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Views from the Bench: Mass Torts

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Hon. Robert E. Grossman; U.S. Bankruptcy Court (E.D.N.Y.)
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Educational Materials

VIEWS FROM THE BENCH 2020:
RECENT DEVELOPMENTS IN MASS TORT REORGANIZATION

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In recent years, a diverse set of debtors with extensive mass tort exposures—driven by disasters, health care crises, and institutional sexual abuse—have filed complex chapter 11 cases in an equally diverse set of jurisdictions. These new chapter 11 cases are impacted importantly by the approaches and outcomes obtained in mass toxic tort reorganizations and resulting law. The following materials examine developments in this rapidly evolving mass tort reorganization area.[1]

ASBESTOS CASES

Bankruptcy cases involving substantial asbestos and other toxic-tort liabilities may often be thought of as the "traditional" line of chapter 11 reorganizations filed to manage mass-tort liabilities. These cases are useful starting points to analyze recent developments in mass-tort bankruptcies generally because the jurisprudence developed through these cases over the years has been used to instruct the management and administration of other mass-tort bankruptcies, including cases primarily concerned with reconciling opioid and sexual-abuse liabilities.

A. Channeling Injunctions:

Section 524(g), the only Bankruptcy Code provision expressly providing for channeling injunctions and third-party releases, applies solely to asbestos liabilities. A channeling injunction is a supplemental injunction available in chapter 11 cases to "channel" tort claims (including known and future or unknown claims) into a litigation trust that assumes liability for those tort claims and is funded by participating parties, such as the debtors, non-debtor parents, subsidiaries, or predecessors, insurers, and other related parties. In exchange for their contributions to the trust, the participating parties are granted releases by the beneficiaries of the trust and injunctions preventing future actions against them. The result is that tort claimants' sole source of recovery is from the cash, insurance policies, and other assets held by the trust to satisfy their claims. An efficient claims-evaluation process is established to determine the allowed amount of the claims that are channeled into the trust, which process invariably is more efficient transactionally than the unchanneled litigation of claims outside of bankruptcy (typically, an estimation formula is established, which is partially based on certain claim characteristics and related probabilistic factors and, thus, manages prudential burdens and legal-cost strictly).

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[*] These materials are intended to present an objective overview of case and case law developments in the mass tort reorganization area as of August 2020. To the extent the materials are read to present a position or viewpoint on any specific case or issue relating to mass tort bankruptcy, any such position or viewpoint said to be expressed is solely attributable to the authors and not to their firm, Blank Rome LLP, any other firm attorney, or any firm client.

[1] As noted below, these materials frequently address cases that were ongoing as of the publication of this writing. Accordingly, subsequent developments in those cases may render certain discussions contained herein incomplete or outdated.

Channeling injunctions can offer benefits to all parties. For defendants, they can minimize the risks posed by excessive jury awards or punitive damages, and dormant future or unknown claims. Such claims may be paid from reserves maintained by the litigation trust, with estimated funding levels determined by economists or other experts in a bankruptcy court trial serving as an aggregate-liability cap. Channeling injunctions can also reduce defendants' litigation costs by consolidating claims asserted through multidistrict or nationwide litigation into a single venue and streamlining the claims resolution process. For plaintiffs, they can provide recoveries without protracted litigation, burdensome proof requirements, or sometimes stressful or traumatic personal testimony. They can also help claimants achieve recoveries where they might otherwise lack the resources to litigate their claims, or where litigation costs would materially offset recoveries. Finally, channeling injunctions prevent a race to the courthouse and promote an equitable distribution of estate assets among all claimants.

The injunction-and-release structure binds future claimants only if the requirements of section 524(g) are satisfied. Its requirements include, *inter alia*: (1) the trust must be funded by at least one debtor's securities and obligation to make future payments; (2) the trust must become the residual owner of a majority of the voting shares of each debtor, or of the parent or a subsidiary-debtor of each debtor; (3) the trust must include mechanisms providing reasonable assurance that it will value and pay present and future claimants in substantially the same manner; (4) the court appoints a legal representative to protect the rights of future claimants and determines that issuance of the injunction is fair and equitable with respect to such claimants in light of the benefits contributed to the trust on their behalf; and (5) the plan receives the vote of at least 75% of asbestos-claim classes and is confirmed, or the confirmation order is affirmed, by the district court. Non-debtor related-persons may benefit from the channeling injunction only if their liability to asbestos claimants is derivative of the debtor's liability, e.g., indemnity and contribution claims against the debtor.[2]

B. Claims Estimation:

The procedure for estimating claims is a critical component of any plan based on a channeling injunction. The court's opinion in the *Garlock* chapter 11 cases is a seminal decision in the law concerning claims estimation procedures in bankruptcy. In *Garlock*, the debtors successfully applied a very aggressive approach to defining the debtor's present and future liabilities to asbestos claimants. They argued that a baseline, objective analysis of asbestos claims was required because the tort system in respect of such claims had yielded outcomes impacted by plaintiff fraud (the use of compounding theories of liability and prosecuting claims based on assumed facts and undiligenced duplicate claims). Accordingly, they advocated a "legal liability" approach to claim estimation, which "considers the merits of the claims in aggregate by applying an econometric analysis of the projected number of claimants and their likelihood of recovery."[3] The Garlock Asbestos Claimants Committee and Future Claimants Representative opposed confirmation of the debtors' plan, defending the allegations of fraud, and advocated for a "settlement approach" to estimating present and future liabilities for 524(g) purposes. The

[2] *E.g.*, *In re W.R. Grace & Co.*, 729 F.3d 311, 325 (3d Cir. 2013).
[3] *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 74 (Bankr. W.D.N.C. 2014).

settlement approach estimates claims based on an extrapolation from the debtors' history in the tort system and the primary outcomes yielded from that system: claim settlements.[4]

The court accepted the Garlock debtors' approach, holding that "the last ten years of [Garlock's] participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers."[5] Accordingly, the *Garlock* court used the "legal liability" approach to claim estimation (which compressed estimated asbestos claims) and confirmed the debtors' plan. This outcome has impacted results in the asbestos space, driving better and swifter outcomes for asbestos debtors and their co-obligors.

The emphasis on safeguarding the claims estimation process in bankruptcy from plaintiff fraud impacting outcomes in the tort system has continued since *Garlock*. In the bankruptcy case of *Kaiser Gypsum Company*, the United States Department of Justice filed what was apparently its first-ever statement of interest in a chapter 11 case proposing the establishment of a trust for asbestos claimants, stating:

> Although the *Garlock* decision directly addressed only the issue of whether the debtors' historic liability in the state tort system was tainted by fraud, its findings also raise troubling concerns about the lack of oversight and operation of the trusts themselves. Most notably, *Garlock* suggests that an unknown, but significant, amount of trust funds has been paid over the years to persons who had already disclaimed having any such claim against that particular trust in another court proceeding. . . . A common factor in many of these abuses has been the secrecy with which many trust claims are submitted, allowed, and paid, which has made it nearly impossible to detect when plaintiffs are seeking recovery based on factual representations that may be incompatible with other representations previously made in other litigation or before other trusts.[6]

The DOJ subsequently objected to the approval of the debtors' disclosure statement because, *inter alia*, the plan failed to include "adequate safeguards against fraud and abuse" and therefore would not satisfy the confirmation requirements of section 1129 of the Bankruptcy Code.[7] In particular, the DOJ argued that the plan's Trust Distribution Procedures (a) contained confidentiality provisions that exceeded typical privacy protections and prohibited the trust from disclosing claims filed against it and the evidence provided in support thereof; (b) did not require claimants to inform the trust about claims they previously made against another trust or solvent defendant, which failure was "most acute" with respect to asbestos claims for which there was no available insurance coverage; and (c) contained only optional (as opposed to mandatory) provisions for auditing the reliability of medical evidence and penalizing fraud. The debtors

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4 *Id.*

5 *Id.* at 82.

6 *Statement of Interest on Behalf of the United States of America*, *In re Kaiser Gypsum Co.*, Ch. 11 Case No. 16-31602 (Bankr. W.D.N.C. Sept. 13, 2018), ECF No. 1150.

7 *United States' Objection to Debtors' Motion for an Order Approving Their Disclosure Statement*, *In re Kaiser Gypsum Co.*, Ch. 11 Case No. 16-31602 (Bankr. W.D.N.C. Nov. 6, 2018), ECF No. 1299.

ultimately filed revised Trust Distribution Procedures, which contained additional provisions including many of the safeguards requested by the DOJ.[8]

The bankruptcy court held a trial on confirmation of the debtors' plan in July 2020 and, as of this writing, had orally approved the plan and directed the parties to submit proposed findings of fact and conclusions of law. However, the DOJ has stated it "will continue to look for opportunities to increase the transparency of asbestos trusts and protect the interests of legitimate claimants and the United States."[9]

Similar objections were raised by the Acting United States Trustee to approval of the disclosure statement for, and confirmation of, the joint pre-packaged plan filed in the *Maremont Corporation* bankruptcy.[10] Overruling all but one of the Trustee's objections, Judge Carey acknowledged that while "claims submissions should be, at least initially, confidential, as a condition of bringing a claim, claimants should do two things: (1) disclose what other claims they've made against other trusts or made a claim and withdrawn it; and (2) offer a release in favor of the trust to share their claim information with other trusts."[11] Otherwise satisfied with the plan's mandatory audit procedures for both unreliable exposure and medical evidence, Judge Carey directed the debtors to address his concerns regarding duplicate claims before the Court would confirm the plan.[12] The Maremont debtors subsequently filed amended Trust Distribution Procedures including the required safeguards, and the plan was confirmed on May 17, 2019.

Issues with trust safeguards are not the only obstacles debtors may encounter when requesting approval of channeling injunctions. Notwithstanding the benefits afforded by such injunctions to both plaintiffs and defendants, interested parties in the *Imerys Talc America* bankruptcy objected to the approval of a disclosure statement for the joint chapter 11 plan filed by the debtors with the support of the Future Claimants Representative and Tort Claimants Committee. Although many of the objections arose "mostly" from the debtors' failure to attach (or even describe) the proposed Trust Distribution Procedures, some objectors also discussed the debtors' failure to sufficiently address a motion for relief from the automatic stay filed by Johnson & Johnson to move dispute resolution for significant debtor-liabilities back to the tort system,

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8 *Third Amended Joint Plan of Reorganization*, *In re Kaiser Gypsum Co.*, Ch. 11 Case No. 16-31602 (Bankr. W.D.N.C. October 21, 2019), ECF No. 1868.

9 *Justice Department Files Statement of Interest in New Asbestos Trust Proposal*, THE UNITED STATES DEPARTMENT OF JUSTICE (Sept. 13, 2018), https://www.justice.gov/opa/pr/justice-department-files-statement-interest-new-asbestos-trust-proposal.

10 *See Objection of the Acting United States Trustee to the Disclosure Statement and Joint Prepackaged Plan of Reorganization*, *In re Maremont Corp.*, Ch. 11 Case No. 19-10118 (Bankr. D. Del. Mar. 4, 2019), ECF No. 112 ("Apart from the serious misconduct it identified in state court asbestos litigation, *Garlock* raised troubling questions about the integrity of the bankruptcy process itself. Much of the misconduct identified in *Garlock* was made possible by the plans confirmed in earlier asbestos bankruptcy cases, which contained few effective safeguards to prevent misconduct by claimants—and which instead contained overarching secrecy provisions that inhibit the detection or prevention of fraud.").

11 *Tr. of Hr'g Mar. 18, 2019*, at 18:10–16, *In re Maremont Corp.*, Ch. 11 Case No. 19-10118 (Bankr. D. Del. Mar. 19, 2019), ECF No. 166.

12 *See id.*, at 23:20–24:12, 55:13–23.

offering holders of talc claims otherwise subject to the debtors' proposed channeling injunction an opportunity to obtain fuller recoveries than under the plan.[13]

Johnson & Johnson, as a member of a class of Indirect Talc Personal Injury Claims by virtue of its indemnification claims against the debtors pursuant to a supply agreement it entered into with a predecessor of the debtors, objected to the process involved in preparing the Trust Distribution Procedures. It asserted that the debtors ceded responsibility for drafting the procedures to the Future Claimants Representative ("FCR") and the Tort Claimants Committee ("TCC"), leaving indirect claimants such as itself unrepresented in plan negotiations and the drafting of the procedures. As a result, indirect claimants "asserting fundamentally different claims [than direct claimants] against a shared pool of very limited resources for distribution" were "facing the very real possibility that they will receive disparate and unfair treatment at the hands of the TCC and the FCR."[14] As discussed in the next section, whether official committees appointed in mass-tort bankruptcies adequately represent the potentially divergent interests of distinct creditor constituencies, such as Johnson & Johnson alleges in *Imerys Talc America*, is becoming an increasingly prevalent issue in these cases and the negotiation of reorganization plans therein.

More importantly, however, Johnson & Johnson wanted to limit its exposure to the risk of over-paying to resolve identical claims. It summarized the rationale for its motion as follows:

> There is already litigation ongoing against J&J by the same claimants for the same injury caused by the same product, and the indemnity relationship between the Debtors and J&J is merely a way to allocate the satisfaction of these claims between the companies. The Plan will purport to assign an assumed allocation for the J&J Talc Claims to Imerys, but those claimants can still proceed against J&J in the tort system for the same claim. J&J's proposal, where one proceeding in the tort system will decide each claim's entire value, is more efficient than one where two separate assessments in two separate processes are made for the same claim—one as to Imerys and another in the tort system as to J&J—potentially leading to inconsistent results and overcompensation of the claims. If the Motion is not granted, J&J could prevail against a particular plaintiff after a fair and lengthy trial and yet still have to pay that same plaintiff's claims under the Imerys Plan. That is not fair. Or J&J could theoretically lose at trial and pay the plaintiff's full claim and then still have to pay the plaintiff again under the Imerys TDPs, an unjustifiable double recovery.[15]

Johnson & Johnson argued that "holders of Talc Personal Injury Claims deserve to know whether an alternative exists that would essentially treat the majority of claims as if these bankruptcy cases were never filed and allow them to return to the tort system, while leaving more of the Debtors' assets for the benefit of holders of the remainder of the Debtors' Talc Personal

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[13] *See, e.g.*, *Certain Insurers' Objection to (1) Disclosure Statement and (2) Proposed Confirmation Schedule*, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. June 16, 2020), ECF No. 1865.

[14] *Objection of Johnson & Johnson* ¶ 4, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. June 16, 2020), ECF No. 1878.

[15] *Johnson & Johnson's Omnibus Reply in Support of J&J's Motion for Entry of Order Modifying Automatic Stay to Implement Talc Litigation Protocol* ¶ 3, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. May 28, 2020), ECF No. 1769.

Injury Claims."[16] It further argued that the "Talc Litigation Protocol" proposed in its stay-relief motion "provides greater certainty for future talc claimants, whose recoveries under the Plan depend on the amount of assets remaining in the Talc Personal Injury Trust at the time they assert their claims."[17] Finally, in light of Johnson & Johnson's significant and important issues with the plan and related proposed bankruptcy-centric dispute resolution processes, it criticized the TCC and FCR of seeking to remain in bankruptcy "where they can inflate values, settle claim amounts for numbers of their own choosing without proving causation, and establish their own eligibility criteria."[18] Other parties have supported Johnson & Johnson's proposal, arguing that the tort-system is preferable to any distribution procedures the debtors might file "with less rigorous proof requirements."[19]

On August 12, 2020, the debtors filed an amended disclosure statement and amended plan asserting that it was incorporating Johnson & Johnson's Talc Litigation Protocol, with modifications proposed by the TCC and FCR. Johnson & Johnson would "assume the defense and control the resolution of Direct Talc Personal Injury Claims against a Debtor that have been channeled to the Talc Personal Injury Trust where the plaintiff alleges use of talcum powder products distributed by [Johnson & Johnson], provided the claims have not reached a final resolution."[20] The amended plan would also release certain indemnity claims against the debtors and waive certain defenses to indemnity claims against itself.[21] As of this writing, Johnson & Johnson has not filed a response to the debtors' amended disclosure statement and amended plan.[22]

OPIOID CASES

Bankruptcy cases filed by large pharmaceutical companies to deal with significant opioid-related liabilities comprise a relatively new strain of mass-tort cases to study. *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del.), has been described as the "first opioid bankruptcy," and *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y.), is following in its footsteps while presenting its own unique issues. Both cases involve masses of

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16 *Objection of Johnson & Johnson*, *In re Imerys Talc Am., Inc.*, *supra*, ¶ 6.

17 *Id.* ¶ 35.

18 *Johnson & Johnson's Omnibus Reply*, *In re Imerys Talc Am., Inc.*, *supra*, ¶ 15.

19 *See, e.g.*, *Hartford Accident and Indemnity Company and First State Insurance Company's Joinder to Certain Insurers' Objection* ¶ 1, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. June 16, 2020), ECF No. 1871.

20 *Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization*, at 11, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. Aug. 12, 2020), ECF No. 2084.

21 *Id.* at 32–33.

22 While the debtors' dispute with Johnson & Johnson appears to currently be the primary issue in the *Imerys Talc America* case, the debtors also face the same objections litigated in *Kaiser Gypsum* and *Maremont* regarding the adequacy of the safeguards to be contained in the Trust Distribution Procedures. *See Objection of Johnson & Johnson*, *In re Imerys Talc Am., Inc.*, *supra*, ¶ 22 ("In line with this Court's decision in *Maremont* and the bankruptcy court's comments in *Kaiser Gypsum*, the TDPs here must include procedural safeguards requiring claimants to: (i) disclose whether the claimant has submitted claims against other trusts or other parties alleging the same injuries, (ii) execute a release of information allowing the trust to obtain claim information submitted to other asbestos trusts by the claimant, and (iii) certify that there is no good faith basis to bring a claim against any other party for the claims made against the Trust."); *Objection of the U.S. Trustee* ¶ 51, *In re Imerys Talc Am., Inc.*, Ch. 11 Case No. 19-10289 (Bankr. D. Del. June 19, 2020), ECF No. 1911 ("There is no assurance that the Trust Distribution Procedures will contain adequate safeguards for preventing fraud and minimizing the number of non-meritorious claims that are paid. Legitimate claimants deserve reasonably specific safeguards to protect the recoveries to which they are entitled . . . .").

personal injury claimants and public entity claimants, presenting private tort claims and various regulatory actions, fines, and penalties for reconciliation and estimation to the Delaware and New York bankruptcy courts. The debtors intend to use bankruptcy as a tool to manage their liabilities and the overwhelming volume of litigation they were defending throughout the United States. While *Insys* has confirmed a plan, *Purdue* hopes to have a proposed plan filed in the fall.

A. Government Unit/Public Claim Injunctions:

In each case, government units had or have claims that are a function of their police power and are, therefore, unstayed under Bankruptcy Code section 362(b)(4). Each set of estates faced masses of potentially unstayed claims and each debtor had to seek injunctions against the enforcement of such claims or an extension of the automatic stay to categories of public claims that might have been unstayed.

