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1986]

TORTS—JOINT TORTFEASORS—RELEASE IN FAVOR OF JOINT
TORTFEASOR WHO FILES PETITION IN BANKRUPTCY BEFORE PAYING
AGREED SETTLEMENT WILL BE APPLIED AS PRO RATA
REDUCTION OF PLAINTIFF'S JUDGMENT AGAINST
NONSETTLING JOINT TORTFEASORS

Rocco v. Johns-Manville Corp. (1985)

Under the Pennsylvania Uniform Contribution Among Tortfeasors Act (Joint Tortfeasors Act),¹ a plaintiff's settlement agreement and release of one joint tortfeasor² reduces the plaintiff's recovery against the nonsettling joint tortfeasors.³ When a released joint tortfeasor defaults

1. 42 PA. CONST. STAT. ANN. §§ 8321-8327 (Purdon 1982). By adoption of the Joint Tortfeasors Act in 1951, Pennsylvania abolished the common law rule that prohibited contribution among joint tortfeasors when one had discharged the claim of the injured plaintiff. Act of July 19, 1951, Pub. L. No. 1130 § 8. For a discussion of the Joint Tortfeasors Act, see Note, *An Analysis of the Pennsylvania Uniform Contribution Among Tortfeasors Act of 1951*, 13 U. PITT. L. REV. 390 (1952). For a discussion of the common law rule against contribution, see W. PROSSER & R. KEETON, *PROSSER & KEETON ON THE LAW OF TORTS*, § 50, at 336 (5th ed. 1984). For a discussion of the policies underlying contribution, see Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365 (proposing contribution among tortfeasors as an adequate and just system of loss distribution governing liability in tort).

2. The Joint Tortfeasors Act defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 PA. CONST. STAT. ANN. § 8322 (Purdon 1982).

3. Joint Tortfeasors Act, 42 PA. CONST. STAT. ANN. §§ 8331-8327 (Purdon 1982). Section 8326 provides:

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

Id. § 8326.

The enactment of § 8326 of the Joint Tortfeasors Act abolished the original English rule that a release of one joint tortfeasor discharged all others liable to the same plaintiff for the same harm. See RESTATEMENT (SECOND) OF TORTS § 885 comment b (1979). The original rule developed at a time when the only tortfeasors who could be joined in one action were those who had acted in concert, so that the act of one became the act of the other. *Id.* This single cause of action was indivisible and was completely surrendered or satisfied by a release of any one tortfeasor. *Id.*

A frequent consequence of this rule was the unintentional discharge of one or more of the tortfeasors. *Id.* The rule compelled a plaintiff "to forego any opportunity of obtaining what it is possible to get from one defendant without suit, or to give up the entire claim against the other without full compensation." W. PROSSER & R. KEETON, *supra* note 1, § 49, at 333; see also *Brown v. City of Pittsburgh*, 409 Pa. 357, 361, 186 A.2d 399, 402 (1962) (at common law, the

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on such an agreement, Pennsylvania law generally allows the plaintiff the option of suing to enforce the breached settlement or of suing on the original cause of action.⁴ If a settling joint tortfeasor's bankruptcy⁵ oc-

release of one joint tortfeasor discharged the other and barred any future claim against him (citing *Hilbert v. Roth*, 395 Pa. 270, 149 A.2d 648 (1959)); *Wilbert v. Pittsburgh Consolidation Coal Co.*, 385 Pa. 149, 151, 122 A.2d 406, 408 (1956) (under common law, release of one person bars actions against another only if both were jointly liable); *Koller v. Pennsylvania R.R.*, 351 Pa. 60, 63, 40 A.2d 89, 90 (1944) (release of one wrongdoer operates as release of all, since there can be but one satisfaction for same injury); *Mason v. C. Lewis Lavine, Inc.*, 302 Pa. 472, 153 A. 754 (1931) (guest's release of driver of auto in which she was riding also released driver of truck that collided with car because both drivers were joint tortfeasors).

One device used to avoid the inequity of the common law rule was the covenant not to sue in which a plaintiff merely agreed that he would not enforce his cause of action against one tortfeasor. W. PROSSER & R. KEETON, *supra* note 1, § 49, at 334. Used as an obvious subterfuge to avoid the common law rule that the release of one tortfeasor releases all, the covenant not to sue preserved a plaintiff's claims against other tortfeasors, unless it was found that there had been full satisfaction of his claims. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 885, comment b (1979). See generally Havighurst, *The Effect of a Settlement with One Co-Obligor Upon the Obligation of the Others*, 45 CORNELL L.Q. 1 (1959). Courts, however, were reluctant to recognize the different effects of a release and a covenant not to sue, and they often continued to disallow recovery against a joint tortfeasor by a plaintiff who had executed a covenant not to sue in favor of another joint tortfeasor. See *Sheppard v. Atlantic States Gas Co.*, 72 F. Supp. 185, 187 (E.D. Pa. 1947) (under Pennsylvania law, covenant not to sue one of two joint tortfeasors is bar to any subsequent recovery from another tortfeasor for claim arising out of same cause of action), *rev'd on other grounds*, 167 F.2d 841 (3rd Cir. 1948); *Smith v. Roydhouse Arey & Co.*, 244 Pa. 474, 90 A. 919 (1914) (covenant not to sue one of two joint tortfeasors is a bar to any subsequent recovery for claims arising out of same cause of action).

To the extent that the Joint Tortfeasors Act allows a plaintiff to recover against nonsettling defendants after executing a release in favor of a settling defendant, it effectively abolishes the distinction between a release and a covenant not to sue. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 21-11, at 772 n.4 (2d ed. 1977).

4. See *Lucas v. Gibson*, 341 Pa. 427, 19 A.2d 395 (1941); *Schwartzfager v. Pittsburgh, H.B. & N.C. Ry.*, 238 Pa. 158, 85 A. 1115 (1913); *Zager v. Gubernick*, 205 Pa. Super. 168, 208 A.2d 45 (1965).

In *Lucas*, the plaintiff, a passenger in her son-in-law's automobile, was injured in a collision with the defendant. *Lucas*, 341 Pa. at 428, 19 A.2d at 396. While she was hospitalized, she executed a release presented to her by the defendant's insurance agent whereby the insurance company agreed to pay her medical bills as well as a separate settlement to her. *Id.* at 428-29, 19 A.2d at 396. The insurance company made the promised payments to the hospital, but failed to pay the plaintiff. *Id.* at 430-31, 19 A.2d at 397. The Supreme Court of Pennsylvania held that since the plaintiff had not received the agreed settlement, she was justified in ignoring the release and suing in trespass on her original cause of action for her injuries. *Id.* at 431, 19 A.2d at 397.

Similarly, in *Schwartzfager*, the plaintiff signed a release of his claims for personal injuries in favor of the defendant railroad company in exchange for the company's agreement to pay his hospital bills and wages until he was able to work. *Schwartzfager*, 238 Pa. at 162, 85 A. at 1116. The Pennsylvania Supreme Court held that the company's subsequent failure to pay the plaintiff his promised wages was a failure of consideration for the release which justified the plain-

curs between the execution of a settlement agreement and the tortfeasor's payment of the agreed sum to the plaintiff, either the plaintiff or the nonsettling joint tortfeasors must bear the risk of the bankrupt's inability to contribute to the plaintiff's recovery.⁶ In *Rocco v.*

tiff in disregarding it and bringing suit upon the original cause of action. *Id.* at 166, 85 A. at 1117.

In *Zager*, the plaintiff's claim for damages in an automobile accident was settled with the defendant's insurance company, and a release in favor of the company was executed. *Zager*, 205 Pa. Super. at 169, 208 A.2d at 47. The company later refused to pay the plaintiff the agreed settlement under the release, asserting that its agent did not have the authority to bind the company in such a release. *Id.* at 170, 208 A.2d at 47. In rejecting this defense, the Pennsylvania Superior Court found that since the company had defaulted on the settlement, the plaintiff was entitled either to enforce the agreement or to sue in trespass for his damages from the accident. *Id.* at 173-74, 208 A.2d at 49.

Often, a court's determination that a plaintiff was justified in ignoring a release and suing on his underlying cause of action has been predicated on the precise characterization of the release as an executory accord, rather than an immediate discharge by the plaintiff of all claims against the defendant. See J. MURRAY, MURRAY ON CONTRACTS § 253, at 513 (1974) (discussing judicial division of agreements into "accord and satisfactions" or "substituted contracts"); Annot., 94 A.L.R.2d 504 (1964) (discussing distinction between executory accords and substituted contracts).

