American Bankruptcy Institute
Mid-Atlantic Bankruptcy Workshop

Purdue Supreme Court Update

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PURDUE/SUPREME COURT UPDATE

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CASES

Truck Insurance Exchange v.
Kaiser Gypsum Co., Inc. *et al.*,
144 S.Ct. 1414 (2024)

Harrington v. Purdue Pharma L.P.,
2024 WL 3187799 (U.S. June 27, 2024)

Office of the United States Trustee v.
John Q. Hammons Fall 2006, LLC, *et al.*,
144 S.Ct. 1588 (2024)

No. 22-1079

IN THE

Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,

Petitioner,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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HOLDING

- An insurer with financial responsibility for bankruptcy claims is a "party in interest" under § 1109(b) that "may raise and may appear and be heard on any issue" in a chapter 11 case.
- Section 1109(b)'s text is capacious. Congress uses the phrase "party in interest in bankruptcy provisions when it intends the provision to apply "broadly." This understanding aligns with the ordinary provision to apply terms "party" and "interest," which together refer to entities that are potentially concerned with, or affected by, a proceeding. The historical context and purpose of § 1109(b) also support this interpretation.
- Broad participation promotes a fair and equitable reorganization process.

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BACKGROUND

- Kaiser Gypsum Co. and Hanson Permanente Cement (Debtors), filed for Chapter 11 bankruptcy. Their Chapter 11 Plan creates an Asbestos Personal Injury Trust (Trust) under 11 U. S. C. §524(g), a provision that allows Chapter 11 debtors with substantial asbestos-related liability to fund a trust and channel all present and future asbestos-related claims into that trust.
- Truck Insurance Exchange provided insurance to the Debtors for asbestos and asbestos-containing products.

BACKGROUND

- Truck is obligated to defend each covered asbestos personal injury claim and to pay up to $500,000 per claim. The Plan requires insured claims to be litigated in the tort system for the benefit of the insurance coverage. Uninsured claims are submitted directly to the Trust for resolution.
- Truck opposed the Plan under §1109(b) of the Bankruptcy Code, which permits any “party in interest” to “raise” and “be heard on any issue” in a Chapter 11 bankruptcy. Truck argues that the Plan exposes it to millions of dollars in fraudulent claims because the Plan does not require the same disclosures and authorizations for insured and uninsured claims.

THE END OF THE "PERSON AGGRIEVED"?

- The person-aggrieved rule allows courts to determine which parties in a bankruptcy case have a sufficient stake in a matter that they should get to challenge an adverse ruling by the bankruptcy court.
- As Justice Gorsuch said when he was on the Tenth Circuit, the rule ensures that bankruptcy cases don't "become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." *In re Krause*, 637 F.3d 1160, 1168 (10th Cir. 2011).
- Efficient judicial administration requires that appellate review be limited to those persons whose interests are directly affected.

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IMPLICATIONS FOR BANKRUPTCY PROCEEDINGS

- "Whether Truck's direct interest is framed as its **executory contracts** or instead its obligations resulting from those contracts, it cashes out in the same way." *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 144 S. Ct. 1414, 1426 (2024)
- Parties contracts? Litigation targets?
  - Who don't share the company's interest in emerging from bankruptcy?
  - Who may benefit by keeping the company in bankruptcy?
- Negotiation leverage?
- Delay?
- Cost?

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FACTUAL SUPPORT FOR THE COURT'S RULING?

- SCOTUS—"An insurer with financial responsibility for bankruptcy claims can be directly and adversely affected by the reorganization proceedings in myriad ways." Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., 144 S. Ct. 1414, 1417 (2024).
- Where a proposed plan "allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed."(In re Global Indus. Technologies, Inc., 645 F. 3d 201, 204 (CA3 2011)).

BUT

- The Bankruptcy and District Courts both found that the Plan did not increase Truck's prepetition obligations or impair its contractual rights under its insurance policies. The Fourth Circuit affirmed, agreeing that Truck was not a "party in interest" under §1109(b) because the plan was "insurance neutral."

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WHAT ABOUT?

- 524(g)(4)(ii)—allows BUT DOES NOT REQUIRE protection for insurers
- 524(e)—"Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."
- Insurance policy standard insolvency provision—"The bankruptcy or insolvency of the Insured shall not relieve the insurer of any of its obligations hereunder."

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HARRINGTON V. PURDUE PHARMA L.P.

