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## EXCULPATION PROVISIONS IN CHAPTER 11: RECENT DEVELOPMENTS AND PRACTICE TIPS

*Exculpation provisions are common in chapter 11 plans and intended to encourage parties to participate in the chapter 11 process. In this article, the authors begin by reviewing the purpose and law pertaining to such provisions. They then turn to a detailed discussion of three recent chapter 11 reorganizations in which the courts required proponents to narrow the scope of the proposed exculpations. They close with practice tips to avoid potential confirmation disputes and delayed confirmation orders.*

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Exculpation provisions are common fixtures in chapter 11 plans of reorganization and are typically less controversial than other forms of bankruptcy releases, such as non-consensual third-party releases. The beneficiaries of exculpations typically include professionals retained by a debtor's estate, committees appointed to represent the interests of a debtor's creditors or equity holders, and other estate fiduciaries. Exculpations are intended to provide such parties with qualified immunity from claims that could otherwise be asserted against them by a debtor, its creditors, and other parties in interest with respect to actions taken during a chapter 11 case. As such, exculpations are generally limited to post-petition conduct and subject to a carve-out for gross negligence, willful misconduct, and bad faith.<sup>1</sup>

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<sup>1</sup> See generally *In re PWS Holding Corp.*, 228 F.3d 224, 245-46 (3d Cir. 2000) (holding that exculpations are permissible only to

The purpose of including exculpation provisions in chapter 11 plans is to encourage parties to participate in a value-maximizing chapter 11 process, without fear that a disgruntled creditor may seek to hold them liable for good faith actions taken in support of a debtor and its estate. As one court observed, "[e]xculpation provisions are frequently included in chapter 11 plans, because stakeholders all too often blame others for failure to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision makers in the chapter 11 case."<sup>2</sup>

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*footnote continued from previous column...*

the extent they relate to post-petition activity and provide that parties remain liable for gross negligence, willful misconduct, or other ultra vires acts).

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<sup>2</sup> *In re DBSD North America, Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), *aff'd*, No. 09 CIV. 10156 (LAK), 2010 WL

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