5. A filing in bankruptcy is brought pursuant to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985) (the Bankruptcy Code). In enacting the Bankruptcy Code, the House indicated that the Code "enunciates a bankruptcy policy favoring a fresh start" for the debtor. H.R. REP. NO. 595, 95th Cong., 1st Sess. 126, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087. The "fresh start" doctrine of bankruptcy law has been given support by the Supreme Court. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (purpose of bankruptcy is to "relieve the honest debtor from the weight of oppressive indebtedness" and to permit him "new opportunity in life and a clear field for future effort, unhampered by the pressures and discouragement of preexisting debt") (quoting *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915)); *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915) (emphasizing need to permit debtors to "start afresh" after bankruptcy). See also Comment, *Protection of a Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. L. REV. 843 (1980) (Bankruptcy Code's primary focus is to enable debtors to maintain their independent economic existences after bankruptcy).

6. It is noted that if the plaintiff bears this risk and sues to enforce the settlement agreement after a defendant files for bankruptcy, the plaintiff's action will be stayed under the Bankruptcy Code's automatic stay provisions. 11 U.S.C. § 362(a)(1) (1982 & Supp. III 1985). For a discussion of the automatic stay provision, see *infra* note 15. Furthermore, as a nonpriority, unsecured creditor, the plaintiff is unlikely to receive the full amount owed him by the defendant as a result of the bankruptcy proceedings. For a discussion of unsecured creditor recovery under the Bankruptcy Code, see *infra* note 15.

If the plaintiff is entitled to ignore the release and maintain his original cause of action, the nonsettling joint tortfeasors will bear the risk of the settling tortfeasor's bankruptcy. See *Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 116-17 (3d Cir. 1985). Because joint tortfeasors are jointly and severally liable, the plaintiffs could proceed against the nonsettling tortfeasors for the settling tortfeasor's share of liability. See W. PROSSER & R. KEETON, *supra* note 1, § 47, at 327 and *infra* note 30 and accompanying text. The nonsettling tortfeasors could thereafter seek contribution from the settling tortfeasor under the joint

Johns-Manville Corp.,⁷ the United States Court of Appeals for the Third Circuit decided that when a plaintiff releases a joint tortfeasor who subsequently files for bankruptcy before paying the agreed settlement, the plaintiff will bear this risk and the court will apply the release to reduce the plaintiff's judgment against the nonsettling joint tortfeasors.⁸

Tortfeasors Act to the extent of its pro rata share. See 42 PA. CONS. STAT. ANN. § 8324 (Purdon 1982) (right of contribution among joint tortfeasors). The treatment in bankruptcy of such a claim for contribution against a settling tortfeasor, however, is not without ambiguity. The Third Circuit, in *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), cert. denied sub. nom., *Frenville Co. v. Avellino & Bienes*, 105 S. Ct. 911 (1985), held that while the acts of the debtor which formed the basis of a contribution claim occurred before the filing of the debtor's bankruptcy petition, the cause of action itself for contribution did not arise until after the filing of the bankruptcy petition. 744 F.2d at 337. Since the automatic stay applies only to proceedings that could have been commenced or claims that arise before the filing of a bankruptcy petition, the Third Circuit held it inapplicable to post-petition contribution claims. *Id.*

A number of courts, however, have disagreed with the Third Circuit's interpretation of the applicability of the automatic stay to claims against a bankrupt for contribution or indemnity. See, e.g., *Paine Webber Group, Inc. v. Baldwin United Corp.* (*In re Baldwin-United Corp. Litigation*), 756 F.2d 343, 348 n.4 (2d Cir. 1985) (noting broad definition of "claim" in Bankruptcy Code and the uncertainty as to whether automatic stay applies to third-party claims for contribution); *In re Baldwin-United Corp.*, 57 Bankr. 759, 765 (Bankr. S.D. Ohio 1985) (expressing disagreement with *Frenville* as to broadness of term "claim" and resulting applicability of automatic stay to actions for contribution and indemnity); *In re Yanks*, 49 Bankr. 56, 58 (S.D. Fla. 1985) (rejecting *Frenville* approach and noting that to treat claim for contribution as post-petition "would allow tortfeasor to collect from the estate of his joint tortfeasor ahead of injured party, which shares with other unsecured creditors at bottom of distribution chain."); *In re Baldwin-United Corp.*, 48 Bankr. 901, 903-04 (Bankr. S.D. Ohio 1985) (declining to follow *Frenville* by finding that right to payment in contribution from the debtor arose before filing of debtor's bankruptcy petition and was thus subject to automatic stay).

Should a court elect to follow *Frenville* and hold that a claim for contribution by the non-settling tortfeasors is a post-petition claim not arising until after the filing of the settling tortfeasor's bankruptcy petition, such a claim would not be subject to the automatic stay. Rather, it is submitted, the post-petition claim for contribution would be treated as an administrative expense of the debtor's tortfeasor's estate. Under the Bankruptcy Code, administrative expenses are given a priority in payment over other unsecured, pre-petition claims. See 11 U.S.C. § 507 (1982 & Supp. III 1985) (priorities). Thus, treatment of a claim for contribution as an administrative expense rather than as a pre-petition claim would result in a greater likelihood of payment to the non-settling tortfeasors and the anomaly, as the bankruptcy court in *In re Yanks* suggested, of recovery by a tortfeasor against his joint tortfeasor before any injured party. See *In re Yanks*, 48 Bankr. 56, 58 (Bankr. S.D. Fla. 1985).

For a further discussion of the operation of the automatic stay, see *infra* note 15.

7. 754 F.2d 110 (3d Cir. 1985).

8. *Id.* at 111, 117. The reduction of the plaintiff's judgment against the nonsettling tortfeasors is made pursuant to the Joint Tortfeasors Act. 42 PA. CONST. STAT. ANN. § 8326 (Purdon 1982). For the text of Section 8326, see *supra* note 1. For a further discussion of the Joint Tortfeasors Act, see *infra* note 23 and accompanying text.

The issue before the Third Circuit arose in a claim by a shipfitter, John Rocco, and his wife against several manufacturers and suppliers of asbestos products.⁹ Rocco contracted asbestosis¹⁰ as a result of his exposure to asbestos products and dust while he was working at the New York and Philadelphia Naval Shipyards.¹¹ The Roccas brought a diversity action for damages on a theory of strict products liability for failure to warn.¹²

9. *Rocco v. Johns-Manville Corp.*, No. 80-0608 (E.D. Pa. Sept. 9, 1982) (unpublished memorandum and order of Judge Louis J. Bechtel) (on file at the offices of the Villanova Law Review).

The Rocco's complaint named 18 defendants: Johns-Manville Corp.; Johns-Manville Sales Corp.; Raybestos-Manhattan, Inc.; Owens-Corning Fiberglass Corp.; Owens-Illinois Glass Co.; Pittsburgh Corning Corp.; GAF Corp.; Celotex Corp.; Unarco Industries; H.K. Porter Co.; Southern Asbestos Co.; Eagle-Pitcher Industries; Amatex Corp.; Pacor, Inc.; Keene Corp.; Garlock, Inc.; Glen Alden, Inc.; Rapid American Corp.. *Rocco*, 754 F.2d at 110. The following companies were joined as third party defendants: Asten-Hill Manufacturing Co.; Certain Teed Corp.; Forty-Eight Insulators, Inc.; Fibreboard Corp.; Nicolet Industries. *Id.* Before trial, the plaintiffs' claims against Keene Corp. were severed and assigned to another judge for disposition as a result of judicial disqualification under 28 U.S.C. § 455(b)(5)(ii) (Supp. V 1982) (judicial disqualification when any justice, judge, or magistrate or his spouse, or person within the third degree of relationship to either of them, or spouse of such person is acting as lawyer in proceeding). *Rocco*, 754 F.2d at 112 n.1.

10. *Rocco*, 754 F.2d at 112. Asbestosis, the earliest known and most common asbestos-related disease, is generally found only among workers employed regularly and continuously with asbestos. I. SELIKOFF & D. LEE, *ASBESTOS AND DISEASE* (1978). A latent disease, asbestosis manifests itself 10 to 40 years after exposure to significant quantities of asbestos. *Id.* Inhalation of asbestos fibers initiates an inflammatory process that replaces functioning lung tissue with scarred tissue. *Id.* This process destroys the air sacs in the lung tissue, preventing the lung from diffusing oxygenated blood to the arteries and preventing carbon dioxide from being released. *Id.* The result is a decrease in pulmonary function and lung volume. *Id.* Symptoms associated with asbestosis includes shortness of breath, coughing, chest pains, and clubbing of the fingers. *Id.* While the disease is not always fatal, it is progressive and incurable, and increases the victim's risk of lung cancer. *Id.*; see also Special Project *An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 *VAND. L. REV.* 573, 579 n.10 (1983) (discussing etiology and symptoms of asbestosis).

