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BUSINESS BANKRUPTCY COMMITTEE ENEWSLETTER

This edition of the eNewsletter features several great features, including: (i) a Spotlight Interview with BBC member Leslie A. Berkoff; (ii) a feature on Megan M. Adeyemo, winner of this year's Kathryn R. Heidt Memorial Award, as well as three recipients of the inaugural 20/20 Partners Rising Young Leader Awards; (iii) interviews with three of the BBC's inaugural class of 20/20 Partners Rising Young Leaders, Steven Golden, Nicole McLemore, and Brigid Ndege.

It also features two articles on current issues in bankruptcy law. The first article is from Alexander Collingsworth, a law student from Georgetown University Law Center, regarding the Purdue bankruptcy case and third-party releases. The second article is from David L. Rosendorf and Mindy Y. Kubs, both at Kozyak Tropin & Throckmorton LLP in Miami, Florida, regarding the Eleventh Circuit Court of Appeals' approach to third-party releases.

Upcoming Dates:

- **Business Law Section Spring Meeting** (March 31–April 2, 2022) in Atlanta, Georgia.
- **Business Law Section Annual Meeting** (September 8–10, 2022) in Toronto, Ontario.
- **Business Bankruptcy Committee/NCBJ Meeting** (October 19–22, 2022) in Orlando, Florida.

BBC Leadership Spotlight Interview: Leslie A. Berkoff

This edition's BBC Leadership Spotlight feature with Leslie A. Berkoff. Ms. Berkoff is a Partner with the firm of Moritt Hock & Hamroff LLP where she serves as the Chair of the firm's Dispute Resolution Practice Group, is the former Chair of the Bankruptcy Practice Group, and serves on the firm's Management Committee. Ms. Berkoff is active in the American Bar Association ("ABA") Business Law Section where she serves as the Section's representative on the Dispute Resolution Advisory Council, and is the Chair of the Dispute Resolution Committee, the Vice-Chair of Programming for the Business Bankruptcy Committee of the Business Law Section and the Vice-Chair of the Bankruptcy Study & Policy Committee. She is also a member of Business Law Today where she serves as a contributing editor on topics concerning Dispute Resolution.

Q&A:

1. How did you come to be a bankruptcy practitioner?

My trajectory to become a bankruptcy lawyer started (unknowingly at the time) in law school when two of my study partners insisted that I could not miss taking bankruptcy from a national leader in the field, Alan Resnick. Alan was a pillar in the bankruptcy community, and I not only excelled in his class, but when it came time for me to apply for clerkships, Alan was one of my key references and an advocate. I first

clerked for the Honorable Allyne R. Ross, who at the time was a Magistrate Judge in the Eastern District of New York (now District Court). Towards the end of my clerkship, the legal market took a hit and an opportunity presented itself to apply for a bankruptcy clerkship with the Honorable Jerome Feller, a Bankruptcy Judge in the Eastern District of New York (who just recently passed away). It was with Judge Ross' encouragement and Alan Resnick's input that I applied for and was fortunate to spend the next two years clerking for Judge Feller.

During this time, I simply fell in love with bankruptcy. For someone that wanted to be in the courtroom, the practice of bankruptcy law afforded both the ability to frequently be in court and to challenge myself with statutory construction and interpretation, as well as tap into a creative side to propose solutions to complex problems. While I did not start with the intention to become a bankruptcy lawyer, my path eventually led me here.

2. How did you get involved with the ABA BBC?

My involvement in the ABA BBC grew out of my involvement in the ABA. I was a member of the ABA for quite some time, and over the years I met and became friends with many different bankruptcy professionals. I believe it was Sharon Weiss (a close friend) who encouraged me to become more active in the BBC. Given my extensive experience in healthcare bankruptcies, I was asked to co-chair the BBC Healthcare Committee and from there I have held multiple different roles in both the BBC and other Committees.

3. Who was the best mentor you have had, and why?

I have had many mentors over the course of my career. At the early stages, I was fortunate to receive guidance and advice from some tremendous jurists. During law school, I interned for Judge Reena Raggi, United States Circuit Court of Appeals for the Second Circuit (ret.), when she was still serving as a District Court judge. Judge Raggi taught me that it was important to always be prepared and to truly understand the meaning and application of the cases we so often throw into long string cites in our papers. She (like all of the judges I worked for) was always fully prepared, more so at times than some of the lawyers who appeared before her, and her work ethic and attention to detail has remained with me through my career. I was fortunate that both Judge Ross and Judge Feller, who I previously mentioned, shared a similar belief in the need to uphold the integrity of the law and to practice with honesty and respect. Building onto these tenets, Judge Feller taught me how to interpret the Bankruptcy Code, and how to apply statutory rules of construction to give meaning to words, punctuation and even the absence of a word in one section over another. All of these wise jurists had a huge impact on how I conduct myself as a lawyer and approach both my practice and my career.

While I have had many other mentors over the years, both my firm's founder Neil Moritt and the firm's managing partner Marc Hamroff, were my initial mentors in private practice. They provided me with the tools and personal support which allowed me to grow and develop as a lawyer over the years and find my own footing as both a business originator and attorney. As a result, I not only was able to develop my practice and service my clients, but also speak, publish and serve on multiple organizations and boards.

5. What tips do you have for other mentors?

Mentoring requires an understanding of the nature, skills and needs of your mentee. You need to be able to mentor in a way that provides a benefit to your mentee and allows them to apply the guidance and advice in a meaningful way - just because something worked for you does not mean it will work for someone else as they may have a different lifestyle or personality. It is important to be constructive, but practical in the advice and guidance provided.

