AMERICAN BANKRUPTCY INSTITUTE

Winter Leadership Conference

Updates on Mass Tort Bankruptcies

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CONCURRENT SESSION

2023

Third-Party Releases

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December 2023

- Current Status
- Possible Outcomes
- Timeline

IMPACTS ON OTHER CASES

BOY SCOUTS

Can it survive an adverse Purdue decision?

THE TEXAS TWO STEP

- Has the last "Texas Two-Step" been danced?
- What does "financial distress" mean after LTL?

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LIFE AFTER PURDUE

Alternatives to Third-Party Releases

1. Opt-in/Opt-Out Settlements
   - Consent issues
   - Implementation:
     - Voting and Conflicts
     - Evidence of Claims
     - Preserving the "day in Court"
   - Insurance Considerations
2. Special Issues: International Cases/ Chapter 15
3. Other possibilities?

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Questions?

Smoke or Fire?: Financial Distress as a Prerequisite for Chapter 11

- 11 U.S.C. § 109 ("Who may be a debtor") does not include a "good faith" or a "financial distress" requirement for filing bankruptcy.
  - 11 U.S.C. § 1123 requires that a plan be filed in good faith.
- 11 U.S.C. § 1112 allows dismissal "for cause." § 1112(b)(4) sets forth a non-exclusive list of "causes" for dismissal, that does not include either bad faith or lack of financial distress. But, nearly all circuits recognize that lack of good faith in filing a petition constitutes "cause" for dismissal.
- So: what is the basis for requiring that (a) Chapter 11 petitions be filed in good faith and (b) good-faith filers be in financial distress?
- Can financially healthy companies use Chapter 11 to impose an automatic stay on tort claimants?

Does Lack of Financial Distress Alone Constitute Cause For Dismissal?

- S.Rep. No. 95-989, July 14, 1978 (Bankruptcy Act): "Chapter 11 deals with the reorganization of a financially distressed business enterprise, providing for its rehabilitation by adjustment of its debt obligations and equity interests."
- 1st Cir:
  - A debtor need not be insolvent before filing Chapter 11, "provided it is experiencing some kind of financial distress." In re Capital Food Corp., 490 F.3d 21, 25 (1st Cir. 2007).
- 3d Cir:
  - Good faith requirement is grounded in "equitable nature of bankruptcy" and "purposes underlying Chapter 11." In re SGL Carbon, 200 F.3d 154, 161-62 (3d Cir. 1999). "When financially troubled petitioners seek to remain in business," exercise of bankruptcy powers is justified." Id. at 165.
  - A Chapter 11 petition must have a "valid bankruptcy purpose" (i.e., preserving a going concern or maximizing the value of the estate). A valid bankruptcy purpose "assumes a debtor in financial distress." In re Integrated Telecom, 384 F.3d 108, 128 (3d Cir. 2004).
- 4th Cir:
  - Finding of subjective bad faith was supported by record where debtor was not "experiencing financial difficulties," noting "this fact alone may justify dismissal." In re Premier Automotive Servs., 492 F.3d 274, 280 (4th Cir. 2007).
- 7th Cir:
  - "The public has an interest in limiting the use of bankruptcy for the purposes for which it was intended rather than permitting it to be used as a vehicle by which solvent firms can beat taxes... The object of bankruptcy is to adjust the rights of creditors of a bankrupt company." In re South Beach Secs., Inc., 606 F.3d 366, 371 (7th Cir. 2010).
- 9th Cir:
  - Good faith requirement is designed to deter filings that seek to obtain objectives outside the "legitimate scope of bankruptcy law." In re Marsch, 36 F.3d 825 (9th Cir. 1994).

When Does Lack of Financial Distress Constitute Cause For Dismissal? Little Circuit-Level Guidance pre-LTL

- Report of the Commission on the Bankruptcy Laws of the United States (1973): "Belated commencement of a case may kill an opportunity for reorganization or amendment."
- 2d Cir:
  - "Although a debtor need not be *in extremis* in order to file [a Chapter 11] petition, it must, at least, face such financial difficulty that, if it did not file at the time, it could anticipate the need to file in the future." In re Cohoes Indus. Terminal, 931 F.2d 222, 228 (2d Cir. 1998).
    - In re Johns Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1984): "[A] financially beleaguered debtor with real debt and real creditors should not be required to wait until the economic situation is beyond repair in order to file a reorganization petition."
- 3d Cir:
  - "[A]n attenuated possibility standing alone" that a debtor "may have to file bankruptcy in the future" does not constitute good faith." In re SGL Carbon, 200 F.3d at 164.
  - BUT: The code contemplates "the need for early access to bankruptcy relief to allow a debtor to rehabilitate its business before it is faced with a hopeless situation."
- 9th Cir:
  - Bad-faith dismissal upheld where debtor had means to pay debts without danger of disrupting business interests. In re Marsch, 36 F.3d 825 (9th Cir. 1994).

When Does Lack of Financial Distress Constitute Cause For Dismissal? Mass Tort Examples

- In re Johns Manville, 36 B.R. 727 (Bankr. S.D.N.Y. 1984)
  - But for the petition, the debtor would have had to book a $1.9 liability reserve that would have triggered acceleration of debt, forcing the debtor to liquidate certain key business segments.
- In re A.H. Robins Company, 89 B.R. 555 (E.D. Va. 1988)
  - Liabilities arising out of Dalkon Shield caused a "critical depletion" of operating cash, and its "financial picture had become so bleak that financial institutions were unwilling to lend it money. With only $5 million in unrestricted funds and the inability to secure commercial financing, it appears that Robins had no choice but to file for relief under Chapter 11 of the Bankruptcy Code."
- In re Dow Corning Corp., 244 B.R. 673 (Bankr. D. Mich. 1999)
  - Legal costs and logistics of defending worldwide product liability suits "threatened [the debtor's] vitality by depleting its financial resources and preventing its management from focusing on core business matters."

In re LTL Mgmt. LLC ("LTL 1.0") Bankr. D.N.J. 2021

- J&J and Johnson & Johnson Consumer Inc. ("JJCI") face talc claims in MDL.
- JJCI conducts divisive merger.
- LTL is vested with JJCI's talc liabilities and $6 million in cash. "New JJCI" is vested with all productive business assets.
- LTL also receives a funding agreement:
  - Outside of bankruptcy, J&J and New JJCI will satisfy all talc-related litigation costs (including payment of judgments) and normal business expenses, up to value of JJCI (over $61.5 billion).
  - Inside bankruptcy, J&J and New JJCI would provide (i) administrative costs and (ii) funding for a trust, within a plan, to address current and future talc liability, up to value of JJCI.
  - No repayment obligations.

In re Aearo Techs. LLC Bankr. S.D. Ind. 2022

- Aearo was acquired by 3M in 2008, transfers Combat Arms earplug business to 3M in 2010 for a ~$965M unpaid receivable, on which no demand was ever made.
- 3M and certain subs (including Aearo) face tort suits related to Combat Arms in largest MDL ever. 3M paid all costs; Aearo had no participation in MDL.
- 3M and Aearo enter into Funding Agreement:
  - Aearo indemnifies 3M
  - 3M makes uncapped funding commitment for all earplug and respirator liabilities, including Aearo's obligation to indemnify 3M, inside or outside bankruptcy.
  - No repayment obligations.

Official Tort Claimants' Committees and others file motions to dismiss each case as a bad-faith filing, alleging, among other things, lack of financial distress.

