AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

It's All About the Third-Party Releases

Daniel C. Cohn
Murtha Cullina LLP | Boston

Irve J. Goldman
Pullman & Comley LLC | Bridgeport, Conn.

Prof. Ingrid Michelsen Hillinger
Boston College Law School | Newton Centre, Mass.

Robert J. Keach
Bernstein Shur | Portland, Maine

Hon. Christopher J. Panos
U.S. Bankruptcy Court (D. Mass.) | Boston

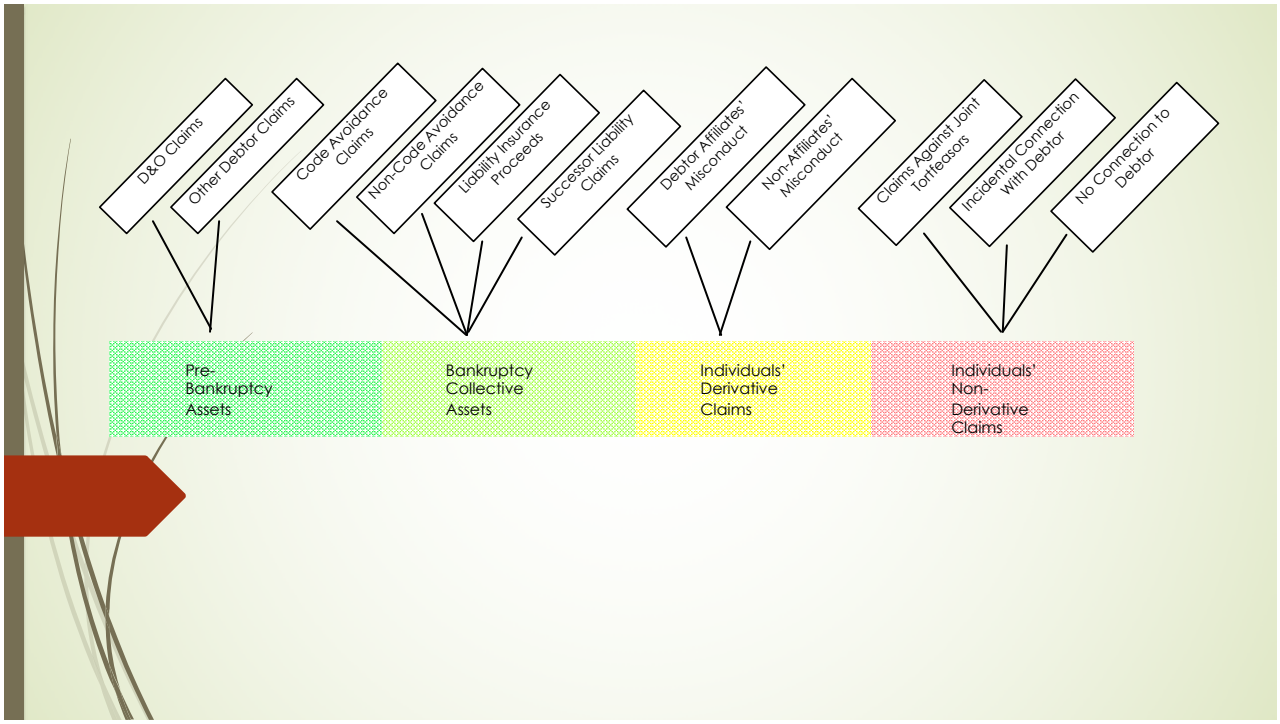
CONCURRENT SESSION

2022

ABI NORTHEAST BANKRUPTCY CONFERENCE
July 16, 2022

NON-CONSENSUAL THIRD-PARTY RELEASES

Daniel C. Cohn, Murtha Cullina LLP
Irve J. Goldman, Pullman & Comley, LLC
Ingrid Hillinger, Boston College Law School
Robert J. Keach, Bernstein Shur
Christopher J. Panos, US Bankruptcy Court (D. Mass.)



Key Recent Cases

- *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021) *rev'd, In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) (appeal pending)
- *In re Mallinckrodt PLC*, No. 20-12522, 2022 WL 404323 (Bankr. D. Del. Feb. 8, 2022)
- *In re LTL Management, LLC*, 637 B.R. 396 (Bankr. D.N.J. 2022) (denying motion to dismiss alleged "Texas Two Step" case) (expedited appeal pending)
- *In re LTL Management, LLC*, 638 B.R. 291 (Bankr. D.N.J. 2022) (granting motion for preliminary injunction shielding non-debtor third parties) (expedited appeal pending)

Argument against Compelled Third-Party Releases

- Cause of action against non-debtor is property right of creditor
- Debtor discharge provisions (§§ 524(e) and 1141(d)) imply non-debtor discharge would require equally express authority
- Section 524(g)(4) underlines this point
- Sections 1123(a)(5), 1123(b)(6) and 105 do not provide authority
- *United States v. Energy Res. Co.*, 495 U.S. 545 (1990), did not involve a compelled third-party release/injunction
- In any event, third-party releases inconsistent with sections 524(g) and (h), 523(a)(2) and (a)(6) and 1141(d).
- Effect of sections 524(g) and (h) and legislative history
- Class action cases indicate Supreme Court won't stretch the law to provide a viable system for multi-defendant mass-tort situations

Argument for Compelled Third-Party Releases

- Permitted by large majority of courts of appeals
- Statutory Authority: Sections 1123(a)(5), 1123(b)(6) and 105
- *United States v. Energy Res. Co.*, 495 U.S. 545 (1990) (sections should be interpreted together; bankruptcy courts have broad authority to confirm plans with injunctive provisions versus third parties)
- Better reading of Section 524(e): It does not bar compelled third-party releases
- Bankruptcy system offers best way to administer mass-tort cases with multiple sources of recovery including non-debtors

Master Mortgage Factors

In re Master Mtg. Inv. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994) (Koger, J.)

(1) Identity of interest between debtor and third party

(2) Contribution of substantial assets by non-debtor

(3) Injunction essential to reorganization

(4) Affected classes overwhelmingly voted to accept

(5) Plan provides for payment of all, or substantially all, affected claims

What's the Alternative?

- What would the bankruptcy world look like without nonconsensual third-party releases?
- Would there be any more mass-tort chapter 11 cases?

Third-Party Releases under Stern v. Marshall

- Basic Issue: Is a third-party release an adjudication of a common-law claim by a non-Article III court?
  - Must look to content, not category, of proceeding
  - Stern disjunctive test
  - Is it integral to restructuring?
- Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019) says no
  - Looked to content of plan, not to content of claims released
  - Release is not adjudication
  - Plan confirmation is integral to debtor-creditor relationship
- In re Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021) says yes
  - For content of proceeding, looked to underlying claims being released
  - Claims fail Stern disjunctive test for Article I decision (stem from bankruptcy or necessarily resolved through claims allowance process)
  - Release is equivalent to judgment; that's an adjudication

Legislative Solutions

Which one of these bills has NOT been introduced?

A. Express authorization for nonconsensual third-party releases based on a standard akin to Master Mortgage
B. Bar injunctions against government units' pursuit of non-debtors
C. Bar any injunction against any party's pursuit of non-debtor
D. Limit time period for preliminary injunction protecting non-debtors

Preliminary Injunctions

Differences from Permanent Injunctions:

- No authority under § 524(g)(4) (asbestos cases)
- Must rely on related-to jurisdiction (28 USC § 1334(b))
- May be broader than permanent

ABI NORTHEAST BANKRUPTCY CONFERENCE

WHICH WAY DO I GO: ADJUDICATION OF THIRD-PARTY RELEASES IN LIGHT OF STERN V. MARSHALL

Presented by: Irve J. Goldman
Pullman & Comley, LLC
850 Main Street
Bridgeport, CT 06604
(203) 330-2000
igoldman@pullcom.com

July 16, 2022

***Stern v. Marshall* – What Did it Hold**

- A debtor's counterclaim (tortious interference with an *inter vivos* gift) to a creditor's proof of claim (for defamation), although statutorily core, could not be constitutionally adjudicated by an Article I court.

- Why is this unconstitutional?

    - Article III, § 1 of the Constitution: "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior as Congress may from time to time ordain and establish"

    - The same section also provides that the judges of these "constitutional courts" "shall hold their Offices during good Behaviour" and "receive for their Services [ ] a Compensation [ ] [that] shall not be diminished" during their tenure.

    - A bankruptcy court, as an Article I court, goes beyond constitutional limits when it "exercise[s] the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common law claim" *Stern v. Marshall*, 564 U.S. 462, 487 (2011).

- Stated differently, "[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," it must be adjudicated by "Article III judges in Article III courts." *Id.* at 484.

What is Considered a "*Stern* claim" and How Does that Relate to Third Party Releases?

- "*Stern* claims" are "claim[s] designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding that way as a constitutional matter." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25-30-31 (2014).

- If third-party releases are statutorily authorized, *Stern* is potentially implicated if one considers the releases to be an adjudication of a common law claim (creditor v. nondebtor) by an Article I court.

The Divergent Views

- Key principles involved

  - *Stern* teaches that courts should focus on the content of the proceeding rather than the category of the proceeding. *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 136 (3d Cir. 2019); *Paterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641, 669 (E.D. Va. Jan. 13, 2022).

  - *Stern's* two-part disjunctive test: for bankruptcy courts to have constitutional authority to adjudicate a matter, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. *Stern*, 564 U.S. at 499.

  - *Stern* also suggested that bankruptcy courts have constitutional authority to enter final orders if the matter adjudicated is "integral to the restructuring of the debtor-creditor relationship." *Id.* at 497.

- **The Cases**

  - *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 136 (3d Cir. 2019)

    - Looked to "content of the plan," not the content of the claims being released, in determining whether the Bankruptcy Court was resolving a matter "integral to the restructuring of the debtor-creditor relationship" *Id.* at 137.

    - Rejected argument that Article III court must decide the nondebtor claims that are being released – there fraudulent misrepresentation claims of creditor against debtor's equity holders – because they "do not stem from the bankruptcy itself and would not be resolved in the claims allowance process." *Id.* at 137-38.

    - Gave overriding significance to concept that matter must be "integral to the restructuring of debtor-creditor relationship" *Id.* at 138 (reason bankruptcy courts can decide matters arising in claims allowance process is because they are integral to the restructuring process).

    - Third-party releases were integral to the restructuring because "[r]estructuring in this case was possible only because of the release provisions." *Id.* at 137.

  - *In re Kirwan Offices S.a.r.l.*, 592 B.R. 489 (S.D.N.Y. 2018)

    - "[B]ankruptcy court's constitutional adjudicatory authority depends, not on the nature of a related claim at issue, but rather on how resolving that claim relates to a core Article I bankruptcy process," *i.e.*, confirmation of a plan. *Id.* at 511.

    - As in *Millennium*, gave overriding significance to whether third party releases were "integral to the restructuring of debtor-creditor relations," and held they were because they were "absolutely necessary to the operation" of the plan. *Id.*

    - Disjunctive test also satisfied because the third-party releases, having been contained in a confirmed plan subject to content and confirmation requirements, "flow[ed] from a federal statutory scheme." *Id.*

- *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. Dec. 16, 2021), *appeal pending* No. 22-110 (2d Cir.) (argued April 29, 2022)

  - In contrast to *Millennium*, which found that the operative proceeding for purposes of the *Stern* analysis was the confirmation proceeding, Court looks instead to the underlying third-party claim that is being released under the plan. *Id.* at 81.

