CALIFORNIA BANKRUPTCY FORUM

POST-*PURDUE:* DR.STRANGE'S INTERDIMENSIONAL MAGIC

May 16, 2025
2:00 p.m. PST

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POST-*PURDUE*: DR. STRANGE'S INTERDIMENSIONAL MAGIC*

[I] INTRODUCTION

Welcome to this discussion of the interdimensional magic that occurred after *Harrington v. Purdue Pharma, L.P.,* 603 U.S. 204 (2024) (*Purdue*). Behold post-*Purdue* legal magic! Behold third-party releases, stays, exculpation and gatekeeping clauses, and mootness (equitable and statutory)! Behold the chapter 11 cases of debtors Purdue Pharma L.P. ("Purdue"), its general partner, and subsidiaries (collectively, "Debtors")!

In 2019, the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") granted a preliminary injunction (the "Preliminary Injunction") that temporarily stayed Debtors' creditors from pursuing their disputed claims against certain Sackler family members (the "Sacklers").

In 2021, after multiple mediations, United States Bankruptcy Judge Robert D. Drain confirmed Debtors' twelfth amended chapter 11 plan (the "Plan"). The Plan contained nonconsensual releases of creditors' disputed claims against the Sacklers.

On June 27, 2024, in a 5-4 divided decision in *Purdue*, the United States Supreme Court invalidated the Plan's nonconsensual third-party releases. The majority opinion, by Justice Gorsuch, joined by Justices Thomas, Alito, Barrett, and Jackson, held that the Bankruptcy Code "does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue,* 603 U.S. at 227.

The crystal ball of the dissenting Justices showed a gloomy future. The dissent, by Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor and Kagan, predicted: "With the current plan now gone and non-debtor releases categorically prohibited, the consequences will be severe. Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and 'there will be no viable path to any victim recovery.'" *Id.* at 230 (quoting Tr. of 12/4/23 Oral Arg. ("12/4/23 Tr.")).

Post-*Purdue,* United States Bankruptcy Judge Sean H. Lane: [1] appointed two experienced mediators (the "Co-Mediators") to facilitate renewed negotiations among Purdue, its creditors, and the Sacklers, [2] extended the duration of the Preliminary Injunction (s*ee Purdue Pharma L.P. v. Massachusetts (In re Purdue Pharma L.P.)*, 2024 Bankr. LEXIS 2916 (Bankr. S.D.N.Y. 2024) *(Massachusetts*)); and [3] authorized Debtors' official creditors committee (the "OCC") to pursue colorable claims that Debtors' bankruptcy estates have against the Sacklers (*In re Purdue Pharma L.P.,* 2024 Bankr. LEXIS 2812 (Bankr. S.D.N.Y. 2024) (*Purdue-OCC*)).

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*This outline was prepared by Leonard L. Gumport. This outline doesn't reflect the views of anyone else. The views stated (and any errors contained) in this outline are exclusively mine. Valuable comments on prior drafts were provided to me by the Hon. Meredith A. Jury (Ret.), the Hon. Michael B. Kaplan, and Thomas R. Phinney.

On November 26, 2024, in *Maryland v. Purdue Pharma L.P. (In re Purdue Pharma L.P.),* 2024 U.S. Dist. LEXIS 21641 (S.D.N.Y. 2024) (*Maryland*), United States District Judge Colleen McMahon affirmed Judge Lane's orders granting short extensions of the Preliminary Injunction. Judge McMahon stated: "The 'elephant in the room' is that the Preliminary Injunction has been in effect for a very, very long time." *Id.* at *27. Quoting from the Mel Brooks' movie *Spaceballs* (1987), Judge McMahon stated: "When will then be now?" and "When is soon?" *Maryland,* at *28.

On January 23, 2025, almost magically, several state attorneys general announced a tentative $7.4 billion settlement among Purdue, its creditors, and the Sacklers. The next day, the Los Angeles Daily Journal reported that the tentative settlement "includes more money from the Sacklers but [contains] an unusual provision that allows them to set aside up to $800 million to pay damages from plaintiffs who don't accept the settlement and sue instead." Craig Anderson, "New deal reached in Purdue Pharma opioid settlement," Los Angeles Daily Journal, Jan. 24, 2025, at 1.

On March 18, 2025, in a press release (the "3/18/25 Press Release") posted on Purdue's website, Purdue announced: "Purdue Pharma L.P. ('Purdue') today filed a Chapter 11 Plan of Reorganization (the 'Plan') and related disclosure statement . . . . [¶] In compliance with the Supreme Court's 2024 ruling, the Plan does not contain non-consensual third-party releases." *See* "Purdue Pharma L.P. Files New Plan of Reorganization Providing for More Than $7.4 Bill in Creditor Distributions," *available at* https://www.purduepharma.com/news/2025/03/18/purdue-pharma-l-p-files-new-plan-of-reorganization-providing-for-more-than-7-4-billion-in-creditor-distributions/ (last visited on 4/21/25). *See* Part III.L of this outline for details of the 3/18/25 Press Release.

[II] *PURDUE'S* HOLDING

Part IV of the majority opinion in *Purdue* summarizes its holding: "As important as the question we decide today are the ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, *e.g., In re Specialty Equipment Cos.,* 3 F.3d 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Because the Second Circuit ruled otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion." *Purdue*, 603 U.S. at 226-227 (emphasis in original).
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[III] THE *PURDUE* CASE

[A] 1996-2019: Pre-Bankruptcy Events

During 1996-2019, Purdue generated approximately $34 billion in revenues, mainly from sales of the addictive painkiller OxyContin. Purdue was indirectly owned and controlled by the Sacklers, who also owned foreign affiliates (the "IACs"). *See Purdue,* 209-21; *id.* at 245 (Kavanaugh, J., dissenting); *Dunaway v. Purdue Pharma L.P. (In re Purdue Pharm. L.P.),* 619 B.R. 38, 43-44 (S.D.N.Y. 2020) (*Dunaway*).

In 2004, Purdue agreed to indemnify the Sacklers. In 2007, a Purdue affiliate (The Purdue Frederick Company, Inc.) pleaded guilty to a federal felony for misbranding OxyContin as less addictive than other pain medications. Between 2008-2016, Purdue distributed more than $10 billion to the Sacklers. They transferred much of that money to overseas trusts and family-owned companies. *Purdue,* at 209-211, 225 n.7; *see USA v. The Purdue Frederick Co., Inc.,* U.S.D.C. No. 1:07-cr-00029 (W.D. Va.).

Over 40 percent of the $10+ billion withdrawn by the Sacklers and their related entities from Purdue went to the IRS and state governments to pay Purdue-associated tax obligations of the Sacklers. *See In re Purdue Pharma L.P.,* 633 B.R. 53, 91 (Bankr. S.D.N.Y. 2021) (*Purdue 1*), vacated in *In re Purdue Pharma, L.P.,* 635 B.R. 26 (S.D.N.Y. 2021) (*Purdue 2*), reversed in part in *Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.),* 69 F.4th 45 (2d Cir. 2023) (*Purdue 3*), reversed in *Purdue*, 603 U.S. 204 (2024).

[B] 2019: Bankruptcy Filing & Preliminary Injunction

In September 2019, Debtors filed their chapter 11 petitions in the Bankruptcy Court. As of September 2019, Debtors "had more than $1 billion in cash, and no funded debt, but were named in more than 2,600 hundred active lawsuit asserting opioid-related claims. Some of those lawsuits named the Sacklers as defendants, with more lawsuits likely to follow in the future." *Purdue-OCC,* at *9 (citation omitted).

By September 2019, Debtors and the Sacklers had negotiated a tentative settlement in which, in return for releases from Purdue and its creditors, the Sacklers would pay $3 billion over seven years, financed by sales of the IACs. *Dunaway*, at 43-44. The Sacklers' position was "that they would only put money back into Purdue's bankruptcy estate if they obtained 'total peace' – meaning that they would, as part of [Debtors' chapter 11 plan], receive releases of all claims from all affected claimants, with or without the consent of all claimants." *Purdue-OCC,* at *7-8; *see Maryland,* at *3-4.

In November 2019, to give Debtors time to come up with a plan, the Bankruptcy Court granted the Preliminary Injunction; it temporarily stayed creditors from pursuing their disputed claims against the Sacklers and related parties. During 2020-2025, the Bankruptcy Court extended the duration of the Preliminary Injunction. *Maryland,* at *6.

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[C] 2020: Plea & Forfeiture Agreement

In 2020, Purdue pled guilty to three felony counts in a criminal information filed by the United States in *USA v. Purdue Pharma L.P.*, U.S.D.C. No. 2:20-cr-01028 (D.N.J.). The stipulated facts in the plea agreement recited opioid-marketing misconduct by Purdue during approximately 2007-2017. *Plea Agreement with Purdue Pharma L.P.* at 15-19 [Case. No. 2:20-cr-01028, ECF No. 6.]; *see Purdue 2,* at 49.

In the plea agreement, Purdue consented to a $2 billion forfeiture judgment. Pursuant to the plea agreement, the United States agreed to provide an offset credit to Purdue for up to $1.775 billion of value that Purdue distributed to non-federal creditors pursuant to a confirmed chapter 11 plan. *Corporate Monthly Operating Report* at 13-15 [Case No. 7:19-bk-23649, ECF No. 7388].

[D] 2021: Mediation, Plan Confirmation, & Settlement with Sacklers

In 2021, after a multi-phase mediation, Debtors proposed the Plan. It incorporated a settlement with the Sacklers, who agreed to pay approximately $4.325 billion over nine years, in return for consensual releases from Debtors' bankruptcy estates and non-consensual releases (and a permanent injunction) of creditors' disputed OxyContin-related claims against the Sacklers and related parties. Of the eligible creditors who voted, the vast majority supported the Plan. The United States Trustee (the "UST") and certain creditors, including multiple States and opioid victims, opposed the Plan's nonconsensual third-party releases. *Purdue,* at 211-212; *Purdue-OCC,* at *12-14.

The Plan's disclosure statement projected that "approximately $5 billion in value will be provided to trusts, each with a mission to fund abatement of the opioid crisis. An addition $700 to $750 million will be provided to a trust that will make distributions to qualified personal injury claimants." *Disclosure Statement for Third Amended Joint Chap. 11 Plan etc.* at 2-3 [Case No. 7:19-bk-23649, ECF No. 2907].

From the $700 to $750 million personal injury trust, the claimants, i.e., opioid victims, "would receive payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses). For those receiving more than the base amount, payments would come in installments spread over as many as 10 years." *Purdue*, at 212 (citations omitted).

As part of the settlement with Debtors, the Sacklers agreed to provide additional consideration, including the dedication of two charities worth at least $175 for opioid abatement purposes; disposal of their interests in the IACs within seven years; inclusion of a snap-back provision designed to protect the collectability of settlement payments; and the creation of an extensive document depository. *Purdue 2,* at 70.

In *Purdue 1*, United States Bankruptcy Judge Robert D. Drain determined that the Plan's nonconsensual third-party releases were valid under Second Circuit precedent.
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In *Purdue 1,* Judge Drain determined that, "without the releases[,] the [P]lan would unravel and Debtors' cases would likely convert to cases under Chapter 7 of the Bankruptcy Code." In that event, unsecured creditors "would probably recover nothing[.]" *Id.,* 633 B.R. at 109. Judge Drain "focused particularly on the difficulty of collecting any judgments that might be obtained against the Sacklers." *Purdue 2,* at 71; *see Purdue 1,* at 88-91. Judge Drain noted that the objecting creditors included States who, "of course, intend to keep the tax payments" received pre-petition from the Sacklers. *Id.* at 91; *see Purdue 2*, at 72.

[E] 2021-2023: Appeals, Mediation, & Additional Settlement

The UST and various creditors appealed from the confirmation order and obtained stays pending appeal. In December 2021, in *Purdue 2*, the District Court vacated the confirmation order. Distinguishing Second Circuit precedent, Judge McMahon held that the Bankruptcy Code did not authorize the Plan's nonconsensual third-party releases of creditors' direct (i.e., non-derivative) claims against third parties. *Id.* at 78.

Judge McMahon stated: "I also acknowledge that the invalidating of these releases will almost certainly lead to the undoing of a carefully crafted plan that would bring about many wonderful things, including especially the funding of desperately needed programs to counter opioid addiction." *Purdue 2,* 635 B.R at 115.