BACKGROUND

- Purdue filed for bankruptcy in 2019 after thousands of lawsuits were filed against it for injuries and deaths stemming from their product OxyContin, which fueled the opioid crisis.
- Chapter 11 plan was confirmed in 2021 where the Sackler family, who owned and controlled Purdue, agreed to contribute $4.325 billion to Purdue's bankruptcy estate in exchange for non-consensual releases from all opioid liability.
- Certain states and the U.S. Trustee's office appealed the confirmed plan and the district court held that nothing in the law authorizes bankruptcy courts to extinguish claims against third-parties, like the Sacklers, without the claimants' consent.
- The Sacklers then increased their contribution to $5.5-6 billion and the states dropped their objection to the plan.
- Purdue appealed to the Second Circuit, where a divided panel reversed the district court and revived the bankruptcy court's order approving the now-modified plan.
- The U.S. Trustee's office appealed to the United States Supreme Court, and the Court granted certiorari due to a circuit split regarding the issue of whether bankruptcy courts can grant third-party releases without the consent of claimants.

HOLDING

- The Bankruptcy Code does not authorize nonconsensual, third-party releases.
  - The only possible authorization for a nonconsensual, third-party release is § 1123(b)(6) allowing "any other appropriate provision not inconsistent with the applicable provisions of this title."
  - "Catchall" encompasses only provisions similar to the preceding list.
  - Nothing in § 1123(b) suggests authority to adjust or release claims against a non-debtor without consent of claimant.
  - Giving a non-debtor a release even broader than a bankruptcy discharge conflicts with the fundamental bargain of bankruptcy law: a debtor receives a discharge in exchange for filing a case, proceeding honestly and placing assets on the table for creditors.

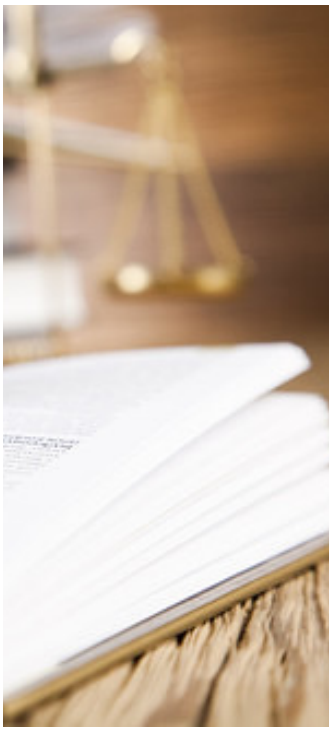
THE DISSENT

BY JUSTICE KAVANAUGH,
JOINED BY CHIEF JUSTICE ROBERTS, JUSTICE SOTOMAYOR, AND JUSTICE KAGAN

- Justice Kavanaugh "respectfully but empathetically" dissented, finding the majority decision restricted "the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims."
- Purdue's plan was "a shining example of the bankruptcy system at work."
  - Secured $5.5 to 6 billion settlement payment from the Sacklers to bring the estate to approx. $7 billion.
  - Guaranteed substantial and equitable compensation to victims and creditors.
  - Provided significant funding for thousands of state and local governments to prevent and treat opioid addiction.
- "Despite the broad term "appropriate" in the statutory text, despite the longstanding precedents approving mass-tort bankruptcy plans with non-debtor releases like these, despite 50 state Attorneys General signing on, and despite the pleas of the opioid victims, today's decision creates a new atextual restriction on the authority of bankruptcy courts to approve appropriate plan provisions."
- "Devastating for more than 100,000 opioid victims and their families."

BANKRUPTCY LAW ADDRESSES "COLLECTIVE-ACTION"

- The purpose of bankruptcy law is to address the collective-action problem that a bankruptcy poses, to halt a race to courthouse to recover first, and "to preserve the debtor's estate so as to ensure fair and equitable recovery for creditors." Mass-tort cases present the same collective-action problem that bankruptcy is designed to address.
- Non-debtor's settlement payment can also solve a collective-action problem, by allowing those assets to be distributed fairly and equitably among victims, rather than swallowed up by the first victim who successfully sues the non-debtor.
- In cases where an insolvent company's officers are indemnified by the company, "a suit against the non-debtor is, in essence, a suit against the debtor." (citing *In re Purdue Pharma L.P.*, 59 F. 4th 45, 78 (CA2 2023). If not barred from doing so, the creditors would race to the courthouse to file suits against indemnified officers and directors.