  - Also rejects *Millennium's* focus on whether the matter adjudicated is "integral to the restructuring of debtor-creditor relations," and instead states that the "correct constitutional question" is whether the third-party claims released "either stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.*

  - Third-party claims against nondebtors neither stem from the bankruptcy nor are resolvable in the claims allowance process. *Id.*

  - As to the argument that *Stern* only limits a bankruptcy court's authority to "adjudicate" claims, not its authority to release them without an adjudication on the merits:

    - Releasing a non-core claim and enjoining its prosecution is the equivalent of a judgment dismissing the claim, notwithstanding there is no adjudication on the merits. *Id.* at 82

    - A nonconsensual third-party release has the effect of a judgment because the release is entitled to *res judicata* claim preclusion. *Id.*

- Effect of Fed. R. Bankr. P. 8018.1

  - "If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law."

  - Effect of rule is to treat the matter on appeal as if it were a "related to" proceeding for which the bankruptcy court submitted proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c)(1)

  - Proceeding in this manner on appeal, "the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party's objections, see Rule 9033; treat the parties' briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law." Advisory Committee Notes to Fed. R. Bankr. P. 8018.1

ABI NORTHEAST BANKRUPTCY CONFERENCE

Nonconsensual Third-Party Releases Are Not Permissible in Bankruptcy Cases

Presented by: Irve J. Goldman
Pullman & Comley, LLC
850 Main Street
Bridgeport, CT 06604
(203) 330-2000
igoldman@pullcom.com

July 16, 2022

Third-Party releases Violate the Separation of Powers

- Article I, Section 8 of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies"
- The twin pillars of this power are the distribution of property of the debtor and the debtor's discharge. *Hanover National Bank v. Moyses,* 186 U.S. 181, 186 (1902).
- A creditor's cause of action against a non-debtor is a species of property belonging to the creditor. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).
- Nonconsensual third-party releases, with standards that have been created by judicial fiat and which vary by circuit, effectively use/contribute property of a creditor - in the form of a cause of action against a nondebtor - to the debtor's reorganization by releasing it.
- This constitutes judicial legislation in violation of the separation of powers between the legislative and judicial branches of our government.

Third-Party Releases Violate Due Process

- "[L]egal claims are sufficient to constitute property such that a deprivation would trigger due process scrutiny." *Elliot v. General Motors LLC* (*In re Motors Liquidation Co.*), 829 F.3d 135, 158 (2d Cir. 2016).
- It is "a basic principle of justice … that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953).
- It is a "deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).
- A nonconsensual release of a creditor's claim against a nondebtor as part of a debtor's plan of reorganization results in a denial of due process by denying the creditor the right to pursue its claim in court.

Third-Party Releases are not Statutorily Authorized

- Section 524(e) provides in pertinent part that "discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

    - Three circuit court decisions have held that section 524(e) precludes the use of third-party releases as part of a plan. *In re Pac. Lumber Co*., 584 F.3d 229, 251-53 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund, Inc*., 922 F.2d 592, 600-02 (10th Cir. 1990).

    - Section 524(g)(4)(A)(ii) provides express statutory authority for third-party releases in favor of "a third party" in asbestos cases, "[n]otwithstanding the provisions of section 524(e)."

- **There is No Bankruptcy Code Section That Can be Teamed Up With Section 105(a) to Authorize Third-Party Releases**

    - Section 105(a) can only be exercised to carry "out the provisions of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003).

    - Section 1123(b)(6) "may include any other appropriate provision not inconsistent with the applicable provisions of this title."

        - Substantively analogous to section 105(a)

        - One highly general provision can't be used as substantive authority to invoke another highly general provision as a backdoor "to do the right thing"

- General "necessary and appropriate" authorization "is too weak a reed upon which to rest so weighty a power," *Czyzewski v. Jevic Holding*, 137 S.Ct. 973, 985 (2017), such as the discharge of debts as against a nondebtor, i.e., Congress does not hide elephants in mouseholes. *Jevic*, 137 S.Ct. 984 (quoting *Whitman v. Am. Trucking Assns., Inc*., 551 U.S. 457, 468 (2001)).

- More than simple statutory silence required to support discharge of nondebtors' obligations

- Specific statute controls the general. Here, section 524(g), which applies in asbestos cases only, must control any general provision such as section 1123(b)(6).

- Section 1123(a)(5) provides that a plan must "provide adequate means for the plan's implementation"

  - Suffers from same infirmities as section 1123(b)(6)

  - Confers no substantive right for court to discharge nondebtors, for which there must be independent statutory authority

  - Court doesn't propose plan and the order contemplated once a plan is proposed is a confirmation order, the effect of which is to discharge **the debtor**. 11 U.S.C. § 1141(d)(1)(A).

- "[S]tatutory words are often known by the company they keep." *Lagos v. U.S.*, 138 S.Ct. 1684, 1688 (2018).

- This is to avoid "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. U.S.* 574 U.S. 528, 544 (2015).

- Every example in section 1123(a)(5) authorizes court to do something with debtor's assets, not dispose of property belonging to someone else.

- "Residual Statutory Authority"

  - Release proponents point to a passing reference in *U.S. v. Energy Resources*, 495 U.S. 545, 549 (1990) that "bankruptcy courts have residual authority to approve plans" (citing what is now 11 U.S.C. § 1123(b)(6) and section 105(a)).

  - These provisions reflect bankruptcy courts' "broad authority to modify creditor-debtor relationships" *Id.*

  - But a nonconsensual third-party release modifies creditor-**nondebtor** relationships, whereas the relationship between the IRS and debtor, Energy Resources, was one of creditor-debtor, and there is a specific statutory provision requiring the plan to "specify the treatment of any class of claims…." 11 U.S.C. § 1123(a)(3).

- In any event, any residuary power must be exercised in a way that is not "inconsistent with the applicable provisions of this title."

  - Nonconsensual third-party releases are inconsistent with sections 524(g) and (h), 523(a)(2) and (a)(6) and 1141(d).

- **Sections 524(g) and (h) of the Bankrutpty Reform Act of 1994**

  - Section 524(g), which applies only to asbestos claims, authorizes injunctions barring third party claims against nondebtors that have a particular relationship to the debtor and requires, *inter alia,* the appointment of a legal representative for future claimants and a finding that the injunction is fair and equitable.

  - Section 524(h) provides that injunctions that had previously been entered in asbestos cases are deemed to be statutorily compliant even if they did not have all the features required by section 524(g).

  - Passage of sections 524(g) and (h) in 1994 signifies Congressional intent to limit third-party releases to asbestos cases

  - Effect of Public Law 111 – nothing in the 1994 amendments, including section 524(g), "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."

    - Legislative history indicates, however, that:

      - Public Law 111 was passed to appease parties in non-asbestos cases, who took the position that sections 524(g) and (h) were unnecessary because authority already existed for third-party releases

- Its passage did not mean Congress agreed with that position ("Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind")

- Congress did not intend to leave it to the courts to work out the contours of third-party releases for other industries ("[h]ow the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas").

Compelled Third-Party Releases (and Related Issues) Under Chapter 11 of the United States Bankruptcy Code

Robert J. Keach*
Letson Douglass Boots*
Bernstein Shur

American Bankruptcy Institute
Northeast Bankruptcy Conference
Panel: *It's All About the Third-Party Releases*
July 16, 2022

* The views expressed herein are solely those of the authors, and do not necessarily reflect the views of their fellow panelists or of the American Bankruptcy Institute.

Compelled Third-Party Releases in U.S. Chapter 11 Plans

The vast majority of circuit courts have endorsed the use of non-consensual third-party releases in plans under appropriate circumstances. These circuits include, at least, the First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See* Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983-84 (1st Cir. 1995); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005); In re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 347-51 (4th Cir. 2014), *cert. denied* 574 U.S. 1076 (2015); In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008); In re Seaside Eng'g & Surveying, 780 F.3d 1070, 1076-79 (11th Cir. 2015). Lower courts within the Eighth Circuit have approved non-consensual third-party releases as well. *See* In re Master Mtg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994).

Within these circuits, courts have developed and applied similar multi-factor balancing tests to determine whether third-party releases should be approved. *See, e.g.*, Metromedia, 416 F.3d at 141-42 (referring to a set of factors to be considered, and noting that none of the factors are dispositive); In re Tribune Co., 464 B.R. 126, 176-180 (Bankr. D. Del. 2011) (summarizing the Third Circuit's approach and applying a four-factor test); Dow Corning, 280 F.3d at 658 (enumerating a seven-factor test, which has been applied by the Fourth and Eleventh Circuits); In re Master Mtg. Inv. Fund, Inc., 168 B.R. at 935 (identifying a five-factor test that has been used in courts within the First and Eighth Circuits); *but see* Airadigm, 519 F.3d at 657 (permitting third-party releases but eschewing the multi-factor approach). Although the factors applied by these courts may vary slightly from Circuit to Circuit, each approach involves examining whether the non-consensual release is necessary to the success of the reorganization, whether the non-debtor

releasee contributed assets to the reorganization, whether the plan provides a mechanism for the payment of the claims of the class affected by the release, and whether the settlement, including the use of third-party releases, is supported by the majority of the parties affected by the releases.

A minority of circuits have held in particular cases that non-consensual third-party releases are inappropriate: the Fifth, Ninth, and Tenth Circuits. *See* In re Pac. Lumber Co., 584 F.3d 229, 252-53 (5th Cir. 2009); In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990). As discussed below, the trend within these Circuits seems to be moving away from this minority interpretation.

The First Circuit Approach

The First Circuit has tacitly approved the concept of non-consensual third-party releases in plans. Monarch Life Insurance Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995); *see also* In re G.S.F. Corp., 938 F.2d 1467, 1474 (1st Cir. 1991) (holding that Bankruptcy Code section 105(a) confers ample power to enjoin suit against non-debtors during the pendency of a chapter 11 case where the court reasonably concludes that such actions would entail or threaten adverse impact upon the administration of the chapter 11 case).[1]

[1] The Supreme Court—in a decision that standing alone articulates statutory authority for the approval and enforcement of third-party releases—has instructed lower courts precisely how to interpret this particular combination of Bankruptcy Code provisions. *See* United States v. Energy Res. Co., 495 U.S. 545 (1990); *see also* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13 (Fall 2006) (noting that "Energy Resources vindicates the pro-release position on every major issue concerning the validity of non-debtor releases. Therefore, under existing precedent, bankruptcy courts possess the equitable power to extinguish claims against third parties."). In Energy Resources, the Supreme Court held that sections 105(a) and 1123(b)(6) in combination conferred broad authority upon bankruptcy courts to approve and enforce plan provisions necessary to the implementation of the plan of reorganization. Id. at 549. As the Court explained, "[t]hese statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." Id. Absent a provision of the Bankruptcy Code or a coequal federal stature clearly, specifically, and unequivocally barring the plan provision at issue, the bankruptcy court had the statutory authority to approve and enforce the provision. Id. at 549-50. In Energy Resources, the subject plans contained provisions providing that payments to the IRS would be first applied to the reduction of trust fund taxes

Given this guidance, lower courts in the First Circuit have followed suit. In confirming plans, non-consensual third-party permanent injunctions or releases are permitted in "exceptional circumstances" and are within the bankruptcy court's authority to issue under sections 105(a) and 1123(b). *See, e.g.*, In re Charles Street African Methodist Episcopal Church of Boston, 499 B.R. 66, 98-103 (Bankr. D. Mass. 2013); In re Chicago Invs., LLC, 470 B.R. 32, 95-96 (Bankr. D. Mass. 2012); In re M.J.H. Leasing, Inc., 328 B.R. 363, 369 (Bankr. D. Mass. 2005); In re Mahoney Hawkes, LLP, 289 B.R. 285, 297 (Bankr. D. Mass. 2002) (holding that § 524(e) does not prohibit third-party injunctions and instead simply explains the effect of a debtor's discharge).