By way of example, the *Insys* debtors moved for an injunction against actions otherwise subject to the police powers exception to the automatic stay.[23] Although the relief requested in the motion was consensually resolved as to certain parties, including the MDL Plaintiffs (the "court-appointed claimants' leadership team" representing thousands of plaintiffs and proposed classes in the opioid multidistrict litigation pending in the Northern District of Ohio, including various individuals, hospitals, third-party payors, health departments, public welfare agencies, counties, municipalities, and Native American tribes) by stipulation, the motion was later withdrawn pursuant to an agreed order entered by the Court staying all other "government actions" and approving certain case protocols.[24] And indeed, this outcome underscores the difficulties faced by bankruptcy courts in using Bankruptcy Code section 105 to stay any claim that is clearly subject to the 362(b)(4) exception. Generally, for this use of section 105 power to work, there needs to be some blurring of the line between a government unit's assertion of a claim as a penalty or for compensation as opposed to as a function of its regulatory power and authority.[25]

The *Purdue* debtors have been very aggressive and initially successful in asserting control over opioid claims reconciliation. They have obtained a temporary preliminary injunction protecting themselves and their related parties (including members of the Sackler family) against anything not already subject to the automatic stay, *including* actions otherwise subject to the police

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[23] The motion requested "entry of an order staying: (i) the eleven actions filed by the States Attorneys General, or other state governmental units charged with public health and safety enforcement ('**State AG Actions**'), against certain of the Debtors; (ii) four active lawsuits filed by numerous counties, cities, towns, and municipalities against certain of the Debtors pending in the multidistrict litigation, *In re National Prescription Opiate Litigation*, Case No. 1:17-md-02804 (MDL No. 2804), U.S. District Court for the Northern District of Ohio ('**MDL**'), and (iii) 152 other lawsuits also filed by numerous counties, cities, towns, and other municipalities that have not been consolidated into the MDL and that are pending in various jurisdictions around the country." *See Notice of Filing Proposed Agreed Order Regarding Estimation Motion, PI Motion and Approving Case Procedures*, at 2, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. June 30, 2019), ECF No. 189.

[24] *See Disclosure Statement for Second Amended Joint Chapter 11 Plan of Liquidation*, at 50–51, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Dec. 4, 2019), ECF No. 956; *Agreed Order Regarding Estimation Motion, PI Motion and Approving Case Procedures*, *Insys Therapeutics, Inc. v. Arizona (In re Insys Therapeutics, Inc.)*, Ch. 11 Case No. 19-11292, Adv. No. 19-50261 (Bankr. D. Del. July 2, 2019), ECF No. 45.

[25] *See, e.g.*, *N.J. Dep't of Envtl. Prot. v. W.R. Grace & Co. (In re W.R. Grace & Co.)*, 412 B.R. 657, 662–66 (D. Del. 2009) (citing *United States v. Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988)).

powers exception to the automatic stay.[26] The temporary injunction has been renewed throughout the cases so far despite objections (although many parties, which originally opposed it, subsequently have agreed to voluntarily abide by the terms of the injunction regardless of the nature of their opposition).[27]

Overruling the objections filed by nonconsenting states, Judge Drain stated that the states' interests in obtaining a final determination as to the facts underlying their claims and compelling information sharing from the defendants (including the Sacklers) were legitimate, but those interests were "outweighed on a preliminary basis by the benefits to all the parties to this case who are creditors in pursuing an overall reorganization that I would hope would include a reasonable and lasting and binding, as I believe only a bankruptcy plan can bind the parties to, means to use the resources of these Debtors for the maximum benefit to the states, communities, and individuals who the Debtors acknowledge have suffered from the opioid crisis."[28] While he recognized that there was only a "prospect" that the debtors would successfully reorganize, he stated that "in the early stages of a case like this, particularly where the alternative is extremely wasteful and potentially murderous litigation, that prospect is all that is required."[29]

Certain parties appealed the preliminary injunction, solely as it applied to an action against Purdue's former president and co-chairman, Dr. Richard Sackler, arguing that the bankruptcy court lacked jurisdiction over the action and that the record was insufficient to support the injunction. The district court affirmed, finding (1) "related to" jurisdiction existed because "Purdue's conduct and related liability 'will remain at the heart' of any further litigation against Dr. Sackler," who might have indemnification and contribution claims against the debtors as a result; (2) the police powers exception to the automatic stay did not constrain Judge Drain from issuing the injunction under section 105(a); and (3) the test for issuance of a preliminary injunction was satisfied.[30]

The district court described the appellants' arguments as "overblown." The injunction did not "destroy" their interest in transparency given that, "[l]ike the state attorneys general in *Insys*," who had entered into an information sharing agreement among the debtors, their creditors, and the governmental actors therein, "[a]ppellants still have the opportunity to receive and publicly disclose documents revealing the extent to which Dr. Sackler was both involved in and benefitted from Purdue's sale of opioids.[31] The district court also rejected the appellants' citation to *Insys*, where no injunction was entered protecting non-debtor related parties, stating that the reason no

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[26] *Order Granting, in Part, Motion for a Preliminary Injunction*, *Purdue Pharma L.P. v. Massachusetts (In re Purdue Pharma L.P.)*, Ch. 11 Case No. 19-23649, Adv. No. 19-08289 (Bankr. S.D.N.Y. Oct. 11, 2019), ECF No. 45. The debtors also obtained entry of an order authorizing them to indemnify their employees and pay their legal fees in connection with the opioid lawsuits. *Final Order Authorizing Debtors to Pay Prepetition Wages, Salaries, Employee Benefits and Other Compensation*, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. Oct. 16, 2019), ECF No. 309.

[27] *See, e.g.*, *Amended Order Granting, in Part, Motion for a Preliminary Injunction*, at 4 n.2, *Purdue Pharma L.P. v. Massachusetts (In re Purdue Pharma L.P.)*, Ch. 11 Case No. 19-23649, Adv. No. 19-08289 (Bankr. S.D.N.Y. Oct. 18, 2019), ECF No. 89.

[28] *Tr. of Hr'g Oct. 11, 2019*, at 265:22–266:8, *Purdue Pharma L.P. v. Massachusetts (In re Purdue Pharma L.P.)*, Ch. 11 Case No. 19-23649, Adv. No. 19-08289 (Bankr. S.D.N.Y. Oct. 14, 2019), ECF No. 87.

[29] *Id.* at 260:24–261:3.

[30] *See generally Dunaway v. Purdue Pharm. L.P. (In re Purdue Pharm. L.P.)*, Civ. A. Nos. 19-10941, 20-03048, 2020 WL 4596869 (S.D.N.Y. Aug. 11, 2020).

[31] *Id.* at *19.

such injunction was entered was simply because the *Insys* parties had quickly agreed on a narrower injunction conditioned on the information sharing agreement.[32] Further, that they had concluded the information sharing agreement "was preferable to a multi-state battle fought between public and private actors over a dwindling *res* suggest[ed] that the decision here appealed from was correct."[33] Thus, the district court sided with "the broad history of non-debtor protections in bankruptcies related to alleged mass torts" in affirming Judge Drain's injunction.[34]

Notably, however, the district court ruled that the bankruptcy court lacked "arising in" jurisdiction to issue the injunction. It stated that whether a proceeding arises in a bankruptcy case, and thus is a core proceeding, "depends on '(1) whether [it] is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization.'"[35] The district court characterized the claims at issue as "entirely independent of the bankruptcy proceeding; they arise under a state statute and they were filed months before there was any bankruptcy."[36] It also specifically rejected the notion that the bankruptcy court had "arising in" jurisdiction over the injunction, "and by extension, over the [state court a]ction," based on the assumption that it would "impede or destroy a reorganization proceeding over which the court is presiding."[37] The district court therefore found that "Judge Drain exceeded his authority to 'enforce or implement court orders' under Section 105 when he identified the [state court a]ction as a core proceeding."[38]

Some commentators have interpreted Chief District Court Judge McMahon's opinion in *Purdue* to potentially imply that a non-consensual third-party release in a plan may be subject to *de novo* review in district court, leaving the debtor unable to consummate the confirmed plan without district court review and approval. However, they also note that in a prior opinion,[39] Judge McMahon appeared to hold that bankruptcy courts have core jurisdiction and constitutional power to enter chapter 11 confirmation orders with third-party releases of non-bankruptcy claims against non-debtors. Judge McMahon alluded to this issue in her opinion, stating that even if a settlement including a full release of the claims against Dr. Sackler were incorporated into a chapter 11 plan:

> [T]he Bankruptcy Court would still not be exercising core jurisdiction over the [state law] claims by confirming the plan. As this court explained in *Kirwan*, although a bankruptcy court's "consider[ation] [of] a third-party release as part of a proposed plan of reorganization . . . may have the *effect* of a ruling on the merits,

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[32] *Id.* at *18 (citing *Order Approving Stipulation Between the Debtors and the Non-MDL Municipal Plaintiffs Regarding a Stay of Litigation*, *Insys Therapeutics, Inc. v. Arizona (In re Insys Therapeutics, Inc.)*, Ch. 11 Case No. 19-11292, Adv. No. 19-50261 (Bankr. D. Del. July 12, 2019), ECF No. 59).

[33] *Id.*

[34] *Id.* at *19.

[35] *Id.* at *13 (quoting *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 229 (2d Cir. 2002)).

[36] *Id.* at *14.

[37] *Id.*

[38] *Id.*

[39] *See Lynch v. Lapidem Ltd. (In re Kirwan Offices S.a.r.l.)*, 592 B.R. 489 (S.D.N.Y. Oct. 10, 2018), *aff'd sub nom. Lynch v. Mascini Holdings Ltd. (In re Kirwan Offices S.a.R.L.)*, 792 F. App'x 99 (2d Cir. 2019).

> it is *not* a ruling on the merits – and thus operates on an entirely different jurisdictional footing."[40]

Accordingly, this will be an important issue to track as *Purdue* nears confirmation proceedings should objections arise as to the scope of the releases the debtors are expected to pursue.

B. Special Issues in Committee Formation/Composition:

Both *Insys* and *Purdue* involved disputes over the formation of a committee to provide representation to public entity plaintiffs and whether the UCC was fairly representative of the debtors' unsecured creditors as a whole. Even though public claimants comprised the majority of claims in both cases, Bankruptcy Code section 1102(b)(1) generally[41] limits the authority of the Office of the United States Trustee and the court to appoint "persons" to creditors' committees. The definition of "person" at Bankruptcy Code section 101(41) excludes government units (other than the PBGC or a unit acting as a guarantor or fiduciary). Accordingly, no public claimants were appointed to the UCC in *Insys*, and only a few were ultimately appointed to the UCC in *Purdue* (and only as non-voting, ex-officio members).[42] Arguments in both cases implicated a decision in the PG&E bankruptcy denying the appointment of a public entities committee.

Public entities in *Insys* highlighted that there were more than 1,000 public-entity lawsuits pending against the debtors and more than half of the creditors that expressed interest in serving on the UCC were public entities. In contrast, there were only approximately 30 personal-injury lawsuits pending against the debtors, 5 of which plaintiffs were appointed to the UCC. Accordingly, they sought appointment of another official committee constituted of public-entity members.[43] The debtors and UCC temporarily agreed to support the appointment of such a committee for the sole purpose of engaging in the plan negotiation process (with a cap on legal fees and expenses), but withdrew that support after representatives of the MDL Plaintiffs declined to serve on the proposed committee.[44] Judge Gross denied the motion in a bench ruling (although he acknowledged the issues were "worthy of a written opinion" despite the need for expediency in this case) that the moving parties failed to satisfy their "very heavy burden" to show that there was an "absolute necessity" for the appointment of another official committee.[45] The crucial issue from Judge Gross's point of view was that the movants failed to show the UCC was acting in a manner

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[40] *See Dunaway*, 2020 WL 4596869, at *14 (emphasis in original).

[41] This is an important qualification. The "personal" limitation is part of the "ordinary" appointment practice in Bankruptcy Code section 1102(b)(1). *See* 11 U.S.C. § 1102(b)(1) (emphasis added) ("A committee of creditors appointed under subsection (a) of this section shall *ordinarily* consist of the *persons*, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee . . . ."). The implication is that in extraordinary circumstances, public entities with claims might be deemed eligible for committee service. The question of whether a deviation is proper perhaps should be left to the courts on motion after notice, while taking into account OUST's recommendation on the point.

[42] *Second Amended Verified Statement of the Official Committee of Unsecured Creditors*, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. June 22, 2020), ECF No. 1294.

[43] *Motion Seeking Appointment of Official Committee of Public Entities*, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. June 24, 2019), ECF No. 134.

[44] *Debtors' Objection to Motion Seeking Appointment of Official Committee of Public Entities*, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. July 23, 2019), ECF No. 333.

[45] *Tr. of Hr'g July 24, 2019*, at 87:17–88:20, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. July 25, 2019), ECF No. 353.

that failed to represent the interests of public entities, despite the composition of its members, as there was "no requirement that a committee must exactly replicate the creditor body."[46]

Although no official public entity committee was formed in *Purdue*, Judge Drain recognized the value such committees provide in granting the debtors' motion to pay the professional fees and expenses of an ad hoc committee of states supporting a pre-petition, global settlement framework that the debtors negotiated with a critical mass of plaintiff constituencies, which the debtors believed could only be finalized and effectuated through bankruptcy. In their motion, the debtors argued "it is not possible for the Debtors to successfully continue to negotiate and implement the Settlement Framework unless the supporting parties are organized into a negotiation counterparty like the Ad Hoc Committee," given that they are defending more than 2,700 lawsuits, approximately 85% of which have been brought by state and local governments.[47] At a hearing on the motion, Judge Drain conditioned payment of the committee's fees and expenses on the approval of a restructuring support agreement or plan, but acknowledged the need for "clear lines of communication and clearly defined roles for the professionals for the ad hoc group," and conversely the danger posed to the debtors' reorganization prospects by states "feeling that they were on their own and taking therefore diverse and unorganized positions."[48]

C. Allocation of Estate Proceeds:

Disputes regarding the allocation of estate proceeds both between and among the private and public creditor bodies have been major sticking points in the *Insys* and *Purdue* cases. In *Insys*, the debtors and UCC reached an agreement in early August as to the allocation of estate proceeds among the various classes of creditors following an informal negotiation process outlined in the agreed case protocols.[49] Following objections from various creditor group representatives, the parties engaged in mediation led by Judge Kevin Carey, resulting in a second agreement, this time including Insurance Ratepayer Claims and Third Party Payor Claims (collectively, Class 5); Hospital Claims and claims for hospital monitoring support on account of children born with neonatal abstinence syndrome (collectively, Class 6); and certain Personal Injury Claimants (Class 9).[50] However, there were lingering disputes regarding the allowance and estimation of Personal Injury Claims. This was resolved through another round of mediation led by Eric D. Green among the debtors, the UCC, and the SMT Group Participants (the MDL Plaintiffs' leadership team and the states of New York, New Jersey, Maryland and Florida, which together represented states, municipalities, and tribes (collectively, Classes 8(a) and 8(b))), resulting in the creation of a "Claims Analysis Protocol."[51] The Plan and Disclosure Statement finally approved and confirmed

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[46] *Id.* at 89:24–90:4.

[47] *Debtors' Motion to Assume the Prepetition Reimbursement Agreement with the Ad Hoc Committee* ¶ 2, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. Oct. 29, 2019), ECF No. 394.

[48] *Tr. of Hr'g Nov. 19, 2019*, at 164:18–165:2, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. Nov. 27, 2019), ECF No. 550.

[49] *Disclosure Statement*, *In re Insys Therapeutics, Inc.*, *supra*, at 52.

[50] *Id.* at 52–53.

[51] *Id.* at 53.

reflected the terms of a Plan Settlement,[52] including the Claims Analysis Protocol, supported by the parties.

The parties agreed to a predetermined allocation of value, and funding of distributions, among the classes. Much of the disagreement related to the proper allocation of proceeds of the debtors' assets, with private claimants initially having a disproportionately favorable allocation relative to public claimants, likely due to the former's greater representation through the UCC. The parties ultimately reached the settlement described in the Disclosure Statement. The allocation was as follows:[53]

	Class	Settlement Claim Amount
Class 4	Trade and Other GUC	Less than $50 million
Class 5	Insurance Related Claims	$258 million
Class 6	Hospital / NAS Monitoring Claims	$117 million
Class 8	SMT Group Claims	$597 million

The distribution scheme provided that the first $38 million of estate distributable value from an "Insys Liquidation Trust" would be split 50% to private claimants (other than Personal Injury Claimants) in Classes 4, 5, and 6 and 50% to public entities in Class 7 (DOJ Claimants) and Class 8. Distributions in excess of $38 million from the Insys Liquidation Trust would be split 17.5% to private claimants (other than Personal Injury Claimants) and 82.5% to public entities. Personal Injury Claimants would be paid distributions from a "Victims Restitution Trust," which would receive 90% of any proceeds recovered from the debtors' products liability insurance. Until all such claimants were paid in full, the other 10% of products liability insurance proceeds would be paid to SMT claimants, and 100% thereafter.[54]

This scheme was designed "to allow for potentially higher recoveries to public litigants" from the proceeds of the debtors' litigation claims should they "prove to have substantial value, but also to provide meaningful dollar recoveries from first-dollars out to private litigants."[55] The scheme "comport[ed] with the views held by the Debtors and the Creditors' Committee regarding the type of claims held by the public litigants as being more speculative, but perhaps with higher potential values to the extent they can be proved, due to the sheer number of states, municipalities and Native American Tribes that have asserted, and may assert, claims."[56]

As part of the settlement, the various creditor groups comprising Class 5 agreed to be classified together, receive distributions from a single class settlement amount, and arbitrate disputes regarding the proper allocation of recoveries between the Class 5 creditor groups (not among the members of the respective creditor groups) before a UCC-selected Insys Liquidation

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[52] The *Insys* debtors and the DOJ engaged in extensive negotiations resolving various pre-petition civil and criminal actions before the filing of the debtors' bankruptcy cases, and so the DOJ was not among the parties to the Plan Settlement.

[53] *Id.* at 56.

[54] *Id.* at 57; *Second Amended Joint Chapter 11 Plan of Liquidation*, at 32, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Jan. 16, 2020), ECF No. 1115-1.

[55] *Disclosure Statement*, *In re Insys Therapeutics, Inc.*, *supra*, at 57.

[56] *Id.* at 57–58.

Trust Claims Arbiter. Members of Class 6 agreed to the same treatment.[57] As discussed below, there are separate procedures governing distribution of the value allocated to each of these classes (or their component creditor groups, as applicable) among their individual members.

Members of Class 8 also agreed to be classified together, subject to the development and court approval of an "SMT Global Allocation Proposal." As set forth in the Confirmation Order, the SMT Group Representatives were to prepare a protocol or model allocating trust assets reserved for such class. Should, within the applicable timeframe, a global agreement be reached in "national opioid litigation" against defendants within and outside of bankruptcy by non-federal governmental entities that allocates distributions or recoveries among non-federal governmental entities on a "nationwide basis," then the allocation protocol or model prepared by the SMT Group Representatives was to be substantially consistent with such global agreement. The proposal may provide for contribution of trust assets into a global allocation program established outside of, and allocation on a nationwide basis without regard to whether any governmental entity filed a proof of claim in, the *Insys* chapter 11 proceedings.[58]

In *Purdue*, Judge Drain has pushed the parties to focus settlement negotiations on reaching an agreement concerning the allocation and distribution of estate resources and assets. While the "traditional bankruptcy function" of conducting due diligence on estate assets was still important, "[t]hat is a relatively easy matter to grapple with," considering that bankruptcy courts routinely address questions relating to who should conduct the investigation, how the investigation findings should be shared, and whether litigation should be tried or settled.[59] The more difficult question is how those resources should be distributed, and "it has been proven that . . . payment mechanisms work best when thoroughly vetted" by negotiations among the parties.[60] While mediation regarding allocation issues is ongoing in *Purdue*, the emphasis on these issues in opioid cases somewhat starkly contrasts with asbestos cases, given that the significant focus shifts toward estimation issues in the latter.

D. Claims Estimation:

As stated above, claims estimation issues have so far taken a backseat in *Purdue*, but not in *Insys*. Early in the case, the Insys debtors filed motion to establish claims estimation procedures under section 502(c) of the Bankruptcy Code.[61] The motion was eventually withdrawn in favor of the agreed case protocols, but the first mediation, which would be nonbinding unless the parties agreed otherwise, was later ordered to facilitate a resolution of the allocation and estimation issues among creditor groups over the objection of MDL Plaintiffs, who did not agree to the case protocols. The MDL Plaintiffs moved to convert the case to chapter 7, which the debtors objected to as a tactic to avoid having the court hear evidence about the estimated amount of the MDL

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57 *Id.* at 54–55.