BROAD STATUTORY TEXT – "APPROPRIATE"

- § 1123(b)(6) of the Bankruptcy Code provides that a plan may include "any other **appropriate** provision not inconsistent with the applicable provisions of" the Code.
- The Court has often said "appropriate" is a "broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." (citing *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).
- The "catchall" phrase empowers bankruptcy courts to exercise reasonable discretion in complex scenarios, like mass-tort cases such as Purdue, where non-debtor releases are often appropriate and indeed essential.

NON-DEBTOR RELEASES APPROPRIATE IN MANY MASS-TORT BANKRUPTCIES

- The non-debtor release is meaningful in that it ensures victim and creditor recovery in the face of multiple collective-action problems.
- In Purdue's case, the non-debtor release (i) protected Purdue's estate from the risk of being depleted by indemnification claims, and (ii) operated as a settlement of potential claims against the Sacklers and thus enabled the Sacklers' large settlement payment to the estate.
- Without the settlement payment, Purdue's estate is worth approx. $1.8 billion, the United Sates would recover its $2 billion superpriority claim first, and victims and other creditors would be left with nothing. (citing *In re Purdue Pharma L.P.*, 633 B.R. 53, 58 (Bkrtcy. Ct. SDNY 2021).

COURT'S *EJUSDEM GENERIS* ARGUMENT IS "DEAD WRONG"

- Court's assertion that the "obvious link" through paragraphs § 1123(b)(1) to (b)(5) is that all are limited to "*the debtor* – its rights and responsibilities, and its relationship with its creditors" is factually incorrect.
  - (b)(3) allows bankruptcy court to modify the rights of debtors with respect to *non-debtors* as the court may approve a reorganization plan that settles, adjusts, or enforces "any claim" that a debtor holds against non-debtor third parties.
  - Debtor's creditors may hold derivative claims against the same non-debtor third party for the same harm done to the estate, so settlement with the non-debtor may extinguish creditors' derivative claims against the non-debtor, and creditors' consent is not necessary to do so.
- A plan provision settling a debtor's claim against non-debtors under § 1123(b)(3) can thus *nonconsensually extinguish creditors' derivative claims against those non-debtors.* A plan provision under the catchall in § 1123(b)(6) that nonconsensually releases creditors' direct claims against those same non-debtors is the same.

NON-DEBTOR RELEASES ARE NOT "INCONSISTENT WITH" OTHER PROVISIONS OF THE CODE

- The text of § 524(g) *expressly precludes* the Court's inference that non-debtor releases are prohibited in other contexts.
  - "Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." 108 Stat. 4117, note following 11 U.S.C. § 524.
- § 524(e) does not purport to preclude releases of creditors' claims against non-debtors.
  - Plan's discharge of debtor "does not affect the liability of any other entity on…such debt." The section does not speak to the issue of non-debtor releases or other steps that a plan may take regarding the liability of a non-debtor for the same debt.
- The Sacklers did not receive a bankruptcy discharge – a discharge in bankruptcy is different from non-debtor releases. A debtor in bankruptcy receives a discharge where most of their pre-petition debts are released, and non-debtor releases "do not offer the umbrella protection of a discharge in bankruptcy." (citing *Johns-Manville Corp.*, 837 F.2d 89, 91 (CA2 1988).

CONCLUSION

- Finds Court's decision that the victims' and creditors' claims against the debtor can be released, but it would be **categorically "inappropriate"** to release their identical claims against non debtors when they are indemnified by the debtor company or when release generates a significant settlement payment makes "little sense legally, practically, or economically…Now opioid victims and creditors are left holding the bag, with no clear path forward."
- The bankruptcy system and non-debtor releases have been indispensable to solving mass-tort cases as evidenced by cases involving asbestos, the Boy Scouts, the Catholic Church, silicone breast implants, the Dalkon Shield, and others.
- "The Court's decision today jettisons a carefully circumscribed and critically important tool that bankruptcy courts have long used and continue to need to handle mass-tort bankruptcies going forward."
- "Only Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue."

OPEN ISSUES

Court did not address consensual releases, plans that provide for "full satisfaction of claims," or impact of decision on substantially consummated plans

- What qualifies as a consensual release? Opt-in or opt-out?
- Are 5th Circuit "gatekeeping" provisions, *e.g. In re Highland Capital Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022), allowed?
- What are the implications for substantially consummated plans?
- What constitutes a plan that provides for "full satisfaction of claims against a third-party nondebtor"?

