"EVEN IF A PARTY HAS A CHANGE OF HEART": A FRAMEWORK FOR ENFORCEMENT OF COURTHOUSE-STEPS SETTLEMENTS IN CASES AND PROCEEDINGS IN THE TEXAS BANKRUPTCY COURTS

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I. THE PROBLEM OF ANNOUNCED SETTLEMENTS IN BANKRUPTCY MATTERS

A. A Familiar Scenario

It is a situation with which experienced bankruptcy lawyers are well acquainted. The adversary proceeding was moving toward a trial date, and the lawyers on both sides sensed risk. The Chapter 7 bankruptcy trustee had sued multiple business entities for prepetition "wrong-doing in various commercial transactions" involving the debtor.[1] At the pretrial hearing on pending motions, the trustee-plaintiff and all of his defendants—all parties being "concerned that the adversary trial was scheduled"—collectively informed the bankruptcy judge "that they wished to negotiate," and "[f]ollowing lengthy negotiations, court reconvened and the parties announced that they had reached a 'global settlement' of all issues [among] them."[2] This is a recurring scenario in the course of both adversary proceedings[3] and contested matters[4] flowing through bankruptcy courts.[5] In open court, the parties then joined together to inform the court:

> The terms of the settlement are that each—the trustee and Mr. Barnett, personally, will give releases, and there will be mutual releases on the part of all defendants with respect to the estate and Mr. Barnett. The consideration for these mutual releases would be $250,000 in cash to be deposited in Mr. Jones' trust account within 30 days. To be paid upon approval of the settlement, $220,000 to the estate and $30,000 directly to Mr. Randy Barnett.[6]

The lawyers departed the courthouse.[7] The trustee's counsel promptly prepared and filed a "Notice of Intent to Compromise Controversy" and served it upon parties in interest.[8] The notice included this additional language:

> Pending approval of this compromise, and no later than August 29, 1993, Defendant's [sic] shall deposit the sum of $250,000.00 in escrow . . . . Defendants [sic] failure to deposit the above funds by the due date shall

1. Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 230 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., Inc. (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994).

2. Holder v. Gerant Indus., Inc. (*In re* Omni Video, Inc.), 165 B.R. 22, 24 (Bankr. N.D. Tex. 1994) *aff'd sub nom*. Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995).

3. *See* FED. R. BANKR. P. 7001.

4. *See* FED. R. BANKR. P. 9014.

5. *See, e.g.*, *In re Omni Video*, 60 F.3d at 230.

6. *Id.* at 231.

7. *Id.*

8. *Id.*

> terminate this pending compromise automatically without further order of the Court and the case will be fully reinstated, including discovery.[9]

Afterward, that last-mentioned eventuality in fact occurred; the funds the defendants expected to use to post the settlement amount did not become available.[10]

All defendants' counsel then appeared at the hearing scheduled on the trustee's notice, apparently expecting a resumption of the pretrial hearing and the setting of a trial date.[11] To defendants' surprise,[12] the trustee's attorney made "an oral motion for a judgment to enforce the settlement."[13] In response, the defendants took the position that there was no settlement because a written settlement agreement "was never executed" and "the money was not funded."[14] But the bankruptcy court immediately entered judgment against the defendants for the $250,000 amount.[15] On rehearing, the defendants argued that the trustee's settlement notice clearly stated that if the money was not posted, the matter would proceed to trial.[16] But the bankruptcy judge denied the defendant's request[17] and confirmed its enforcement of the deal solely based on the terms that had been announced: "An agreement announced on the record becomes binding *even if a party has a change of heart* after he agreed to its terms," the bankruptcy court wrote.[18]

On appeal, the defendants contended "that the announcement in the record did not reflect all the terms of the agreement" and "that the notice should be considered in conjunction with the announcement to determine the terms of the settlement entered by the parties."[19] In its *In re Omni Video, Inc.* decision of twenty-five years ago, the Fifth Circuit Court of Appeals rejected those arguments, affirming the bankruptcy court's judgment and holding that "there is an enforceable contract between the litigants" because:

> [A]ll of the interested parties announced to the bankruptcy court that they had reached a settlement. The trustee then read the terms of the settlement into the record and each party stated that those were the terms agreed to by

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9. *Id.* (alteration in original) (emphasis omitted).
10. *Id.*
11. *Id.*
12. *Id.* at 233 ("[D]efendants' counsel was surprised by the trustee's oral motion for judgment on the settlement.").
13. *Id.* at 231.
14. Holder v. Gerant Indus., Inc. (*In re* Omni Video, Inc.), 165 B.R. 22, 25 (Bankr. N.D. Tex. 1994), *aff'd sub nom.* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995).
15. *In re Omni Video*, 60 F.3d at 231.
16. *Holder*, 165 B.R. at 25.
17. *Id.* at 27.
18. *Id.* at 26 (emphasis added).
19. *In re Omni Video*, 60 F.3d at 232–33.

> all of the parties. This *formal announcement met the requirements of [Texas] Rule [of Civil Procedure] 11 and created a binding agreement*.[20]

The appellate court added: "If the summary of the settlement announced in court failed to include a term, the attorneys should have objected. They did not."[21] The bankruptcy court properly relied on the oral statements of the parties on the record.[22] The settlement was a binding contract whose terms were exactly as announced, not as augmented by the subsequent notice.[23]

B. A Definition of "Courthouse-Steps Settlement" in Bankruptcy Practice

In a landmark decision of eighty years ago, the Supreme Court remarked that settlements are "a normal part of the process of reorganization" in bankruptcy courts.[24] Today as then, settlements are entirely common in, and indeed are characteristic of, reorganization proceedings and cases not only under the business restructuring provisions of Chapter 11 of the Bankruptcy Code but also in all types of bankruptcy cases and related adversary proceedings.[25] A bankruptcy settlement may be reached in one of two ways.[26]

The first is what this Article will refer to as a "conventional settlement:" a settlement agreement reached after substantial, even lengthy, negotiations of the relevant parties' counsel that culminates in the preparation of a full, written settlement agreement or a settlement offer that has been accepted;[27] occasionally together with an agreement about the form of settlement-approval motion and orders to effectuate the settlement[28] to be filed, almost always but not necessarily by the debtor-party,[29] and usually

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20. *Id.* at 232 (emphasis added).

21. *Id.* at 233.

22. *Id.*

23. *Id.* at 232.

24. Case v. L.A. Lumber Prods. Co., 308 U. S. 106, 130 (1939) ("Settlement of . . . conflicting claims to the res in the possession of the court is a normal part of the process of reorganization.").

25. Myers v. Martin (*In re* Martin), 91 F.3d 389, 393 (3d Cir. 1996) (alteration in original) (noting that to reduce the time and costs of litigation, "[c]ompromises are favored in bankruptcy"); *see infra* Section I.C (providing examples of the broad range of disputes and issues susceptible to settlement in a bankruptcy case).

26. *See In re* Energy Future Holdings Corp., 648 Fed. App'x 277, 281 (3d Cir. 2016) (exemplifying the second type of settlement).

27. Del. Trust Co. v. Energy Future Intermediate Holdings (*In re* Energy Future Holding Corp.), 527 B.R. 157 (Bankr. D. Del. 2015), *aff'd*, 648 Fed. App'x 277, 281 (3d Cir. 2016) ("'[T]ender offer' . . . was simply a means to convey a settlement offer to certain creditors . . . ."). In one case, an approvable offer to "settle disputes" was transmitted to "certain creditors" by the "mechanism" of a "tender offer" that the court found "equivalent to a detailed settlement memorandum." *Id.*

28. *See, e.g.*, N.D. TEX. LOC. BANKR. R. 9019-1(c). In some instances, the written settlement agreement is signed by the parties or by their counsel, and other times the written agreement is unsigned but its form is attached to an agreed notice or motion as an exhibit. *See id.* Some local rules require that forms of orders to implement the settlement also be submitted. *Id.*

29. *See infra* note 179 and accompanying text (noting that in rare circumstances, a nondebtor party may file for settlement approval).

reciting Bankruptcy Rule 9019(a); plus a notice of some sort to be served so as to apprise interested parties of the terms and conditions of the deal and to explain the rationale for compromise in the circumstances, as well as to afford an opportunity for objections to the bankruptcy court.[30]

As typified in *Omni Video*, the second manner in which a bankruptcy settlement can be reached is as a "courthouse-steps settlement."[31] A courthouse-steps settlement is a settlement agreement reached immediately before—or even during, but generally not after[32]—a scheduled hearing before the bankruptcy judge about a matter of consequence for the bankruptcy estate, whether in a contested matter in a bankruptcy case or in an adversary proceeding, the terms of which the parties' lawyers orally announce immediately to the judge "in open court," specifically with an official court reporter or court recording officer[33] capturing the exact words spoken by the parties' lawyers, including most specifically their expressions of assent on behalf of their respective clients, together with any directives or comments of the judge.[34]

The courthouse-steps settlement may include a term for prompt preparation of a full written agreement, which may possibly be specified as a condition to the deal.[35] If such a written agreement is indeed subsequently

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30. *See infra* Part II (discussing impetus for bankruptcy settlements).

31. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., Inc. (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994). The preeminent legal dictionary defines courthouse steps as "[t]he figurative location of settlement negotiations that occur shortly before trial commences, regardless of the literal location of the negotiations," and it provides this usage example: "[T]he parties settled the lawsuit on the courthouse steps." *Courthouse Steps*, BLACK'S LAW DICTIONARY 451 (11th ed. 2019). Moreover, the phrase "courthouse-steps settlement" has a well understood meaning both in federal case law and in legal literature. *See* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 118 (2d Cir. 2005). For instance, the Second Circuit Court of Appeals referred to parties having "struck a deal *at the courthouse steps*" in *Wal-Mart Stores, Inc*. *Id.* (emphasis added). The Ninth Circuit also noted that "the attorneys worked out a compromise '*on the courthouse steps*'" in *In re FPI/Agretech Securities Litigation*. Hayes v. Haushalter (*In re* FPI/Agretech Sec. Litig.), 105 F. 3d 469, 472 (9th Cir. 1997) (emphasis added). Moreover, commentators have used this phrase; for instance, one authority on settlements has observed that in certain bargaining scenarios, "the cases that . . . *settle*[] do so *on the courthouse steps*." Kathryn E. Spier, *A Note on Joint and Several Liability: Insolvency, Settlement, and Incentives*, 23 J. LEGAL STUD. 559, 564 n.9 (1994) (emphasis added). Other authors working in the employment-disputes arena have observed that if a case cannot be settled before hearings on motions, "there is always the *'courthouse steps' settlement* that is still very common." Hillary Jo Benham-Baker & Julia Campins, *Settlement and Alternative Dispute Resolution*, in EMPLOYEE LEAVE LAWS: COMPLIANCE AND LITIGATION, *2017 Update* § 8.3 at 8–10 (Matthew D. Mandelbaum, ed., 2017) (emphasis added).

32. Caesars Entm't Operating Co. v. Bokf (*In re* Caesars Entm't Operating Co.), 561 B.R. 441, 453 (Bankr. N.D. Ill. 2016) ("Cases that settle on the courthouse steps settle *on the way in* to the courthouse, *not on the way out*.") (emphasis added). Of course, it is possible for the parties to make a settlement after the close of a hearing and before the court makes a ruling, and similarly for matters that are on appeal but not yet decided on a final and nonappealable basis. *See* Ferreira v. Gray, Cary, Ware & Freidenrich, 104 Cal. Rptr. 2d 683, 684 (Cal. Ct. App. 2001) (considering a case that was settled after trial).

33. 28 U.S.C. § 753(b) (2011).

34. *See id.*

35. *See* Steve Mehta, *Is an Oral Settlement Agreement Enforceable?*, STEVE MEHTA MEDIATION OFFICES (May 16, 2016), www.stevemehta.com/oral-settlement-agreement-enforceable/.

executed by both parties, the deal becomes what this Article is calling a conventional settlement.[36] If an effort to document the announced deal fails, and assuming the announced terms constitute a contract, the settlement continues to be what this Article is terming a courthouse-steps settlement.[37]

The latter type of settlement, the courthouse-steps settlement, is the context for my analysis and proposal. Because *Omni Video* is a precedent of the Fifth Circuit that turns on Texas law, the focus here is on the courthouse-steps settlement in matters in the bankruptcy courts of the four judicial districts of Texas.

C. Difficulties Created by Default or Disavowal of Courthouse-Steps Settlements

From time to time,[38] after announcement of a courthouse-steps settlement, just as in *Omni Video*, a lawyer's client (or the officers or representatives of a business client) may determine that the client cannot, or no longer wishes to, fund the settlement amount or will suffer "the legal equivalent of buyer's remorse"[39] or some other regret about the deal.[40] Occasionally, a settling party will conclude afterward that in the shortness of time just before a hearing,[41] the lawyer pressured them to agree to the deal,[42]

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36. *See id.*

37. *See id.*

38. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements). Statistics about the incidence of courthouse-steps settlements in bankruptcy do not exist, but they occur frequently enough to have generated the body of reported cases adjudicating issues as discussed more particularly in Part III of this Article. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements). One commentator noted: "It is surprising how often parties or attorneys will agree to a settlement of pending litigation and then attempt to renege on the agreement." Neil P. Olack & Kristina M. Johnson, *Compelling Statement Agreements in Bankruptcy Cases: Holding Their Feet to the Fire*, 18 MISS. C. L. REV. 427, 431 (1998). In the personal experience of the author with over thirty-nine years of bankruptcy practice, courthouse-steps settlements occur on nearly a daily basis in the Texas bankruptcy courts. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

39. Powell v. Omnicom, 497 F.3d 124, 127 (2d Cir. 2007).

40. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 230–31 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., Inc. (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994). While the bankruptcy literature has not heretofore focused on the phenomena identified in this paragraph, legal commentators have touched on it in other contexts; for instance, a Canadian advocate of "collaborative law practice" has reported: "I have had a number of clients come into my office complaining about a *courthouse steps settlement* with other counsel, describing feelings of duress and undue pressure that pushed them into a settlement they later regretted." NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOG at 239–40 (2014) (emphasis added).

41. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 128 (1994). One commentator observed that "the proverbial last-minute, courthouse-steps settlement offer . . . . can allow little time for consideration or reflection before a reply is required." *Id.*

42. *See* Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 94 (2008). "It is commonly believed among experienced family lawyers that *'courthouse steps' settlement agreements* may be pressed upon reluctant clients by litigious family lawyers who recognize that no more money exists to pay the lawyer for taking the matter through trial." *Id.* (emphasis added).

that they did not understand the terms as they were announced, or that the lawyer failed to include in the announcement additional "understandings" or specific terms or clarifications[43] the client has subsequently come to think to be essential.[44] This predicament occurs both with clients who are creditors asserting claims against the estate or are defendants in litigation brought by debtors, and with clients who are themselves debtors.[45]

When a lawyer then follows the client's instruction to seek to change or else to repudiate a settlement for any reason of dissatisfaction or of inability or unwillingness to fund a payment to which the lawyer had announced assent to the judge, multiple difficulties can ensue both for the lawyer and for the tribunal.[46] For such a lawyer, the resulting problems require initial consideration of whether his words to the court have indeed bound the client to the terms announced in open court, which raises issues of whether the attorney had authorization to negotiate for and to agree to a deal on behalf of the client, thus implicating the rules of legal ethics and the law of contracts.[47] Other assessments may include the status of the matter at that moment under the bankruptcy procedural rules, bankruptcy settlement standards under relevant case law authority, notice to other parties, and the authority of the judge.[48] This situation places the unhappy client's lawyer in a difficult position, to say the least.