In re LTL Mgmt. LLC ("LTL 1.0") Bankr. D.N.J. 2021

- Bankruptcy Court held that LTL was in financial distress, focusing on the scope of litigation faced by JJCI and transferred to LTL, and speculating that drawing on the Funding Agreement could force J&J/JJCI to deplete their available cash and have a "horrific impact" on those companies. 637 B.R. 396 (Bankr. D.N.J. 2022)
- 3d Circuit reversed, holding that it was "legal error" to hold JJCI, rather than LTL, as the "lodestar" of the financial distress analysis and ignore the benefits of the Funding Agreement to LTL. 64 F.4th 84 (3d Cir. 2023).
- 3d Circuit ruled that Funding Agreement was "not unlike an ATM disguised as a contract, that it can draw on to pay liabilities without disruption to its business or threat to its financial liability."
- If talc verdicts continue to accrue to the point that cash available under Funding Agreement cannot adequately address talc liability, "[p]erhaps at that time LTL could show it belonged in bankruptcy….At best, the filing was premature."
- "**Financial distress must not only be *apparent*, but it must be *immediate* enough to justify a filing.**"

In re Aearo Techs. LLC Bankr. S.D. Ind. 2022

- Bankruptcy Court declined to apply a multi-factor good-faith test, agreeing with the Third Circuit that "good faith is better measured by whether the Chapter 11 case serves a valid reorganizational purpose . . . and that a debtor's 'need' for relief under Chapter 11 is central to that inquiry." 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).
- "[A]re the problems the debtor is facing within the range of difficulties envisioned by Congress when it crafted Chapter 11?"
- Bankruptcy Court found that Aearo could use Funding Agreement inside or outside bankruptcy to request that 3M fund any liability resulting from Combat Arms actions, and there was no evidence that Combat Arms liability threatened 3M's ability to honor Funding Agreement.
- "It is simply to early to conclude that the MDL is enterprise threatening or will result in the liquidation of either 3M or Aearo."
- Aearo and 3M commence appeal, then settle.

In re LTL Mgmt. LLC ("LTL 2.0")
Bankr. D.N.J. 2023

- After the Third Circuit's opinion, J&J caused LTL to jettison the Funding Agreement and replace it with a more limited Funding Agreement under which only JJCI, not J&J, was liable. In the interim, JJCI had spun off its consumer health business.
- LTL entered into a "support agreement" with J&J that was only available in bankruptcy and conditioned J&J's funding on final, non-appealable approval of a J&J-approved plan and capped it at $8.9 billion (over 25 years).
- J&J then caused LTL to file a second bankruptcy proceeding two hours and eleven minutes after the dismissal of LTL 1.0.
- LTL alleges 3d Cir. opinion caused initial funding agreement to be "void or voidable" and, under new funding agreement, LTL was in financial distress.
- LTL further alleges that "the vast majority" of claimants support the plan.
- Official Committee of Talc Claimants moves to dismiss for subjective bad faith and lack of financial distress and files a standing motion and complaint.

Motion to Dismiss Granted
652 B.R. 433

- Under 3d Circuit's guidance, LTL did not establish that its financial distress was "immediate."
- While LTL argued that litigation cost in the tort system would increase, there was no evidence that the aggregate amount of talc liability would surpass LTL's ability to pay.
- LTL's estimate of near-term trial costs assumed a number of trials that LTL conceded it would be unable to conduct.
- LTL appeals; J&J threatens "LTL 3.0".

Dismissal?

- Debtors need "immediate" and "apparent" financial distress.
- But, situation does not have to be "hopeless" or "beyond repair."

- Possible gauge: Ability to pay debts as they come due, without disruption to business?
  - Too close to equitable insolvency?

Purdue Pharma
Third-Party Releases Update

December 2023

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Privileged and Confidential

Timeline of select key dates

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Timeline of select key dates

- **February 2018**: Purdue ceases promoting opioid medications to prescribers and begins eliminating its opioid medication sales force
- **March 2018**: Davis Polk retained
- **July – December 2018**: All Sacklers and several other legacy directors exit board
- **July 2018 – May 2019**: Four new independent directors retained
- **January 2019**: No member of the Sackler family remains at Purdue as an officer, director or employee
- **May 2019**: Rhodes Pharma and Rhodes Tech are contributed to Purdue Pharma, enabling subsequent divestment of Sacklers' entire U.S. pharmaceutical holdings under the Plan
- **August 2019**: Negotiations among opioid MDL plaintiffs, Purdue and the Sacklers assisted by opioid multidistrict litigation ("**MDL**") judge Dan Polster ultimately result in an agreed settlement framework under which (i) the Debtors' businesses will be transferred to an entity with a public benefit mission and provide medications at no or low cost to address the opioid crisis and (ii) the Sacklers will make $3 billion in guaranteed settlement payments plus material potential upside from the sale of the Sacklers' non-U.S. pharmaceutical companies (the "**IACs**") (the "**Settlement Framework**")
- **September 15, 2019**: Chapter 11 filing date

Note: This presentation includes general descriptions of various elements of the Purdue chapter 11 cases and does not purport to set forth the precise terms of any of the complex documents and transactions described herein. Reference should be made to the underlying documents for the precise terms thereof.

Timeline of select key dates (cont.)

- **October 11, 2019**: Preliminary injunction staying litigation against Purdue and its shareholders, supported by UCC and AHC, granted. Includes voluntary self-injunction sought by Debtors
- **February 21, 2020**: Appointment of Monitor
- **February – September 2020**: Mediation before Hon. Layn Phillips (ret.) and Mr. Kenneth Feinberg (the "**Mediators**") among key public and private creditor constituencies yielding agreements regarding intercreditor allocation of value ("**Phase One Mediation**")
- **August 11, 2020**: Denial by District Court of appeal of preliminary Injunction
- **September 2020 – January 2021**: Mediation among Sackler families, AHC, NCSG, MSGE and Debtors regarding claims against the shareholders ("**Phase Two Mediation**"). Mediators' joint proposal that increased the Sackler payments to $4.275 billion accepted by all parties except NCSG (24 attorneys general)
- **November 2020**: Bankruptcy Court authorizes settlement between the United States and the Debtors under which up to $1.775 billion of an agreed $2.0 billion Forfeiture Judgment superpriority claim will be credited dollar for dollar against distributions made to the states, local governments and Tribes for abatement, so long as the Debtors emerge as a public benefit company or entity with similar mission

Timeline of select key dates (cont.)

- **May – July, 2021**: Hon. Shelley C. Chapman presides over mediation between NCSG and Sacklers ("**Phase Three Mediation**"), yielding agreement by 15 of the 24 then-non-consenting states to settlement increasing the Sackler contribution to $4.325 billion and adding other additional terms/covenants, including a historic expansion of the document repository
- **August 2, 2021**: Creditors overwhelmingly vote to accept the Plan, with over 95% of creditors voting in favor, and all 9 voting classes accepting. Over 120,000 voting creditors – largest number in U.S. history
- **August 27, 2021**: Confirmation Hearing concludes, with approximately 19 claimants (out of over 614,000) continuing to press objections to third-party releases. All official and ad hoc creditor groups support the Plan
- **September 17, 2021**: Confirmation Order entered, appellate/stay litigation commenced by ~15 remaining holdouts
- **December 16, 2021**: District Court issues a Decision and Order on Appeal vacating the Confirmation Order
- **January 3, 2022**: Hon. Shelley C. Chapman appointed to preside over "**Phase Four Mediation**" between the eight states and D.C. that appealed the Confirmation Order (the "**Nine**") and the Sacklers

Timeline of select key dates (cont.)

- **January 27, 2022**: Permission to appeal to Second Circuit granted
- **March 3, 2022:** The Sacklers and the Nine reach agreement, memorialized in a settlement term sheet (the "**Nine Settlement Term Sheet**"), that increases the aggregate Sackler payments to $5.5-$6.0 billion, depending on the sale of the IACs and includes several material and meaningful non-economic concessions from the Sacklers. The Nine agree not to oppose the appeal of the District Court decision being prosecuted by the Debtors and other Plan supporters
  - Including $276.8 million in aggregate Sackler payments to a supplemental opioid abatement fund (the "**SOAF**") established, structured, and administered by the Nine
- **March 9, 2022:** The Bankruptcy Court approves the Nine Settlement Term Sheet over objections with respect to the SOAF from 20+ states
- **March 10, 2022:** At the mediator's recommendation, the Bankruptcy Court facilitates a two-hour hearing during which 26 personal injury victims publicly address representatives from the Sackler family
- **March 11, 2022:** Deadline to file appellee briefs passes. The Nine file joint notices regarding non-opposition
- **April 29, 2022:** Second Circuit hears oral arguments

Timeline of select key dates (cont.)