After the adverse judgment in *Purdue 2*, Debtors, the Sacklers, and others appealed to the United States Court of Appeals for the Second Circuit. *Purdue*, at 213.

In 2022, Debtors and the Sacklers participated in another mediation. It resulted in a settlement between the Sacklers and all nine States that previously appealed. In that settlement, "the Sacklers agreed to pay at least an additional $1.175 billion towards the settlement – payable over 18 years – bringing the nominal amount of the Sackler contribution for settlement of the estate and other claims to not less than $5.5 billion, and possibly as much as $6 billion." *Purdue-OCC,* at *15. This settlement "built up" Debtors' bankruptcy estates to approximately $7 billion, including the $5.5 to $6 billion promised settlement contribution from the Sacklers. *Purdue*, at 227 (Kavanaugh, J., dissenting). "The Sacklers' proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016. Nor did it begin to reflect the earnings the Sacklers [had] enjoyed from that sum over time. And the proposed contribution would still come in installments spread over many years." *Id.* at 213 (Gorsuch, J.).

In 2023, in *Purdue 3,* in a 2-1 divided decision, the Second Circuit decided that 11 U.S.C. § 524(e) did not prohibit the Plan's nonconsensual releases and injunction because they did not "discharge" the Sacklers. *See Purdue 3,* 69 F.4th at 70-71 ("While the Bankruptcy Code forbids a *discharge* of a non-debtor's claim under 11 U.S.C. § 524(e), the releases at issue on appeal do not constitute a discharge of debt for the Sacklers because the releases neither offer umbrella protection against liability nor extinguish all claims.") (italics in original).

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In *Purdue 3,* the panel majority also decided that 11 U.S.C. §§ 105(a) and 1123(b)(6), in tandem, authorized the Plan's nonconsensual third-party releases and injunction. *Id.* at 72-73. In a concurring opinion, United States Circuit Judge Richard C. Wesley urged Supreme Court review and concurred in the majority opinion by reason of Second Circuit precedent.

[F] 2023: Circuit Split, Stay, & Grant of Certiorari

In August 2023, on behalf of the UST, the Solicitor General obtained a stay and writ of certiorari from the Supreme Court. *See Harrington v. Purdue Pharma L.P.,* 2023 U.S. LEXIS 2872 (Aug. 10, 2023).

By then, the circuits were split on the validity of nonconsensual third-party releases. The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits had decided that the Bankruptcy Code authorizes a court to confirm a chapter 11 plan containing nonconsensual third-party releases in certain circumstances. The Fifth, Ninth, and Tenth Circuits prohibited such releases. *See Purdue*, at 214 n.1; *Purdue 3*, 69 F.4th at 74; *but see Blixseth v. Credit Suisse,* 961 F.3d. 1074, 1085 (9th Cir. 2020) (11 U.S.C. § 524(e) did not prohibit exculpation clause that covered "only liabilities arising from the bankruptcy proceedings and not the discharged debt"). In circuits that did not permit such nonconsensual releases, however, "consensual third-party releases were permissible." *In re Smallhold, Inc.,* 2024 Bankr. LEXIS 2332, at *25 n.36 (Bankr. D. Del. 2024) (*Smallhold*) (citing *In re PG&E Corp.,* 617 B.R. 671, 683 (Bankr. N.D. Cal. 2020)).

[G] December 2023: Oral Argument of *Purdue*

On December 4, 2023, the Supreme Court heard oral argument in *Purdue* (aka *Purdue 4*). By then, "all 50 states Attorneys General" had "signed on" to the Plan. *Purdue,* at 228 (Kavanaugh, J., dissenting).

At oral argument, counsel for the parties presented conflicting scenarios of what would happen if the Court invalidated the Plan.

On behalf of the UST, the deputy solicitor general argued that the Sacklers may "want global peace," but that did not mean "that they wouldn't pay a lot for 97.5 percent peace." *Purdue*, at 225 (quoting 12/4/23 Tr., p. 26).

In contrast, the OCC's counsel argued: "If there's one thing you take away from my argument today, it is this, and let me be crystal-clear: Without the release, the plan will unravel, Chapter 7 liquidation will follow, and there will be no viable path to any recovery." 12/4/23 Tr., pp. 100-101. Similarly, Purdue's counsel argued: "If the [UST] succeeds here, the billions of dollars that the [P]lan allocates for opioid abatement and compensation will evaporate. Creditors will be left with nothing, and lives literally will be lost." *Id.* at 62.
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[H] June 2024: The *Purdue* Decision

[1] Holding: On June 27, 2024, in a 5-4 divided decision, the Supreme Court reversed the Second Circuit and decided that the Plan's nonconsensual third-party releases and permanent injunction were invalid. The majority opinion, by Justice Gorsuch, held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue,* at 227.

[2] The Discharge: The Plan's nonconsensual third-party releases and permanent injunction were "essentially" a "discharge" of the Sacklers. *Id.* at 227 ("The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge."). The Plan's proponents argued that the "Sacklers seek a 'release,' not a 'discharge.'" *Id.* at 223. "But word games cannot obscure the underlying reality." *Ibid.* The Sacklers did not "seek a traditional release, for they hope to have a court extinguish claims of opioid victims without their consent." *Ibid.*

[3] The Discharge Bargain: "The bankruptcy code contains hundreds of interlocking rules about the relations between a debtor and [its] creditors. But beneath that complexity lies a simple bargain: A debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors." *Id.* at 209 (internal quotations and citations omitted). The Plan's proposed nonconsensual third-party releases did not comply with that bargain: "The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge." *Id.* at 215.

[4] Sections 524(e) and 524(g): 11 U.S.C. § 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any entity for, such debt." Citing § 524(e), the majority opinion states: "Generally, however, a discharge operates only for the benefit of the debtor against its creditors and 'does not affect the liability of any other entity.' § 524(e)." *Id.* at 221."For asbestos-related bankruptcies – and only for such bankruptcies – Congress has provided that, '[n]otwithstanding' the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, § 524(e), courts may issue 'an injunction . . . bar[ring] any action against a third party' under specified circumstances." *Id.* at 222 (citing 11 U.S.C. § 524(g)(4)(A)(ii)).

[5] Section 523(a): A discharge "does not reach claims based on 'fraud' or those alleging 'willful and malicious injury.' §§ 523(a)(2), (4), (6). And it cannot 'affect any right to trial by jury' a creditor may have with regard to a personal injury or wrongful death tort claim.' 28 U.S.C. §1411(a)." *Id.* at 221-222. The Plan's proposed discharge of the Sacklers exceeded those limits. *Id.* at 223 ("Once more, the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table.").

[6] Section 105(a): 11 U.S.C. § 105(a) provides in part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry the provisions of this title." The majority opinion states that § 105(a), standing alone, did not authorize the Plan's discharge of the Sacklers. **"**As the Second Circuit recognized, however, '§ 105(a) alone cannot justify' the imposition of nonconsensual third-party releases because it serves only to 'carry out' authorities expressly conferred elsewhere in the code." *Purdue,* at 216 n.2 (quoting *Purdue 3*, 69 F.4th at 73 (quoting 11 U.S.C. § 105(a)).

[7] Section 1123(b)(6): 11 U.S.C. § 1123(b)(6) authorizes a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." The majority opinion states that § 1123(b)(6) did not authorize the Plan's discharge of the Sacklers. Section 1123(b)(6) is a "catchall phrase" tacked on at the end of a long and detailed list of specific directions." *Purdue,* at 217. "Doubtless, paragraph (6) operates to confer additional authorities on a bankruptcy court." *Id.* at 218 (citing *United States v. Energy Resources Co.,* 495 U.S. 545, 549 (1990). "But the catchall cannot be fairly read to endow a bankruptcy court with the radically different power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." *Purdue,* at 218.

[8] Issues Expressly Not Decided: "Nothing in what we have said should be construed to call into question *consensual* third-party releases. . . . Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated." *Id.* at 226-227 (citation omitted; emphasis in original). In addition, *Purdue* did not decide other issues, including constitutional issues discussed by Justice Gorsuch during oral argument. (*See* 12/4/23 Tr., pp. 73-74.)

[I] July-Nov. 2024: Mediation Order & Preliminary Injunction Extensions

On June 27, 2024, the same day as *Purdue*, Debtors requested the Bankruptcy Court to appoint the Co-Mediators and to extend the Preliminary Injunction to 60 days from their appointment. *Massachusetts,* at *6.

The next day, Debtors argued: [1] "Despite [*Purdue*], these reorganization cases remain likely to succeed – provided that the injunction remains in place to facilitate expedited mediation." [2] "The Court need look no further than the history of these Chapter 11 cases to find strong evidence of the Debtors' prospects of success." [3] "Over the course of five years and through numerous uncertain litigation outcomes, the Debtors and their stakeholders successfully struck – in mediation – a series of complex and interlocking settlements among themselves and with the Sackler families." *Mem. of Law in Support of Motion to Extend the Preliminary Injunction to Facilitate Mediation* at 11 [Adv. No. 7:19-ap-08289, ECF No. 490].
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After a hearing on July 9, 2024, the Bankruptcy Court extended the Preliminary Injunction for 60 days and granted an order (the "Mediation Order") appointing United States Bankruptcy Judge Shelley C. Chapman (Ret.) and Eric D. Green to serve as Co-Mediators. *Massachusetts,* at *6-7; *see Order Appointing the Hon. Shelley C. Chapman (Ret.) and Eric D. Green as Co-Mediators and Establishing Terms and Conditions of Mediation* [Case No. 7:19-bk-23469, ECF No. 6537].

In extending the Preliminary Injunction, Judge Lane found that "the requesting parties had satisfied the requirements for a preliminary junction to bar litigation against the third-party Sacklers while the mediation went forward." Judge Lane found "that the breathing room provided by the requested injunction was critical to the parties' mediation efforts." Judge Lane also noted that the "history of [the] cases provided strong evidence of [Debtors'] prospects for success through a plan of reorganization that might result from the mediation." *Massachusetts,* at *7.

The Mediation Order provided in part: [1] The mediation would terminate on September 9, 2024, unless the Bankruptcy Court extended that deadline. *See* Mediation Order, at ¶ 5. [2] "All communications made by . . . a Mediation Party in connection with the Mediation . . . shall remain confidential, [and'] shall not be made available to the public," subject to exceptions. *Id.* at ¶ 11. [3] "Except as provided in paragraphs 8 and 17 hereof, the Co-Mediators shall have no communication with the Court relating to the substance of the Mediation or matters occurring during the Mediation, and the Mediators shall not disclose whether a verbal agreement was reached or [whether] a Mediation Party has refused to execute a definitive written settlement." *Id.* at ¶ 9. [4] "At any time during the Mediation, the Co-Mediators, in their sole discretion, may also file interim status reports with the Court." *Id.* at ¶ 17.

Subsequently, Debtors requested and were granted short extensions of the Preliminary Injunction. The extensions were accompanied by parallel extensions of the Mediation Order. The requested extensions met with few objections.

Among the few objectors was the State of Maryland ("Maryland"). It objected only to extensions of the Preliminary Injunction. On August 23, 2024, Debtors moved for (and were subsequently granted) an order (the "37th Order") extending the Preliminary Injunction for 18 days. On September 13, 2024, Debtors moved for (and were subsequently granted) an order (the "38th Order") extending the Preliminary Injunction for 35 days. On October 21, 2024, Debtors moved for (and were subsequently granted) an order (the "39th Order") granting a second 35-day extension of the Preliminary Injunction. Maryland appealed the 37th-39th Orders. *Maryland,* at *2-3, 10-13.

[J] Nov. 2024: Mediation Reports & "When Will Then Be Now?"

On November 12, 2024, during Maryland's appeals, the Co-Mediators filed their first mediation report. It reported in part: [1] "The Co-Mediators, consistent with the confidentiality provisions of the Mediation Order, can now report that substantial progress on multiple complex issues has occurred thus far in the Mediation." [2] Certain

"agreements in principle" had been reached. [3] "While the Co-Mediators are pleased with the progress to date, much work remains." [4] The "continuation of the injunction and the absence of the litigation has been utterly essential to the Mediation process and has enabled the progress achieved to date." *Co-Mediators' First Interim Status Report* at ¶¶ 3-4 [Case No. 7:19-bk-23649, ECF No. 6917].

