



AMERICAN
BANKRUPTCY
INSTITUTE

Alexander L. Paskay Memorial Bankruptcy Seminar

Chapter 11 Updates and Core Issues

Hon. Roberta A. Colton, Moderator

U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Eyal Berger

Akerman LLP | Fort Lauderdale, Fla.

Matthew B. Hale

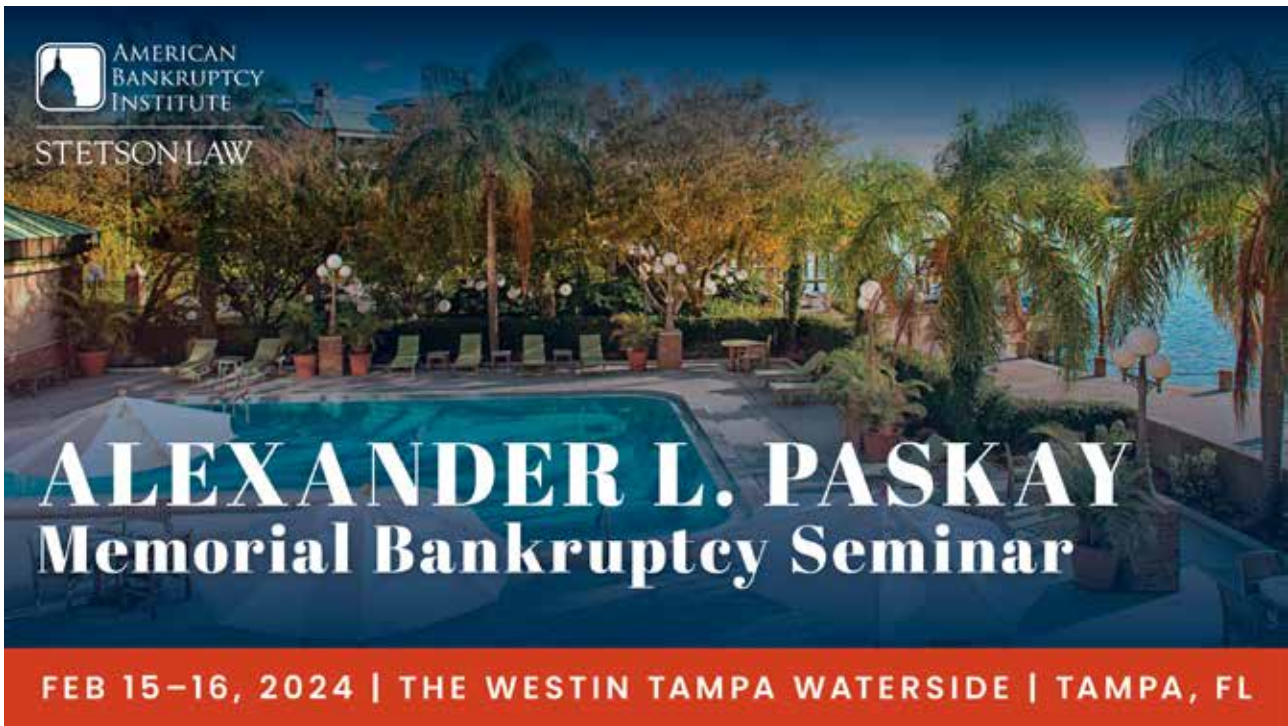
Stichter, Riedel, Blain & Postler, P.A. | Tampa, Fla.

Dana L. Robbins

Burr & Forman LLP | Tampa, Fla.

J. Ryan Yant

Carlton Fields, P.A. | Tampa, Fla.



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Panelists

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Subchapter V – Discharge Exceptions *Do Not Apply*

- *Nutrien AG Solutions, Inc. v. Hall, et al. (In re Hall)*, 651 B.R. 62 (Bankr. M.D. Fla. 2023) (Judge Burgess):
 - 523(a) discharge exemptions do not apply in Subchapter V cases filed by corporate debtors that receive a discharge under Section 1192 based upon rules of statutory construction.
 - Declined to follow Fourth Circuit (*Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022)).



Subchapter V – Discharge Exceptions *Do Not Apply*

- *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, Case No. 22-04099-TPG, Adv. No. 23-00007-TPG, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023) (Judge Geyer):
 - Dismissing an adversary proceeding seeking to except a debt from discharge under Section 523(a)(6) because the Subchapter V debtors were not “individuals” receiving a discharge under Section 1192 but limited liability companies.
 - The Court certified a direct appeal to the Eleventh Circuit.