58 *Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Chapter 11 Plan of Liquidation* ¶ 23, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Jan. 16, 2020), ECF No. 1115.

59 *Tr. of Hr'g Oct. 10, 2019*, at 46:23–47:5, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. Oct. 14, 2019), ECF No. 325.

60 *Id.* at 47:6–12.

61 *Motion for Entry of Order Establishing Procedures and Schedule for Estimation Proceedings*, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Jan. 16, 2020), ECF No. 1115.

Plaintiffs' claims.[62] As discussed above, these disputes were eventually resolved by the Plan Settlement and Claims Analysis Protocol.

Among the issues addressed by the Plan Settlement were motions filed by representatives of the various creditor groups comprising Class 5 and Class 6 to file "Class Proofs of Claim."[63] The parties agreed that these claims would be administered by the Insys Liquidation Trust Claims Arbiter pursuant to "Class Claims Procedures" filed with plan supplements governing the distribution of the overall value attributable to each Class Claim under the Plan to individual holders of claims covered by such Class Claim. Class representatives must receive court approval of plans allocating the value of the Class Claims among their members before distributions can be made. Class representatives will evaluate and reconcile individual claims before allocating the value of the Class Claim among individual class members. The Disclosure Statement indicates that this multi-tiered process was designed to "promote efficiency and result in cost savings by obviating the need for the Liquidating Trustee to review and evaluate each individual Claim comprising a Class Claim which may have significant overlap (leading to duplicative reconciliation efforts) and likely raise similar allegations and intra-class issues that are most effectively addressed by class members and the class representative in a collective process."[64]

With respect to Class 9, a "Victims Restitution Trust Administrator," selected by the UCC and SMT Group Representatives, was appointed with authority to determine the eligibility, amount, and allowance of Personal Injury Claims.[65] The Claims Analysis Protocol (attached hereto as **Appendix A**) sets forth the criteria that shall be used by the administrator to estimate these claims. However, the protocol specifically provided that its criteria "shall have no precedential impact or effect whatsoever and shall not be used by parties or counsel in any manner as such in any other litigation or proceeding of any kind involving any entity or individual outside of the Debtors' bankruptcy cases."[66] The administrator's determinations are final and binding, and claimants do not have any right of challenge or review of any kind by any court or other person or entity.[67] If any claimant disputes the administrator's decision, it may submit any new facts, information, or evidence for the administrator's review within 30 days. The administrator shall consider any such submissions in making a final, binding determination.[68]

For all classes of claims not subject to determination by the Insys Liquidation Trust Claims Arbiter or Victims Restitution Trust Administrator, a "Liquidating Trustee," selected by the UCC and SMT Group Representatives, was appointed with authority to move under Section 502(c) of the Bankruptcy Code for estimation of claims.[69] The Liquidating Trustee would also have responsibility for achieving a determination of the total amount of trade and other unsecured claims

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62 *Debtors' Objection to Motion for an Order Converting These Cases* ¶ 6, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Nov. 1, 2019), ECF No. 838.

63 *Disclosure Statement*, *In re Insys Therapeutics, Inc.*, *supra*, at 55–56.

64 *Id.* at 56.

65 *Id.* at 58.

66 *Personal Injury Claims Analysis Protocol*, at 1 n.1, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Dec. 30, 2019), ECF No. 1049-13.

67 *Disclosure Statement*, *In re Insys Therapeutics, Inc.*, *supra*, at 58.

68 *Id.* at 110.

69 *Id.* at 109.

(Class 4) and DOJ claims (Class 7) for purposes of finalizing the allocation of value among classes.[70]

E. Releases:

In *Insys*, the Plan contained release and injunction provisions in favor of the debtors, the UCC and its members, and each of their related parties. Objections were made as to the breadth and scope of these provisions, as well as to deemed-consent and opt-out mechanisms also contained in the Plan.[71] Eventually, the release and injunction provisions carved out enforcement of police or regulatory actions and liabilities or obligations to the United States, as well as liabilities covered by insurance, to the extent of such coverage.[72] The deemed-consent and opt-out releases were approved on the basis that the notice provided was sufficient, taking into account the size and notoriety of the case, and because the third-party releases were essential components of the plan.[73]

F. Case Monitor and the Public Benefit:

One issue that is unique to the *Purdue* case is that the debtors proposed and submitted to a voluntary injunction, initially entered pursuant to the Court's Second Amended Preliminary Injunction,[74] and subsequently modified by the entry of further amended injunctions, indicating they wanted to transition their businesses into "public benefit" companies.[75] The voluntary injunction prohibited them from engaging in much of the conduct giving rise to the liabilities precipitating their bankruptcy cases. The injunction, among other things and subject to certain carveouts, prohibited the debtors from promoting opioids, opioid products, and products indicated for treatment of opioid-induced side-effects; providing financial support or incentives to their employees or third parties for selling, prescribing, or promoting opioids; or engaging certain lobbying activities in connection with the enactment of federal, state, or local any rules or regulations relating to opioids or opioid substitutes or treatments. The injunction also prohibited certain members of the Sackler family from engaging in the opioid business.

Finally, the injunction required the debtors to operate an effective monitoring and reporting system. To this end, they were required to retain an independent monitor to oversee their compliance with the injunction. Judge Drain noted there was a "legitimate public interest" in the debtors' activities, comparable to *Enron*, *Lehman Brothers*, and the tobacco settlement, which interest supported the appointment of a monitor.[76] The monitor was not appointed under any special authority granted to the court under the Bankruptcy Code or Federal Rules of Bankruptcy Procedure or Civil Procedure; rather, it was a purely voluntary undertaking. The monitor entered

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70 *Id.* at 84.

71 *E.g.*, *United States Trustee's Objection to Second Amended Joint Chapter 11 Plan of Liquidation*, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Jan. 6, 2020), ECF No. 1066.

72 *Second Amended Joint Plan*, *In re Insys Therapeutics, Inc.*, *supra*, at 75–76.

73 *Tr. of Hr'g Jan. 16, 2020*, at 110:5–111:16, *In re Insys Therapeutics, Inc.*, Ch. 11 Case No. 19-11292 (Bankr. D. Del. Jan. 17, 2020), ECF No. 1121.

74 *Second Amended Order Granting Motion for a Preliminary Injunction*, *Purdue Pharma L.P. v. Massachusetts (In re Purdue Pharma L.P.)*, Ch. 11 Case No. 19-23649, Adv. No. 19-08289 (Bankr. S.D.N.Y. Nov. 6, 2019), ECF No. 105.

75 *Statement of the Official Committee of Unsecured Creditors*, at 2, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. June 16, 2020), ECF No. 1278.

76 *Tr. of Hr'g Oct. 11, 2019*, *Purdue Pharma L.P. v. Massachusetts*, *supra*, at 64:25–65:19.

into an agreement with the debtors,[77] pursuant to which he was an independent contractor with the authority to employ third party consultants with the debtors' prior consent (not to be unreasonably withheld) and the responsibilities outlined in the injunction. The monitor's responsibilities included filing a quarterly compliance report and, if the debtors fail to cure any violation of the terms of the injunction within 30 days after notice is given by an Attorney General, determining the appropriate action and response.

While the *Insys* and *Purdue* opioid cases do not seem to involve any kind of proxy for a future claimants representative typically appointed in asbestos cases, unknown claimants representative sometimes appointed in sex-abuse cases, or section 524(g) future claims trust, the *Purdue* debtors seem to view their plan to abate the opioid crisis as part of the consideration afforded to claimants under the plan.[78] Whether such a program actually would substitute for payment of claims is highly speculative at this point. Judge Drain has acknowledged the competing purposes to be served by the case: "One is to deal specifically with Purdue's exposure and the other is to deal more generally with the general crisis. And those two courses can be harmonized, but it will be a difficult task."[79] Given that even the significant value of the debtors' estate is likely far outstripped by the monetary damages associated with the larger opioid crisis, he stated that "dealing with individual claims is not necessarily the best use" of estate assets, "[a]lthough one can't possibly ignore the direct human impact."[80] However, the UCC has stated in response to a motion by the debtors to enter into a funding agreement for a naloxone nasal-spray, that debtor support for public health initiatives should not be considered until after, or as a part of, ongoing mediation regarding the allocation of value between private and public claimants, "at which time parties hopefully will have a greater understanding of the future of Purdue and which of the Debtors' creditors (if any) may be willing to accept value to the American public in lieu of payment on their claims."[81]

SEX-ABUSE CASES

Claims for historical sexual abuse are being revived around the nation by the opening of statutes of limitations, whether through legislation or judicial decisions. Accordingly, the law relating to the management and administration of mass-tort liabilities through bankruptcy is evolving as chapter 11 cases stimulated by revived tort claims are filing at pace.

A. Statutes of Limitations:

Since 2002, at least 17 states have enacted legislation allowing victims of sexual abuse to assert claims that otherwise would have been barred by the applicable statute of limitations. These states have primarily opened revival windows temporarily eliminating the statute of limitations for victims whose claims previously expired (e.g., California, Delaware, Georgia, Hawaii, Minnesota, New Jersey, and North Carolina). Other states have fully eliminated the applicable statute of

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[77] *Monitor Agreement*, at 3, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. May 20, 2020), ECF No. 1175-2.

[78] *See Debtors' Informational Brief*, at 51, *In re Purdue Pharma L.P.*, Ch. 11 Case No. 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019), ECF No. 17.

[79] *Tr. of Hr'g Oct. 10, 2019*, *In re Purdue Pharma L.P.*, *supra*, at 46:1–9.

[80] *Id.* at 46:18–22.

[81] *Statement of the Official Committee of Unsecured Creditors*, *In re Purdue Pharma L.P.*, *supra*, at 5–6.

limitations (e.g., Vermont). The nationwide reopening of limitations periods accelerated in 2019, when more than a dozen states passed legislation allowing sexual-abuse victims to assert otherwise time-barred claims. As a result, older victims of sexual abuse have filed lawsuits decades after the underlying abuse occurred. This litigation has caused many entities to file for bankruptcy as a tool to address their previously barred or dormant, but suddenly actionable and overwhelming mass-tort liability for sexual-abuse claims.

By way of example, the Boy Scouts of America (the "BSA") are using bankruptcy to address liability for revived sexual-abuse claims. The BSA has stated that the "vast majority" of the claims filed against the debtor and its local affiliates (approximately 1,500 of 17,000 claims) relate to sexual abuse that occurred before 1988.[82] In particular, the BSA has highlighted a lawsuit (which is currently stayed) filed by a group of plaintiffs in the U.S. District Court for the District of Columbia arguing that the District's recent legislation permits parties to bring previously time-barred claims, *regardless of where the abuse occurred or where the plaintiff resides*.[83] The plaintiffs live in eight different states: Arkansas, Arizona, Florida, Hawaii, Kentucky, Utah, Virginia, and West Virginia. The grounds for this lawsuit against the BSA are somewhat unique, as the plaintiffs argue the District of Columbia has jurisdiction because the BSA was chartered by Congress as a non-profit corporation under Title 36 of the United States Code in 1916.[84]

In addition to the BSA, many diocese and archdiocese belonging to the Catholic Church have recently filed for bankruptcy—possibly as a direct or indirect result of the reopening of these limitations periods. *See, e.g.*, *In re Archbishop of Agana*, Ch. 11 Case No. 19-00010 (Bankr. D. Guam); *In re Diocese of Winona-Rochester*, Ch. 11 Case No. 18-33707 (Bankr. D. Minn.); *In re Roman Catholic Diocese of Syracuse*, Ch. 11 Case No. 20-03663 (Bankr. N.D.N.Y.); *In re Diocese of Rochester*, Ch. 11 Case No. 19-20905 (Bankr. W.D.N.Y.); *In re Diocese of Buffalo*, Ch. 11 Case No. 20-10322 (Bankr. W.D.N.Y.); and *In re Roman Catholic Diocese of Harrisburg*, Ch. 11 Case No. 20-00599 (Bankr. M.D. Pa.).

These statutes of limitations can also affect the administration of a debtor's bankruptcy case itself. For example, the Diocese of Rochester, New York, proposed a claims bar date that was the same date as the expiration of the reopened statute of limitations under the New York Child Victims Act. The debtor stated that this would allow it to determine the total amount of sexual-abuse claims not only against itself, but also against other non-debtor Catholic entities which might be jointly liable with the debtor or be co-insureds under the debtor's insurance policies. The Diocese believed this information would help facilitate an efficient resolution of disputes regarding its insurance coverage.[85]

After New York extended the deadline to file claims under the CVA, the Official Committee of Unsecured Creditors of the Diocese of Rochester moved for a corresponding

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[82] *Debtors' Informational Brief*, at 34 n.72, *In re Boy Scouts of America*, Ch. 11 Case No. 20-10343 (Bankr. D. Del. Feb. 18, 2020), ECF No. 4.

[83] *Disclosure Statement for Chapter 11 Plan of Reorganization*, at 25, *In re Boy Scouts of America*, Ch. 11 Case No. 20-10343 (Bankr. D. Del. Feb. 18, 2020), ECF No. 21.

[84] *Complaint* ¶¶ 8, 25, *Does 1–8 v. Boy Scouts of America*, Civ. A. No. 20-00017 (D.D.C. Jan. 6, 2020), ECF No. 3.

[85] *Motion for Entry of an Order Establishing a Deadline for Filing Proofs of Claim* ¶ 14, *In re Diocese of Rochester*, Ch. 11 Case No. 19-20905 (Bankr. W.D.N.Y. Jan. 17, 2020), ECF No. 376.

extension of the bar date.[86] The court denied the UCC's motion. Acknowledging that his decision "may be seen, by some, as unfair to yet-unknown victims of childhood sexual abuse," Judge Warren held that "[b]ecause potential late-filed claims can (and should) be dealt with on a case-by-case basis, under Rule 3003(c)(3), the answer is no."[87] He reiterated his "disinclination," previously expressed at a hearing on the debtor's bar-date motion while the bill to extend the CVA deadline, to have the proof of claim process become a "shifting target."[88] His opinion was influenced by the debtor's bar-date noticing-protocol, which he felt had its intended effect, and the high volume of claims filed after the COVID-19 pandemic hit Western New York, despite the UCC's argument that the pandemic would hinder claimants' ability to timely submit proofs of claim.[89]

The Official Committee of Unsecured Creditors of the Diocese of Buffalo, New York, objected for similar reasons to the debtor's motion to set a bar date six weeks before the extended deadline under the CVA. The UCC argued that many of the diocese's non-debtor parishes and other related parties likely are additional insureds under the diocese's insurance policies. "As such, there is strong a possibility that the insurers will not be willing to negotiate a meaningful settlement while additional insured claims may be filed against" those parties.[90] The UCC's objection in *Buffalo* was still pending as of this writing, and given that it is requesting the original bar date be coterminous with the extended deadline under the CVA rather than seeking an extension of the original bar date, the outcome may be different than in *Rochester*.

B. Unique Organizational Structures:

Because of the non-profit status of such entities and related social characteristics, many debtors with substantial sexual-abuse liabilities often have unique organizational structures, where related entities either are organized informally, formally but outside of generally applicable state law, or, purportedly, have alter ego/consolidation characteristics. This creates challenges in defining the precise scope and extent of the estate in such cases. For example, the BSA umbrella organization, a chapter 11 debtor, is affiliated with more than 260 independent "Local Councils" and 41,000 "Chartered Organizations."[91] Local Councils (all non-debtors) organize, operate, and promote scouting in a manner consistent with the BSA's mission across the United States. The BSA analogizes its relationship with Local Councils to "that of a franchisor and franchisee."[92] Chartered Organizations typically are local faith-based institutions, clubs, civic associations, educational institutions, businesses, or groups of citizens that sponsor the more than 81,000 scouting units throughout the country.

Likewise, in diocesan cases, a diocese or archdiocese is canonically separate from its parishes and the parishes often have substantial assets on their balance sheets (real property,

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[86] *Motion for an Order Extending the Deadline to File Sexual Abuse Claims*, *In re Diocese of Rochester*, Ch. 11 Case No. 19-20905 (Bankr. W.D.N.Y. July 13, 2020), ECF No. 658.

[87] *Decision and Order Denying Motion to Extend Claims Bar Date*, at 1–2, *In re Diocese of Rochester*, Ch. 11 Case No. 19-20905 (Bankr. W.D.N.Y. July 29, 2020), ECF No. 701.

[88] *Id.* at 3.

[89] *Id.* at 7.

[90] *Limited Objection to Motion for Entry of an Order Establishing a Deadline for Filing Proofs of Claim* ¶ 2, *In re Diocese of Buffalo*, Ch. 11 Case No. 20-10322 (Bankr. W.D.N.Y. July 24, 2020), ECF No. 475.

[91] *Disclosure Statement*, *In re Boy Scouts of America*, *supra*, at 18.

[92] *Id.* at 18.

restricted gifts, etc.). But in certain cases, the church and the diocesan authority have not mirrored canon law distinctions between parish and diocese under applicable state non-profit corporation law, creating a clearly separate organizational identity between diocese and parish. There is significant local variation in this regard.

These debtors are often proactive in addressing these issues and exposures in their bankruptcies. For example, the BSA requested entry of a preliminary injunction against actions involving sexual-abuse claims to the extent they are against the BSA (and not otherwise subject to the automatic stay) or certain related parties, including the Local Councils and the Chartered Organizations (to the extent the Chartered Organizations are co-defendants with the BSA or other related parties).[93] The BSA argued that the continued prosecution of such actions would deplete valuable estate assets otherwise distributable to creditors from shared insurance policies between the BSA and related parties. Although the BSA ultimately entered into a consent order granting it much of the relief it sought, the order permitted previously filed complaints to be served and allowed parties to request preservation discovery from aging or infirm witnesses as necessary to prevent evidence from becoming permanently unavailable.[94] The order also allowed the filing of complaints asserting sexual-abuse claims against the BSA related-parties.[95]

During the standstill period effected by the preliminary injunction, the Official Committee of Tort Claimants raised grievances relating to the sale of real property by the Local Councils in which it argued the BSA had contingent reversionary interests, which its fiduciary duties as debtor-in-possession obligated it to protect.[96] Thus, in connection with a second extension of the preliminary injunction, the BSA and the Local Councils entered into an Acknowledgment and Agreement requiring the Local Councils to provide reporting on the marketing, sale, transfer, encumbrance, or lease of real property (or sale or transfer of personal property) outside the ordinary course of business.[97] However, despite this agreement, in response to a motion by the BSA to extend the exclusive period for it to file and solicit acceptances of a plan, the TCC has accused the BSA of failing to take meaningful action to prevent the Local Councils from transferring those assets beyond the reach of creditors for inadequate consideration.[98]

Bankruptcies filed by diocesan and archdiocesan entities also frequently involve disputes regarding the transfer of assets by non-debtor related parties and related insurance issues. For example, the Official Committee of Unsecured Creditors of the Roman Catholic Church of the Archdiocese of Santa Fe has alleged that the debtor engaged in a fraudulent, pre-petition

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93 *Motion for a Preliminary Injunction*, *Boy Scouts of America v. A.A. (In re Boy Scouts of America)*, Ch. 11 Case No. 20-10343, Adv. No. 20-50527 (Bankr. D. Del. Feb. 18, 2020), ECF No. 6.

94 *Consent Order Granting Motion for a Preliminary Injunction* ¶ 6, *Boy Scouts of America v. A.A. (In re Boy Scouts of America)*, Ch. 11 Case No. 20-10343, Adv. No. 20-50527 (Bankr. D. Del. Mar. 30, 2020), ECF No. 54.

95 The BSA has apparently removed to federal court all sexual-abuse claims previously filed in state court against it and its Local Councils and Chartered Organizations, with the intent to transfer all such actions to the Delaware District Court. It believes this will improve the administration of its bankruptcy and assist all parties in their negotiations. *See Debtors' Informational Brief*, *In re Boy Scouts of America*, *supra*, at 9.