Courts within the First Circuit have adopted a multi-factor test known as the Master Mortgage test for determining when a permanent injunction or release in favor of a non-debtor third party is warranted. *See* Mahoney Hawkes, 289 B.R. at 297-98 (citing Master Mtg. Inv. Fund, 168 B.R. at 935); *see also* Charles Street, 499 B.R. at 100; Chicago Invs., 470 B.R. at 95-96; In re The Ground Round, Inc., No. 04–11235–WCH, 2007 WL 496656 (Bankr D. Mass. Feb. 13, 2007) (finding Master Mortgage test applicable to determination of whether third-party injunctions will be allowed). The Master Mortgage test looks to five factors:

> i. An identity of interests between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(thus eliminating first the possible liability of debtor officers as responsible persons); outside of bankruptcy, pursuant to IRS regulations and decisions, the opposite result would have pertained. The Supreme Court held that the combination of sections 105(a) and 1123(b)(6) provided authority to approve and enforce against the IRS the subject plan provision unless the provision was specifically barred by another Bankruptcy Code provision or coequal federal law. Id. Scouring the sections of the Bankruptcy Code on tax priority and the provisions of the tax laws on trust fund taxes and responsible person liability, the court located no specific and express bar to the plan provisions at issue. Id. at 550 ("It is evident that these restrictions on a bankruptcy court's authority do not preclude the court from issuing orders of the type at issue here, for those restrictions do not address the bankruptcy court's ability to designate whether tax payments are to be applied to trust fund or non-trust-fund tax liabilities."). Accordingly, the Court held, the bankruptcy court had authority to approve and enforce them, and properly exercised that authority. Id. at 550-51.

ii. The non-debtor has contributed substantial assets to the reorganization;

iii. The injunction is essential to the reorganization;

iv. A substantial majority of creditors agree to such injunction, specifically, the impacted class, or classes, has overwhelmingly voted to accept the proposed plan treatment; and

v. The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Master Mortgage, 168 B.R. at 935.

The debtor does *not* need to prove the existence of all five of these factors; "[t]hese factors are neither exclusive nor conjunctive requirements." Charles Street, 499 B.R. at 100; Chicago Invs., 470 B.R. at 95; M.J.H. Leasing, Inc., 328 B.R. at 369. The factors are a "useful starting point." Charles Street, 499 B.R. at 100.

On this point, Chicago Investments is instructive. The court, in confirming the challenged plan, rejected arguments that the third-party releases were impermissible and overbroad. The court found that the released parties were supplying "substantial consideration," that the "injunction was essential to the reorganization because neither [the principal funding source] nor its related entities would go forward without it," the affected creditors were being paid in full, and the creditors had voted in favor of the plan. Chicago Invs., 470 B.R. at 95-96.

Payment in full is not, however, required; the plan must simply provide a "mechanism" for the substantial payment of affected claims. The Charles Street African Methodist Episcopal Church court held that the plan should "replace what it releases with something of indubitably equivalent value to the affected creditor," such as a settlement fund to which claims are channeled.

499 B.R. at 102. An adequate settlement fund (as is present here) has consistently been held to be such a "mechanism."

The Second Circuit Approach

Beginning with In re Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), continuing in In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992), and then in In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005), the Second Circuit has developed a strong body of precedent that supports compelled third-party releases. Johns-Manville, in particular, in allowing such releases and accompanying channeling injunctions, helped facilitate the success of subsequent mass tort bankruptcies. *See* Johns-Mansville, 837 F.2d at 93.

Courts within the Second Circuit have regularly applied a multi-factor balancing test, based on the Second Circuit's reasoning in Metromedia, which includes: "(i) the released parties provide a substantial contribution to the debtor's estate, (ii) where the claims are "channeled" to a settlement fund rather than extinguished, (iii) where the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution, (iv) where the released party provides substantial consideration, (v) where the plan otherwise provides for the full payment of the enjoined claims, or (vi) where the creditors consent." *See, e.g.*, In re Stearns Holdings, LLC, 607 B.R. 781, 787-88 (Bankr. S.D.N.Y. 2019) (citing to Metromedia and collecting cases); In re Genco Shipping & Trading Ltd., 513 B.R. 233, 268-69 (Bankr. S.D.N.Y. 2014); *see also* In re SunEdison, Inc., 576 B.R. 453, 461-62 (Bankr. S.D.N.Y. 2017) (determining that the debtors failed to prove that the third-party releases at issue were appropriate under the Metromedia standard); In re Sabine Oil & Gas Corp., 555 B.R. 180, 288-89 (Bankr. S.D.N.Y. 2016) (finding the third-party releases to be appropriate under the Metromedia standard).

In 2021, the District Court for the Southern District of New York departed Second Circuit precedent when it overturned the bankruptcy court's approval of non-consensual third-party releases on the grounds that courts lack statutory authority to do so in In re Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021) (McMahon, J.).[2] The bankruptcy court in Purdue Pharma had, like the courts in its district before it, applied the Metromedia factors. *See* In re Purdue Pharma L.P., 633 B.R. 53, 105 (Bankr. S.D.N.Y. 2021). The Second Circuit heard oral argument in the appeal of the district court's decision in Purdue Pharma in April, and the case is under advisement at this time.

The Third Circuit Approach

The Third Circuit opened the door for approval of compelled third-party releases in In re Continental Airlines, 203 F.3d 203 (3d Cir. 2000). The Third Circuit subsequently explained (and clarified) Continental as follows:

> In *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), we left open the possibility that some small subset of non-consensual third-party releases might be confirmable where the release is "both necessary [to the plan of confirmation] and given in exchange for fair consideration." *Id*. at 214 n. 11. We identified the "hallmarks" of a permissible non-consensual third-party release as "fairness, necessity to the reorganization, and specific factual findings to support these conclusions[.]" *Id*. at 214.

[2] The judge in Purdue Pharma came to this conclusion despite an earlier opinion approving such third-party releases in which she explained that that "the third-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(b)(5) & (6), 105, and 524(e)" and noting that, "[i]n other words, those releases flow from a federal statutory scheme." *See* In re Kirwan Offices S.à.r.l., 592 B.R. 489, 505, 511 (S.D.N.Y. 2018) (McMahon, J.) (internal quotation marks omitted), *aff'd* 792 F.App'x 99 (2d Cir. 2019). In Purdue Pharma, Judge McMahon attempted to distinguish its previous statements in Kirwan by explaining that it "did not *analyze* whether there was a statutory . . . basis for the injunction that was at issue." 635 B.R. at 89 (emphasis added). The court in Kirwan also held that "bankruptcy court thus possessed the inherent constitutional adjudicatory authority to include the exculpation and injunction clauses in [a] confirmed reorganization plan," *see* 592 B.R. at 512; the court in Purdue Pharma did not reach the issue of constitutional authority having concluded that it lacked the statutory authority, *see* 635 B.R. at 38.

In re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014). In the time between Continental Airlines and Lower Bucks Hospital, courts within the Third Circuit put some meat on the bones of this sparse test. In Genesis Health Ventures, Inc., Bankruptcy Judge Wizmur elaborated:

> The question of necessity requires demonstration that the success of the debtors' reorganization bears a relationship to the release of the non-consensual parties, and that the releasees have provided a critical financial contribution to the debtors' plan that is necessary to make the plan feasible in exchange for receiving a release of liability. Unlike the approval of releases in cases such as *A.H. Robins*, in which "the entire reorganization" of a massive and complex Chapter 11 case "hinged" on the approval of certain releases, the necessity of the Senior Lender here is more marginal.

260 B.R. 591, 607-08 (Bankr. D. Del. 2001) (internal citations omitted). Judge Carey stated, in In re Exide Technologies, as follows:

> On the other hand, non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in "extraordinary cases." *Genesis Health Ventures*, 266 B.R. at 608 *citing Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212 (3d Cir.2000). In *Continental,* the Third Circuit did "not establish a rule regarding conditions under which non-debtor releases and permanent injunctions are appropriate or permissible" (203 F.3d at 214), but determined that the non-consensual release of a non-debtor party in *Continental's* plan did "not pass muster under even the most flexible tests for the validity of non-debtor releases. The hallmarks of permissible non-consensual releases-fairness, necessity to the reorganization, and specific factual finding to support these conclusion—are all absent here." *Id*.

303 B.R. 48, 72 (Bankr. D. Del. 2003). The Delaware district court, in In re W.R. Grace & Co., summarized the Third Circuit approach:

> In order for a reorganization plan that includes an injunction barring third-party claims against non-debtors to be approved, the injunction must be "both necessary to the reorganization and fair" under 11 U.S.C. § 105(a). In re Global Indus. Techs., Inc., 645 F.3d 201, 206 (3d Cir.2011) (internal citations omitted) ("GIT"); see also, In Re Cont'l Airlines, Inc., 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings[.]"). In re Prussia Assoc.,

> 322 B.R. 572, 596 (Bankr. E. D. Pa. 2005) (citing Cont'l Airlines); In re Exide Tech., 303 B.R. 48, 72 (Bankr.D.Del. 2003) (same).

475 B.R. 34, 107 (D. Del. 2012). Judge Carey comprehensively summarized relevant case law in In re Tribune Co.:

> Both the Noteholders and the D & Os argue that the Bar Order is an improper nonconsensual release of third-party claims. *See* Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir.2000); Matter of Genesis Health Ventures, 266 B.R. at 608 (discussing standards for permitting third-party releases in reorganization plans). The Continental Court determined that "non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases,' " and that the "hallmarks of a permissible non-consensual release" were "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." Continental, 203 F.3d at 212, 214. The Genesis Court evaluated whether a non-consensual release fit the "hallmarks" discussed in *Continental* by considering whether: (i) the non-consensual release was necessary to the success of the reorganization, (ii) the releasees have provided a critical financial contribution to the debtor's plan, (iii) the releasees' financial contribution is necessary to make the plan feasible, and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release. *Genesis,* 266 B.R. at 607–08.

