AMERICAN BANKRUPTCY INSTITUTE

New York City Bankruptcy Conference

Consensual Releases Post-*Purdue*

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CONCURRENT SESSION

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Third-Party Releases Post-*Purdue*

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Agenda

1. The Scope of *Purdue*
2. What Constitutes Consent?
3. Direct vs. Derivative Claims
4. Gatekeeping, Exculpation, and Injunctive Provisions
5. Chapter 15 Recognition

1 The Scope of *Purdue*

Nonconsensual Releases and *Purdue*

- **Pre-*Purdue* Landscape**
  - Before the Supreme Court's ruling in *Purdue*, federal courts were divided on whether non-consensual third-party releases were permissible.
  - Several circuits, including the Third, Fourth, Sixth, Seventh, and Eleventh, permitted such releases under narrow conditions based on various legal theories.
  - In contrast, the Fifth, Ninth, and Tenth Circuits rejected these releases altogether, unless explicitly authorized under provisions like § 524(g).

- **Immediate Impacts of *Purdue***
  - The *Purdue* decision significantly restricts the ability of bankruptcy courts to approve non-consensual third-party releases.
  - Practitioners must now carefully assess release provisions in plan drafting and confirmation strategies to ensure releases are consensual or otherwise permissible under *Purdue*.

The Scope of *Purdue*

- **What *Purdue* Actually Held**
  - The Bankruptcy Code does not authorize non-consensual third-party releases under § 1123(b)(6).
  - The Court concluded that the 'catchall' provision cannot override the structural limitations embedded in the statutory scheme.
  - Only § 524(g) was recognized as a legitimate statutory basis for such extraordinary relief.

- **What *Purdue* Left Open**
  - The decision did not address the constitutionality of non-consensual third-party releases.
  - It also left open the question of whether consensual releases remain valid and how consent should be defined.
  - While the Court acknowledged policy concerns, it made clear that such questions are best left to Congress.

2 What Constitutes Consent?

Approaches to Consent after *Purdue*

- **Due Process v. Contract Theory**
  - In the wake of *Purdue*, courts have diverged on the appropriate theory of consent to third-party releases.
    - Some courts follow the "Due Process Theory," finding that notice and a meaningful opportunity to opt out may constitute consent.
    - Others adopt the "Contract Theory," holding that legal obligations cannot be imposed without an affirmative expression of agreement – a "contracting" approach to consent.

Consensual Releases Mechanisms

- Courts continue to diverge on what constitutes valid consent to third-party releases.
- Opt-In Model
  - Creditor must take affirmative action (e.g., check a box or return a signed form).
  - Viewed as a clear, express grant of consent.
  - Favored in jurisdictions applying a stricter, contract-based approach.
- Opt-Out Model
  - Consent presumed unless creditor takes action to withhold it, paired with disclosure in the plan and ballot materials.
  - Accepted by some courts under a due process theory—if notice and opportunity to object are meaningful.
- Judicial Trends and Concerns
  - Courts increasingly scrutinize whether opt-out mechanics are fair and non-coercive.
  - Substantial weight placed on the clarity of disclosures and the opportunity to reject the release.
- Economic incentives (e.g., higher recovery for releasing creditors) may complicate consent analysis.

3 Direct vs. Derivative Claims

Direct vs. Derivative Claims

- *Purdue* did not distinguish between derivative and direct claims but has intensified scrutiny of the divide between these types of claims:
  - Derivative claims are property of the estate under § 541 and may be released or settled under the plan.
  - Direct claims, held individually by creditors, fall outside estate control and generally require affirmative consent for release.
- The line between derivative and direct liability is frequently blurred, particularly in mass tort and corporate misconduct contexts.
  - Claims involving corporate veil-piercing, aiding and abetting, or concerted tortious conduct raise fact-specific questions of ownership and standing.
- Courts have adopted varied multi-factor tests to assess whether claims are truly personal or derivative of estate injuries.
  - Some decisions emphasize the nature of the harm; others focus on the identity of the plaintiff or the uniformity of creditor impact.
  - Recent rulings underscore the importance of respecting structural boundaries in plan treatment, reinforcing limits on releasing non-estate assets.
  - Trends suggest outcomes may hinge less on legal theory than on cases-specific narratives of harm and control.