96 *Response to Motion for Entry of an Order Extending Exclusive Periods* ¶ 5, *In re Boy Scouts of America*, Ch. 11 Case No. 20-10343 (Bankr. D. Del. June 30, 2020), ECF No. 915.

97 *Second Stipulation and Agreed Order Modifying Consent Order Granting Motion for a Preliminary Injunction*, at 3–4, *Boy Scouts of America v. A.A. (In re Boy Scouts of America)*, Ch. 11 Case No. 20-10343, Adv. No. 20-50527 (Bankr. D. Del. June 9, 2020), ECF No. 77.

98 *Response to Motion for Order Extending Exclusive Periods*, *In re Boy Scouts of America*, *supra*, ¶ 8.

restructuring pursuant to which it incorporated several previously unincorporated parishes and transferred its real property and other assets into trusts for the benefit of those parishes, to put them beyond the reach of creditors.[99] Accordingly, the UCC moved for standing to file actions under §§ 544 and 548 to avoid the transfer of those assets into the trusts and for declaratory relief that they constitute property of the estate, arguing the debtor suffers from an "irreconcilable" conflict of interest as the "architect" of the fraudulent scheme.[100] In response, the debtor argued that, essentially, the parishes were already independent entities for which the archdiocese always held the property in trust:

> The Parishes were and are independent juridic persons under the Canon Law of the Roman Catholic Church ("Canon Law"). Each juridic person under Canon Law has its own property and operates as a separate entity. Under Canon Law, the Archbishop of the Archdiocese, under the "corporation sole" structure, holds title to the juridic person's property as a steward for each juridic person. Holding property in stewardship is legally equivalent to holding property in trust. As such, all property of each Parish was held in trust by the Archdiocese for each separate Parish.[101]

Thus, the debtor argues there was no fraudulent scheme, no transfer of assets, its creditors never had a right to reach the property, and there is no conflict. The incorporation of the parishes and formation of the trusts was simply "part of a decades-long continual process to improve the structure of the Archdiocese and the Parishes."[102] A final hearing on the UCC's motion for standing has been scheduled for August 28, 2020.

The Official Committee of Unsecured Creditors of the Archdiocese of Agana has also contested the debtor's assertion that more than $10 million of its assets are in resulting trusts for its affiliated parishes and schools, and therefore, are not property of the estate. Unlike the parishes identified in *Santa Fe*, the parishes in *Agana* are not separately incorporated from the archdiocese. Thus, the UCC has filed an adversary proceeding requesting a declaratory judgment that such assets are property of the estate and moved for summary judgment, arguing the parishes and schools "have no separate legal identity, operate under the Debtor's charter from a tax and licensing perspective, cannot be sued, hold no property, and operate under the Debtor's pervasive and thorough control."[103]

The Agana Archdiocese has disputed both the UCC's argument that its parishes have no separate existence from the archdiocese and its analogy between the parishes and operating divisions of a commercial, for-profit corporation. The debtor has argued that the parishes were unincorporated associations and the caselaw cited by the UCC holding that unincorporated

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[99] *Memorandum in Support of Motion for Authority to Commence Adversary Proceedings*, at 1–2, *In re Roman Catholic Church of the Archdiocese of Santa Fe*, Ch. 11 Case No. 18-13027 (Bankr. D.N.M. May 29, 2020), ECF No. 383.

[100] *Id.* at 3.

[101] *Objection to Motion for Authority to Commence Adversary Proceedings*, at 2, *In re Roman Catholic Church of the Archdiocese of Santa Fe*, Ch. 11 Case No. 18-13027 (Bankr. D.N.M. June 26, 2020), ECF No. 418.

[102] *Id.* at 4.

[103] *Memorandum in Support of Motion for Partial Summary Judgment*, at 4, *Official Comm. of Unsecured Creditors v. Archbishop of Agana (In re Archbishop of Agana)*, Ch. 11 Case No. 19-00010, Adv. No. 19-00001 (Bankr. D. Guam Dec. 7, 2019), ECF No. 10.

parishes and schools are not separate entities is distinguishable because, *inter alia*: (1) Guam statutes provide that the archbishop holds property in trust for its parishes and schools, (2) unincorporated associations may own land and may sue or be sued under Guam law, and (3) equity supported the extension of Ninth Circuit law recognizing the existence of resulting trusts, which had not yet been recognized under Guam law.[104] Thus, the debtor asserts that its parishes and schools held beneficial title to the assets under resulting trusts pursuant to "neutral-principles of law," rather than canonical law, and therefore the assets are not property of the estate. This adversary proceeding is ongoing and unresolved as of this writing.

C. Channeling Injunctions:

Plan channeling injunctions under Bankruptcy Code section 524(g) (the asbestos context) govern future claims and enable third-party releases. Section 524(g) is the only clear and express source of authority in the Code to force recoveries on future and similarly contingent claims against a debtor and related entities to a plan trust. But broad channeling injunctions have been issued in other mass-tort bankruptcies[105] under section 105(a) of the Bankruptcy Code and otherwise applicable law.[106] While the scope of channeling injunctions are not an evident, public issue yet in major opioid cases,[107] broad channeling injunctions have been ordered in sexual-abuse cases to manage present and future liabilities.[108] Whether a bankruptcy court will approve a suitably broad channeling injunction outside of the asbestos context typically depends on whether third-party releases are allowed in the court's jurisdiction, and if allowed in (usually) extraordinary circumstances, the requirements of the third-party release standard and related process/estate-release requirements. For example, in *Archdiocese of Saint Paul and Minnesota*, the court initially denied confirmation of the debtor's chapter 11 plan, even though it satisfied three out of four factors required for approval of third-party releases, because it was "overwhelmingly" rejected by the sexual-abuse victims class.[109]

In sexual-abuse cases, channeling injunctions do not necessarily define "future" claims as they have been commonly understood and defined in other contexts. Unlike claims in mass-tort

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[104] *See generally Memorandum Opposing Motion for Partial Summary Judgment*, *Official Comm. of Unsecured Creditors v. Archbishop of Agana (In re Archbishop of Agana)*, Ch. 11 Case No. 19-00010, Adv. No. 19-00001 (Bankr. D. Guam Feb. 1, 2020), ECF No. 34.

[105] *See, e.g.*, *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285 (2d Cir. 1992) (securities class action claims); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002) (silicone breast implant claims); *Menard-Sanford v. Mabey (In re A.H. Robbins Co.)*, 880 F.2d 694 (4th Cir. 1989) (Dalkon Shield birth control device claims).

[106] The scope of such non-statutory injunctions is a particularly fact intensive question as it relates to future demands and claims.

[107] However, Mallinckrodt Pharmaceuticals has signaled that it may in the future file a bankruptcy case to address its substantial opioid-related liabilities through a channeling injunction. *See Mallinckrodt Announces Agreement in Principle for Global Opioid Settlement and Associated Debt Refinancing Activities*, PR NEWSWIRE (Feb. 25, 2020), https://www.prnewswire.com/news-releases/mallinckrodt-announces-agreement-in-principle-for-global-opioid-settlement-and-associated-debt-refinancing-activities-301010427.html ("It is expected that Mallinckrodt plc would receive the benefit of a 'channeling injunction' that would provide for the release of all opioid-related claims that have been or could have been asserted against Mallinckrodt plc or its subsidiaries . . . .").

[108] *See, e.g.*, *Order Confirming Plan* ¶ F, *In re Archdiocese of Saint Paul and Minneapolis*, Ch. 11 Case No. 15-30125 (Bankr. D. Minn. Sept. 25, 2018), ECF No. 1278.

[109] *See Order Denying Confirmation of Debtor's Plan Dated and Filed on December 19, 2016*, *In re Archdiocese of Saint Paul and Minneapolis*, Ch. 11 Case No. 15-30125 (Bankr. D. Minn. Dec. 28, 2017), ECF No. 1170.

cases relating to asbestos and other environmental liabilities, claims in sexual-abuse cases are said by some to be primarily backward-looking. Such claims arguably are caused by abuse that has already occurred. While plaintiffs argue that there is broad latency in significant, springing harms resulting from sexual abuse, to illustrate the issue's complexity, the disclosure statement filed by the BSA states that a "future" claim should be understood in this mass-tort context as:

> [A] claim related to abuse that has already occurred but which is held by an individual who (a) has not attained 18 years of age, (b) suffers from "repressed memory" such that he or she is not aware that he or she holds an abuse claim, or (c) has not discovered the injury or the connection between the injury and the abuse and who could not in the exercise of reasonable care have discovered the injury or connection between the injury and the abuse.[110]

In *Boy Scouts of America*, the debtor intends to confirm a plan with a channeling injunction applicable to all known and unknown (i.e., future) tort claims for sexual abuse, subject to district court approval.[111] The BSA's plan would establish such an injunction in favor of certain of its affiliates, including its Local Councils and Chartered Organizations. If the Plan is confirmed, all sexual-abuse claims may be asserted only and exclusively against a Victims Compensation Trust. The trust would assume all liability of the "Protected Parties," including the BSA, certain Local Councils, certain Chartered Organizations, and other related parties, which would receive releases from the abuse claimants.[112] In exchange, the Protected Parties would transfer to the trust all of their interests in any policies providing rights, benefits, indemnity, or insurance coverage to the BSA for sexual-abuse liability, and certain other assets to be determined.[113] Like traditional channeling injunctions under section 524(g), the validity of this remedy, if confirmed by the Delaware Bankruptcy Court, will be closely related to the found efficacy and fairness of the trust's funding against such estimated "future" claims.

In *Agana*, the archdiocese has also filed a proposed chapter 11 plan providing for a channeling injunction and releases benefiting itself, its parishes and schools, settling insurers, and certain other related parties, as well as a supplemental injunction benefiting the settling insurers.[114] In exchange, the debtor is funding $7 million from the liquidation of its nonessential real property and cash, parishes are funding $1 million from the sale of their property, and insurers are funding $13 million.[115] These contributions will comprise the sole source of recoveries from which known and unknown tort claimants will be paid.

Other debtors (for example, the Diocese of Winona-Rochester and the Archdiocese of New Orleans) might also seek channeling injunctions in their bankruptcies. Whether these injunctions will be approved ultimately will depend on the constantly-evolving law regarding the permissibility of third-party releases in the jurisdictions where these cases are filed.

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[110] *Disclosure Statement*, *In re Boy Scouts of America*, *supra*, at 27 n.13 (emphasis in original).
[111] *Id.* at 52.
[112] *Id.* at 1–4, 37.
[113] *Id.* at 39.
[114] *Disclosure Statement for Chapter 11 Plan of Reorganization*, at 14–15, 23, *In re Archbishop of Agana*, Ch. 11 Case No. 19-00010 (Bankr. D. Guam Jan. 16, 2020), ECF No. 321.
[115] *Id.* at 14.

D. Claims Estimation:

Debtors with mass-tort liability relating to sexual abuse have been said to be better able to focus their attention on establishing claims-estimation procedures than debtors with mass-opioid liability, as victims of sexual abuse more cleanly fit into a single class (or relatively limited classes) of claimants/victims. In contrast, so far, there are more likely to be multiple, distinct classes of opioid claimants fighting over the allocation of estate proceeds in the latter line of cases.

Although the BSA filed a proposed chapter 11 plan early in its case, it is unclear what claims-estimation process the BSA intends to implement. While the plan provides that the bankruptcy court would retain jurisdiction to estimate any claim or class of claims during litigation relating to any claim objection, it also provides that the Victims Compensation Trust would be responsible for administering, processing, settling, resolving, liquidating, satisfying, and making distributions from its assets according to certain "Trust Distribution Procedures" and other trust documents.[116] None of those documents have been filed as of the writing of these materials. Thus, whether the bankruptcy court or the trust would be responsible for estimating sexual-abuse claims is unclear, as are the criteria that would be applied to estimate such claims and the appellate process available to the claimants.

Proposed claims estimation procedures have been filed in *Agana*.[117] Known and unknown tort claims will be reviewed by an "Abuse Claim Reviewer" according to certain "Trust Distribution Protocols" and other trust documents. Known tort claims will be paid on the effective date of the plan, while unknown tort claims will be paid over a six-year period on a point-based system. Each year, the trustee shall distribute no more than 10% of the remaining Unknown Tort Claims Reserve to all filed, allowed unknown claimants and no more than 4% to any single claimant. Annual distributions shall first be made to new claimants, with any additional available funds to thereafter be distributed to all claimants. On the sixth anniversary of the effective date, the reserve shall be dissolved an all remaining funds shall be distributed to holders of allowed unknown tort claims up to the maximum claim amount, with all remaining funds to be returned to the debtor.

The Abuse Claims Reviewer will assign a point-value to each tort claim pursuant to the evaluation factors set forth in the Trust Distribution Protocols (attached hereto as **Appendix B**). Broadly speaking, each claim will be allocated points based on the nature, circumstances, and impact of the alleged abuse, the claimants' previous contributions to the legal and factual development of claims against the archdiocese, and whether the claimant has a pending state court lawsuit related to the abuse against a Catholic entity; and the claim will be reduced by 33% if the abuser belonged to a religious order not formally affiliated with the archdiocese. After all known tort claims have been evaluated, the reviewer will assign a monetary value to each claim based on the claimant's pro rata share of the total amount of points assigned to all known tort claims. The same process will apply to unknown claims. The reviewer's determination of each claim will be final, unless the claimant timely requests reconsideration and pays a $500 fee. The claimant may submit additional evidence and argument in support of such request, and the reviewer's

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[116] *Disclosure Statement*, *In re Boy Scouts of America*, *supra*, at 38.

[117] *Chapter 11 Plan of Reorganization*, at 23–28, *In re Archbishop of Agana*, Ch. 11 Case No. 19-00010 (Bankr. D. Guam Jan. 16, 2020), ECF No. 322.

reconsideration will be final and not subject to any further reconsideration, review, or appeal by any party or court. Plan negotiations are ongoing.

Finally, based on the public record, it is unclear whether (and how) the BSA and the Archdiocese of Agana intend to treat claims on which they might be jointly liable. The archdiocese indicated in its Disclosure Statement that, of the 255 sexual-abuse claims filed against it as of the bar date, "approximately 140 implicate the Boy Scouts of America, and a substantial portion of unknown claims asserted against Agana in the future presumably would also implicate the BSA.[118] The availability of alternative sources of recovery could support a downward adjustment of the points assigned to these claims, or potentially a claim objection.

WILDFIRE CASES

The *PG&E Corporation* bankruptcy is among the most complex in United States history. It was filed in the wake of the devastating wildfires across Northern California in 2015, 2017, and 2018, which caused over one hundred deaths, destroyed homes and buildings, severely burned vast tracts of land, and inflicted untold suffering on tens of thousands of California residents. The debtors intended to use the proceedings to manage and administer thousands of claims of fire victims for wrongful death, personal injury, property damage, emotional distress, and punitive damages. Nearly 83,000 Fire Victim Claims have been filed against the debtors.[119]

A. Claims Estimation:

The debtors' confirmed plan provides for creation of a Fire Victim Trust that will assume liability for all Fire Victim Claims pursuant to a channeling injunction. The trust will be funded with $13.5 billion of assets (including $6.75 billion in cash and $6.75 billion in common stock of the reorganized debtors) as well as certain of the debtors' causes of action and rights under insurance policies.[120] The $13.5 billion amount was determined by settlement among the plan proponents and Tort Claimants Committee. The district court had initially accepted a recommendation by the bankruptcy court to withdraw the reference as to this issue, discussing with the parties "the use of settlements PG&E had agreed to in prior fires and other disasters as benchmarks for the wrongful death, personal injury, and property damages claims."[121] However, those proceedings were terminated after the parties reached the $13.5 billion settlement amount "based on the substantial body of data regarding these claims and prior settlements available to the parties," supplemented by economic expert analyses and other subject matter experts, including:

> [I]nformation submitted by wildfire claimants . . . substantial discovery from both the underlying state court proceedings . . . and the estimation proceedings before

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[118] *Disclosure Statement*, *In re Archbishop of Agana*, *supra*, at 20.

[119] *See Disclosure Statement for Debtors' and Shareholder Proponents' Joint Chapter 11 Plan of Reorganization*, at 24, *In re PG&E Corp.*, Ch. 11 Case No. 19-30088 (Bankr. N.D. Cal. Mar. 17, 2020), ECF No. 6353. "Fire Victim Claims" include "claims of individuals for personal injury, wrongful death, or property damage and claims of Governmental Units, arising out of the Butte Fire (2015), the North Bay Wildfires (2017), and the Camp Fire (2018) (other than Public Entities Wildfire Claims, Subrogation Wildfire Claims, and Subrogation Butte Fire Claims)." *See id.* at 19.

[120] *Id.* at 1–2.

[121] *Order Terminating Estimation Proceedings*, *In re PG&E Corp.*, Civ. A. No. 19-05257 (N.D. Cal. June 9, 2020), ECF No. 387.

> this Court, extensive historical settlement data from the Debtors' previous wildfire-related settlements, as well as a wide variety of public data (including insurance data) regarding the losses suffered by wildfire claimants. . . . [and] PG&E's estimates of potential losses reflected in the Debtor's financial accounting accruals.[122]

The settlement parties have emphasized that "[n]o party to these proceedings has agreed that the estimated value of the Fire Victim Claims is equal to a particular number, such as $13.5 billion." Rather, the settlement amount "provides a factual and evidentiary basis for [the district court] to estimate the Fire Victim Claims at that mix of consideration" because "it is not possible to reduce it to a precise legally binding number."[123]

The trust will be administered by a Fire Victim Trustee, Claims Administrator, and Fire Victim Trust Oversight Committee. The Claims Administrator, in conjunction with the Fire Victim Trustee, will determine the eligibility, amount, and allowance of each claim in accordance with the procedures set forth in the Claims Resolution Procedures (the "CRP") (attached hereto as **Appendix C**).[124] In their determination, they will implement a variety of methods, including consideration of publicly available information, expert analysis, and material submitted by claimants. The debtors have stated that "a small percentage of claimants may seek amounts large enough to impact the recovery of all remaining claimants in a capped fund. As a result, special consideration may be given to the treatment of those claims . . . to ensure that all other claimants receive fair and expeditious compensation."[125]

Certain parties objected to the CRP on the basis that they did not allow judicial review of a final determination by the Fire Victim Trustee. The court stated that "determination of any particular claim is governed by Section 502(b)" and that by objecting to the procedures before confirmation, the parties preserved their right to judicial review thereunder (thereby distinguishing the claims resolution procedures depriving claimants of judicial review in *Takata*, where no objections had been filed).[126] The court rejected cases cited by the Tort Claimants Committee using "streamlined claims resolution procedures," as "none of the cases submitted appear to include language as strict or binding as the CRP" or restricted claimants' ability to file suit if their claims are rejected. The court also rejected "speculation that millions if not billions of dollars of trust assets will be depleted" by allowing judicial review, stating that in light of the "highly detailed and sophisticated CRP . . . recourse to judicial review will likely be the exception rather than the rule."

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[122] *Joint Statement of the Debtors and the Official Committee of Tort Claimants*, *In re PG&E Corp.*, Civ. A. No. 19-05257 (N.D. Cal. May 26, 2020), ECF No. 378.

[123] *Id.*

[124] *Fire Victim Trust Agreement* ¶ 2.4(b), *In re PG&E Corp.*, Ch. 11 Case No. 19-30088 (Bankr. N.D. Cal. June 21, 2020), ECF No. 8057-1.

[125] *Disclosure Statement*, *In re PG&E Corp.*, *supra*, at 25.