- **May 30, 2023**: Second Circuit issues its decision expressly deciding all issues in favor of the Confirmation Order and sets forth new demanding seven-factor test for third-party releases
- **July 7, 2023:** U.S. Trustee seeks stay of the mandate pending disposition of petition for *writ of certiorari*
- **July 25, 2023:** Second Circuit denies motion to stay mandate and a *pro se* petition for rehearing
- **July 28, 2023:** U.S. Trustee submits application for a stay of the mandate and request to be construed as a petition for *writ of certiorari*; subsequently opposed by the Debtors, UCC, AHG, AHC, and the MSGE.
- **July 31, 2023:** Second Circuit issues mandate to District Court
- **August 10, 2023:** Supreme Court grants *certiorari* and recalls/stays mandate pending oral arguments in December
- **September – November 2023:** Briefing submitted to the Supreme Court, including by a diverse array of *amicus curiae* in support of the Plan (see slide 23)
- **December 4, 2023**: Scheduled date for Supreme Court oral argument

Overview of the Sackler Settlement

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Highlights of the Sackler Settlement

- Comprehensive resolution with an agreed allocation among many different creditor constituencies of 100% of Purdue's assets and payments under the settlement agreement (the "**Settlement**") with applicable members of the Sackler family ("the **Sacklers**")
  - Purdue's operating assets will be transferred to a newly created company, Knoa Pharma LLC ("**Knoa Pharma**"), which will continue Purdue's in-development public health initiatives, including opioid overdose reversal and addiction treatment medications to be distributed at low or no cost.
    - Knoa Pharma will be indirectly owned by opioid abatement trusts to which excess funds distributed from Knoa Pharma will flow
    - Knoa Pharma will be subject to strict covenants, an operating injunction and a monitor to ensure that it operates its business safely and responsibly
    - The Sacklers have no role or connection of any kind in or to Knoa Pharma
  - $5.5 to 6.0 billion in Sackler payments under the Settlement and Purdue's $1.0 billion in cash and all of its revenues and assets will be used to fund creditor trusts to abate the opioid crisis (after satisfying other obligations under the Plan), except for $700-750 million that will be dedicated to making distributions to qualified personal injury claimants
- Many complex, interrelated settlements underlie this structure

Overview of the Sackler Settlement

Existing Settlement Agreement

- Under the terms of the Settlement, the Sacklers, along with certain trusts that benefit the Sacklers and other entities owned by the Sacklers, will pay an aggregate of $5.5 billion[1] pursuant to the schedule below (in addition to the $225 million already paid to the DOJ)
- The payment obligations will be secured by certain assets of the Sacklers, including shares of their non-U.S. pharmaceutical companies

#	Funding Deadline	Minimum Required Settlement Payment to MDT	Minimum Required Settlement Payment to SOAF	Total Minimum Required Settlement Payments
1.	9/30/2022	$475.0 million	$25.0 million	$500.0 million
2.	1/31/2023	$375.0 million	$25.0 million	$400.0 million
3.	6/30/2023	$375.0 million	$25.0 million	$400.0 million
4.	6/30/2024	$375.0 million	$25.0 million	$400.0 million
5.	6/30/2025	$375.0 million	-	$375.0 million
6.	6/30/2026	$300.0 million	-	$300.0 million
7.	6/30/2027	$1,000.0 million	-	$1,000.0 million
8.	6/30/2028	$475.0 million	-	$475.0 million
9.	6/30/2029	$425.0 million	-	$425.0 million
10.	6/30/2030	$325.0 million	-	$325.0 million
11.	6/30/2031	$80.0 million	$20.0 million	$100.0 million
12.	6/30/2032	$80.0 million	$20.0 million	$100.0 million
13.	6/30/2033	$80.0 million	$20.0 million	$100.0 million
14	6/30/2034	$80.0 million	$20.0 million	$100.0 million
15.	6/30/2035	$80.0 million	$20.0 million	$100.0 million
16.	6/30/2036	$80.8 million	$19.2 million	$100.0 million
17.	6/30/2037	$80.8 million	$19.2 million	$100.0 million
18.	6/30/2038	$80.8 million	$19.2 million	$100.0 million
19.	6/30/2039	$80.8 million	$19.2 million	$100.0 million
TOTALS		**$5,223.1 million**	**$276.9 million**	**$5,500.0 million**

* Payment dates are subject to adjustment as set forth in the shareholder settlement agreement
[1] Plus up to an additional $500 million from the net proceeds of the sale of the IACs

Overview of the Sackler Settlement (cont.)

Sale of the Independent Associated Companies

- The Sacklers must divest their interests in the IACs over a seven-year period commencing on the Effective Date
- Net proceeds from the sales of the IACs will be paid to the estate as prepayments of the $5.5 billion of payment obligations
- The Sacklers are obligated to pay the $5.5 billion regardless of the outcome of the IAC sale process
- If the IACs are not sold within the sale period set forth in the Settlement, the estate will have the right to foreclose on the shares and apply the proceeds to the payment of the Sacklers' Settlement obligations
- The Nine Settlement Term Sheet also contemplates potential further payments of up to an additional $500 million, consisting of 90% of the amount by which specified net proceeds from the sale of the IACs exceed $4.3 billion

Overview of the Sackler Settlement (cont.)

Preserving the Value of the Independent Associated Companies

- The Settlement contains covenants and other provisions to preserve the value and saleability of the IACs, including:
  - Restrictive covenants that limit the ability of the IACs to make dividends or distributions or enter into affiliate transactions
  - Restrictions on the ability of the IACs to amend or modify organizational documents or enter into transactions that would impair the saleability of the IACs
  - Reporting requirements, including reporting on IAC financial performance, the IAC sale process and IAC cash levels.

Overview of the Sackler Settlement (cont.)

Exit from Opioid Businesses; No New Naming Rights; Restrictions on Personal and Trust Assets

- Key Sackler family members have agreed to exit their investments and involvement in opioid businesses in perpetuity
  - Other family members have agreed not to hold a controlling interest in any opioid business or serve as an executive officer or director in an opioid business until their family subgroup has satisfied its payment obligations in full under the Settlement
- The Sacklers have agreed not to seek, request, or permit any new naming rights with respect to charitable or similar donations to organizations until they have satisfied all sale and payment obligations under the Settlement, and to allow any institution or organization in the United States to remove the Sackler name from physical facilities and academic, medical, and cultural programs, scholarships, endowments, and the like
- Key Sackler family members and certain of the Sackler trusts are providing assets as collateral to secure the settlement obligations. To ensure value preservation, the Settlement includes:
  - Restrictive covenants, including limitations on incurrences of debt, distributions, dispositions and related party transactions
  - An anti-secretion covenant that, subject to certain exceptions, prohibits the Sacklers from taking actions that purposefully or materially frustrate their ability to satisfy the settlement obligations

Overview of the Sackler Settlement (cont.)