6. What advice would you give to younger members of ABA?

Younger members should recognize that the ABA is unique from other organizations. At the ABA and within the BBC in particular, members have the opportunity to interact with more judges and thought leaders in a different way than other organizations. Among other things you are interacting with people from multiple disciplines that are involved in the ABA, not just bankruptcy. This wider scope of involved professionals can provide a robust educational experience and the opportunity to interact and learn from a wide variety of professionals.

Additionally, one of the great things about the ABA is the level of support and ability to become involved at a very early stage. As a junior lawyer you are afforded the chance to be a part of educational panels, committees, publications, and more. These are tangible items that you can show to your firm or your organization so that it can appreciate what you are getting from the ABA not just in terms of exposure, but as potential leadership roles. By getting involved at such an early stage, the ABA can play a critical part of your growth as a young lawyer and have a platform to develop leadership skills and enhance your practice.

Megan M. Adeyemo is the Winner of the Business Law Section's 2021 Kathryn R. Heidt Memorial Award

At the Fall Meeting of the Business Bankruptcy Committee in Indianapolis, Chair Judge Christopher Alston presented the annual Kathryn R. Heidt Memorial Award to Megan M. Adeyemo. The Heidt Award is awarded annually by the BBC to a lawyer under the age of 46 who exemplifies the dedication, scholarship, leadership and spirit of its namesake, Kathryn R. Heidt, a former Chair of the Business Bankruptcy Committee. The Heidt Award is the highest honor that can be bestowed by the Business Bankruptcy Committee.

In selecting Megan, the Heidt Award Subcommittee co-chairs noted that she has demonstrated a commitment to her practice, her community, the Business Bankruptcy Committee, and other organizations. Megan is co-chair of the bankruptcy and restructuring group of Gordon Rees Scully Mansukhani, LLP. She is dedicated to mentoring and developing women attorneys at her firm. She oversees the Dallas office's participation in the firm's Women's Initiative.

Megan is a former co-chair of the Mountain/Desert Network of the International Women's Insolvency & Restructuring Confederation, and a former co-chair of the Bankruptcy Sub-Section of the Colorado Bar Association. Megan is also a Member of the Faculty of Federal Advocates, "an organization of attorneys dedicated to improving the quality of legal practice in the federal courts in Colorado by enhancing advocacy skills, professionalism, and the integrity of practice."

Megan is Publications Director of the Business Bankruptcy Committee

and also co-chair of the Pro-Bono Subcommittee. She has edited, authored, or contributed to several ABA publications, including Guide for In-House Counsel: Practice Resource to Cutting Edge Issues (March 2019), Reorganizing Failing Businesses: A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, 3d ed. (2017), and Lawyers' Professional Liability in Colorado (2018 Edition).

Donald Kirk, one of four nominators, had this to say: "Megan is the type of person who truly gives a part of herself to our profession. She mentors younger lawyers in a meaningful and impactful way. She is also that welcoming face in a crowd at our ABA meetings who makes newcomers feel comfortable and important, helping ensure that our Committee remains strong for years to come. I am proud to be her colleague and cannot think of a better representative of our Committee."

Business Bankruptcy Committee Chair Judge Alston congratulated Megan for this well-deserved recognition, adding "I am confident Megan will continue to serve the Business Bankruptcy Committee and the legal profession with distinction."

Third Party Release Circuit Split Rears Head in Purdue Bankruptcy - New York District Court Rejects Purdue Bankruptcy Plan, Setting Up Appeal to Second Circuit.

By: Alexander Collingsworth[1]

On December 16, 2021, Judge Colleen McMahon of the U.S. District Court for the Southern District of New York, vacated[2] the plan of reorganization for the Purdue Pharma chapter 11 bankruptcy, which had been confirmed by Bankruptcy Judge Robert Drain in September of last year.[3] The central issue the court considered was that of third-party nonconsensual releases, which, the court noted, had "hovered over bankruptcy law" for 35 years. "It must be put to rest sometime; at least in this Circuit, it should be put to rest now," Judge McMahon wrote.[4]

Several groups of creditors had opposed the plan of reorganization and appealed the confirmation, with eight states including California, Washington, and West Virginia, as well as the District of Columbia, filing objections to the plan and later filing appeals.[5] However, the plan was endorsed by a majority of claimants, with 15 states including New York and Massachusetts supporting the plan.[6] Under the plan, Purdue's tort creditors, namely victims of opioid addiction and their families, would receive between $3,500 and $48,000.[7] The plan would establish Purdue as a public benefit company.

The objections of the states and the U.S. Trustee— "the

[1] Alexander Collingsworth is a 3L at Georgetown University Law Center. He interned with the U.S. Trustee Program in 2021. The opinions expressed in this article are the author's own and do not represent the official policy or position of the United States Trustee Program or the United States Government.

[2] *In re Purdue Pharma*, *L.P.*, No. 21 CV 7532 (CM), 2021 WL 5979108, at *2 (S.D.N.Y. Dec. 16, 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022), hereinafter "*Purdue* District Court Decision."

[3] Hearing on Ruling on Confirmation (Bench Ruling), *In Re Purdue Pharma*, 19-cv-23649 (U.S. Bankr. Ct., S.D.N.Y., Sept. 1, 2021). *See also*, *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re Purdue Pharma, L.P.*, No. 21 CV 7532 (CM), 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[4] *Purdue* District Court Decision, at *4.