OTHER QUESTIONS

- Court distinguished release of claims belonging to the estate, including derivative claims. What constitutes a claim belonging to the estate? *See, e.g., In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020); *In re Tronox Inc.*, 855 F.3d 84 (2d Cir. 2017)
- Will we see cases filed in new venues?

OFFICE OF THE UNITED STATES TRUSTEE
V.
JOHN Q. HAMMONS FALL 2006, LLC, ET AL.

NO. 22-1238 (2024)

- In *Hammons*, the Supreme Court revisited its 2022 decision in *Siegel v. Fitzgerald*, which held a statute unconstitutional for violating the Bankruptcy Clause's uniformity requirement by imposing different filing fees for Chapter 11 debtors. Slip op. at 1
- Three key aspects of *Siegel*'s holding are applicable in *Hammons*: (1) "the violation identified was nonuniformity, not high fees"; (2) "the fee disparity was short-lived"; and (3) "the disparity was small." *Id.* at 6. *Hammons* resolved *Siegel*'s lingering question: what is the appropriate remedy for the constitutional violation? *Id.* at 1. The Court chose prospective parity, reasoning that "equal fees for otherwise identical Chapter 11 debtors going forward comports with congressional intent, corrects the constitutional wrong, and complies with due process."
- In 2021, before the *Siegel* and *Hammons* litigation concluded, Congress amended the fee statute to equalize higher fees for both U.S. Trustee and Bankruptcy Administrator districts. *Hammons*, No. 22-1238 at 10. The amendment explained that its uniform cost increase would "further the long-standing goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer." *Id.* at 9. Issuing refunds to all affected debtors would undermine this goal, as the cost would "exceed the $200 million threshold Congress selected in 2017 to signal fiscal distress in the U.S. Trustee Program and trigger higher fees." *Id.*
- Similarly, by "mandating equal fees prospectively only," the amendment signaled that Congress never intended to provide refunds. *Id.* at 10. Giving refunds to all affected debtors would also be impracticable because eighty-five percent of Chapter 11 cases involving higher fees have closed.
- In dissent, Gorsuch discussed traditional remedial principles and caselaw in which the government retroactively provided monetary relief and concluded that the appropriate remedy was a claim for a refund.

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Q & A

Thank you

Hon. Thomas Horan - U.S. Bankruptcy Judge (D. Del.)

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Faculty

Emily K. Devan is counsel at Miles & Stockbridge in Baltimore. She is a creditors' rights attorney involved in commercial litigation and insolvency proceedings, including foreclosures, asset sales, receiverships and assignments for the benefit of creditors. Ms. Devan assists diverse clients, such as lenders, unsecured creditors, potential asset-purchasers, trustees and other interested parties, in all phases of bankruptcy and insolvency proceedings, including cash-collateral motions, debtor-in-possession financing, asset sales, claim objections, lease disputes and commercial foreclosures. She also has represented specialized constituencies in bankruptcy, such as trade creditors, general contractors, commercial lenders, landlords and former owners and officers of bankrupt entities. In addition, she counsels clients on issues arising from bankruptcy proceedings, including adversary proceedings, preference actions, fraudulent-transfer actions and fiduciary liability claims, and she has experience litigating commercial proceedings in and out of bankruptcy on behalf of creditors, landlords, trustees and receivers. Ms. Devan is ranked as an "up-and-coming" lawyer in bankruptcy/restructuring for 2024 by *Chambers USA*. Prior to joining Miles & Stockbridge, she was an associate with a law firm in Delaware and practiced in bankruptcy courts throughout the country. Her previous practice experience also includes insurance coverage disputes, which allows her to assist creditors and other where insurance coverage may be available. Ms. Devan received her B.A. in 2005 from the University of Chicago and her J.D. *cum laude* in 2012 from the University of Maryland Francis King Carey School of Law.

Edwin J. Harron is a partner in the Wilmington, Del., office of Young Conaway Stargatt & Taylor, LLP, where he specializes in mass tort insolvencies and settlement trusts, routinely advising debtors, mass tort future claimants' representatives, trustees and other parties in out-of-court workouts, complex foreign and domestic restructurings, pre-planned bankruptcies and chapter 11 cases. Having long led a team dedicated exclusively to the restructuring of companies facing overwhelming asbestos liability, he has helped extend the "injunction and trust" model to other types of product-liability personal-injury claims. Mr. Harron is admitted to practice in Delaware, New York and New Jersey, and before the U.S. Bankruptcy Court for the District of Delaware, the U.S. Courts of Appeals for the Third and Fourth Circuits, the U.S. District Courts for the Southern District of New York and the Western District of Pennsylvania, and the U.S. Supreme Court. He received his B.A. from Temple University and his J.D. from Widener University Delaware Law School.