[126] *Memorandum on Objection of Adventist Health, AT&T, Paradise Entities and Comcast to Trust Documents*, *In re PG&E Corp.*, Ch. 11 Case No. 19-30088 (Bankr. N.D. Cal. May 26, 2020), ECF No. 7597. In issuing its decision, the court noted that "[u]nder normal circumstances the court would take the time to explain in detail its reasoning behind the decisions summarized below. The exigencies of the current situation, however, and the press of business to prepare for and conduct the forthcoming confirmation trial, make that nearly impossible. Further, the Debtors, the TCC and the Objectors need to know the court's decisions promptly. Thus, this abbreviated ruling will have to suffice. If time permits, the court may follow up with a reasoned memorandum explaining its determinations in detail." *Id.*

Thus, the objecting parties were "entitled to their guaranteed right to a judicial determination of their specific claims if they do not agree with the Trustee" and the court directed the parties to agree on appropriate amendments to the CRP.

Ultimately, the parties agreed on a three-tiered appeal process.[127] First, a claimant can request reconsideration from the Claims Administrator and submit additional information and documents. Second, a decision on reconsideration can be appealed to a "neutral" and the claimant will have another opportunity to submit additional information and documents. The neutral will submit the determination on appeal to the Fire Victim Trustee, who will determine whether to accept, reject, or revise the determination. Finally, those claimants who timely objected to the Fire Victim Trust documents will be entitled to judicial review of the trustee's determination in a contested matter before the bankruptcy court or, to the extent the bankruptcy court determines the claim constitutes a personal injury tort or wrongful death claim and the claimant so elects, the district court. Following judicial review of a claim implicating a determination of damages inconsistent with other theories, facts, or issues of a similar type to the claim subject to judicial review, the Fire Victim Trustee has discretion to adjust the amount of other prior determinations (solely in an upward manner) to be consistent with the final judicial determination.

B. Public Benefit:

An overarching theme in *PG&E* is the debtors' commitment to the public benefit (a theme apparently adopted by the debtors in *Purdue*, as discussed above). The PG&E debtors and other plan proponents have stated that their plan will enable the debtors to "support California's clean energy goals and ensure that PG&E has access to sufficient resources to aggressively invest in capital improvements and wildfire mitigation and to provide safe and reliable service to its customers and communities."[128]

In furtherance thereof, the confirmation order provides that the debtors will make an initial contribution of approximately $4.8 billion and another initial annual contribution of approximately $193 million, to the Go-Forward Wildfire Fund in order to secure the participation therein of the reorganized debtors, who would be responsible for funding subsequent annual contributions.[129] The Go-Forward Wildlife Fund is "designed to support the creditworthiness of California electrical corporations and provide a mechanism to attract capital for investment in safe, clean, and reliable power for California at a reasonable cost to ratepayers."[130] Each of California's large investor-owned electric utility companies that are not currently subject to chapter 11 (Southern California Edison and San Diego Gas & Electric Company) has elected to participate in the Go-Forward Wildfire Fund. The debtors state that "[p]articipation in the Go-Forward Wildfire Fund is expected to have a material impact on the Reorganized Debtors' financial condition, results of operations, liquidity and cash flows."[131]

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[127] *See Fire Victim Trust Agreement*, *In re PG&E Corp.*, *supra*, Ex. 1 at 9–15.
[128] *Disclosure Statement*, *In re PG&E Corp.*, *supra*, at 2.
[129] *Order Confirming Debtors' and Shareholder Proponents' Joint Chapter 11 Plan of Reorganization* ¶ 21, *In re PG&E Corp.*, Ch. 11 Case No. 19-30088 (Bankr. N.D. Cal. June 20, 2020), ECF No. 8053.
[130] *Disclosure Statement*, *In re PG&E Corp.*, *supra*, at 3.
[131] *Id.* at 15.

The debtors also agreed to a Case Resolution Contingency Process through which they committed to abide by certain conditions, including (1) a limitation on the ability of the reorganized PG&E holding company to pay dividends over a period of time after emergence from chapter 11 until it has recognized $6.2 billion in profits, to be deployed as a capital investment or reduction in debt; (2) a commitment by the recognized PG&E utility company to apply for a 30-year, $7.5 billion securitization transaction with the California Public Utilities Commission, without the approval of which it cannot seek to recover any portion of the amounts paid on account of fire victims' claims under the plan through rate increases; (3) the application of cash flows generated by net operating losses resulting from the payment of claims under the plan to the securitization transaction; and (4) the terms of a contingent purchase option in favor of the state of California.[132] These commitments (in addition to other changes to the debtors' governance, operations and financial structure designed to prioritize safety and the appointment of an independent safety monitor when its court-appointed federal monitor expires) were necessary in order to gain support for the plan from California Governor Gavin Newsom.

[132] *Disclosure Statement Supplement*, at 3–5, *In re PG&E Corp.*, Ch. 11 Case No. 19-30088 (Bankr. N.D. Cal. Mar. 25, 2020), ECF No. 6483-1.

APPENDIX A

Insys Claims Analysis Protocol

INDIVIDUAL SUBSYS CLAIMANT CLAIMS CRITERIA[1]

§ 1. CLAIMS ADMINISTRATOR.

The Trust claims administrator[2] shall have the authority to determine the validity and valuation of any claim. Pursuant to that authority, the Trust claims administrator may investigate any claim, and may request information from any claimant to ensure compliance with the terms outlined in this document.

The Trust claims administrator shall be and is appointed as the successor of the Debtors and will retain all property, rights and privileges of the Debtors with respect to any claims administered by the Trust, including all medical, prescription, or business records of the Debtors, or in the Debtors' possession, custody or control, related to any claims administered under this Criteria. Prior to the Effective Date of the Plan, the Debtors shall compile all such records and transfer the same to the Trust claims administrator on the effective date.

§ 2. APPLICABILITY.

The claims at issue concern SUBSYS (fentanyl sublingual spray) an opioid agonist indicated for the management of breakthrough pain in cancer patients 18 years of age and older who are already receiving and tolerant to opioid therapy for their underlying persistent pain. Patients prescribed SUBSYS must remain on around-the-clock opioids when taking SUBSYS. This fentanyl cancer medication and its limited FDA approved use varies significantly from other manufactured, marketed and distributed opioids.

§ 3. INITIAL CLAIM VALIDITY REQUIREMENTS.

A claimant must demonstrate both of:

(a) The claimant or decedent received a prescription for Subsys, including any prescription for off-label use; and

(b) Injury from Subsys use – The claimant must demonstrate one or more of the following:

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[1] These claims procedures and the agreements reflected herein solely relate to the unique facts present in the Debtors' bankruptcy case and their drug Subsys. By agreement of the parties, to be so ordered by the Court, these criteria shall have no precedential impact or effect whatsoever and shall not be used by parties or counsel in any manner as such in any other litigation or proceeding of any kind involving any entity or individual outside of the Debtors' bankruptcy cases. The chemical composition of Subsys, the physical reactions to Subsys, and the FDA labeling and TIRF-Rems procedures associated with Subsys, as well as the financial aspects of the Insys bankruptcy case and its assets, all contribute to the parties willingness to make the compromise reflected herein and those factors are unlikely to exist in other matters.

[2] Acceptance of these Claims Criteria is contingent upon the selection of a Trust claims administrator that is acceptable to the SMT group.

1. Prescribed use of Subsys by the claimant for a period of 30 days or more;[3]

2. Addiction to Subsys;

3. The decedent's death was at least partially caused by a Subsys addiction, overdose or complication; or

4. The claimant sustained other bodily injury arising out of the claimant's use of Subsys.

§ 4. CLAIM VALIDITY EVIDENCE.

(a) A claimant shall demonstrate a qualifying prescription of Subsys as described in § 2(a) by submitting to the Trust claims administrator:

1. A copy of a Subsys prescription or pharmacy record issued in the name of the claimant or decedent;

2. A photograph of a prescription container clearly showing the name of the claimant or decedent thereon;

3. Medical records identifying a prescription of Subsys for the claimant or decedent; or

4. Medical or insurance billing records that reflect charges for Subsys administered to claimant or decedent.

(b) Alternatively, a claimant may demonstrate the existence of a Subsys prescription by use of a certification supplied by the debtor, its successors, or by a third party at the debtor's or its successors' request, indicating that TIRF REMS or similar prescription data otherwise available to the Debtor reflects that the claimant had at least one prescription for Subsys.

(c) A claimant may demonstrate a qualifying injury by submitting to the Trust claims administrator:

1. One or more prescriptions evidenced by the methods identified in § 2(b) for a period of and in amounts reflecting Subsys use of 30 days or more;[4]

[3] Evidence of a prescribed use of Subsys for 30 days or more will support an award of nominal damages. Such use will not, however, be presumed to be proof of any other specific bodily injury. Other bodily injury must be evidenced by appropriate specific evidence.

[4] Evidence of a prescribed use of Subsys for 30 days or more will support an award of nominal damages. Such use will not, however, be presumed to be proof of any other specific bodily injury. Other bodily injury must be evidenced by appropriate specific evidence.

2. A death certificate or similar official record identifying a cause of death as opioid overdose, complications arising out of opioid use, and/or drug interactions involving opioid use

3. Medical records identifying Subsys use as a cause of an injury or death;

4. A report by a qualified physician indicating that (i) he or she personally examined the claimant's medical records and/or the claimant, and (ii) based upon that review states to a reasonable medical probability that the claimant died or has an injury caused in part by a prescribed use of Subsys;

5. Documents supporting or establishing a claimant's addiction to Subsys; or

6. Any other credible evidence that tends to establish the existence of a qualifying injury, to be accepted or rejected at the Trust claims administrator's discretion.

(c) A claimant and their attorney must deliver a certification signed by both the claimant and their attorney attesting to the accuracy and truthfulness of the claimant's submission.

a. Such certification must include an attestation to the best of their knowledge that the claimant has provided all evidence, consistent with this procedure, of his or her use of other opioids, legal or illegal, prior to, during, of after his or her use of Subsys.

b. Such certification must include an attestation that no records or information that would reasonably be relevant to the valuation of the claim have been withheld.

§ 5. CLAIM VALUATION.

(a) The Trust claims administrator will determine the amount of any claim that has satisfied the initial claim validity requirements described in § 2. Such claim valuation shall be limited as described below. These limitations shall apply collectively to all claims that arise from a single individual's use of Subsys regardless of the number of claimants. Such allowed claims may include:

1. Actual present and future damages as described below in § 4(d), subject to any limitations on such amounts as provided herein and as would be applied under applicable law; and

2. Pain and suffering damages, as may be permitted under applicable law, and subject to the further limitations provided in § 2(b) or (c), as applicable.

(b) Wrongful death claims may include pain and suffering damages in an amount not to exceed $575,000 per claim.

(c) Claims that are not based upon a wrongful death claim may include pain and suffering damages in an amount set by the Trust claims administrator so the aggregate of all pain and suffering components of all non-wrongful death claims administered by the Trust that have satisfied the requirements of § 2 will not exceed an average of $195,000 per Subsys user.

(d) The claimant will provide the following information to the Trust claims administrator. The Trust claims administrator will consider, as he or she deems appropriate, the following non-exhaustive factors in deciding the value of any claim:

1. The amount of any medical expenses incurred due to injuries caused by the claimant or decedent's use of Subsys;

2. The duration of any medical, mental health, or rehabilitative treatment arising out of the claimant or decedent's use of Subsys;

3. The amount of any lost wages caused by the claimant or decedent's use of Subsys;

4. The amount of any funeral or burial expenses for the decedent, so long as the claimants' death was consistent with Section 2(b)(3) of this Procedure.

5. The claimant or decedent's age;

6. The claimant or decedent's employment history;

7. The claimant or decedent's medical history, including, specifically, the conditions that prompted any prescription for opioid use, including Subsys;

8. Whether the claimant or decedent had surviving spouse, parents, or dependents, and if so, the age of those dependents;

9. The nature of the claimant or decedent's bodily injury caused by the use of Subsys;[5]

10. The nature, extent and duration of a claimant's addiction to Subsys;

11. The nature of claimant's neurological, cardiovascular, or any other injury related to Subsys use (e.g., hypoxic brain injury);

12. The claimant or decedent's prior use usage of opioid analgesics, including the duration, quantity, dosage, and escalation of any opioid mediations;

[5] Evidence of a prescribed use of Subsys for 30 days or more will support an award of nominal damages. Such use will not, however, be presumed to be proof of any other specific bodily injury. Other bodily injury must be evidenced by appropriate specific evidence.

13. The claimant or decedent's prior usage of fentanyl products, including transmucosal immediate release fentanyl (TIRF) products (Actiq, Lazanda, Fentora, Abstral, Onsolis, Subsys), including the duration, quantity, dosage, and escalation of such medications;

14. The claimant or decedent's usage concurrent with Subsys of any around the clock and short acting opioid analgesics, including any other fentanyl or TIRF product;

15. The claimant or decedent's prior usage of any benzodiazepine concurrent with another opioid;

16. The claimant or decedent's history of prior substance abuse, including opioid use disorder, as reflected in the claimant or decedent's medical records;

17. The claimant or decedent's prior use of illicit drugs or of distribution or diversion of controlled dangerous substances;

18. Information that might suggest the existence of another source or condition that may have caused or contributed to any injuries;

19. The potential liability of other entities or persons for some or all of the claimant's injuries or damages of decedent's death and any compensation and recoveries, of any kind received from any person or entities connected to claimants' injuries; and

20. Information as to why the claimant did not pursue a claim against Insys substantially contemporaneous with any assertion of a claim related to opioid use against any other party if the claimant pursued other claims and did not assert a claim against Insys; and

21. Information as to any explanation as to why the claimant did not pursue a claim against Insys prior to the filing of the bankruptcy case if no such claim was filed prior to the Insys bankruptcy petition date.

(e) In no circumstance shall the Trust claims administrator assign any claim value for any punitive damages, statutory enhanced damages, attorney's fees or costs, or claims presentation-related expenses.

§ 6. CLAIM VALUATION EVIDENCE.

(a) To permit the Trust claims administrator to evaluate the value of a claim, a claimant shall submit if applicable, all of the following, non-exhaustive, types of documents, to the extent reasonably available and unless for good cause shown:

1. A properly completed claim form as established by the Trust claims administrator, consistent with the requirements herein;

2. A death certificate, if the claim is presented for a deceased individual;

3. Evidence of the claimant's condition at the time of the claimant's use of Subsys and evidence of the condition that prompted a prescription of Subsys;

4. Medical records that document, the claimant's injuries, and the nature and cost of treatments resulting from use of Subsys;

5. Documents reflecting payment of medical expenses, *e.g.*, receipts, hospital records, insurance records, any applicable funeral or burial expenses;

6. Copies of all claims, complaints, proofs of claim, notices, settlement documents, releases, recoveries, compensation received, or similar documents that claimant submits or entered into in respect of claims asserted against or to be asserted against any other entity or person arising from or related to claimant's or decedent's use of opioids or related to any of the injuries that underlie that claim presented to the Trust claims administrator. (To the extent that additional such documents or evidence becomes available to the claimant after his or her claim submission and before the claims administrator determines the amount of the claim, the claimant will supplement his or her claim with such additional evidence); and

7. Affidavits from claimant, heirs, or others with personal knowledge, describing the timing, length and circumstances of claimant or decedent's addiction to Subsys, injuries, or history of use.

(b) The claimant may submit such additional information as the claimant believes will assist the Trust claims administrator determine that appropriate amount of any claim that has satisfied the initial claim validity requirements.

(c) The Trust claims administrator may request additional information as reasonably necessary in the opinion of the Trust claims administrator to determine the amount of a claim.

(f) A claimant that has satisfied the initial claim validity requirements described in § 2 and who has submitted the required claim supporting evidence described in § 3 may request an opportunity – by personal appearance, telephone, or video conference – to make a presentation to the Trust claims administrator regarding the amount of a claimant's claim, and shall be granted, at least, one thirty (30) minute oral presentation.

(g) Representatives of the SMT group will be permitted to submit a memorandum to the Trust claims administrator highlighting scientific or medical background, research, or

literature that the SMT group believes may assist the Trust claims administrator generally to evaluate the claims asserted against Insys or to assist the Trust claims administrator to judge the causal connection between Subsys use and particular forms of injury. Such memorandum may cite generally available published materials. Such memorandum will not address any specific claim but will instead focus on the general experience of Subsys users. Such memorandum will not exceed 20 pages in length and will be made available by the Trust claims administrator to claimants. Claimants may submit as part of their claims submission any rebuttal material that they believe will assist the Trust claims administrator achieve a just conclusion.

§ 7. CLAIM VALUATION FACTORS.

(a) The following factors will tend to reduce the amount of an allowed claim below the maximum values established as to such claims:

1. Any illegal drug use prior to the prescribed use of an opioid for pain management;

2. The manifestation of particular injuries prior to the fist prescribed use of Subsys;

3. Forms of injury that, based on the medical research or literature, the Trust claim administrator concludes are more commonly associated with other opioids that were also utilized by the claimant prior to or concurrent with the claimant's first prescribed use of Subsys where the claimant has not demonstrated to the Trust claims administrator a likelihood of causal connection between the injury and the claimant's Subsys use;

4. Forms of injury that would have been expected given the nature of claimant's or decedent's pre-existing medical condition at the time of the first Subsys prescription, although the acceleration or exacerbation of any such conditions after prescription of Subsys may ameliorate any downward implication of any appropriate award; and

5. Any assertion by claimant in any other claims or pleadings that is inconsistent with claimant's contentions that Subsys was a significant contributor to any element of claimant's damages.

(b) The following factors will tend to increase the amount of an allowed claim closer to any maximum values established as to such claims:

1. The claimant's likely inability to recover material compensation from other potentially liable entities for the same injuries supporting claimants' asserted damages;

2. A substantial worsening of elements of injury or initial manifestation of injuries after the first prescribed use of Subsys;

3. Use of relatively high doses of Subsys; and

4. Indications that use of other opioid drugs with generally less serious side effects were successful in managing claimant's pain issues prior to the first prescribed use of Subsys;

(c) The following factors will generally not, alone, tend to increase or reduce the allowed amount of a claim:

1. The fact that the prescribing doctor has been accused of improper conduct with respect to opioid prescriptions where the circumstances do not clearly indicate some wrongful conduct by the claimant; and

2. The illegal use of opioids after a prescribed use;

APPENDIX B

Agana Trust Distribution Protocols

EXHIBIT 1

THE ARCHBISHOP OF AGAÑA
TRUST DISTRIBUTION PROTOCOLS

1. Definitions

1.1 Capitalized terms. Capitalized terms used in this Trust Distribution Protocols shall have the meanings given them in the Plan, the Trust Agreement or the Bankruptcy Code, unless otherwise defined herein, and such definitions are incorporated in this Trust Distribution Protocols by reference.

2. Purpose, Interpretation

2.1 Purpose. This Trust Distribution Protocols is designed to provide guidance to the Tort Claims Reviewer in determining the amount of each Tort Claim under the Plan by assigning to each such Claim a value pursuant to the Evaluation Factors below.

2.2 General Principles. As a general principle, this Trust Distribution Protocols intends to set out a procedure that provides substantially the same treatment to holders of similar Class 3 Claims. The range of values set forth in the Evaluation Factors below and the discretion given to the Tort Claims Reviewer to determine and to adjust the value to be assigned to a particular Class 3 Claim are intended to reflect the relative values of Class 3 Claims. Likewise, this Trust Distribution Protocols intends to set out a procedure that provides substantially the same treatment to holders of similar Class 4 Claims. As to Class 4 Claims, the Tort Claims Reviewer will determine values based on the maximum amount in the Unknown Tort Claim Reserve Fund which is reserved for Unknown Tort Claims, taking into consideration all possible additional claims that could be made up to the sixth anniversary of the effective date. The range of values set forth in the Evaluation Factors below and the discretion given to the Tort Claims Reviewer to determine and to adjust the value to be assigned to a particular Class 4 Claim are intended to reflect the relative values of Class 4 Claims.