Subchapter V – No vote, no problem?

- Consensual confirmation – Section 1191(a).
- Implications of consensual versus non-consensual confirmation.
- Consensual confirmation requires satisfaction of Section 1129(a)(8):
 - “With respect to each class of claims or interests ... such class has accepted the plan.”
- Prevalence of non-voting classes.



Subchapter V – No vote, no problem?

- Two recent cases out of Southern District of Texas have held that, in a Subchapter V case, a non-voting class is not counted for purposes of Section 1129(a)(8).
 - *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023)
 - *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)
- These courts held that the voting calculation in Section 1126(c) cannot be performed where no votes are cast.
 - What is zero divided by zero?



Subchapter V – Pre-Packaged Chapter 11 Plans

A pre-packaged Chapter 11 Plan is a plan that a debtor has fully or partially solicited for acceptance prior to commencement of the Bankruptcy Case.

Subchapter V has unique procedural considerations for these types of cases arising from:

- (i) Appointment of Subchapter V Trustee;
- (ii) Subchapter V eligibility requirements; and
- (iii) Setting of a mandatory status conference.



Subchapter V – Pre-Packaged Chapter 11 Plans

First Day Motion Setting Confirmation and Related Relief:

- Request date certain for Confirmation Hearing;
- Request to combine the status conference with the Confirmation Hearing;
- Request for approval of form of ballot and solicitation package for any continued post-petition solicitation of Plan;



Subchapter V – Pre-Packaged Chapter 11 Plans

First Day Motion Setting Confirmation and Related Relief (con't):

- Request shortening of deadlines for:
 1. Objections to Subchapter V eligibility;
 2. 1111(b) elections;
 3. 523 objections to discharge (where applicable);
 4. Filing Proofs of Claim;
 5. Filing claims to allow administrative expenses (including professional claims);



Subchapter V – Pre-Packaged Chapter 11 Plans

First Day Motion Setting Confirmation and Related Relief (con't):

- Request setting Meeting of Creditors at earlier date;
- Make Debtor's corporate representative available for examination on shortened notice.



Subchapter V – Pre-Packaged Chapter 11 Plans

In re BPI Sports, LLC, Case No. 23-17463-SMG, Bankr. S.D. Fla. (J. Grossman)

- Debtor filed a pre-packaged plan that had partial acceptances from a class of secured claims and a class of unsecured claims held by Debtor's critical vendor. The case was commenced on September 18, 2023 and confirmed on **October 20, 2023**



Subchapter V – Pre-Packaged Chapter 11 Plans

In re BPI Sports, LLC (con't)

- The Plan contained certain general releases to Debtor's insiders and was accepted by every class with approximately 96% of the aggregate debt against the Debtor voting in favor of the Plan.



Subchapter V – Pre-Packaged Chapter 11 Plans

In re BPI Sports, LLC (con't)

- Judge Grossman granted Debtor's motion to set confirmation in compliance with the pre-petition restructuring support agreement negotiated pre-petition by the Debtor and its critical vendor. However, Judge Grossman denied Debtor's requests to deem the filing of a pre-packaged plan was sufficient to negate any potential cause for requiring the filing of a disclosure statement or the appointment of a committee at the outset of the case.



Subchapter V – Pre-Packaged Chapter 11 Plans

In re BPI Sports, LLC (con't)

- The meeting of creditors was held and concluded a day before confirmation and the Debtor created a data room at the outset of the case to allow any interested parties to inspect all documents in debtor's possession related to the Schedules, SOFA, Plan, Restructuring Agreement, or any pre-petition transfers.



Subchapter V - Recent Developments

In re Carter, Case No. 23-54816-JWC, ECF No. 47 (Bankr. N.D. Ga. Dec. 13, 2023) (J. Cavender)

- Case of first impression where bankruptcy court held that an individual debtor was ineligible for Subchapter V where debtor owned majority interests in two subsidiaries that were in Chapter 7 at the time the individual commenced his Chapter 11 case. The bankruptcy court held that the noncontingent and liquidated debt of both subsidiaries was required to be aggregated with the individual debtor's debt and that collectively the debt exceeded the \$7.5 million cap.