On November 14, 2024, during oral argument of Maryland's appeals from the 37th-39th Orders, the District Court asked Debtors to estimate a date when they would no longer need the Preliminary Injunction. Quoting from the Mel Brooks' movie *Spaceballs* (1987), Judge McMahon asked: "When will then be now?" *Id.* at *28 ("At oral argument, I asked the parties, 'When will then be now?' in an effort to figure out when 'soon' might be arriving. No one could tell me. No one even hazarded a guess.").

On November 25, 2024, the Co-Mediators filed their second status report. It reported in part: [1] "Consistent with the requirements of mediation confidentiality, the Co-Mediators can report that additional points of agreement have been" reached among the key parties. [2] "The parties expect that the Debtors will file a plan and disclosure statement and exhibits thereto in January 2025." [3] There was now a "detailed term sheet," and "negotiations are ongoing to resolve the remaining open issues." [4] "Also consistent with the requirements of mediation confidentiality, the Co-Mediators can report that, the total amount of cash consideration being made available . . . is higher than the amount provided for in the Plan." [5] The Preliminary Injunction was "absolutely vital" to ongoing negotiations, and "far too much is at stake to run the risk, with so many parties, that we would guess incorrectly about the parties' ability to continue to work towards a fully consensual resolution while being forced to engage in dozens, if not hundreds or thousands, of separate litigations." *Co-Mediators' Second Interim Status Report* at ¶¶ 2-5 [Case No. 7:19-bk-23649, ECF No. 6960].

On November 26, 2024, in *Maryland,* the District Court affirmed the 37th-39th Orders. Judge McMahon cautioned: "As more and more extensions are sought, it becomes less and less convincing that the parties really are on the cusp of a deal, or that the public interest would be served by prolonging the stay, rather than by ramping up litigation against the (perhaps recalcitrant) Sacklers." *Id.* at *29 (footnote omitted).

At a hearing on the same day, in a bench ruling, the Bankruptcy Court granted an extension of the Preliminary Injunction. On December 2, 2024, the Bankruptcy Court granted an order (the "40th Order") extending the Preliminary Injunction through December 23, 2024. *See Massachusetts,* at *32-33; *Fortieth Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction* [Adv. No. 19-ap-8289, ECF No. 610]. In granting the extension, the Bankruptcy Court overruled evidentiary objections to the Co-Mediators' interim reports. *Massachusetts*, at *19; *see* Part XI.

After *Maryland* and *Massachusetts,* the Co-Mediators reported additional progress, and the Bankruptcy Court granted additional extensions of the Preliminary Injunction.

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[K] Feb. 2025: Co-Mediators' Fifth Interim Report

On February 21, 2025, in their fifth interim status report, the Co-Mediators reported, among other things, that: [1] "Having reached agreements in principle, the Mediation Parties are now working diligently to complete the dozens of documents needed to the file the Thirteenth Amended Plan and schedule a disclosure statement hearing." [2] Consistent with *Purdue,* "public and private claimants who choose not to provide releases to the Sacklers Covered Parties will have the opportunity to pursue litigation against the Sackler Covered Parties." [3] "[C]laimants who do not provide releases to the Sackler Covered Parties will not receive consideration directly from the Sackler Covered Parties." [4] Total cash consideration from Debtors' new plan and settlement with the Sacklers will be "up to" $7.4 billion, including $900 million from Debtors' bankruptcy estates, plus "up to" $6.5 billion from the Sacklers, payable over 15 years, plus "up to" an additional $500 million. [5] "The continuation of the [Preliminary Injunction] remains essential to the parties' efforts to complete their work so that billions of dollars can at long last flow to the Debtors' creditors, providing compensation to victims of the opioid crisis and funding to the public entities for their critical abatement efforts." *Co-Mediators' Fifth Interim Status Report* at 1, 3-5, and 8 [Case No. 7:19-bk-23649, ECF No. 7254].

[L] March 2025: Press Release & Drafts of Plan & Disclosure Statement

On March 18, 2025, on its website, Purdue announced: "Purdue Pharma L.P. ('Purdue') today filed a Chapter 11 Plan of Reorganization (the 'Plan') and related disclosure statement" in the Bankruptcy Court. 3/18/25 Press Release, *available at* https://www.purduepharma.com/news/2025/03/18/purdue-pharma-l-p-files-new-plan-of-reorganization-providing-for-more-than-7-4-billion-in-creditor-distributions/ (last visited on 4/21/25).

The 3/18/25 Press Release also stated: "Assuming full creditor participation, the Plan will deliver to creditors more than $7.4 billion of cash, subject to certain reserves, to compensate victims and abate the opioid crisis. There will also be substantial value created by the continued development and distribution of lifesaving opioid use disorder and overdose rescue medicines for no profit, as well as expected insurance and other recoveries. . . . [¶] In compliance with the Supreme Court's 2024 ruling, the Plan does not contain non-consensual third-party releases. Instead, creditors will need to opt in to the settlement to receive their full settlement payments. Alternatively, creditors can preserve their right to take legal action against the Sacklers if they do not opt in to the Sackler releases contained in the Plan. . . . [¶] The cash value of the Plan, assuming full creditor participation and net of certain reserves, is approximately $7.4 billion, including available cash from Purdue and payments by the Sacklers. The number could go higher, with up to an additional $500 million from the Sacklers if the international pharmaceutical businesses they will be required to sell yield proceeds above a certain value. Additional value is also expected from insurance and litigation recoveries that the bankruptcy estate will pursue. [¶] . . . . Assuming full creditor participation, the Sacklers will contribute approximately $6.5 billion in installments over the next 15 years, subject

to reserves. They will pay $1.5 billion on the day the Plan becomes effective.[¶] . . . .[¶] . . . . Notably, the Plan is the only opioid settlement to date that meaningfully compensates individual victims. Assuming full participation, individual victims will receive more than $850 million, subject to certain reserves." *Ibid.*

On the same day, Debtors filed a proposed thirteenth amended plan. The cover page stated in capital letters: "This draft of the plan remains subject to continuing negotiations with all parties in interest and the final version may contain material differences." Section 10.6(b) of the draft plan stated in part: "For the avoidance of doubt and notwithstanding anything to the contrary in this Plan or the Confirmation Order, the releases set forth in this Section 10.6(b) shall not apply to (i) Holders of Claims who do not opt-in to the releases through their applicable ballots . . . ." *Thirteenth Amended Joint Plan* at 143, Sec. 10.6(b) [Case No. 7:19-bk-23469, ECF No. 7306] (underlining deleted).

The next day, Debtors filed a proposed amended disclosure statement. The cover page stated in capital letters: "This draft of the disclosure statement remains subject to continuing negotiations with all parties in interest and the final version may contain material differences." In the table of contents, under the heading "Appendices and Schedules," the draft stated: "[To come.]" Under the heading "Terms of Settlement of Claims Against the Sackler Families," the draft stated: "[To come.]" *Disclosure Statement for Thirteenth Am. Joint Chapter 11 Plan of Reorg. of Purdue Pharma L.P. and Its Affiliated Debtors* at pp. vi, 124 [Case No. 7:19-bk-23469, ECF No. 7307].

[M] April 2025: Cumulative Chapter 11 Fees of $962 Million

On April 21, 2025, Purdue reported cumulative payments of $962,784,081 in "Retained Restructuring Professional Fees" through March 31, 2025. *Corp. Monthly Operating Report* at 23 [Case No. 7:19-bk-23649, ECF No. 7388]. The Preliminary Injunction remains in effect. Debtors are expected to finalize soon the draft plan and disclosure statement that were filed on March 18, 2025.

[IV] CONSENSUAL RELEASES OF CREDITORS' 3RD-PARTY CLAIMS

[A] Consensual Releases in General

The majority opinion in *Purdue* does not question the validity of consensual releases of third-party claims. *See id.* at 226 ("Nothing in what we have said today should be construed to call into question *consensual* third-party releases in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, *e.g., In re Specialty Equipment Cos.,* 3 F.3d 1043, 1047 (CA 7 1993).") (emphasis in original).

Purdue does not decide what constitutes a valid consent and does not decide whether a creditor's mere passive failure to opt out from a plan's third-party release qualifies as a valid consent. *See Purdue,* at 226 ("Nor do we have occasion today to express a view on what qualifies as a consensual release . . . .").

Purdue cites (but does not quote from or discuss) page 1047 of *Specialty Equip. Cos.,* 3 F.3d 1043 (7th Cir. 1993). *See Purdue,* at 226. In *Specialty Equipment*, the Seventh Circuit stated: "But section 524(e) provides only that a discharge does not affect the liability of third parties. . . . Accordingly, courts have found releases that are *consensual* and *non-coercive* to be in accord with the strictures of the Bankruptcy Code. [Citations omitted.] Unlike the injunction created by the discharge of a debt, a consensual release does not inevitably bind individual creditors. It binds only those creditors *voting in favor of the plan*." *Id.* at 1047 (emphases added).

In a different context (and with a different membership), the Supreme Court decided that consent to adjudication by a bankruptcy court may be express or implied but must be voluntary and knowing. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015) (*Wellness*) ("We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.").

In *Wellness,* the Supreme Court found implied consent where the party was both aware of the need to consent and voluntarily appeared: "*Roell* makes clear that the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, *and still voluntarily appeared* to try the case before the non-Article III adjudicator." *Wellness,* at 685 (quoting *Roell v. Withrow,* 538 U.S. 580, 590 (2013) (*Roell*) (emphasis added; litigant's conduct showed implied consent to adjudication by Article I judge)); *see also Washington v. Kijakazi,* 72 F.4th 1029, 1036 (9th Cir. 2023); *see id.* at 1040 ("And, as the Supreme Court observed, 'as long as parties are notified of the availability of a district judge as required by [28 U.S.C.] § 636(c)(2) and [Fed.R.Civ.P.] Rule 73(b), a litigant's general appearance before the magistrate judge will usually indicate the necessary consent.'") (quoting *Roell*, 538 U.S. at 591 n.7).

[B] Consensual Releases: The *Firefighters* Rule

"Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Local Number 93, International Assoc. of Firefighters, etc. v. Cleveland*, 478 U.S. 501, 529 (1986) (*Firefighters*).

On June 21, 2024, six days before *Purdue,* the Supreme Court applied the *Firefighters* rule in a water rights dispute in *Texas v. New Mexico*, 602 U.S. 943, 948 (2024) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party.") (brackets in original; quoting *Firefighters,* at 529).

On June 27, 2024, in *Purdue,* the Supreme Court stated: "Nor is what the Sacklers seek a traditional release, for they hope to have a court extinguish claims of opioid victims without their consent." *Id.* at 223 (citing, *inter alia*, *Firefighters,* at 529).
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[C] Consensual Releases: Opt-In vs. Opt-Out

Before and after *Purdue*, courts disagree on whether opt-out third-party releases are valid consensual releases.

"An opt-out provides that the third-party release will be effective as to each party who is sent a ballot or opt-out form that clearly explains that the ballot or opt-out form must be returned and the opt-out box checked if the party elects not to approve the third-party release. [Citation omitted.] An opt-in provides that no party (even a party voting in favor of the proposed plan) would be deemed to have granted a third-party release unless that party elected to submit a form that opted into a release, with that election being separate from that party's vote with respect to the plan. [Citation omitted.]" *In re Spirit Airlines, Inc.*, 2025 Bankr. LEXIS 553, at *27 (Bankr. S.D.N.Y., March 7, 2025) (*Spirit Airlines*) (official citation unavailable as of 4/23/25).

Pre-*Purdue,* courts were divided on whether a creditor's failure to opt-out from a release was a valid consent. *See In re Astria Health,* 623 B.R. 793, 803 (Bankr. E.D. Wash. 2021) (Holt, J.) ("[C]ourts are split about whether creditors must affirmatively 'opt in' to such releases or whether it is sufficient to give creditors a chance to 'opt out.'"); *see also In re Arsenal Intermediate Holdings, LLC,* 2023 Bankr. LEXIS 752, at *2 (Bankr. D. Del. 2023) (*Arsenal*) (Goldblatt, J.) ('This Court concludes that in the typical case, so long as the disclosure is prominent and conspicuous, and impaired creditors are given the ability to opt out simply by marking their ballot or by some other comparable device, it is appropriate to infer consent from a creditor's failure to opt out."); *Patterson v. Mahwah Bergen Retail Grp., Inc.,* 636 B.R. 641, 687 (E.D. Va. 2022) (*Patterson*) ("Third-party releases in bankruptcy actions [sic] based only on a failure to opt out also raise serious due process concerns, because they lack the critical due process protections of Rule 23 [of the Federal Rules of Civil Procedure].").