4 Gatekeeping, Exculpation, and Injunctive Provisions

Gatekeeping Provisions Post-*Purdue*

- Gatekeeper provisions condition a party's ability to initiate litigation against protected actors on first obtaining bankruptcy court authorization
  - Function procedurally, distinguishing them from releases by focusing on access to forum, not substantive immunity.
- Authority derives from the Barton doctrine and judicial interest in preserving the integrity of the bankruptcy estate and its administration.

- **Post-*Purdue* Landscape**
  - The permissible scope of gatekeeping remains unsettled, particularly where the provision implicates direct creditor claims.
  - Tension exists between respecting the bankruptcy court's oversight role and protecting non-debtor claimants' rights to pursue independent remedies.
  - Courts now scrutinize gatekeeper provisions more rigorously in light of *Purdue's* emphasis on statutory limits.
  - Emerging judicial approaches distinguish between narrowly drawn gatekeeping and broader mechanisms that approximate unauthorized third-party releases.

Exculpation Provisions – Scope and Reassessment

- Exculpation clauses provide limited protection to estate fiduciaries for conduct within the scope of their court-approved roles during the case.
- Though long accepted in practice, exculpation, particularly of non-estate fiduciaries, lacks explicit statutory grounding, relying instead on interpretive flexibility under § 1123(b)(6).

Post-Purdue Landscape

- The *Purdue* dissent signals judicial discomfort with using implied authority to create categorical liability shields, and courts remain divided on whether exculpation clauses are permissible and, if so, how far they may extend beyond traditional estate fiduciaries.
  - Some decisions reaffirm historical boundaries; others reject them as inconsistent with the Code's remedial and accountability principles.
- The viability of broad exculpation clauses may ultimately depend on clearer legislative direction or a national consensus among the circuits.

5 Chapter 15 Recognition

Chapter 15 Recognition

- Chapter 15 authorizes U.S. courts to recognize foreign insolvency proceedings and related relief, including enforcement of third-party releases approved in foreign jurisdictions.
  - The recognition regime balances deference to foreign courts with domestic safeguards, articulated through the "manifestly contrary to public policy" exception.
  - Courts must reconcile foreign norms of creditor treatment with fundamental principles of U.S. bankruptcy law.
- Post-*Purdue* cases like *Crédito Real* and *Odebrecht* illustrate the judiciary's willingness to recognize foreign plans featuring non-consensual releases, provided they reflect procedural fairness.
  - This tolerance suggests that Chapter 15's policy exception is narrow and procedural, rather than substantive.
- The potential use of Chapter 15 to effectuate relief foreclosed by *Purdue* invites scrutiny over the consistency and integrity of the U.S. insolvency framework.
- As courts grapple with cross-border comity versus domestic limits, the boundaries of permissible enforcement remain a developing and contested space.

Faculty

Gregory V. Demo is an attorney with Pachulski Stang Ziehl & Jones in New York and regularly represents hedge funds and other significant holders of securities in connection with complex chapter 11 reorganizations. In addition, he is part of the firm's team handling insolvency-related sales and acquisitions. Mr. Demo is adept at creating litigation strategies for investments in state, federal and bankruptcy court, and overseeing all aspects of the implementation of such strategies. He is admitted to practice in New York and Illinois. Mr. Demo received his B.A. *magna cum laude* in 2003 from Marquette University and his J.D. in 2008 from the College of William & Mary School of Law, where he was elected to the Order of the Coif, served on the *William & Mary Law Review* and graduated second in his class.

Matthew J. Dundon is the principal of Dundon Advisers LLC in White Plains, N.Y., and founded the firm in 2016. He has been a global credit, litigation and distressed investment leader for more than 13 years, having served as research head at Miller Tabak Roberts Securities from 2006-10 and portfolio manager at Pine River Capital and Advent Capital from 2010-16, and has been involved in dozens of litigation-intensive investments and trading opportunities. Mr. Dundon was a corporate finance lawyer and analyst from 1998-2006. He received his B.A. from the University of California at Berkeley and his J.D. from the University of Chicago.