Moreover, an attempt to renege on a courthouse-steps settlement by a client also creates significant problems for the bankruptcy court's orderly and efficient administration of its dockets, management of the progress of its bankruptcy cases, and scheduling and conduct of hearings in contested matters and trials in adversary proceedings.[49] The court should ask the important questions of a lawyer's authority and of the substance and binding

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43. *See, e.g.*, Hyperion Found., Inc. v. Acad. Health Ctr., Inc. (*In re* Hyperion Found., Inc.), No. 08-51288-NPO, 2009 WL 3633878, at *4 (Bankr. S.D. Miss. Oct. 27, 2009).

44. *See* CAMERON, *supra* note 40, at 239–40. Although no surveys or other empirical studies can be found, in the author's experience consisting of over four decades of bankruptcy practice, it is more likely that a client will experience remorse, regret, or unhappiness after a courthouse-steps settlement than a conventional settlement because in the former circumstance the client will have had little opportunity to review, mull, and understand the exact terms—and the precise wordings—prior to the lawyers' announcement to the court; while in the latter instance, the client will have had a full chance to review and discuss with the lawyer the complete, written expression of the deal. *Id.* Additionally, a conventional settlement typically will contain an integration clause. *See, e.g.*, *Settlement Agreement and Release*, PRACTICAL LAW STANDARD DOCUMENT 2-503-1929 (2018).

45. *See* CAMERON, *supra* note 40, at 226.

46. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

47. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

48. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

49. Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 283 (2016) ("Today, bankruptcy judges appear to be significantly managerial. They frequently encourage settlements and to greater and lesser degrees scrutinize the merits of the requests made of them. An entire chapter of the Bankruptcy Code (chapter 3) is devoted to case 'administration,' which contemplates varying degrees of judicial management."); *see also* Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 581 (2015) (discussing judges roles in Chapter 11 reform).

nature of the deal announced. Other noteworthy impacts can include the shifting of positions before the court both by the settling parties and by other parties in interest as may be induced by the settlement and the future progress of the dynamic bankruptcy judicial process, in light of the deal of the settling parties, as to other issues and positions presented by or important to other parties.[50] Lesser but not inconsequential effects include inconvenience; due to a courthouse-steps settlement the judge may have—to the surprise of other parties—abruptly cancelled a hearing about to begin or already in progress, or rescheduled other matters for the future.[51]

D. The Need for a Framework to Assess the Enforceability of Courthouse-Steps Settlements

The text of the Bankruptcy Code is of limited assistance in addressing those difficulties. Only in one place does the Code even acknowledge settlements, obliquely mentioning "the settlement . . . of [a] claim or interest belonging to the debtor or to the estate" in the laundry list of subject matters that a Chapter 11 plan can address and treat.[52] Somewhat laconic are the words of a few Federal Rules of Bankruptcy Procedure, the most obviously pertinent of which is Rule 9019(a):

> On motion by the trustee [or debtor in possession[53]] and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.[54]

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50. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

51. *See infra* Part III (discussing cases adjudicating courthouse-steps settlements).

52. 11 U.S.C. § 1123(b)(3)(A) (2005).

53. Of course, in a Chapter 11 case, unless a trustee is appointed for cause, the debtor remains in possession of the estate or its assets and has substantially all the powers and duties of a Chapter 7 trustee. 11 U.S.C. § 1107; *see also* FED. R. BANKR. P. 9001(11) (noting that a "'[t]rustee' includes a debtor in possession in a chapter 11 case"). In Chapters 12 and 13, the debtor and a standing trustee share those powers and duties. 11 U.S.C. §§ 1202–03, 1302–03. In Chapter 9, the option for a trustee is strictly limited to pursuit of preferences. *Id.* § 926(a). In those cases where a trustee is appointed, the analysis in this Article also pertains, but for simplicity this Article will refer only to "the debtor" as the generalized representative of the bankruptcy estate. Furthermore, the settlements that are the topic of this Article should be understood to be between a debtor and a nondebtor party on an issue that affects the bankruptcy estate (generally postpetition agreements between nondebtor parties do not need court approval).

54. FED. R. BANKR. P. 9019(a). Rule 9019 is titled "Compromise and Arbitration." Its subdivision (b) is inapposite to the present topic, providing that "the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice." FED. R. BANKR. P. 9019(b). Subdivision (c) is irrelevant; it addresses arbitration. FED. R. BANKR. P. 9019(c).

The rule speaks disjunctively of "compromise *or* settlement," although the preeminent legal dictionary indicates that the two nouns are essentially synonyms.[55]

The essential text of Rule 9019(a) originated as a section of the old Bankruptcy Act,[56] but the Bankruptcy Reform Act of 1978 repealed it.[57] Today's Bankruptcy Rule 9019(a) is procedural, not substantive, in nature and is far from comprehensive.[58] The first sentence of Rule 9019(a) is phrased permissively—"the court *may* approve"—and its second sentence states the rule's only requirement—some sort of "[n]otice" of the settlement is to be "given to creditors, the United States trustee, the debtor, and indenture trustees"—with a cross-reference to Rule 2002, which itself is quite short in its provisions germane to settlements.[59] In *Omni Video*, the Fifth Circuit mentioned Rule 9019(a) only once, stating that court approval is required: "At that hearing, the trustee urged the court to approve the compromise *as required by* Bankruptcy Rule 9019."[60] But the decision does not answer three other significant questions: How to handle issues of authority raised by a party's reneging on a settlement that his or its lawyer made; what standards a court is to use to evaluate a settlement presented to it; and pertinently to the present scenario, whether, to be enforceable, the settlement must be in writing or may be expressed simply as an announcement from the parties' lawyers to the court.[61]

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55. FED. R. BANKR. P. 9019(a) (emphasis added). The 2014 edition of the primary legal dictionary defines "compromise" as "[a]n agreement between two or more persons to settle matters in dispute between them" and "settlement" as "[a]n agreement ending a dispute or lawsuit." *Compromise*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Settlement*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Compromise*, A DICTIONARY OF MODERN LEGAL USAGE at 134 (2d ed. 1998) ("[T]he parties compromised and dropped their claims against each other."). No material distinction between the two terms can be found in the case law. *See* Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (using the terms compromise and settlement synonymously when discussing reorganization proceedings). In this Article, for simplicity, the verb "settle" as defined in BLACK'S and the noun "settlement" will henceforth be used exclusively; and the term "deal" will be used as shorthand for an agreement to settle.

56. 11 U.S.C. § 50 (repealed 1978). The Bankruptcy Act of 1938 § 27 provided that "[t]he receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate." *Id.* The recent report of the commission appointed by the American Bankruptcy Institute to study reform of the Bankruptcy Code recommends that Rule 9019(a) be recodified. AMERICAN BANKRUPTCY INSTITUTE, COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 2012–2014, FINAL REPORT AND RECOMMENDATIONS, § V. G. at 183 (2014).

57. 11 U.S.C. § 101 (1978) *amended by* 11 U.S.C. § 101 (2019).

58. FED. R. BANKR. P. 9019(a). The Rules Enabling Act provides that the Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075; *see also id.* § 2072(b) (the same for district court rules); Diamond Mortg. Corp. v. Sugar, 913 F.2d 1233, 1241 (7th Cir. 1990) ("[B]oth the district courts and the bankruptcy courts may apply the Bankruptcy Rules in appropriate cases.").

59. FED. R. BANKR. P. 9019(a) (emphasis added).

60. Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 231 (5th Cir. 1995) *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994) (emphasis added).

61. *See id.* (failing to discuss authority to enforce, standards of evaluation, etc.).

As to the effectiveness and binding nature of courthouse-steps settlements, the Fifth Circuit provided the affirmative answer in *Omni Video*.[62] To the bankruptcy or federal court practitioner first encountering it, the decision may seem a strange or even harsh result. The Fifth Circuit resorted to a state court procedural rule and found it to be a rule of substance.[63] The court arguably ignored the parties' real agreement: the original expression of the contract might have either included additional but unannounced terms, or else the settlement notice as a writing prepared by and signed by the party to be charged—the trustee—might have constituted an amendment to the contract. [64] The decision also ratified the use of an oral motion to summarily enforce the settlement immediately upon default by entry of judgment, at least where the bankruptcy court provided due process through a reconsideration hearing upon the defaulting party's subsequent request.[65] The precedent has now stood for a quarter century, and the Fifth Circuit has never retreated from it or indicated any dissatisfaction with it.[66]

So *Omni Video* and Texas Rule of Civil Procedure 11 are the law for courthouse-steps settlements, and it has fallen to the bankruptcy courts of Texas to subsequently apply that precedent and apply the rule to questions in various factual and procedural permutations of courthouse-steps settlements.[67] For such issues, the appellate and the bankruptcy courts have, on an ad hoc basis, created a substantial body of case law.[68] Also, new questions and points about the application of the Fifth Circuit's precedent and the Texas rule continue to arise; no court or commentator has provided a full explanation or an outline of exactly how the pieces should fit and work together to facilitate the adjudication of courthouse-steps settlements in situations of reneging or default.[69] At this point, the formulation of a logical and specific framework incorporating the *Omni Video* precedent, Texas Rule 11, and all other relevant authorities is desirable and useful—both for the bankruptcy courts and for the lawyers.

In Part II, this Article examines the general principles that apply to all bankruptcy settlements, both the conventional and the courthouse-steps types, including: first, the strong impetus for and the desirability of bankruptcy settlements; second, the ethical rules applicable to the lawyers'

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62. *See id.* at 230.

63. *Id.* at 232; *see also* Condit Chem. & Grain Co. v. Helena Chem. Corp., 789 F.2d 1101, 1102 (5th Cir. 1986) ("It is obvious from the nature of this Texas rule that it is a law of controlling substance.").

64. *In re* Christie, 173 B.R. 890 (Bankr. E.D. Tex. 1994). One Texas appellate court read *Omni Video* this way: the "settlement agreement announced in court . . . omitted [a] term of [the] original agreement." Stubbs v. Ortega, 977 S.W.2d 718, 723 (Tex. App.—Fort Worth 1998, pet. denied).

65. *See In re Omni Video*, 60 F.3d at 233.

66. *See, e.g.*, Ho Kim v. Dome Entm't Ctr., Inc. (*In re* Ho Kim), 657 F. App'x 287, 290 (5th Cir. 2016) (affirming the holding).

67. *See* TEX. R. CIV. P. 11; *In re Omni Video*, 60 F.3d at 232.

68. *See, e.g.*, Gillette Air Conditioning Co. v. Scheutzow, No. SA-10-CV-0548 FB(NN), 2011 WL 6056880, at *2 (W.D. Tex. Dec. 5, 2011).

69. *See generally* Olack & Johnson, *supra* note 38.

negotiation of such deals; third, the standards for evaluating such deals' approvability; and finally, the question of notice to case parties and related considerations of court authority in these circumstances. In Part III, I take a close look at *Omni Video*, Texas Rule 11, and the progeny of bankruptcy-case and adversary-proceeding decisions in the judicial districts of Texas that have applied the announcement rule and Texas substantive contract law to courthouse-steps settlements in various factual and procedural contexts. In Part IV, I posit a framework that integrates all of those authorities and considerations for determining the enforceability of courthouse-steps settlements in the event either party reneges.[70]

II. OVERARCHING PRINCIPLES APPLICABLE TO ALL SETTLEMENTS IN BANKRUPTCY MATTERS

A. Impetus for Bankruptcy Settlements

The bankruptcy judges of the nation are excellent jurists, but none are infallible. So if a party's lawyer can settle a claim or an issue, the lawyer may protect the client against a worse result that might occur by putting the dispute to an unpredictable judicial ruling.[71] Even if the lawyer wins a hearing or a trial, the matter may be far from over because the rules provide a panoply of optional post-hearing motions for the losing party,[72] and then there will be an opportunity for appeal.[73] This is why one Texas bankruptcy judge long ago postulated that "[s]ettlement of controversies by discussion and compromise is a method of resolution of disputes which is *far superior* to contested litigation."[74]

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70. *See* BRENDON ISHIKAWA, CRAFTING EFFECTIVE SETTLEMENT AGREEMENTS: A GUIDEBOOK FOR ATTORNEYS AND MEDIATORS (2018) (providing more information regarding settlement agreements). The American Bar Association recently published this guidebook on settlement agreements. *Id.* The book contains a short chapter on "Oral Settlement Agreements," in which oral agreements that are "stated on the record in open court" are at least mentioned, with the author observing that "[c]ourts are uniformly unsympathetic" to later arguments that the terms incorrect or incomplete and that "there seems to be no published case in which any oral settlement agreement stated in court and accepted by a trial judge has later been invalidated." *Id.* at 361, 363. But the author does not address what "acceptance by a trial judge" means or requires. Most importantly, the book never mentions Texas Rule 11; the *Omni Video* precedent; or the unique considerations, factors, and rules that govern or inform settlements in Texas bankruptcy courts. The book is essentially a "how-to" guide for two-party settlements in general litigation; and for present purposes, the best take away is the book's common-sense advice that "[w]hen stating the terms of the agreement on the record, attorney should take their time in articulating the entire settlement agreement on the record." *Id.* at 361.

71. *See Settlement and Negotiation Strategies*, MICH. LEGAL HELP, http://www.michiganlegal-help.org/self-help-tools/family/settlement-and-negotiation-strategies (last visited Nov. 18, 2019).

72. *See, e.g.*, FED. R. BANKR. P. 9023, 9024, 9033.

73. FED. R. BANKR. P. 8001–05.

74. Hill v. Farmers Home Admin. (*In re* Hill), 19 B.R. 375, 379 (Bankr. N.D. Tex. 1982) (emphasis added). In open court, this judge repeatedly, and more pithily, advised the lawyers that "a *poor settlement* beats a *great trial*." E-mail from Hon. Bill H. Brister, U.S. Bankr. Judge, retired, to Josiah M. Daniel, III (May 11, 2016) (emphasis added) (copy on file with the author). As a young lawyer appearing before him

Settlements are highly favored by the courts in bankruptcy matters.[75] The case law of bankruptcy settlements[76] is replete with the mantra "compromises are favored in bankruptcy."[77] They can resolve issues large and small.[78] The Fifth Circuit noted long ago that "[t]he right and power of the Trustee to settle subject to court approval extends to controversies and not merely those involved in pending suits."[79] Surveying the case law two decades ago, one scholar found that the "courts are uniform in their respect, desire, and appreciation of settlements in a bankruptcy case."[80] The reason is that "negotiated outcomes save the bankruptcy estate the time and expense of protracted proceedings, perhaps even litigation, regarding the disputed issue or issues."[81] As one Texas bankruptcy judge put it: "The glue that often holds the bankruptcy process together is the ability of parties to resolve disputes by settlement instead of litigation. If bankruptcy judges had to try a much larger percentage of matters than they currently do, the system would surely bog down."[82]

According to reported cases, the subject matter of bankruptcy settlements runs a broad gamut from debtors' claims against creditors and third parties for recovery or payment of money—such as in *Omni Video*—to case administration issues,[83] to objections to proofs of claim,[84] to objections to individual debtors' exemptions,[85] and to plan formulation and confirmation issues.[86] Settlements of significant disputes or issues can alter

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during 1982 to 1985, I personally heard Judge Brister so state in open court many times. The reported case law contains similar sentiments of judges. *See, e.g.*, Gillette Air Conditioning Co. v. Scheutzow, No. SA-10-CV-0548 FB(NN) 2011 WL 6056880, at *1 (W.D. Tex. Dec. 5, 2011) (stating the "usual result" of a settlement is that "neither party obtains everything the party wants, but each party walks away with more than it had").