11. *Rocco*, 754 F.2d at 112. Rocco was employed at the New York Shipyard and the Philadelphia Naval Shipyard from 1943 to 1981. *Id.*

12. *Id.* at 112. The plaintiffs' action was brought under § 402A of the *Restatement (Second) of Torts* comment k (unavoidably unsafe products). Section 402A provides as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

During the trial, the plaintiffs settled with a number of defendants.¹³ The plaintiffs also entered a settlement agreement in which one of the defendants, Unarco Industries, Inc. (Unarco), promised to pay the Roccas \$15,000 in exchange for the Roccas' release.¹⁴ Unarco, however, filed for corporate reorganization under chapter 11 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code)¹⁵ after obtaining a

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1979). Comment k provides that "[s]uch a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." *Id.* comment k (emphasis in original); *see also* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (landmark case imposing duty to warn on manufacturers and suppliers of asbestos), *cert. denied*, 419 U.S. 869 (1974).

13. *Rocco*, 754 F.2d at 111. The plaintiffs executed pro rata releases in favor of the following defendants: Amatex Corp.; Asten-Hill Manufacturing Co. Inc.; Forty-Eight Insulators, Inc.; GAF Corp.; Nicolet Industries; Owens-Illinois Glass Corp.; Pacor, Inc.; Raybestos-Manhattan, Inc.; Owens-Corning Fiberglass; Celotex Corp.; Eagle-Picher Industries, Inc.; Fibreboard Corp.; Garlock, Inc.; H.K. Porter Co.; and Unarco Industries, Inc. *Id.* at 112-13 & 113 nn. 3-4.

14. *Rocco*, 754 F.2d at 116. The release executed by plaintiffs in Unarco's favor provided as follows:

It is further agreed and understood by the parties hereto, that any other person or organization whom we claim is liable to us for our injuries, losses and damages shall not be entitled to a satisfaction of reduction or pro rata reduction or the damages we are claiming against them by reason of the payment herein, unless it is adjudicated that Releasees are Joint Tortfeasors with said person or organization. In the event that Releasees are adjudicated to be Joint Tortfeasors than *the payment herein shall constitute a reduction to the extent of the pro rata share of liability of Releasees for the damages recoverable by us from the other tortfeasors.*

Rocco v. Johns-Manville Corp., et al., No. 80-0608 (E.D. Pa. Dec. 15, 1982) (unpublished memorandum and order of Judge Louis J. Bechtel at 7) (emphasis supplied by the court) (on file at offices of Villanova Law Review).

It is observed that the release provided that no reduction would be made in plaintiffs' ultimate recovery against any other tortfeasor unless Unarco was adjudicated a joint tortfeasor. Moreover, if Unarco was adjudicated a tortfeasor, the release provided and the Joint Tortfeasors Act provides that a pro rata reduction would be made in the plaintiffs' recovery against the nonsettling tortfeasors. *See*, 42 PA. CONS. STAT. ANN. § 8326 (Purdon 1982). Such a pro rata reduction provision protects a settling defendant from a claim of contribution by a nonsettling defendant in the event that the settling defendant is adjudicated a tortfeasor because the settling defendant's pro rata share has been extinguished by the release. *See Id.* § 8327.

15. *Rocco*, 754 F.2d at 116; *see* 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985). Chapter 11 reorganization is available to "persons," which is defined by the Code to include individuals, partnerships and corporations. *Id.* §§ 109(d), 101(30). The primary purpose of chapter 11 is to rehabilitate businesses so that they can maintain employment levels, pay creditors, and produce a return for their investors. A. COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS ¶ 14.501, at 265 (1981). The provisions in chapters 1, 3 and 5 are applicable to cases filed under chapter 11. 11 U.S.C. § 103(a) (1982 & Supp. III 1985). The filing of a reorganization petition has the legal effect of halting all judicial actions against the corporate debtor, including suits brought in tort. *Id.* § 362(a)(1). The filing stays

release executed by the Roccas but before paying them the agreed settlement.¹⁶ The plaintiffs subsequently recovered verdicts against both Johns-Manville and Pittsburgh Corning.¹⁷ In response to special interrogatories,¹⁸ the jury found that Johns-Manville, Pittsburgh Corning, Unarco, and five other settling defendants had proximately caused the plaintiffs' injury.¹⁹

the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . or to recover a claim against the debtor that arose before the commencement of the case. . . .

11 U.S.C. 362(a) (Supp. III 1985).

While judgments cannot be recovered against a debtor in reorganization, a claimant may petition to have the automatic stay modified to allow a case to be tried up to the point of judgment to determine damages. 11 U.S.C. § 362(d) (1982 & Supp. III 1985).

In a reorganization under chapter 11, secured and unsecured claimants receive payment through a plan of rehabilitation. *Id.* §§ 1121, 1123. Under § 1123 of the Bankruptcy Code, the debtor or his trustee must propose a plan to pay off the corporate debts either with corporate assets or future earnings from operations. *Id.* § 1123; see A. COHEN, *supra*, at ¶ 14-504.2-14-509. Creditors whose claims are secured by a lien on the property of the bankrupt corporation are secured creditors who enjoy the highest priority and are satisfied to the extent of their security interest before any unsecured creditor receives payment. See 11 U.S.C. § 506 (1982 & Supp. III 1985) (determination of secured status). Under the Bankruptcy Code unsecured creditors are general creditors who have no security interest but are entitled to a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, . . . legal (or) equitable." *Id.* § 101(4)(A). Because a person with a tort claim is classified as a non-priority, unsecured creditor, the tort claimant is likely to receive less through a reorganization than through an independent tort suit. See *id.* § 502 (allowance of claims or interests); § 507 (priorities). See also Comment, *Tort Creditor Priority in the Secured Creditor System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045 (1984). A tort claimant who exercises a release in favor of a bankrupt defendant would similarly be classified as a non-priority, unsecured creditor because his claim against the debtor is based on the contractual settlement. See 11 U.S.C. §§ 502, 507 (1982 & Supp. III 1985).

16. *Rocco*, 754 F.2d at 116. The chapter 11 petition was filed three weeks after the plaintiffs signed the release in Unarco's favor. *Id.* See *In re UNR Indus., Inc.*, 29 Bankr. 741, 743 (N.D. Ill. 1983). UNR Industries, of which Unarco Industries is a subsidiary, filed for chapter 11 reorganization on July 29, 1982. *Id.* The company alleged that it was a defendant in some 17,000 asbestos-related personal injury lawsuits with exposure to damages in the incalculable millions of dollars. *Id.*

17. *Rocco*, 754 F.2d at 111. The verdict was entered against Johns-Manville Corp., Johns-Manville Sales Corp. and Pittsburgh Corning Corp. *Id.* at 113 n.5. Rocco was awarded \$500,000 in damages; his wife, Antoinette, was awarded \$50,000. *Id.* at 112. The parties to the appeal, as well as the court, treated Johns-Manville Corp. and Johns-Manville Sales Corp. as one entity. *Id.* at 113 n.5.

18. 754 F.2d at 112. The special interrogatories were submitted in conjunction with defendants Johns-Manville's and Pittsburgh Corning's cross-claims. *Id.*; see FED. R. CIV. P. 49(b) (submission to jury of written interrogatories accompanying forms for general verdict).

19. 754 F.2d at 112. Eight defendants were, therefore, adjudicated as joint

The district court denied Johns-Manville's and Pittsburgh Corning's post-trial motions for judgments *non obstante verdicto* (n.o.v.) and new trial,²⁰ but in accordance with the Joint Tortfeasors Act,²¹ the district

tortfeasors: Johns-Manville; Pittsburgh Corning; and six of the settling defendants (Unarco, Celotex Corp., Eagle-Picher Industries, Fibreboard Corp., Garlock Inc., and H.K. Porter Co.). *Id.* at 113 & n.4. An additional defendant, Owens Corning Fiberglass Corp., was acknowledged to be a joint tortfeasor by the terms of a release executed in its favor by the plaintiffs. *Id.* at 113. For a further discussion of the significance of adjudication as a joint tortfeasor and of the effect given Owens Corning's release by the district court and the Third Circuit, see *infra* note 23 and accompanying text.

While a total of nine defendants were determined to be joint tortfeasors either by jury adjudication or by the terms of their releases, the severing of the plaintiffs' claim against Keene Corp. made it impossible for the Third Circuit to fix the exact share of each defendant's liability. See 754 F.2d at 119. For a further discussion of this problem, see *supra* note 9 and *infra* note 39 and accompanying text. Should Keene Corp. ultimately be adjudged a joint tortfeasor, each defendant's share of liability would be 1/10 rather than 1/9. For a further discussion of this calculation, see *infra* note 39. The determination of each defendant's share of liability is necessary in order to reduce the plaintiffs' judgment against the nonsettling defendants (Johns-Manville and Pittsburgh Corning) by any pro rata releases executed by the plaintiffs in favor of the settling defendants. For a further discussion of the reduction of plaintiffs' judgment against Johns-Manville and Pittsburgh Corning, see *infra* notes 31-39 and accompanying text.