Hearing for Personal Injury Victims

- Judge Chapman, as mediator, recommended in her final Report that the Court set aside time at the Approval Hearing to hear from personal injury victims without interruption or response by any party, and that members of the Sackler family be in attendance
- The Court accepted this recommendation and tasked the UCC to select and organize the speakers
  - With input from state attorneys general, the various ad hoc committees, and in consideration of the public articles and court submissions received over the course of the case, the UCC selected 26 individual victims of the opioid epidemic
  - At a special session of the Approval Hearing (held via Zoom due to COVID protocols), speakers directly addressed three members of the Sackler family for roughly three hours
  - The speakers included persons recovering from addiction, surviving family members, parents of children suffering from NAS, and individuals in the medical field who had been targeted by Purdue salespeople

Third-party releases under the Plan

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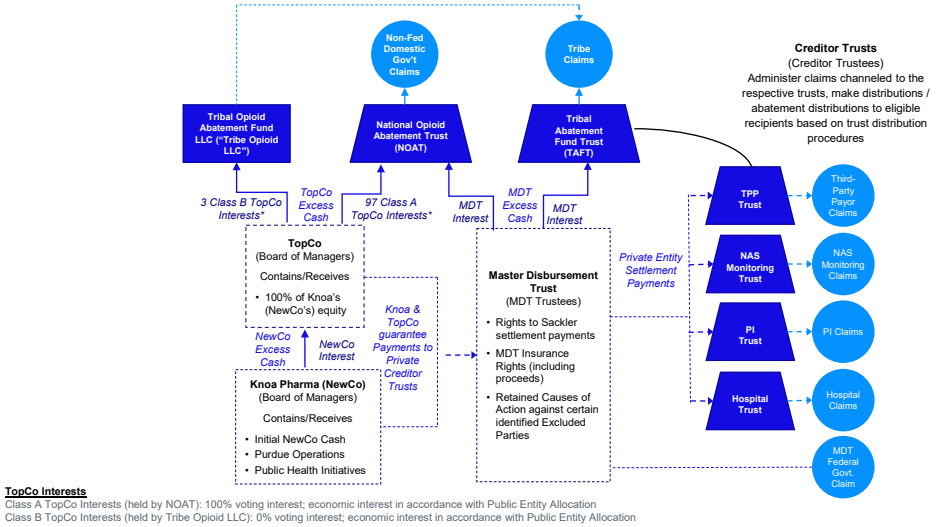
Overview of the Plan

Post-Emergence Structure



TopCo Interests

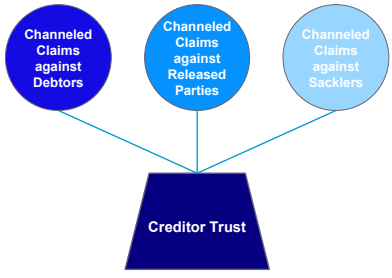
Class A TopCo Interests (held by NOAT): 100% voting interest; economic interest in accordance with Public Entity Allocation

Class B TopCo Interests (held by Tribe Opioid LLC): 0% voting interest; economic interest in accordance with Public Entity Allocation

Channeling injunction

On the Effective Date of the Plan, certain claims against the Debtors, the Sacklers and the "Released Parties" will be "channeled" to the Creditor Trusts

- **Channeled Claims**: Non-Federal Domestic Governmental Claims, Tribe Claims, Hospital Claims, Third-Party Payor Claims, NAS Monitoring Claims, PI Claims and all related Claims against the Sackler Families and the Released Parties
- The Creditor Trusts will assume liability for the Channeled Claims
- The Channeled Claims will be administered, liquidated and discharged by the Creditor Trusts pursuant to the applicable Creditor Trust agreements
- Holders of the Channeled Claims may assert their Claims only against the respective Creditor Trust and may receive distributions on account of their Claims, subject to the applicable trust distribution procedures



Scope of the Shareholder Releases

- The third-party release provisions of the Plan release the Sacklers from certain claims held by Purdue's creditors, including "any derivative claims asserted or assertible . . . on behalf of the Debtors or their Estates," as well as claims that the Debtors' creditors could "assert in [their] own right" insofar as they relate to the "Debtors' Opioid-Related Activities."
- While the releases cover an array of opioid-related claims held by creditors, including claims for fraud, they are limited in several critical respects:
  - The releases encompass only claims for which the "conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor."
  - As a result, any third-party claims against any Sacklers that are (a) not held by a creditor of the Debtors, (b) not opioid-related, or (c) opioid-related but *not* dependent on the Debtors' conduct are *not* subject to the releases.
  - The releases also exclude all claims based on post-bankruptcy conduct, governmental claims for criminal or tax liability, and claims by the United States.

Scope of the Shareholder Releases (cont.)

- The Shareholder Releases provided for in the Plan do not release <u>any</u> potential criminal actions
  - Criminal actions are specifically and expressly excluded from the scope of the Shareholder Releases
  - The Bankruptcy Court has repeatedly stated on the record that it has no authority to, does not and will not release criminal actions
  - All prosecutorial authorities remain free to investigate and bring criminal charges against any member of the Sackler families at any time, including after emergence and while and after the Settlement payments are made
- The decision of whether to indict some or all of the Sacklers is within the prosecutorial discretion of enforcement agencies

The Second Circuit decision

- On May 30, 2023, the Second Circuit reversed the District Court's decision and affirmed the Plan, holding that the Bankruptcy Court properly approved the Plan and made the requisite detailed factual findings to approve the Shareholder Releases.
- First, the Second Circuit held that the Bankruptcy Court had broad subject-matter jurisdiction to confirm the Plan, including the Shareholder Releases, under the Court's "related to" jurisdiction.
- Second, the Second Circuit affirmed the Bankruptcy Court's conclusion that two sections of the Bankruptcy Code – 11 U.S.C. §§ 105(a) and 1123(b)(6) – "jointly" provide the statutory basis for approving a plan that includes nonconsensual releases of third-party claims.
  - Section 1123(b)(6), the Court recognized, permits the inclusion of "any other appropriate provision" in a plan so long as it is "not inconsistent" with other sections of the Bankruptcy Code.
  - In tandem with § 105(a)'s grant of "broad equitable power to the bankruptcy courts to carry out the provisions of the Bankruptcy Code," § 1123(b)(6), therefore, confers upon "bankruptcy courts a residual authority consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships.

The Second Circuit decision (cont.)

- The Second Circuit identified seven factors that should be considered in order for a bankruptcy court to approve of nonconsensual third-party releases:
  - whether there is an identity of interests between the debtors and released third parties;
  - whether claims against the debtors and non-debtor are factually and legally intertwined;
  - whether the scope of the releases is appropriate;
  - whether the releases are essential to the reorganization;
  - whether the non-debtor contributed substantial assets to the reorganization;
  - whether the impacted class of creditors "overwhelmingly" voted in support of the plan with the releases; and
  - whether the plan provides for the fair payment of enjoined claims.

The Supreme Court

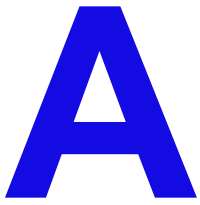
- Oral argument before the Supreme Court is scheduled for Monday, December 4
  - The Court will issue a decision before the end of the 2023-2024 term
- The question presented is "[w]hether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent."
- Who still opposes the Plan?
  - Out of 614,000 filed claimants, fewer than 10 parties (less than 2/1000th of 1%) objected to the Plan and Settlement:
    - A group consisting of four Canadian municipalities and two Canadian First Nations;
    - Three *pro se* objectors; and
    - The U.S. Trustee (who is not a claimant).
    - The Department of Justice filed statements regarding the shareholder releases both before the Bankruptcy Court and on appeal.

The Supreme Court (cont.)

- Parties submitting *amicus curiae* briefs in support of the Plan Proponents:
  - Certain Former Commissioners of the ABI
  - Amici Curiae Law Professors
  - Chamber of Commerce et al.
  - Boy Scouts of America
  - AHG of Local Councils of the Boy Scouts of America
  - Aldrich Pump LLC et al.
  - United States Conference of Catholic Bishops
  - Association of the Bar of the City of New York
  - The Recovery Advocacy Project
  - Arkansas Opioid Recovery Partnership et al.
  - Individual Victims
  - Highland Capital Management
- Parties submitting amicus curiae briefs in support of the U.S. Trustee:
  - Eugene Wedoff; various Law Professors
  - Martin Bienenstock and Daniel Desatnik
  - Kim Harold
  - NexPoint Advisors (Highland Capital litigant)
  - Texas Two Step Victims
  - Atlantic Basin Refining
  - Federation of Sovereign Indigenous Nations
- Parties submitting *amicus curiae* briefs in support of neither party
  - American College of Bankruptcy
  - Insolvency Law Committee
  - Commercial Law League of America