Subchapter V - Recent Developments

In re Carter (con't)

- Judge Cavender noted that an individual Chapter 11 debtor that filed a chapter 7 petition for a majority owned subsidiary after the commencement of the Chapter 11 case may satisfy the technical definition of debtor under Section 1182 without being required to aggregate the debts of the chapter 7 subsidiary because the definition focuses on the aggregate debts as of the date of the petition.
- Thus, the *Carter* case will likely compel the debtor bar to carefully analyze the timing of filing affiliated bankruptcy cases.



MCAs - What is an MCA?

- Overview
- Distinctions from loans
 - Indefinite repayment term
 - Reconciliation provision
 - No true interest component
- What is the “specific percentage”?



MCAs – Property Law Rights

- Can you buy something that doesn’t exist yet?
- What is the nature of an MCA company’s property interest in the Debtor’s “future receivables” or “future receipts”?
- How does this decision impact a Chapter 11 debtor?
 - Section 552
 - Executory contracts
 - Cash collateral



MCAs – Cash Collateral Issues

- How do MCA companies approach cash collateral?
- Senior secured lender vs. no senior secured lender
 - *In re Brooks*, 619 B.R. 669 (Bankr. C.D. Ill. 2020)
- How does the MCA company's "ownership" of future receivables or receipts factor into cash collateral?
- Why do many MCA companies ignore chapter 11 debtors?



MCAs – Confirmation Considerations

- Classification
- Motions to value vs. adversary proceeding to determine validity, priority, or extent of a lien or interest
- Post-confirmation pursuit of causes of action



Showdown at the Supremes: Examining Purdue Pharma



Credit: Fred Schilling, Collection of the Supreme Court of the United States
<https://www.supremecourt.gov/about/justices.aspx>

On December 4, 2023, the Supreme Court heard oral argument in the bankruptcy case of Purdue Pharma --*Harrington v. Purdue Pharma L.P.* The Supreme Court will decide whether the bankruptcy plan presented by Purdue Pharma, which releases the controlling Sackler family from opioid-related liability in exchange for a financial contribution of at least \$5.5 billion, is permissible under the Code.



Showdown at the Supremes: Examining Purdue Pharma

Question presented:

- Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.



Showdown at the Supremes: Examining Purdue Pharma

Petitioner United States Trustee Region 2's Brief Answer:

The Bankruptcy Code Does Not Authorize Third-Party Releases.

- The Code provides no express authority to release nondebtors from personal liability to other nondebtors.
- The residual equitable powers in Sections 105(a) and 1123(b)(6) do not include the power to authorize nonconsensual third-party releases.



Showdown at the Supremes: Examining Purdue Pharma

- Grants the functional equivalent of a discharge to a nondebtor, despite the Code's clear provisions limiting a discharge to the debtor, who undertook the many duties and obligations imposed by the Code to obtain a fresh start.
- It also provides full repose to the Sacklers without requiring them to commit substantially all their assets to compensating their creditors.



Showdown at the Supremes: Examining Purdue Pharma

- Congress’s narrow allowance for asbestos trusts in Section 524(g)—which is the only provision of the Code specifically authorizing an injunction of claims between nondebtors—also illustrates the impermissible breadth of the release approved by the court of appeals.
- Policy Arguments.



Showdown at the Supremes: Examining Purdue Pharma

Respondent Purdue Pharma’s Brief Answer:

The Bankruptcy Code Does Not Prohibit Third-Party Releases.

- Section 1123(b)(6)’s use of the terms “any” and “appropriate” in describing plan provisions is permissive and gives great latitude on what can be included in a plan.
- The provision does not draw a distinction between consensual and nonconsensual plans.



Showdown at the Supremes: Examining Purdue Pharma

- This case illustrates how third-party releases can and do advance the core objectives of bankruptcy in appropriately limited circumstances.
- Third-party releases have been around in bankruptcy for three decades and have been used in courts of equity for centuries.
- If these releases go away, so does the money. And “lives literally will be lost.”



Showdown at the Supremes: Examining Purdue Pharma

Respondent Unsecured Creditor’s Committee’s Positions:

- The U.S. Trustee does not speak for the victims, the UCC does.
- All creditors involved filed POCs, the creditors insisted on the provision, and all contingencies voted in favor.

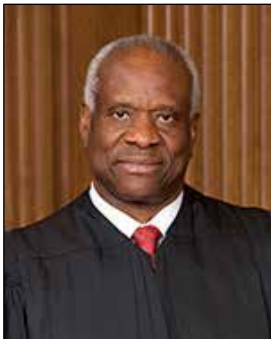


Showdown at the Supremes: Examining Purdue Pharma

A broad reading of 11 U.S.C. § 1123(b)(6) implicates “our major questions doctrine.”