20. 754 F.2d at 112. The defendants' motions were based on insufficiency of the evidence and excessiveness of the verdicts. *Id.* The district court found that the evidence was sufficient to support the jury's verdict and that the verdict itself was not excessive. *Id.* at 113-14. In affirming the district court's decision, the court of appeals noted that it must affirm the jury's damage award unless it is "so grossly excessive as to shock the conscience of the court." *Id.* at 114; see *Black v. Stephens*, 662 F.2d 181, 192 (3d Cir. 1981) (jury's damage award must be affirmed unless so excessive as to shock the judicial conscience), *cert. denied*, 455 U.S. 1008 (1982); *Edynak v. Atlantic Shipping, Inc. Cie Chambon Maclovia S.A.*, 562 F.2d 215, 225-26 (3d Cir. 1977) (court of appeals may reverse determination of district judge and grant new trial only if verdict is so grossly excessive as to shock judicial conscience), *cert. denied*, 434 U.S. 1034 (1978).

The plaintiffs filed motions for verdict *nunc pro tunc* and for judgment n.o.v. on behalf of three defendants in whose favor the plaintiffs had executed pro rata releases, asserting that there was insufficient evidence to support the jury's finding that these defendants had proximately caused plaintiffs' injury and, therefore, that they should not be adjudged joint tortfeasors. Memorandum and order of Sept. 9, 1982, at 8-9. The plaintiffs made these motions to avoid a reduction of the verdict in the event that the released defendants later were adjudged joint tortfeasors under the Joint Tortfeasors Act. 42 PA. CONST. STAT. ANN. §§ 8321-8327 (Purdon 1982). For a discussion of the reduction made in a plaintiff's verdict under the Joint Tortfeasors Act, see *infra* notes 31-39 and accompanying text.

The court found the plaintiffs' motion for a directed verdict untimely, having been submitted after the verdict was entered. Memorandum and order of Sept. 9, 1982, at 7. The district court noted that the filing of a motion for a directed verdict at the close of all the evidence was a prerequisite to consideration of a motion for judgment n.o.v. *Id.* (citing *Wall v. United States*, 592 F.2d 154, 159-60 (3d Cir. 1979) (motion for judgment n.o.v. cannot be granted to party who fails to move for directed verdict); see also FED. R. CIV. P. 50(b) (motion for judgment notwithstanding the verdict). After the trial, the plaintiffs also

court granted in part Johns-Manville's and Pittsburgh Corning's motion to mold the verdict in light of the releases executed by the plaintiffs.²² The court made pro rata reductions in the plaintiffs' recovery for the releases executed by the plaintiffs in favor of the settling defendants whom the jury had adjudged as joint tortfeasors.²³ One such reduction

moved to add delay damages to the verdict, pursuant to Pennsylvania Rule of Civil Procedure 238. *Id.* at 8; see PA. R. CIV. P. 238. The plaintiffs' motion for delay damages was granted, but entry of the amounts due was reserved until the court modified the verdicts in accordance with the Joint Tortfeasors Act. Memorandum and order of Sept. 9, 1982, at 10. For a discussion of plaintiff's verdict, see *infra* note 31 and accompanying text. After reducing the verdicts by giving effect to the various settlements, delay damages at 10% per year were computed on plaintiffs' awards. Memorandum and order of Dec. 15, 1982, at 2-8.

21. 42 PA. CONST. STAT. ANN. § 8326 (Purdon 1982). For the text of § 8326, see *supra* note 3.

22. Memorandum and order of Dec. 15, 1982, at 3-8.

23. *Id.* at 7-8. The settling defendants who had received pro rata releases and who were subsequently adjudged tortfeasors were Celotex Corp., Eagle-Picher Industries, H.K. Porter Co., Unarco Industries. *Id.* at 6. Pro rata reduction of the plaintiffs' verdict was also made for a release executed in favor of Owens-Corning Fiberglass Corp. for consideration of \$25,000. *Id.* at 5-6.

Under the Joint Tortfeasors Act, a defendant is not entitled to a reduction of plaintiff's judgment against him, unless the settling defendant who executed the release is ultimately adjudged a joint tortfeasor. 42 PA. CONST. STAT. ANN. § 8326 (Purdon 1982). In order to establish his status as a joint tortfeasor, a settling defendant may be required by a nonsettling defendant to remain in the case through trial and verdict. See *Slaughter v. Pennsylvania X-Ray Corp.*, 638 F.2d 639 (3d Cir. 1981); *Davis v. Miller*, 385 Pa. 348, 123 A.2d 422 (1956). Joint liability may also be established in a separate contribution suit or from a prior judicial determination. See *Schwartz v. Sunderland*, 402 Pa. 222, 169 A.2d 289 (1961) (action for contribution); *Mazer v. Security Ins. Group*, 507 F.2d 1338 (3d Cir. 1975) (en banc) (prior judicial determination).

In addition, the Third Circuit has held that a plaintiff can concede in a release that a settling defendant was a joint tortfeasor regardless of whether he was in fact a joint tortfeasor. *Griffin v. United States*, 500 F.2d 1059, 1072 (3d Cir. 1974). Through such a "Griffin" release, a plaintiff agrees to a reduction, whether pro rata or for consideration paid, of any subsequent judgment he may receive against other joint tortfeasors. *Id.* While the release executed in Owens-Corning Fiberglass' favor did not acknowledge Owens-Corning Fiberglass to be a joint tortfeasor, counsel stipulated in advance of trial that the release should be "treated as if it were a 'Griffin' release" and that the verdict should be reduced pro rata whether or not the released party herein was in fact a joint tortfeasor. 754 F.2d at 115, n.6.

The district court also reduced the plaintiffs' verdict by the amounts paid for releases given the following defendants: Amatex Corp.; Asten-Hill Manufacturing Co.; Forty-eight Insulations; GAF Corp.; Nicolet Industries; Owens-Illinois Glass Corp.; Pacor, Inc.; and Raybestos-Manhattan, Inc. Memorandum and order of Dec. 15, 1982, at 3. These releasees provided that any other organization claimed by the plaintiffs to be liable to them "shall not be entitled to a satisfaction or reduction or pro rata reduction of the damages we are claiming against them by reason of the judgment herein, unless it is adjudicated that Releasees are Joint Tortfeasors with said person or organization." 754 F.2d at 115 n.6. Although these defendants were not adjudged joint tortfeasors, the district court reduced the plaintiffs' verdict "on the basis of . . . equity and fairness . . . to prevent an unjust enrichment." Memorandum and order of Dec.

in the plaintiffs' judgment against Johns-Manville and Pittsburgh Corning was for the Roccas' release of Unarco, notwithstanding the fact that Unarco had commenced bankruptcy proceedings and had not paid the Roccas the agreed settlement.²⁴ The district court ruled that Unarco's bankruptcy did not alter either its joint tortfeasor status or the rights of Johns-Manville and Pittsburgh Corning to pro rate reduction of the judgment under the Joint Tortfeasors Act.²⁵

On appeal to the Third Circuit,²⁶ the plaintiffs argued that Unarco's filing of a chapter 11 petition and its failure to pay the agreed consideration for the Roccas' release constituted a breach of the settlement agreement and, therefore, gave the plaintiffs the right to rescind²⁷ the release.²⁸ The Roccas contended that, under Pennsylvania law, they had the option of enforcing the release or of treating it as rescinded, thereby retaining their original cause of action.²⁹ By proceeding on their original tort claim, the plaintiffs argued, they could recover Unarco's pro rata share of the judgment from Johns-Manville and Pittsburgh Corning.³⁰

15, 1982, at 3-4. The Third Circuit stated that the amounts paid by these defendants should not have been deducted from the verdicts "because as to them there was no adjudication of liability nor had they executed joint tortfeasor ["Griffin"] releases." 754 F.2d at 115.

24. Memorandum and order of Dec. 15, 1982, at 7 n.5. For a discussion of the propriety of this reduction under the circumstances, see *infra* notes 73-75 and accompanying text.