Pre-*Purdue,* interpreting *Wellness* and *Roell*, *Patterson* ruled: "Applying this standard here, it becomes clear that the Bankruptcy Court erred as a matter of law in finding that failure to return the opt-out form could constitute consent to Article I adjudication. . . . [¶] *Wellness* and *Roell* make clear that courts can discern the implication of consent to a non-Article III court based on a party's *actions.* However, they do not permit a finding of consent based on *inaction*." *Patterson,* 636 B.R. at 674 (emphases in original).

Patterson reasoned: "The Bankruptcy Court relied on the fact that the Releasing Parties received notice and an opportunity to opt out of the Third-Party Releases as a basis for consent. But the Bankruptcy Court made this determination in the context of whether the Releasing Parties consented to the Third-Party Releases, not the threshold question of whether they consented to having the Bankruptcy Court adjudicate the released claims. This will not support a finding of consent to Article I adjudication for all the Releasing Parties." *Id.* at 674 (citation and footnote omitted).
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Patterson rejected an argument that opt-out releases are valid consent because such releases are permitted in class actions under Fed.R.Civ.P. 23: "True, as noted by Debtors, courts (notably, Article III judges) may bind absent class members to a judgment so long as they provide them notice of the action and the opportunity to either opt out or participate. *Phillips Petroleum Co. v. Shutts,* [472 U.S. 797 (1985).] But to do so, courts must ensure that the class action complies with the unique requirements of Rule 23 of the Federal Rules of Civil Procedure." *Patterson,* at 686.

Post-*Purdue,* in *Spirit Airlines*, Judge Lane stated: "Since *Purdue Pharma*, the majority of courts outside this jurisdiction have permitted an opt-out mechanism for a consensual release given in circumstances similar to those presented here." *Id.* at *45. Judge Lane stated that "the courts are not in universal agreement." *Id.* at 45 n.26; *compare Smallhold*, 2024 Bankr. LEXIS 2332, at *35 ("While the undersigned had previously been comfortable, for the reasons described in *Arsenal*, concluding that creditors that failed to opt out may be deemed to consent to a plan's third-party release, the Court no longer believes it is appropriate to do so.") (overruling *Arsenal*)), *with In re Robertshaw US Holding Corp.,* 662 B.R. 300, 2024 Bankr. LEXIS 1958, at *52 (Bankr. S.D. Tex., Aug. 16, 2024) (*Robertshaw*) ("There is nothing improper with an opt-out feature for consensual third-party releases.") (Lopez, J.).

In *Spirit Airlines*, Judge Lane concluded that opt-out third-party releases are permissible under certain circumstances. *See id.* at *28 ("Decisions in this District generally permit use of an opt-out mechanism if the affected parties receive clear and prominent notice and [an] explanation of the releases and are provided an opportunity to decline to grant them. In assessing the permissibility of an opt-out, courts also look to the circumstances of each case to determine whether consent exists.").

Spirit Airlines includes a non-exhaustive list of circumstances assessed by bankruptcy judges in the Southern District of New York in determining the propriety of an opt-out procedure: [1] the clarity and prominence of the language of the third-party release; [2] the circumstances of the releasing parties, including "whether they have any economic disincentive" to follow the bankruptcy case; [3] the procedural history of the case and whether the requested release has been "clearly and consistently presented" to the affected creditors; and [4] "general principles of contract law." *Id.* at *31.

Spirit Airlines acknowledges "that this Court recognizes that not every judge will necessarily reach the same conclusion as to what constitutes consent under given set of facts." *Id.* at 45 n.26 (citing, *inter alia*, *Patterson*, 636 B.R. at 684-88). In *Patterson*, discussed above, Judge Novak relied in part on the statement in *Wellness* that "the key inquiry is 'whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator." *Wellness*, 575 U.S. at 685 (quoting *Roell*, 538 U.S. at 590); *see Patterson,* at 673-674. The "still voluntarily appeared" phrase in *Wellness* and *Roell* (and *Patterson*) does not appear in the extensive and thoughtful opinion in *Spirit Airlines.*
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In *Smallhold*, decided post-*Purdue* and pre-*Spirit Airlines,* Judge Goldblatt ruled: "The rationale of *Arsenal* was that creditors that did not object to or opt out of a third-party release could essentially be 'defaulted,' with the release being imposed on them, despite their silence, on that basis. After *Purdue Pharma,* that relief is no longer appropriate under the ordinary principles that govern when a default may be entered. While a number of courts have reached a contrary conclusion even after [*Purdue*], this Court does not find their reasoning persuasive." *Smallhold,* at *23; *but see Spirit Airlines*, at *53 (criticizing "default theory" in *Smallhold*).

Discussing *Robertshaw,* Judge Goldblatt in *Smallhold* stated: "The decision in that case emphasized that under Rule 23, opt outs are permissible in class action cases involving claims for damages. . . . While that is true, the critical difference is that in the class action context, a class is only certified after a court makes a factual finding that the named representative is an appropriate representative of the unnamed class members. In the plan context, there is no named plaintiff, found by the court to be an adequate representative, whose actions may presumptively bind others." *Smallhold*, at *36 n.53.

In *Smallhold,* Judge Goldblatt decided: "As to those creditors in class 2 who voted *in favor* of the plan and elected not to opt out, the Court is satisfied that the plan releases are valid and appropriate as a matter of ordinary contract law. Creditors who returned their ballots and voted in favor of the plan after being informed that doing so, unless they checked the box to opt out, have not been silent. They have taken an affirmative step. And under ordinary contract principles, what they have done is sufficient to hold them to the terms of the release." *Id.* at *40.

Judge Goldblatt decided that creditors who voted against the plan but did not check the opt-out box had consented to the proposed third-party releases. Disagreeing with *In re Chassix Holdings,* 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015), Judge Goldblatt stated: "A vote against the plan serves as evidence that the creditor was on notice and actively engaged, and thus has taken an affirmative step such that consent can be established to bind the party to the terms of the release." *Smallhold,* at *42. *See also Patterson,* 636 B.R. at 674 ("Here, the Court cannot discern any actions undertaken by the Releasing Parties to support a finding that they knowingly and voluntarily consented to Article I adjudication of the claims that they released.").

[D] Rules 2002(c)(3), 3016(c), & 3017(f)

Spirit Airlines discusses the importance of the "clarity and prominence of the language used" in a proposed third-party release. *See id.* 2025 Bankr. LEXIS 553, at *31. Rules 2002 and 3016 of the Federal Rules of Bankruptcy Procedure require conspicuous notice of a proposed plan provision that enjoins conduct not otherwise enjoined by the Code.

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Fed.R.Bankr.P. 2002(c)(3) states: "If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall: [¶] (A) include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction; [¶] (B) describe briefly the nature of the injunction; and [¶] (C) identify the entities that would be subject to the injunction."

Fed.R.Bankr.P. 3016(c) similarly states: "If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction."

In addition, Fed.R.Bankr.P. 3017(f) extends the notice requirements of Fed.R.Bankr.P. 3017(d) to an entity that is neither a creditor nor an equity security holder but is the subject of a proposed plan injunction against conduct not otherwise enjoined by the Code. *See, e.g., Houser (Ret.) v. J.F.H. (In re BSA),* 2025 U.S. Dist. LEXIS 54446, at *13 (D. Del., March 24, 2025); *see id.* at *21 ("The Court agrees that the Trustee failed to carry the burden of showing that Appellee was given notice of the Insurance Entity Injunction or confirmation hearing as required by the Bankruptcy Rules.").

[V] RELEASES OF CREDITORS' 3RD-PARTY DERIVATIVE CLAIMS

Purdue does not prohibit courts from confirming chapter 11 plans that release the derivative claims of creditors without their consent. *See Purdue,* at 219 ("And no one questions that Purdue may address in its own bankruptcy plan claims 'wherever located and by whomever held,' §541(a) – including those claims derivatively asserted by another on its behalf, see §1123(b)(3).").

In *Purdue*, the Plan's nonconsensual third-party releases were invalid because they released claims that did not belong to Purdue. *See id.* at 219 ("Rather than seek to resolve claims that *substantively belong* to Purdue, it seeks to extinguish claims against the Sacklers that belong to their victims. And precisely nothing in §1123(b) suggests that those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property." *Id.* at 219 (emphasis added; footnote omitted).

In *Purdue*, it was undisputed that creditors' fraudulent conveyance claims against the Sacklers were derivative claims that belonged to Purdue's estate. During oral argument of *Purdue*, the Deputy Solicitor General, on behalf of the UST, stated: "The difference between a derivative claim and a direct claim is whether it's a claim that is being recovered on behalf of all of the – on behalf of the corporation as a whole. And so that's why the fraudulent conveyance claims, if anyone brought an individual fraudulent conveyance action against the Sacklers here, those all become property of the estate because the benefit of bringing that asset back into the estate goes to the entire corporation. So Purdue takes over those claims. [¶] Purdue doesn't take over personal injury claims. Those are not brought on behalf of the corporation. If somebody gets a money judgment or some sort of relief for their individual claim, that's not something that accrues to every other creditor for the corporation." (12/4/23 Tr., p. 120.)

"Derivative claims are property of the bankruptcy estate." *In re Genger,* 2024 Bankr. LEXIS 2460, at *69 (Bankr. S.D.N.Y. 2024) (*Genger*) (citing *Tronox Inc. v. Kerr-McGee Corp. (In re Tronox Inc.),* 855 F.3d 84, 99 (2d Cir. 2017)). Applying Second Circuit precedent, a New York bankruptcy court recently stated: "The reason is that derivative and duplicative claims are based on injuries to the debtor that affected all creditors collectively, rather than particularized injuries to specific creditors." *Genger,* at *69 (citing *Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC),* 740 F.3d 81, 89 (2d Cir. 2014)); *see Genger,* at *79 ("Both *Madoff* and *Tronox* emphasize that the crux of determining whether a claim is direct or derivative lies in the nature of the injury and who suffered it.").

Purdue does not address whether creditors' alter ego or successor liability claims are direct claims (belonging to creditors) or derivative or general claims (vested in the bankruptcy estate). *Compare Stadtmauer v. Tulis (In re Nordlicht),* 115 F.4th 90, 105, 109-110 (2d Cir. 2024) (creditors' alter ego claim was a general claim that was property of debtor's bankruptcy estate) *with Ahcom, Ltd. v. Smeding,* 623 F.3d 1248, 1249 (9th Cir. 2010) (rejecting argument that creditors' alter ego claim belonged to debtor's bankruptcy estate); *Int'l Petro. Prods. & Additives Co. v. Black Gold S.A.R.L.,* 115 F.4th 1202, 1215 (9th Cir. 2024) ("We have already answered the question as to who owns an alter ego claim under California law in *Ahcom* – a case that, on the facts, is a near spitten image of this one."); *see also Emoral, Inc. v. Diacetyl (In re Emoral, Inc.)*, 740 F.3d 875, 882 (3d Cir. 2014) (creditors' cause of action for successor liability against third party was property of debtor's bankruptcy estate); *Whittaker, Clark & Daniels, Inc. v. Brenn AG (In re Whittaker, Clark, & Daniels),* 2024 Bankr. LEXIS 1913, at *38, 663 B.R. 1 (Bankr. D.N.J. 2024) ("Accordingly, the Debtors in the instant case have standing to assert the Successor Liability Claims and creditors are precluded from pursuing them until they have been abandoned or upon further order of the court."); *Whittaker, Clark & Daniels, Inc. v. Brenntag (In re Whittaker, Clark & Daniels, Inc.),* 2024 Bankr. LEXIS 2608, at *14 (Bankr. D. N.J. 2024) (*Whittaker*) ("For the reasons expressed in this Court's Summary Judgment Opinion (ECF No. 268), Successor Liability Claims are property of the bankruptcy estate and, thus, subject to the automatic stay."); *see also Smallhold,* 2024 Bank. LEXIS 2332, at *9 (*Purdue* "does not . . . prevent a debtor in appropriate circumstances from releasing estate causes of action, which under Third Circuit law would eliminate veil-piercing liability.") (footnote omitted).

[VI] FULL SATISFACTION PLANS

Purdue expressly refrains from deciding whether the Code authorizes nonconsensual releases of third-party claims when the chapter 11 plan provides for full satisfaction of the creditors' released claims. *Id.* at 216 ("Nor do we have occasion today to . . . pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.").