Appendix A

Complex Mass Tort Bankruptcies with Third-Party Releases



Appendix A

Third-Party Release Mass Tort Bankruptcies

#	Case	Nature of Claims
1	*In re T H Agriculture & Nutrition, LLC*, No. 08-14692 (Bankr. S.D.N.Y. Oct. 14, 2009)	Asbestos
2	*In re The Fairbanks Company*, No. 18-41768, 2019 WL 1752774 (Bankr. N.D. Ga. Apr. 17, 2019)	Asbestos claims (personal injury and wrongful death)
3	*In re USA Gymnastics*, No. 18-09108 (Bankr. S.D. Ind. 2018)	Sexual abuse claims
4	*Archdiocese of Saint Paul and Minneapolis*, No. 15-30125 (Bankr. D. Minn.) (confirmed 9/25/2018)	Sexual abuse claims against Archdiocese
5	*In re TK Holdings Inc.*, 17-11375 (plan confirmed 2/21/2018) (Bankr. D. Del.)	Injuries from defective airbag inflators against manufacturer
6	*In re Energy Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del. July 30, 2015) (confirmed 2/27/2018)	Asbestos-related injuries
7	*In re Blitz U.S.A., Inc.*, No. 11-13603 (Bankr. D. Del.) (plan confirmed 1/30/2014)	Claims for injuries from explosions of defective gasoline cans against manufacturer
8	*In re U.S. Fidelis, Inc.*, No. 10-41902 (Bankr. E.D. Mo.) (plan confirmed 8/28/2012)	Claims arising from fraudulent marketing of vehicle service contracts against seller
9	*In re Archdiocese of Milwaukee*, No. 11-20059 (Bankr. E.D. Wisc. July 14, 2011) (confirmed 11/13/2015)	Sexual misconduct claims
10	*In re CBC Framing, Inc.*, No. 1:09-bk-20610 (Bankr. C.D. Cal.) (plan confirmed 9/7/2010)	Construction defect claims against homebuilder
11	*In re Global Indus. Techs.*, No. 02-21626 (Bankr. W.D. Penn.) (plan confirmed 12/27/2007)	Claims for injuries from silica dust against manufacturer of refractory products
12	*Roman Catholic Archbishop of Portland Oregon*, No. 04-37154 (Bankr. D. Or.)	Sexual abuse claims against Archdiocese
13	*In re Kaiser Aluminum Corp.*, No. 02-10429 (Bankr. D. Del.) (plan confirmed 10/6/2006)	Injuries from silica dust and coal tar pitch hearing loss claims against manufacturer

Appendix A (cont.)

Third-Party Release Mass Tort Bankruptcies

#	Case	Nature of Claims
14	*Met-Coil Sys. Corp*. No. 03-12676 (Bankr. D. Del.) (plan confirmed 8/16/2004)	Injuries from water supply contamination by trichloroethylene
15	*Karta Corp*., No. 02-22028 (Bankr. S.D.N.Y. 2002) (plan confirmed 4/28/2006)	Not mass tort; "all claims," but primarily self-dealing and breach of fiduciary claims brought by single individual
16	*Williams Communications Grp*. No. 02-11957 (Bankr. S.D.N.Y. 2002) (plan confirmed 9/20/2003)	Securities fraud class action claims
17	*Dow Corning Corp*., No. 95-20512 (Bankr. E.D. Mich.) (affirmed by Sixth Circuit 1/29/2002)	Silicone implant injury claims
18	*American Family Enters*., No. 99-41774 (Bankr. D.N.J. 1999) (plan confirmed 9/11/2000)	Claims arising from allegedly fraudulent sweepstakes mailing by magazine company
19	*Piper Aircraft*, No. 91-31884 (Bankr. S.D. Fla. 1991) (plan confirmed 7/11/1995)	Aircraft crash injuries caused by defective products
20	*SEC v. Drexel Burnham Lambert Group, Inc*., No. 90-CV-6954 (S.D.N.Y. 1990) (settlement affirmed by 2d Cir. 3/27/1992)	Securities fraud class action claims
21	Menard-Sanford v. Mabey (In re A.H. Robins Co.), No. 85-01307 (E.D. Va. 1998) (plan affirmed by 4th Cir. 6/16/1989)	Dalkon Shield injury claims
22	*Johns-Manville Corp*., No. 82-11656 (Bankr. S.D.N.Y. 1982) (plan affirmed by 2d Cir. 3/30/1988)	Asbestos claims (pre-524(g))
23	*In re Catholic Bishop of Spokane*, No. 04-08822, 329 B.R. 304, 310 (Bankr. E.D. Wash. 2005), rev'd in other part, 2006 WL 1867955 (E.D. Wash. June 30, 2006)	Sexual abuse by clergy
24	*In re USG Corp*., No. 01-2094 (Bankr. D. Del.)	Asbestos property damage and personal injury claims
25	*In re W.R. Grace & Co*., No. 01-01139 (Bankr. D. Del.)	Asbestos related claims (personal injury, property damage)
26	*In re Eagle-Picher Industries, Inc*., No. 91-00100 (S.D. Ohio)	Asbestos claims

Comity Is Key: Nonconsensual Third-Party Releases Alive and Well in Chapter 15 Despite Recent Decisions Casting Doubt in Chapter 11 Context

By: Lisa Laukitis, Peter Newman, Justin Winerman, and Anthony Joseph

Decisions by the District Courts in the Purdue Pharma L.P. and the Ascena Retail chapter 11 cases garnered a great deal of attention and caused judges in the chapter 11 context to at least pause before granting approval of nonconsensual third party releases.[1] Despite the publicity and increased uncertainty around nonconsensual third-party releases in chapter 11 cases, those decisions do not (and should not) affect the ability to obtain such releases in chapter 15 cases.

A critical aspect of this distinct treatment is that chapter 15 is different than chapter 11 in its purpose and its statutory framework. In contrast to chapter 11's goal of facilitating restructurings in the United States, the primary goal of chapter 15 is to facilitate cooperation between U.S. and foreign courts through "ancillary" cases commenced to aid foreign insolvency cases.[2] In furtherance of—and to assist in effectuating— this purpose, the Bankruptcy Code provides statutory authority in chapter 15, not available in chapter 11, to provide relief that is consistent with principles of comity, even where such relief may not be available under the Bankruptcy Code or other U.S. law.[3] For instance, a number of courts have agreed that section 1507 and 1521 authorize recognition and enforcement of nonconsensual third-party releases

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1 *See In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021), *rev'd in part, aff'd in part*, *Purdue Pharma, L.P. v. City of Grande Prairie* (*In re Pharma L.P.*), 2d Cir. 2023), *cert. granted*, 2023 U.S. LEXIS 2872, U.S. Aug. 10, 2023) (hereinafter, the "**Purdue Decision**"); *see also Patterson v. Mahwah Bergen Retail Group, Inc. (Ascena Retail Group)*, No. 3:21CV167 (DJN), 2022 WL 135398, at *43 (E.D. Va. Jan. 13, 2022) (invalidating plan's third-party releases because bankruptcy court "plainly lacked the constitutional power to adjudicate" certain claims covered by the releases). *But see In re BSA* 642 B.R. 504, 594 (Bankr. D. Del. 2023) *aff'd* 650 B.R. 87 (D. Del. 2023) (finding authority in the Bankruptcy Code for, and approving, releases of third party claims and channeling injunction in chapter 11 plan).

2 *See* 11 U.S.C. § 1501.

3 *See id.* §§ 1507 ("[T]he court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States") & 1521 ("Upon recognition of a foreign proceeding . . . the court may, at the request of the foreign representative, grant any appropriate relief"); *see, e.g.*, *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("[R]elief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity." (quoting *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y.2008))); *In re Sino-Forest Corp.*, 501 B.R. 655, 662 (Bankr. S.D.N.Y. 2013) ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness." (quoting *In re Metcalfe*, 421 B.R. at 697)); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 616 (Bankr. S.D.N.Y. 2018) ("In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts."); *see also In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1060–62 (5th Cir. 2012) (noting that section 1507 is meant to "provide relief not otherwise available under [the Bankruptcy Code or other] United States law").

granted by a non-U.S. court, even if such releases would not otherwise be available under U.S. law.[4]

In light of this statutory authority in chapter 15, applicable case law holds that U.S. bankruptcy courts should enforce third-party releases approved in foreign proceedings so long as the foreign proceedings comport with U.S. notions of fundamental fairness and just treatment of creditors.[5] Accordingly, as shown in at least a couple of chapter 15 cases decided between the issuance of the Purdue Decision and its reversal, establishing a robust record on fundamental fairness in the foreign proceeding is key to obtaining such releases in chapter 15 on the basis of comity.