25. Memorandum and order of Dec. 15, 1982, at 7 n.5.

26. Johns-Manville and Pittsburgh Corning both appealed the Sept. 9, 1982 district court order. 754 F.2d at 112. Johns-Manville's appeal was docketed at No. 82-1624, but was stayed on April 27, 1983, following the company's filing of a chapter 11 reorganization petition on August 26, 1982. 754 F.2d at 112 n.2; see *In re Johns-Manville Corp.*, 36 Bankr. 727 (Bankr. S.D.N.Y. 1984). Pittsburgh Corning's appeal of the Sept. 9, 1982 order was docketed at No. 82-1652, but was dismissed for failure to prosecute. 754 F.2d at 112 n.2. The plaintiffs and Pittsburgh Corning appealed the Dec. 15, 1982 district court order. *Id.* at 113. The appeal was heard by Circuit Court Judges Adams, Gibbons and Weis. *Id.* at 111. Judge Weis wrote the majority opinion. *Id.* Judge Gibbons filed a dissenting opinion. *Id.* at 119.

27. 754 F.2d at 116. Both the plaintiffs and the court addressed the ability of the plaintiffs to "rescind" the release. *Id.* As one authority has suggested: "the word rescission should be relegated to a mutual agreement of discharge of an executory bilateral contract. The term, however, shares the malady of other legal terms which have been used in a variety of senses." J. MURRAY, *supra* note 4, § 252 at 510 n.41. The plaintiffs and the court undoubtedly intended "rescind" to mean the ability of the plaintiffs to ignore the release in the event of its breach. See *Rocco*, 754 F.2d at 116. Such will be the use of the word in this casebrief.

28. *Rocco*, 754 F.2d at 116.

29. *Id.* For a further discussion of remedies in Pennsylvania for the breach of a settlement agreement, see *supra* note 4 and accompanying text.

30. *Rocco*, 754 F.2d at 116. Since Unarco, Johns-Manville and Pittsburgh Corning were all adjudicated joint tortfeasors, the plaintiffs could elect to proceed against Johns-Manville and/or Pittsburgh Corning on a theory of joint and several liability if the release was rescinded. See W. PROSSER & R. KEETON, *supra*

Judge Weis, writing for a majority of the Third Circuit, rejected this argument and held that, under Pennsylvania law, the Roccas' release of Unarco would be applied to reduce their judgment against Johns-Manville and Pittsburgh Corning.³¹ Although the court acknowledged the Pennsylvania rule that allows a plaintiff to rescind a breached settlement agreement and to proceed under his original cause of action, the court held that this rule is inapplicable when the filing of a chapter 11 reorganization petition constitutes the alleged breach.³² Moreover, the court observed that the plaintiffs had cited no authority to support their contention that the filing of a bankruptcy petition gave them the option of voiding their release.³³ The court observed that even if Unarco's release was construed as an executory contract,³⁴ the Bankruptcy Code provides that entry into bankruptcy alone does not act as a breach of an

note 1, § 47, at 327; see also *supra* note 6 and accompanying text. Johns-Manville's filing of its chapter 11 petition, however, would stay any legal action commenced by the plaintiffs against it since, under the Bankruptcy Code, all legal proceedings against a debtor are stayed once a bankruptcy petition is filed. See 11 U.S.C. § 362(a)(1) (Supp. II 1984). For a discussion of the automatic stay provision, see *supra* note 15. For a discussion of the same problem faced by the plaintiffs in their attempt to enforce the releases against Unarco, see *supra* notes 15.

31. *Rocco*, 754 F.2d at 116-17.

32. *Id.* at 116. The court suggested that had the breach occurred before Unarco's bankruptcy intervened, the plaintiffs would have been entitled to rescind the release. *Id.* The court, however, did not discuss whether Unarco's nonpayment of the promised consideration constituted a breach of the release even before the bankruptcy proceedings were commenced. *Id.* For a further discussion of the court's failure to consider non-payment as breach, see *infra* notes 65-73 and accompanying text.

33. *Rocco*, 754 F.2d at 116.

34. *Id.* at 116 n.7. Although the Bankruptcy Code does not define "executory contract," the legislative history to § 365 explains that the term "generally includes contracts on which performance remains due to some extent on both sides." H.R. REP. NO. 595, 95th Cong., 1st Sess. 347, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 5920; S. REP. NO. 989, 95th Cong., 2d Sess. 58, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963. One scholar has defined an executory contract as a "contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). Professor Williston has commented that "all contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 14 at 28 (3d ed. 1957). Another authority has noted that the usual release is not promissory in character but, rather, purports to be and is, an executed transaction. J. MURRAY, *supra* note 4, § 260, at 526; see *In re KMMCO, Inc.*, 40 Bankr. 976 (E.D. Mich. 1984) (settlement agreement was not executory where one party had performed her promise to release her rights).

The Third Circuit noted that the Roccas' release, having been signed by the plaintiffs and the claims against Unarco having been dismissed, was not an executory contract. *Rocco*, 754 F.2d at 116 n.7. For a further discussion of the significance of the Third Circuit's determination that the Roccas' release was not an executory contract, see *infra* notes 55-57 and accompanying text.

executory contract.³⁵ The court reasoned that because the filing of a chapter 11 petition was not a breach by Unarco, the plaintiffs did not have a right of rescission.³⁶ Furthermore, because the Roccas had not taken steps to rescind the settlement agreement before Unarco's bankruptcy intervened,³⁷ the majority found the plaintiffs to be in the same

35. *Rocco*, 754 F.2d at 116 n.7 (citing 11 U.S.C. § 365 (1982)). Section 365 of the Bankruptcy Code provides in pertinent part:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee . . . may assume or reject any executory contract. . . .

(b)(1) If there has been a default in an executory contract . . . the trustee may not assume such contract . . . unless, at the time of assumption of such contract . . . the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate . . . for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract. . . .

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(e)(1) Notwithstanding a provision in an executory contract . . . or in applicable law, an executory contract . . . of the debtor may not be terminated or modified, and any right or obligation under such contract . . . may not be terminated or modified, at any time after commencement of the case solely because of a provision in such contract . . . that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title. . . .

11 U.S.C. § 365 (1982 & Supp. III 1985).

36. *Rocco*, 754 F.2d at 116-17.

37. *Id.* The court noted its dissatisfaction with the plaintiffs' legal course of action, suggesting that the plaintiffs "at least should have applied to the bankruptcy court for modification or rescission of their contract with Unarco." *Id.* at 117. The court of appeals decision indicates that the plaintiffs had not commenced separate action against Unarco in bankruptcy court at the time of their judgment against Johns-Manville and Pittsburgh Corning. *Id.* at 117. If the Roccas had attempted rescission or enforcement of their settlement agreement with Unarco, they would have brought such an action in the bankruptcy court, because the bankruptcy courts, as adjuncts of the federal district courts, are granted original and exclusive jurisdiction over all matters and proceedings in bankruptcy cases. *See* 28 U.S.C. § 151 (Supp. III 1985) (bankruptcy judges shall constitute a unit of the district court to be known as the bankruptcy court); 28 U.S.C. § 157 (Supp. III 1985) (district court may provide that cases arising under title 11 be referred to bankruptcy judges for the district, bankruptcy judges thus empowered to hear cases and core proceedings arising under title 11); 28 U.S.C. § 1334 (Supp. III 1985) (district court has original and exclusive jurisdiction of all bankruptcy cases, and original but not exclusive jurisdiction of all civil proceedings arising in or related to bankruptcy cases).

It is submitted, however, that the plaintiffs' failure to contest the release in

position as any other unsecured creditor forced to seek payment from a bankrupt.³⁸ Finally, the court noted that to allow the plaintiffs to rescind their release of Unarco would unduly prejudice Unarco's other creditors because the result would be a contribution judgment in Johns-Manville's and Pittsburgh Corning's favor for more than \$50,000, instead of Unarco's obligation to pay the plaintiffs \$15,000 under the release.³⁹

Dissenting from the court's decision, Judge Gibbons stated that the Pennsylvania Supreme Court would not, at the Roccas' expense, allow Johns-Manville and Pittsburgh Corning to escape the risk of Unarco's insolvency.⁴⁰ Judge Gibbons acknowledged that Pennsylvania law pro-

bankruptcy court would not alone preclude the Third Circuit from reaching the issue of the legal consequence of Unarco's bankruptcy on the release and, consequently, plaintiffs' ability to disregard the release and proceed against Johns-Manville and Pittsburgh Corning for Unarco's share of liability. The district court's consideration of the effect of the plaintiffs' release of Unarco within the context of the plaintiffs' suit against Johns-Manville and Pittsburgh Corning gave the Third Circuit jurisdiction to review this determination as a matter of law. See 28 U.S.C. § 1291 (Supp. III 1985) (court of appeals with jurisdiction over appeals from all final decisions of district courts); C. WRIGHT, LAW OF FEDERAL COURTS § 101, at 697 (4th ed. 1983) (discussing review of district court decisions by courts of appeals).