There is a difference between plans that (1) temporarily stay creditors' claims pending their receipt of full payment and (2) permanently extinguish creditors' claims based on an estimate that creditors will eventually be paid in full on their claims.

A temporary stay does not discharge creditors' claims. *See In re Hal Luftig Co.,* 2025 Bankr. LEXIS 399, at *39-54 (Bankr. S.D.N.Y., Feb. 24, 2025) (*Hal Luftig*) (official citation not available as of 4/23/25) (in Subchapter V case, bankruptcy court granted post-confirmation 5-year extension of stay of collection from third-party); *see id.* at *41 ("The Court concludes that, under the facts and circumstances of this case as described herein, the non-debtor stay extension should not be for a limited duration and may extend for the life of the plan, consistent with Bankruptcy Code § 362(c)(2).")

Full satisfaction plans are controversial. In an editorial, Professor Melissa Jacoby wrote: "The Boy Scouts of America predicted full compensation for survivors of child sex abuse when it sought approval of its Chapter 11 plan. Yet it was later made clear that survivors almost certainly will not recover at that level. To ensure the trust does not run out of money and shortchange later claimants, initial payouts to Boy Scouts survivors are set at just 1.5 percent of claim values; claimants should collect more later, but no one can say how much more or when." Melissa B. Jacoby, "The Moral Limits of Bankruptcy Law," New York Times, June 4, 2024.

Recently, in *In re Red River Talc LLC,* 2025 Bankr. LEXIS 863 (Bankr. S.D. Tex., March 31, 2025), the bankruptcy court rejected the debtor's contention that its plan was a "full satisfaction" plan: "The Supreme Court [in *Purdue*] provided no guidance on the 'full satisfaction of claims' language. This Court does not read *Purdue* as implicitly endorsing the third-party releases in this case because this is not a 'full pay' case. While it is material that Red River based its analysis on prior estimated payouts for settlements that J&J has made with claimants, there has been a verdict against J&J exceeding the proposed payout under the Plan. There is also a difference between a claim for liquidated damages under a contract, where the damages may be calculated from the contract alone, and estimated damages based on previous settlements." *Red River,* at *77-78.

[VII] NONCONSENSUAL 3RD-PARTY RELEASES - CHAPTERS 7, 9, 11-13, & 15

Purdue's holding is limited to nonconsensual third-party releases that are contained in chapter 11 plans. *Purdue's* reasoning, however, relies in part on 11 U.S.C. § 524(e). *See Purdue,* at 221 ("Generally, however, a discharge operates only for the benefit of the debtor against its creditors and 'does not affect the liability of any other entity.' § 524(e)."). Section 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt."

To the extent that *Purdue* relies on § 524(e), *Purdue*'s reasoning (in addition to its narrow holding) does not appear to extend to the Bankruptcy Code chapters that are excepted from § 524(e). The chapters excepted from § 524(e) are chapters 9 and 15; in addition, § 524(g) contains an exception to § 524(e) for asbestos cases.
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[A] Chapter 7

Section 524(e) applies in chapter 7 cases. 11 U.S.C. § 103(a).

In a recent chapter 7 case, a New York bankruptcy court decided that the Bankruptcy Code did not authorize a chapter 7 trustee's settlement releasing creditors' claims against third parties. The bankruptcy court stated that *Purdue* permitted such relief only in the context of asbestos-related bankruptcy cases. *Genger,* 2024 Bankr. LEXIS 2460, at *68-69 n.32. Further, "even prior to the Supreme Court's ruling, nonconsensual nondebtor releases were permitted in some circumstances as necessary for a plan of reorganization, but the statutory basis for this authority could not have extended to a settlement agreement in a case under chapter 7 of the Bankruptcy Code." *Id.* at *69 n.32.

[B] Chapter 9

Section 524(e) does not apply in chapter 9 (municipal reorganization) cases. *See* 11 U.S.C. § 901(a); *see In re City of San Bernardino,* 566 B.R. 46, 57 (Bankr. C.D. Cal. 2017) ("Section 524(e), however, is inapplicable in chapter 9 cases, and thus the holdings of *American Hardwoods, Inc.* [*v. Deutsche Credit Corp. (In re American Hardwoods, Inc.,* 885 F.2d 621 (9th Cir. 1989)] and its progeny do not control the outcome here.").

[C] Chapter 11

Purdue expressly applies in chapter 11 cases. Subchapter V is part of chapter 11, and § 524(e) applies in chapter 11 cases. *See* 11 U.S.C. § 103(a); *see, e.g., Smallhold, Inc.,* 2024 Bankr. LEXIS 2332, at *4-5 (applying *Purdue* in Subchapter V case).

Purdue does not question the validity of nonconsensual third-party releases in asbestos-related chapter 11 cases; such releases are authorized by 11 U.S.C. § 524(g). *See Purdue*, at 222 ("For asbestos-related bankruptcies – and only for such bankruptcies – Congress has provided that, '[n]otwithstanding' the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, §524(e), courts may issue 'an injunction . . . bar[ring] any action directed against a third party' under certain statutorily specified circumstances. §524(g)(4)(A)(ii). That the code *does* authorize courts to enjoin claims against third parties without their consents, but does so in only *one* context, makes it all the more unlikely that §1123(b)(6) is best read to afford courts that same authority in *every* context.") (italics in original).

The asbestos exception in § 524(g) specifies the types of creditors' claims against third parties that may be enjoined. *See In re Quigley Co.,* 676 F.3d 45, 59 (2d Cir. 2012) (discussing "by reason of" in 11 U.S.C. § 524(g)(4)(A)(ii)); *see also In re Red River Talc,* 2025 Bankr. LEXIS 863, at *82 (Bankr. S.D. Tex., March 31, 2025) ("For actions against nondebtor third parties to be channeled, a debtor must demonstrate that those actions properly fall within § 524(g)(4)(A)(ii)'s scope."); *see id.* at *83.
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[D] Chapters 12 & 13

Section 524(e) applies in chapter 12 and chapter 13 cases. *See* 11 U.S.C. § 103(a).

[E] Chapter 15

Section 524(e) does not apply in chapter 15 cases. *See* 11 U.S.C. § 103(a). Post-*Purdue*, "the international insolvency community has debated whether, under chapter 15, a bankruptcy court nonetheless may enter an order enforcing a *foreign plan* containing" non-consensual third-party releases. *In re Credito Real, S.A.B. de C.V., SOFOM, E.N.R.,* 2025 Bankr. LEXIS 751, at *2 (Bankr. D. Del., April 1, 2025) (*Credito Real*) (footnote omitted; emphasis in original). In *Credito Real*, the bankruptcy court decided such an order was permissible and granted enforcement of a Mexican plan containing such releases. The court stated: "Accordingly, chapter 15 authorizes this Court to enforce nonconsensual third-party releases ordered by foreign courts." *Id.* at *39. The court found: "The Mexican Prepack was fair, and the Concurso Plan and the Concurso Order are not manifestly contrary to public policy." *Ibid.*

Section 1506 of the Bankruptcy Code provides: "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." *Credito Real* determined that non-consensual third-party releases were not "manifestly contrary" to public policy. *Id.* at *37; *see also In re Engenharia,* 2025 Bankr. LEXIS 990, at *15 (Bankr. S.D.N.Y. April 21, 2025) (public policy exception of § 1506 is "narrowly construed."); *Samba v. Int'l Petro. Prods. & Additives Co. (In re Black Gold S.A.R.L.),* 635 B.R. 517, 531 (B.A.P. 9th Cir. 2022) (agreeing that "a party's misconduct or 'bad faith,' standing alone, is not a proper place for invoking the exception in § 1506 to deny recognition") (citations and footnote omitted); *see also In re Kiener Maschinenbau GmbH,* 664 B.R. 863, 875 (Bankr. N.D. Ga. 2024) ("The interplay of [§§] 1506, 1520, and 1521 gives courts broad latitude to mold relief to meet specific circumstances.") (quotations and citation omitted); *see id.* at 875 ("The Court can fashion stay relief to minimize the legitimate risks to the German insolvency estates while not sanctioning the use of the Bankruptcy Code to protect an insurance carrier.").

Section 1507(b)(4) of the Bankruptcy Code requires a court to consider whether the assistance requested by a foreign representative will reasonably assure "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by" the Code. Section 1521(a)(7), a catchall, authorizes a court, upon recognition of a foreign proceeding, "where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors," to "grant any appropriate relief, including . . . any additional relief that may be available to a trustee," except for specified exceptions. In *Credito Real,* the bankruptcy court decided that sections 1507 and 1521 provided "a broad grant of discretion to aid foreign courts in accordance with principles of comity. Nothing in the plain language of these statutes or the legislative history or canons of construction indicates that Congress intended to diverge from this policy of comity to prohibit enforcing releases entered by foreign courts." *Id.* at *39.

For examples of pre-*Purdue* chapter 15 cases, *see, e.g., Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031, 1065 (5th Cir. 2012) (affirming court's denial of assistance to foreign reorganization with non-consensual third-party releases); *In re PT Bakrie Telecom Tbk,* 628 B.R. 859, 881 (S.D.N.Y. 2021) ("Courts in the Second Circuit have permitted a third-party release in Chapter 15 cases after analyzing the circumstances for the grant of such relief in the foreign proceeding."); and *In re Avanti Communs. Grp., PLC,* 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018) (enforcing nonconsensual third-party releases granted in UK proceedings where "creditors had a full and fair opportunity to be heard in a manner consistent with US due process standards.").

[VIII] BAR ORDERS & SECTION 502(e) INDEMNITY CLAIMS

[A] Bar Orders

Non-bankruptcy law authorizes courts to grant orders barring joint tortfeasors from asserting claims for indemnity and contribution against a settling joint tortfeasor. *See, e.g., In re Heritage Bond Litig. v. U.S. Trust Corp.,* 546 F.3d 667, 676 (9th Cir. 2008) (*Heritage Bond*) ("We have already acknowledged the authority of a district court under federal common law to issue bar orders barring future claims for contribution and indemnity as part of its approval of a proposed class action securities case, once it has found that the settlement satisfies the requirements of Rule 23."); *see also* 15 U.S.C. § 78u-4(f)(7)(A); Cal. Code Civ. Proc. § 877.6.

In the Ninth Circuit, nonconsensual bar orders in favor of a settling joint tort-feasor are generally limited to extinguishing the non-settling tortfeasors' claims for indemnity and contribution (and disguised claims for such relief), not independent claims. *Heritage Bond*, 546 F.3d at 679 ("Similarly, interpreting the PLSRA to bar disguised claims for contribution and indemnity prevents non-settling defendants from engaging in an end-run around a settlement agreement and an accompanying contribution and indemnity bar, while allowing them to pursue genuinely independent claims."); *id.* at 680 ("By barring future claims for contribution and indemnity arising out a partial settlement, section 877.6 [of the Code of Civil Procedure] seeks to encourage settlement and prevent settling and non-settling parties from bearing more than their proportionate share of liability."); *see also Papas v. Buchwald Capital Advisors, LLC (In re Greektown Holdings, LLC),* 728 F.3d 567, 579 (6th Cir. 2013) ("[W]hen the bar order is limited to claims for contribution or indemnity, the court can compensate the non-settling defendants for the loss of those claims by reducing any future judgment against them.").

In *United States SEC v. Peterson*, 129 F.4th 599 (9th Cir. 2025) (*Peterson*), the Ninth Circuit recently affirmed a bar order in an SEC receivership proceeding. Relying in part on Fifth Circuit precedent, *Peterson* upheld a bar order where: (1) the non-consenting third-party's claim "substantially overlapped" with the receiver's claim against the settling party and (2) the bar order "was necessary to protect the receivership assets." *Peterson*, 129 F.4th at 608, 610 (citing, *inter alia*, *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019)).

Peterson does not cite the Ninth Circuit's opinion in *Heritage Bank*. In addition, *Peterson* distinguishes *Purdue* as a case involving the Bankruptcy Code, although *Purdue* also applied the *Firefighters* rule that two parties cannot bargain away the rights of a non-consenting third-party. *See Peterson,* at 614 n.18. On May 7, 2025, the Ninth Circuit denied a petition for rehearing in *Peterson*.