This article first reviews chapter 15 jurisprudence on nonconsensual third-party releases. Then this article briefly examines chapter 11 decisions on nonconsensual third-party releases. Finally, this article explains why, for the reasons above, those decisions do not affect the continued availability of nonconsensual third-party releases in chapter 15.

Chapter 15 Jurisprudence on Nonconsensual Third-Party Releases

Beginning with the case of *In re Metcalfe & Mansfield Alternative Investments*, a number of U.S. courts have extended comity to foreign court orders and found that Bankruptcy Code sections 1507 authorizes recognition and enforcement of nonconsensual third-party releases granted by a non-U.S. court, even if such releases would not otherwise be available under U.S. law.

Metcalfe & Mansfield Alternative Investments: In *In re Metcalfe*, the U.S. Bankruptcy Court for the Southern District of New York evaluated a request to recognize nonconsensual third-party releases granted pursuant to a Canadian court order.[6] The bankruptcy court noted that a recent Second Circuit decision had rendered "uncertain" whether a bankruptcy

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4 *In re Metcalfe*, 421 B.R. at 696 ("[P]rinciples 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."); *In re Vitro*, 701 F.3d at 1062 (noting that "although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law"); *In re Sino-Forest Corp.*, 501 B.R. 655, 663 (Bankr. S.D.N.Y. 2013) (finding that "[s]imilar to *Metcalfe*, approval of the third-party releases there "is proper as 'additional assistance' under section 1507 of the Bankruptcy Code"); *In re Avanti*, 582 B.R. at 618 ("The Court concludes that schemes of arrangements sanctioned under UK law that provide third-party non-debtor guarantor releases should be recognized and enforced under chapter 15 of the Bankruptcy Code.").

5 *See, e.g.*, *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. at 696 ("Section 1507 directs the court to consider comity in granting additional assistance to the foreign representative"); *In re Sino-Forest Corp.*, 501 B.R. at 664 (noting that "the factors identified in section 1507(b)(1)–(5)" which include, among other things, consideration of just treatment of creditors, are "required to be considered in determining whether to extend comity in a case under chapter 15"); *In re Avanti*, 582 B.R. at 616 ("In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts.").

6 *In re Metcalfe*, 421 B.R. 685.

court had jurisdiction to grant such a release in chapter 11.[7] Nonetheless, the *Metcalfe* court approved the releases in the chapter 15 context. In reaching its conclusion that such releases may be nonetheless recognized when granted by foreign courts, it noted:

> "[t]his Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by Canadian Courts. . . . [P]rinciples 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."[8]

The bankruptcy court noted that the Canadian court had evaluated and dismissed challenges to its own jurisdiction to grant the release. Thus, the bankruptcy court, relying on those findings, approved the releases despite case law that created doubt as to a bankruptcy court's jurisdiction to grant nonconsensual third-party release in chapter 11.

Sino-Forest Corp.: Subsequently, in *In re Sino-Forest Corp.,* the U.S. Bankruptcy Court for the Southern District of New York re-affirmed its decision in *Metcalfe*. In *In re Sino-Forest*, the bankruptcy court noted that the parties had a full and fair opportunity to litigate third-party releases in Canada, and that extending comity does not contravene any of the principles outlined in section 1507(b).[9] It noted that "the Canadian court's decision to approve the non-debtor release reflected similar sensitivity to the circumstances justifying approving such provisions as those considered by U.S. courts."[10] For that reason, the bankruptcy court agreed that the third-party releases should be recognized and enforced in the United States.[11]

Avanti Communications Group PLC: In *In re Avanti Communications Group PLC*, the U.S. Bankruptcy Court for the Southern District of New York agreed to recognize an English-law scheme of arrangement that provided for the release of non-debtor subsidiary guarantees.[12]

The bankruptcy court distinguished *In re Vitro S.A.B. de CV*, where the court had denied U.S. enforcement of third-party releases contained in a foreign restructuring plan because the foreign plan had been approved primarily by insider votes and a majority of non-insider

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7 *Id.* at 695 (citing *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008), *rev'd and remanded sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)).

8 *Id.* at 696.

9 *In re Sino-Forest Corp.*, 501 B.R. 655.

10 *Id.* at 665–66.

11 *See In re Sino-Forest Corp.*, 501 B.R. at 662.

12 *In re Avanti,* 582 B.R. 603.

creditors had not voted in favor of the plan.[13] In contrast, the *Avanti* court held that the English-law scheme adequately provided for creditor voting, and such creditors overwhelmingly voted in favor of the releases.[14] The court noted that failure to recognize the releases could "result in prejudicial treatment of creditors to the detriment of the Debtor's reorganization efforts and prevent the fair and efficient administration of the [r]estructuring."[15] Thus, the court recognized and enforced the scheme, including the releases. *See also In re Agrokor d.d.*,[16] (applying similar analysis to grant discretionary relief under sections 507 and 1521 of the Bankruptcy Code including enforcement of plan containing third party releases)

* * *

These cases illustrate that the role of the bankruptcy court evaluating nonconsensual third-party releases in a chapter 15 case is not to determine whether such releases are appropriate under U.S. law, but rather to determine whether recognition and enforcement of such releases is a proper exercise of comity.[17] To satisfy this standard, the foreign proceedings should, in line with the statutory authority provided under Bankruptcy Code sections 1507 and 1521, satisfy U.S. notions of fundamental fairness and just treatment of creditors.

Purdue Decision and Chapter 15

In re Purdue Pharma, L.P.: In the highly-publicized Purdue Decision, the U.S. District Court for the Southern District of New York vacated the bankruptcy court's order confirming oxycontin manufacturer Purdue Pharma, L.P. and its affiliated debtors' plan of reorganization.[18] Purdue and its owners, the Sackler family, were defendants in more than 2,600 civil actions by the time of Purdue's bankruptcy filing, generally alleging that Purdue and the Sacklers acted improperly in the sale and marketing of opioids. The releases sought to release claims that third-parties, including state and other personal injury litigants, asserted or might assert in the future, against the Sackler family and their related entities, in return for a large payment by the released parties as part of a global settlement of claims against them by the debtors' estates and creditors.

Chapter 15 Decisions: The Purdue Decision held that bankruptcy judges lack statutory authority under the Bankruptcy Code to approve nonconsensual third-party releases of

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13 *In re Vitro*, 701 F.3d at 1065–69.

14 *In re Avanti*, 582 B.R. at 618–19.

15 *Id.* at 619.

16 591 B.R. 163, 187-92 (Bankr. S.D.N.Y. 2018).

17 *See In re Sino-Forest Corp.*, 501 B.R. at 662 ("[T]he correct inquiry in a chapter 15 case [is] not whether the [foreign] orders [granting third-party releases] could be enforced under U.S. law in a plenary chapter 11 case, but whether recognition of the [foreign] courts' decision was proper in the exercise of comity in a case under chapter 15." (citing *In re Metcalfe*, 421 B.R. at 696)).

18 Purdue Decision, 635 B.R. at 36.

creditors' direct claims in chapter 11 cases.[19] Pending the appeal of the Purdue Decision to the U.S. Court of Appeals for the Second Circuit, courts weighed in on the propriety of nonconsensual third-party releases in chapter 15 cases. Depending on the outcome of the Supreme Court's review of Purdue, and the basis for its ruling,[20] such decisions may provide an alternative to an absolute ban on such a restructuring tool, because such releases have been upheld in a number of chapter 15 cases, two of which are notable for the bankruptcy court's specific pronouncements on the issue.[21]

Huachen Energy Co. Ltd.: Huachen Energy, a thermal power generator in the People's Republic of China (the "**PRC**"), sought chapter 15 recognition in the United States Bankruptcy Court for the Southern District of New York of a financial restructuring of its funded debt, including approximately $578 million of New York-law governed senior secured notes, pursuant to a reorganization plan under the PRC Enterprise Bankruptcy Law.