Shana A. Elberg is a Corporate Restructuring partner with Skadden, Arps, Slate, Meagher & Flom LLP in New York and has represented companies, creditors, equityholders, lenders, investors, sellers and purchasers in such matters as prepackaged and prearranged bankruptcies, traditional chapter 11 cases, and out-of-court workouts and acquisitions. She has experience working across a wide variety of industries, including pharmaceuticals, energy, financial services, sports, shipping and retail. Ms. Elberg has been selected for inclusion in *Chambers USA* for her work in bankruptcy and restructuring and named one of *Lawdragon*'s 500 Leading Global Bankruptcy & Restructuring Lawyers. She is also a recipient of the Burton Award for Legal Writing and has been recognized by *Turnarounds & Workouts* as an Outstanding Young Restructuring Lawyer. Ms. Elberg serves on Skadden's Hiring and Summer Associate committees. She also serves on the Steering/Planning Committee for Focus on Gender Diversity, a corporate restructuring-focused gender equity initiative. In addition, Ms. Elberg is a member of the UJA-Federation of New York's Restructuring Executive Committee, a member of the Practical Law Bankruptcy Advisory Board, a member of AJC's Financial Services Executive Committee and a co-author of the *Chambers International Insolvency Guide*. She received her B.S. in 1998 from Cornell University and her J.D. *cum laude* in 2001 from Cornell Law School.

Hon. Martin Glenn is Chief U.S. Bankruptcy Judge for the Southern District of New York in New York, initially sworn in on Nov. 30, 2006, and appointed Chief Judge on March 1, 2022. Previously, he was a law clerk for Hon. Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Second Circuit, from 1971-72, and he practiced law with O'Melveny & Myers LLP in Los Angeles from 1972-85 and in New York from 1985-2006, where he focused on complex civil litigation including securities, RICO, financial and accounting fraud, and unfair competition. Judge Glenn is a member of the American Law Institute, International Insolvency Institute, New York Federal-State Judicial

Council, New York City Bar, National Conference of Bankruptcy Judges and ABI. He is a past member of the Committee on International Judicial Relations of the U.S. Judicial Conference and the Bankruptcy Judge Advisory Group of the Administrative Office of the U.S. Courts. In addition, he is an adjunct professor at Columbia Law School, a contributing author to *Collier on Bankruptcy* and a frequent lecturer on bankruptcy-related issues. Judge Glenn received his B.S. from Cornell University in 1968 and his J.D. from Rutgers Law School in 1971, where he was an articles editor of the *Rutgers Law Review*.

Lisa G. Laukitis is a partner with Milbank LLP in New York and a member of the firm's Financial Restructuring Group. For more than 25 years, she has advised clients on all aspects of corporate restructurings. The primary focus of her work has been representing companies in connection with their out-of-court restructurings and chapter 11 cases, but she also frequently represents private-equity and hedge funds in connection with their investments in and acquisitions of distressed companies. Ms. Laukitis's experience spans a wide variety of industries, including pharmaceuticals, manufacturing, retail, consumer products, metals and mining, automotive, energy and shipping. A frequent lecturer and author on restructuring topics, she has been repeatedly selected for inclusion in *Chambers USA*, *IFLR1000*, *The Best Lawyers in America* and the *Lawdragon 500*. She also was named one of *Crain's New York Business*'s 2023 Notable Women in Law and has been previously recognized as one of *The Deal*'s Top Women in Dealmaking for M&A. In addition, Ms. Laukitis has been named to The M&A Advisor's 40 Under 40 list, recognized as a "Rising Star" by both the *New York Law Journal* and *Law360*, and named an Outstanding Young Restructuring Lawyer by *Turnarounds & Workouts*. She also was recently selected as a Fellow of the American College of Bankruptcy, and previously served on the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York and the Lincoln Center Business Council. Ms. Laukitis received her B.A. in 1996 from Miami University and her J.D. in 1999 from the University of Dayton.

David M. Posner is a partner with Lowenstein Sandler LLP in New York and vice chair of its Bankruptcy & Restructuring Department. Leveraging a deep knowledge of reorganization proceedings and commercial litigation earned from over 25 years in the practice of creditor-focused advocacy, he is highly sought-after by companies, creditors' committees, acquirers, financial institutions and other significant parties-in-interest for his counsel on complex reorganizations and financially distressed situations, as well as disputes over debtor/creditor rights. Mr. Posner has represented the official committees of unsecured creditors in numerous chapter 11 cases with $100 million or more in debt. His work spans such industries as retail, quick service restaurants, aviation, oil and gas, and financial services, among others. Over the course of his career, Mr. Posner has represented clients in the chapter 11 bankruptcies of marquee brands such as Nine West, Gold's Gym, American Apparel, Bon Ton Stores, Sbarro and Reader's Digest. He also is experienced in the areas of bankruptcy litigation, judgment enforcement and bankruptcy appellate practice. In addition to his work representing clients in reorganization proceedings, Mr. Posner has substantial commercial litigation experience in state and federal courts. He has tried both jury and non-jury trials in bankruptcy, state and federal district courts. Mr. Posner received his B.A. *magna cum laude* in political science and philosophy from Syracuse University in 1984 and his J.D. *cum laude* in 1988 from Syracuse University College of Law, where he was senior editor of the *Syracuse Law Review*.