Hon. Thomas M. Horan is U.S. Bankruptcy Judge for the District of Delware in Wilmington, appointed in 2023. He previously practiced law in Wilmington for 18 years, focusing on financial restructuring and bankruptcy litigation. Most recently, Judge Horan had been a member of the Bankruptcy, Insolvency and Restructuring group at Cozen O'Connor, a national firm headquartered in Philadelphia with a Wilmington office. He joined Cozen in a group-wide 2020 defection from Fox Rothschild, for which he had worked since its own 2018 merger with Wilmington-based Shaw Fishman Glantz & Towbin. Judge Horan's national practice included representing debtors and official unsecured creditor committees in complex chapter 11 proceedings, and he represented secured creditors and other parties in litigation. He also frequently provided opinion letters on commercial transactions and represented parties before the state's Court of Chancery and Superior Court. Last year, Judge Horan was named to *Lawdragon*'s list of the Top 500 U.S. bankruptcy and restructuring lawyers. He

also serves on ABI's Board of Directors. Judge Horan received his B.A. in 1989 and his M.A. in 1992 from Fordham University, and his J.D. *cum laude* from St. John's University School of Law in 2002, where he was executive notes and comments editor for the *ABI Law Review*.

R. Stephen McNeill is a partner in the Wilmington, Del., office of Potter Anderson & Corroon LLP, where he focuses his practice on complex bankruptcy proceedings involving national and regional clients, including debtors, secured lenders, creditors' committees and a variety of unsecured creditors. He has been involved in contesting and defending asset sales and plans of reorganization, assumption and rejection of leases and contracts, and other creditor issues including defense of preference litigation. In addition to being a frequent author on bankruptcy-related topics, Mr. McNeill is a coordinating editor of the *ABI Journal*'s Building Blocks column, served as co-secretary of the Delaware Bankruptcy Inn of Court from 2021-22, and is a certified Delaware Superior Court and Delaware Bankruptcy Court mediator. He also serves as an adjunct professor at Widener University Delaware School of Law, where he teaches a class entitled "Fiduciary Duty in the Zone of Insolvency." Mr. McNeill is a member of the American and Delaware State Bar Associations and ABI, and is admitted to practice before the U.S. District Court for the District of Delaware and the U.S. Court of Appeals for the Third Circuit. He was recognized in *Chambers USA* in 2023, and he has been listed in *The Best Lawyers in America* for Litigation - Bankruptcy since 2020. Mr. McNeill received his B.S. *summa cum laude* from Auburn University at Montgomery in 2002 and his J.D. cum laude from Washington and Lee University in 2008, where he was senior articles editor of the *Washington and Lee Law Review*.

Edward E. Neiger is a co-managing partner at ASK LLP in New York, where his practice focuses on representing unsecured trade creditors in complex bankruptcy cases and prosecuting and defending large preferences and fraudulent conveyance actions. He is a nationally recognized leader in both bankruptcy and mass tort law. Prior to joining ASK, Mr. Neiger founded Neiger LLP, where he represented clients in the bankruptcy cases of Lehman Brothers, American Airlines and General Motors, among others. Previously, he was in the bankruptcy group of Weil, Gotshal & Manges LLP, where he worked on behalf of such debtors as Enron, Lehman Brothers, GM and PG&E, and he represented thousands of victims of Boy Scout sexual abuse and more than 100,000 victims of Purdue Pharma. Mr. Neiger is on the board of 2EndTheSitgma and works to help those suffering from addiction, including those incarcerated, get the help they need. At the same time, he fights to hold those responsible for the opioid crisis, especially governments and elected officials, accountable. In the past, Mr. Neiger helped Holocaust survivors recover monetary damages from the German government, including his own grandfather (all of his grandparents are Holocaust survivors and came to the U.S. as refugees after the Second World War). He is a member of the New York City Bar Association's Imperfect History Committee, which explores and uncovers the racist roots of the NYC Bar Association, and in 2020, he was honored as one ABI's "40 Under 40." Mr. Neiger is the author of the *New York Law Journal*'s "Mass Torts Roundup" and "Bankruptcy Update" columns. He received his undergraduate degree *summa cum laude* from Touro College, where he served as the president of the Pre-Law Society and as editor-in-chief of the *Pre-Law Journal*, and his J.D. in 2004 from Fordham University, where he served on its law review.