464 B.R. 126, 176-180 (Bankr. D. Del. 2011).

More recently, the Third Circuit has again affirmed the statutory *and* constitutional authority of bankruptcy courts to approve plans with non-consensual third-party releases, but only if the "exacting standards" set forth in the Circuit's previous decisions, like Continental, are satisfied. *See* In re Millennium Lab Holdings II, LLC, 945 F.3d 126, 139 (3d Cir. 2019). Lower courts within the Third Circuit have not balked at following Millennium and Continental, despite the doubt cast on non-consensual third-party releases in the recent Purdue Pharma decision. *See* In re Mallinckrodt PLC, No. 20-12522 (JTD), 2022 WL 404323, at *20 (Bankr. D. Del. Feb. 8, 2022).

The Fourth Circuit Approach

The Fourth Circuit, reaffirmed the ability of bankruptcy courts to confirm plans containing non-consensual third-party releases when one or more of the so-called Dow Corning factors is/are met, emphasizing the weight given to the creation of an adequate settlement fund to which claims are channeled in approving non-consensual third-party releases in a plan. National Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 347-51 (4th Cir. 2014). The circuit panel held that:

> Although we reiterated this circuit's longstanding rule that non-debtor releases may be enforced in appropriate circumstances, we cautioned that they should only be approved "cautiously and infrequently." To determine whether such circumstances exist, we directed the bankruptcy court to consider the six substantive factors enumerated in Class Five Nevada Claimants v. Dow Corning Corp. (In re Down Corning Corp.). These include whether:
>
> > (1) There is an identity of interests between the debtor and the third party …; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization…' (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; [and] (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full.

Id. at 347 (quoting Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp., 280 F.2d 648,658 (6th Cir. 2002)).

The Sixth Circuit Approach

As the above discussion indicates, the Sixth Circuit allows compelled third-party releases based on a balancing of the factors listed above. *See* Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.2d 648, 658 (6th Cir. 2002).

The Seventh Circuit Approach

The Seventh Circuit allows approval of compelled third-party releases in a plan of reorganization based upon an approach that eschews the multiple factor approach; the circuit held, reviewing sections 105(a) and 1123(b)(6) of the Bankruptcy Code that: "In light of these provisions, we hold that this "residual authority" permits the bankruptcy court to release third parties from liability to participating creditors if the release is "appropriate" and not inconsistent with any provision of the bankruptcy code." In re Airadigm Communications, Inc., 519 F.3d 640, 657 (7th Cir. 2008). Such releases should be "appropriately tailored." Id., *see also* Caesars Entertainment Operating Co., Inc. v. BOKF, N.A. (In re Caesars Entertainment Operating Co.), 808 F.3d 1186 (7th Cir. 2015) (bankruptcy court has broad authority under § 105(a) of the Bankruptcy Code to enjoin third-party claims against non-debtor in furtherance of debtor's reorganization).

The Eighth Circuit Approach

The Eighth Circuit Court of Appeals has not yet ruled on the issue, but courts within the circuit approve compelled third-party releases in plans. In re Master Mtg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994) (listing the "Master Mortgage" factors detailed above); In re Archdiocese of Saint Paul and Minneapolis, 578 B.R. 823, 833 (Bankr. D. Minn. 2017) (applying a version of the Master Mortgage/Dow Corning factors).

The Eleventh Circuit Approach

The Eleventh Circuit also authorizes compelled third-party releases in plans:

> Like the Fourth Circuit in Behrmann v. National Heritage Foundation, 663 F.3d 704, 712 (2011), we commend for the consideration of bankruptcy courts the factors set forth by the Sixth Circuit in Dow Corning Corp., 280 F.3d at 658.

> Again, we agree with the Fourth Circuit in Behrmann that bankruptcy courts should have discretion to determine which of the Dow Corning factors will be relevant in each case. 663 F.3d at 712. The factors should be considered a nonexclusive list of considerations, and should be applied flexibly, always keeping in mind that such bar orders should be used "cautiously and infrequently," id. at 712, and only where essential, fair and equitable, Munford, 97 F.3d at 455.

In re Seaside Engineering & Surveying, Inc., 780 F.3d 1070-79 (11th Cir. 2015).

The Minority Approach

As noted above, the Fifth, Ninth, and Tenth Circuits have all held in particular cases that non-consensual third-party releases are inappropriate.[3] *See* In re Pac. Lumber Co., 584 F.3d 229, 252-53 (5th Cir. 2009); In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990).

The Fifth Circuit, however, has consistently indicated that third-party releases may be appropriate in mass tort cases. *See, e.g.*, Pac. Lumber, 584 F.3d at 252 (explaining that third-party "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets"); Feld v. Zale Corp., 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing its holding from Drexel Burnham, 960 F.2d 285, 293 (2d Cir. 1992), on the factual basis that the Drexel Burnham Court approved an injunction of third-party claims because it channeled those claims to allow recovery from separate assets, whereas the "the injunction at issue in this case provided no alternative means . . . to recover from [the third-party insurer]").

[3] These holdings are premised on the argument that section 524(e) of the Bankruptcy Code—which simply explains the scope of a debtor's discharge—necessarily precludes non-consensual third-party releases. This interpretation of section 524(e) has been soundly refuted, as the scope of a debtor's *discharge* has nothing to do with authority to allow a *release* of a non-debtor, and the section contains no language supporting a bar on third-party releases. *See, e.g.*, Dow Corning, 280 F.3d at 657.

At least one district court within the Tenth Circuit found that the alleged bar against third-party releases attributed to Western Real Estate Fund was not absolute, noting that section 524(e) does not preclude such releases:

> Having reviewed the arguments of the parties and the decisions by the various United States Courts of Appeals and other bankruptcy courts, this Court concludes the bar on third-party releases imposed by Western Real Estate is not as broad as it has previously been argued and applied in other cases. Accordingly, the Court is prepared to follow the majority view that while § 524(e) does not expressly provide for the release of a third party's claims against a non-debtor, § 524(e) does not expressly preclude such releases. This is not *carte blanche*, however. The Court agrees § 105(a) permits bankruptcy courts to release third parties from liability in certain, and very limited, circumstances if the release is "appropriate" and not inconsistent with any other provision of the Bankruptcy Code, including § 524(e). The court believes this interpretation is consistent with and fully respects, the dictates of the Tenth Circuit as set forth in Western Real Estate.

In re Midway Gold US, Inc., 575 B.R. 475, 505 (Bankr. D. Col. 2017).

And finally, as to the Ninth Circuit, a recent decision by that Circuit suggested that a release of third-party claims could, in certain circumstances, be imposed in a plan. *See* Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85 (9th Cir. 2020); *see also* Purdue Pharma, 633 B.R. at 101-02 (explaining the recent movement of the minority circuits away from an absolute ban on third-party releases).

Liquidating Plans

Additional recent authority emphasizes that non-consensual non-debtor releases can be a permissible feature of *liquidating* chapter 11 plans, where one or more of the Master Mortgage factors are present. *See e.g.*, In re U.S. Fidelis, Inc., 481 B.R. 503, 518-21(Bankr. E.D. Mo. 2012). Addressing the non-debtor releases in the plan of liquidation before it, which contained a

settlement addressing consumer claims against the debtor funded by the released parties, the court (applying Master Mortgage) stated:

> Even if the releases in the Plan cannot be determined to be consensual, under persuasive precedent from the U.S. Bankruptcy Court for the Western District of Missouri, this fact does not make confirmation of the Plan per se improper. *See* In re Master Mortgage Invest. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994). Under Master Mortgage, the court may confirm a plan that includes compelled releases of non-debtors, if such extraordinary relief is warranted. Specifically, releases may be included in a confirmed plan if exceptional circumstances exist, the releases are widely supported by the creditor constituency (including those creditors who will be restrained), the constituency to be restrained receives significant benefits, and the creditors as a whole are being treated fairly. Id. at 935.
>
> All these Master Mortgage requirements are fulfilled here. Exceptional circumstances exist. Despite the incredibly complex nature of the claims and interests among and between the major parties in this Case, a unique and singular opportunity has presented itself in the hard-negotiated [general settlement agreement ("GSA")]: a significant return to the consumer creditors. However, if the third party releases are not permitted in the Plan, the GSA evaporates, as neither Mepco nor Warrantech would agree to its terms. Instead, the UCC, Mepco, and Warrrantech would spend years litigating, resulting in a significant loss to the estate. Meanwhile, the consumer creditors most likely would end up with little return, and no return in the near future (further devaluing whatever return they may receive, if any). This is not a circumstance where the Debtor and its secured creditors filed for bankruptcy relief with the pre-conceived purpose of buying third-party releases at a lowball price. The opposite is true, and the GSA offers the rare opportunity to actually serve the truly injured.
>
> Additionally, the releases were widely supported by the consumer creditors, directly and through the Attorneys General. No consumer creditor who would actually be restrained by the releases objected to confirmation, and the overwhelming majority of consumer creditors who cast a ballot voted to accept the Plan. All the Attorneys General that cast ballots voted to accept the Plan (and none objected), and the Steering Committee filed a brief in support of confirmation. And, the consumer creditors stand to obtain the significant benefit in the form of a distribution from the CRF.

> Last the consumer creditors as a whole would be treated fairly. Master Mortgage provides that the court should look at five factors in determining the necessity and fairness of third-party releases included in a proposed plan.

Id. at 518-19. The court directly addressed the use of such releases in liquidating plans:

> This Case is—in bankruptcy vernacular—a "liquidating 11." A bankruptcy case may proceed as a liquidating 11, if doing so would benefit the creditors (including the unsecured creditors). It is a well-established use of chapter 11 relief.
>
> A few courts suggest that compelled releases may not be appropriate in a liquidating 11 because the debtor necessarily does not need such extraordinary relief for the purpose of reorganizing. The Court recognizes this concern and the possible abuse that could occur if the releases of non-debtors are commonly included in a plan of liquidation. However, an orderly liquidation is a valid use of chapter 11 and one of its chief purposes—to ensure the best return for the unsecured creditors—should be promoted. If the plan of liquidation ensures the best possible outcome for unsecured creditors and the releases therein are critical to confirmation of the plan, then the fact that the case is not a reorganization should not per se prohibit confirmation of the plan. As discussed in Footnote 8 herein, Mepco will substantially contribute to the orderly liquidation of the Debtor, just as Warrantech and the Debtor itself will do.

Id. at 520.

Commission Report

In addition to the abundant and unequivocal support for approval of third-party releases explained above, the ABI Commission to Study the Reform of Chapter 11 has recommended that the availability of third-party releases *be codified* and incorporate the Master Mortgage factors. AM. BANKR. INST. COMM'N TO STUDY THE REFORM OF CHAPTER 11, 2012 - 2014 Final Rep. and Recommendations, 252-256 (2014), http://commission.abi.org/full-report. This recommendation alone would indicate that third-party releases do not violate public policy.

Recognition of Releases in Foreign Plans Under Chapter 15

The authority of a Bankruptcy Court in the U.S. to enter an order enforcing a CCAA plan sanction order is routine and non-controversial. "The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings." In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010); *see also* Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255, 1259 (S.D.N.Y.) *aff'd,* 614 F.2d 1286 (2d Cir. 1979) ("The fact that the foreign country involved is Canada is significant. It is 'well-settled' in New York that the judgments of the Canadian courts are to be given effect under principles of comity.").