75. *See* N.D. TEX. LOC. BANKR. R. 9014-1(d)(1). One Texas bankruptcy court *requires* that settlement be attempted: "In any evidentiary hearing, all counsel shall certify before the presentation of evidence . . . that good faith settlement discussions have been held or why they were not held." *Id.*

76. Meyers v. Martin (*In re* Martin), 91 F.3d 389, 393 (3d Cir. 1996); *In re* Adelphia Comm. Corp., 368 B.R. 140, 226 (Bankr. S.D.N.Y. 2007) ("[S]ettlements or compromises are favored in bankruptcy and, in fact, encouraged.").

77. *In re Adelphia Comm.*, 368 BR at 226. Another court noted that "[b]ankruptcy, itself, is about nothing so much as compromise." Gold v. Gen. Motors Corp. (*In re* Signet Indus.), No. 96-2534, 1998 U.S. App. LEXIS 22652, at *5 (6th Cir. Sept. 10, 1998); *see also* Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425 (1999) (commenting on the significance of compromises).

78. *See In re Martin*, 91 F.3d at 393.

79. Fla. Trailer & Equip. Co. v. Deal, 284 F.2d 567, 569 (5th Cir. 1960).

80. Valencia, *supra* note 77, at 430.

81. *Id.* (footnote omitted).

82. Leif M. Clark, *Bankruptcy*, 28 TEX. TECH L. REV. 299, 324 (1997).

83. *See In re* Trinity Gas Corp., No. 97-60425011, 2000 Bankr. LEXIS 2098, at *1 (Bankr. N.D. Tex. Nov. 9, 2000) (addressing "settlement of a dispute over a fee application").

84. Valencia, *supra* note 77, at 437.

85. *In re* Duncan, No. 02-46291, 2007 Bankr. LEXIS 3339, at *1, 6, 16–17 (Bankr. E.D. Tex. Sept. 28, 2007).

86. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 432 (1968). In *TMT Trailer Ferry*, the Supreme Court reversed a district court's approval of a

or fix the course of bankruptcy cases, affecting parties other than the immediate parties to the deal; because bankruptcy is a collective proceeding,[87] almost every settlement is a serious matter for all parties in the case. A settlement resolves a dispute permanently; it is treated as a judgment with issue-preclusive effect.[88]

For the bankruptcy lawyer representing a client in an adversary proceeding or a bankruptcy case, the question whether to negotiate for and to agree to a settlement of a claim or issue embraces at least three interconnected considerations. First, *strategy*: What is the client's ultimate goal?[89] Would a settlement—rather than an adjudication—the outcome of which cannot be accurately predicted, better advance the client's interest?[90] Second, *client authorization*: Has the client, either in current consultations during the proceedings (or in rare situations, in the engagement agreement or another writing) authorized the lawyer to negotiate a resolution of a dispute or matter, and is the resulting settlement, particularly if time is short, appropriately agreed to by the lawyer on behalf of the client in light of the ethical rules?[91] Third, *effectiveness*: Are the terms of the deal such that the bankruptcy judge would approve it when presented or considered by the court subsequently?[92]

This first is a question of "lawyering." Lawyering is the work of an attorney who, as an agent serving her principal (the client) "invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the *status quo*" for the client.[93] The essence of lawyering is captured in a sentence from a law school text: The "lawyer's job is to find a way—to the extent possible—for the client to gain control over a situation."[94] In figuring out a way to achieve a desired result for the client, the lawyer's work is frequently

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settlement between a Chapter X trustee and key creditors calling for "inclusion in the [reorganization] plan" of certain terms. *Id.* In the instance of contested Chapter 11 plan confirmations, a Texas bankruptcy judge once observed: "Much of this give-and-take," modifying plan provisions and changing votes, "occurs, literally, *on the courthouse steps*." *In re* Am. Solar King Corp., 90 B.R. 808, 825 n.33 (Bankr. W.D. Tex. 1988) (emphasis added).

87. Vineyard v. McKenzie (*In re* Quality Holstein Leasing), 752 F.2d 1009, 1014 (5th Cir. 1985) (describing "bankruptcy's collective proceeding"); THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 4 (1986) ("[A] copulsory and collective forum to sort out [creditors'] relative entitlements to a debtor's assets.").

88. United States v. Kellogg (*In re* W. Tex. Mktg. Corp.), 12 F.3d 497, 500 (5th Cir. 1994).

89. *See generally* KRIEGER & NEWMANN, *supra* note 89, at 9.

90. *Id.*

91. *Id.*

92. *Id.* Concerns for debtors include whether the deal represents an exercise of good judgment as a fiduciary for the estate. *See generally* AM. JUR. 2D *Bankruptcy* § 156 (2019). For nondebtors, concerns include whether the court and other case parties may see in the agreement, if the settlement is not approved, an admission or tacit acknowledgment of weakness of the nondebtor's stated legal position. *Id.*

93. Josiah M. Daniel, III, *A Proposed Definition of the Term "Lawyering"*, 101 LAW LIBR. J. 207, 215 (2009). The newest edition of the leading legal dictionary substantially adopts the author's definition. *See Lawyering*, BLACK'S LAW DICTIONARY 1063 (11th ed. 2019).

94. KRIEGER & NEUMANN, *supra* note 89, at 9.

improvisational in nature,[95] and this is intensified under the pressure of a scheduled hearing about to commence.[96] The answer to the first question, whether a settlement would be an exercise of good strategy, depends on the client's objectives and the dynamics of the particular case or adversary proceeding in which the lawyer is active.[97]

But as the second question reveals, there are important limitations and caveats for the lawyer to bear in mind, even when squeezed by intense time pressure.[98] Lawyers must conduct their work within the ambit of fiducial duties the lawyer owes the client and the scope of authority the client has granted the lawyer.[99] The lawyer must remain inside the boundaries of the legal system's mandate of ethical conduct not only in making a deal on behalf of a client but also at all times.[100] So an important consideration in determining whether and how to settle is the applicability of multiple legal, ethical rules.[101]

Finally, making such a deal with an opponent makes no sense if the court cannot enforce the agreement which requires approval by the bankruptcy court.[102] A court will be concerned about a settlement if it "necessarily impacts the estate—either because the estate will fund at least a portion of the settlement or the estate's claims against third parties are being compromised."[103] Accordingly, the standards for court approval and the procedural steps to achieve that are highly important.[104]

B. Legal Ethics of Settling a Bankruptcy Matter for a Client

It is imperative that the bankruptcy lawyer complies with the prevailing regimen of legal ethics in making a settlement for a client.[105] This point is important for two reasons.[106] First, lawyers must always remember that the rules of legal ethics continuously govern every aspect of their lawyering.[107]

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95. AM BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: NARROWING THE GAP, 147–48 (1992) ("[T]he fundamental lawyering skills essential for competent representation. . . . [include] problem solving.").

96. *See id.* at 198–99 (explaining all the specialized skills required of an attorney when preparing for various forms of litigation).

97. *Id.* at 142–43.

98. *See id.* at 203–06.

99. *See id.* at 205.

100. *See id.* at 203–04.

101. *See id.* at 206.

102. AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 184 (2014).

103. *Id.*

104. *See* AM BAR ASS'N, *supra* note 95.

105. *See id.* at 207.

106. *Id.* (explaining that lawyers must apply the rules of ethics to their practice daily).

107. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 9, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. ("Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules.

Second, between the client and the lawyer, the applicable code of legal ethics furnishes a default rule about a lawyer's authority to agree to a settlement on behalf of the client: The *client* must make the decision except in the rare case where the client has delegated that decision to the lawyer or some third person in the engagement agreement or other valid agreement.[108]

The Bankruptcy Code contains prohibitions on conflicts of interest by professional persons engaged by or at the expense of the bankruptcy estate,[109] but those sources of bankruptcy law and rules do not otherwise regulate attorneys' conduct.[110] Rather, the obligations of ethical conduct in the lawyers' making of a bankruptcy settlement originate in the federal courts', including the bankruptcy courts' "inherent power to regulate the practice of counsel appearing before [them]."[111] "Fifth Circuit precedent requires the court to consider several [sources of] ethical standards in determining whether there has been an ethical violation,"[112] including both national and state-level professional organizations' promulgations of ethical rules.[113] The national standards are the American Bar Association's Model Rules of Professional Conduct (MPRC).[114] However, the American Bar Association (ABA) is a voluntary organization to which only a minority of lawyers belong, and the lower federal courts routinely prefer the state standards.[115] In fact, the local rules of both the bankruptcy and district courts in Texas explicitly adopt or incorporate the ethical rules applicable to members of the State Bar of Texas that are known as the Texas Disciplinary Rules of Professional Conduct (Texas D.R.s) that the Texas Supreme Court adopted.[116]

The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct.").

108. *See id.* at r. 102 cmt. 1. The ethical rules distinguish decisions to settle from mere technical and tactical matters. "[A] lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected." *Id.*

109. 11 U.S.C. § 327(a) (1986) ("[W]ith the court's approval, [a debtor] may employ . . . attorneys . . . [who] do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . ."); FED. R. BANKR. P. 2014 (requirements for applications to the court for approval to employ professionals); FED. R. BANKR. P. 9011 (essentially replicating Federal Rule of Civil Procedure 11).

110. *See* 11 U.S.C. § 327(a); FED. R. BANKR. P. 2014; FED. R. BANKR. P. 9011 (specifying only specific attorney conduct and omitting any other mandated conduct).

111. *In re* Fahey, No. 09-00501, 2009 WL 2855728, at *1 (Bankr. S.D. Tex. Sept. 1, 2009).

112. Galderma Labs. v. Actavis Mid Atl. L.L.C., 927 F. Supp. 2d 390, 394 (N.D. Tex. 2013).

113. FDIC v. U.S. Fire Ins., 50 F.3d 1304, 1312 (5th Cir. 1995); *In re* Am. Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992); *In re* Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1990).

114. *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2015).

115. *See* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of Theory*, 56 VAND. L. REV. 1303, 1306 (2003).

116. *See* E.D. TEX. LOC. BANKR. R. 1001-1(i) ("The standards for attorney conduct [of the State Bar of Texas] . . . apply in the Bankruptcy Court."); N.D. TEX. LOC. BANKR. R. 2090-2(b), (d) ("A Presiding Judge . . . may take any appropriate disciplinary action against a member of the bar for . . .unethical behavior . . . that violates the Texas Disciplinary Rules of Professional Conduct."); S.D. TEX. LOC. R. app. A, r. 1A ("[T]he minimum standard of practice shall be the Texas Disciplinary Rules of Professional

The regime of legal ethics applies to communications between lawyers for the parties in negotiating a settlement.[117] Regrettably, lawyers have a poor reputation for honesty in serving their clients and in presenting their clients' positions to other lawyers and tribunals.[118] Several key Texas D.R.s, informed by their accompanying official comments, explicitly proscribe attorney dishonesty.[119] The rules require an attorney to "provide[] a client with an informed understanding of the client's legal rights and obligations" and then negotiate on behalf of a client "consistent with requirements of honest dealing with others."[120] It is true that "a lawyer should zealously pursue clients' interests";[121] the lawyer is, after all, working to accomplish a result, causing a desired change to happen or else protecting the status quo, for the client.[122] But that professional zeal is to be exercised "within the bounds of the law," and "[a] lawyer should use the law's procedures only for legitimate purposes."[123] As the Supreme Court recently noted, "all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court."[124] These obligations apply in a lawyer's negotiation with opposing counsel for a settlement in a bankruptcy matter.[125]

Conduct."); W.D. TEX. LOC. R. AT-7(a) (stating that attorneys "must comply with the standards of professional conduct set out in the Texas Disciplinary Rules of Professional Conduct"). The Texas Center for Legal Ethics provides additional resources on Texas legal ethics. *See* TEX. CTR. FOR LEGAL ETHICS, https://www.legalethicsTexas.com (last visited Nov. 17, 2019).

117. *See* AM BAR ASS'N, *supra* note 95, at 203–04.

118. *See, e.g.*, MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 31, 100, 264 (2005); Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1155 (2009); *see also* Josiah M. Daniel, III, *Am I a "Licensed Liar"?: An Exploration into the Ethic of Honesty in Lawyering . . . And a Reply of "*No!*" to the Stranger in the La Fiesta Lounge*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 32, 34 (2016) (discussing the unmerited phrase "licensed liar" as applied to attorneys).

119. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 1. The first section of the Preamble to the D.R.s states that "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A consequent *obligation of lawyers* is to maintain *the highest standards of ethical conduct*." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 1 (emphasis added). The Texas version of the preamble deviates in wording and style but not in substance from the Preamble of the ABA Model Rules of Professional Conduct. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 1; MODEL RULES OF PROF'L CONDUCT, Preamble § 1 (AM. BAR ASS'N 2015). This concept, often referred to as legal professionalism, is the notion that an attorney is not solely an agent for a principal but also is an officer of the courts and a public citizen with heightened responsibility—"to maintain the highest standards of ethical conduct"—both to the client and to the public. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT Preamble § 1. Specific D.R.s, illuminated by the comments, then make honesty a crucial and required element of the ethical obligation of attorneys—not only to his client but also to the client's opponent or counterparty and the court. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT Preamble §§ 2–3.

120. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 2.

121. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 3.

122. Daniel, *supra* note 93, at 215.

123. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble §§ 3–4.

124. Azar v. Garza, 138 S. Ct. 1790, 1793 (2018).

125. A good discussion of the ethics of honesty in settlement negotiations is found in CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATIONS AND SETTLEMENT, 389–412 (8th ed. 2016). Other D.R.s that

The Texas ethical rules also demand honesty of the attorney in his communications—whether affirmatively stated and unstated or omitted—with judges. Texas D.R. 3.03, titled "Candor Toward the Tribunal," provides: "A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal."[126] Moreover, if the lawyer has offered false evidence, such as in a hearing on approval of a settlement, and then learns of it, the lawyer must seek "to persuade the client to authorize the lawyer to correct or withdraw the false evidence"; and "[i]f such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts."[127]

In recent years, the Texas and federal courts have increasingly enforced the case law immunity for attorneys who acted in the course and scope of their engagement by clients from claims of non-client parties in litigation based on allegations of negligent misrepresentation, fraud, and suborning of perjury by the client's lawyer,[128] even in the context of settlement negotiations.[129] The federal courts have followed the state cases, recognizing the applicability of that state-law immunity of lawyers in diversity-of-citizenship civil actions.[130] Some commentators have criticized this development as the "Lone Star State's License to Lie."[131] In the absence of potential civil liability, the state-law ethical precepts are the sole governors on conduct of attorneys in the negotiation of settlements.[132]

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may be applicable to bankruptcy settlements include Rule 3.01 (Meritorious Claims and Contentions) and Rule 3.02 (Minimizing the Burdens and Delays of Litigation). *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.01, 3.02.

126. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.03(a)(1). The rule further provides that a lawyer shall not: "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act . . . or . . . offer or use evidence that the lawyer knows to be false." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.03(a)(2), (5).

127. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.03(b). Furthermore, "a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 8.03(a).

128. Youngkin v. Hines, 546 S.W.3d 675, 682 (Tex. 2018); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); Gaia Envtl., Inc. v. Galbraith, 451 S.W.3d 398, 410 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); James v. Easton, 368 S.W.3d 799, 802 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

129. Alpert v. Crain, Caton & James, PC, 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

130. *See* Ironshore Europe DAC v. Schiff Hardin, L.L.P., 912 F.3d 759, 763–65 (5th Cir. 2019).

131. Aaron K. Bender & Andrew B. Bender, *Cloaked in Attorney Immunity: The Lone Star State's License to Lie?*, 58 S. TEX. L. REV. 145 (2016).

132. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 11. Yet other D.R.s address the not unusual situation of a single lawyer or firm representing multiple parties—such as representing a corporate family of debtors or a group of secured or unsecured creditors in a bankruptcy case or in an adversary proceeding when the debtor or another party offers a settlement to one or more but fewer than all of the lawyer's clients. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.06(a). Rule 1.06(b)(2) provides that "a lawyer shall not represent a person if the representation of that person . . . . reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client,"

Furthermore, under the generally applicable rules of legal ethics for attorneys in the conduct of court proceedings, major decisions such as settling a claim or a substantial issue normally belong to the client.[133] MPRC Rule 1.2(a) is succinct and direct: "A lawyer shall abide by a client's decision whether to settle a matter."[134] Texas D.R 1.02 provides that, with a few exceptions, "a lawyer shall abide by a client's decisions" not only "concerning the objectives and general methods of representation" but also more specifically, "whether to accept an offer of settlement of a matter."[135] The official comments to that Texas D.R. state: "Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case . . . . [I]t is for *the client to decide* whether or not to accept it."[136] Because of this ethical imperative, the courts generally presume that a settlement deal announced by an attorney is done with client consent.[137] As one Texas bankruptcy court explained:

> A lawyer must have the consent of his client to settle a lawsuit. Absent the client's consent, a settlement would not be enforceable. But, Texas courts indulge every reasonable presumption in favor of a settlement made by an attorney duly employed, especially after accepted by a court.
>
> . . . If an attorney represents a party, then he is presumptively authorized to take all actions necessary to conduct that litigation. Therefore, a court may rely on the representation of counsel of record that his clients agree to

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and a comment to the rule notes that "[a]n impermissible conflict may exist or develop by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.06(b)(2), cmt. 3; *see* FED. R. BANKR. P. 2019 (requirements for informational filing by a lawyer representing multiple creditors and indenture trustees). Rule 1.03(a) provides for a lawyer to "keep a client reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions," which can become problematic when one of multiple clients insists that a settlement be confidential. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.03(a), (b).

133. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02(a)(2).

134. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N). As the ABA strongly emphasizes, "no matter the degree to which the lawyer disagrees with the client or thinks the settlement is too low or predicated on poor information, he is ultimately bound to abide by the client's wishes." *Settlement Offers: The Client Is Always Right*, A.B.A., https://www.americanbar.org/news/abanews/publications/youraba/2016/march-2016/settlement-offers--the-client-is-always-right/ (Feb. 22, 2016).

135. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 (a)(1)–(2). The client's exclusive right to decide on a settlement is subject in Texas to the qualifier "except as otherwise authorized by law." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02(a)(2). As the official comment states, "a lawyer's normal deference to a client's wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 cmt. 3. This comment refers to the insurance-defense context in which "an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 cmt. 3. An example is where the policy grants the insurer "'complete and exclusive control' of the insured's defense." State Farm Mut. Auto. Ins. v. Traver, 980 S.W.2d 625, 627 (Tex. 1998).

136. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 cmts. 2–3 (emphasis added).

137. *See In re* Harco Energy, Inc., 270 B.R. 658 (Bankr. N.D. Tex. 2001).

> a settlement. Consequently, the [client] bear[s] the burden of establishing that [the client's] counsel lacked authority to enter the settlement and present the settlement to the court.[138]

Because they insist on observance of legal ethics by attorneys appearing before them, the federal courts, including bankruptcy courts, generally presume that a lawyer would not announce a settlement without the client's approval.[139] When clients take the position with their lawyer that they did not authorize such an announcement, the customary step for the lawyer to take is to move to withdraw from the representation.[140] Moreover, the court has multiple disciplinary options: If a party does not raise the issue,[141] the court may initiate disciplinary proceedings against the lawyer by an order to show cause why discipline, even disbarment, should not be ordered for violation of the court's local rule on attorney ethics.[142] Or it may refer the matter to the State Bar of Texas, whose companion Texas Rules of Disciplinary Procedure provide multi-level processes, ranging from an informal process before a panel of a local grievance committee to evidentiary hearing or trial in a state court, for determining and punishing ethical violations of Texas attorneys.[143]

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138. *Id.* at 667–68 (citations omitted). The Texas Supreme Court has written: "The attorney-client relationship is an agency relationship. The attorney's acts and omissions within the scope of his or her employment are regarded as the client's acts . . . . " Gavenda v. Strata Energy, Inc., 705 S.W.2d 690, 693 (Tex. 1986). Another state court added: "[A]n attorney may execute an enforceable Rule 11 agreement on his client's behalf." Green v. Midland Mortgage Co., 342 S.W.3d 686, 691 (Tex. App.—Houston [14th Dist.] 2011, no pet.). For a critique of courts' reliance on agency authority principles in these situations, see Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473 (1990).

139. *In re Harco Energy*, 270 B.R. at 667–68.

140. *See, e.g.*, Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 609 (E.D. Tex. 1998).

141. *See, e.g.*, F.D.I.C. v. U.S. Fire Ins. Co., 50 F.3d 1304, 1308–09 (5th Cir. 1995). Often an ethical issue is raised in federal court, not sua sponte, but on motion of a party. *Id.*; *see also* De La Fuente v. Wells Fargo Bank (*In re* De La Fuente), 409 B.R. 842, 847 (Bankr. S.D. Tex. 2009) (explaining that all settlement announcements must incorporate all material issues).

142. *See In re* Jaques, 972 F. Supp. 1070, 1072 (E.D. Tex. 1997).

143. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.03(a)(1); *see* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992); Cantu v. Comm'n for Lawyer Discipline, No. A-16-CA-1278-SS, 2017 WL 605315, at *1 (W.D. Tex. Feb. 14, 2017) (stating that the bankruptcy judge's opinion was forwarded to the State Bar of Texas, which initiated disciplinary action against Cantu).

All of these ethical rules[144] apply to the lawyer's negotiation with opposing counsel, to the announcement of courthouse-steps settlements, and to the presentation of requests for court approval.[145]

C. Jurisprudential Settlement-Approval Standards

In the Fifth Circuit, a bankruptcy settlement requires court approval.[146] "Settlements are favored, but the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them."[147] The reported cases regarding bankruptcy settlements have articulated and repeatedly refined a set of judicial standards to be used by

144. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02, 3.03, 8.04(a). A catchall Texas D.R. provides, "A lawyer shall *not* . . . engage in conduct involving *dishonesty, fraud, deceit or misrepresentation*." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 8.04(a)(3) (emphasis added). Additionally, each newly licensed Texas attorney must take the statutory oath of office to "*honestly* demean [one]self in the practice of law . . . and . . . conduct [one]self with *integrity* and civility in dealing and communicating with the court and all parties." *Oath of Office Form*, ST. BAR TEX. (emphasis added) https://www.texasbar.com/AM/Template.cfm?Section=New_Lawyer_Forms_and_Fees1&Template=/CM/ContentDisplay.cfm&ContentID=29062 (last visited Nov. 17, 2019). Accordingly, honesty in negotiating a settlement and then in presenting it to the bankruptcy court is mandatory. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 8.04(a)(3) (emphasis added) ("A lawyer shall *not* . . . engage in conduct involving *dishonesty*."). The attorney practicing in Texas bankruptcy courts must also take to heart the aspirational Texas Lawyer's Creed originally promulgated by Texas courts in 1989. *Texas Lawyer's Creed: A Mandate for Professionalism*, TEX. CTR. FOR LEGAL ETHICS, (emphasis added) www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed.aspx/Texas-Lawyer-s-Creed (last visited Nov. 17, 2019) ("A lawyer owes to the administration of justice personal dignity, *integrity*, and independence. . . . A lawyer owes to a client allegiance . . . . A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation . . . *candor* . . . and scrupulous observance of all agreements and mutual understandings. . . . Lawyers and judges owe each other . . . *candor* . . . ."); *see also In re* Mortg. Analysis Portfolio Strategies, Inc., 221 B.R. 386, 389 (Bankr. W.D. Tex. 1998) (quoting Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc)) ("[A] lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.").

145. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble § 11 ("The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."). Also applicable is Bankruptcy Rule 9011—i.e., Federal Rule 11—under which a bankruptcy court that determines that a pleading to be frivolous may award just damages to the other party "to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. BANKR. P. 9011(c)(2). The rule is typically applied to averments setting forth claims. J. Scott Humphrey, *Sanctions Against the Creditors Attorney in Non-Reorganization Bankruptcy Proceedings*, 6 BANKR. DEV. J. 481, 496 (1989). But it also applies to defenses, and indeed the scope of the rule is unlimited. Citizens Bank & Tr. Co. v. Case (*In re* Case), 937 F.2d 1014, 1022–23 (5th Cir. 1991). Decisions may be found applying Federal Rule 11 to bankruptcy settlements. *See, e.g.*, Rankin v. Brian Lavan & Assocs., P.C. (*In re* Rankin), 438 Fed. App'x 420, 424 (6th Cir. 2011); *In re* Dewey & LeBoeuf LLP, No. 12-12321 (MG), 2012 WL 5985445, at *3 (Bankr. S.D.N.Y. 2012).

146. Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 263 (5th Cir. 2010).

147. Will v. Nw. Univ. (*In re* Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006).

bankruptcy judges to evaluate the merits of specific settlements.[148] Bankruptcy settlements, like class action settlements, shareholder derivative suit settlements, and consent decrees in antitrust cases are "special situations" that require more than the consent of individual litigants.[149] In each type of matter, "the trial court must find that the settlement is fair, adequate, and reasonable" because "the interests of individuals and organizations other than those approving the settlement may be implicated."[150]

Over the past half century, the landmark case for approval of bankruptcy settlements has been *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*.[151] In that case, the United States Supreme Court observed that "[i]n administering . . . proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts."[152] *TMT Trailer Ferry* requires that a bankruptcy judge reach an "informed and independent judgment as to whether a proposed compromise is fair and equitable."[153] That inquiry requires that:

> [T]he bankruptcy judge . . . apprise[] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.[154]

While it was decided in a Chapter X reorganization case under the former Bankruptcy Act, *TMT Trailer Ferry* is a decision that retains vitality; the courts of appeals and the bankruptcy courts, as well as legal commentators, continuously cite it to the present day regarding the topic of bankruptcy settlements.[155]

Ten years later, in *In re Jackson Brewing Co.*,[156] the Fifth Circuit acknowledged the precedence of *TMT Trailer Ferry* and refined its holding as three judicial standards for a bankruptcy court to use to test whether a

148. *See, e.g.*, Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968); Conn. Gen. Life Ins. v. United Cos. Fin. Corp. (*In re* Foster Mortg. Corp.), 68 F.3d 914 (5th Cir. 1995); Rivercity v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 599 (5th Cir. 1980).

149. United States v. City of Miami, 614 F.2d 1330, 1330 (5th Cir. 1980).

150. *Id.* at 1330–31.

151. *See TMT Trailer Ferry*, 390 U.S. 414.

152. *Id.* at 424.

153. *Id.*

154. *Id.* at 424–25.

155. *See, e.g.*, Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 262 n.20 (5th Cir. 2010).

156. Rivercity v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 599, 602 (5th Cir. 1980).

settlement is "fair and equitable" and "in the best interest of the estate."[157] Those three factors are:

> (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
> (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
> (3) All other factors bearing on the wisdom of the compromise.[158]

In *In re AWECO, Inc.*, a reorganization case filed subsequently to the 1979 effective date of the Bankruptcy Code, the Fifth Circuit confirmed that these factors continue to apply and further held that "[t]he words 'fair and equitable' are terms of art" in this context that relatedly "mean that 'senior interests are entitled to full priority over junior ones.'"[159]

In later cases, the Fifth Circuit has amplified this principle.[160] In *In re Texas Extrusion Corp.*, a 1988 case, the court declared that "in the bankruptcy [settlement] context, the interests of [the] creditors not the debtors are paramount."[161] In *In re Foster Mortgage Corp.*, the appellate court reconfirmed the *Jackson Brewing* tripartite test and elucidated the broad phrase "all other factors bearing on the wisdom of the compromise" by looking to the "the paramount interest of creditors with proper deference to their reasonable views."[162] Then, in *In re Cajun Electric Power Cooperative, Inc.*, the court interpreted *Foster Mortgage* to specify two additional factors within the third prong of the *Jackson Brewing* factors, namely to accord "proper deference to [creditors'] reasonable views" and to determine whether the settlement is "truly the product of arms-length bargaining."[163]

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157. *Id.*

158. *Id.*

159. United States v. AWECO, Inc. (*In re* AWECO, Inc.), 725 F.2d 293, 298 (5th Cir. 1984) ("Our understanding of bankruptcy law's underlying policies leads us to make a limited extension of the fair and equitable standard: a bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that *priority of payment* will be respected as to objecting senior creditors.") (emphasis added). In a 1990 case, the Fifth Circuit agreed with a settlement's opponents that the court "should consider the interests of employees in deciding whether a compromise will be in the best interest of the estate and enhance the success of the reorganization." Cont'l Airlines, Inc. v. Evans (*In re* Cont'l Airlines Corp.), 907 F.2d 1500, 1508 (5th Cir. 1990); *see also In re* Sensitive Care, Inc., 239 B.R. 117, 123 (Bankr. N.D. Tex. 1999) (reasoning "the fair [and] equitable standard should relate to the priorities" of the particular chapter of the Bankruptcy Code under which the case is proceeding). While it is not a settlement case, a recent decision of the Supreme Court reemphasizes the primacy of priority rules in bankruptcy cases. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 976–77 (2017).

160. *See* Tex. Extrusion Corp. v. Lockheed Corp. (*In re* Tex. Extrusion Corp.), 844 F.2d 1142, 1159 (5th Cir. 1984).

161. *Id.*

162. Conn. Gen. Life Ins. v. United Cos. Fin. Corp. (*In re* Foster Mortg. Corp.), 68 F.3d 914, 917 (5th Cir. 1995).

163. Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (*In re* Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997).