[5] *See, e.g.,* Objection of the State of Washington, the State of Oregon, and Objecting States to Confirmation of the Debtor's Plan of Reorganization, *In re Purdue Pharma*, 19-cv-23649 (U.S. Bankr. Ct., S.D.N.Y., July 19, 2021).

[6] Jan Hoffman*, Purdue Pharma's Creditors Overwhelmingly Endorse Bankruptcy Plan*, NY TIMES (July 27, 2021), https://www.nytimes.com/2021/07/27/health/purdue-bankruptcy-creditors-settlement.html?searchResultPosition=1.

[7] *See* Objection of the U.S. Trustee to Sixth Amended Joint Chapter 11 Plan of Reorganization at 9, *In re Purdue Pharma*, 19-cv-23649, (U.S. Bankr. Ct., S.D.N.Y., July 19, 2021).

watchdog of the federal bankruptcy system"[8]—focused on the "nonconsensual third-party releases" sought by Purdue, which would absolve the Sackler family—the primary beneficiaries of the several trusts that own Purdue—of claims against them for their alleged role in directing Purdue's strategy of market saturation of Purdue's keystone product OxyContin. Under the plan, the Sacklers or related entities will contribute approximately $4.3 billion over ten years into the settlement pool used to pay creditors.

The ability to put litigation against a debtor on hold, to equitably distribute available assets among claimants, and to extinguish outstanding claims against the debtor are main features of the bankruptcy process. In mass tort situations, bankruptcy provides a vehicle for a global settlement of claims against the debtor. Without bankruptcy, a "race to the courthouse" would ensue, with those claimants who were first to file and litigate their claims (or first to settle) getting a greater share of the available assets and later claimants getting the crumbs left over. However, in the Purdue Bankruptcy, the Sacklers sought to extinguish claims against themselves, even though they were not the debtors. Under the plan, Purdue's tort creditors have essentially agreed (through the class voting system in chapter 11 bankruptcies) to not pursue claims against the Sacklers and only seek compensation through the settlement trust. In return, the Sacklers are making a substantial contribution to that trust.

The releases are called third-party releases because in this case the Sacklers are a third party in the chapter 11 bankruptcy, with no members of the Sackler family having filed for bankruptcy. They are considered nonconsensual because some of the parties relinquishing legal rights to sue have not affirmatively consented to releasing these non-debtors. In earlier versions of the plan, these third-party nonconsensual releases encompassed both current claimants and those who had not submitted claims in the bankruptcy proceedings, who had therefore not given their approval; however, the plan was later tailored so that the only "holders of claims" against Purdue would be releasing claims against the Sacklers.[9]

It's important to distinguish between direct claims and derivative claims. A claim based on the debtor's own liability is a derivative claim—it is derived from a claim against the debtor. Any claim that the bankruptcy trustee could bring, including a creditor's claim, on behalf of the estate would be a derivative claim. An insurance company, for example, could be derivatively liable for claims against the debtor because it agreed to insure the debtor. Releasing derivative claims against third-parties are permissible and common in the bankruptcy

[8] *Id.* at 1.
[9] Hearing on Ruling on Confirmation (Bench Ruling) at 117, *In Re Purdue Pharma*, 19-cv-23649 (U.S. Bankr. Ct., S.D.N.Y., Sept. 1, 2021).

process. Direct claims, on the other hand, are not derived from the debtor's liability. In the *Purdue* case, the claims at issue are direct claims, based on the Sackler family's own conduct, not derived from the company's liability.[10]

The common-sense argument against allowing such releases is that it allows a non-debtor to take advantage of the benefits of bankruptcy system without submitting itself to the associated burdens of bankruptcy, such as increased transparency and the full range of statutory requirements imposed on debtors. Advocates for these kinds of releases say that they are an important tool is crafting global settlements, such as in the Purdue case, especially where a financial contribution by the third party is contingent upon releasing claims against it.[11]

Background of the Purdue Bankruptcy

Purdue and its affiliates filed for chapter 11 bankruptcy on September 15, 2019 in the wake of numerous individual lawsuits and actions taken by states attorneys general against the company,[12] with claims amounting to hundreds of trillions of dollars.[13] The company faced this legal tsunami after a decades long surge in opioid addiction and overdose deaths claimed the lives of over 500,000 people in the U.S. since 2000.[14] Some states had also pursued claims against members of the Sackler family directly.[15] Purdue had reached a preliminary settlement agreement in 2019 with 24 states, but a number of significant holdouts, including New York and Massachusetts, forced the company to pursue a global settlement agreement through the bankruptcy system.[16]

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[10] *See, e.g.*, *Purdue* District Court Decision, at *49.

[11] *See, e.g., Congressional Committees Propose Changes to Bankruptcy Code Prohibiting Non-Consensual Releases of Third Parties and Limiting Other Important Bankruptcy Tools,* Gibson Dunn, Aug. 2, 2021, https://www.gibsondunn.com/congressional-committees-propose-changes-to-bankruptcy-code-prohibiting-non-consensual-releases-of-third-parties-and-limiting-other-important-bankruptcy-tools/.

[12] *Case info*, Purdue Pharma, PRIME CLERK, https://restructuring.primeclerk.com/purduepharma/Home-Index (last visited Sept. 23, 2021).

[13] Objection of the U.S. Trustee to Sixth Amended Joint Chapter 11 Plan of Reorganization at 7, *supra* footnote 5. This figure represents only those claims with a liquidated dollar amount.