The Court in Metcalf confirmed that "the correct inquiry… is whether the foreign orders should be enforced in the United States," as opposed to whether a U.S. court would be permitted to grant the same relief in a plenary chapter 11 case. Metcalfe, 421 B.R. at 696. In In re Sino-Forest Corp., 501 B.R. 655, 662 (Bankr. S.D.N.Y. 2013), the Bankruptcy Court reiterated its ruling in Metcalf that "the correct inquiry in a chapter 15 case was not whether the Canadian orders could be enforced under U.S. law in a plenary chapter 11 case, but whether recognition of the Canadian courts' decision was proper in the exercise of comity in a case under chapter 15."

Metcalfe involved the recognition and enforcement of an order which contained third-party releases. In the underlying Canadian proceedings in Metcalfe, the Court of Appeal for Ontario held that the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court. Metcalfe, 421 B.R. at 694. The U.S. Bankruptcy Court in Metcalf granted comity to the Canadian orders, specifically finding that it was not precluded from doing so by the public policy exception under § 1506 of the Bankruptcy Code. Id. at 698.

The Bankruptcy Court noted "that principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, *even if those provisions could not be entered in a plenary chapter 11 case*." Id. at 696 (emphasis added).

Sino-Forest, decided after Metcalfe, also involved the recognition and enforcement of an order with compelled third-party releases.[4] There, the Bankruptcy Court noted that the Canadian courts "specifically found that the approval of the Sanction Order and the Settlement Order was consistent with a prior opinion of the Court of Appeal for Ontario establishing the requirements for third-party releases under the CCAA." Sino-Forest, 501 B.R. at 658 (the "prior opinion" being the Ontario court's decision referenced in Metcalfe). As in Metcalfe, the Bankruptcy Court granted comity to the Canadian orders, and found that § 1506 did not preclude it from doing so. Id. at 665.

Finally, the case of Muscletech Research and Development Inc. ("Muscletech") involved a liquidating case where the entire purpose of the CCAA filing was to deal with the wide-ranging products liability claims in the case and where, without the contributions of the third parties who were to benefit from third-party releases and injunctions, no funds would have existed to pay a meaningful dividend. The Endorsement of the Canadian court in Muscletech provides extensive support for the approval, under Canadian law, of a plan sanction order that provides for third-party releases, stating, in relevant part:

> It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by

[4] Sino-Forest addresses Vitro, a case determined after Metcalfe, which declined to grant comity to a Mexican order regarding a reorganization plan. Sino-Forest distinguishes Vitro, given that it was decided on the grounds that "the bankruptcy court did not abuse the discretion expressly provided in section 1507(b)." Further, Sino-Forest distinguishes the unique facts of Vitro, specifically that it concerned "a Mexican court order approving a reorganization plan that vitiated guarantees issued by [the debtor's] U.S.-based affiliates, under loan agreements governed by U.S. law." Sino-Forest Corp., 501 B.R. at 665.

> the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties.

Muscletech Endorsement, p. 7.

The plan sanction order in Muscletech was recognized and enforced by U.S. District Judge Rakoff, as noted above. *See also* In re Ephedra Products Liab. Litig., 349 B.R. 333 (S.D.N.Y. 2006) (recognizing and enforcing Canadian order approving claims resolution procedure in Musceltech).

The U.S. Bankruptcy Court for the District of Maine, in an unreported decision, enforced the Montreal Maine and Atlantic Canada Sanction order in that firm's Chapter 15 case. Consistent with those cases, the United States Bankruptcy Court for the Southern District of New York recently recognized and enforced the order approving a U.K. scheme of arrangement that contained the compelled release of the guarantee liabilities of non-debtor affiliates. In re Avanti Comm. Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018). The court first recognized that, in the U.S., "[t]hird-party releases are often problematic in chapter 11 cases – seemingly prohibited entirely in some Circuits but permitted under limited circumstances in other Circuits." Id. at 606. However, this circuit split and uncertainty did not prevent enforcement of the U.K. Scheme; the standard was whether to extend comity:

> The issues presented by third-party releases in chapter 15 cases have received a different analysis than in chapter 11 cases, focusing primarily on the foreign court's authority to grant such relief. The issue in chapter 15 cases then is whether to recognize and enforce the foreign court order based on comity. Well-settled case law in the UK expressly authorizes third-party releases in scheme proceedings, particularly the release of affiliate-guarantees. The UK Court sanctioned the Avanti Scheme, and the Court concludes that the Avanti Scheme should be recognized and enforced in the U.S.

Id.

22-110-bk(L),

**22-113-bk(CON), 22-115-bk(CON),
22-116-bk(CON), 22-117-bk(CON),
22-119-bk(CON), 22-121-bk(CON),
22-203-bk(XAP), 22-299-bk(CON)**

United States Court of Appeals

for the

Second Circuit

IN RE: PURDUE PHARMA L.P., PURDUE PHARMA, INC.,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CASE NO. 21-CV-7532(L) (HONORABLE COLLEEN MCMAHON, JUDGE)

AMICUS BRIEF IN SUPPORT OF APPELLANTS BY COMMISSIONERS OF THE AMERICAN BANKRUPTCY INSTITUTE'S COMMISSION TO STUDY THE REFORM OF CHAPTER 11

ROBERT J. KEACH, ESQ.
BERNSTEIN SHUR SAWYER & NELSON, P.A.
100 Middle Street, P.O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200

ALBERT TOGUT, ESQ.
TOGUT, SEGAL & SEGAL LLP
One Penn Plaza, Suite 3335
New York, NY 10019
(212) 594-5000

Counsel for Amici Curiae by Commissioners of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11

PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P., IMBRIUM THERAPUTICS L.P., ADLON THERAPUTICS L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE PHARMACEUTICAL PRODUCTS L.P., PURDUE

NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND INC., QUIDNICK LAND L.P., RHODES PHARMACEUTICALS L.P.,RHODES TECHNOLOGIES, UDF LP, SVC PHARMA LP, SVC PHARMA INC.,

Debtors.

PURDUE PHARMA L.P., PURDUE PHARMA INC., PURDUE TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P., IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF PUERTO RICO, AVRIO HEALTH L.P., PURDUE PHARMACEUTICAL PRODUCTS L.P., PURDUE NEUROSCIENCE COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON LAND L.P., RHODES ASSOCIATES L.P., PAUL LAND, INC., QUIDNICK LAND L.P., RHODES PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF LP, SVC PHARMA LP, SVC PHARMA INC.

Debtors-Appellants-Cross Appellees,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PURDUE PHARMA L.P., *et al.,* AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION CLAIMANTS, THE RAYMOND SACKLER FAMILY, AD HOC GROUP OF INDIVIDUAL VICTIMS OF PURDUE PHARMA, L.P., MULTI-STATE GOVERNMENTAL ENTITES GROUP, MORTIMER-SIDE INITIAL COVERED SACKLER PERSONS,

Appellants-Cross Appellees,

-v.-

THE CITY OF GRAND PRARIE, as Representative Plaintiff for a Class Consisting of All Canadian Municipalities, THE CITIES OF BRANTFORD, GRAND PRARIE, LETHBRIDGE, AND WETASKIWIN, THE PETER BALLANTYNE CREE NATION, on behalf of All Canadian First Nations and Metis People, THE PETER BALLANTYNE CREE NATION on behalf itself, and THE LAC LA RONGE INDIAN BAND,

Appellees-Cross-Appellants,

THE STATE OF WASHINGTON, STATE OF MARYLAND, DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K. HARRINGTON, STATE OF CONNECTICUT, RONALD BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF CALIFORNIA, by and through Attorney General Rob Bonta, STATE OF OREGON, STATE OF DELAWARE, by and through Attorney General Jennings, STATE OF RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, on behalf of Patrick Ryan Wroblewski, MARIA ECKE, ANDREW ECKE, RICHARD ECKE,

Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES **PAGE(S)**

RULES **PAGE(S)**

OTHER AUTHORITIES **PAGE(S)**

INTEREST OF AMICI CURIAE[1]

The American Bankruptcy Institute ("ABI") is a national organization with approximately 10,000 members from all sectors of the restructuring community. In 2012, the ABI formed a commission (the "Commission") to evaluate and propose possible improvements to reorganization laws, especially chapter 11 of the Bankruptcy Code. After over two years of intensive study by the Commission and multiple advisory committees, including testimony at field hearings throughout the United States, and input from experts from all sides of various issues, the Commission issued a formal report containing its findings and recommendations

[1] This Amicus Brief is accompanied by a Motion for Leave to File as required by Federal Rule of Appellate Procedure 29(a)(3). Amici curiae contacted counsel for all parties prior to filing this brief to seek consent to file it. Of those that responded, the vast majority consented to or did not oppose the filing of this brief; only one party opposed. *See* Addendum A to the Motion Information Statement. No counsel for a party authored this brief in whole or in part and no person or entity, other than amici curiae and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(e).

(the "Report"). [2] Counsel for amici curiae (the "Amici") co-chaired the Commission.[3] Six additional former commissioners join the co-chairs in this brief.[4]

Included in the Commission's purview was a review of third-party releases in chapter 11 plans of reorganization. The Commission recommended their continued use as an essential tool in certain chapter 11 cases, subject to a multi-factor balancing test. *See* Report, at 252.

The district court's decision in this case is of interest to the Amici, not merely because it was wrongly decided, but because of its potentially destructive effect on

---

[2] AM. BANKR. INST. COMM'N TO STUDY THE REFORM OF CHAPTER 11, 2012 - 2014 FINAL REP. AND RECOMMENDATIONS (2014), http://commission.abi.org/full-report.

[3] The Commissioners included the Chair and former Chair of the influential National Bankruptcy Conference, the immediate past Chair and former President of the prestigious American College of Bankruptcy, two past Chairs of the New York City Bar Committee on Bankruptcy and Reorganization, the former Chief Restructuring Officer of the United States Treasury, a past Chair of the Turnaround Management Association, three prominent turnaround consultants, a past member of the National Bankruptcy Review Commission, a former Chief Bankruptcy Judge of the Southern District of New York, the two principal draftsmen of the 1978 Bankruptcy Code, several past members of the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, the then current President of INSOL International, the Director of the Executive Office for U.S. Trustees in the Department of Justice, five past Presidents of the American Bankruptcy Institute, and nine current and former global heads of the bankruptcy departments at major U.S. law firms.

[4] The Amici include: D.J. Baker, Geoffrey L. Berman, William A. Brandt, Jr., Jack Butler, Robert J. Keach, Sheila Smith, Albert Togut, and Deborah D. Williamson.

the entire restructuring process, well beyond the chapter 11 case of Purdue Pharma. The availability of third-party releases drives settlements essential to complex reorganizations, particularly in mass tort cases. Barring such releases will end such global settlements to the great detriment of claimants, particularly tort victims. If third-party releases are lost as a tool in these cases, tort victims will suffer the greatest loss.