As a consequence of that jurisprudential evolution, in *In re Moore*, the Fifth Circuit again restated the criteria for settlement approval:

> Five factors inform the "fair and equitable" analysis: (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any, to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the settlement is truly the product of arm's-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise.[164]

Furthermore, in *In re Moore*, the Fifth Circuit added yet another facet to the "fair and equitable" analysis in the determining of approval of settlement of litigation claims that are property of the estate.[165] In short, bankruptcy courts must also determine whether such property "might draw a higher price through a competitive process and be the proper subject of a [Bankruptcy Code §] 363 sale."[166] If there is an overbid and the settling defendant wins the resulting auction, the court is to apply both the standards for approval of settlement and those for asset sales; but if the third party wins, only the sale procedures apply "because the transaction would not constitute a proposed settlement."[167]

Finally, it should be noted that the bankruptcy court need not "conduct a mini-trial" to determine the settlement factors.[168] Moreover, settlements can be presented to the court procedurally by a motion or a notice also, as the bankruptcy encyclopedia puts it, "[c]ompromises are not uncommonly contained in plans of reorganization."[169] If a settlement is proposed within

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164. Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 263 (5th Cir. 2010). Today case law approval standards vary from circuit to circuit. *See id.* For instance, in courts within the Second and Third Circuits, a lesser standard of "lowest point" in a "range of reasonableness" pertains. *In re* Nortel Networks, Inc., 522 B.R. 491, 510 (Bankr. D. Del. 2014) ("The Court need only conclude that the settlement falls within the reasonable range of litigation possibilities somewhere above the lowest point in the range of reasonableness."); *see* Resolution Tr. Corp. v. Best Prods. Co. (*In re* Best Prods. Co.), 68 F.3d 26, 33 (2d Cir. 1995) ("The bankruptcy court merely had to satisfy itself that the Settlement was within the range of reasonableness."). The American Bankruptcy Institute (ABI) Commissioners "generally agreed that the lowest point of reasonableness standard did not sufficiently scrutinize the terms of the proposed settlement and its impact on the estate." AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11, 2012–2014, § V. G., 185. "Above the lowest point" is not the standard in the Fifth Circuit. *In re Moore*, 608 F.3d at 263.

165. *In re Moore*, 608 F.3d at 264.

166. *Id.*

167. *Id.* at 266.

168. *In re Cajun Elec. Power Coop.*, 119 F.3d at 356; *see* Moeller v. Chase Capital Corp. (*In re* Age Refining, Inc.), 801 F.3d 530, 541 (5th Cir. 2015).

169. COLLIER ON BANKRUPTCY ¶ 9019.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018); *see* United States v. AWECO, Inc. (*In re* AWECO, Inc.), 725 F. 2d 293, 298 (5th Cir. 1984) (explaining

the text of a plan, then both the jurisprudential settlement approval standards and the plan confirmation standards of Bankruptcy Code § 1129 apply.[170] The bankruptcy court may not, however, approve a settlement that would constitute a "modification of a confirmed and substantially consummated plan of reorganization in contravention of [Bankruptcy Code] § 1127(b) regardless of . . . attempts to clothe it as a settlement."[171] Nor may a court change the terms of the parties' settlement or condition its approval upon changes made to the agreement.[172] A bankruptcy court's approval of a settlement is difficult to overturn on appeal.[173]

D. Considerations of Notice and Bankruptcy Court Authority

Normally courthouse-steps settlements are processed and evaluated by bankruptcy courts the same way as written settlement agreements.[174] Notice with a reasonable opportunity for creditors and parties in interest to object and to participate in any hearing on the proposed settlement is desirable and preferred.[175] But when good cause exists, bankruptcy courts have authority to limit the parties to be notified, to reduce the notice period, and even to approve courthouse-steps settlements without much, if any, notice or a hearing.[176]

The starting point is Rule 9019(a)'s reference to a court approving a settlement "after notice and a hearing."[177] That five-word phrase is defined, not in the rules but in Bankruptcy Code § 102(1) to mean:

> [S]uch notice . . . and such opportunity for a hearing as [are] appropriate in the particular circumstances; but
>
> . . . authorizes an act without an actual hearing if such notice is given properly and if . . .
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act . . . .[178]

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that a court may approve a settlement that forms part of a Chapter 11 plan if it is fair and equitable and respects priorities).

170. *See, e.g.*, *In re Age Refining*, 801 F.3d at 535–41.

171. *In re* U.S. Brass Corp., 255 B.R. 189, 194 (Bankr. E.D. Tex. 2000).

172. Cont'l Airlines, Inc. v. Evans (*In re* Cont'l Airlines Corp.), 907 F.2d 1500, 1509–10 (5th Cir. 1990).

173. *See* Conn. Gen. Life Ins. v. United Cos. Fin. Corp. (*In re* Foster Mortgage Corp.), 68 F.3d 914, 917 (5th Cir. 1995). The standard of appeal in these matters is abuse of discretion. *Id.*

174. *See supra* Part I.B (explaining courthouse-steps settlements and written settlements).

175. *See supra* Part I.B (explaining that notice is given to inform interested parties of the nature of the negotiation).

176. *See supra* note 35 and accompanying text (noting that courthouse-steps settlements need not include a full written agreement).

177. 11 U.S.C. § 102(1) (2010).

178. *Id.*

Read together with § 102(1), Rule 9019(a) contemplates that there be court consideration of the appropriate quantum of notice to be given, almost always by the debtor,[179] and of the parties to be notified of the settlement for which court approval is requested.[180] Notice may be adjusted to the circumstances of the case.[181]

To completely understand the notice aspect of courthouse-steps settlements requires a tour through several other rules. Rule of Bankruptcy Procedure Rule 9019(a) explicitly incorporates Rule 2002(a)(3) of which provides that "at least 21 days' notice by mail" of a hearing on approval of a settlement to be given to creditors.[182] But Rule 2002(m) recognizes the court's discretion here: "The court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules."[183] Additionally, Rules 2002(3) and 9006(c)(2) provide that notice may be reduced or scaled to fit the circumstances.[184] If notice has been given, an actual hearing may be unnecessary if no party has objected, if time is short, or some other good reason exists and the court then approves the deal without a hearing.[185]

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179. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 231 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 265 B.R. 22 (Bankr. N.D. Tex. 1994). In *Omni Video*, it was the trustee who filed and served the notice of and sought approval of the courthouse-steps settlement. *Id.* at 231. In *In re Trinity Gas Corp.*, the debtor and a settling claimant filed a "joint motion" for approval of their settlement. *In re* Trinity Gas Corp., No. 97-60425-11, 2000 Bankr. LEXIS 2098, at *4 (Bankr. N.D. Tex. Nov. 9, 2000). No definitive precedent on this point exists in Fifth Circuit case law. *See id.* Some courts state that in "rare circumstances" nondebtor parties may file for and seek approval of a settlement over the objection of the debtor. Freewwweb, L.L.C. v. Juno Online Servs., Inc. (*In re* Smart World Techs., L.L.C.), 423 F.3d 166, 180 (2d Cir. 2005); Liberty Towers Realty, L.L.C. v. Richmond Liberty, L.L.C., 569 B.R. 534, 543 (E.D.N.Y. 2017); COLLIER ON BANKRUPTCY ¶ 9019.01 (Richard Levin & Henry J. Summer eds., 16th ed. 2018); *see also* Fry's Metals, Inc. v. Gibbons (*In re* RFE Indus., Inc.), 283 F.3d 159, 164 (3d Cir. 2002) ("It is implicit in the debtor's being given notice [pursuant to Rule 9019] that the debtor may object to a proposed settlement.").

180. *See* 11 U.S.C. § 102(1); FED. R. BANKR. P. 9019(a).

181. *See* 11 U.S.C. § 102(1); FED. R. BANKR. P. 9019(a).

182. FED. R. BANKR. P. 2002(a)(3), 9019(a). Note that Rule 9006(f) may add three days to such period of time. *See* FED. R. BANKR. P. 9006(f). Additionally, one must take care to observe or take advantage of other twists and turns of the other specific subdivisions of Rules 2002 and 9006. *See* FED. R. BANKR. P. 2002, 9006. Also note that notice and opportunity for hearing of agreements in settlements regarding issues of cash collateral, postpetition financing, and adequate protection, which are matters governed by 11 U.S.C. §§ 361–364, are governed by Bankruptcy Rule 4001 and not by Rule 9019. *See* FED. R. BANKR. P. 2002, 4001, 9006.

183. FED. R. BANKR. P. 2002(m).

184. FED. R. BANKR. P. 9006(c) provides "the court for cause shown may in its discretion with or without motion or notice order the [otherwise required] period reduced." FED. R. BANKR. P. 9006(c); *see* Cory v. Leasure, 491 B.R. 476, 487 (W.D. Ky. 2013) (noting that Rule 2002(a)(3)'s twenty-one day notice period may be reduced under appropriate circumstances).

185. *See* FED. R. BANKR. P. 9019(b).

Another section of the Code, § 105(a), provides in relevant part:

> The court may issue any order . . . necessary or appropriate to carry out the provisions of [the Bankruptcy Code]. No provision of [the Code] providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules . . . . [186]

This subsection has generally been interpreted narrowly.[187] The Fifth Circuit has repeatedly said: "Section 105(a) 'does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.'"[188] For present purposes, the focus is on the statute's authorization for a bankruptcy court, on its own motion, to "tak[e] an[] action" and "mak[e] [a] determination" expedient to "implement . . . rules," which includes Rule 9019(a).[189]

Additionally, Rule 2002(a)(3) itself states an exception to the ostensible requirement of notice: "[U]nless the court for cause shown directs that notice not be sent."[190] So the court can, per Bankruptcy Code § 105(a) and the Rules, dispense with *any* notice of a settlement.[191] The bankruptcy encyclopedia agrees: "Ordinarily, there is no final compromise and settlement without notice, but notice of these hearings may be waived 'for cause shown.'"[192] So the court can pretermit any notice of a settlement.[193] Case law about the authority of bankruptcy courts further reinforces the notion that a bankruptcy judge may determine whether to approve a settlement without an actual hearing.[194]

Moreover, under Fifth Circuit precedent and other case authorities, the court has "inherent authority"—apparently untethered to any rule of procedure—to enforce a courthouse-steps settlement, or any settlement,

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186. 11 U.S.C. § 105(a) (2019).

187. Wells Fargo Bank v. Sommers (*In re* Amco Ins.), 444 F.3d 690, 695 (5th Cir. 2006); Cont'l Airlines Corp. v. Air Line Pilots Ass'n (*In re* Cont'l Airlines Corp.) 907 F.2d 1500, 1509 (5th Cir. 1990).

188. *In re Amco Ins.*, 444 F.3d at 695; *In re Cont'l Airlines Corp.*, 907 F.2d at 1509 (quoting U.S. v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)).

189. 11 U.S.C. § 105(a).

190. FED. R. BANKR. P. 2002(a)(3).

191. FED. R. BANKR. P. 2002(a)(3). A later subdivision of the rule, Rule 2002(i), provides that the court may order that a notice of a compromise or a settlement need be given only to the United States trustee, committees, and "to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them[;]" but this subdivision is optional and does not override Rule 2002(a)(3). FED. R. BANKR. P. 2002(i).

192. COLLIER ON BANKRUPTCY ¶¶ 2002–17 (Richard Levin & Henry J. Summer eds., 16th ed. 2018) (quoting FED. R. BANKR. P. 2002(a)(3)).

193. *Id.*

194. *See In re* Glinz, 66 B.R. 88, 90–91(D.N.D. 1986).

under Texas Rule 11.[195] In *Omni Video*, prior to holding that "the formal statement of the parties on the record controls" over any inconsistencies in a notice of the settlement given under Rule 2002(a)(3),[196] the Fifth Circuit emphatically stated that "federal courts have *inherent power* to enforce settlement agreements entered into by the parties."[197] Another handful of cases decided by bankruptcy courts also recite the same thing, sometimes not even mentioning Rule 9019(a).[198]

Those repeated assertions of inherent court authority as to bankruptcy settlements have escaped close analysis by commentators.[199] The lower courts have naturally quoted and repeated the statement because it appears forcefully in the text of *Omni Video*.[200] But the assertion is really dictum, a sentence unnecessary to the decision. It is possible that among the fundamental powers a federal court "inherently" possesses, in addition to jurisdiction to determine jurisdiction and the power to govern and sanction the lawyers who appear in the court,[201] is an innate authority to govern the proceedings by enforcing the settlements that the litigants reach.[202] Or else, if a court dispenses with notice and hearing under the Rule 2002(a)(3) exception to the giving of notice, the court can be said to exercise the inherent

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195. White Farm Equip. Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986). In its *Omni Video* opinion, the Fifth Circuit cited this proposition to a prior decision in a diversity-of-citizenship litigation. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994) (citing *White Farm Equip. Co.*, 792 F.2d at 529). Other Fifth Circuit appellate decisions reinforce that in non-bankruptcy cases the federal courts have "inherent authority" to enforce settlements of the parties. *See, e.g.*, Lafevre v. Keaty, 191 F.3d 596, 598 (5th Cir. 1999); Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 390–91 (5th Cir. 1984); Cia Anon Venezolana De Navegacion v. Harris, 374 F.2d 33, 36 (5th Cir. 1967).

196. *In re Omni Video*, 60 F.3d at 233.

197. *Id.* at 232 (quoting *White Farm Equip. Co.*, 792 F.2d at 529) (emphasis added); *Holder*, 165 B.R. at 24 (holding same).

198. Hyperion Found. v. Acad. Health Ctr., Inc. (*In re* Hyperion Found., Inc.), No. 08-51288-NPO, 2009 WL 3633878, at *3 (Bankr. S.D. Miss. Oct. 27, 2009) (citing Bell v. Schexnayder, 36 F.3d 447, 449 (5th Cir. 1994)) ("The bankruptcy court has the inherent power not only to recognize and encourage settlements, but also to enforce such agreements when reached by the parties."); *In re* Blast Energy Servs., Inc., 396 B.R. 676, 688 (Bankr. S.D. Tex. 2008) ("A litany of Fifth Circuit cases support the notion that this Court has inherent power . . . to enforce settlements entered into by parties in this case . . . ."); *In re* Mortg. Analysis Portfolio Strategies, Inc., 221 B.R. 386, 388 (Bankr. W.D. Tex. 1998) ("[T]his Court has the inherent power to enforce settlement agreements between parties . . . ."); *In re* Christie, 173 B.R. 890, 891–92 (Bankr. E.D. Tex. 1994) ("If necessary, '[a] federal court has the inherent power to enforce an agreement which settles litigation.'").

199. Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 1909*, 78 OR. L. R. 425, 498 (1999) (lacking elaboration on inherent authority).

200. *See* cases cited *supra* note 195 (using language cited in *Omni Video*).

201. Cadle Co. v. Pratt (*In re* Pratt), No. 00-35215-HDH-7, 2008 WL 2954755, at *3–4 (Bankr. N.D. Tex. Jul. 30, 2008) (imposing sanctions on lawyers under FED. R. BANKR. P. 9011 rather than under "its inherent authority").