It is further submitted that the decision by the Third Circuit on the validity of the release would have no collateral estoppel effect on Unarco because Unarco was not a party to the Third Circuit's decision regarding this issue. See *id.* § 100A at 682-85 (non-parties to action are not bound by previously litigated issue in subsequent action); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (previously litigated issue essential to judgment is conclusive in subsequent action between parties).

38. *Rocco*, 754 F.2d at 117. For a discussion of the plaintiffs' status as an unsecured creditor, see *supra* note 15 and accompanying text.

39. *Rocco*, 754 F.2d at 117. In this action eight defendants were adjudicated joint tortfeasors (i.e., Johns-Manville, Pittsburgh Corning, Unarco, Celotex Corp., Eagle-Picher Industries, Fibreboard Corp., Garlock, Inc., H.K. Porter Co.), and one was conceded a joint tortfeasor by the terms of its release (i.e., Owens Corning Fiberglass). *Id.* at 113. If the plaintiffs were allowed to rescind their release, Johns-Manville and Pittsburgh Corning, as the nonsettling joint tortfeasors, would be forced to pay Unarco's 1/9 share of the judgment. *Id.* at 116. Because the district court awarded John Rocco \$500,000 and his wife, Antoinette, \$50,000 in damages, this 1/9 share would be in excess of \$50,000. *Id.* The court noted, however, that the precise monetary judgment awarded the plaintiffs against Johns-Manville and Pittsburgh Corning could not be determined until the plaintiffs' claims against the severed defendant, Keene Corp., were adjudicated. *Id.* at 119. For a discussion of the severed claim against Keene Corp., see *supra* note 9. If Keene Corp. was adjudicated a joint tortfeasor, each tortfeasor's pro rata share would be 1/10 of the actual judgment. *Id.*

40. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting). In determining a substantive state law question, a federal court looks first to enactments of the state legislature and to decisions of the state's highest court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). If none exist, a federal court must apply what it finds to be the state law after considering and giving proper regard to relevant rulings of the state's lower courts. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). In its determination of state law, a federal court considers all the data available to the highest state court in light of current legal trends and policies of

vides the plaintiffs with two options in the event of such a default by a settling defendant: to sue to enforce the settlement agreement or to sue on the underlying cause of action.⁴¹ According to Judge Gibbons, the fact that Unarco's default occurred because bankruptcy intervened was irrelevant and, therefore, had no effect on the plaintiffs' contract rights.⁴² Moreover, Judge Gibbons noted that no provision in the Bankruptcy Code preempts the plaintiffs' option to disregard Unarco's breach of the settlement agreement.⁴³ Rejecting the argument that Johns-Manville and Pittsburgh Corning would be unduly prejudiced if the release was not applied to reduce the plaintiffs' verdict against them,⁴⁴ Judge Gibbons stated that Johns-Manville and Pittsburgh Corning would still have a cause of action against Unarco for contribution.⁴⁵ Alternatively, Judge Gibbons emphasized that each joint tortfeasor is liable for the entire judgment without regard to its ability to collect contribution from other joint tortfeasors.⁴⁶ Thus, Judge Gibbons maintained that the risk of Unarco's bankruptcy should rest on the other joint tortfeasors, not on the plaintiffs, and, therefore, should not prevent the Rocco from recovering in full from Johns-Manville and Pittsburgh Corning.⁴⁷

the particular state. See *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). See generally C. WRIGHT, *supra* note 37, § 58, at 370-77 (1983) (discussing federal court's determination of state law).

41. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting). For a discussion of Pennsylvania law allowing plaintiff such an option, see *supra* note 4 and accompanying text.

42. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting).

43. *Rocco*, 754 F.2d at 119-20 (Gibbons, J., dissenting). Judge Gibbons argued that § 365 of the Bankruptcy Code did not apply to the case and that even under § 365(b)(1), a trustee could not assume an executory contract until the default was cured, compensation paid, or adequate assurances provided. *Id.* (citing 11 U.S.C. § 365 (1982)). For the pertinent provisions of § 365, see *supra* note 35 and accompanying text.

44. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting). Judge Gibbons did not address the majority's argument that to allow the plaintiffs to rescind the release would unduly prejudice Unarco's creditors. *Id.* at 119-20. For a discussion of the majority's argument, see *supra* note 39 and accompanying text.

45. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting). Judge Gibbons observed, however, that any action for contribution would be stayed under the Bankruptcy Code. *Id.* It is submitted, though, that should a court elect to follow the decision of the United States Court of Appeals for the Third Circuit in *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied sub. nom.*, *Frenville Co., Inc. v. Avellino & Bienes*, 105 S. Ct. 911 (1985), the action for contribution would not be subject to the automatic stay. For a discussion of the potential applicability of the automatic stay to actions for contribution, see *supra* note 6.

46. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting); accord W. PROSSER & R. KEETON, *supra* note 1, § 47, at 327 (each joint tortfeasor is liable for entire judgment and plaintiff may proceed against one or all).

47. *Rocco*, 754 F.2d at 119 (Gibbons, J., dissenting). Judge Gibbons stated that if Unarco's bankruptcy had occurred prior to settlement, or after a judgment had been entered against Unarco, the plaintiffs would have been entitled

It is submitted that the Third Circuit in *Rocco*⁴⁸ was correct in concluding that filing for chapter 11 is not a breach of contract authorizing the plaintiffs to rescind their release.⁴⁹ In so holding, however, the court disregarded an alternative analysis⁵⁰ which would have allowed the plaintiffs to recover in full, while placing the risk of Unarco's bankruptcy⁵¹ on the nonsettling joint tortfeasors and still complying with the strictures of the Bankruptcy Code. The Third Circuit's decision effectively forecloses a plaintiff's recovery of one tortfeasor's share of liability when that tortfeasor files for bankruptcy after executing a settlement agreement.⁵² By demanding immediate payment for the execution of their releases, however, plaintiffs who enter settlement agreements can avoid the fate of the plaintiffs in *Rocco*.⁵³

In arriving at its decision in *Rocco*, the Third Circuit cited no cases in support of its conclusion that Unarco's filing of a chapter 11 petition did not give the plaintiffs the right to rescind.⁵⁴ Rather, the court considered only the effect of the release under section 365 of the Bankruptcy Code should the release be construed as an executory contract.⁵⁵

to proceed against Johns-Manville and Pittsburgh Corning on a theory of joint and several liability. *Id.*

48. For a discussion of the facts of *Rocco*, see *supra* notes 9-25 and accompanying text.

49. *Rocco*, 754 F.2d at 116-17. For a discussion of the majority's decision that Unarco's filing in chapter 11 was not a breach of the release, see *supra* notes 32-39 and accompanying text.

50. For a discussion of an alternative analysis which the Third Circuit could have undertaken and a possible reason for their failure to do so, see *infra* notes 65-73 and accompanying text.

51. For a discussion of the allocation of risk when one joint tortfeasor files for bankruptcy, see *supra* note 6 and accompanying text.

52. For a discussion of the effect of a release on the plaintiff when the released joint tortfeasor files for bankruptcy, see *supra* notes 8, 31-32 and accompanying text.

53. It is possible, however, that a plaintiff who succeeds in receiving immediate payment from a defendant who subsequently files for bankruptcy may, nonetheless, risk having the payment to him avoided by a trustee in bankruptcy. Section 547 of the Bankruptcy Code empowers a trustee to avoid any preferential transfer to a creditor by a debtor on account of an antecedent debt which is made on or within ninety days before the filing of the debtor's petition in bankruptcy and which enables the creditor to receive more than he would through the bankruptcy distribution. 11 U.S.C. § 547 (1982 & Supp. III 1985) (preferences). Should a settlement payment be made to a plaintiff within ninety days prior to the defendant's filing of its bankruptcy petition, the payment, it is submitted, may be avoided by the trustee in bankruptcy.

54. *Rocco*, 754 F.2d at 116-17. For a discussion of the court's holding that a joint tortfeasor's filing of a bankruptcy petition is not a breach of a release authorizing the plaintiff's rescission, see *supra* notes 32-35 and accompanying text.

55. *Rocco*, 754 F.2d at 116 n.7. The Third Circuit noted that construction of the release as an executory contract would not change its determination that the plaintiffs did not have a right of rescission because section 365 provides that entry into bankruptcy does not act as a breach of an executory contract. *Id.* For the text of section 365, see *supra* note 35. For a further discussion of the operation of section 365, see *infra* note 57.

While section 365 might appear dispositive of the Roccas' case, the Third Circuit itself acknowledged that, for bankruptcy purposes, the release could not be construed as an executory contract because the Roccas' claim against Unarco had been discharged.⁵⁶

It is submitted that the proper justification for the Third Circuit's decision is to be found not in the specific language of section 365 but, rather, should be inferred from the rationale of section 365,⁵⁷ the Code's general approach to bankruptcy termination clauses,⁵⁸ and the

56. *Rocco*, 754 F.2d at 116, n.7.

