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The Unredeemable Debtor

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> ***The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.***
>
> ***- Oliver Wendell Holmes***

Bankruptcy law decisions are replete with references to the "worthy debtor." In re Carp, 340 F.3d 15, 25 (1st Cir. 2003); In re BankVest Capital Corp., 360 F.3d 291 (1st Cir.2004); In re Institute of Business and Professional Educ., Inc., 79 B.R. 948 (Bankr. S.D. Fla. 1987); In re Nickerson, 40 B.R. 693 (Bankr. N.D. Tex. 1984); In re Marble, (Bankr. W.D. Tex. 1984); In re Doherty, 219 B.R. 665 (Bankr. W.D. N.Y. 1998).

These decisions typically employ the "worthy debtor" nomenclature in the context of the entitlements that are afforded by the provisions of the Bankruptcy Code. It is always the "worthy debtor" that is entitled to a discharge of debts, a "fresh start", or to reject cumbersome contracts. This usage bespeaks a universe that also contains the "unworthy debtor," a party whose behavior does not merit the statutory benedictions of the Bankruptcy Code. The identity of these parties is most often examined in the context of the discharge of debts and the behavior or actions that merit a denial of discharge or the finding that a particular debt is non-dischargeable.

There is a larger and more amorphous question though that also merits consideration, namely are their industries, companies, enterprises whose function and purpose is so odious and inconsistent with the precepts of good citizenship and the "moral development of the race", to quote Justice Holmes, that they should be denied the benefits of reorganization afforded by the Bankruptcy Code.

If there is an argument to be made to prevent such enterprises from receiving the benefits of the Bankruptcy Code, to deny them the colloquial label of "worthy debtor", that recourse likely lies within the provisions of the Bankruptcy Code that require that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The "not forbidden by law" requirement is of limited utility in situations where the behavior is recognizable as immoral or intrinsically evil to most but has not yet been sanctioned by any legislative authority. Notably, and perhaps inversely, enterprises engaged in the sale and growing of cannabis are without access to the

Bankruptcy Code because they act in contravention of the federal Controlled Substances Act, 21 U.S.C. §§ 801 et seq., which has been found to take precedence over state laws allowing the sale of cannabis. See, Gonzales v. Raich, 545 U.S. 1, 12 (2005). As a result, bankruptcy being a creature of federal law, cannabis cases are generally being dismissed at the outset for cause in accordance with 11 U.S.C. § 1112(b) and not making it as far as the confirmation standard. See, In re Way To Grow, Inc., 597 B.R. 111 (Bankr. D. Colo. 2018).

If "forbidden by law" is unavailable as a source of relief, the last best hope to prevent the sanctioned reorganization of the unworthy debtor lies within the requirement that a plan be proposed in "good faith."

"Good faith" is not defined by the Bankruptcy Code, a fact that makes it more likely that our understanding of good faith may be transitory and that as the 'moral development of the race' proceeds, so might our understanding of 'good faith.' In other words, what was good faith yesterday might not, in light of our communal experience and growth as citizens, be good faith today.

In the first instance, we can understand from the ordering of the words within section 1129(a)(3) that the good faith standard exists independently of the 'forbidden by law' standard. A plan of reorganization may describe a course of action not forbidden by law, but may still not meet the 'good faith' standard.

The good faith standard as used within section 1129(a)(3) is most commonly described as proposing a plan that fulfills the purposes and objectives of the Bankruptcy Code. Those purposes and objectives within the context of Chapter 11 are most commonly understood as being "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1983); see also, Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 452 (1999) ("[T]he two recognized policies underlying Chapter 11 [are] preserving going concerns and maximizing property available to satisfy creditors")

This case law, which is by far the most consistent usage of the term, emphasizes paying back creditors and preserving an ongoing enterprise. It does not suggest the existence of anything more amorphous beyond those standards and it supports the idea that the 'good faith' standard is not meant to be an existential inquiry into the moral worth of a particular industry.

Bankruptcy courts have, however, recognized that the absence of a definition of good faith leaves courts without "any precise formulae or measurements to be deployed in a mechanical good faith equation." Metro Emps. Credit Union v. Okoreeh–Baah (In re Okoreeh–Baah), 836 F.2d 1030, 1033–34 (6th Cir.1988) (interpreting good faith in context of Chapter 13).

Any successful collateral attack under section 1129(a)(3) on the 'good faith' of the immoral enterprise must likely follow the path of connecting the good faith standard to the "public good." Bankruptcy Courts have invoked the 'public good' in refusing to enforce certain contracts and have followed the dictates of some courts that "while violations of public policy must be determined through "definite indications in the law of the sovereignty," courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society. Stamford Bd. of Educ. v. Stamford Educ. Ass'n., 697 F.2d 70, 73 (2d Cir.1982).

The concept of the 'public good' is not a foreign one in bankruptcy courts. Seeking relief for debtors that are the only providers of a service within their geographic area is an immensely easier task, no court, and no bankruptcy judge, likes to see a business fail and when the business is important to the community, support for reorganization from the bench often works to make reorganization easier. Bankruptcy courts, although restrained by a statutory scheme, are as a matter of practice courts of equity. Employing those equitable arguments to support a reorganization is both achievable and a reality of present practice.

Whether equitable arguments can be inversely employed to graft a sense of the 'public good' onto the good faith requirement within section 1129(a)(3) is decidedly uncertain and is not directly supported by the case law as it exists.

Somewhere out there though in one of those small border towns between the places of unelected legislators and the judicious and novel application of historical precedent lies the "moral development of the race" and the bankruptcy court that finds that incumbent within the concept of good faith is fair consideration of the public good.

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