202. *See supra* note 198 and accompanying text (discussing the inherent authority courts have).

authority to approve settlements that the Fifth Circuit says all federal courts have.[203]

But resorting to such a vague and undeveloped juridical theory is unnecessary. Texas Rule 11 and Bankruptcy Rules 9019(a) and 2002 clearly apply to courthouse-steps settlements and endow the Bankruptcy Court with ample ability and latitude to process and to enforce a courthouse-steps settlement.[204] The Rules, augmented by Bankruptcy Code §§ 102(1) and 105(a), provide for a range of types and periods for notice of a settlement, whether conventional or courthouse-steps in nature.[205] But for a settlement to be enforceable, there is an essential condition: Court approval.[206] Perhaps the courts' recitation of its "inherent authority" is just an emphatic, shorthand way of saying that court approval of bankruptcy settlements is required, and perhaps a reminder that the approval standards are judge-made and that Rule 9019(a) is phrased permissively. Inherent authority may be consistent with those rules: Its recitation by the courts should be regarded as a confirmation of the essentiality of court approval.

Other bases may exist for dispensing with a requirement of additional post-announcement notice to relevant parties in interest.[207] One ground could be that implicit, if not explicit, within the announced courthouse-steps settlement is an oral motion for the approval of the deal.[208] Rule 9013 provides that a "request for an order . . . shall be by written motion, *unless made during a hearing*."[209] Furthermore, there is support for the notion that the original motion or request for relief can provide adequate notice to support the result that flows from the settlement of the dispute created when a nonmovant opposes the request.[210] All parties who receive notice of the filing of a bankruptcy case or an adversary proceeding have the opportunity to file an appearance and to receive—today via the electronic case filing and notice service provided by each Bankruptcy Clerk in each judicial district of the nation—a copy of all papers filed in the case.[211] If a party cares about the matter raised in a motion or a complaint, it can participate by filing an objection or by attending the hearing, either in person or by telephone, so that if a courthouse-steps settlement is made, the party will know immediately.[212] So long as the outcome represented by the settlement is within the ambit of

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203. *See supra* note 191 and accompanying text (discussing a court's ability to dispense with the notice requirement).

204. FED. R. BANKR. P. 2002, 9019(a); TEX. R. CIV. P. 11 (1988).

205. 11 U.S.C. §§ 102(1), 105(a) (2019).

206. *Id.* § 105.

207. *See supra* note 191 and accompanying text (discussing a court's ability to dispense with the notice requirement).

208. *See* FED. R. BANKR. P. 9019(a).

209. FED. R. BANKR. P. 9013 (emphasis added).

210. *See* FED. R. BANKR. P. 4002(3), 5001(1)–(2); *In re* Shop N' Go P'ship, 261 B.R. 810, 816–17 (Bankr. M.D. Pa. 2001).

211. FED. R. BANKR. P. 5005(1), (2).

212. FED. R. BANKR. P. 4002(3).

the relief requested in the motion, the nonmoving party can well be said to have had adequate notice.[213] That is in fact the thesis of certain courts' local procedures.[214]

Two more points must be noted. First, in courts within the Fifth Circuit, both the courthouse-steps and the conventional settlement bind the parties until the court has acted either to approve or to disapprove the deal.[215] As the Fifth Circuit wrote: "A proposed settlement may bind the parties, but it does not bind the courts; otherwise, the approval process would be meaningless."[216] One court held that the parties may not escape a settlement on the ground that a debtor withdrew the Rule 9019 motion before an approval order could be entered.[217] Second, it appears that in a proper case, the nondebtor party to a settlement may file and present a request for settlement approval.[218] The bankruptcy encyclopedia states that "in extraordinary situations . . . a party in interest other than a trustee [may] seek approval over the objections of a trustee or debtor in possession,"[219] and its editors also observe that "a debtor can be compelled to file a motion to approve a settlement even if the debtor has changed its mind."[220]

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213. *See In re Shop N' Go P'ship*, 261 B.R. at 816–17 (discussing what is necessary for a nonmoving party to receive adequate notice).

214. *See* S.D. TEX. LOC. BANKR. R., Exhibit D. Order Granting Complex Chapter 11 Bankruptcy Case Treatment ("If a matter is properly noticed for hearing and the parties reach a settlement of the dispute prior to the final hearing, the parties may announce the settlement at the scheduled hearing. If the court determines that the notice of the dispute and the hearing is adequate notice of the effects of the settlement, (i.e., that the terms of the settlement are not materially different from what parties in interest could have expected if the dispute were fully litigated) the court may approve the settlement at the hearing without further notice of the terms of the settlement."). In another Texas district, the local procedure provides: "Counsel and unrepresented parties must confer prior to the date the Pre-Trial Order is required to be filed, to fully explore the possibility of settlement" and "matters to be considered by the Court at docket call are . . . settlement announcements." Bankr. W.D. Tex., App. L-7016 Form Scheduling Order.

215. *See* Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 266 (5th Cir. 2010).

216. *Id.* Another court of appeals noted that "[a] settlement or compromise in bankruptcy is not enforceable in advance of bankruptcy court approval." Am. Prairie Constr. Co. v. Hoich, 594 F.3d 1015, 1024 (8th Cir. 2010) (citing Levey v. Sys. Div., Inc. (*In re* Teknek, L.L.C.), 563 F.3d 639, 651 (7th Cir. 2009)).

217. *See In re* Frye, 216 B.R. 166, 173–74 (Bankr. E.D. Va. 1997).

218. Smart World Techs., L.L.C. v. Juno Online Servs. (*In re* Smart World Techs., L.L.C.) 423, F.3d 166, 176–77 (2d Cir. 2005).

219. COLLIER ON BANKRUPTCY ¶ 9019.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018).

220. *Id.* ¶ 9019.02A; *see also* Christopher Fong, *Creditors and Rule 9019(a): Casting Doubt on the Trustee's Sole Authority to Settle Claims of the Estate*, 82 AM. BANKR. L. J. 591, 592 (2008) ("[W]hether Rule 9019(a) can be interpreted to preclude any party other than the trustee or debtor in possession . . . from moving for court approval of a settlement.").

III. THE APPLICATION OF TEXAS RULE 11 TO COURTHOUSE-STEPS SETTLEMENTS IN BANKRUPTCY PRACTICE

A. Texas Rule 11 and Applicable State Contract Law

Courthouse-steps settlements are like conventional settlements in many ways—the overarching principles discussed in the prior section of this Article apply equally to both types of settlements—but courthouse-steps settlements differ, lacking a complete and signed written settlement agreement; and when a settling party defaults or reneges, that distinction subjects them to analysis under additional substantive law.[221] In fact, the courthouse-steps settlement occurs at an interesting intersection of federal bankruptcy process with state law, namely, a Texas state court rule and its state decisional law, here supplying the substantive rules of decision.[222]

In *Omni Video*, the Fifth Circuit identified the policies for enforcing the courthouse-steps settlement: "Litigants may not disavow compacts thus made and approved, for avoiding the bargain would undermine its contractual validity, increase litigation, and impair efficient judicial administration."[223] It further found the Bankruptcy Code is silent about, and "no strong federal interest" subsists in, the validity of settlements in bankruptcy court matters despite that the ultimate standards for court approval are the federal bankruptcy concepts of "fair and equitable" and "in the best interest of the estate" that are the bankruptcy-centric foci of so much Fifth Circuit jurisprudence.[224]

Accordingly, "a settlement is a contract [that] is best resolved by reference to state contracts law," and because the place of negotiation and performance was in Texas, the court held that "the settlement agreement entered by the parties will be interpreted under Texas law."[225] As mentioned at the outset, for settlements made in bankruptcy cases and proceedings in the four judicial districts within the state, Texas Rule of Civil Procedure 11—not to be confused with Federal Rule of Civil Procedure 11[226]—is the Texas law that governs in bankruptcy cases, specifically as a type of statute of frauds,[227] despite the rule's denomination as one of the 822 rules of civil procedure in Texas civil practice.[228]

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221. Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994).

222. *Id.*

223. *Id.* at 233 (quoting White Farm Equip. Co. v. Kupcho, 792 F.2d 526, 528 (5th Cir.1986)).

224. *Id.* at 232.

225. *Id.* The court noted that in bankruptcy matters, the rule of *Erie Railroad v. Tompkins* applies. *Id.*

226. *Compare* FED. R. CIV. P. 11 (describing the effect of attorney signatures), *with* TEX. R. CIV. P. 13 (also describing the effect of attorney signatures). The analogue of Federal Rule of Civil Procedure 11 in state procedure is Texas Rule of Civil Procedure 13. *Id.*

227. *See, e.g.*, Padilla v. LaFrance, 907 S.W.2d 454, 460 (Tex. 1995).

228. *See In re Omni Video*, 60 F.3d at 232.

Texas Rule 11 comprises two prongs, the first of which describes a conventional settlement and the second of which describes a courthouse-steps settlement: "No agreement between attorneys or parties touching any suit pending will be enforced [1] unless it be in writing, signed and filed with the papers as part of the record, or [2] *unless it be made in open court and entered of record*."[229]

For courthouse-steps settlements, the second prong of Texas Rule 11 is the first step.[230] "Assuming a settlement meets the requirements of [Texas] Rule 11 *and* is an enforceable contract, it can be enforced," wrote the court in *Omni Video*.[231] So compliance with Texas Rule 11 in the parties' lawyers orally and jointly announcing the deal on the record of the case is a "necessary, but not sufficient" condition to enforceability of a courthouse-steps settlement.[232]

Also required is the further step of court determination, again under Texas law, that those words uttered on the record constitute at least a minimal expression of agreement or mutual consent.[233] The announcement of an oral settlement in open court "which was instantly disavowed" by one party does not satisfy either condition of *Omni Video*.[234] Because Texas Rule 11 has a relatively robust jurisprudence in Texas appellate decisions, the Texas bankruptcy courts have, post-*Omni Video*, appropriately referred to Texas case law for answers as to how Texas Rule 11 works and Texas contract law applies.[235]

Under Texas Rule 11, the Texas courts have held that the lawyers' announcement of the deal's terms must demonstrate offer, acceptance, and consideration.[236] The Texas Supreme Court recently summarized:

> Litigants' Rule 11 agreements are contracts relating to litigation, and thus we construe them under the same rules as a contract. We do not give a [Texas] Rule 11 agreement greater effect than the parties intended. If a

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229. TEX. R. CIV. P. 11 (emphasis added). Outside the scope of this Article but germane to conventional settlements is this Texas statute: "If the parties reach a settlement and execute a *written* agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (emphasis added); *see generally* Margo Ahern, *Agreements in Crisis: The Stinging Effects of Texas Rule of Civil Procedure 11 on Settlement Agreements and the Alternative Dispute Resolution Process*, 31 TEX. TECH L. REV. 87 (2000).

230. *See In re Omni Video*, 60 F.3d at 232.

231. *Id.* at 232 (emphasis added).

232. Kennedy v. Hyde, 682 S.W.2d 525, 529 (Tex. 1982).

233. *See* Anderegg v. High Standard, Inc., 825 F.2d 77, 80–81 (5th Cir. 1987).

234. *See id.* at 80.

235. *See In re* Mortg. Analysis Portfolio Strategies, Inc., 221 B.R. 386, 388–89 (Bankr. W.D. Tex. 1998) (first citing Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995); and then citing Kosowska v. Khan, 929 S.W.2d 505 (Tex. App.—San Antonio 1996, writ denied)). In *In re Mortgage Analysis Portfolio Strategies*, a Texas bankruptcy judge resorted to a Texas case to resolve a question about whether a courthouse-steps settlement was made "on the record." *Id.* at 388.

236. *See* Gen. Metal Fabricating Corp. v. Stergiou, 438 S.W.3d 737, 744 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

> contract can be given a certain or definite legal meaning or interpretation, it is not ambiguous and we construe it as a matter of law.[237]

A Texas Rule 11 settlement must contain at least "payment terms and release of claims," if germane, and such other terms that the parties "would reasonably regard as vitally important elements of their bargain."[238]

Issues of intention and ambiguity can arise.[239] The state case law under Texas Rule 11 is extensive and a representative sample illustrates the variety of other Texas contract law issues that can arise when a court construes the terms of a courthouse-steps settlement.[240] One recurrent issue is the attorney's authorization to enter the agreement on behalf of the client.[241] A few cases indicate that swearing in and recording the client's or the corporate client representative's articulation of consent can be useful in the event of a later consideration about enforceability of the deal.[242] Indeed that step would likely obviate the possibility of a lawyer authorization issue being raised. Other state contract law issues that can arise with courthouse-steps settlements under Texas Rule 11 include contractual conditions such as issues with subsequent documentation and signatures,[243] court approval, effective dates, and performance.[244] Defensive doctrines such as mistake,[245] fraudulent inducement,[246] fraud,[247] duress or undue influence,[248] or estoppel[249] may also apply.[250] A court may raise, sua sponte, issues about the parties' rights under a settlement.[251]

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237. Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't. of Health & Human Servs., 540 S.W.3d 553, 560–61 (Tex. 2018) (citations omitted).

238. MKM Eng'rs, Inc. v. Guzder, 476 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (quoting Potcinske v. McDonald Prop. Invs., Ltd, 245 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

239. *See Gen. Metal Fabricating Corp.*, 438 S.W.3d at 744.

240. *Id.*

241. *See id.* at 741–42.

242. *See id.* at 743.

243. *Id.* at 748–50.

244. *Id.* at 750.

245. Dunbar Med. Sys., Inc. v. Gammex Inc., 216 F.3d 441, 452 (5th Cir. 2000). But unilateral mistake does not suffice to set aside the Texas Rule 11 settlement. Oliver v. Kroger Co., 872 F. Supp. 1545, 1551 (N.D. Tex. 1994).

246. *Dunbar Med. Sys.*, 216 F.3d at 453 (holding that Texas Rule 11 does not preclude reliance on oral representations to establish fraudulent inducement).

247. *See id.*

248. Kosowska v. Khan, 929 S.W.2d 505, 508 (Tex. App.—San Antonio 1996, writ denied) (explaining that coercion by a party's own attorney does not suffice to show duress or undue influence).

249. Dehnert v. Dehnert, 705 S.W.2d 849, 851 (Tex. App.—Beaumont, 1986, no writ.).

250. *See id.*

251. *See* Summit Residential Servs. L.L.C. v. Ocwen Loan Servicing, L.L.C., No. 3:15-CV-1935-D, 2017 WL 4758884, at *1 (N.D. Tex. Oct. 20, 2017).

