasonable business judgment, is fair and equitable, and is in the best interest of the debtor's estate, given all of the relevant facts and circumstances of the case?	No uniform test to evaluate nonconsensual third-party release, but the <i>Master Mortgage</i> Test is adopted by many courts: (1) identity of interest between the debtor and the third-party, (2) substantial contribution of assets to reorganization, (3) release is necessary to the reorganization, (4) majority of affected creditors have overwhelmingly accepted plan treatment, and (5) plan provides payment of all, or substantially all, of affected classes' claims.
Circuit Split	None.	None.	Yes. Circuits holding that nonconsensual third-party releases are permissible in unusual circumstances: Second, Third, Fourth, Sixth, Seventh and Eleventh. Circuits holding that nonconsensual third-party releases are impermissible: Fifth (requires opt-out provision to be permissible), Tenth.
Selected Case Guidance	<i>In re Bainbridge Uinta, LLC</i> , No. 20-42794 (MXM) (Bankr. N.D. Tex. July 7, 2021) [Dkt. 366] (“exculpation is appropriate because it provides protection to those constituents and parties who served as fiduciaries during these cases or made substantial and critical contributions”).	<i>In re Bainbridge Uinta, LLC</i> , No. 20-42794 (MXM) (Bankr. N.D. Tex. July 7, 2021) [Dkt. 366] (approving debtor release as reasonable within the debtors' business judgment).	<i>In re Bainbridge Uinta, LLC</i> , No. 20-42794 (MXM) (Bankr. N.D. Tex. June 28, 2021) [Dkt. 358] (approving third-party release as consensual where voting classes are entitled to opt-out of the third-party releases through ballot and non-voting classes are entitled to opt-out of third-party releases through an opt-out form); <i>In re TriVascular Sales LLC</i> , No. 20-31840 (SGJ) (Bankr. N.D. Tex. Sept. 16, 2020) [Dkt. 390] (approving third-party release where holders of claims were entitled to opt-out).

¹ Consensual third-party releases typically do not garner opposition and are generally approved by bankruptcy courts. Accordingly, nonconsensual releases are the focus on this chart. Further discussion on consensual third-party releases can be found in Section II(c) of the accompanying paper – *Third-Party Releases and Controversial Plan Provisions*.