[14] *See, e.g.,* Tom Hals & Mike Specter, *Judge Will Approve Purdue Pharma Bankruptcy Plan that Shields Sacklers,* REUTERS (Sept 1, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/judge-rule-purdue-pharma-bankruptcy-plan-that-shields-sacklers-2021-09-01/.

[15] Madeline Holcomb, *The Sackler Family Withdrew More Than $10 Billion From Purdue Pharma During The Country's Opioid Crisis*, CNN (Oct. 21, 2020), https://www.cnn.com/2019/12/17/us/purdue-pharma-sackler-family-10-billion-withdrawals/index.html.

[16] Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy,* NY TIMES (Sept. 15, 2020, Updated Nov. 24, 2020), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html.

Purdue pled guilty in November of 2020 to three federal felony offenses: one count of conspiracy to defraud the United States and two counts of conspiracy to violate the Federal Anti-Kickback Statute.[17] Pursuant to the plea, Purdue agreed to a multi-billion dollar criminal fine which could be offset by payments made to state and local jurisdictions.[18] The violations Purdue admitted to involved lying to the Drug Enforcement Agency (DEA) about anti-diversionary compliance programs it had in place when in fact the company was marketing opioids to healthcare providers that it had reason to believe were selling opioids to abusers.[19] Purdue also admitted to providing benefits to at least two doctors to induce them to write more prescriptions for OxyContin.[20] The fines imposed by the Department of Justice converted the United States into the largest unsecured creditor in the Purdue Bankruptcy with most of the fines imposed expected to go unpaid.[21]A Purdue affiliate had previously pled guilty to charges in 2007 of mislabeling OxyContin.[22] The Sacklers to date have not been charged with any criminal violations.[23]

A key issue surrounding the bankruptcy was the transfer of funds out of Purdue into Sackler controlled trusts and entities throughout the opioid crisis. The company moved over ten billion dollars through hundreds of transactions into these other entities after its 2007 guilty plea.[24] This could be considered a fraudulent transfer, where someone moves assets away from the reach of potential or existing creditors, because the Sacklers may have anticipated the massive liabilities the company faced as it continued to market and sell OxyContin.

Circuit Split Over Third Party Releases

Releases by debtors of their claims against third parties are quite common: in the Purdue bankruptcy, for example, the plan contains provisions releasing *Purdue's* claims against the Sacklers. However,

[17] *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies*, U.S. DEPT. OF JUSTICE (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Mike Spector, *Oxycontin Maker Purdue Pharma Pleads Guilty to Criminal Charges*, REUTERS (Nov. 24, 2020), https://www.reuters.com/article/us-purdue-pharma-opioids-plea/oxycontin-maker-purdue-pharma-pleads-guilty-to-criminal-charges-idUSKBN2842SQ.

[22] *Id.*

[23] *Id.*

[24] Emma Vickers, *How the Sacklers Shifted $10.8 Billion of Their Opioid Fortune*, Bloomberg (Aug. 26, 2020), https://www.bloomberg.com/graphics/2020-sackler-family-money/.

nonconsensual third-party releases are the subject of substantial controversy, with the Fifth, Ninth, and Tenth Circuits having ruled that they amount to a discharge of debts by a non-debtor, and thus violate the Bankruptcy Code's prohibition against such discharges of debts by non-debtors.[25] While temporary injunctions have generally been allowed (with some exceptions)[26], especially in situations where "there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor…,"[27] permanent releases or injunctions (and especially nonvoluntary ones) are seen as pushing the envelope of the inherent powers of a bankruptcy court.[28]

Unlike the third-party releases, there are several provisions that underpin the permissibility of debtor releases, including 11 U.S.C. §§ 363, 1123(b)(3)(A) and Fed. R. Bankr. P. 9019. The lack of similar provisions to support third-party releases underpins much of the controversy. The Bankruptcy Code only expressly authorizes permanent injunctions enjoining suit against third parties under Section 524(g)-(h), allowing claims in asbestos cases to be subject to a "channeling injunction" where claimants can only seek funds from a trust set up through the bankruptcy process, extinguishing any claims against related third parties.[29] The Bankruptcy Code neither expressly prohibits nor authorizes other forms of permanent injunctions and releases, leading to the argument that if Congress had intended to allow them, it would have said so in the statute.[30] Proponents of such releases point to Section 105(a) as granting bankruptcy courts equitable powers under which such measures could be ordered.[31] The circuit split that has emerged goes directly to the limits of the powers of bankruptcy courts: do they have certain residual powers that allow them to approve remedies that are not provided for in the Bankruptcy Code, or are they strictly confined to the Code?

The Ninth Circuit took up the question of third-party releases in

[25] *See* Objection of the U.S. Trustee to Sixth Amended Joint Chapter 11 Plan of Reorganization at 17, *supra* footnote 5; *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re Western Real Estate*, 922 F.2d 592, 600 (10th Cir. 1990).

[26] For example, courts in the Ninth Circuit take a dim view on them. *See In Re Brotby*, 303 B.R. 177 (9th Cir. BAP 2003). By contrast, the Seventh Circuit is more permissible. *In re Caesars Entm't Operating Co., Inc*., No. 15-3259, 2015 WL 9311432 (7th Cir. Dec. 23, 2015).

[27] Adam Levitin, *Business Bankruptcy: Financial Restructuring and Modern Commercial Markets*, 882, 2d Ed., Wolters Kluwer (*quoting Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 658 (6th Cir. 2002)).

[28] *Id.* at 883.