The third-party releases released noteholder claims against certain non-debtor parties involved with the restructuring, including the notes trustee, the tabulation agent, the notes collateral agent, and other agents and relevant parties related to the notes or the restructuring. U.S. Bankruptcy Judge Lisa G. Beckerman granted recognition of the Huachen reorganization plan, including the third-party releases. In approving the releases, Judge Beckerman noted:

> Non-consensual third-party releases and what constitutes consent for a third-party release given in connection with a Chapter 11 plan of reorganization remains controversial under the United States Bankruptcy Code especially in light of the recent [Purdue Decision] . . . .
>
> However, this Court is not being asked to approve non-consensual third-party releases under the US Bankruptcy Code, but rather, to determine whether

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19 Purdue Decision, *Id.*, at 78..

20 For example, if the Supreme Court were to reverse the Second Circuit and affirm the District Court's Purdue Decision on constitutional grounds (although no party argued in the lower courts that the plan's third party releases were unconstitutional), section 1506 of the Bankruptcy Code might be invoked to deny a foreign representative's request to enforce a third party release approved in a foreign proceeding. That section states, "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. However, the fact that a foreign restructuring plan violates a right granted by the U.S. Constitution does not necessarily result in the plan's invalidation under section 1506. *See In re RSM Richter Inc. v. Aguilar* (*In re Ephedra Prods. Liab. Litig.*), 349 B.R. 333, 335-36 (S.D.N.Y. 2006) (neither section 1506 nor section 1521 of the Bankruptcy Code prevented the court from enforcing a Canadian plan's claims resolution procedure in a foreign main proceeding under chapter 15 of the Bankruptcy Code notwithstanding that the procedure abrogated the right to a jury trial).

21 In addition to the two cases detailed in this article, also see, for example, *In re RongXingDa Development (BVI) Limited*, No. 22-10175 (DSJ) (Bankr. S.D.N.Y. Mar. 14, 2022) (recognizing, on certificate of no objection and without a hearing, British Virgin Islands scheme of arrangement containing third-party releases); and *In re PT Pan Bros. Tbk*, No. 22-10136 (MG) (Bankr. S.D.N.Y. Mar, 8, 2022) (recognizing nonmain proceeding regarding Singaporean scheme of arrangement and enforcing third-party releases under a deed of release).

> the recognition of the PRC's decision is a proper exercise of [comity] in a Chapter 15 case.[22]

Accordingly, the bankruptcy court "provide[d] additional assistance in the form of recognizing and enforcing the releases in the plan" under Bankruptcy Code sections 1507 and 1521.[23] The bankruptcy court noted that creditors had a full and fair opportunity to vote on the plan and to be heard in the underlying proceedings based on the information and notice provided. As a result, "[p]rinciples of [comity] permit a United States Bankruptcy Court to recognize and enforce this plan."[24]

Markel CATCO Reinsurance Fund Ltd.: Judge Beckerman similarly enforced broad, third-party releases as part of the Markel CATCo chapter 15 cases.[25] Notably, while Judge Beckerman indicated that there has been resistance to granting nonconsensual third-party releases in the chapter 11 context, she actively encouraged the creative use of foreign restructuring tools and chapter 15 to achieve a result that may not have been possible in a chapter 11 case.[26]

Markel CATCo and its affiliated debtors ("**CATCo**" or the "**CATCo Debtors**") comprised a Bermuda-based investment fund business that raised investor capital to invest in reinsurance products. After suffering historic losses in 2017 and 2018, the CATCo business began a run-off in 2019 to return remaining capital to investors as the underlying insurance policies were settled.

In 2020, an investor sued the former CATCo CEO on account of its losses. While this first suit was quickly settled, other investors also threatened or asserted similar claims. Any successful investor claims would ultimately be paid from fund assets due to various indemnities between the CATCO entities and their officers and therefore reduce assets available for distribution to fund investors in the run-off. Investors were thus incentivized to assert claims in order to avoid other investors benefitting by jumping the queue. Additionally, as the total amount of investor losses significantly exceeded the amount of cash remaining in the funds, the CATCo funds became unable to make further distributions to investors as they needed to reserve amounts in respect of any potential investor claims.

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[22] Hr'g Tr. at 18:23–19:10, *In re Huachen Energy, Co.*, No. 22-10005 (LGB) (Bankr. S.D.N.Y. Feb. 1, 2022) (hereinafter, the "**Huachen Hearing Transcript**").

[23] Huachen Hr'g Tr. at 20:3–5; 20:20–21:3.

[24] Huachen Hr'g Tr. at 20:13–15.

[25] Skadden represented the foreign representatives of the CATCo Debtors in these chapter 15 cases.

[26] *See* Hr'g Tr. at 27:2–10, *In re Markel CATCo Reinsurance Fund Ltd.*, No. 21-11733 (LGB) (Bankr. S.D.N.Y. Mar. 16, 2022) (hereinafter, the "**Enforcement Hearing Transcript**") (noting that the Buy-Out Transaction "was an interesting and unique way of dealing with a restructuring problem and one that actually I'm sure people will be interested in looking at, and perhaps utilizing the methodology in the future" and "does appear to be a well thought out and uncommon but creative use of various provisions in Bermuda law, as well as obviously just overall restructuring proceedings").

To (a) resolve the uncertainty around further investor litigation; (b) ensure that all investors were treated alike, and none gained an unfair advantage through litigation; and (c) facilitate the expeditious return of funds to investors, the CATCo Debtors proposed a buy-out transaction (the "**Buy-Out Transaction**") under which the CATCo Debtors' parent, Markel Corporation, would fund the return of substantially all of the investors' remaining capital invested in the CATCo Debtors as well as the investors' pro rata shares of certain additional cash consideration,[27] in exchange for comprehensive, third-party releases of any claims such investors may hold against the CATCo Debtors, Markel Corporation, and their affiliates, including claims for gross negligence, willful misconduct, and fraud (the "**Releases**").

To implement the Buy-Out Transaction, the CATCo Debtors entered Bermudian provisional liquidation proceedings and the CATCo funds proposed schemes of arrangement (the "**Schemes**") to their investors (the "**Scheme Creditors**") and sought U.S. chapter 15 recognition and enforcement of those Bermudian proceedings. Following negotiations and settlements with certain key investors who had objected to the Schemes, the Supreme Court of Bermuda (the "**Bermuda Court**") approved the Schemes and, in particular, the Releases. In a judgment, dated February 25, 2022 (the "**Judgment**"), the Bermuda Court found that:

> (a) the Releases are necessary in order to give effect to the proposed arrangement between the Scheme Companies and the Scheme Creditors; (b) the Releases are necessary for the Schemes to achieve their purposes; and (c) there is a sufficient nexus between the relationship between the Scheme Creditor and the Scheme Company on the one hand, and the release of Investor Claims against all of the Released Parties on the other hand. Thus, I am satisfied that the Releases fall within the jurisdiction of [the Bermuda Companies Act, governing schemes of arrangement].[28]

Judge Beckerman recently recognized and enforced the same in the CATCo Debtors' chapter 15 cases, noting that while nonconsensual third-party releases are still controversial in chapter 11, especially in light of the Purdue Decision,

> this Court is not being asked in this case to approve nonconsensual third-party releases under the United States Bankruptcy Code in connection with a plan of reorganization, but instead is being asked to determine whether recognition of the Bermuda court's decision is a proper exercise of comity in a case under chapter 15 in connection with the sanctioned schemes that were approved by the Bermuda court.[29]

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[27] Additionally, Markel Corporation covered the costs of the transaction so that such costs did not reduce the distributable amounts available to investors.

[28] Judgment ¶ 87.

[29] Enforcement Hr'g Tr. at 21:23–22:5.

The CATCo Debtors established a fulsome record to overcome any concerns the bankruptcy court may have with respect to the releases.[30] Among other things, the CATCo Debtors presented as evidence a declaration from local Bermuda counsel attesting to the permissibility of third-party releases under Bermuda law, the Bermuda Court's judgment approving the Releases, and key submissions in the Bermuda proceedings illustrating how the Releases were repeatedly disclosed to and considered by the Scheme Creditors.