For these reasons, the Commission warned in the Report that a blanket prohibition on non-consensual third-party releases was inadvisable, and recommended their continued use under certain conditions. In particular, the Commission included in the Report this recommendation:

> In reviewing a proposed third-party release included in a chapter 11 plan, the court should consider and balance each of the following factors: (i) the identity of interests between the debtor and the third party, including any indemnity relationship, and the impact on the estate of allowing continued claims against the third party; (ii) any value (monetary or otherwise) contributed by the third party to the chapter 11 case or plan; (iii) the need for the proposed release in terms of facilitating the plan or the debtor's reorganization efforts; (iv) the level of creditor support for the plan; and (v) the payments and protections otherwise available to creditors affected by the release. In a case involving the application of third-party releases to creditors and interest-holders not voting in favor of the plan, the court should give significant weight to the last of these factors.

Report, at 252. Without imposing a vague requirement of "rarity," balancing these factors makes third-party releases available in appropriate cases, while ensuring that the recipients of releases pay a fair price for them, and that the parties releasing

claims receive as much or more than they would receive through litigation. This balancing test provides an appropriate governor against any tendency toward overuse of this critical tool; courts recognize that the test is exacting and stringent, requiring a particularized factual basis and evidence.

The Amici submit this brief because the facts, legal analysis and logic that supported that recommendation in the Report are equally, if not more compelling today. Bankruptcy Judge Drain's decision below, in confirming the Debtor's plan and authorizing the third-party releases essential to the plan's implementation, proceeded with appropriate caution, properly balanced each of the factors suggested by the Commission, and supported essential factual findings for each by reference to considerable and irrefutable evidence. Unquestionable statutory authority in the Bankruptcy Code empowered him to so rule. That decision confirming Purdue Pharma's plan should be affirmed.

PRELIMINARY STATEMENT

> Bankruptcy Cases present a unique and perhaps the only means to resolve the collective problem presented by an insolvent debtor and a large body of creditors competing for its insufficient assets, including especially when there are mass claims premised on products to which, as here, massive harm is attributed.

In re Purdue Pharma L.P., 633 B.R. 53, 58 (Bankr. S.D.N.Y. 2021).

Judge Drain's assessment of chapter 11's efficacy as a tool in mass liability cases was correct. Since the passage of the current Bankruptcy Code, debtors and their creditors have turned to chapter 11 to find a solution to the intractable problems posed by cases requiring a "global settlement of massive liabilities against the debtor and co-liable parties." *See* In re Continental Airlines, 203 F.3d 203, 212-13 (3d Cir. 2000) (describing the Drexel Burnham and Johns-Manville reorganizations in the Second Circuit). The chapter 11 process is designed to orient a debtor, its creditors, and other stakeholders—parties that have disparate and often conflicting interests and goals—towards a collective solution. In mass tort cases in particular, reaching such a solution depends on the unique tools available to a bankruptcy court based on the authority provided to it by the Bankruptcy Code. One such essential tool, used only after careful scrutiny, is the non-consensual release of non-debtor claims against non-debtors (the "third-party release"). In certain circumstances, such as mass tort cases, a third-party release is critical in reaching a global settlement with creditors and, thus, an essential element of a debtor's plan of reorganization.

In the mass tort context in particular, use of third-party releases permits and drives settlements that distinctly benefit tort claimants; without such releases, and the third-party contributions they allow and incentivize, debtors would often lack sufficient assets to compensate victims. *And those victims would receive far less via litigation.* Tellingly, in the opinion confirming the plan below and a recent opinion confirming a nearly identical plan in another opioid-crisis driven chapter 11, both bankruptcy courts found, based on days of testimony and other evidence, that victims would undoubtedly receive a far greater recovery as a result of the reorganization plans at issue than they would receive by fully litigating their alleged claims, and receive that amount far faster. *See* Purdue Pharma, 633 B.R. at 109 ("I therefore conclude that if I denied confirmation of the plan, the objectors' aggregate net recovery on their claims against the Debtors and the shareholder released parties would be materially less than their recovery under the plan."); *see also* In re Mallinckrodt PLC, No. 20-12522, 2022 WL 334245, at *19 (Bankr. D. Del. Feb. 3, 2022) ("The settlement of those claims, of which the releases are a necessary and integral part, will remove an existential threat to Debtors' business while at the same time ensuring that Opioid Claimants receive recoveries far in excess of what they could obtain through continued litigation."). As the opening quote above from Judge Drain's well-reasoned opinion states, a chapter 11 plan incorporating such

settlements—grounded in global third-party releases—is often the only possible rational solution to value-destructive years of uncertain litigation.

History is the best teacher. Before the use of chapter 11 to resolve mass tort crises, mass torts simply precipitated a chaotic race to the courthouse with varying and often unfair results. Early-filing plaintiffs were covered by limited insurance that once exhausted, left remaining claimants with no source of recovery as the underlying business, besieged with litigation, failed and liquidated. Judgment amounts varied greatly depending on the court, the competence of counsel, the sympathies of the jury, and to some extent, luck; there was no uniformity. The same underlying set of facts resulted in wildly different judgment amounts. Courts were swamped with these actions, severely taxing them, with attendant, lengthy delays. For future claimants, there was no recourse at all; they were left in the cold with no remedy.

Once companies with mass tort exposure filed for chapter 11 relief, starting most notably with the Johns-Manville Corporation in 1982, order and fairness was achieved. Instead of disparate treatment of claim holders, equality of treatment, required under the Bankruptcy Code, occurred. A centralized forum for adjudication of all claims was created. All of the defendant-debtor's property came under the supervision and control of the bankruptcy court, including valuable insurance rights. *See* 11 U.S.C. §541(a) and §365(f). The rights of future claimants whose diseases

were manifested after the bankruptcy were protected through the appointment of future claims representatives. *See, e.g.*, In re Johns-Manville Corp., 600 F.3d 135, 140 (2d Cir. 2010) (describing the appointment of a future claims representative early in that case, in 1984, to represent future asbestos claimants). Critically, potentially co-liable third parties were incentivized to contribute to the settlements because they could be protected by third-party releases. Id. at 142. This was a seminal change in the resolution of mass tort crises.

The list of successful mass tort chapter 11 cases involves varying factual contexts: defective airbags in cars (Takata), wildfires (Pacific Gas & Electric), sexual abuse (several Catholic dioceses and USA Gymnastics), ground water contamination (Met-Coil), and opioids (Mallinckrodt and Insys). The plans in each rely upon non-consensual third-party releases. The newest mass tort cases involve ovarian cancer (among other diseases) attributed to talc powder (Imerys and Cyprus Mines) and in each case, resolutions will be dependent upon significant contributions from non-debtor third parties who will only contribute if there are non-consensual third-party releases under a confirmed chapter 11 plan.

Pursuant to the plain meaning of relevant provisions of the Bankruptcy Code, and Supreme Court and circuit court case law interpreting it, bankruptcy courts unquestionably have statutory authority to approve and enforce third-party releases. Bankruptcy courts understand that such authority must only be exercised in

appropriate circumstances. While articulation of their approaches varies, courts in almost all of the circuits employ some form of a stringent multi-factor balancing test, understanding that a tool like the third-party release should not be employed lightly. *See, e.g.*, In re Millennium Lab Holdings II, LLC, 945 F.3d 126, 139 (3d Cir. 2019) (explaining that "[o]ur precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution"); *see also* Mallinckrodt, 2022 WL 334245, at *13 (citing Millennium, 945 F.3d at 139).

Because the bankruptcy court below correctly understood the Bankruptcy Code as providing it authority to approve the third-party releases included in the Plan, and decided it was appropriate to exercise that authority only after careful consideration of a number of factors, all amply supported by the considerable evidence before it, this Court should affirm the Bankruptcy Court's confirmation of the Debtors' Plan.[5]

[5] This court, of course, reviews Judge Drain's opinion afresh, without any deference to the district court's opinion. "In an appeal from a district court's review of a bankruptcy court decision," such as this appeal, this Court shall "review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law de novo." *See* In re Bernard L. Madoff Inv. Sec. LLC, 818 Fed. Appx. 48, 54 (2d Cir. 2020) (internal quotation omitted).

ARGUMENT

I. The Majority of Circuit Courts Interpret the Bankruptcy Code as Providing Authority to Approve Non-Consensual Third-Party Releases In Chapter 11 Plans.

Beginning with In re Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), continuing in In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992), and then in In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005), this Circuit has developed a strong body of precedent that supports third-party releases. Johns-Manville, in particular, in allowing such releases and accompanying channeling injunctions, helped facilitate the success of subsequent mass tort bankruptcies. *See*, Johns-Mansville, 837 F.2d at 93. Indeed, the vast majority of circuit courts have endorsed the use of non-consensual third-party releases in plans under appropriate circumstances. These circuits include this Circuit, as well as, at least, the First, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See* Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983-84 (1st Cir. 1995); Metromedia, 416 F.3d at 141; In re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 347-51 (4th Cir. 2014), *cert. denied* 574 U.S. 1076 (2015); In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008); In re Seaside Eng'g & Surveying, 780 F.3d 1070, 1076-79 (11th Cir. 2015).

Within these circuits, courts have developed and applied similar multi-factor balancing tests to determine whether third-party releases should be approved. *See, e.g.*, Metromedia, 416 F.3d at 141-42 (referring to a set of factors to be considered, and noting that none of the factors are dispositive)[6]; In re Tribune Co., 464 B.R. 126, 176-180 (Bankr. D. Del. 2011) (summarizing the Third Circuit's approach and applying a four-factor test); Dow Corning, 280 F.3d at 658 (enumerating a seven-factor test, which has been applied by the Fourth and Eleventh Circuits); *but see* Airadigm, 519 F.3d at 657 (permitting third-party releases but eschewing the multi-factor approach). Although the factors applied by these courts may vary slightly from circuit to circuit, each approach involves examining whether the non-consensual release is necessary to the success of the reorganization, whether the non-debtor releasee contributed assets to the reorganization, whether the plan provides a mechanism for the payment of the claims of the class affected by the release, and whether the settlement, including the use of third-party releases, is supported by the majority of the parties affected by the releases.

[6] The bankruptcy courts in the Southern District of New York following Metromedia regularly apply a multi-factor balancing test, which includes: "(i) the released parties provide a substantial contribution to the debtor's estate, (ii) where the claims are "channeled" to a settlement fund rather than extinguished, (iii) where the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution, (iv) where the released party provides substantial consideration, (v) where the plan otherwise provides for the full payment of the enjoined claims, or (vi) where the creditors consent." *See, e.g.*, In re Stearns Holdings, LLC, 607 B.R. 781, 787-88 (Bankr. S.D.N.Y. 2019) (citing to Metromedia and collecting cases).