57. Under § 365 of the Bankruptcy Code, a debtor has the option of terminating those unperformed executory contracts that would hamper a debtor's recovery. See 11 U.S.C. § 365(a) (1982 & Supp. III 1985). In a chapter 11 reorganization, such an option facilitates orderly rehabilitation by enabling a debtor to affirm only those contracts that will assist a company's attempt to once again become viable. See, e.g., *In re American National Trust*, 426 F.2d 1059, 1064 (7th Cir. 1970) (if executory contract is determined to be detrimental or onerous to corporation, its rejection should be authorized); *Local Joint Executive Board v. Hotel Circle*, 419 F. Supp. 778, 786-87 (S.D. Cal. 1976) (provision of Bankruptcy Act authorizing rejection of executory contract was designed to facilitate reorganization by relieving debtor of contractual obligations that unduly burden estate), *aff'd*, 613 F.2d 210 (9th Cir. 1980).

In a chapter 11 proceeding, an executory contract or unexpired lease may be rejected at any time before confirmation of the reorganizational plan. 11 U.S.C. § 365(d)(2) (1982 & Supp. III 1985). Rejection by a debtor or his trustee is subject to court approval. See, e.g., *In re Parrot Packing Co.*, 42 Bankr. 323, 330-31 (Bankr. N.D. Ind. 1983) (bankruptcy court is empowered to discharge certain obligations, including executory contracts, in favor of debtor so that he can function without unnecessary burdens); *In re Oxford Royal Mushroom Products, Inc.*, 45 Bankr. 792, 793 (Bankr. E.D. Pa. 1985) (subject to court approval, bankruptcy trustee may assume or reject an executory contract).

A "business judgment test" is usually employed in determining whether to reject an executory contract. See, e.g., *In re Stable Mews Associates*, 41 Bankr. 594, 596 (Bankr. S.D.N.Y. 1984) (to reject executory contract, trustee need only satisfy "business judgment test," demonstrating that rejection will benefit the estate); *In re Condominium Ass'n of Plaza Towers South*, 43 Bankr. 18, 21-22 (Bankr. S.D. Fla. 1984) (to reject an executory contract or unexpired lease, "business judgment test" requires showing that rejection will benefit the estate).

Rejection of an executory contract or unexpired lease by the debtor constitutes a breach of the contract or lease. 11 U.S.C. § 365(g) (1982 & Supp. III 1985). In the event an executory contract or lease is rejected, the other party to the agreement can file a claim for any damages resulting from such rejection. 11 U.S.C. § 501(d) (1982 & Supp. III 1985).

58. Under the Bankruptcy Act, the statute in effect immediately prior to the enactment of the Bankruptcy Code, a valid and enforceable clause in a contract or lease could provide for termination if one party filed a bankruptcy petition. See Bankruptcy Act § 70(b), 52 Stat. 881, *repealed by* Act of Nov. 6, 1978, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Section 70(b) of Bankruptcy Act, recognizing bankruptcy termination clauses in leases as valid and enforceable, provided in pertinent part as follows: [A]n express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. Bankruptcy Act at § 70(b); see e.g., *Finn v. Meighan*, 325 U.S. 300, 302 (1945) (express covenant providing for termination of lease upon approval of reorganization petition is valid and enforceable under the Bankruptcy Act); *In re Triangle Laboratories*,

663 F.2d 463, 468-69 (3d Cir. 1981) (where no compelling reason to the contrary, bankruptcy termination clauses should be given effect under § 70(b) of Bankruptcy Act); *In re D.H. Overmyer, Co.*, 383 F. Supp. 21 (S.D.N.Y. 1974) (affirming termination of leases on bankruptcy of lessees), *aff'd*, 510 F.2d 329 (2d Cir. 1975); *In re Hucknall*, 2 Bankr. 382 (Bankr. W.D.N.Y. 1980) (termination allowed despite extensive renovation of leased premises by debtor where reorganization plan not capable of performance); *In re Hough Mfg. Corp.*, 1 Bankr. 69 (Bankr. W.D. Wis. 1979) (termination under § 70(b) allowed where reorganization would not be frustrated by termination).

Many courts sought to limit the applicability of these ipso facto clauses, thereby avoiding forfeitures and allowing the processes of bankruptcy to be effectively implemented. *See Weaver v. Hutson*, 459 F.2d 741 (4th Cir.) (where landlords had accepted rents of debtor after invocation of bankruptcy termination clause, clause would not be enforced where to do so would result in complete emasculation of reorganization), *cert. denied*, 409 U.S. 957 (1972); *In re Imperial "400" National, Inc.*, 429 F.2d 680 (3d Cir. 1970) (appointment of trustee in reorganization did not constitute breach of express covenant authorizing termination of lease on lessee's bankruptcy); *In re Fleetwood Motel Corp.*, 335 F.2d 857 (3d Cir. 1964) (forfeiture provision of lease would not be enforced in reorganization proceedings where public had invested over one-half million dollars in debtor corporation); *In re M & M Transp. Co.*, 437 F. Supp. 821 (S.D.N.Y. 1977) (termination of lease would preclude successful rehabilitation of company); *In re Delta Motor Hotel*, 10 Bankr. 585 (Bankr. N.D.N.Y. 1981) (forfeiture would deprive debtor of primary asset required for reorganization); *see also* 2 L. COLLIER, COLLIER'S BANKRUPTCY MANUAL ¶ 363.07 (3d ed. 1985); Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 MINN. L. REV. 341 (1980). The current Bankruptcy Code, although not declaring such clauses void, provides that they are not enforceable while the bankruptcy case is open, thus indicating the Code's general disinclination to enforce bankruptcy termination clauses and to allow a party to renounce his contract upon the other contracting party's entry into bankruptcy. *See* 11 U.S.C. § 365(e)(1) (1982); *see also* H. REP. NO. 989, 95th Cong., 1st Sess. 59, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6304. The legislative history to section 365(e) explains that this subsection does not limit the application of an ipso facto or bankruptcy clause to a new insolvency or receivership after the bankruptcy case is closed. That is, the clause is not invalidated in toto, but merely made inapplicable during the case for the purposes of disposition [sic] of the executory contract or unexpired lease.

Id. at 6305. Such a clause would, therefore, be enforceable in the event of a subsequent insolvency case or receivership after the bankruptcy or reorganization case has been closed. *See* H. MILLER & M. COOK, A PRACTICAL GUIDE TO THE BANKRUPTCY REFORM ACT 172.9 (Supp. 1984); *see also* 2 L. COLLIER, *supra*, ¶ 363.07.

The Code's disinclination to enforce bankruptcy termination clauses is further illustrated in section 363(1) which authorizes a trustee to use, sell, or lease property of a bankrupt regardless of a contract provision which purports to effect a forfeiture of such property by a bankrupt on the commencement of bankruptcy proceedings. 11 U.S.C. § 363(1) (1982 & Supp. III 1985). Section 541(c)(1)(B) further states that an interest of the debtor becomes property of the estate notwithstanding any provision

that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

11 U.S.C. § 541(c)(1)(B) (Supp. III 1985). Section 365 additionally provides

policies underlying the Bankruptcy Code itself.⁵⁹ While no provision of the Bankruptcy Code explicitly states that entry into bankruptcy is not a breach of contract,⁶⁰ to allow a plaintiff to rescind a contract with a defendant solely on the basis of a chapter 11 filing would undermine the purpose of chapter 11: the successful rehabilitation of a bankrupt corporation through reorganization.⁶¹

Thus, given the Bankruptcy Code's tendency to disfavor terminations of contracts on commencement of bankruptcy proceedings,⁶² it is submitted that the Third Circuit was correct in holding that the rule allowing a plaintiff to ignore a breached settlement agreement and to proceed against nonsettling defendants⁶³ is inapplicable when the sole reason for the alleged breach is the filing of a chapter 11 reorganization petition.⁶⁴ It is suggested, however, that the Third Circuit's analysis should have addressed the possibility that a breach of the release had

that commencement of a chapter 11 reorganization itself is not a breach of an executory contract. 11 U.S.C. § 365(b)(2) (1982 & Supp. III 1985). For the text of section 365(b)(2), see *supra* note 35. It is submitted that these provisions of the Bankruptcy Code recognize that it is often to the benefit of the debtor to maintain certain contractual relationships without having such relationships terminated on bankruptcy. See 2 L. COLLIER, *supra*, ¶ 365.02[1]; see also S. REP. NO. 989, 95th Cong., 1st Sess. 59, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5845. In explaining the Code's reluctance to enforce bankruptcy termination clauses, the legislative history to section 365(e) states:

These [bankruptcy termination] clauses, protected under present law, automatically terminate the contract or lease, or permit the other contracting party to terminate the contract or lease in the event of bankruptcy. *This frequently hampers rehabilitation efforts.* If the trustee may assume or assign the contract . . . the contract or lease may be utilized to assist in the debtor's rehabilitation. . . .