[B] Section 502(e)

Purdue does not decide whether the Sacklers' indemnification claims against Purdue under a pre-petition indemnity agreement were valid or would deplete Purdue's bankruptcy estate. Citing 11 U.S.C. §§ 502(e)(1)(B) and 510(c)(1), the majority opinion in *Purdue* describes the Deputy Solicitor General's argument that "bankruptcy courts have a variety of statutory tools at their disposal to disallow or equitably subordinate any potential indemnification claims the Sacklers might pursue." *Id.* at 225 n.7. In dissent, Justice Kavanaugh states that, by reason of the pre-petition indemnification agreement with the Sacklers, "Purdue could potentially be on the hook for a substantial amount of the Sacklers' liability and litigation costs." *Id.* at 248; *see id.* at 253.

Section 502(e)(1)(B) of the Bankruptcy Code disallows a "contingent" claim for "reimbursement" or "contribution" to the extent such claim is "contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution."

"Pursuant to 11 U.S.C. § 502(e)(1)(B), the bankruptcy court must disallow any contingent claim for reimbursement where the claiming entity is co-liable with the debtor. Section 502(e)(1)(B) thus protects debtors from multiple liability on contingent debts, and prevents the estate from being burdened by estimated claims contingent in nature." *Excluded Lenders v. Serta Simmons Bedding, L.L.C. (In re Serta Simmons Bedding, L.L.C.)*, 125 F.4th 555, 589 (5th Cir. 2024) (internal citations and quotations omitted); *see id.* at 589-591 (post-petition settlement indemnity in plan was an impermissible end-run around 11 U.S.C. § 502(e)(1)(B)).

In addition, § 502(e)(2) of the Code allows a claim for reimbursement or contribution "that becomes fixed after the commencement of the case . . . the same as if such claim had become fixed before the filing of the petition." 11 U.S.C. § 502(e)(2); *see, e.g., In re Mylife.com, Inc.,* 2023 Bankr. LEXIS 2264, at *12-13 (Bankr. C.D. Cal. 2023) ("Because the Debtor's liability to Tinsley under the Indemnification Agreement, if any, most likely arose prior to the Petition Date, such liability most likely constitutes a general unsecured claim.").

[IX] EXCULPATION CLAUSES

Purdue does not address the validity of exculpation clauses. In *Purdue*, the dissent defines exculpation clauses as follows: "Exculpation clauses shield the estate's fiduciaries and other professionals (non-debtors) from liability for their work on the reorganization plan." *Id.* at 264 (Kavanaugh, J., dissenting).
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During oral argument of *Purdue*, Justice Sotomayor asked a question about exculpation clauses. The Deputy Solicitor General responded: "And so I – I take the point in the amicus briefs that third-party releases come in lots of flavors. As we've already made clear today, that we do think that consensual ones we think [sic] are okay, even though nonconsensual ones are not. [¶] And we think that derivative claims are okay, direct claims are not, because the derivative claims are property of the estate. . . . [¶] . . . . There's also a common law immunity doctrine floating around in the context of exculpation clauses." (12/4/23 Tr., pp. 38-39.)

Post-*Purdue*, the Supreme Court denied a certiorari petition challenging the Fifth Circuit's partial invalidation of an exculpation clause. *See Nextpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.),* 48 F.4th 419 (5th Cir. 2022) (*Highland Capital 1*), *cert. denied,* 2024 U.S. LEXIS 2913 (U.S., July 2, 2024). In *Highland Capital 1*, the Fifth Circuit disagreed with *Blixseth v. Credit Suisse,* 961 F.3d 1074 (9th Cir. 2019) (*Blixseth*), *cert. denied,* 141 S. Ct. 1394 (2021).

In *Blixseth,* decided pre-*Purdue,* the Ninth Circuit decided that an exculpation clause in a chapter 11 plan was valid "because the Clause covers only liabilities arising from the bankruptcy proceedings and not the discharged debt." *Id.* at 1085. The clause was valid because it: (1) did not exculpate pre-petition claims, only claims that arose during the bankruptcy proceedings; (2) did not release claims for willful misconduct or gross negligence; and (3) only exculpated parties closely involved in drafting the chapter 11 plan. *Id.* at 1081-1082; *see id.* at 1082 ("We conclude, however, that § 524(e) does not bar a narrow exculpation clause of the kind here at issue – that is, one focused on actions of various participants in the Plan approval process and relating only to that process."); *see also In re Astria Health*, 623 B.R. 793, 798 (Bankr. E.D. Wash. 2021) ("Nothing in the Bankruptcy Code forbids (or otherwise addresses) inclusion of an exculpation provision in a chapter 11 plan. As such, section 1123(b)(6) permits the inclusion of an appropriately tailored exculpation provision. Indeed, in [*Blixseth*], the Ninth Circuit Court of Appeals recently affirmed confirmation of a plan with an exculpation clause similar to the one at issue here.") (footnote omitted).

In *Highland Capital 1*, the Fifth Circuit stated: "Our court along with the Tenth Circuit hold [that] § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations." *Highland Capital 1*, 48 F.4th at 436 (citations omitted); *but see In re Rocking M Media, LLC,* 2024 Bankr. LEXIS 1786, at *5 (Bankr. D. Kansas 2024) (*Rocking M*) (mentioning lack of Tenth Circuit precedent on exculpation). *Highland Capital 1* decided: "In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees with the scope of their duties [citation omitted]." *Id.,* 48 F.4th at 437. The debtor's independent directors were entitled to "limited qualified immunity for any actions short of gross negligence" because they were appointed "to act together as the bankruptcy trustee for Highland Capital." *Id.* at 438.

After *Highland Capital 1,* in *Highland Cap. Mgmt. Fund Advisors, L.P. v. Highland Cap. Mgmt. (In re Highland Cap. Mgmt., L.P.),* 2025 U.S. App. LEXIS 6320, 132 F.4th 353 (5th Cir., March 18, 2025) (*Highland Capital 2*), the Fifth Circuit stated that the scope of the exculpation clause should be limited to: "(i) the Debtor; (ii) the Independent Directors, for conduct within the scope of their duties; (iii) the Committee; and (iv) the members of the Committee in their official capacities, for conduct within the scope of their duties." *Id.* at *14.

In *Patterson,* the federal district court in Virginia stated: "In contrast to third-party releases that offer protection to non-debtors for pre-confirmation liability, an exculpation provision serves to protect court professionals who act reasonably while carrying out their responsibilities in connection with the bankruptcy case. Exculpation clauses do not release parties, but instead raise the liability standard of fiduciaries for their conduct during [the] case." The court explained: "Exculpation clauses have their origin in two sources: the *Barton* Rule and Section 1103(c) of the Bankruptcy Code." *Patterson,* 636 B.R. at 700 (citing, *inter alia, Barton v. Barbour,* 104 U.S. 126 (1881)).

Patterson decided that an exculpation clause "must contain the following limitations: [¶] (a) it must be limited to the fiduciaries who have performed necessary and valuable duties in connection with the bankruptcy case; [¶] (b) is limited to acts and omissions taken in connection with the bankruptcy case; [¶] (c) does not purport to release any pre-petition claims; [¶] (d) contains a carve out for gross negligence, actual fraud or willful misconduct; and, [¶] (e) contains a gatekeeper function." *Id.* at 702 (citation omitted).

In *Rocking M*, the Kansas bankruptcy court stated: "The basis for such exculpation is the general law of fiduciaries. For example, outside of bankruptcy, a term of an express trust may relieve a trustee of liability for breach of trust, except for a breach committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries. In bankruptcy, exculpation clauses applicable to estate fiduciaries are approved when they reflect this general law of fiduciary liability, by providing general immunity for acts or omissions within the scope of the fiduciaries' duties but preserving liability for willful acts taken other than in performance of duties in the case. In other words, exculpation clauses generally express the standard to which estate fiduciaries are held in Chapter 11 cases." *Id.,* 2024 Bankr. LEXIS 1786, at *4-5 (internal quotations and footnotes omitted).

Rocking M cited with approval authority that an exculpation clause may provide "for immunity of the debtor, its officers and directors, the committee and its individual members, and representatives, the liquidating trustee, and the liquidating trustee committee [sic], subject to two limitations." *Id.* at *5 (footnote omitted). "The first limitation is that the acts and omissions within the scope of the exculpation be limited to acts or omissions in connection with the Chapter 11 case. Second, such immunity must be qualified by exclusion of willful or gross misconduct, and fraud." *Id.* at *5 (footnote omitted).
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[X] GATEKEEPING CLAUSES

Purdue does not discuss the validity of gatekeeping clauses. A gatekeeping Clause may require a claimant to obtain leave from the bankruptcy court prior to filing post-confirmation litigation against persons and entities protected by the gatekeeping clause, including persons protected by an exculpation clause in the plan.

In *Patterson,* the district court invalidated an exculpation clause in part because It lacked a gatekeeping clause. *Id.* 636 B.R. at 702 ("In conclusion, the Exculpation Provisions extends beyond the permissible parties and fails to contain a gatekeeper function that would allow an avenue into court for some claims.").

"Under the doctrine of *Barton v. Barbour,* 104 U.S. 126, 26 L.Ed. 672 (1881), a party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity." *In re Gen. Growth Props.,* 426 B.R. 71, 74 (Bankr. S.D.N.Y. 2010) (internal quotations and citation omitted); *see id.* ("Under the circumstances of this case, an action against the Board, whose members act as officers of the court, implicates the *Barton* doctrine.").

"Courts have long recognized bankruptcy courts can perform a gatekeeping function." *Highland Capital 1,* 48 F.4th at 439. "Consistent with its purpose, the *Barton* doctrine has been applied to lawsuits against trustees, counsel for trustees, and other officers appointed or approved by the bankruptcy court." *Akhlaghpour v. Orantes,* 86 Cal.App. 5th 232, 243 (2022) (citing, *inter alia, In re VistaCare Group, LLC,* 678 F.3d 218, 224 (3d Cir. 2012)).

In *Highland Capital 2,* 2025 U.S. App. LEXIS 6320, the Fifth Circuit stated: "Relatedly, although we have recognized that bankruptcy courts have some power to perform gatekeeping functions, they nevertheless do not have unrestricted power to protect non-debtors from liability via a pre-filing injunction." *Id.* at *12. The *Barton* doctrine protects trustees and other bankruptcy court-appointed officers for acts done within their official capacities. *Id.* at *13. "Beyond these few [above-named] non-debtor individuals, we have never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors." *Id.* at *14.

In *Highland Capital 2,* the Fifth Circuit required the plan's gatekeeping clause to be coextensive with the exculpation clause and limited to: "(i) the Debtor; (ii) the Independent Directors, for conduct within the scope of their duties; (iii) the Committee; and (iv) the members of the Committee in their official capacities, for conduct within the scope of their duties." *Ibid.*

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[XI] STAYS OF LITIGATION AGAINST THIRD PARTIES

Post-*Purdue*, the Bankruptcy Court extended the duration of the Preliminary Injunction that prevented Debtors' creditors from pursuing their disputed claims against the Sacklers. While acknowledging that the Preliminary Injunction "has been in effect for a very, very long time," the District Court affirmed the calibrated extensions granted by the Bankruptcy Court. *Maryland,* at *27; *id.* at *29-30.

A significant reason for the Bankruptcy Court's extensions of the Preliminary Injunction was the progress reported by the Co-Mediators. The Bankruptcy Court relied upon the Co-Mediators' interim status reports. *See Massachusetts,* at *17-20.

In *Massachusetts,* the Bankruptcy Court rejected arguments that the Co-Mediators' interim reports were inadmissible. *Id.* at *19-20. The Mediation Order expressly authorized the Co-Mediators to file interim reports. *Id.* at *20 ("The Mediators' Reports are being made consistent with the confidentiality provisions of the Mediation Order."). The Bankruptcy Court decided that the mediation reports were admissible under the hearsay exception in Fed.R.Evid. 807(a). *Massachusetts,* at *19-20 ("The Court finds that the Mediators' Reports are a highly reliable source of information, having been drafted and filed on the docket by two preeminent, court-appointed mediators, one of whom is a former federal judge."). In addition, "hearsay testimony is admissible to support the issuance of a preliminary injunction." *Id.* at *19 (internal quotations and citation omitted).

Purdue does not question the validity of preliminary injunctions that grant temporary stays of creditors' claims against non-debtor third parties. *See Coast to Coast Leasing, LLC v. M&T Equip. Fin. Corp. (In re Coast to Coast Leasing, LLC),* 2024 Bankr. LEXIS 1662, at *7 (Bankr. N.D. Ill. 2024) (*Coast to Coast*) ("Here, the guarantors are not seeking a release of claims against them, unlike in [*Purdue*]. The guarantors, nondebtor third parties, are seeking a temporary restraining order to enjoin creditors from bringing claims against them until August 13, 2024."). Post-*Purdue*, the District Court in *Maryland* and the Bankruptcy Court in *Massachusetts* rejected arguments that *Purdue* prohibited temporary stays of creditors' claims against third parties.