2.3 Sole and Exclusive Method. The Evaluation Factors set forth below shall be the sole and exclusive method by which the holder of a Class 3 Claim may seek allowance and distribution of such Claim. Although the Evaluation Factors collectively comprise the methodology that must be applied in reviewing Claims, the Tort Claims Reviewer may, as indicated below, take into account considerations in addition to those identified herein when evaluating a Claim. The Evaluation Factors set forth below shall be the sole and exclusive method by which the holder of a Class 4 Claim may seek allowance and distribution of such Claim. Although the Evaluation Factors collectively comprise the methodology that must be applied in reviewing Claims, the Tort Claims Reviewer may, as indicated below, take into account considerations in addition to those identified herein when evaluating a Claim.

2.4 Interpretation. The terms of the Plan shall prevail if there is any discrepancy between the terms of the Plan and the terms of this Trust Distribution Protocols.

2.5 Confidentiality and Privilege. All information that the Tort Claims Reviewer receives from any source about any Tort Claimant shall be held in strict confidence and shall not be disclosed absent an Order of the Bankruptcy Court or the written consent of the Tort Claimant (or such Claimant's counsel of record). All information the Tort Claims Reviewer receives from any Tort Claimant (including from counsel to such Claimant) shall be subject to a mediation privilege and receipt of such information by the Tort Claims Reviewer shall not constitute a waiver of any attorney-client privilege or attorney work-product claim or any similar privilege or doctrine.

3. Tort Claims Reviewer

3.1 Designation. To be determined is the Tort Claims Reviewer, subject to an order of the Bankruptcy Court. The Tort Claims Reviewer shall conduct a review of each of the Tort Claims, according to the Evaluation Factors and other provisions contained in §§ 5 and 6 below, make determinations upon which individual monetary distributions will be made subject to the Plan and Confirmation Order.

4. Procedure

4.1 Allowance of a Tort Claim. A Tort Claim shall be allowed if the Tort Claims Reviewer determines the Tort Claimant proved his or her claim by a preponderance of the evidence. If necessary, the Tort Claims Reviewer can ask for additional information to make this determination. The Tort Claimant may refuse such a request at his or her own risk. If a Tort Claim is allowed, the Tort Claims Reviewer shall determine the amount of such Tort Claim by assigning such Tort Claim a value pursuant to the Evaluation Factors. The Tort Claims Reviewer may consider the credibility of the Tort Claimant and the facts alleged in support of the Claim and, in the Tort Claims Reviewer's sole discretion, reduce or deny the Tort Claim.

4.2 Supplemental Information. The Tort Claims Reviewer shall consider all of the facts and evidence presented by the Tort Claimant in the Class 3 claimant's filed proof of claim. Within fourteen (14) calendar days after confirmation of the Plan, Tort Claimants may submit supplemental information to the Tort Claims Reviewer in support of their Tort Claims. The Tort Claims Reviewer shall have the ability to request additional information from any Tort Claimant.

4.3 Determinations by the Tort Claims Reviewer. The Tort Claims Reviewer or Trustee shall notify each Tort Claimant in writing of the estimated monetary distribution based on the points awarded under § 5 below with respect to the Tort Claimant's claim, which may be greater or smaller than the actual monetary distribution to be received based on the outcome of any reconsideration claims. The Tort Claims Reviewer's determination shall be final unless the Tort Claimant makes a timely request

for the point award to be reconsidered by the Tort Claims Reviewer in accordance with § 4.4 below. The Tort Claimant shall not have a right to any other appeal of the Tort Claims Reviewer's point award. The Tort Claims Reviewer shall make final determinations as expeditiously as possible, while ensuring a full and fair review process for all Tort Claims.

4.4 Requests for Reconsideration. The Tort Claimant may request reconsideration by delivering a written request for reconsideration to the Tort Claims Reviewer within fourteen (14) calendar days after the date of mailing of the notice of the preliminary monetary distribution provided by the Tort Claims Reviewer under § 4.3 above. Each written request must be accompanied by a check for the reconsideration fee of five hundred dollars ($500). The Tort Claimant, with the request for reconsideration, may submit additional evidence and argument in support of such request. The Tort Claimant's monetary distribution amount may go up or down as a result of his or her request for reconsideration. The Tort Claims Reviewer shall have sole discretion to determine how to respond to the request for reconsideration. The Tort Claims Reviewer shall have the power to change the award if cause exists. The Tort Claims Reviewer's determination of such request for reconsideration shall be final and not subject to any further reconsideration, review or appeal by any party, including a court.

4.5 Deceased Abuse Survivor. The Tort Claims Reviewer shall review the claim of a deceased Tort Claimant without regard to the Tort Claimant's death, except that the Tort Claims Reviewer may require evidence that the person submitting the claim on behalf of the decedent is authorized to do so.

4.6 Payment. After all Class 3 Claims have been evaluated pursuant to the Evaluation Factors, the Trustee shall determine the dollar value for each Tort Claim based on the Class 3 claimant's pro rata share of the total points assigned to all Class 3 claimants and the available funds for distribution after accounting for necessary holdbacks including, but not limited to, Trust operating expenses. The Trustee shall then make payment to Class 3 Claimants in accordance with the Trustee's powers and duties under Section 3.l(h) of the Trust Agreement. After all Class 4 Claims have been evaluated pursuant to the Evaluation Factors, the Trustee shall determine the dollar value for each Tort Claim based on the Class 4 claimant's pro rata share of the total points assigned to all Class 4 claimants and the available funds in the Unknown Tort Claim Reserve Fund as determined by the Unknown Claims Representative. Claims that meet the definition of an Unknown Tort Claim pursuant to paragraph 2.114 (iv.) of the Plan and are not otherwise excused by paragraphs 2.114 (i.) through (iii.), inclusive, will receive the de minimis payment of $2,500.00 as sole compensation for their claim. The Trust shall then make payment to Class 4 Claimants in accordance with Sections 7.2 and 9.5 of the Plan.

4.7 Undeliverable Distributions. If, after the passage of 365 days of the Effective Date, the Trustee does not have signed copies of all required releases and forms, including the Claimant's refusal to sign or returned mail due to lack of current address, the funds allocated to the Claimant shall go back to the general corpus of the Trust and shall be available for pro rata distribution to the other Claimants.

5. Guidelines for Allocation for Abuse Survivor Claims

5.1 Evaluation Factors. Each Tort Claim will be evaluated by the Tort Claims Reviewer. Each Tort Claim will be assigned points according to the following system, and the points shall determine the amount of distribution to each Tort Claimant on a pro-rata basis ("Evaluation Factors"):

a. Nature of Abuse & Circumstances. A point value ranging from 0 to 50 should be allocated for this section. Considerations should include, but are not limited to, the following factors:

(1) The duration and/or frequency of the abuse.

(2) Type of abuse: e.g. penetration, attempted penetration, masturbation, oral sex, touching under the clothing, touching over the clothing, kissing, sexualized talk.

(3) Circumstances of abuse:

a. grooming behaviors including but not limited to special privileges, special activities, and attention, social relationship with parents, personal relationship with claimant, opportunity to experience sports or activities, isolation from others, use of alcohol or illicit drugs by abuser or claimant or use of or exposure to pornography;

b. coercion or threat or use of force or violence, stalking;

c. relationship of claimant to perpetrator including but not limited to whether claimant was a parishioner or student, held perpetrator in high regard, whether perpetrator was in position of trust, whether perpetrator had unsupervised access to claimant, and whether claimant valued relationship with perpetrator; and

d. location of abuse, including but not limited to isolated location, Tort Claimant's home, rectory, church, cabin, orphanage, boarding school, trip.

b. Impact of the Abuse. Overall, this category looks to how the abuse impacted the Tort Claimant. This includes how the abuse impacted the Tort Claimant's mental health, physical health, spiritual well-

being, inter- personal relationships, vocational capacity or success, academic capacity or success, and whether the abuse at issue resulted in legal difficulties for the Tort Claimant. Some of these considerations may include the below factors, but the below list is not intended to be exhaustive. A point value ranging from 0 to 50 should be allocated for this section.

The Tort Claims Reviewer should consider, along with any and all other relevant factors, whether the abuse at issue manifested, or otherwise led the claimant to experience, or engage in behaviors resulting from:

a. Mental Health Issues: This includes but is not limited to anxiety, depression, post-traumatic stress disorder, substance abuse, addiction, embarrassment, fear, flashbacks, nightmares, sleep issues, sleep disturbances, exaggerated startle response, boundary issues, self- destructive behaviors, guilt, grief, homophobia, hostility, humiliation, anger, isolation, hollowness, regret, shame, isolation, sexual addiction, sexual problems, sexual identity confusion, low self-esteem or self-image, bitterness, suicidal ideation and suicide attempts.

b. Physical Health Issues: This includes but is not limited to physical manifestations of emotional distress, gastrointestinal issues, headaches, high blood pressure, physical manifestations of anxiety, erectile dysfunction, heart palpitations, sexually-transmitted diseases, physical damage caused by acts of abuse, reproductive damage, self- cutting and other self-injurious behavior.

c. Spiritual Well-being: This includes but is not limited to loss of faith in God, loss of faith and trust in religion and spiritual distress.

d. Interpersonal Relationships: This includes but is not limited to problems with authority figures, hypervigilance, sexual problems, marital difficulties, problems with intimacy, lack of trust, isolation, betrayal, impaired relations, secrecy, social discreditation and isolation; damage to family relationships, and fear of children or parenting.

e. Vocational Capacity: This includes but is not limited to under and unemployment, difficulty with authority figures, difficulty changing and maintaining employment, feeling of unworthiness or guilt related to financial success. Academic Capacity: This includes but is not limited to school behavior problems.

f. Legal difficulties: This includes but is not limited to criminal difficulties, bankruptcy, fraud.

c. **Claimant Involvement.** The Tort Claims Reviewer shall consider that all Claimants have benefited from the work and cost incurred by those Claimants who have previously asserted claims against the Archbishop and have participated in the legal and factual development of claims against the Archbishop. A point value ranging from 0 to 15 should be allocated for this section. The Tort Claim Review should consider factors including but not limited to whether the Claimant has filed a lawsuit; whether the Claimant and/or the Claimant's family has been subject to a deposition, mediation or interview; whether the Claimant has participated on the committee representing survivors; and whether the Claimant participated in publicizing the issue of clergy sex abuse which has benefitted all claimants.

In addition to the points available in Section 5.1, the Tort Claims Reviewer may, in his discretion, further increase an award to an individual Tort Claimant based on the Tort Claimant's unique and substantial contribution to the development of legal and factual claims against the Archbishop. Specifically, the Tort Claims Reviewer may award increased compensation to a Tort Claimant who has succeeded in obtaining a favorable verdict against the Archbishop at trial. While the Tort Claims Reviewer has broad discretion to increase an award under this provision, in no instance may a Tort Claimant receive more than four (4) times the average monetary payment awarded to Class 3 Claimants.

d. **Pending Lawsuit.** If the Tort Claimant has a pending state court lawsuit related to the abuse against a Catholic Entity, the Tort Claims Reviewer shall award the Tort Claimant an additional 30 points.

6. Tort Claim Provisions. The following provisions shall apply to all Tort Claims:

6.1 Reduction for Payments from Order. If the Tort Claimant's abuser(s) belonged to a religious order, the Tort Claimant's final monetary distribution shall be

reduced by thirty-three percent (33%). If the reduction result is not a whole number, the Tort Claims Reviewer should round up to the nearest whole number.

6.2 Further Reduction. If a Tort Claimant is also a clergy abuser in another allowed Tort Claim, then his points will be reduced by the number of points allocated to his victim(s).

APPENDIX C

PG&E Claims Resolution Procedures

FIRE VICTIM CLAIMS RESOLUTION PROCEDURES

PREAMBLE

The goal of the Fire Victim Trust[1] is to provide an efficient process to fairly compensate the holders of timely filed Fire Victim Claims (respectively, "**Claimants**" and "**Claims**") in an equitable manner and on a *pro rata* basis consistent with the terms of the Trust Documents, the Plan, the Confirmation Order and California and federal law. These Fire Victim Claims Resolution Procedures ("**CRP**") apply to all Claims, provided that, any Claim that has been liquidated pursuant to a settlement agreement approved by the Bankruptcy Court or is the subject of a Final Judicial Determination shall not be subject to further determination under the CRP. The Claims Administrator shall implement and administer the CRP in consultation with the Trustee, Claims Processor, Neutrals, and Trust Professionals with the goal of securing the just, speedy, and cost-efficient determination of every Claim. Those entrusted with the consideration and determination of Claims shall treat all Claimants with abiding respect and shall strive to balance the prudent stewardship of the Trust with care in its administration, allocation, and distribution.

The speed of any distribution in a program involving thousands of claimants relies on multiple variables impacting administrative expediency. To achieve maximum fairness and efficiency, the CRP is founded on the following principles:

1. Objective eligibility criteria;

2. Clear and reliable proof requirements;

3. Administrative transparency;

4. Rigorous review processes that generate consistent outcomes regardless of the asserted amount of the Claim; and

5. Independence of the Trustee, Claims Administrator, Claims Processor, Neutrals, Appeals Officer and Trust Professionals.

The Trustee and Claims Administrator will consult with the Claims Processor and other Trust Professionals to develop claims valuation processes that result in fair and reasonable compensation of eligible Claims in accordance with the Trust Documents, the Plan and the Confirmation Order.

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[1] All capitalized terms not otherwise defined herein shall have their respective meanings as set forth in the PG&E Fire Victim Trust Agreement (the "**Trust Agreement**") and the Debtors' and Shareholder Proponents' Joint Chapter 11 Plan of Reorganization dated June 19, 2020, as it may be further modified, amended, or supplemented from time to time and, together with all exhibits and schedules thereto, the "**Plan**"), as applicable.

I. CLAIMANT ELIGIBILITY

To be eligible to receive compensation from the Trust, a Claimant must: (1) have a Claim related to a Fire; (2) have timely filed a Proof of Claim; and (3) submit supporting documentation as outlined in Section II of this CRP or as required by the Claims Administrator ("**Supporting Documents**"). Upon submission of the Supporting Documents, the Trust will review each Claim and apply California law or, if applicable, other non-bankruptcy law to determine the Approved Amount of the Claim, including all recoverable damages and costs, whether or not identified or enumerated in Article II hereof.

A. Included Fires. The Trust is established to administer Claims related to the fires identified in Exhibit 1 (each a "**Fire**" and collectively the "**Fires**"). Any claims unrelated to the Fires are ineligible for payment by the Trust and, pursuant to the process described herein, shall be held to be ineligible on a final basis. Solely for the purposes of claims determination, including assertion of defenses, in accordance with the CRP, including Section IX hereof, PG&E's negligence and/or equipment is deemed to be a substantial factor in causing all Fires, provided that, (i) nothing herein or in any of the Trust Documents, Plan or Confirmation Order shall be deemed to require the Trustee to concede that PG&E was negligent or that its negligence and/or equipment is deemed to be a substantial factor in causing all Fires with respect to the Assigned Rights and Causes of Action, and (ii) except as otherwise provided in the Trust Documents, the Plan and the Confirmation Order, the Trustee shall have the right to assert all defenses that the Debtors have or would have had under applicable law to all Fire Victim Claims, provided, however, that (A) the Trust's and Trustee's right to assert the defenses of comparative fault and/or comparative negligence with respect to a Claimant shall be limited to the determination of the amount of that Claimant's Claims and for no other purpose (including the determination of the amount of any other Claimant's Claims), (B) the Trust's rights and defenses (except as otherwise expressly set forth in this subsection (ii)(A) and (ii)(C)) shall not include claims that may be asserted by the Debtors or Reorganized Debtors by way of setoff, recoupment, counterclaim, or cross claim and (C) the Trustee may raise and assert Assigned Rights and Causes of Action in defense of a Claim. Any holder of a Fire Victim Claim shall be permitted to assert any defense to Assigned Rights and Causes of Action that such holder would have had under applicable law, if the Debtors, as opposed to the Trust, were asserting the Assigned Rights and Causes of Action.

B. Proof of Claim. All Claimants must have filed a Proof of Claim for their Claims or those of their family in the Chapter 11 Cases on or before December 31, 2019, and as amended, which was the extended Bar Date for Fire Claimants. Claims that were not timely filed in the Chapter 11 Cases are ineligible for payment by the Trust, unless the Claimant (a) obtains relief from the Bankruptcy Court to file a late Claim, and (b) within 30 days after the Bankruptcy Court order allowing such late filing (i) files the Claim in the Chapter 11 Cases and (ii) submits such Claim to the Trust. Claims that have been disallowed or that have been withdrawn from the Claims Register in the Chapter 11 Cases are ineligible for payment by the Trust.

C. Supporting Documents. Section II sets forth each type of Claim ("**Claim Type**") the Trust will consider and the Supporting Documents that may be submitted for each. In addition to the Supporting Documents outlined in Section II, Claimants will be required to submit a Claims Questionnaire, as explained in Section V.

II. CLAIM TYPES AND SUPPORTING DOCUMENTS

The Trust will use all information that assists in objectively valuing Claims and alleviates the burden on Claimants. This includes, but is not limited to, data from a Claimant's (a) Proof of Claim Form; (b) Wildfire Assistance Program Claim Form; (c) Damages Questionnaire established under Case Management Order 5 in the California North Bay Fire Cases (JCCP 4955); and (d) other reasonably ascertainable and reliable information. Claimants may be required to submit additional facts and documents to support their Claims for each of the following Claim Types:

A. Real Property.

1. ***Description of Real Property Claim.*** Real Property Claims include Claims for damage to structures on residential or commercial real property, landscaping, forestry, and other real property improvements (*e.g.*, hardscape, fencing, retaining walls, pools, and solar panels) as a result of the Fires. Real Property damages may be measured in one of two ways: (1) the loss in fair market value to the property ("**Diminution in Value**"); or (2) the reasonable costs to rebuild or repair the property ("**Cost of Repair**"). Whether Diminution in Value or Cost of Repair is awarded will depend on the facts of each Claim.

(a) ***Diminution in Value.*** Diminution in Value will be calculated by subtracting the fair market value of the property immediately after the Fire from the fair market value of the property immediately before the Fire

(b) ***Cost of Repair.*** The reasonable costs to rebuild or repair the property will be determined based on: (1) the use of the structure(s) and other improvement(s); (2) the extent of damage to the structure(s); (e.g., burn damage versus smoke and soot damage); (3) the square footage of structure(s); (4) the geographic location of the property; (5) the size of the vegetation on the property immediately before the Fire; (6) the extent of damage to vegetation; (7) the type of vegetation damaged; and (8) the fair market value of the property immediately before the Fire. In addition, the Claimant may claim the value of trees lost.

(c) ***Consequential Damages.*** Claimants also may make a claim for other reasonably foreseeable economic losses directly caused by destruction of or damage to real property.

2. ***Types of Supporting Documents.*** Claimants may provide the following documents to support a Real Property Claim:

(a) Verification of ownership;
(b) Appraisals;
(c) Tax records;
(d) Purchase records;
(e) Mortgage or loan documentation showing the pre-Fire condition or value of the property;
(f) Pre-Fire and post-Fire photos or videos of the structures (interior or exterior) or other damaged areas of the property;
(g) Architectural or engineering drawings;
(h) Permits;
(i) Contractor rebuild or repair estimates or invoices;
(j) Arborist reports, timber surveys, or documents relating to landscaping; and
(k) Other supporting documents within the Claimant's possession.

B. Personal Property.

1. ***Description of Personal Property Claim.*** Personal Property Claims include Claims for loss of or damages to personal property, such as household items (*e.g.*, clothes, furniture, or tools) and automobiles, as a result of the Fires.

2. ***Types of Supporting Documents.*** Claimants may provide the following documents to support a Personal Property Claim:

(a) List of items destroyed or damaged in the residency;
(b) Proofs of purchase;
(c) Pre-Fire and post-Fire photos;
(d) Appraisals; and
(e) Other supporting documents within the Claimant's possession.