[29] *Id.*

[30] *Id.*

[31] *Id.*

In re Lowenschuss, holding that third-party releases amount to a release by a non-debtor of liability for debt, in violation of the Ninth's circuits prior decisions finding that Section 524(e) precludes a bankruptcy court from discharging the debts of non-debtors.[32] Because bankruptcy courts cannot approve plans that conflict with the bankruptcy code, third-party party released are not allowed.[33]

Some circuits, such as the Seventh Circuit, have decided that such releases are not outright prohibited under the Bankruptcy Code and instead should be subject to a fact intensive inquiry: whether they are necessary to the reorganization and whether the releases are narrowly tailored to the situation.[34] In *Aradigm Communications*, the Seventh Circuit held that Section 105(a) codified the understanding that bankruptcy courts have traditionally broad equitable powers.[35] Combined with Section 1123(b)(6), which allows a bankruptcy court to "include any other appropriate provision not inconsistent with the applicable provisions of this title," these statutory provisions point to a bankruptcy court having residual powers in equity to approve remedies that may not be expressly authorized in the Bankruptcy Code.[36]

Objections in the Purdue Case

There were a number of objections to the plan filed by the objecting states, insurance companies, individual claimants, and the U.S. Trustee. These objections ranged from the procedural (objections by certain states to their classification for voting purposes) to objections of plan feasibility. The following analysis of the objections focuses on the states' and the U.S. Trustee's objections to the nonconsensual third-party release provisions of the plan.

In the Purdue case, the court evaluated whether the proposed plan satisfies the requirements of Section 1129 of the Bankruptcy Code. Among other things, Section 1129(a)(1) provides that a plan must comply with all applicable provisions of the Bankruptcy Code. The objections claim that the nonconsensual third-party releases do not. In particular, the objectors contend that these releases violate both the U.S. Bankruptcy Code and the Fifth Amendment's Due Process Clause. The U.S. Trustee distinguished the typical releases sought by a debtor or a party in interest against future related claims from the "releases" here, which involve a broad extinguishing of claims against members of the

[32] *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995).

[33] *Id*.

[34] *See, e.g., Airadigm Communs., Inc. v. FCC (In re Airadigm Communs., Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008).

[35] *Id.* at 657.

[36] *Id.*

Sackler family, including unnamed members of the family, who are not debtors in the bankruptcy.[37]

Secondly, the objectors argued that even if the Code did allow for these kinds of releases, the releases here still violate the Fifth Amendment's Due Process Clause, amounting to "a broad deprivation of the rights of third parties absent proper notice and a hearing—notice that is woefully deficient here because of the incomprehensible definitions of who is released, who is releasing, and what is released."[38] "The Plan would fully release a potentially limitless group of people from an array of claims."[39] Further, the parties doing the releasing reaches "all persons and entities."[40] The nonconsenting states also raised objections arguing that it was improper for a permanent injunction under the plan to bar the states from exercising their police powers, claiming that doing so would be unprecedented.[41]

The Court's Ruling Confirming the Plan

The bankruptcy court addressed each of the objections in turn in a lengthy oral bench ruling that spanned six and a half hours.

The Due Process objections were somewhat addressed in the final plan that was approved, which narrowed down which third parties were being released and made clear that "only holders of claims against the Debtor or Debtors" would be releasing their claims against third parties.[42] "Holders of claims" presumably means that only current claimants—not future ones—are releasing their claims. "I find that the notice of the plan, confirmation hearing and request for approval of the third-party release satisfied due process," Judge Drain said.

The precedents relied on in discussing third-party releases are outcome determinative. These releases are either discharges of debt by a non-debtor (which would be prohibited by Bankruptcy Code), or they are not. In the *Purdue* case, the court set aside the interpretations by the Fifth, Ninth, and Tenth Circuits as going "against the majority of cases

[37]Objection of the U.S. Trustee to Sixth Amended Joint Chapter 11 Plan of Reorganization at 2, *In re Purdue Pharma*, 19-cv-23649, (U.S. Bankr. Ct., S.D.N.Y., July 19, 2021).

[38] *Id.*

[39] *Id*. at 11.

[40] *Id.* at 13.

[41] *See* Objection of The State of Washington, The State Of Oregon, And The Objecting States To Confirmation of The Debtors' Plan of Reorganization at 9, *In re Purdue Pharma*, 19-cv-23649 (U.S. Bankr. Ct., S.D.N.Y., July 19, 2021).

[42] Hearing on Ruling on Confirmation (Bench Ruling) at 125, *In Re Purdue Pharma*, 19-cv-23649 (U.S. Bankr. Ct., S.D.N.Y., Sept. 1, 2021).

dealing with third-party releases."[43] The court relied a good deal on the Seventh Circuit's ruling in *Airadigm Communs., Inc. v. FCC* in finding that the Bankruptcy Code did not preclude nonconsensual third-party releases. [44]

Having reached the finding that it had the power to issue nonconsensual third-party releases, the court applied a range of factors set down by the Second and Third Circuits in deciding whether to issue such releases. These included: that the estate receives substantial consideration; that the enjoined claims would channel into a settlement fund; that the non-consensual release is necessary to the success of the reorganization.[45] The court noted however that the Second Circuit had stated that "this is not a matter of factors or prongs and further that no case has tolerated non-debtor releases absent the finding of circumstances that may be characterized as unique."[46] Judge Drain found that the factors were satisfied and further observed, "I believe this case is the most complex case given the issues before the parties and ultimately the Court that I have ever seen and that has come before the courts under Chapter 11."[47]

Decision Vacating Confirmation of the Plan

The District Court found that the Bankruptcy Court did not have the statutory authority to approve the releases sought by the debtors here and vacated the Bankruptcy Court's order confirming the plan of reorganization.