Showdown at the Supremes: Examining Purdue Pharma



“[T]ell me why a consensual agreement, a release, is consistent with the code?”



Showdown at the Supremes: Examining Purdue Pharma

“[I]s this the best deal that’s available for the creditors?”



Showdown at the Supremes: Examining Purdue Pharma



“So how do we write this not to effect [exculpation clauses for professionals]?”



Showdown at the Supremes: Examining Purdue Pharma

“It’s overwhelming, the support for this deal” The UST’s “position rests on hifalutin principles of bankruptcy law.”



Showdown at the Supremes: Examining Purdue Pharma



“How about the Seventh Amendment . . . ?”

“Even if [the Sacklers] put all their assets on the table, they still wouldn’t get a release for fraud, right?”



Showdown at the Supremes: Examining Purdue Pharma

“[W]e have 30 years of bankruptcy court practice that have approved releases of this kind....”



Showdown at the Supremes: Examining Purdue Pharma



“[T]his is a very complicated problem in mass tort litigation that involves bankruptcy.”



Showdown at the Supremes: Examining Purdue Pharma

“So [the release] is only necessary insofar as [the Sacklers] are requiring it.”



Chapter 11 Updates and Core Issues

Questions?

Comments?

Predictions?

Practice Tips?



Chapter 11 Updates and Core Issues

Thank you!!

Faculty

Eyal Berger is a partner with Akerman LLP in its Bankruptcy and Reorganization Department in Fort Lauderdale, Fla., where he focuses his practice on complex business reorganizations, out-of-court debt restructuring, the representation of creditors' committees, assignments for the benefit of creditors, corporate dissolutions, Article 9 transactions and the enforcement of creditors' rights. He also protects the interests of financial institutions and lessors as secured and unsecured creditors in myriad insolvency proceedings by assisting them in preserving, liquidating or repossessing their collateral. He has 18 years of experience as an insolvency professional representing debtors-in-possession, trustees, assignees and receivers. Previously, Mr. Berger served as judicial clerk extern to Bankruptcy Judge Michael G. Williamson and Chief Bankruptcy Judge Paul M. Glenn in the Middle District of Florida. In addition, he was a member of NCBJ-NextGeneration, for which he served on its Organizing Committee from 2014-19, and is a member of NCBJ's NextGeneration Class of 2012. Mr. Berger recently assisted a subchapter V debtor client in confirming a prepackaged subchapter V plan in 33 days. He is admitted to practice in all bankruptcy and district courts in Florida, as well as the Eleventh Circuit Court of Appeals. He also is listed in *Chambers USA* for 2020-23, ranked in Florida (South Florida) for Bankruptcy/Restructuring in *The Best Lawyers in America* for 2020-24, listed in Florida for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy, listed in *The Best Lawyers in America* in 2022 as “Lawyer of the Year” for Litigation - Bankruptcy in Fort Lauderdale, named a “Top Lawyer in Broward County” for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2022 in *Fort Lauderdale Illustrated*, listed in *Super Lawyers* magazine from 2009-19 as a Florida “Rising Star” for Bankruptcy & Creditor/Debtor Rights, and named an “Up & Comer” in 2013 in *Florida Trend's* Legal Elite. In addition, he received a book award in civil procedure. Mr. Berger received his B.A. in criminology and his B.S. in psychology, both *cum laude*, in 1999 from the University of Florida, and his J.D. *magna cum laude* in 2004 from the University of Florida Levin College of Law, where he was admitted to the Order of the Coif.

Hon. Roberta A. Colton is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed in December 2017. Contemporaneously, she was appointed as a member of the judicial mediation team involved in the Puerto Rico PROMESA cases and served in that capacity until January 2022. Prior to taking the bench, Judge Colton practiced at Trenam Law in Tampa, Fla., where she was a shareholder and a member of the firm's Management Committee. Prior to joining Trenam, she served as a judicial law clerk for Hon. James C. Hill of the U.S. Court of Appeals for the Eleventh Circuit. During her more than 30 years in practice, Judge Colton was active in service to the legal profession and has been recognized for her accomplishments. Among others, she was listed in *The Best Lawyers in America* for Bankruptcy & Creditor/Debtor Rights from 1995-2016 and named one of the top 10 *Super Lawyers* in Florida from 2011-16. Judge Colton served as Eleventh Circuit Regent for the American College of Bankruptcy and as chair of the Grievance Committee of the U.S. District Court for the Middle District of Florida. She also is the former chair of the Florida Bar Business Law Section's Bankruptcy/UCC Committee, as well as the Tampa Bay Bankruptcy Bar Association. Judge Colton received her B.A. in commerce with distinction from the University of Virginia in 1979 and her J.D. from William & Mary Law School in 1982, where she served on its law review and was a national moot court finalist.