To be accurate, there are three respects in which Texas law does not govern these matters in bankruptcy and other federal courts.[252] Although the issue appears somewhat unsettled, according to a number of Texas cases, parties can revoke their consent to a Texas Rule 11 settlement so long as a judgment has not yet been rendered based upon the deal.[253] In contrast, the Fifth Circuit in *Omni Video* clearly holds that a Texas Rule 11 deal is not subject to unilateral withdrawal.[254] Second, *Omni Video* permits summary enforcement of the courthouse-steps settlement, but Texas cases generally require either amendment of a party's pleading to add a breach of contract claim followed by a summary judgment motion[255] or else a separate suit.[256] Third, a few Texas cases evince willingness, for the sake of equity, to overlook technical failures to comply with Texas Rule 11.[257] The bankruptcy courts of Texas, however, look for close compliance with the Texas rule both as to the announcement of counsel and the sufficiency of the words to constitute a contract.[258]

Following *Omni Video*, Texas bankruptcy and district courts' case law illustrates the broad range of scenarios in *bankruptcy* matters in which courthouse-steps settlements are binding on both parties under Texas Rule 11 and state contract law.[259]

B. The Omni Video Precedent in the District and Bankruptcy Courts of the Judicial Districts of Texas

The Texas bankruptcy courts have clearly learned from *Omni Video* that Texas Rule 11 applies to courthouse-steps settlements,[260] and in subsequent case law they have worked out ancillary questions and issues in the circumstances of their own bankruptcy cases and adversary proceedings,

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252. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994); Samples Exterminators v. Samples, 640 S.W.2d 873, 874–75 (Tex. 1982).

253. *See Samples Exterminators*, 640 S.W.2d at 874–75.

254. *In re Omni Video*, 60 F.3d at 232.

255. *See* Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996); Batjet, Inc. v. Jackson, 161 S.W.3d 242, 245 (Tex. App.—Texarkana 2005, no pet.).

256. *See, e.g.*, *Mantas*, 925 S.W.2d at 658–59.

257. *See, e.g.*, Padilla v. LaFrance, 907 S.W.2d 454, 461 (Tex. 1995); Massey v. Galvan, 822 S.W.2d 309, 318 (Tex. App.— Houston [14th Dist.] 1992, writ denied).

258. *In re Omni Video*, 60 F.3d at 233.

259. *See* cases cited *supra* note 198 (citing a wide variety of cases following *Omni Video*).

260. *See* cases cited *supra* note 198 (citing a wide variety of cases following *Omni Video*). One Texas bankruptcy court has incorporated the principle of Texas Rule 11 into a local rule providing that when a disputed matter is ready for hearing, and "the parties have resolved the matter," then "if the agreement has not been reduced to writing, the terms of the agreement must be read into the record by at least one interested party or such party's attorney." E.D. TEX. LOC. BANKR. R. 9022-1(a). In another Texas district, the standard form for a complex Chapter 11 administrative order provides: "If a matter is properly noticed for hearing, and the parties reach a settlement of the dispute prior to the final hearing, . . . [t]he parties may announce the settlement at the scheduled hearing." S.D. TEX. LOC. BANKR. Exhibit D. Order Granting Complex Chapter 11 Bankruptcy Case Treatment.

further demonstrating that a settlement that is orally announced by the lawyers in open court pursuant to Texas Rule 11 can be binding and enforceable against a recalcitrant or reneging party, whether a nondebtor or a debtor.[261]

Texas bankruptcy courts analyze the announcement and the exact words on the record of the case to assess compliance with the second prong of Texas Rule 11.[262] Per *Omni Video*, "the formal *statement* of the parties *on the record* controls."[263] That means in the first instance, there have to be words in the nature of settling a dispute or an issue that was spoken and memorialized in a court's record, such as a recording officer's tape or electronic recording made in open court or in a transcript prepared from such recording or from a court reporter's shorthand made while the court was in session.[264]

In *In re Mortgage Analysis*, a Chapter 7 case, a bankruptcy court in Texas considered whether an announcement by attorneys during a prehearing deposition constituted a Texas Rule 11 agreement per *Omni Video*.[265] At the deposition, "the parties reached a full and complete settlement of all remaining issues, including the discovery dispute," and then the "agreement was read into the record of the deposition with *both* counsel present and both indicating their consent without reservations of any kind."[266] The court held that the deposition transcript contained and sufficiently memorialized words of settlement, even though one party repudiated the agreement before the court reporter's transcript of the deposition was filed with the court.[267]

In contrast, another Texas bankruptcy court considered an announcement and found it insufficient.[268] In an adversary proceeding in *In re Classy Chassis*, the attorney for a group of intervenors was present in the hearing, heard opposing counsel announce a settlement, had actual and apparent authority to enter such settlement on behalf of his clients, and "failed to voice any objection to the terms of the settlement, as announced on the record."[269] But the court observed, "counsel for the intervenors also *failed* to affirmatively *assent* to the terms of the settlement on the record."[270] After

261. *See In re* Mortg. Analysis Portfolio Strategies, Inc., 221 B.R. 386, 388 (W.D. Tex. 1998).

262. *See id.* at 388–89.

263. *In re Omni Video*, 60 F.3d at 233 (emphasis added).

264. *In re Mortg. Analysis Portfolio Strategies, Inc.*, 221 B.R. at 388 ("[T]his Court must first find that the settlement meets the requirements of [Texas] Rule 11 . . . .").

265. *See id.*

266. *Id.* at 387. One Texas district court enforced a settlement in a diversity case where one of the lawyers did not attend the pretrial conference in person but confirmed the terms via telephone to court personnel, and those terms of the settlement agreement were then read into the record by the judge in open court. *See In re* Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 609 (E.D. Tex. 1998) ("[T]he court was satisfied that each attorney was representing to the court that the case had settled, and the terms of the settlement agreement were read into the record in open court.").

267. *See Mortg. Analysis Portfolio Strategies, Inc*., 221 B.R. at 389.

268. *See* Janzen v. Classy Chassis, Inc. (*In re* Classy Chassis, Inc.), No. 01-52660-C, 2003 Bankr. LEXIS 1974, at *2 (Bankr. W.D. Tex. Sept. 4, 2003).

269. *Id.*

270. *Id.* (emphasis added).

reciting its inherent authority in these matters and reviewing *Omni Video* and Texas Rule 11, the bankruptcy court quoted from a Texas case that the state rule requires "dictation into the record of the agreement's substance and assent to it on the record by *all* parties sought to be bound."[271] Accordingly, this settlement was unenforceable.[272]

Similarly, *In re McCarble* illustrates the necessity of both an announcement and an agreement.[273] In that case, during the ninth day of trial of an adversary proceeding, "counsel for the Bank announced preliminary agreement on a settlement proposal. . . . read the terms into the record. . . . [and] announced that the settlement required subsequent approval by the Bank's internal loan committee, and by the court."[274] Citing Texas Rule 11 and *Omni Video*, the bankruptcy court observed: "The announcement of the settlement by counsel for the Bank on the record at the hearing on May 18, 2016 reflects that the settlement was not yet accepted by the Bank," and thus the announcement did not constitute a meeting of the minds.[275]

Once the joint-oral-announcement requirement of Texas Rule 11 is satisfied, the Texas bankruptcy courts then assess the parties' words seeking to find the terms of the agreement.[276] In *In re Christie*—a decision in a Chapter 11 case that chronologically followed and cited the bankruptcy court's *Holder* decision but preceded its affirmance in *Omni Video*—the court enforced an oral announcement of a "global settlement[]" made on the record by the respective counsel for the debtors and a litigation claimant at the outset of a scheduled hearing on the latter's case-conversion motion.[277] The debtor agreed to dismiss an appeal, waive a wrongful-foreclosure claim, and return certain property; the creditor agreed to cease participation in the bankruptcy case; and both agreed the plan would separately classify and treat the claim of the claimant, who would receive no distribution but would retain "any rights [the creditor] may have in the pending [prepetition] litigation" brought by the debtors in a nonbankruptcy court.[278]

An unstated but undisputed term of the *Christie* courthouse-steps settlement was that the creditor's claims in that other litigation would be only for the defensive purpose of offsetting against the debtors' claims.[279] Afterward, the lawyers "were unable to prepare and submit an agreed order"

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271. *Id.* at *6 (emphasis added) (quoting Anderegg v. High Standard, Inc., 825 F.2d 77, 80–81 (5th Cir. 1987)).

272. *Id.* at *7. *But cf.* E.D. TEX. LOC. BANKR. R. 9022-1(a) (seemingly permitting a single attorney to announce the parties' deal).

273. *In re* McCarble, No. 14-33210-H3-7, 2016 WL 4169221, at *3 (Bankr. S.D. Tex. Aug. 4, 2016).

274. *Id.* at *1.

275. *Id.*

276. *See In re* Christie, 173 B.R. 890, 891–92 (Bankr. E.D. Tex. 1994).

277. *Id.* at 891.

278. *Id.* (emphasis omitted).

279. *Id.*

to approve the courthouse-steps settlement.[280] When the creditor then amended its counterclaim in the other court to add new causes of action, the debtor moved against the creditor in the bankruptcy court either to enforce the settlement or to be freed from it.[281] The bankruptcy court denied that motion and rejected the debtor's view of the courthouse-steps settlement, noting that the agreement "could have been conditioned" on the creditor not asserting other claims, but the settlement was not conditioned in that manner.[282] The court enforced the courthouse-steps settlement against the debtors.[283]

As in *Omni Video*, the bankruptcy courts in Texas have summarily enforced settlements without prior approval orders entered.[284] In *In re King*, the court received the announcement on the record that a secured creditor pressing a lift-stay motion and the objecting debtor had reached an agreement that the creditor's lawyer read into the record and that the "Debtor agreed to."[285] The parties then failed to submit an agreed written order.[286] Later, taking the position that the stay had terminated by operation of law, the creditor sought to escape the deal.[287] When the debtor amended his plan to incorporate the terms announced on the record, the bankruptcy court held that "an agreement . . . announced on the record . . . becomes binding *even if a party has a change of heart*," and it enforced the agreement without requiring that a prior approval order be entered.[288] Citing Texas Rule 11, the *McCarble* court stated: "Approval by the court is *not* a prerequisite for enforcement of a settlement."[289]

One Texas bankruptcy court addressed the excuse or objection of a recalcitrant party that other parties following the in-court announcement did not sign a written settlement agreement.[290] In *In re Harco Energy*, the court determined that a removed state court lawsuit had in fact been settled before bankruptcy because the announcement that had been made on the record "establishes compliance with the [Texas] Rule 11 requirement," and as a matter of law, "the parties entered into an enforceable agreement."[291] Similarly, another Texas bankruptcy court ruled: "The fact that the 'Settlement Agreement' contemplated further documentation is not

280. *Id.*
281. *Id.*
282. *Id.* at 892.
283. *Id.*
284. *See In re* King, No. 11-40725-H3-13, 2013 WL 5723325, at *1 (Bankr. S.D. Tex. Oct. 18, 2013).
285. *Id.* at *1.
286. *Id.* at *1.
287. *Id.*
288. *Id.* at *2 (emphasis added).
289. *In re* McCarble, No. 14-33210-H3-7, 2016 WL 4169221, at *3 (Bankr. S.D. Tex. Aug. 4, 2016) (emphasis added).
290. *See* Harco Energy, Inc. v. Anadrill (*In re* Harco Energy, Inc.), 270 B.R. 658, 664 (Bankr. N.D. Tex. 2001).
291. *Id.*

problematic. . . . A provision for future more formal documentation does not establish as a matter of law that no agreement has been reached."[292]

But a condition precedent for the parties' future agreement on an essential term can defeat enforceability.[293] In *In re De La Fuente*, the individual Chapter 13 debtors reached a courthouse-steps settlement with the home lender.[294] When the court called the adversary complaint of the debtors for trial,

> [C]ounsel for both parties announced that they were in the process of negotiating a global settlement. Counsel for the parties then recited into the record those terms upon which they had reached agreement. While counsel for the De La Fuentes stated that the parties had reached agreement on many terms, he noted that there were two material points over which the parties had yet to reach agreement: the amount of the [debtors'] attorneys' fees to be paid by [the lender] for prosecuting the Adversary Proceeding and the amount of the monthly escrow payment to be paid in the future.[295]

The court then heard and decided the attorney's fee issue; but the parties in subsequent negotiations could not agree on the escrow.[296] When the lender filed a motion to enforce the deal, the court declined, noting that even if there was a courthouse-steps settlement, it "[would] not be enforced when parties include a condition precedent and then subsequently fail to meet that condition."[297]

Moreover, Texas bankruptcy decisions show that a courthouse-steps settlement can present a context for applying other fundamental doctrines and rules of bankruptcy law against a later recalcitrant party.[298] For instance, in *In re Villareal*, the court confronted debtors who, after filing a bankruptcy petition, sought to undo a prepetition settlement of a state court suit that had been announced under Texas Rule 11.[299] The settlement included granting a creditor a lien on a ballroom that the debtors claimed in bankruptcy as a homestead.[300] The creditor testified that the debtors had misled him: "Had he known that [the] Ballroom was Debtors' homestead, he would have never agreed to the settlement."[301] The court validated the settlement under two

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292. Hudgins v. Sec. Bank (*In re* Hudgins), 188 B.R. 938, 942 (Bankr. E.D. Tex. 1995); *see also* Borden v. Banacom Mfg. & Mktg., Inc., 698 F. Supp. 121, 122–23 (N.D. Tex. 1988) (mem. op.) (deciding whether a deal on terms set forth in correspondence between counsel is enforceable).

293. *See* De La Fuente v. Wells Fargo Bank (*In re* De La Fuente), 430 B.R. 764, 771–72 (Bankr. S.D. Tex. 2010).

294. *Id.*

295. *Id.* at 771–72.

296. *Id.* at 772.

297. *Id.* at 772 n.9.

298. *See In re* Villareal, 401 B.R. 823 (Bankr. S.D. Tex. 2009).

299. *Id.* at 827–29.

300. *Id.* at 828.

301. *Id.* at 830.

estoppels.[302] Under equitable estoppel,[303] the debtors' fault in failing to inform the creditor that the property upon which, under the settlement terms, a lien was granted to the creditor was in fact a homestead; thus, the court estopped the debtors to deny the settlement.[304] Judicial estoppel also applied because the settlement complied with Texas Rule 11.[305]

Second, conversion of the case from one chapter to another does not operate to undo a courthouse-steps settlement.[306] In *Cantu v. International Bank of Commerce*—a Texas district court—sitting in a bankruptcy appeal, cited *Omni Video* and held that a debtor cannot escape a written settlement agreement regarding a secured claim that the bankruptcy court approved prior to the conversion of the case from Chapter 11 to Chapter 7.[307] The court ruled: "[H]aving voluntarily entered into what the parties do not dispute is a valid Settlement Agreement, and having obtained court approval of it, Debtors cannot now use conversion to escape its terms."[308] The same should pertain to a courthouse-steps settlement.

Third, in *In re Blast Energy Services*, the debtor sued a contract counterparty in the bankruptcy court regarding prepetition termination of contracts.[309] The parties "announced to this Court that they had negotiated a settlement . . . [for] an aggregate payment to [the debtor] . . . in exchange for a complete release."[310] A week after the court approved the settlement, the defendant filed its own bankruptcy case in another judicial district and took the position that the original debtor's motion to enforce the settlement violated the automatic stay in this case.[311] The original debtor's court held that "this Court [was] not being asked to deprive [the second debtor] of its property, but rather to enforce its own orders and approved settlements," and the first debtor's effort to enforce the settlement "does not violate the stay in [the other party's] bankruptcy case."[312]

In all these cases, Texas Rule 11—Texas substantive law—applied because the courthouse-steps settlement was made within the State of Texas.[313] But of course there are other situations in which Texas law provides

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302. *Id.* at 833, 837.