The court first examined the legislative history of Section 524(g)-(h) of the Bankruptcy Code (the asbestos claims channeling provisions) before turning to the other provisions the Bankruptcy Court cited as giving it the authority to approve the plan. Congress passed the asbestos channeling provisions after the Second Circuit affirmed a channeling injunction in the bankruptcy of the Johns Manville Corporation in 1988[48] in order to remove any doubt of the legality of such injunctions in asbestos cases.[49] The District Court pointed to the explicit language in 524(g-h) as strictly limiting channeling injunctions

[43] *Id*. at 125.

[44] *Id.* at 124-128.

[45] *See id.* at 135-36 (*citing In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, (2d Cir. 2005); *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000)).

[46] *Id.* at 136, 138.

[47] *Id.* at 138.

[48] *MacArthur Co. v. Johns–Manville Corp.* (*In re Johns–Manville Corp*.), 837 F.2d 89, 91 (2d Cir. 1988) ("*Manville I*").

[49] *Purdue* District Court Decision, at *49.

to asbestos cases. The legislative history of that provision, the court said, made clear that it was Congress' intent to allow experimentation with channeling injunctions in the area of asbestos only, which would then allow Congress to judge whether the concept should be extended to other areas.[50] Since then, the court noted, "Congress has been deafeningly silent on this subject."[51]

The other provisions the Bankruptcy Court cited as giving it the authority to approve the releases were Sections 105(a), 1123(a)(5) and (b)(6), and 1129. Section 105(a) reads: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[52] Although this may be read to give bankruptcy courts broad powers to approve equitable solutions not otherwise provided for in the Code, the District Court explained that 105(a) had limits under Second Circuit precedent, allowing a bankruptcy court only "to enter orders that carry out other, substantive provisions of the Bankruptcy Code."[53] Similarly, the other provisions cited do not create substantive powers that a bankruptcy court can marshal.[54]

The District Court also rejected Purdue's argument that the Bankruptcy Court was authorized to approve the releases because there were no provisions of the Bankruptcy Code expressly prohibiting them. Because the Bankruptcy Code has been found to be "comprehensive," a lack of statutory prohibition is not enough to authorize a Bankruptcy Court to do something.[55] Turning again to the legislative history of 524(g)-(h), the District Court noted that while Congress was aware of other non-asbestos mass-tort bankruptcies, it "declined to make this extraordinary form of relief [channeling injunctions] – relief that ran counter to the fundamental purpose of the Bankruptcy Code – available in circumstances other than asbestos bankruptcies. And it reserved for itself the right to change that."[56]

Lastly, the District Court held that the Bankruptcy Court did not have any residual powers that would allow it to approve the releases.[57]

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[50] *Id.* at *51.

[51] *Id.*

[52] United States Bankruptcy Code, 11 U.S.C. § 105.

[53] *Purdue* District Court Decision, at *62, *65 *(citing In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005)).

[54] *Id.* at *62.

[55] *Id.* at 65 (*citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); E. Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington, 236 F.3d 117, 120 (2d Cir. 2001)).

[56] *Id.*

[57] *Id.* at *68.

Although the Supreme Court has recognized that bankruptcy courts have some residual powers to approve plans that are not inconsistent with the Bankruptcy Code, these equitable powers "must and can only be exercised within the confines of the Bankruptcy Code."[58]

Having found that the Bankruptcy Court lacked statutory authority to approve the releases, the court did not reach the constitutional arguments advanced by the Appellants.

Conclusion

The District Court acknowledged with some regret that its decision came at the end of a lengthy bankruptcy process which "proceeded on the assumption that releases of the sort contemplated in Section 10.7 of the Debtors' Plan would be authorized – this despite the language of the Bankruptcy Code and the lack of any clear ruling to that effect. I am sure that the last few years would have proceeded in a very different way if the parties had thought otherwise."[59] Further, it also acknowledged "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."[60] However, the Bankruptcy Court's ability to provide such relief in this case was limited by the Bankruptcy Code.

There have been some signals from Congress of bipartisan support for prohibiting the kind of third-party releases at issue, with several committees holding hearings examining the Purdue bankruptcy.[61] However, Congress did not advance the proposed legislation before the August 12, 2021 confirmation hearing in the Purdue case and have made no other substantial progress since then.[62] Given that an appeal to the Second Circuit is certainly in the works (and perhaps to the Supreme Court after that), now might be a good time for Congress to clarify this complex issue with a few simple words added to Bankruptcy Code.

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[58] *Id*. (*citing Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *In re Energy Resources Co,* 495 U.S. 545 (1990)).

[59] *Id*. at 70

[60] *Id.*

[61] *See, e.g., The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic*, Dec. 17, 2020 Hearing, House Committee on Oversight and Reform, https://oversight.house.gov/legislation/hearings/the-role-of-purdue-pharma-and-the-sackler-family-in-the-opioid-epidemic; Paul Schott, *'An outrage:' Tong, Others Denounce Purdue Pharma and Owners in Congressional Bankruptcy Hearing*, STAMFORD ADVOCATE (July 28, 2021), https://www.stamfordadvocate.com/business/article/An-outrage-Tong-others-denounce-Purdue-16347094.php.

[62] *See* Hoffman, *supra* footnote 6.

