

DRAFT – 10/10/2022



# Hot Topics in Chapter 11 Plans, Disclosure Statement & Plan Confirmation

2022

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## Goal of the Presentation

- **Part I:** *In re Highland Capital Management, L.P.*
- **Part II:** “Opt In” and “Opt Out” Provisions in Texas
- **Part III:** Trend toward Provisional Approval of Disclosure Statements
  - Combined Plans/ Disclosure Statement Hearing in S.D.T.X.

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# Part I: *In re Highland Capital Management, L.P.*

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## Trends in Exculpation Clauses

- Historical trend in Texas is to exculpate everyone involved in a bankruptcy case
- In Delaware some Judges limit exculpation to fiduciaries
- Recently in the N.D.T.X, the trend is to limit the scope of exculpations to fiduciaries
  - *In re Highland Capital Management L.P. (2022)*
    - Bankruptcy plan was appealed to the 5<sup>th</sup> Circuit, which validated the “Gatekeeper Provision,” a protected party quasi injunction, while reversing the plan’s broad exculpation provisions.
    - Gatekeeper provision requires that enjoined parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is colorable, the Bankruptcy Court may, if it has jurisdiction, adjudicate the action.

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## In re Highland Capital Management, L.P.

- Highland Capital Management, L.P., a Dallas-based investment firm, filed for bankruptcy on Oct. 16, 2019. During the proceedings, former CEO James Dondero proved to be very disruptive and litigious. The Bankruptcy Plan was confirmed on Feb. 22, 2021 and took effect on Aug. 11, 2021.
- Due to Dondero's conduct, the Plan included an exculpation provision that shielded Highland Capital and bankruptcy participants from lawsuits.
  - Plan shielded Highland Capital and bankruptcy participants through an exculpation provision that is enforced by an injunction and gatekeeper provision.
  - Under the plan, a party that seeks to bring a claim against any of the protected parties, must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim, and the Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits." (5<sup>th</sup> Cir. No. 21-10449, pg. 8)

## In re Highland Capital Bank. Plan: Exculpation Provision

- No Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of
  - (i) the filing and administration of the Chapter 11 Case;
  - (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan;
  - (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date;
  - (iv) the implementation of the Plan; and
  - (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(v); *provided, however*, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. The Plan's exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of the Plan, including Article IV.C.2 of the Plan, protecting such Exculpated Parties from liability. (Order Confirming the 5<sup>th</sup> Amended Plan of Reorganization of Highland Capital, pg. 74)

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