Matthew B. Hale is a shareholder with Stichter, Riedel, Blain & Postler, P.A. in Tampa, Fla., where he focuses on assisting businesses and their owners in navigating the restructuring process, both in

and out of court. More broadly, he represents debtors, creditors, committees and trustees in business bankruptcy cases, seeking to maximize value for stakeholders. In addition to his bankruptcy practice, Mr. Hale represents fiduciaries and other parties in Florida assignment for the benefit of creditors cases and receivership cases. He also advocates for clients in a variety of commercial litigation matters, including fraudulent transfer actions, preference actions, litigation against directors and officers, complex creditor enforcement litigation, business owner disputes, real estate litigation and contract disputes. Mr. Hale previously served as a term law clerk for Hon. Karen S. Jennemann, Chief U.S. Bankruptcy Judge for the Middle District of Florida. He received his B.S. in business administration with a focus on economics from the University of Florida, and his J.D. *magna cum laude* from Florida State University College of Law, where he served as an editor of the *Florida State University Law Review* and joined the Order of the Coif.

Dana L. Robbins is an associate with Burr & Forman LLP in Tampa, Fla., where she serves in its Creditors' Rights and Bankruptcy Practice Group. She represents a diverse array of clients, including banking institutions, municipalities, real estate developers, title insurance groups and retail shopping centers in commercial bankruptcy cases, as well as in business litigation, commercial litigation, appeals and general civil litigation. Ms. Robbins' practice includes all aspects of corporate restructuring, bankruptcy and insolvency proceedings, including § 363 sales, and preference and fraudulent transfer litigation. Prior to joining Burr & Forman, she clerked for the Chief Judge Caryl E. Delano in the U.S. Bankruptcy Court for the Middle District of Florida, where she assisted with complex bankruptcy and state law issues. She has also served as a trial court staff attorney in the Office of Court Counsel for the Sixth Judicial Circuit of Florida, where she advised circuit court judges on substantive and procedural issues in trial and appellate cases. Ms. Robbins is actively involved in several professional organizations, including serving on the boards of the Federal Bar Association's Tampa Bay Chapter, and the International Women's Insolvency & Restructuring Confederation. She has been listed in *The Best Lawyers in America* as a "One to Watch" for Insurance Law since 2021, and for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, Litigation - Banking and Finance for 2023, and she was listed as a *Florida Super Lawyers* "Rising Star" from 2021-22. Ms. Robbins received her B.S. from the University of Tampa, her M.B.A. from Stetson University and her J.D. from Stetson University College of Law. She also studied abroad at the University of Oxford.

J. Ryan Yant is a shareholder with Carlton Fields, P.A. in Tampa, Fla., where he focuses on bankruptcy and creditors' rights law, and has substantial courtroom experience. He has represented both debtors and creditors in chapter 7, 11, 12 and 13 bankruptcies. He also has handled associated contested matters and adversary proceedings, with an emphasis on personal and corporate chapter 11 debtor representation. In court, Mr. Yant has handled all aspects of client representation and case management from beginning to end, including hearings, depositions, mediations and negotiations with opposing parties. He also has drafted all documents necessary for representation, including complaints, answers, plans, disclosure statements, confirmation orders, motions, responses, objections, applications and proposed orders. Prior to joining Carlton Fields, he clerked for Hons. K. Rodney May and Roberta A. Colton in the U.S. Bankruptcy Court for the Middle District of Florida after beginning his practice as a debtor's attorney with a focus on personal and corporate chapter 11 debtor representation. Mr. Yant has been listed in *The Best Lawyers in America* as one of its Ones to Watch for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law since 2021. He received his B.S. *cum laude* in 1986 from the University of Florida, his M.B.A. with honors in 2013 from Stetson University and his J.D. *cum laude* in 2013 from Stetson University College of Law.