Based on this robust record, Judge Beckerman stated: "[O]bviously, under Bermuda law, the [Bermuda] Court has clearly ruled that those [releases] are permissible under Bermuda law, both with respect to the statute and also with respect to the cases cited in the motion and the declaration that was filed by [local Bermuda counsel] as well."[31] In addition, the bankruptcy court noted that "[e]xtending comity to the releases and the injunction and other parts of the scheme sanction orders, and the schemes themselves, does not affect the just treatment of creditors."[32]

Therefore, even though Judge Beckerman pointed out that "there might be an issue if [releases with no carveouts for gross negligence, willful misconduct, and fraud] were done in a United States Chapter 11 plan, in addition to the issue of nonconsensual third-party releases, as a whole, and whether those are appropriate or legal, or satisfies the Second Circuit principles," those issues were not before her in the chapter 15 context.[33] Instead, because "principles of enforcement of foreign judgments and comity in the chapter 15 cases strongly counsel approv[al] of enforcement in the United States of third-party nondebtor release and injunction provisions, even if those provisions could not be entered in a plenary Chapter 11 case," the bankruptcy court granted the enforcement motion, including enforcement of the Releases.[34]

As a result of the enforcement of the Releases in the United States, the CATCo Debtors were able to successfully complete their restructuring and effectuate the Buy-Out Transaction.

Conclusion

As these two recent cases show, nonconsensual third-party releases remain alive and well in chapter 15 despite the controversy they are garnering in chapter 11 after the Purdue

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30 *Cf. In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 882–85 (Bankr. S.D.N.Y. 2021) (denying approval of third-party releases in Indonesian restructuring plan where there was "no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering th[e] third-party release" there, and, as such, "relying on the [Indonesian] Commercial Court Judgment [approving the restructuring plan] is insufficient where it does not provide any justification for the release, either under Indonesian law or otherwise").

31 Enforcement Hr'g Tr. at 22:22–23:1.

32 Enforcement Hr'g Tr. at 23:2-5.

33 Enforcement Hr'g Tr. at 22: 12–21.

34 Enforcement Hr'g Tr. at 22:6–11.

Decision. Given that chapter 15 is different in purpose and statutory framework, the cases interpreting chapter 15 continue to permit nonconsensual third party releases even if they might be impermissible in chapter 11. The key to approval in chapter 15 is producing a fulsome record demonstrating fundamental fairness and just treatment of creditors so that a U.S. bankruptcy court is comfortable enforcing the releases as a matter of comity.

Faculty

Hon. Robert D. Drain is Of Counsel with Skadden, Arps, Slate, Meagher & Flom LLP in New York and previously served for 20 years as a U.S. bankruptcy judge for the Southern District of New York, presiding over several high-profile and impactful cases involving well-known companies and organizations. Prior to leaving the bench in 2022, Judge Drain oversaw proceedings ranging from large chapter 11 corporate restructurings and consumer-level bankruptcies to international chapter 15 matters. He also served as a court-appointed mediator for other judges in numerous cases. In his current practice, Judge Drain advises on U.S. and cross-border chapter 11 and 15 reorganizations, out-of-court restructurings, debtor-in-possession loans, secured financings, distressed M&A and investments in troubled companies, and potential examiner or trustee roles and mediations. He is a Fellow of the American College of Bankruptcy, a member and former Board member ABI, and a former board member and officer of the National Conference of Bankruptcy Judges. For several years, he chaired the Bankruptcy Judges Advisory Group established by the Administrative Office of the U.S. Courts, and he currently serves on the FDIC's Systemic Resolution Advisory Committee. In addition, he was a founding member and chair of the Judicial Insolvency Network, which developed, among other issuances, guidelines that were adopted by courts in the U.S. and abroad for cooperation and communication in concurrent transnational insolvency cases. He also annually presided over a mock transnational bankruptcy case for the International Association of Restructuring, Insolvency & Bankruptcy Professionals' (INSOL) training program, and he is a member of the International Insolvency Institute. Judge Drain is currently an adjunct professor at Pace University School of Law and a former adjunct professor in St. John's University School of Law's LL.M. in Bankruptcy Program. Judge Drain has published in treatises on bankruptcy law and frequently lectured on bankruptcy law in multiple programs for the Federal Judicial Center, the NCBJ, the ABI, AIRA, TMA, PLI, the American College of Bankruptcy, the International Insolvency Institute, the Federal Bar Council, Columbia University School of Law and national, international and local bar associations, as well as in judicial and professional interchanges with judges and practitioners in South America, Europe, China, South Korea, Singapore and India. Prior to his time on the court, he spent nearly 20 years in private practice, including 10 years as a partner in the bankruptcy and restructuring practice of another global law firm. He also authored a novel, *The Great Work in the United States of America*. Judge Drain received his B.A. *cum laude* from Yale University and his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years.

Shari I. Dwoskin is a partner in Brown Rudnick LLP's Bankruptcy & Corporate Restructuring Practice Group in Boston. She represents creditors' committees, tort victims, bondholders, equity interestholders, and debtors in chapter 11 restructurings and litigation arising from related disputes, as well as out-of-court wind-downs. Ms. Dwoskin has experience managing many facets of the restructuring process in some of the largest recent bankruptcy cases, including negotiating restructuring support agreements, plans and DIPs; plan-confirmation trials; valuation; avoidance actions; bankruptcy auctions; the claims-resolution process; and related motion practice and litigation. She also regularly consults with Brown Rudnick's Corporate, Intellectual Property and Real Estate Groups on bankruptcy-related matters. Ms. Dwoskin co-chairs the New England Network of the International Women's Insolvency & Restructuring Confederation (IWIRC) and was named an Up and Coming Lawyer by *Massachusetts Lawyers Weekly* in 2021. She received her B.A. in 2002 from McGill University, her

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Timothy E. Graulich is a Restructuring partner with Davis Polk & Wardwell LLP in New York and head of International Restructuring. He is experienced in U.S. and cross-border restructurings, including in Bermuda, Brazil, Canada, Cayman Islands, China, Curacao, England, Hong Kong, Ireland, Italy, Japan, Luxembourg, New Zealand, the Netherlands, Mexico and Mongolia. He has represented public and private companies, agent banks and lenders, acquirers and hedge funds in connection with prepackaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and §363 sales. Mr. Graulich was named an "Outstanding Restructuring Lawyer" by *Turnarounds & Workouts* in 2013 and 2018. He is an INSOL Fellow, co-chair of the USA/Canada/Caribbean Regional Committee of the International Insolvency Institute, and co-chair of the Insolvent Financial Institutions Subcommittee of the Insolvency Section of the International Bar Association. Previously, Mr. Graulich was counsel at Davis Polk & Wardwell and an associate with Weil, Gotshal & Manges. He received his B.A. *summa cum laude* in philosophy and political science from St. John's University, his J.D. from St. John's University School of Law, where he was a St. Thomas More Scholar and a member of the *ABI Law Review*, and his LL.M. in Bankruptcy from St. John's University School of Law.

Kami E. Quinn is a partner with Gilbert LLP in Washington, D.C., and chairs the firm's Executive Committee. She brings more than two decades of experience to the most cutting-edge and high-profile matters in insurance recovery and mass torts. Ms. Quinn has worked with corporate clients and creditors' committees in insurance, products liability, mass torts and bankruptcy in regards to asbestos injury, sexual abuse claims, opioid-related liability, safety products, talc-related injuries, malpractice claims, and directors and officers liability. Much of her recent work has centered around the intersection of bankruptcy and insurance recovery in many of the most high-profile cases in the nation, where she has successfully developed strategies to maximize and preserve billions of dollars in insurance assets. Ms. Quinn is vice chair of the Insurance Subcommittee of the ABA's Business Bankruptcy Committee and a former board member of the Legal Aid Society of the District of Columbia Board, and she was listed in *Washington, DC Super Lawyers* from 2013-22 and in *The Best Lawyers in America* for Insurance Law from 2019-24. She received her B.A. in 1996 from Drake University and her J.D. in 2000 from the University of Chicago Law School.