Under Supreme Court precedent, the traditional standard for a preliminary injunction is a four-factor test. *See Starbucks Corp. v. McKinney,* 219 L.Ed. 2d 99, 105, 107 (June 13, 2024) (*Starbucks*). "The default rule is that a plaintiff seeking a preliminary injunction must make a clear showing that 'he is likely to succeed on the merits, that he is likely to suffer irreparable irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* at 107 (quoting *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20, 22 (2008)).

After *Purdue,* chapter 11 debtors will not be able to satisfy the likelihood of success factor by arguing that there is a likelihood of confirming a plan containing nonconsensual third-party releases. *See, e.g., Coast to Coast,* 2024 Bankr. LEXIS 1662, at *11 (granting temporary stay because, among other things, debtors' principals

showed a reasonable likelihood of a successful reorganization); *In re Parlement Techs., Inc.,* 2024 Bankr. LEXIS 1627, at *2 (Bankr. D. Del. 2024) (*Parlement*) ("Following [*Purdue*], 'success on the merits' cannot be based on the likelihood that the non-debtor would be entitled to a non-consensual third-party release through the plan process.").

Denying a preliminary injunction, the bankruptcy court in *Parlement* stated: "But a preliminary injunction may still be granted if the Court concludes that (a) providing the debtor's management a breathing spell from the distraction of other litigation is necessary to permit the debtor to focus on the reorganization of its business *or* (b) because it believes the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors. Both of those outcomes may be viewed as 'success on the merits' for this purpose."). *Id.* at *2-3.

The Ninth Circuit has stated that "a debtor seeking to stay an action against a non-debtor must show a reasonable likelihood of a successful reorganization." *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1095 (9th Cir. 2007) (*Excel Innovations*); *see id.* at 1089 ("We hold that when a debtor applies for a 11 U.S.C. § 105(a) preliminary injunction to stay a proceeding in which the debtor is not a party, the bankruptcy court must balance the debtor's likelihood of success in reorganization against the relative hardship of the parties, as well as consider the public interest if warranted.").

"In the Ninth Circuit, courts may apply an alternative 'serious questions' test, which allows for a preliminary injunction where a plaintiff shows that 'serious questions going to the merits' were raised and the balance of hardships tips sharply in the plaintiff's favor, assuming the other two elements of the *Winter* test are met." *Gilley v. Stabin,* 2024 U.S. Dist. LEXIS 129571, at *3 (D. Or. 2024) *see id.* at *3 n.3 ("Defendants have not convinced the Court that *Starbucks* invalidated the 'serious questions' test, which applies the *Winters* factors.").

In the Third Circuit, the automatic stay can be extended to nondebtor third-parties when there are "unusual circumstances." *See Whittaker,* 2024 Bankr. LEXIS 2608, at *18 (Bankr. D. Del. 2024) ("As the parties recognize, Third Circuit jurisprudence permits extension of the automatic stay to nonbankrupt codefendants where 'unusual circumstances' exist."). In the Ninth Circuit, however, the availability of relief by extending the automatic stay under the "unusual circumstances" standard is "at best uncertain." *In re Mariner Health Cent., Inc.*, 2023 Bankr. LEXIS 95, at *24 (Bankr. N.D. Cal. 2023) (*Mariner Health*). "Rather, the Ninth Circuit has stated its clear preference that debtors pursue extraordinary relief in favor of non-debtors through the more traditional and well settled remedy of injunctive relief." *Id.* at *24 (citing *Excel Innovations*, 502 F.3d at 1096).

Debtors seeking a non-debtor stay should make a detailed showing. *See Mariner Health*, at *28 ("Rather, all too often, debtors seek an injunction against further prosecution of claims against non-debtors based on generic claims that failure to enjoin

these claims will prevent or frustrate the reorganization efforts, and will essentially allow the prosecution of claims against the debtors, frustrating the automatic stay.").

In deciding whether a non-debtor stay should be granted, the non-debtor's rights to indemnity should be considered. In addition, the impact of 11 U.S.C. § 502(e) on the non-debtor's indemnity rights should be considered. *See, e.g., Whittaker,* 2024 Bankr. LEXIS 2608, at *28 ("The Court is unpersuaded by the TCC's argument that any indemnification obligation would not cause irreparable harm because it would result in a contingent prepetition claim disallowable under 11 U.S.C. § 502(e)(1)(B). This contention effectively concedes that continued litigation of the Direct Claims could result in liquidation of a claim against the Debtors – which is a violation of the automatic stay and certainly harmful to the Debtors' reorganizational efforts."). In contrast, in *In re Mylife.com Inc.,* 2023 Bankr. LEXIS 2264 (Bankr. C.D. Cal. 2023), the California bankruptcy court decided that the debtor's obligations under a pre-petition indemnification agreement did not show irreparable harm justifying a preliminary injunction. *Id.* at *11-12 ("[W]hatever obligations the Debtor may (or may not) have to Tinsley would most likely be relegated to the status of a general unsecured claims.").

Chapters 9, 12, and 13 provide for automatic stays of actions against third parties under specified circumstances. *See* 11 U.S.C. §§ 922(a)(1), 1201(a), and 1301(a).

[XII] EQUITABLE & STATUTORY MOOTNESS & RES JUDICATA

[A] Equitable Mootness

Purdue does not decide the scope or validity of the equitable mootness doctrine. *Id.* at 226-227 ("Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated.").

Equitable mootness "has been accepted as a concept in virtually every circuit in the United States, yet all the while the very courts that have implemented this concept have cautioned against its widespread use." *In re ConvergeOne Holdings, Inc.,* 2024 U.S. Dist. LEXIS 192875, at *7 (S.D.N.Y. Texas 2024) (footnote and citation omitted); *see Excluded Lenders v. Serta Simmons Bedding, L.L.C. (In re Serta Simmons Bedding, L.L.C.)*, 125 F.4th 555, 585 (5th Cir. 2024) (*Serta Simmons*) ("At the threshold, we note that equitable mootness is a bit of a misnomer – much like green pastel redness.").

In a concurring opinion in *One2One Communs., LLC v. Quad/Graphics, Inc.,* 805 F.3d 428 (3d Cir. 2015) (*One2One*), U.S. Circuit Judge Cheryl Ann Krause criticized the equitable mootness doctrine. In her concurring opinion, Judge Krause stated: "I write separately, however, because I do not believe we should persist in our failed attempts to cabin this legally ungrounded and practically unadministrable 'judge-made abstention doctrine'." *Id.* at 438 (quoting *In re Semcruide, L.P.,* 728 F.3d 314, 317 (3d Cir. 2013)).
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An appeal from an unstayed confirmation order granting a third-party release is not necessarily equitably moot. *See, e.g., Patterson,* 636 B.R. at 697 ("However, the Court will continue its analysis of the equitable mootness doctrine and find that it does not apply even if the Confirmation Order had not been converted into a Report and Recommendation."); *see id.* at 700 ("However, the Court will not allow [the non-severability] provision or an equitable doctrine to preclude appellate review of plainly erroneous release provisions."); *see also In re BSA,* 2025 U.S. App. LEXIS 11472, at *56 (3d Cir., May 13, 2025) (Krause, J.) ("Accordingly, we decline to dismiss these appeals as equitably moot and proceed to consider the merits of the Certain Insurers' and Allianz Insurers' claims.") (footnote omitted).

Deciding whether to apply the equitable mootness doctrine to an appeal does not require the appellate court to take an all-or-nothing approach. *See Serta Simmons*, 125 F.4th at 588 ("If endorsed, the appellees' argument would effectively abolish appellate review of even clearly unlawful provisions in bankruptcy plans. Parties supporting such provisions could always argue that they would have done things differently if they had known the provisions would later be excised.") (footnote omitted).

The equitable mootness doctrine applies especially "when a party sits idly by and permits intervening events to extinguish old rights and create new ones." *Patterson,* 636 B.R. at 697 (internal quotations and citation omitted). In *Int'l Petro. Prods. & Additives Co. v. Black Gold S.A.R.L.,* 115 F.4th 1202 (9th Cir. 2024), the Ninth Circuit stated: "Were we to excuse a losing party's failure to seek a stay of a bankruptcy court's order simply because that order is later reversed on appeal, then moving for relief under Rule 8007 would no longer be 'obligatory.'" *Id.* at 1213 (quoting *Rev Op Group v. ML Manager (In re Mortgs. Ltd.)*., 771 F.3d 1211, 1215 (9th Cir. 2014) (quoting *In re Roberts Farms, Inc.,* 652 F.2d 793, 798 (9th Cir. 1981)); *see also Serta Simmons,* 125 F.4th at 585 ("In assessing equitable mootness, we analyze three factors: (i) whether a stay has been obtained, (ii) whether the plan has been substantially consummated, and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan.") (internal quotations and citations omitted).

[B] Statutory Mootness

In *In re BSA,* 2025 U.S. App. LEXIS 11472 (3d Cir., May 13, 2025) (*BSA)*, the United States Court of Appeals for the Third Circuit decided appeals from the order confirming the chapter 11 plan of debtors Boys Scouts of America and Delaware BSA, LLC ("BSA"). BSA's chapter 11 plan contained non-consensual third-party releases combined with a sale to insurers of BSA's insurance policies. Pre-*Purdue,* the bankruptcy confirmed BSA's plan. Appeals from the confirmation order were filed by certain non-consenting third parties, consisting of certain abuse victims and insurers.

In *BSA,* the circuit court affirmed in part, reversed in part, and dismissed in part. In *BSA,* Judge Krause, joined by Judge Anthony J. Scirca, decided that the appeals of the abuse victims were statutorily moot under 11 U.S.C. § 363(m) but the appeals of the insurers were neither statutorily nor equitably moot.

The appeals of the abuse victims were moot under § 363(m) because those appeals "would affect the validity of the Insurance Policy Buyback authorized by the Confirmation Order." *Id.* at *31. The appeals of non-consenting insurers, however, were not moot under § 363(m) because those insurers sought "a limited form of relief sufficiently collateral" to the buyback of the consenting insurers' policies. *Id.* at *29.

In the majority opinion in *BSA,* Judge Krause stated: "Our decision does not read § 363(m) to immunize from appellate review all facets of a plan whenever a § 363(b) sale is involved. Put differently, a challenge to a § 363(b) sale that is collateral to or would not otherwise affect the validity of the sale falls outside the ambit of § 363(m), and given the breadth of issues a reorganization plan may resolve that do not necessarily implicate the terms of a § 363(b) sale, *see* 11 U.S.C. § 1123(a)-(b), the vast majority of challenges, no doubt, will fall into this category." *BSA*, at *40 (internal quotations and citation omitted).

The majority opinion cautioned: "Our decision today depends on the unique characteristics of this Plan, this § 363(b) sale, and the relief these Appellants seek. The Bankruptcy Code prevents us from disrupting the nonconsensual third-party releases in BSA's Plan at this late stage. If proposed today, the Plan would be unconfirmable in the wake of *Purdue* and the Lujan and D&V Claimants could not have had their claims released without their consent." *BSA,* at *70.

In a concurring opinion, Judge Marjorie Rendell stated that the appeals of the Lujan and D&V Claimants should have been dismissed based on equitable mootness, not statutory mootness. Judge Rendell stated in part: "Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide – perhaps the Sackler family should have purchased the estate's fraudulent conveyance claims in addition to the nonconsensual third-party releases and called it a § 363 sale." *Id.* at *79.

[C] Res Judicata (Claim Preclusion)

Purdue does not question (or discuss) the rule that third-party releases in a confirmed reorganization plan are not subject to collateral attack by parties who received adequate notice. *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 152, 155 (2009); *In re FFS Data, Inc.*, 776 F.3d 1299, 1306-1309 (11th Cir. 2015) (third-party release of debtor's guarantor in in chapter 11 plan had *res judicata* effect); *see also United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 269-270 (2010) (*Espinosa*) (order confirmed chapter 13 plan that unlawfully discharged student loan was not void); *Jackson v. Le Ctr. on Fourth, LLC (n re Le Ctr. on Fourth, LLC),* 17 F.4th 1326, 1334-1335 (11th Cir. 2021) (*Le Ctr.)* (applying *Espinosa* in chapter 11 case).