Id. (emphasis added).

59. For a discussion of the policies underlying the Bankruptcy Code and chapter 11 in particular, see *supra* notes 5 & 15.

60. It is noted, however, that the Supreme Court has held that the initiation of bankruptcy proceedings is an anticipatory breach of an executory contract constituting the basis for a provable claim. *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433 (1937). Such a rule was adopted not as a logical consequence of the doctrine of anticipatory breach, but as a policy decision to facilitate allowance of unmatured claims in bankruptcy proceedings. J. CALAMARI AND J. PERILLO, *supra* note 3, § 12-8, at 463. Since the amended Bankruptcy Code explicitly allows unmatured claims, it is questionable whether the Supreme Court today would follow this holding. See 11 U.S.C. § 101(4) (1982) (claim is right to payment whether or not such right is unmatured). Moreover, the specific language of section 365 mandates that filing in bankruptcy is not a breach of an executory contract. For the pertinent provision of section 365, see *supra* note 35.

61. For a discussion of the purpose behind chapter 11, see *supra* note 15.

62. For a discussion of the Code's tendency to disfavor termination of contracts on the commencement of bankruptcy proceedings, see *supra* note 58.

63. For a discussion of Pennsylvania law concerning a plaintiff's options upon the settling defendant's default on a settlement agreement, see *supra* note 4.

64. For a discussion of the majority's decision preventing plaintiffs who execute a release in favor of a defendant who later files for bankruptcy from pro-

occurred by reason of Unarco's failure to pay the Roccas the agreed settlement prior to its filing for reorganization.⁶⁵ It is thus submitted that while the Third Circuit was correct in its decision to treat the Roccas as ordinary creditors on the basis of their allegation of Unarco's bankruptcy as breach, such a decision cannot be justified if the Roccas had established a legitimate ground under state law to rescind their release prior to Unarco's bankruptcy.⁶⁶

The Third Circuit either did not know or did not disclose the nature of the settlement agreement between the Roccas and Unarco.⁶⁷ It is suggested that the settlement agreement may have been breached before Unarco filed for reorganization. If the release was contingent upon Unarco's payment of the agreed consideration,⁶⁸ Unarco's failure to pay would have constituted a material breach of the release,⁶⁹ giving

ceeding against nonsettling joint tortfeasors, see *supra* notes 31-39 and accompanying text.

65. The majority opinion indicated that if the Roccas had asserted breach of contract for nonpayment of the agreed settlement before Unarco filed for reorganization they would have been entitled to proceed against Johns-Manville and Pittsburgh Corning for Unarco's pro rata share, without reduction being made under the Joint Tortfeasors Act for Unarco's release. See *Rocco*, 754 F.2d at 116. The majority stated that the plaintiffs' argument that they should be entitled to disregard the release "is not applicable here where plaintiffs have not argued that the breach occurred *before* the chapter 11 petition was filed. . . ." *Id.* (emphasis added). The plaintiffs' error, in the majority's opinion, was their failure to assert a breach of the settlement agreement before Unarco filed its chapter 11 petition. See *id.* The majority, however, did not address the possibility of nonpayment before bankruptcy as breach. *Id.* at 116-17.

66. For a discussion of possible justification for plaintiffs' rescission of the release given to Unarco, see *infra* notes 68-72 and accompanying text.

67. *Rocco*, 754 F.2d at 116-17. The Third Circuit's decision quoted no language from Unarco's release. *Id.* The only language quoted by the Third Circuit was from releases given by the Roccas to other settling defendants with regard to reduction of the plaintiffs' judgment on the adjudication of these defendants as joint tortfeasors. *Id.* at 115 n.6.

68. It is submitted that releases, as executed transactions, are necessarily conditional in nature: what the plaintiff bargains for in discharging the settling defendant is immediate compensation for his injury, rather than a promise by the settling defendant to pay in the future. Thus the discharge effected by the release is conditional on payment. See J. MURRAY, *supra* note 4, at 526 (release, as an executed transaction is not promissory in character).

69. See RESTATEMENT OF CONTRACTS §§ 274, 397 (1969). To determine whether one party's failure to perform is a material breach of contract, the original *Restatement of Contracts* indicated that if the failure of one party to perform or his delay in performing was so material that it would result in the other party's not receiving substantially what he bargained for, the duty of the injured party would be discharged and he would be wholly excused from carrying out his undertaking. See *id.* § 274 (failure of consideration as discharge of duty), § 397 (material breach or non-performance of one party as discharge of duty of other). The current *Restatement* emphasizes that a material failure to perform operates as the nonoccurrence of a condition that may either temporarily prevent the activation of the other party's duty to perform or, when the condition can no longer occur, discharge the duty entirely. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979) (effect on other party's duties of failure to render performance).

the Roccas the option, before bankruptcy was actually initiated, of proceeding against Johns-Manville and Pittsburgh Corning for Unarco's pro rata share.⁷⁰ With the release already rescinded because of Unarco's breach, Unarco's subsequent filing for bankruptcy would have had no effect on the plaintiffs' rights against the other joint tortfeasors.⁷¹ The Roccas, thus, would have been entitled to proceed against Johns-Manville and Pittsburgh Corning as joint tortfeasors to recover Unarco's pro rata share, and no reduction in the judgment would be made under the Joint Tortfeasors Act as a result of the release.⁷²

Proceeding on the basis that filing for reorganization is not a breach of contract, the Third Circuit did not undertake this alternative analysis.⁷³ The court's decision in *Rocco*, therefore, while legally correct under the Bankruptcy Code, denies the plaintiffs their possible rightful recovery against Johns-Manville and Pittsburgh Corning under the Pennsylvania Joint Tortfeasors Act.⁷⁴ In placing the risk of Unarco's bankruptcy on the plaintiffs rather than the defendants, Johns-Manville and Pittsburgh Corning, the Third Circuit has reached a result that is more equitable among tortfeasors than fair to the injured plaintiff.⁷⁵

The current *Restatement* also indicates certain circumstances that are significant in determining whether a breach is material:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. § 241; see also J. MURRAY, *supra* note 4, § 167, at 322 (comparing the original and current *Restatement's* approach to material breach).

70. For a discussion of a plaintiff's ability in Pennsylvania to disregard a breached settlement, see *supra* note 4 and accompanying text.

71. For a discussion of a plaintiff's ability to proceed against one or all joint tortfeasors, see *supra* note 6 and accompanying text.

72. For a discussion of the reduction in the plaintiffs' judgment under the Joint Tortfeasors Act, see *supra* note 23 and accompanying text.

73. It is submitted that the Third Circuit's failure to consider this alternative contract law analysis may be attributed either to the failure of the plaintiffs' attorney to fully raise the argument or to the Third Circuit's dissatisfaction with the plaintiffs' failure to promptly contest the validity of the release in bankruptcy court. For a discussion of the majority's dissatisfaction with the plaintiffs' failure to timely contest the validity of the release, see *supra* note 37 and accompanying text.

74. For a discussion of the plaintiffs' ability to recover against Johns-Manville and Pittsburgh Corning for Unarco's pro rata share, see *supra* note 26-39 and accompanying text.

75. As a result of the Third Circuit's decision, Johns-Manville and Pittsburgh Corning are entitled to a reduction of the judgment against them to the

Given the Third Circuit's decision in *Rocco*, plaintiffs should execute releases only in exchange for immediate payment of the agreed consideration at the time of settlement.⁷⁶ Otherwise, plaintiffs risk having to seek payment from a bankrupt.

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extent of Unarco's pro rata share, thus avoiding a contribution claim by Johns-Manville and Pittsburgh Corning against Unarco. See *Rocco*, 754 F.2d at 117. For a discussion of Johns-Manville's and Pittsburgh Corning's ability to seek contribution from Unarco, see *supra* note 6 and accompanying text.

The plaintiffs, on the other hand, have received no compensation from Unarco for the execution of the release in its favor and must face the prospect of recovering, through Unarco's plan of reorganization, an amount less than that agreed on in the release. For a discussion of the plaintiffs' recovery as an unsecured creditor, see *supra* note 15.

76. As noted previously, a plaintiff may still risk having a settlement payment avoided as a preference by a trustee in bankruptcy. For a discussion of the ability of a trustee to avoid certain transfers of a debtor, see *supra* note 53.