The Eleventh Circuit Clarifies the Standards for Seeking Approval of Bar Orders in Bankruptcy

By: David L. Rosendorf and Mindy Y. Kubs[63]

As every bankruptcy lawyer knows, non-debtor releases are the hot topic in our practice. The Second Circuit Court of Appeals in the Purdue Pharma chapter 11 case is considering the issue on an expedited basis. The bankruptcy court confirmed a plan that included non-debtor releases, but the district court reversed. If the Second Circuit affirms the district court's decision, debtors in that jurisdiction that are facing significant civil litigation will have a difficult time finding parties willing to fund a plan or settlement that will provide a meaningful distribution to creditors.

The Eleventh Circuit Court of Appeals, which allows such releases when applicable factors are satisfied, may become a more appealing choice of venue. Furthermore, in a recent decision, the Eleventh Circuit settled a long-standing debate over the appropriate standard bankruptcy courts should apply when asked to approve a settlement that enjoins any further claims against third parties, commonly referred to as bar orders. The Eleventh Circuit's first decision on the issue, *In re Munford*, 97 F.3d 449 (11th Cir. 1996), set forth a number of factors for bankruptcy courts to apply when considering approval of a bar order. For the next 20 years, courts and practitioners proceeded under *Munford* without much debate. Then, in 2015, the Eleventh Circuit issued an opinion, *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (11th 2015), establishing a separate set of factors bankruptcy courts were to consider when approving bar orders that were incorporated into a proposed plan of reorganization. Although a number of those factors are applicable only in the context of plan confirmation (i.e., whether impacted classes have voted to accept the plan), practitioners and courts alike were unsure about when it was necessary to consider these new factors along with or instead of the factors already established in *Munford*.

Eventually many attorneys and courts began citing to the factors established in both cases "just to be safe." The debate finally made its way to the Eleventh Circuit when appellant, Joseph Markland, the former CEO of two bankrupt payroll processing companies (the debtors), appealed the Bankruptcy Court's approval of a $2.6 million settlement agreement. The debtors faced exposure to millions of dollars of creditor claims due to the misappropriation of customer tax deposits and the settlement agreement proposed by the debtors and official committee of unsecured creditors would have likely resulted in a 100% distribution to the creditors of both debtors, with a potential surplus for

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equity. Markland, however, objected to the settlement because he believes the settling parties may have the means to pay more and he wants a higher return on his equity interest in a bankrupt company that was involved in defrauding its customers. Markland also complained that the settlement agreement contains an impermissible bar order that deprives him of yet to be alleged independent claims he supposedly has against the settling parties.

With respect to the bar order, the parties' motion seeking approval of the settlement addressed only the *Munford* factors. Markland objected to the motion on the basis that, among other things, the movants failed to address *Seaside* or otherwise present evidence that the bar order was consistent with *Seaside.* The movants did, however, address the *Seaside* factors at the approval hearing, arguing that they were satisfied to the extent they were applicable. Because the settlement was not incorporated into a plan of reorganization, not all of the *Seaside* factors were relevant.

The bankruptcy court approved the settlement, addressing both the *Munford* and *Seaside* factors in its decision. Markland appealed, at which time the movants argued that the bar order was controlled by *Munford*, not *Seaside*, so the bankruptcy court used the correct standard when approving the settlement. More specifically, the movants argued that *Munford* controlled stand-alone litigation settlements while *Seaside* applied only when a bar order is presented as part of a plan of reorganization. The district court agreed and affirmed the bankruptcy court's approval of the settlement.

Markland appealed to the Eleventh Circuit. In a recent opinion, the Court finally settled the *Munford/Seaside* debate in stating: "The *Munford* factors apply to bar orders assessed in the settlement context. Such a bar order is appropriate where the parties would not have entered into a settlement agreement without it, and thus it is 'integral' to the settlement." *Markland v. Davis (In re Centro Group, LLC)*, No. 21-11346 (11th Cir. Nov. 5, 2021) at 9. In contrast, "[t]the *Seaside* factors apply to bar orders that are specifically within the reorganization context" when "such an order is necessary for the success of the reorganization." *Id.* The Court further determined that the bankruptcy court did not abuse its discretion in approving the bar order Markland opposed.

Attorney David Rosendorf of Kozyak Tropin & Throckmorton LLC, counsel for the Liquidating Trustee of the debtors' estates, notes the significance of the decision. "It enables us to move forward with a $2.6 million settlement that will fund a close-to 100% distribution to creditors in the Centro bankruptcy, in which a number of local businesses had their payroll tax deposits pilfered, and it provides clarity on an important issue regarding the law applicable to bankruptcy bar orders. The *Munford* factors apply to litigation settlements, the *Seaside* factors only apply to bar orders incorporated into a Ch 11 plan."

Inaugural 20/20 Partners Rising Young Leader Award Recipients: Steven Golden, Nicole McLemore, and Brigid Ndege

The eNewsletter celebrates all the winners of the inaugural 20/20 Partners Rising Young Leader Awards, presented on October 6, 2021, at the National Conference of Bankruptcy Judges. In this edition, we are proud to share Q&A responses from three such winners: Brigid K. Ndege, Nicole McLemore, and Steven Golden.

* * *

Name: Steven Golden
Employer/Firm & Location: Pachulski Stang Ziehl & Jones LLP, New York/Wilmington
Law School & Class Year: Georgia State University (J.D., 2014); St. John's University (LL.M. in Bankruptcy, 2015)

Why did you decide to pursue a career in bankruptcy/restructuring?
It started by accident; a friend of mine asked me if I was taking bankruptcy, so I said yes and signed up for the class my 2L year. I found that I enjoyed the class, so my professor connected me with a bankruptcy judge and the U.S. Trustee, both of whom I interned with, and that sealed it. I was going to be a bankruptcy lawyer. I think I fell in love with restructuring because I love puzzles, and corporate restructuring is ultimately just solving a big financial puzzle. Also, I am just a really big nerd.