"Although it is true that a confirmed chapter 11 plan is 'binding on all parties and questions that could have been raised pertaining to the plan are entitled to *res judicata* effect,' *Trulis v. Barton,* 107 F.3d 685, 691 (9th Cir. 1995), due process requires that 'a confirmed plan will not preclude parties from subsequently asserting their rights unless specific language in the plan clearly and unambiguously disposed of those rights.'" *Solimano Framing Group LLC v. Pier Constr. & Dev., LLC (In re Solimano Framing*

Group, LLC), 664 B.R. 803, 813 (B.A.P. 9th Cir. 2024)." *In re PS on Tap, LLC,* 2025 Bankr. LEXIS 786, at *43 (Bankr. C.D. Cal., March 31, 2025) (official citation not available as of 4/23/25). In *Solimano Framing Group,* the BAP stated: "Very recently, the Ninth Circuit stressed that chapter 11 debtors-in-possession must be clear and explicit in matters that impact creditors' rights." *Id.,* 664 B.R. at 811 (citing *Munding v. Masingale (In re Masingale),* 108 F.4th 1195 (9th Cir. 2024)).

In *Purdue 2,* Judge McMahon stated: "Nor is there any doubt that the entry of an order releasing a claim has former adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim: First in *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938)], and against in *Travelers Indemnity Co. v. Bailey,* 557 U.S. 137, 155 (2009)." *Purdue 2,* at 82 (parallel citations and footnote omitted).

In *Corestates Bank, N.A. v. Huls Am., Inc.,* 176 F.3d 187 (3d Cir. 1999), the Third Circuit decided that "an order rejecting an objection to a reorganization plan has a claim preclusive effect on a claim that could have been brought in that proceeding by the objector, even if only under the non-core 'related' bankruptcy jurisdiction. Our conclusion in this regard is consistent with those of the Second, Sixth and Ninth Circuits." *Id.* at 197 (rejecting Fifth and Seventh Circuit precedent). The Third Circuit stated that "the restrictions on a bankruptcy judge's judicial power with respect to non-core-'related' claims do not limit the effect of the doctrine of claim preclusion." *Ibid.*

In *Harbinger Capital LL v. Ergen,* 103 F.Supp. 3d 1251 (D. Colo. 2015), the district court stated: "On appeal to the Tenth Circuit, the debtor argued a position taken by the Fifth and Seventh Circuits, both of which reasoned that non-core proceedings in bankruptcy cannot be given [claim preclusive] effect because under 28 U.S.C. § 157 bankruptcy courts cannot hear non-core proceedings absent consent of the parties without being subject to de novo review by the district court. The Tenth Circuit, however, rejected this reasoning and instead agreed with the Second, Sixth and Ninth Circuits that the bankruptcy court's power to hear non-core claims suffices for claim preclusion purposes." *Id.* at 1261 (internal quotations and citations omitted; brackets in original).

[XIII] CONSTITUTIONAL ISSUES

In *Purdue*, the Supreme Court did not decide any constitutional issues, including Due Process and Seventh Amendment issues that were discussed at oral argument of *Purdue* on December 4, 2023.

During oral argument, the Deputy Solicitor General argued: "This release [in Purdue's Plan] extinguishes personal property rights, the creditors' state law chose[s] in action, that do not belong to the bankruptcy estate. That result is not supported by any historical analogue in equity, and its raises significant constitutional questions that should be avoided in the absence of a clear command from Congress." 12/4/23 Tr., p. 5.
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Justice Gorsuch stated: "And then, on the constitutional question, we have serious questions. We don't normally say that a nonconsenting party can have its claim for property eliminated in this fashion without consent or any process of court other than, you know what – you know, the procedure here. This would defy what we do in class action contexts. It would raise serious due process concerns and Seventh Amendment concerns, as the government highlighted." 12/4/23 Tr., pp. at 73-74.

Purdue's counsel argued: "[Section] 524(g), Your Honor, a situation where Congress specifically allowed these sorts of releases, if these constitutional concerns are real, then [section] 524(g) is unconstitutional, and this Court, frankly, is going to take a wrecking ball to the bankruptcy code given the situations in which bankruptcy courts are allowed to dispose of, eliminate, defeat, stand in the way of property interests that you don't see outside of bankruptcy. There's no question about that. [¶] And I think, with respect to a lot of these constitutional questions, they really ought to be dealt with on an as-applied basis. The only issue before this Court is one of statutory authority . . . ." 12/4/23 Tr., pp. 76-77.

By refraining from deciding what constitutes valid consent to a third-party release, the majority in *Purdue* avoided revisiting the consent standard stated in *Wellness* and *Roell* in a different (but related) context. *See Serta Simmons*, 125 F.4th at 574 ("The *Wellness* Court articulated the key inquiry with respect to implied consent: 'whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator.'")(quoting *Wellness*, 575 U.S. at 685; internal quotations omitted).

In addition, *Purdue* did not decide the *Stern* issue. In *Purdue 2*, the District Court decided that the Bankruptcy Court lacked constitutional authority to enter a confirmation order that released non-consenting creditors' claims against third parties. *See id.* at 79-80; *id.* at 82 ("Because the non-consensual releases and injunction are the equivalent of a final judgment for *Stern* purposes, Judge Drain did not have the power to enter an order finally approving them. To the extent of his approval of the Section 10.7 Shareholder Releases, his opinion should have been tendered as proposed findings of fact and conclusions of law, both of which this court could review *de novo*.") (citing *Stern v. Marshall*, 564 U.S. 462, 475 (2011)); *see Patterson,* 636 B.R. at 670 ("Debtors' argument that the Third-Party Releases do not implicate *Stern's* constitutional limitations fails.").

[XIV] INSURANCE ISSUES

[A] Purdue's Insurance

Purdue focuses on the Sacklers' assets. *Purdue* does not discuss whether Debtors expect a significant recovery from their insurers.

According to Purdue: "Since October 2001, the Company has been self-insured with respect to product liability claims." *Corporate Monthly Op. Report* at 9 [Case No. 7:19-bk-23649, ECF No. 7388].

Purdue also reports: "The Company has a significant historical tower of product liability insurance ('the 'Tower'), which provides coverage for all or a portion of the opioid claims filed in the Chapter 11 Cases." *Id.* at 16.

In addition, Purdue has pending litigation "which addresses insurance coverage for the Company's liabilities under 2003-2018 general liability policies," which was "stayed pending the ruling of the U.S. Supreme Court" in *Purdue.* "Further recoveries from the Companies' insurance policies are expected but not assured." *Id.* at 16-17.

Section 10.6(b) of Purdue's draft thirteenth amended plan, filed March 18, 2025, provides in part: "Notwithstanding anything herein to the contrary, but subject to the MDT Insurer Injunction and the Settling MDT Insurer Injunction, the Debtors shall not be released from liability for any Claim (other than any Co-Defendant Claim) that is or may be covered by any Purdue Insurance Policy; *provided* that recovery for any such Claim, including by way of settlement or judgment, shall be limited to the available proceeds of such Purdue Insurance Policy (and any extra-contractual liability of the Insurance Companies with respect to the Purdue Insurance Policies), and no person or party shall execute, garnish or otherwise attempt to collect any such recovery from any assets other than the available proceeds of the Purdue Insurance Policies. The Debtors shall be released automatically from a Claim described in this paragraph upon the earlier of (x) the abandonment of such Claim and (y) such a release being given as part of settlement or resolution of such Claim . . . ." *Thirteenth Amended Joint Plan* at 144, Section 10.6(b) [Case No. 7:19-bk-23469, ECF No. 7306].

[B] Insurance Policy Buybacks

In general, the discharge of an insured debtor does not discharge the debtor's insurer. "Subsection (a) [of § 524] enjoins creditors from attempting to collect from the debtor or the debtor's assets debts that have been discharged in bankruptcy. Subsection (e) makes clear that this injunction applies only to the debtor's personal liability and does not inhibit collection efforts against other entities." *Holmes v. Mendez*, 2018 U.S. Dist. LEXIS 238846, at *6 (C.D. Cal. 2018). "Courts have interpreted § 524 to permit creditors to bring an action or continue an action directly against the debtor for the purpose of establishing the debtor's liability in order to recover from another entity, e.g., a liability insurer." *Id.* at *7; *see also In re Beeney,* 142 B.R. 360, 363-364 (B.A.P. 9th Cir. 1992).

"Insurers and their insureds who have filed chapter 11 cases because of mass tort claims often enter into settlement agreements characterized as 'buyback' transactions to obtain funds to pay claimants. In a buyback, the transaction is considered a 'sale' of the policy by the debtor back to the insurer, accompanied by the termination of the policy. Chapter 11 debtors seek approval of insurance buyback agreements pursuant to § 363(b) and (f), as sales free and clear of other interests, and/or pursuant to Bankruptcy Rule 9019." *In re Hopeman Bros.,* 667 B.R. 101*,* 106 (Bankr. E.D. Va. 2025) (*Hopeman*) (footnote omitted); *see In re Sunland, Inc.,* 2014 Bankr. LEXIS 5000, at *10-16 (Bankr. D. New Mex. 2014) (*Sunland*) (authorizing sale of insurance policies free and clear).
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In *Hopeman* the bankruptcy court discussed the impact of *Purdue* on bankruptcy sales: "As the Supreme Court stated, its decision in *Purdue* is limited to the issue before it, i.e., whether non-consensual non-debtor releases may be included in chapter 11 plans. Nothing in its opinion suggests that the protections afforded a buyer pursuant to § 363, including the ability of the purchaser to obtain the asset free of the claims of the debtor's creditors, were intended to be abrogated." *Hopeman*, at 108 (footnote omitted).

A sale of an insurance policy (or other property) pursuant to 11 U.S.C. § 363(b) and (f) is subject to 11 U.S.C. § 363(e), which provides in part: "Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit such use, sale, or lease as is necessary to provide adequate protection of such interest."

In *Purdue 2,* the District Court rejected Debtors' argument that creditors' claims against the Sacklers were validly "channeled." *Id.* at 67-68 ("[T]he claims against the Shareholder Released Parties are effectively being extinguished for nothing, even though they are described as being 'channeled.'").

In *BSA,* BSA's chapter 11 plan included non-consensual third-party releases combined with insurance policy buybacks by BSA's insurers. In *BSA,* the Third Circuit stated: "If proposed today, the Plan would be unconfirmable in the wake of *Purdue* and the Lujan and D&V Claimants could not have had their claims released without their consent." *BSA,* at *70.

[XV] TAX PAYMENTS – *US v. MILLER*

In *United States v. Miller,* 604 U.S. __ (2025) (*Miller*), the respondent trustee argued that the United States could not validly assert sovereign immunity in response to the trustee's state law avoidance claims under 11 U.S.C. § 544(b). Citing *Purdue 1,* the trustee in *Miller* unsuccessfully argued: "But because All Resort paid [the shareholders'] tax debts, those liabilities were wiped out. The Sackler family appears to have attempted a similar maneuver on a far larger scale, transferring over $4 billion from Purdue Pharma to pay personal taxes, 'including large amounts to the IRS.' *In re Purdue Pharma L.P.,* 633 B.R. 53, 91 (Bankr. S.D.N.Y. 2021), *rev'd,* 144 S.Ct. 2071 (2024). For every company in dire straits, the government's interpretation would incentivize future corporate officers with personal debts to the United States to raid corporate coffers." *Brief for Respondent* at 42 [U.S. Sup. Ct. No. 23-824], filed Sept. 19, 2024.

Post-*Purdue,* on March 26, 2025, in *Miller,* the Supreme Court decided that the waiver of sovereign immunity in 11 U.S.C. § 106(a) did not apply to state-law claims nested within § 544(b). As a result, the trustee was not entitled to recover from the United States under § 544(b) funds that the debtor's shareholders misappropriated from the debtor and transferred to the IRS to pay the shareholders' personal income tax liabilities.
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[XVI] CONCLUSION

On December 4, 2023, the OCC's counsel forcefully argued: "If there's one thing you take away from my argument today, it is this, and let me be crystal-clear: Without the release, the plan will unravel, Chapter 7 liquidation will follow, and there will be no viable path to any recovery." Tr. of Oral Arg. 100-101. In *Purdue,* four Justices were persuaded. Post-*Purdue,* the 3/18/25 Press Release suggests that Debtors will reorganize under chapter 11 without non-consensual third-party releases.

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-Leonard Gumport

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