Beyond these circuits, courts within the Eight Circuit have approved non-consensual third-party releases, based on a five-factor balancing test that considers: (1) the "identity of interest between the debtor and the third-party non-debtor, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate"; (2) whether "[t]he non-debtor has contributed substantial assets to the reorganization"; (3) whether "[t]he injunction is essential to reorganization"; (4) whether "[a] substantial majority of the creditors agree to such injunction"—specifically, whether "the impacted class or classes have 'overwhelmingly' voted to accept the proposed plan treatment"; and (5) whether "[t]he plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction." *See* In re Master Mtg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994). No one factor is dispositive, and the list is neither exclusive, nor conjunctive; the inquiry is fact-driven. *See, e.g.*, In re Charles St. African Methodist Episcopal Church of Boston, 499 B.R. 66, 100 (Bankr. D. Mass. 2013) (explaining that it would apply the factors from Master Mortgage and noting that the factors are a "useful starting point," but that they are "neither exclusive or conjunctive requirements") (internal quotation omitted). Indeed, the test in Master Mortgage, with some clarification, was the model for the Commission's recommendation precisely because it is flexible enough to accommodate different factual contexts,

and stringent enough to ensure that third-party releases will be the exception. Particular emphasis is placed on the last two factors, ensuring acceptance by the majority of claimants and fundamental fairness. *See* id.

Despite the well-established law of this Circuit, the district court below looked to the law espoused by a minority of circuits, law which even those circuits appear to be moving away from. Those circuits have all held in particular cases that non-consensual third-party releases are inappropriate.[7] *See* In re Pac. Lumber Co., 584 F.3d 229, 252-53 (5th Cir. 2009); In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592, 600 (10th Cir. 1990). The Fifth Circuit, however, has consistently indicated that third-party releases may be appropriate in mass tort cases. *See, e.g.*, Pac. Lumber, 584 F.3d at 252 (explaining that third-party "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets"); Feld v. Zale Corp., 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing its holding from Drexel Burnham, 960 F.2d 285, 293 (2d Cir. 1992), on the factual basis that the Drexel Burnham Court approved an injunction of third-party claims because it channeled those claims to allow recovery

[7] These holdings are premised on the argument that section 524(e) of the Bankruptcy Code—which simply explains the scope of a debtor's discharge—necessarily precludes non-consensual third-party releases. This interpretation of section 524(e) has been soundly refuted, as the scope of a debtor's *discharge* has nothing to do with authority to allow a *release* of a non-debtor, and the section contains no language supporting a bar on third-party releases. *See, e.g.*, Dow Corning, 280 F.3d at 657.

from separate assets, whereas the "the injunction at issue in this case provided no alternative means . . . to recover from [the third-party insurer]"). At least one district court within the Tenth Circuit found that the alleged bar against third-party releases attributed to Western Real Estate Fund was not absolute, noting that section 524(e) does not preclude such releases. *See* In re Midway Gold US, Inc., 575 B.R. 475, 505 (Bankr. D. Col. 2017). And finally, as to the Ninth Circuit, a recent decision by that Circuit suggested that a release of third-party claims could, in certain circumstances, be imposed in a plan. *See* Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85 (9th Cir. 2020); *see also* Purdue Pharma, 633 B.R. at 101-02 (explaining the recent movement of the minority circuits away from an absolute ban on third-party releases).

In sum, while there may be a split among the circuits as to the particulars of use of third-party releases, the majority support for use of third-party releases is not an accident. A review of the Bankruptcy Code—and Supreme Court precedent interpreting the specific provisions undergirding third-party releases—reveals unquestionable statutory authority sufficient to warrant this Court's affirmance of the bankruptcy court's order confirming the plan below.[8]

[8] Indeed, since the district court's decision below vacating the bankruptcy court's approval of third-party releases, other courts in opioid-crisis-driven cases have flatly rejected the district court's view, recognizing that "that bankruptcy courts do have statutory and constitutional authority to approve a plan of reorganization that

II. Supreme Court and Circuit Court Cases Recognize and Define a Statutory Basis Authorizing Bankruptcy Court Approval of Third-Party Releases.

Statutory authority for approval and enforcement of third-party releases contained in plans of reorganization is found in sections 105(a), 1123(a)(5), and 1123(b)(6) of the Bankruptcy Code. Section 1123(a)(5) provides, in relevant part, that "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation . . . ." 11 U.S.C. § 1123(a)(5). Section 1123(b)(6) provides that a plan may "include any other provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Section 105(a) provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Thus, within certain limits not relevant here, plans may incorporate provisions, such as third-party releases, even if nonbankruptcy law would bar them,[9] unless a specific provision of the Bankruptcy

---

contains non-consensual third-party releases." *See* Mallinckrodt, 2022 WL 334245, at *14 n.69.

[9] In the Third Circuit, this provision has been interpreted to expressly preempt state law barring certain plan provisions. For example, plan provisions transferring insurance policies and proceeds to trusts formed under chapter 11 plans to pay allowed asbestos-related claims channeled to that trust were allowed despite contractual provisions and state law barring such transfers. *See* In re Federal-Mogul Global, Inc., 684 F.3d 355, 369 (3d Cir. 2012); In re W.R. Grace & Co., 475 B.R. 34, 198-99 (D. Del. 2012).

Code prohibits inclusion of such a provision. The bankruptcy court then, within section 105, has the power to approve and enforce those plan provisions.

Fortunately, the Supreme Court—in a decision that standing alone articulates statutory authority for the approval and enforcement of third-party releases[10]—has instructed lower courts precisely how to interpret this particular combination of Bankruptcy Code provisions. *See* United States v. Energy Res. Co., 495 U.S. 545 (1990).

In Energy Resources, the Supreme Court held that sections 105(a) and 1123(b)(6)[11] in combination conferred broad authority upon bankruptcy courts to approve and enforce plan provisions necessary to the implementation of the plan of reorganization. Id. at 549. As the Court explained, "[t]hese statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." Id. Absent a provision of the Bankruptcy Code or a coequal federal stature clearly, specifically, and unequivocally barring the plan provision at issue, the bankruptcy court had the

[10] *See* Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13 (Fall 2006).

[11] The Court in Energy Resources cites to section 1123(b)(5), but the Bankruptcy Code has since been amended, and the provision to which the Court referred is now codified at section 1123(b)(6).

statutory authority to approve and enforce the provision. Id. at 549-50. In Energy Resources, the subject plans contained provisions providing that payments to the IRS would be first applied to the reduction of trust fund taxes (thus eliminating first the possible liability of debtor officers as responsible persons); outside of bankruptcy, pursuant to IRS regulations and decisions, the opposite result would have pertained. The Supreme Court held that the combination of sections 105(a) and 1123(b)(6) provided authority to approve and enforce against the IRS the subject plan provision unless the provision was specifically barred by another Bankruptcy Code provision or coequal federal law. Id. Scouring the sections of the Bankruptcy Code on tax priority and the provisions of the tax laws on trust fund taxes and responsible person liability, the court located no specific and express bar to the plan provisions at issue. Id. at 550 ("It is evident that these restrictions on a bankruptcy court's authority do not preclude the court from issuing orders of the type at issue here, for those restrictions do not address the bankruptcy court's ability to designate whether tax payments are to be applied to trust fund or non-trust-fund tax liabilities."). Accordingly, the Court held, the bankruptcy court had authority to approve and enforce them, and properly exercised that authority. Id. at 550-51.

The circuit courts approving the use of third-party releases in plans of reorganization, given the Supreme Court's guidance, find statutory authority for such plan provisions in sections 1123 and 105. For example, in Dow Corning, a

chapter 11 case precipitated by mass tort litigation, the Sixth Circuit rejected the bankruptcy court's finding that approval and enforcement of third-party releases was entirely grounded in the court's inherent authority as a court of equity, and therefore inhibited by limits on the exercise of that power. 280 F.3d at 657-58. "The district court rejected this argument on the grounds that the releases were authorized by 'sufficient statutory authority under the Bankruptcy Code.' . . . [W]e agree with the district court." Id. at 657 (quoting the district court's opinion). The circuit court found that the combination of sections 105(a) and 1123(b)(6) provided specific statutory authority for the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. Id. at 658. Moreover, no provision of the Bankruptcy Code or coequal federal law, including, without limitation, section 524(e) of the Bankruptcy Code, barred third-party releases. Id. 657-58.

Similarly, following Energy Resources, the Seventh Circuit found authority to approve and enforce third-party releases in the provisions of the Bankruptcy Code. *See* Airadigm, 519 F.3d at 657. First, the circuit rejected the argument that section 524(e) barred the inclusion of third-party releases in plans and the court's approval and enforcement of such releases. Id. at 656. Next, the court found the authority to approve and enforce third-party releases resided in the combination of sections 105(a) and 1123(b)(6):

> The second related question dividing the circuits is whether Congress affirmatively gave the bankruptcy court the power to release third

> parties from a creditor's claims without the creditor's consent, even if § 524(e) does not expressly preclude the releases. A bankruptcy court "appl[ies] the principles and rules of equity jurisprudence," Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939), and its equitable powers are traditionally broad, United States v. Energy Resources Co., Inc., 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Section 105(a) codifies this understanding of the bankruptcy court's powers by giving it the authority to effect any "necessary or appropriate" order to carry out the provisions of the bankruptcy code. Id. at 549; 11 U.S.C. § 105(a). And a bankruptcy court is also able to exercise these broad equitable powers within the plans of reorganization themselves. Section 1123(b)(6) permits a court to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). In light of these provisions, we hold that this "residual authority" permits the bankruptcy court to release third parties from liability to participating creditors if the release is "appropriate" and not inconsistent with any provision of the bankruptcy code.

Id. at 657.

The Eleventh Circuit, citing Airadigm, joined the majority view and "agree[d] that § 105(a) codifies the established law that a bankruptcy court 'applies the principles and rules of equity jurisprudence.'" *See* Seaside Eng'g, 780 F.3d at 1078.

Beyond the circuits discussed above, lower courts often attribute the source of bankruptcy-court authority to approve third-party releases to specific sections of the Bankruptcy Code. *See, e.g.*, In re Millennium Lab Holdings II, LLC, 591 B.R. 559, 584 (D. Del. 2018) (explaining that courts look to sections 1129(a)(1), 1123(b)(6), and 105 as sources of authority to approve third-party releases); Charles St., 499 B.R. at 100 (citing sections 105 and 1123 as "statutory background" leading it to say that it "cannot conclude . . . that no third-party release, however well-tailored

and justified, may ever be permitted in a plan of reorganization"); *see also* Midway Gold, 575 B.R. at 502 (explaining that "[c]ourts subscribing to the majority view" cite to section 105(a) and subsections in 1123(b) when approving of third-party releases in chapter 11 plans).[12]

Indeed, courts within this Circuit have agreed on the particulars of this statutory basis for third-party releases. *See* In re Kirwan Offices S.à.r.l., 592 B.R. 489, 505, 511 (S.D.N.Y. 2018) (McMahon, J.) (explaining that "the third-party releases contained in a confirmed plan are subject to 11 U.S.C. §§ 1129(a)(1), 1123(b)(5) & (6), 105, and 524(e)" and noting that, "[i]n other words, those releases flow from a federal statutory scheme") (internal quotations omitted).[13] Thus, the search is not for a specific provision allowing third-party releases; that authority

[12] This is consistent with this Circuit's view of the role of section 105(a). For third-party releases, section 1123(a)(5) and 1123(b)(6) provide the substantive right to include third-party release provisions in plans. Section 105(a) authorizes the orders and injunctions to implement and enforce those provisions. *See* Metromedia, 416 F.3d at 142.

