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BEWARE THE BOILERPLATE: COURT ENFORCES THIRD-PARTY RELEASES IN BANKRUPTCY PLAN DESPITE FAILURE TO COMPLY WITH NOTICE REQUIREMENTS

The United States Court of Appeals for the 11th Circuit recently upheld third-party releases and injunctions contained in a bankruptcy plan of reorganization notwithstanding the debtor's failure to comply with the notice provisions of Federal Rule of bankruptcy Procedure ("Rule") 2002(c)(3).

In *In re Le Centre on Fourth, LLC*, 2021 WL 5290428 (11th Cir. Nov. 15, 2021), the Debtor's confirmed Plan of Reorganization ("Plan") included releases of multiple non-debtor third-parties and an injunction. The Debtor was the owner of an Embassy Suites Hotel located in Louisville, Kentucky ("Hotel"). The Hotel was operated by non-debtor affiliated entities. The various agreements by and among the entities provided for indemnification for certain liabilities including personal injury claims. The affected creditors ("Creditors") in the case were a husband and wife who were guests at the Hotel. The husband was severely injured by a motor vehicle operated by a valet at the Hotel.

The Creditors commenced an action against the valet company and the driver in Kentucky State Court. Thereafter, the Creditors sought to amend the complaint to include the Debtor and the related entities. The Debtor filed for bankruptcy protection after the commencement of the case, but prior to the amendment of the complaint. The Bankruptcy Court granted the Creditors relief from stay for the purpose of pursuing claims against the insurance carriers.

The Debtor filed its first Amended Disclosure Statement, including a copy of the Plan. The proposed Plan included releases of the Debtor and the related third-parties that operated the Hotel (the "Release Parties"). The Disclosure Statement included a four (4) page disclaimer which included the following language:

> "THE INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT IS INCLUDED HEREIN FOR PURPOSES OF SOLICITING ACCEPTANCES" of the First Amended Plan. Bankr. Doc. 298 at 2. It further provided that "CREDITORS ARE ADVISED AND ENCOURAGED TO READ THIS DISCLOSURE STATEMENT AND THE PLAN **IN THEIR ENTIRETY** BEFORE VOTING TO ACCEPT OR REJECT THE PLAN." Id. (emphasis in original).

The Disclosure Statement included a specific section devoted to the releases and injunctions, including a statement that any person who voted for the Plan or abstained from voting "would be deemed to be fully, completely, unconditionally, irrevocably, and forever release the Release Parties" (as defined therein).

It is noteworthy that the Plan solicitation materials were devoid of the notice required by Rule 2002(c)(3), which requires that where a plan includes third party releases and/or an injunction, it must: (a) include in conspicuous language (bold, italic or underlined text) a statement that the plan proposes an injunction; (b) describe briefly the nature of the injunction; and (c) identify the entities that would be subject to the injunction.

The Debtor amended its Plan for a third and final time on the date of the Confirmation Hearing to add additional Release Parties. At the Confirmation Hearing, the Bankruptcy Court examined and addressed the releases and injunction contained in the Plan and determined that the failure to include the release provisions would seriously impair, if not preclude, the Debtor's ability to confirm the Plan. The Creditors did not appear at the Confirmation Hearing or object to any of the provisions contained in the Plan, including the release provisions.

Upon entry of the Confirmation Order, the Debtor and Release Parties sought to dismiss the Creditors' claims asserted against them in Kentucky State Court. In response, the Creditors sought clarification of the Confirmation Order that the release provisions and injunction did not enjoin them from pursuing nominal claims against the Release Parties. Specifically, the Creditors sought to pursue claims against the Release Parties' insurance providers. Additionally, the Creditors argued that the Debtors' failure to comply with the notice provisions of Rule 2002(c)(2) violated due process.

The Bankruptcy Court determined that the Creditors' attorneys had received copies of the Disclosure Statement and Plan, as well as notice of the hearings and approve the Disclosure Statement and confirm the Plan. As a result, the Bankruptcy Court held that the Creditors had an opportunity to be heard at a meaningful time and in a meaningful matter, but failed to exercise this option and, therefore, there was no due process violation. The Bankruptcy Court further determined that the Creditors could not proceed with nominal claims against the Release Parties to pursue the insurance proceeds.

On Appeal, the District Court affirmed, and ruled that there was no due process violation because the Creditors had been served with copies of the various versions of the Plan and Disclosure Statement and that the plain language of Rule 2002 did not require Debtor to provide the Creditors with a separate notice to comply with Rule 2002(c)(3). The District Court also agreed with the Bankruptcy Court that the Creditors could not pursue the nominal claims against the insurance carriers because the indemnification provisions of the respective agreements between the Release Parties would interfere with the Debtor's reorganization.

The 11th Circuit affirmed. Relying on the Supreme Court's Decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), the 11th Circuit held that the Debtor had provided all the information required by Rule 2002(c)(3), just not in the form contemplated by the rule. The 11th Circuit held that the Disclosure Statement and Plan, copies of which had been received by the Creditors' attorneys prior to the confirmation hearing, contained sufficient information relating to the releases and the nature of the injunction so as to satisfy the requirements of Rule 2002(c)(3). The 11th Circuit also affirmed the Bankruptcy Court's determination that the Plan and injunction provisions barred nominal claims against the Release Parties' insurance carriers.

Releases and injunctions now are commonplace in bankruptcy plans. These injunctions may affect a creditor or party in interest from pursuing some or all of their rights post-plan confirmation. Often times these provisions are buried deep within documents that could number hundreds, if not thousands of pages (with exhibits). Further, it is common for a disclosure statement or plan to be revised or amended multiple times prior to entry of the confirmation order.

The 11th Circuit's decision in *Le Centre* puts creditors and parties-in-interest on notice that a separate notice highlighting the terms and conditions of general releases and injunctions in a bankruptcy plan may not be required under Rule 2002(c)(3). Those affected by a bankruptcy must be diligent in reviewing notices, proposed plans, disclosure statements, and all amendments and revisions, to determine whether there are any provisions that may adversely affect a present or future claim. Creditors and parties-in-interest must be vigilant in their scrutiny of these bankruptcy related documents and should retain competent, experienced professionals to protect their rights.

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