C. Personal Income Loss.

1. ***Description of Personal Income Loss Claim.*** Personal Income Loss Claims include Claims of individuals who lost income as a result of the Fires, to the extent permitted by California law.

2. ***Loss of Rental Income.*** Personal Income Loss Claims also include loss of income from rental of a damaged or destroyed property.

3. ***Types of Supporting Documents.*** Claimants may provide the following documents to support a Personal Income Loss Claim:

(a) Tax returns, including all schedules and attachments;
(b) W-2 Forms;
(c) 1099 Forms;
(d) Lease agreements or canceled rent checks;
(e) Bank account statements identifying earnings;
(f) Paycheck stubs or payroll records; and
(g) Other supporting documents within the Claimant's possession.

D. Business Loss.

1. ***Description of Business Loss Claim.*** Business Loss Claims include Claims for economic losses suffered by a business as a result of the Fires, including loss of business property or inventory used to conduct business and lost profits or revenue.

2. ***Types of Supporting Documents.*** Claimants may provide the following documents to support a Business Loss Claim:

(a) Description of the business, including its mission statement;
(b) Tax returns, including all schedules or attachments;
(c) Financial statements, including profit and loss statements;
(d) Articles of Incorporation, bylaws, shareholder lists, or partnership or limited partnership agreements;
(e) Leases, deeds, titles, or other documents identifying the property owned or occupied by the business;
(f) Canceled contracts;
(g) Photos, videos, or other documentary evidence of fire damage to the Claimant's home or business; and
(h) Other supporting documents within the Claimant's possession.

E. Other Out-of-Pocket Expenses.

1. ***Description of Other Out-of-Pocket Loss Claim.*** Other Out-of-Pocket Loss Claims include Claims for out-of-pocket expenses that are not considered in any other Claim Type. These may include additional living expenses, medical and counseling expenses, and other out-of-pocket expenses as a result of the Fires.

2. ***Types of Supporting Documents.*** Claimants may provide the following documents to support an Other Out-of-Pocket Loss Claim:

(a) Documentation supporting a claim for additional living expenses;
(b) Medical bills;
(c) Counseling bills; and
(d) Other supporting documents within the Claimant's possession.

F. Wrongful Death and Personal Injury.

1. ***Description of Wrongful Death and Personal Injury Claim.*** Wrongful Death and Personal Injury Claims include Claims relating to individuals who died or suffered personal injury as a result of the Fires ("**PI/WD Claims**"). The Trustee and Claims Administrator will devise procedures ensuring a streamlined and sensitive process providing Claimants and their family members the dignity that is critical to successfully resolving Claims relating to these extraordinary losses.

2. ***Types of Supporting Documents.*** Claimants may provide medical records and other documents supporting a Wrongful Death or Personal Injury Claim, as well as documents supporting a Claim for loss of relationship, love, support, and companionship.

G. Emotional Distress.

1. ***Description of Emotional Distress Claim.*** Emotional Distress Claims include claims for emotional distress the claimant suffered as a result of the Fires, to the extent permitted by California law.

2. ***Types of Supporting Documents*.** Claimants may provide the following documents to support an Emotional Distress Claim:

(a) A written narrative or an audio or video recording detailing the Claimant's evacuation and impact of the Fire on the Claimant and his or her family, including impact related to the loss of property and any sentimental items in the home;
(b) Texts, emails, or social media content the Claimant created during the evacuation;
(c) Photos or videos taken during the evacuation;
(d) Pre-Fire and post-Fire photos and videos of the Claimant's property;
(e) Records describing bodily injury or mental health counseling or treatment;
(f) Documentation of medical and counseling expenses; and
(g) Other supporting documents in the Claimant's possession.

III. OTHER DAMAGES

The Trustee and Claims Administrator will devise procedures to evaluate any additional categories of recoverable damages.

IV. CLAIMS SUBMISSION

The Claims Processor will maintain a secure, web-based portal (the "**Portal**") for Claimants to submit Claims Questionnaires, Supporting Documents, Releases, and any other relevant information or documents. After submitting a Claim, Claimants will be able to use the

Portal check their Claim status, receive and respond to determination notices, submit supplementary materials, and update contact information and other demographic information, if necessary.

V. CLAIMS QUESTIONNAIRE

In addition to the Claim-specific Supporting Documents identified in Section II, the Claims Administrator will require Claimants to complete a Claims Questionnaire that provides sufficient information to: (1) verify the Claimant's identity; (2) identify and support the claimed damages; and (3) demonstrate the Claimant's authority to assert the Claims.

Individual Claimants may submit Claims Questionnaires by household. The Claims Processor will pre-populate Claims Questionnaires with information already in its possession, including but not limited to data from a Claimant's (a) Bankruptcy Claim Proof of Claim Form; (b) Wildfire Assistance Program Claim Form; (c) Damages Questionnaire established under Case Management Order 5 in the California North Bay Fire Cases (JCCP 4955); and (d) information that is otherwise reasonably ascertainable and reliable.

The Claims Administrator shall obtain insurance claims files ("**Insurance Claims Files**") from the relevant insurers and store them on the Portal where they shall be made available to relevant Claimants and their attorneys for download, review and response over a thirty (30) day period. Such responses may include: (1) approving the ability of the Claims Administrator and Trust professionals to access the Insurance Claims Files applicable to a Claimant; (2) redacting portions of the Insurance Claims Files applicable to a Claimant; and/or (3) contesting redactions applied to Insurance Claims Files by insurers or objecting to the Insurance Claims Files production, which will prevent the use of the Insurance Claims Files or specific portions thereof in the claims process. The Plan does not absolve the insurance carriers of their duty to fulfill their coverage obligations under their policies of insurance with a Claimant.

VI. RELEASES

Prior to making each distribution to a Claimant on account of an Approved Fire Victim Claim, the Trust will require the Claimant to execute a release in substantially the same form and content as the (i) Claimant Release and Indemnification in Connection With the Fire Victim Trust Awards or (ii) Entity Claimant Release and Indemnification in Connection With the Fire Victim Trust Awards, attached to the Trust Agreement as **Exhibits 4A and 4B** (each, a "**Claimant Release**" and together the "**Claimant Releases**").[2] In addition, pursuant to and subject to Section 4.25(f)(ii) of the Plan and the Confirmation Order, and except with respect to any settlement or other agreement regarding the Fire Victim Claims asserted by Adventist Health System/West and Feather River Hospital d/b/a Adventist Health Feather River, the Trust shall require all Claimants who hold Approved Fire Victim Claims to execute a release in substantially the same form and content as the Mutual Made Whole Release attached to the Trust Agreement as **Exhibit 5**.

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[2] In accordance with the *Order on Remaining Objection of California State Agencies and the United States of America Regarding Proposed Government Entity Release* [Docket No. 7973] the governmental entities that were the subject of such Order shall not be required to execute a Claimant Release in connection with receiving distributions from the Trust.

By signing a Claimant Release, the Claimant will agree to release, through the date on which the Claimant receives the distribution on account of which the Claimant Release is signed, the Trust, the Trustee, Delaware Trustee, TOC, Claims Administrator, Special Master and each of their respective predecessors, successors, assigns, assignors, representatives, members, officers, employees, agents, consultants, lawyers, advisors, professionals, trustees, insurers, beneficiaries, administrators, and any natural, legal, or juridical person or entity acting on behalf of or having liability in respect of the Trust, the Trustee, Delaware Trustee, TOC, Claims Administrator or Special Master (the "**Trust Released Parties**") from any and all past, present and future claims, counterclaims, actions, rights or causes of action, liabilities, suits, demands, damages, losses, payments, judgments, debts, dues, sums of money, costs and expenses (including, without limitation, attorneys' fees and costs), accounts, reckonings, bills, covenants, contracts, controversies, agreements, obligations, or promises, in law or in equity, contingent or non-contingent, known or unknown, suspected or unsuspected, foreseen or unforeseen, matured or unmatured, accrued or unaccrued, liquidated or unliquidated, whether direct, representative, class or individual in nature, in any forum that an applicant had, have, or may have in the future arising from, relating to, resulting from or in any way connected to, in whole or in part, the discharge of the Trust Released Parties' duties and responsibilities under the Retention Order, the Trust Agreement, including any agreement, document, instrument or certification contemplated by the Trust Agreement, the CRP, the Plan, the formulation, preparation, negotiation, execution or consummation of the Trust Agreement, the CRP and the Plan, and any and all other orders of the District Court or Bankruptcy Court relating to the Trust Released Parties and/or their duties and responsibilities.

The Claimant Release will also require the Claimant to (i) acknowledge and agree that the Claimant remains solely responsible for resolving all open Government Payors'[3] and Non-Government Payors' liens, rights of reimbursement, and other claims (collectively, "**Liens and Other Claims**"); (ii) use best efforts to resolve all known Liens and Other Claims; (iii) agree to indemnify and hold harmless the Trust in connection with all known Liens and Other Claims and any future Liens and Other Claims; (iv) agree that the Trust will not be liable for any act, or failure to act, of the lien resolution administrator retained in connection with the Fire Victim Trust; and (v) assign the Trust the right to pursue the 2015 Insurance Rights, if any, and the Claimant Insurance Rights (as defined in the Trust Agreement), if applicable, for the full value of the Fire Victim Claim.

VII. NOTICE OF CLAIMS DETERMINATION

A. Claims Determination. The CRP will govern the process by which each Claim is reviewed, including determining whether a Claim is eligible or ineligible for payment and, if eligible, the amount approved for payment (the "**Claims Determination**"). After the Trust has fully evaluated a Claim, the Claims Processor will issue a notice to the Claimant explaining the review result ("**Determination Notice**"). If the Claim has been approved and is eligible for payment (an "**Approved Claim**"), then the notice will include the specific amount that the Trust

[3] "**Governmental Payor**" means any federal, state, or other governmental body, agency, department, plan, program, or entity that administers, funds, pays, contracts for, or provides medical items, services, and/or prescription drugs, including, but not limited to, the Medicare Program, the Medicaid Program, Tricare, the Department of Veterans Affairs, and the Department of Indian Health Services.

has approved (the "**Approved Claim Amount**"). If the Claimant accepts the Approved Claim Amount, it becomes the final determination of the Claim (the "**Final Determination**"). If the Claim is missing documents or information required for the Trust to fully evaluate the Claim (a "**Deficient Claim**"), the notice will explain what is required and provide a timeline within which the Claimant may resolve the deficiencies. If the Claim is ineligible for payment from the Trust pursuant to the CRP, the notice will explain the reason(s) that the Claim is ineligible.

B. Application of the Payment Percentage.

1. ***Payment Upon Final Determination.*** Only after the Trustee has established an Initial Payment Percentage in accordance with Section VII.B.2 and the Trust Agreement, then once there is a Final Determination of a Claim pursuant to Section II.B., VII.A, VIII.A, VIII.C, IX.B.1 or IX.C.1 hereof, the Claimant will receive a *pro rata* share of the Final Determination based on a Payment Percentage described in Section VII.B.2 & VII.B.3. For the purpose of payment by the Trust, a Final Judicial Determination (as defined in Section IX.B.1 hereof) shall constitute a Final Determination.

2. ***Initial Payment Percentage.*** An Initial Payment Percentage shall be set after the Trust is established by the Trustee in accordance with the Trust Agreement. The Initial Payment Percentage shall apply to **all** Final Determinations except as provided in Section VII.B.3 with respect to supplemental payments in the event the Initial Payment Percentage is changed.

3. ***Supplemental Payment Percentage.*** When the Trustee determines that the then-current estimates of the Trust's assets and its liabilities, as well as then-estimated value of then-pending Claims, warrant additional distributions on account of Final Determinations, the Trustee shall set a Supplemental Payment Percentage in accordance with the Trust Agreement. Such Supplemental Payment Percentage shall be applied to all Final Determinations that became final prior to the establishment of such Supplemental Payment Percentage. Claimants whose Claim becomes a Final Determination after a Supplemental Payment Percentage is set shall receive an initial distribution equal to the aggregate of the Initial Payment Percentage and all prior Supplemental Payment Percentages set by the Trustee.

VIII. DISPUTE RESOLUTION

Claimants dissatisfied with their Claims Determination will have the opportunity to dispute the determination and to provide supplemental information or documents to support their dispute. The Trust will implement the following three-tiered process:

A. Reconsideration. If a Claimant contests a Claims Determination, the Claims Administrator and Claims Processor will review the Claim again and will consider any newly submitted information and documents and all previously submitted information. Taking into account all information before them, the Claims Administrator and Claims Processor will determine the amount in which the Claim should be approved, and the Claims Processor will issue a Reconsideration Determination. The Claimant may accept the Reconsideration Determination or may appeal to a Neutral. If accepted by the Claimant, the Reconsideration Determination becomes the Final Determination of the Claim.

B. Appeal. If a Claimant appeals a Reconsideration Determination, the Claimant shall submit a Notice of Appeal to the Claims Administrator. The Claims Administrator shall submit the Claim to the Appeals Officer[4] for further consideration *de novo* in accordance with the procedure set forth herein.

1. The Claims Administrator shall submit the following to the Appeals Officer and the Claimant:

(a) The Notice of Appeal;
(b) The record from the Claims Administrator and Claims Processor resulting in the Claims Determination;
(c) The record from the Claims Administrator and Claims Processor resulting in the Reconsideration Determination;

2. Claimant may submit to the Appeals Officer and the Claims Administrator the following:

(a) Any additional information and/or documents not included in the record from either the Claims Determination or the Reconsideration Determination;
(b) A brief not to exceed twenty (20) pages setting forth the issues on appeal and the basis for appeal as to each such issue.

3. Claimant shall designate the type of review sought:

(a) Document review only;
(b) Document review followed by telephonic hearing;
(c) Document review followed by virtual hearing
(d) Document review followed by in-person hearing.

4. The Appeals Officer shall determine whether the appeal shall be considered by a Neutral from the Complex Panel. The Claimant may request that the appeal be considered by a Neutral from the Complex Panel, subject to a determination by the Appeals Officer.

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[4] The **Appeals Officer** shall be an individual appointed for the sole purpose of determining whether an appeal from a Determination of the Claims Administrator should be heard by a Neutral from the General Panel or by a Neutral from the Complex Panel. Such determination shall be at the sole and exclusive discretion of the Appeals Officer, who shall at all times remain independent of the Trustee and the Claims Administrator.

(a) The determination of whether an appeal should be considered by a Neutral from the Complex Panel shall be made by the Appeals Officer in his sole discretion.

(b) The Appeals Officer may consider the type, amount and complexity of a Claim and the type of review requested when determining whether an appeal should be considered by a Neutral from the Complex Panel the Claim

(c) The Appeals Officer's determination of whether an appeal should be considered by a Neutral from the Complex Panel shall be final, binding and non-appealable and is not subject to review by any Court.

5. A Neutral shall be chosen at random from the General Panel or from the Complex Panel, as determined by the Appeals Officer, to consider the Claim *de novo* in accordance with the type of review requested by Claimant.

6. The Neutral shall consider the appeal based on all items submitted by Claimant through the close of the review and/or hearing.

7. Within thirty (30) days of the close of the hearing, the Neutral shall issue an Appeals Determination, increasing, decreasing, or confirming the Reconsideration Determination.

C. Trustee Determination. The Neutral shall submit to the Trustee the Appeals Determination, increasing, decreasing, or confirming the Reconsideration Determination. The Trustee may accept, reject, or revise the Appeals Determination to ensure that all Claims are treated equitably and then will issue a Trustee Determination to the Claimant. If an Eligible Claimant (as defined in Section IX.B, below) rejects the Trustee Determination but fails to file an election notice pursuant to Section IX.B.1 hereof within 14 days of receiving the Trustee Determination, the Eligible Claimant shall be deemed to have accepted the Trustee Determination. If the Claimant accepts the Trustee Determination it becomes a Final Determination.

IX. COURT REVIEW

A. Court Review of Claims. This Section IX shall only apply to Claimants who are identified in the Confirmation Order at paragraph 18(k).[5]

B. Bankruptcy Court Review for Eligible Claims. Claimants who fully exhaust the dispute resolution process set forth in Section VIII by (i) contesting their Claims Determinations, (ii) exhausting their appellate rights under the CRP, (iii) rejecting the Trustee Determination, and (iv) satisfying the condition of eligibility under Section IX.A ("**Eligible Claimants**") with respect to their Claims, shall have the right to have the Trustee Determination

[5] For the avoidance of doubt, Section IX(C) of this CRP applies to all Claimants and all Claims generally.

(x) with respect to such Claims and in respect of damages, and (y) with respect to any other determination (legal or factual) made by the Trustee in connection with such Claims, in each case, given plenary review by the Bankruptcy Court,[6] in accordance with the Trust Documents, the Plan and the Confirmation Order and the procedures set forth therein. Judicial Determination (described herein, and generally "**Judicial Determination**") shall be treated as a contested matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure. Except as otherwise provided in the Trust Documents, Plan or Confirmation Order, the Trustee shall have the right to assert all defenses that the Debtors have or would have had under applicable law to such Claims, provided, however, that (A) the Trust's and the Trustee's right to assert the defenses of comparative fault and/or comparative negligence with respect to a Claimant shall be limited to the determination of the amount of that Claimant's Claims and for no other purpose (including the determination of the amount of any other Claimant's Claims), (B) the Trust's rights and defenses (except as otherwise expressly set forth in this Section IX(B)(A) and Section IX(B)(C)) shall not include claims that may be asserted by the Debtors or Reorganized Debtors by way of setoff, recoupment, counterclaim, or cross claim, (C) the Trustee may raise and assert Assigned Rights and Causes of Action in respect to a Claim, and (D) the Trustee may waive any defense and/or concede any issue of fact or law. Eligible Claimants shall be permitted to assert any defense to Assigned Rights and Causes of Action that such Eligible Claimants would have had under applicable law if the Debtors, as opposed to the Trust, were asserting the Assigned Rights and Causes of Action. Eligible Claimants remain subject to, and bound by, the Plan, including, without limitation, the Channeling Injunction and any other injunction or release issued or granted in connection with the Plan. Payment by the Trust of a judgment for monetary damages obtained pursuant to this Section IX shall be subject to adjustment, if applicable, for subordination of Claims for punitive or exemplary damages as provided in Section IX.C.

1. ***Election of Judicial Determination***. Within fourteen (14) days after an Eligible Claimant receives a Trustee Determination (the "**Election Deadline**") with respect to a Claim, such Eligible Claimant must notify the Trust of the Eligible Claimant's intent to seek a Judicial Determination by submitting a written notice to the Trustee (a "**Judicial Determination Election Notice**") and filing a copy of such Judicial Determination Election Notice with the Bankruptcy Court. Eligible Claimants who fail to submit and file a Judicial Determination Election Notice by the Election Deadline shall be deemed to accept the Trustee Determination of such Claim, and such Trustee Determination shall become a Final Determination that is final, binding, non-appealable and not subject to review by any Court. Eligible Claimants who submit and file a Judicial Determination Election Notice by the Election Deadline ("**Electing**

[6] To the extent the Bankruptcy Court determines that a claim asserted by an Eligible Claimant constitutes a personal injury tort or wrongful death claim under and for purposes of 28 U.S.C. § 157(b)(5) (an "**Eligible PI/WD Claimant**"), that Eligible PI/WD Claimant may elect review of its claim pursuant to this Section IX in the District Court for the Northern District of California, subject to the same constraints, election, notice and filing requirements, and other limitations described herein with respect to Bankruptcy Court Review; provided, however, that an Eligible PI/WD Claimant may request that the District Court provide relief, such that review of its Claim may proceed in the court where such claim was pending or could have been pending prior to the Petition Date. The Trustee's rights to contest any such request are hereby preserved. Nothing in these procedures shall be deemed a waiver or modification of the Eligible PI/WD Claimant's right, if any, to a trial by jury.