303. *Id.* at 833 (citing Gulbenkian v. Penn, 252 S.W.2d 929, 932 (Tex. 1952)).

304. *Id.* at 836–37.

305. *Id.* at 837 (citing Superior Crewboats, Inc. v. Primary P & I Underwriters (*In re* Superior Crewboats, Inc.), 374 F.3d 330, 334 (5th Cir. 2004)).

306. Cantu v. Int'l Bank of Commerce, No. M-11-28, 2011 WL 10620314, at *3 (S.D. Tex. Aug. 5, 2011), *aff'd In re* Cantu, 464 Fed. App'x 385 (5th Cir. 2012).

307. *Id.* at *7.

308. *Id.*

309. *In re* Blast Energy Servs, Inc., 396 B.R. 676, 681–82 (Bankr. S.D. Tex. 2008).

310. *Id.* at 682.

311. *Id.* at 684.

312. *Id.* at 689.

313. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994); *Cantu*, 2011 WL 10620314, at *3; *In re Blast Energy Servs.*, 396 B.R. at 682.

the rule of decision in cases in bankruptcy courts located in districts in states outside Texas.[314] A clear example of Texas Rule 11's application and resulting disallowance of creditors' claims based on an allegation of a prepetition settlement in a mediation made outside of court and within the State of Texas is presented in *In re Dow Corning Corp.*, a mass tort Chapter 11 case in a bankruptcy court in Michigan.[315] The district court allowed the claims, but the Sixth Circuit Court of Appeals reversed, noting that the mediated settlements were not "placed on the record in open court" so that "the requirements of Rule 11 had not been followed" and Texas law therefore precludes enforcement of these agreements.[316]

IV. A PROPOSED FRAMEWORK FOR ANALYZING THE ENFORCEABILITY OF COURTHOUSE-STEPS SETTLEMENTS IN BANKRUPTCY COURTS IN TEXAS

The Fifth Circuit has always urged parties to reach settlement agreements as the "favored means of resolving disputes."[317] The enforceability of settlements follows from the court's recognition of "three important goals encouraged by our judicial system: voluntary settlements of disputes, the enforcement of agreements according to the objective intent of the parties, and an end to litigation."[318] Courthouse-steps settlements in bankruptcy matters, just as much as conventional settlements, can well serve all three of those goals and deserve the careful attention of the bankruptcy courts, both when the parties are cooperating in requesting court approval—the essential condition of all bankruptcy settlements—and when one party later becomes recalcitrant or defaults. Based on the authorities discussed in this Article, a framework for court analysis in such situations may be derived for bankruptcy cases, proceedings in Texas bankruptcy courts, and in other courts in which Texas Rule 11 provides the rule.

To begin, a courthouse-steps settlement should ordinarily be presented to and determined by the bankruptcy court in the same manner as a conventional settlement.[319] The precedent is *Omni Video*, in which the trustee filed the settlement approval notice and scheduled a hearing on it.[320] The reasons for this common mode of initiating the judicial processing of the deal, whether courthouse-steps or conventional in nature, are faithfulness to the only Bankruptcy Rules pertaining to the topic of courthouse-steps settlements and to the traditional jurisprudence of determining approvability of such

314. *See* Dow Corning Corp. v. Caffrey (*In re* Dow Corning Corp.), 531 F. App'x 563 (6th Cir. 2013).
315. *Id.* at 564.
316. *Id.* at 566.
317. Thomas v. Louisiana, 534 F.2d 613, 615 (5th Cir. 1976).
318. Bell v. Schexnayder, 36 F.3d 447, 450 (5th Cir. 1994).
319. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994).
320. *Id.* at 230–31.

deals.[321] A normal settlement approval motion or notice presupposes contract formation and each lawyer's authority to agree to the settlement on behalf of the client; and absent anything more, such as an objection by a third party, the court may proceed directly to consider the settlement-approval factors.[322] After a courthouse-steps settlement has been approved, if a party then reneges, the court should easily enforce the deal against that party, as easily as it did in *Omni Video*, and as it would in the instance of a breached conventional settlement.[323]

But a repudiation or default by either the nondebtor party or the debtor, before court approval of a courthouse-steps settlement, creates additional problems and issues as discussed in this Article.[324] So before it can get to the ultimate approval issue as to whether the settlement is "fair and equitable" and "in the best interest of the estate," the court dealing with a recalcitrant party must determine: whether the terms of the deal were jointly announced on the record and whether those words were adequate to evidence a meeting of the minds of the parties; whether any other contract issues of a defensive nature exist; and whether creditors and other interested parties have been appropriately notified of the terms of the settlement or are excused from such notification by the court—all before the bankruptcy court considers in some fashion, sua sponte or by exercising inherent authority, the traditional approval factors and determines the best-interest issue.[325]

More specifically, I posit here that when, prior to an approval hearing or order, either the debtor or the nondebtor reneges or defaults on the settlement that the respective counsel has joined in announcing to the court, the court should ask and determine the following questions, whether raised by a party or on the court's own motion, in the following order:

i. Has the "entered of record" requirement of the second prong of Texas Rule 11 has been complied with? This rule "is a minimum requirement for enforcement of all agreements concerning pending suits"[326] and resolution of disputes within those matters; and Texas "contract law could not be applied to enforce an agreement that does not comply with [Texas] Rule 11."[327] So the purported courthouse-steps settlement must have been "entered of record"—which means orally articulated and jointly assented to by both or all lawyers for

321. *See id.* at 232–33.

322. *See id.*

323. *See id.*

324. *See supra* Part I.C (discussing other problems that arise with repudiation or default).

325. Rivercity v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 599, 602 (5th Cir. 1980) (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968)).

326. Kennedy v. Hyde, 682 S.W.2d 525, 528 (Tex. 1984).

327. Padilla v. LaFrance, 875 S.W.2d 730, 734 (Tex. App.—Houston [14th Dist.] 1994, writ granted), *rev'd*, 907 S.W.2d 454 (Tex. 1995).

the relevant parties—in open court, with a court reporter or court recording officer making a transcript, an audio recording of the announcement, an equivalent record in the case such by orally stating the deal in a deposition that becomes filed with the court, or orally stating the terms to the judge or to the court's staff outside of court, but repeated by the judge on the record of the case.[328]

ii. *Do the announced words create and evidence a contract?* Texas Rule 11 and its jurisprudence require this second-level evaluation.[329] The terms of courthouse-steps settlements are typically terse, and being unwritten, lack the signatures of the parties themselves or even of their counsel.[330] The example of the parties' announcement in *Omni Video* vividly demonstrates that it can take relatively few words to make an enforceable settlement by announcement on the record.[331] The courts have even shown themselves willing to find an agreement despite conditions of subsequent "formal documentation"[332] and to supply unarticulated but undisputed additional terms, if needed.[333] If the courthouse-steps settlement constitutes a contract, then it binds the participating parties until and unless the court disapproves.[334]

iii. *Do defensive doctrines of contract law, if raised by a recalcitrant party or if perceived by the court acting sua sponte, apply?* Because of judicial precedents,[335] the court should presume the authority of the lawyer to have made and announced the deal on behalf of the client, and the burden is on any objecting client to show to the contrary.[336] This evaluation should include any conditions to approval, effectiveness, or performance; and any condition of subsequent documentation and signature, mistake, fraudulent inducement, fraud, duress or undue influence, or estoppel. If the lawyer acted without authority from the client, and if the client complains to the court, the court itself can and should determine whether the client is entitled to any contract defense. Moreover, the

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328. TEX. R. CIV. P. 11.

329. TEX. R. CIV. P. 11.

330. Hudgins v. Sec. Bank (*In re* Hudgins), 188 B.R. 938, 943 (Bankr. E.D. Tex. 1995) ("The Court must determine whether the 'Settlement Agreement' represents an actual agreement between the parties constituting an enforceable contract.").

331. *See* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 233 (5th Cir. 1995), *aff'g* Holder v. Gerant Indus., (*In re* Omni Video, Inc.), 165 B.R. 22 (Bankr. N.D. Tex. 1994).

332. *Hudgins*, 188 B.R. at 942.

333. *See In re* Christie, 173 B.R. 890, 891 (Bankr. E.D. Tex. 1994).

334. *See* 11 U.S.C. § 349(b) (1994). Of course, if the deal is approved, then it will be binding for the remainder of the case or proceeding or for such other period of time as the deal terms specify, including after the dismissal or closing of the case. *See id.* § 349(a).

335. *See* Harco Energy, Inc. v. Anadrill (*In re* Harco Energy, Inc.), 270 B.R. 658, 664 (N.D. Tex. 2001); Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 610 (E.D. Tex. 1998).

336. *See generally* Arnold I. Siegel, *Abandoning the Agency Model: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473 (1990) (surveying case law across the nation to determine whether courts should uphold settlements where the client subsequently raised an issue of authorization).

court should apply the relevant disciplinary rules and assess penalties against the lawyer or else refer the ethical issue to the appropriate disciplinary authority of the State Bar of Texas.

iv. *What notice has been given, have the appropriate parties in interest and the United States trustee received adequate notice of the substance of the deal, and is any, or any additional notice necessary in the circumstances?* The requirement that there be notice does not mandate a hearing; Rules 9019(a) and 2002(a)(3) & (i) and Bankruptcy Code § 102(1) clearly contemplate that notice can be sufficient if it provides an opportunity to appear and be heard but parties fail to object.[337] Furthermore, if applicable, notice with opportunity for competing bids under Rule 2002(a)(2) and 6004 is required where the courthouse-steps settlement constitutes the disposition of an estate cause of action requiring treatment as a sale under Code § 363 and the *Mims* case. Alternatively, the court may, "for cause," exercise its authority under Rule 2002(a)(3), and alternatively or additionally, its power under Code § 105(a) to simply eliminate any, or any further notice.[338] As a final option, the court may exercise its inherent authority to approve and enforce such a settlement on the spot, although resort to that exercise of power seems unnecessary and even unhelpful given the full range of authority the court holds under the foregoing Bankruptcy Rules and Bankruptcy Code § 105(a).

v. *Does the deal satisfy the bankruptcy-settlement approval factors?* In any event the court's approval of the courthouse-steps settlement is a necessary precondition to enforcement. The court should make an "adequate and intelligent consideration" to the settlement-approval factors to determine whether the agreement is "fair and equitable" and "in the best interest of the estate" so as to fulfill its obligations under *TMT Trailer Ferry* and the Fifth Circuit's long line of settlement-approval jurisprudence.[339]

Under this recommended, step-by-step process of settlement adjudication, if the court is satisfied that the courthouse-steps settlement is in

337. *See* 11 U.S.C. § 102(l) (1986); FED. R. BANKR. P. 2002(a)(3), (i); FED. R. BANKR. P. 9019.

338. 11 U.S.C. § 105(a) (2010); FED. R. BANKR. P. 2002(a)(3). "Counsel and unrepresented parties must confer prior to the date the Pre-Trial Order is required to be filed, to fully explore the possibility of settlement . . . . [M]atters to be considered by the Court at docket call are . . . settlement announcements." Bankr. W.D. Tex., App. L-7016 Form Scheduling Order ¶¶ 13–14 (emphasis omitted). "If a matter is properly noticed for hearing and the parties reach a settlement of the dispute before the final hearing, the parties may announce the settlement at the scheduled hearing." Bankr. W.D. Tex., Exhibit D. Order Granting Complex Chapter 11 Bankruptcy Case Treatment ¶ 4.

339. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 434 (1968); Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 263 (5th Cir. 2010) (quoting Am. Can Co. v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 605, 608 (5th Cir. 1980)).

the best interest of the estate, it may then summarily enforce the deal, as in *Omni Video*.

This framework may serve two useful functions, both in everyday bankruptcy cases and in hotly litigated adversary proceedings.[340] First, Texas bankruptcy judges can use this framework to logically assess a courthouse-steps settlement, as and after announced, and efficiently determine whether to approve, and if necessary, whether to order the enforcement of the deal against a reneging, defaulting, or recalcitrant party.[341] Second, lawyers for opposing parties can also bear this framework in mind when they negotiate courthouse-steps settlements in order to maximize the probability that the deal will succeed or at least will be enforceable.[342]

V. CONCLUSION

Bankruptcy in many ways is an ongoing negotiation, a deal-making process.[343] It is important for bankruptcy lawyers for all parties to bear in mind at all times the case law precedents and formal rules, along with the full panoply of ethical obligations that apply when they conduct settlement negotiations, not only in law offices but also on courthouse steps, because so long as it is in the best interest of the estate, an oral agreement made by lawyers and announced on the record of a case or proceeding will be enforced.

In the *De La Fuente* case, the bankruptcy judge offered this warning and practical advice about courthouse-steps settlements:

> [C]ounsel for the debtor and counsel for the . . . lender frequently announce agreements into the record that they have just negotiated prior to the start of a hearing. This [court] underscores the need for counsel to ensure that they really have negotiated *all material terms to their clients' satisfaction* before coming to the podium and announcing that an agreement has been reached.[344]

The lesson is clear.[345] Despite the pressures and the lack of time to ruminate, when a bankruptcy lawyer makes a courthouse-steps settlement,

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340. *See supra* Part IV (discussing the overarching framework).

341. *See supra* Part IV (discussing the overarching framework).

342. *See supra* Part IV (discussing the overarching framework).

343. *See In re* Mirant Corp., 334 B.R. 800, 811 (Bankr. N.D. Tex. 2005) ("One of the goals of Congress in fashioning the Bankruptcy Code was to encourage parties in a distress situation to work out a deal among themselves."). "Bankruptcy, itself, is about nothing so much as compromise." Gold v. Gen. Motors Corp. (*In re* Signet Indus.), No. 96-2534, 1998 U.S. App. LEXIS 22652, at *7 (6th Cir. Sept. 10, 1998).

344. De La Fuente v. Wells Fargo Bank (*In re* De La Fuente), 409 B.R. 842, 843–44 (Bankr. S.D. Tex. 2009) (emphasis added).

345. Lawyers should have a basic list—or have committed to memory—fundamental terms for a bankruptcy settlement readily available in such situations, including whether the agreement is to be final

care must be exercised in stating the terms on the record—or else the attorney should seek a recess to gain enough time to think through and to put the precise terms on paper—because *Omni Video* and Texas Rule 11 makes binding those terms that are jointly announced in open court—"*even if a party has a change of heart*."[346]

and binding, preliminary and nonbinding and subject to further negotiation, or contingent upon the completion and signing of documentation. Although, if the deal is only tentative, the court may not be willing to adjourn the scheduled hearing and other truly essential points, such as: the scope of releases, procedural disposition of the pending contested matter or adversary proceeding by dismissal, a judgment or order to be entered, and payment or performance terms.

346. *In re* Christie, 173 B.R. 890, 891 (Bankr. E.D. Tex. 1994) (emphasis added) (quoting Holder v. Gerant Indus., Inc. (*In re Omni Video*), 165 B.R. 22, 26 (Bankr. N.D. Tex. 1994), *aff'd sub nom.* Houston v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 232 (5th Cir. 1995)); *see In re* King, No. 11-40725-H3-13, 2013 WL 5723325, at *2 (Bankr. S.D. Tex. Oct. 18, 2013) (mem. op.).