Rachael L. Ringer is a partner with Kramer Levin Naftalis & Frankel LLP in New York and has played a prominent role in advising on many of the largest bankruptcies and restructurings in recent years across a diverse range of industries, including retail, financial services, oil and gas services, biopharmaceuticals, shipping and health care. She handles high-stakes and complex bankruptcy matters on behalf of creditors' committees, bondholder/creditor groups and companies. Ms. Ringer's recent representations include leading the representation of the parent ad hoc claimant group in the cross-border case of LATAM Airlines, which successfully emerged from bankruptcy in November 2023, facilitated by nearly $4 billion in exit capital backstopped by the parent ad hoc claimant group after prevailing in multiple litigations before the bankruptcy court and appellate courts (including the Second Circuit). She also is currently representing the official creditors' committees in the Rite Aid and Endo Pharmaceuticals bankruptcies, each of which involves numerous cutting-edge litigations as well as issues attendant to mass tort cases. Ms. Ringer represented the Boy Scouts of America official creditors' committee and represents the ad hoc committee of governmental claimants in the Purdue Pharma bankruptcy cases. She also has recently represented the GenesisCare, Aegerion, Hexion and Toys "R" Us creditors' committees, as well as a large lender in the Nine West bankruptcy. Ms. Ringer regularly advises hedge funds in bankruptcy cases, out-of-court restructurings and sale transactions, as well as on investments in distressed credits with complex capital structures. She received her B.A. with high distinction from the University of Michigan in 2007 and her J.D. *cum laude* in 2010 from the Maurice A. Deane School of Law at Hofstra University, receiving the ABI Medal of Excellence in Bankruptcy.

Patricia B. Tomasco is a partner in Quinn Emanuel Urquhart & Sullivan LLP's Houston and New York offices and has more than 35 years of experience solving corporate insolvency problems. She represents debtors and creditors in some of the largest bankruptcy cases filed in the U.S. and in cross-border insolvency matters. Ms. Tomasco frequently represents clients in the energy, telecommunications and high-tech industries in both reorganizations and litigation. Her current and recent include lead counsel to Rhodium Encore LLC in chapter 11 proceedings; lead counsel to Bittrex, Inc. in chapter 11 proceedings; Southrock Capital Ltda in chapter 15 proceedings; Moby S.p.A in chapter 15 proceedings and litigation; Ad Hoc Tort Claimants' Committee in Alto Maipo SpA; counsel to plaintiffs in *Northlight European Fundamental Credit Fund v. Intralot Capital Luxembourg, S.A.*, Certain Shareholders in Grupo Aeromexico, S.A. de C.V., Cinemex USA Holdings, Inc, Kingfisher Midstream, LLC in the chapter 11 cases of Alta Mesa Resources, Inc.; Ad Hoc Committee of Unsecured Bondholders in Sanchez Energy, Inc., Official Unsecured Creditors' Committee of Halcon Resources, Inc.; Official Committee of Unsecured Creditors in EXCO Resources, Inc.; counsel to the Ad Hoc Committee of First Lien Lenders in Vanguard Natural Resources, Inc.; and debtors' counsel in SH-130 Concession Company, LLC., Westmoreland Coal Company, iHeartMedia, Inc., Linn Energy LLC, Berry Petroleum, Midstates Petroleum Company, Inc., El Paso Children's Hospital, AF Global and Ameriforge Group, Inc., Light Tower Rentals, and equity sponsor in Francis' Drilling Fluids, Inc. Ms. Tomasco recently completed a three-year term as chair of the Complex Case Committee for the Southern District of Texas, a function created by Judges Jones and Isgur to review and improve complex case procedures and to provide a liaison between complex case practitioners and the courts. She has been listed in *The Best Lawyers of America* since 2019, in *Super Lawyers* since 2005, and in *Lawdragon* and *Legal500* for multiple years. Ms. Tomasco was selected Best Business Bankruptcy Lawyer by the *Austin Business Journal*. She is admitted to the New York and Texas Bars, as well as the U.S. Court of Appeals for the District of Columbia, Federal, Fifth and Sixth Circuits, the U.S. District Courts for the District of Columbia, the Eastern District of Michigan, the Southern District

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