Judicial Claimants") shall have no right to receive any distribution from the Trust absent the issuance of an order or judgment of the Bankruptcy Court, or District Court as applicable, awarding damages on account of the Eligible Claimants' Claim that is no longer subject to appeal and for which no appeal is pending (a "**Final Judicial Determination**").

2. ***Recovery Limited to Final Judicial Determination***. To the extent that a Claimant's Final Judicial Determination with respect to a Claim results in a judgment or award in an amount less than the amount of the Trustee Determination with respect to such Claim, the Claimant will receive payments from the Trust that will be based on the amount of the Final Judicial Determination for such Claim. In determining whether a Claimant's Final Judicial Determination is less than the amount of the Trustee Determination, no amounts awarded for punitive or exemplary damages shall be considered in either circumstance.

3. ***Judicial Determinations after Initial Review Period***. Electing Judicial Claimants may only seek a Final Judicial Determination by commencing a contested matter against the Trust in Bankruptcy Court under this Section IX.B within the time prescribed herein after all Claimants that hold Approved Claims have received a Determination Notice with respect to such Approved Claims and have had an opportunity to fully exhaust the dispute resolution process set forth in Section VIII of this CRP (the "**Initial Review Period**"). The Trustee shall file a notice that the Initial Review Period has ended (the "**Initial Review Period Notice**") with the Bankruptcy Court and post the Initial Review Period Notice on the Trust Website.[7] Electing Judicial Claimants who fail to commence a contested matter in the Bankruptcy Court within the fourteen (14) day period after the filing of the Initial Review Period Notice shall be deemed to accept the Trustee Determination of their Claims, and such Trustee Determination shall become a Final Determination that is final, binding, non-appealable and not subject to review by any Court. Upon filing, all contested matters commenced under this section shall be stayed pending a decision by the Bankruptcy Court regarding the consolidation of all such matters as set forth in Section IX.B.5 hereof.

4. ***Supporting Evidence.*** During the Judicial Determination, the Claimant and the Trustee shall be governed by the rights and obligations imposed upon parties to a contested matter under the Federal Rules of Bankruptcy Procedure; provided, however, that an Electing Judicial Claimant shall not have the right to introduce into evidence during the Judicial Determination

[7] The Trustee shall also contemporaneously serve a copy of the Initial Review Period Notice via email on counsel of record or as otherwise provided in the Claims Questionnaire for Claimants who are identified in the Confirmation Order at paragraph [18(k)] and upon such additional representatives of any of such Claimants as may be designated in writing by that Claimant from time to time, provided that, such email notices shall be required for a Claimant only if the Claimant is an Electing Judicial Claimant or the Election Deadline for the Claimant has not passed when the Initial Review Period Notice is filed.

any information or documents that (a)(1) were requested by the Trustee or (2) the Electing Judicial Claimant reasonably could have been expected (before issuance of the Trustee Determination) to rely on or introduce as evidence in a Judicial Proceeding, and (b) were available to the Electing Judicial Claimant at the time of the request or during the pendency of the review of the Claim by the Trustee and Claims Administrator, but which the Claimant failed to or refused to provide to the Trust prior to the issuance of the Trustee Determination; provided, however, that nothing in this Subsection IX.B.4 shall prohibit an Electing Judicial Claimant from introducing information or documents that is responsive to information or documents not disclosed to the Electing Judicial Claimant before the issuance of the Trustee Determination. The Claimant's responses to requests by the Trustee for documents or information shall be subject to Rule 37 of the Federal Rules of Civil Procedures, as applicable under the Federal Rules of Bankruptcy Procedure. Claimants shall not have the right to disclose the Claims Determination, Appeals Determination or Trustee Determination to any Court except as provided in the following sentence. Subject to the terms of any protective order entered by a Court, a Claimant's filing of a Judicial Determination Election Notice shall permit the Trust or any representative thereof to introduce as evidence before a Court all information and documents submitted to the Trust under the CRP, and the Claimant may introduce any and all information and documents that it submitted to the Trust under the CRP.

5. ***Consolidation of Judicial Determinations***. Subject to notice and a hearing and at the discretion of the Bankruptcy Court, all judicial review proceedings elected pursuant to this section IX.B may be heard and determined in one or more consolidated proceedings to the extent practicable, in a manner acceptable to the court, and in accordance with applicable law. All contested matters filed within the fourteen (14) day period following the filing of the Initial Review Period Notice shall be stayed pending the Bankruptcy Court's determination on how or whether to proceed under this subsection.

6. ***Attorneys' Fees and Expenses.*** Electing Judicial Claimants shall be required to pay their own attorneys' fees and expenses unless such fees and expenses are otherwise recoverable as part of their Claim under California law.

7. ***Payment of Bankruptcy Court Determinations***. Under no circumstances shall interest be paid under any statute on any judgments obtained in the tort system. If and when a Claimant obtains a Final Judicial Determination it shall be treated within and receive *pro rata* distributions from the Trust, subject to the Trust Documents, including Section VII.B hereof, the Plan and the Confirmation Order.

C. Punitive and Exemplary Damages. The Trustee shall have the discretion to award punitive or exemplary damages consistent with California law and the Trust Agreement. Any award of punitive or exemplary damages made by the Trustee or a Court with respect to any Claim shall be subordinate and junior in right to the prior payment in full of all Final Determinations and Final Judicial Determinations as provided herein.

D. Redetermination of Prior Final Determinations. To the extent that a Final Judicial Determination of a Claim implicates a determination of damages which is inconsistent to other Claims, theories, facts, or issues of a similar type to the Claim subject of a Final Judicial Determination, the Trustee, in his sole and absolute discretion, may redetermine, adjust or modify the amount of any prior Final Determinations, solely in an upward manner, to be consistent with such Final Judicial Determination.

X. PREVENTION AND DETECTION OF FRAUD

A. The Claims Administrator may institute claim auditing procedures and other procedures to detect and prevent the allowance of fraudulent claims. All Claims must be signed under the pains and penalties of perjury. To the extent of applicable law, the submission of a fraudulent Claim may violate the criminal laws of the United States, including the criminal provisions applicable to Bankruptcy Crimes, 18 U.S.C. § 152, and to the extent of applicable law, may subject those responsible to criminal prosecution in the federal courts. If the Claims Administrator determines that a Claim is fraudulent, the Trustee shall deny the Claim and so inform the Claimant.

B. The Claims Administrator shall have the authority to request the Claimant to submit additional records in order to make a determination of allowance or denial of any Claim. If the Claimant refuses to or fails to respond to such a request within ninety (90) days or if the Claims Administrator determines that a Claimant's response is inadequate, the Claims Administrator shall take such actions as she deems appropriate on the Claim and notify the Claimant of the action and basis therefore and the Claimant may dispute the same and seek a Judicial Determination as set forth in Article IX.

C. The Claims Administrator may conduct random audits to verify supporting documentation submitted (including death certificates, medical and other records) by randomly selecting Claims and may audit individual claims or groups of Claims.

D. All Claimants must certify to the Claims Administrator on the Claims Questionnaire that the Claimant has not transferred his or her or its right to recover from the Released Parties with respect to his or her Claim such that the Claim can be asserted by another person or entity. The fact that a Claimant has executed a "subrogation" agreement with a health insurer or that a statutory provision grants to any governmental entity rights of subrogation shall not of itself be construed as a transfer of Claimant's right to recover.

XI. ATTORNEY'S FEES

A. Attorney's Fees Determined Pursuant to State Law. Any award of attorney's fees with respect to a Claim shall be determined in accordance with the laws of the State of California.

B. Hold-Back for Attorney Liens. Prior to receiving any award in respect of any Claim Determination, any Claimant who was represented by an attorney ("**Claimant Attorney**") at the time of filing its Proof of Claim in the Chapter 11 Cases or at any time thereafter, shall: (1) agree to receive their award through their Claimant Attorney; or (2) provide evidence to the satisfaction of the Claims Administrator and Trustee that there is no lien or potential lien on their Final Determination asserted or assertable by a Claimant Attorney (an "**Attorney Lien**"), including by providing written confirmation from such Claimant Attorney that no Attorney Lien exists. If an Attorney Lien exists, is asserted or assertable, then only the undisputed portion of the award shall be provided to the Claimant. The disputed portion shall be held back until the Claims Administrator receives satisfactory notice in his or her sole determination, that such dispute and Attorney Lien has been resolved. The payment of attorney's fees incurred by Claimant and the satisfaction of any Attorney Lien is the sole obligation of Claimant. Neither the Trustee nor the Trust is responsible for the payment of any attorney's fees or the resolution of any Attorney Lien incurred in connection with a Claim.

XII. CREDITS AND DEDUCTIONS

A. Credits for Amounts Covered By Insurance. In determining all award amounts, the Trustee will take into account all insurance recoveries available to the Claimant as provided in the Trust Agreement.

B. Deduction for Payment Received from Wildfire Assistance Fund. In determining all award amounts, the Trustee will take into account any payment Claimant has received from the Wildfire Assistance Fund as provided in the Trust Agreement.

C. Deduction for Payment Received from FEMA. In determining all award amounts, the Trustee will take into account any payment Claimant has received from the Federal Emergency Management Agency ("**FEMA**") on account of the same damages or losses, as provided in the Trust Agreement.

D. Medical Liens. In determining all award amounts, the Trustee will take into account all known outstanding governmental medical liens, if any, currently owed by the Claimant. Claimants shall be responsible for the payment of all medical or other applicable liens. The Claimant will undertake to resolve such liens, and if not done, the Trustee will take over the process, solely with respect to governmental liens. The Trustee will retain the services of a Lien Resolution Administrator to identify, resolve, and satisfy, in accordance with applicable law, certain Claimant governmental repayment obligations, including, but not limited to, Medicare (Parts A and B), Medicaid, and other governmental liens.

E. Taxes. In connection with their duties hereunder, the Trustee and Claims Administrator will make every effort to ensure that the Trust complies with all applicable laws,

including without limitation all tax return filings and information reporting requirements set forth in applicable laws.

F. Authority to Withhold Distributions Pending Resolution of Third Party Claims. The Trustee has the authority and discretion to withhold any distribution, or portions thereof, on account of any Claim that received a Final Determination or Judicial Determination if the Claimant is subject to pending or contemplated litigation brought by the Trust in respect of Assigned Rights and Causes of Action under the Plan until the final resolution of such litigation, including the conclusion of all appellate rights or expiration of any statutes of limitation. The Trustee may disallow any Claim of any entity or person that is liable to the Trust in respect of Assigned Rights and Causes of Action under the Plan until such entity or person has paid the amount for which such entity or person is liable to the Trust.

XIII. CONFIDENTIALITY OF CLAIMS INFORMATION

All personal information, facts, and documents submitted to the Trust by or regarding any Claimant or Claim shall be kept confidential and shall only be disclosed: (1) to the Trustee, Claims Administrator, Claims Processor, Neutrals, and Trust Professionals to the extent necessary to process and pay Claims; or (2) as may be required by applicable law, ethical requirements, or legitimate business uses associated with administering the Trust.

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Faculty

Michael L. Bernstein is a partner in the Washington, D.C., office of Arnold & Porter Kaye Scholer LLP and chaired its national bankruptcy and corporate restructuring practice for more than a decade and founded the firm's corporate governance practice. He represents parties in a wide variety of bankruptcy and corporate restructuring matters and in related litigation throughout the U.S. Mr. Bernstein is a co-author of ABI's *Bankruptcy in Practice*, now in its Fifth Edition, and *Chapter 11-101: The Nuts and Bolts of Chapter 11 Practice CD-Rom*. A Fellow of the American College of Bankruptcy, he has written numerous articles, lectured on bankruptcy law topics and been interviewed by major newspapers and on television and radio. He has also testified before Congress as an independent expert, on several occasions, regarding proposed bankruptcy reform legislation. Mr. Bernstein has been recognized as a leading bankruptcy lawyer by numerous publications, including *The Best Lawyers in America*, *Chambers USA: America's Leading Business Lawyers*, *The Legal 500 US: Corporate and Finance*, *Guide to the World's Leading Insolvency and Restructuring Lawyers*, *Washington D.C. Super Lawyers*, *Washingtonian Magazine* and *Lawdragon 3000 Leading Lawyers in America*. He received his A.B. from Brandeis University and his J.D. from Northwestern School of Law.

Hon. Melanie L. Cyganowski chairs Otterbourg P.C.'s Bankruptcy practice in New York. She joined the firm in 2008 after serving a full 14-year term as a U.S. Bankruptcy Judge for the Eastern District of New York and as its Chief Judge from 2005-08. She is currently co-counsel to the Ad Hoc Committee in *Purdue Pharma*, and was appointed as a member of a blue-ribbon committee by the Rockville Center Diocese with former Chief Bankruptcy Judge Arthur Gonzalez and former Comptroller of the City of New York Harrison J. Goldin. Judge Cyganowski's fiduciary appointments include receiver in *SEC v. Platinum Partners*; CRO and temporary operator of Brooklyn's Interfaith Medical Center; patient care ombudsman in *Randolph Hospital Inc.*, *Promise Healthcare*, *Orianna Health Systems*, *21st Century Oncology* and *California Proton*; auditor of Capital One; and various trusteeships. She also served as special master in *Vivendi* and *Neogenix Oncology*, a court-appointed expert in Orion HealthCorp, and an arbitrator/mediator in cases including *Madoff* and *Lehman*. Judge Cyganowski has testified as an expert in international cases involving U.S. bankruptcy laws. She is a Fellow in the American College of Bankruptcy, sits on the editorial advisory board of the *Norton Journal of Bankruptcy Practice & Law*, and is an adjunct professor at St. John's University School of Law in the Bankruptcy LL.M. Program. She also is active in philanthropic organizations, including Tina's Wish. Judge Cyganowski received her J.D. *magna cum laude* from the State University of New York at Buffalo School of Law in 1981.

Hon. Robert E. Grossman is a U.S. Bankruptcy Judge for the Eastern District of New York in Central Islip, appointed in April 2008, and serves as a visiting judge in the Southern District of New York. Prior to taking the bench, he practiced in the areas of corporate law, business reorganization and litigation at Duane Morris, where a significant part of his practice focused on providing advice to troubled or newly restructured companies, as well as investors, with respect to their financing needs. Judge Grossman has extensive experience in complex bankruptcy and creditor-rights litigation for both individuals and institutions, and he has represented parties in the restructuring and transfer of assets in bankruptcy court. He is experienced in the intricacies of bankruptcy and restructuring matters across a wide range of industries, including real estate and health care, and has represented bor-

rowers, secured creditors, landlords and owners across the U.S. Prior to joining Duane Morris, Judge Grossman chaired the restructuring practice group of Arent Fox, directing almost 20 professionals in matters across the U.S. and in Europe. He began his legal career at the Securities and Exchange Commission in its Division of Enforcement in a group associated with the Division of Corporate Finance. After leaving the SEC, he founded and served as general counsel to a large financial services company that focused on acquiring and operating distressed assets. Judge Grossman is an adjunct professor at Touro Law School and a past chair of the International Secured Transactions and Insolvency Committee of the American Bar Association's Section of International Law, and he is a frequent speaker both in the U.S. and in Europe. In addition, he is a past president of the Brooklyn Law School Alumni Association. Judge Grossman was recently elected to the Board of Governors of the National Conference of Bankruptcy Judges. He received his undergraduate degree from Rider University and his J.D. from Brooklyn Law School in 1973.

Hon. Michael B. Kaplan is Chief U.S. Bankruptcy Judge for the District of New Jersey in Trenton, initially appointed on Oct. 3, 2006, and named Chief Judge on May 1, 2020. Prior to taking the bench, Judge Kaplan served as a standing chapter 13 bankruptcy trustee, as well as a member of the chapter 7 panel of bankruptcy trustees, where he received case appointments as both a chapter 11 and chapter 12 trustee. His private practice included the representation of institutional lenders consumer debtors (under both chapters 7 and 13), business debtors and individuals undergoing reorganization pursuant to chapter 11. Judge Kaplan is licensed to practice law in New Jersey, New York and Connecticut, and is admitted to practice before the U.S. Supreme Court, Third Circuit Court of Appeals, U.S. Court of International Trade and various federal district courts. Over the past 30 years, he has spoken to numerous bar associations and business organizations, and authored several articles relating to bankruptcy issues. Judge Kaplan is a co-author of West's *Consumer Bankruptcy Manual* and *Consumer Bankruptcy Handbook*. Additionally, he serves on the editorial board and as business manager for the *American Bankruptcy Law Journal* and teaches as an adjunct professor at Rutgers University School of Law. Judge Kaplan has been the recipient of the Conrad B. Duberstein Memorial Award given by the New York Institute of Credit, the Judicial Service Award from the Association of Insolvency and Restructuring Advisors, the National Association of Chapter 13 Trustees' 2006 Distinguished Service Award and New Jersey State Bar Association's 1999 Legislative Recognition Award. He has been appointed by the Director of Administrative Office of the Courts (AO) to a term as the Third Circuit representative to the Bankruptcy Judges Advisory Group, in addition to appointments as the Bankruptcy Judge representative on both the Human Resources Advisory Council and Budget & Finance Advisory Council to the AO. He is an officer of the National Conference of Bankruptcy Judges and member of the Turnaround Management Association, ABI and the Commercial Law League of America. Prior to taking the bench, Judge Kaplan served as mayor and councilman for the Borough of Norwood, N.J., and as a member of the Norwood Planning Board. He received his A.B. from Georgetown University in 1984 and his J.D. from Fordham University School of Law in 1987.

Michael B. Schaedle is a partner with Blank Rome LLP in Philadelphia in its Finance, Restructuring and Bankruptcy Practice Group, which has more than 70 attorneys. He concentrates his practice on bankruptcy, reorganizations and workouts, debt and equity restructuring, and commercial and public debt transactions. Mr. Schaedle frequently represents secured creditors, creditors' and other committees and creditor groups, creditors, contract counterparties, asset-purchasers/plan-of-reorganization proponents, and trustees, debtors, foreign representatives and other fiduciaries. He is a Fellow in the American College of Bankruptcy, a member of the International Insolvency Institute, and has been

certified as a Business Bankruptcy Specialist by the American Board of Certification. Mr. Schaedle was a member of the 2020 faculty for ABI's Complex Financial Restructuring Program. He routinely publishes on bankruptcy topics, including previously serving as an editor to an ABI publication. Mr. Schaedle received his B.A. *cum laude* with distinction in major from the University of Pennsylvania and his J.D. from the University of Wisconsin-Madison.

Hon. James J. Tancredi is a U.S. Bankruptcy Judge for the District of Connecticut in Hartford, sworn in on Sept. 1, 2016. Prior to his appointment to the bench, he was a commercial litigation and business restructuring partner at Day Pitney, LLP (f/k/a Day Berry & Howard), where, as a business litigator and commercial restructuring lawyer, he co-founded the firm's regional and national bankruptcy practice. During his 37 years in private practice, he represented financial institutions and other major constituents in a broad range of prominent insolvency related proceedings pending in courts on the Amtrak corridor. During his career, Judge Tancredi frequently lectured at the University of Connecticut School of Law and at bar association Continuing Legal Education programs on a broad range of commercial, real estate, and restructuring issues and strategies. His professional and bar association activities included service as president and director of the Hartford County Bar Association and the Connecticut Turnaround Management Association. He also has been an active member of the Connecticut Bar Association, American Bar Association and the American Trial Lawyers Association, and he was a director of the Hartford County Bar Foundation and Connecticut Mental Health Association. He is also a Connecticut Bar Foundation James W. Cooper Fellow. Judge Tancredi has written widely about business restructuring issues and co-authored the Connecticut chapter in *Strategic Alternatives for and Against Distressed Businesses*, 2016 edition, published by Thomson Reuters. He received his B.A. *magna cum laude* in urban studies and political science from the College of the Holy Cross in Worcester, Mass., and his J.D. *magna cum laude* from the University of Connecticut School of Law.