What has been your favorite bankruptcy- or restructuring-related project to date, and why?
I don't think I can choose just one, but some career highlights include the two Supreme Court *amicus* briefs I co-authored, realizing I have a penchant for bankruptcy litigation while serving as committee counsel in *Neiman Marcus*, and acting as debtors' counsel in a complicated restructuring that included three DIP facilities and four separate asset sales. I love to think of creative legal arguments (which is why I enjoy appellate litigation), and any opportunity to do so successfully is a win in my book.

What advice would you give to younger lawyers or law students looking to pursue a career in bankruptcy/restructuring?
Never be afraid to ask. Whether it is for advice, a job, an introduction, or just for help because you don't understand something. I would literally be nowhere in my career if it wasn't for those people who took the opportunity to talk to me and teach me. Also, never be afraid to say "no." You can't be everything to everyone, and your professional

reputation is all you have. Sometimes, you just have to say no.

What does earning the 20/20 Partners Rising Young Leader recognition mean to you?
It's incredibly humbling to be recognized for the work that I have had the opportunity to do. I feel incredibly lucky that I wake up every day to a job that I enjoy, colleagues that I respect, and a career with many opportunities ahead. To have others recognize the work that I do is just icing on the cake.

Is there anyone you'd like to thank or shout-out for their support or mentorship?
So many people. Jess Cino, Jack Williams, and Judge Margaret Murphy for getting me started. Dick Lieb and Ray Warner for guiding me from academia into practice. All of my colleagues at Pachulski (far too many to list here, but you know who you are).

* * *

Name: Nicole McLemore
Employer/Firm & Location: Law Clerk to the Hon. Mindy A. Mora, U.S. Bankruptcy Court for the Southern District of Florida
Law School & Class Year: University of Miami School of Law, 2019

Why did you decide to pursue a career in bankruptcy/restructuring?
I decided to pursue a career in bankruptcy/restructuring because I enjoyed the way that bankruptcy often intersects with other practice areas. There is a great opportunity to learn about many areas of the law in this practice. It keeps things interesting!

What advice would you give to younger lawyers or law students looking to pursue a career in bankruptcy/restructuring?
Young lawyers and even law students should get involved with organizations like the ABA Business Bankruptcy Committee. Those organizations provide excellent opportunities to meet and work with established professionals in the field, and you can learn a lot through the programs and process.

What does earning the 20/20 Partners Rising Young Leader recognition mean to you?
I am honored to join the 20/20 class. Meeting the other young leaders at the ABA meeting in Indianapolis was particularly rewarding, and I am excited to see them at ABA events moving forward.

Is there anyone you'd like to thank or shout-out for their support or mentorship?
Judge Mindy A. Mora for her leadership, mentorship, and top-notch training to start my career, Trish Redmond for nominating me, her mentorship, and igniting the bankruptcy spark for me, Marni Lennon for

her guidance, and Tara Trevorrow and Maria Romaguera for all of their invaluable advice and support.

* * *

Name: Brigid K. Ndege
Employer/Firm & Location: Lewis Brisbois Bisgaard & Smith LLP, Chicago, IL
Law School & Class Year: Harvard Law School, 2010

Why did you decide to pursue a career in bankruptcy/restructuring?
My first job after law school was at a legal services organization. While there, I was exposed to the bankruptcy code and to bankruptcy law in general. I found learning about the code extremely interesting and decided that I wanted to explore the challenge of practicing bankruptcy law in a firm setting.

What has been your favorite bankruptcy- or restructuring-related project to date, and why?
I have had the opportunity to work on many interesting and challenging legal issues so far in my career. It is difficult to pick just one, as I have enjoyed delving into the different projects I have had the pleasure to work on.

What advice would you give to younger lawyers or law students looking to pursue a career in bankruptcy/restructuring?
I would advise younger attorneys and law students to talk to people who are practicing bankruptcy law. I have been incredibly lucky to have many practitioners advise me and encourage me along my career path.

What does earning the 20/20 Partners Rising Young Leader recognition mean to you?
I am elated to be an award recipient and look forward to further developing as an attorney through my participation with the ABA.

Is there anyone you'd like to thank or shout-out for their support or mentorship?
The bankruptcy practitioners at Lewis Brisbois (especially Richard Lauter, Vince Alexander, and John Park). The managing partner of the Chicago office (Danny Worker). The co-chairs of the Diversity Equity & Inclusion Committee at Lewis Brisbois (Alexis Crump and Karen Campbell). As well as the many attorneys outside of the firm who have advised and mentored me.

Submit Articles for the Business Bankruptcy Newsletter

The Business Bankruptcy Committee invites interested law students and law clerks to submit articles for possible publication in future issues. The articles

do not need to be long or in-depth, and it is a great way to get involved in the Committee. Articles can survey the law nationally or locally, discuss business bankruptcy issues, or examine a specific case.

If you are interested in submitting an article, please contact Editor-in-Chief, Michael A. Sabella (Msabella@bakerlaw.com), Co-Editor-In-Chief, Zhao ("Ruby") Liu (liu@teamrosner.com), and Co-Editor-In-Chief, Freddi Mack (freddi.mack@lewisbrisbois.com).