[13] The district court attempted to distinguish its previous statements in Kirwan by explaining that it "did not *analyze* whether there was a statutory . . . basis for the injunction that was at issue." In re Purdue Pharma, L.P., 21 cv 7532, 2021 WL 5979108, at *47 (S.D.N.Y. Dec. 16, 2021) (emphasis added). However, the finding that statutory authority existed for the inclusion, approval and enforcement of third-party releases was an essential and critical element of the reasoning in Kirwan, not merely *dicta* or some passing reference. That the judge may now have changed her mind does not decrease the force of her earlier reasoning. The district court was right in Kirwan; it is simply wrong in its opinion below.

resides in the broad authority provided by sections 1123 and 105, unless a specific statutory provision expressly and unequivocally bans the exercise of that authority. No such Bankruptcy Code provision barring third-party releases exists. The district court below simply had the appropriate inquiry reversed. Bankruptcy Judge Drain, in confirming the plan, followed Supreme Court and this Circuit's authority to the letter.

CONCLUSION

For the foregoing reasons, this Court should affirm the bankruptcy court's order confirming the debtors' plan. Barring non-consensual third-party releases—as the district court below would do—removes a critical tool for the resolution of mass tort crises, leaving those crises to be resolved only though years-long value-destructive litigation with lower, if any, victim recoveries and liquidated businesses as collateral damage. Given clear statutory authority, as recognized by the Supreme Court, we ask that this Court come to the same conclusion as the Commission: the Bankruptcy Code authorizes third-party releases in appropriate cases under a balancing test that ensures general acceptance by the victim classes and fundamental fairness.

Respectfully submitted,

Dated: February 18, 2022

/s/Albert Togut
Albert Togut, Esq.
TOGUT, SEGAL & SEGAL LLP
One Penn Plaza, Suite 3335
New York, New York 10119
Telephone: (212) 594-5000
Facsimile: (212) 967-4258
E-mail: altogut@TeamTogut.com

Robert J. Keach, Esq.
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
100 Middle St., P.O. Box 9729
Portland, Maine 04104-5029
Telephone: (207) 774-1200
Facsimile: (207) 774-1127
Email: rkeach@bernsteinshur.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 5,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word in in 14-point Times New Roman font.

Dated: February 18, 2022

/s/Albert Togut
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service to all parties will be accomplished by the appellate CM/ECF system, except for the following, who will be served via first class mail, postage prepaid:

Ronald Bass
450 Little Place, Apt. 53
N. Plainfield, NJ 07060

Maria Ecke
8 Glenbrook Drive
West Simsbury, CT 06092

Andrew Ecke
18 Meadowlark Road
West Simsbury, CT 06092

Richard Ecke
18 Meadowlark Rd.
West Simsbury, CT 06902

Ellen Issacs, on behalf of Patrick Ryan Wroblewski
P.O. Box 725
Floyd, VA 24091

Dated: February 18, 2022

/s/Albert Togut
Albert Togut
Togut, Segal & Segal LLP
One Penn Plaza, Suite 3335
New York, New York 10119
212-594-5000
altogut@teamtogut.com

Faculty

Daniel C. Cohn is a partner with Murtha Cullina LLP in Boston, where represents debtors in chapter 11 cases and out-of-court restructurings, and acquirers of distressed businesses, primarily in the middle market. He also represents directors, officers, equity sponsors, landlords, suppliers, creditors' committees, and parties in litigation related to troubled companies. A trained mediator, Mr. Cohn has served as an arbitrator, mediator and advocate in alternative dispute resolution proceedings in the insolvency context. He has received the highest ranking from *Chambers & Partners Directory of America's Leading Business Lawyers*, and is also listed in *The Best Lawyers in America* and in *Massachusetts Super Lawyers*. A Fellow in the American College of Bankruptcy, Mr. Cohn recently completed a four-year term as the college's leader in the First Circuit, and currently serves on the College's Policy and Senior Fellows Committees. He lectures frequently on cutting-edge bankruptcy issues for such organizations as the American College of Bankruptcy, ABI and Massachusetts Continuing Legal Education. Mr. Cohn is admitted to the Massachusetts Bar, the U.S. Supreme Court and the U.S. Courts of Appeals for the First and Third Circuits. He received his B.A. in 1975 from Yale University and his J.D. *cum laude* in 1978 from Cornell Law School, where he served as an editor of the *Cornell Law Review*.

Irve J. Goldman is a member of Pullman & Comley LLC in Bridgeport, Conn., and chairs its Bankruptcy, Creditors' Rights and Financial Restructuring practice. He has practiced in the areas of bankruptcy law and commercial litigation for more than 30 years. In 1993, Mr. Goldman was the first attorney in Connecticut to become Board Certified in Business Bankruptcy and has represented a diversity of interests in bankruptcy proceedings, including companies reorganizing under chapter 11, secured creditors, equipment lessors, franchisees, landlords and other creditor groups and asset-purchasers in § 363 sales. He has represented companies in reorganization proceedings ranging in size from large retail businesses to smaller-sized concerns, such as a marina in St. Thomas, Virgin Islands, a regional hardware chain, a vintage car company and a cross section of other businesses and individuals. He also has served as a chapter 11 trustee and represented chapter 11 and 7 trustees in various bankruptcy cases. In a case that has received national attention, he represented the State of Connecticut and a group of other states in the chapter 11 case of *In re Purdue Pharma, L.P. et al.* A frequent author on topical bankruptcy issues, Mr. Goldman has published articles in the *ABI Journal* dealing with standing issues in bankruptcy, prejudgment asset-freeze injunctions and executory contracts; in the *Connecticut Bar Journal* on the status of lien-stripping under bankruptcy law; and in the *Quinnipiac Law Revie*w's annual summary of decisions from the Second Circuit. At the First Annual Connecticut Bankruptcy Conference in 2019, he moderated a panel on third-party releases in chapter 11 plans, and for the Fourth Annual Connecticut Bankruptcy Conference in 2021, he prepared the materials for credit bidding in § 363 sales and selling assets in chapter 11 when the estate is administratively insolvent. In addition to his bankruptcy experience, Mr. Goldman has handled a wide variety of commercial disputes in both state and federal court, including actions involving civil RICO, breach of fiduciary duty, other business torts and debtor-creditor issues. He is admitted to practice before the U.S. District Courts for the District of Connecticut and the Eastern, Northern and Southern Districts of New York, before the U.S. Courts of Appeals for the Second and Third Circuits, and before the U.S. Supreme Court. Mr. Goldman received his B.B.A. in 1980 from Temple

University and his J.D. in 1984 from Western New England University School of Law, where he was a member of the *Western New England Law Review*.

Prof. Ingrid Michelsen Hillinger is a professor of law at Boston College Law School in Newton, Mass., where she teaches a variety of commercial law/bankruptcy courses including business bankruptcy, contracts and secured transactions. She was named one of the 26 "best law teachers" in the country by the authors of *What the Best Law Teachers Do* (Harvard University Press 2013), and was the 2002 winner of the Boston College Distinguished Teaching Award. Prof. Hillinger is a co-editor of *Chapter 11 Theory & Practice: A Guide to Reorganization*, a multi-volume bankruptcy treatise, and a co-author of an Article 9 case book, *Commercial Transactions: Secured Financing: Cases, Materials & Problems*, which adopts a problem-solving approach to teaching transactional law. She has taught at a variety of schools during her nearly 40-year teaching career, including College of William & Mary, the University of Texas at Austin, Emory University, Northeastern University School of Law and the University of Connecticut School of Law. While at William & Mary, she received an Outstanding Teacher Award from the Virginia Council on Higher Education. Prof. Hillinger is the faculty advisor to the *Uniform Commercial Code Reporter Digest*, a LexisNexis publication that annotates important UCC cases. She received her A.B. from Barnard College and her J.D. from the College of William & Mary.

Robert J. Keach is a shareholder at Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, and co-chairs its Business Restructuring and Insolvency Practice Group. He focuses on the representation of various parties in workouts and bankruptcy cases, including debtors, creditors, creditors' committees, lessors and third parties acquiring troubled companies and/or their assets. Mr. Keach served as co-chair of ABI's Commission to Study the Reform of Chapter 11. He also is a Fellow of the American College of Bankruptcy and a former ABI President (2009-2010). Mr. Keach has appeared as a panelist on national bankruptcy, lender liability and creditors' rights programs, and is the author of several articles on bankruptcy and creditors' rights appearing in the *ABI Law Review*, *Commercial Law Journal* and *ABI Journal*, among other publications. He also is a contributing author to *Collier Guide to Chapter 11: Key Topics and Selected Industries* (2011 Ed.). Mr. Keach is recognized as a "Star Individual" in Corporate M&A/Bankruptcy in *Chambers USA*, *The Best Lawyers in America* (10-Year Certificate) and *New England Super Lawyers* (Bankruptcy and Top 100 Lawyers in New England). He also is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Keach served as the chapter 11 trustee in the railroad reorganization case of *Montreal Maine & Atlantic Railway, Ltd.*, and as the fee examiner in both the *Exide Technologies* case in Delaware and the *In re AMR Corporation* case (the chapter 11 cases of American Airlines and its parent and certain affiliates). In addition, he *inter alia* represented ad hoc committees in the *Homebanc Mortgage*, *New Century TRS Holdings* and *Nortel Networks* cases in Delaware, as well as a public utilities commission in the *FairPoint Communications* case in the Southern District of New York. Mr. Keach received his J.D. in 1980 from the University of Maine.

Hon. Christopher J. Panos is Chief Judge of the U.S. Bankruptcy Judge for the District of Massachusetts in Boston, initially appointed on Sept. 21, 2015. He also serves on the Bankruptcy Appellate Panel for the First Circuit. Prior to his appointment, Judge Panos practiced at Craig and Macauley P.C. in Boston for more than 25 years and served as its managing shareholder until the attorneys at that firm joined Partridge Snow & Hahn, LLP to open its Boston office. He then served as partner

in charge of the Boston office until his appointment. Judge Panos had a diverse practice focusing on business restructuring and insolvency, mergers and acquisitions, commercial finance, business litigation and general business law. He represented companies, individuals, banks, hedge funds and private-equity funds in many different industries, including financial services, life sciences, pharmaceuticals, manufacturing, retail and real estate development. Judge Panos was elected as a Fellow of the American College of Bankruptcy in 2008 and served on its First Circuit Council from 2012-15. He has also served as chair of the Bankruptcy Law Section of the Boston Bar Association and on the Board of Trustees of the Boston Bar Foundation. Judge Panos is co-author of the *MCLE Bankruptcy Practice in Massachusetts* chapter on "Courts, Jurisdiction and Abstention," published in 2014. He was regularly recognized in peer-review publications such as *Chambers USA* and *The Best Lawyers in America*, and was selected Boston "Lawyer of the Year" in the area of bankruptcy and restructuring for the 2012 and 2016 issues of *The Best Lawyers in America*. *Law & Politics* and *Boston Magazine* designated him a "Super Lawyer" each year of publication of that list and several times named him a "Top 100 Attorney" in Massachusetts and New England. Judge Panos received his undergraduate degree from Georgetown University in 1985 and his J.D. *cum laude* from Boston University School of Law in 1989.