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U.S. Trustee Hot-Button Issues

John R. Ashmead, Moderator
Seward & Kissel LLP

Lauren C. Doyle
Milbank LLP

William K. Harrington
Office of U.S. Trustee

Marc E. Hirschfield
Royer Cooper Cohen Braunfeld LLC

Hon. Sean H. Lane
U.S. Bankruptcy Court (S.D.N.Y.)

Seth H. Lieberman
Pryor Cashman LLP

Dennis C. O’Donnell
DLA Piper

CONCURRENT SESSION

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United States Trustee Hot Button Issues Panel

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John Ashmead, Moderator (Seward & Kissel LLP)

Hon. Sean Lane (Southern District of New York Bankruptcy Court)

Hon. William Harrington (United States Trustee Regions 1 & 2)

Lauren Doyle (Milbank)

Mark Hirschfield (Royer Cooper Cohen Braunfeld LLC)

Seth Lieberman (Pryor Cashman)

Dennis O'Donnell (DLA Piper)

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Role of the United States Trustee

- Purdue Pharma Highlights Tension
  - The recent *Purdue Pharma* oral arguments highlighted the range of opinions on the role of the UST. There, the UST opposed relief (plan releases) that was favored by an overwhelming majority of opioid claimants (97.5% approval of voting claimants), the debtors, and the unsecured creditors committee.
    - Counsel for the debtors went so far as to state that the U.S. Trustee was an “interloper with absolutely no financial stake in this [case’s] resolution and . . . lack[ed] standing.”
    - Counsel for the UST conversely described its role as that of a “watchdog . . . that helps ensure that there’s a disinterested observer who is able to ensure that the bankruptcy courts are applying the Bankruptcy Code appropriately.”
    - Justices Kavanaugh and Thomas appeared to agree with the idea that the UST lacked standing to argue against the deal, with Justice Thomas commenting that “I’m wondering what exactly [your role is] and why is it you’re able to come in and undo something that has such overwhelming agreement.”

Role of the United States Trustee

- The Watchdog
  - The *Purdue Pharma* oral argument underscores, but is by no means a rare example of, the tension that is present at times regarding the UST's role in the chapter 11 process. A key description of the UST emphasized by multiple appellate courts over many years is that of a "watchdog" or "guardian" of the public interest:
    - *An Attorney at Law v. Stuart (In re Charges of Unprofessional Conduct Against 99-37)*, 249 F.3d 821, 824 (8th Cir. 2001) (noting that the UST "may be compared with a prosecutor and serves as a bankruptcy watch-dog to prevent fraud, dishonesty and overreaching in the bankruptcy arena.");
    - *In re South Beach Sec., Inc.*, 606 F.3d 370-371 (7th Cir. 2010) (J. Posner) (stating that the role of the UST "is to be a watchdog" and the "guardian of the public interest in bankruptcy proceedings."); and
    - *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 225 (3rd Cir. 2003) (stating that "U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding judges in monitoring certain aspects of bankruptcy proceedings").
  - Similarly, in its brief filed with the Supreme Court prior to oral argument in *Purdue Pharma*, the UST noted that Congress made the UST "responsible for protecting the public interest and ensuring that bankruptcy cases are conducted according to law." (citing *In re Revco D.S., Inc.*, 898 F.2d 498, 499-500) (6th Cir. 1990).

Role of the United States Trustee

- The Watchdog (cont.)
  - Professor Lindsey Simon of the University of Georgia School of Law speaks to the unique position of the UST, noting that it straddles both the executive and judicial powers of the United States:
    - *"The US Trustee differs from other specialists within the Justice Department because it does not directly represent 'the government' in bankruptcy cases. In many ways the US Trustee is a hybrid entity, taking on some quasi-judicial tasks, such as reviewing petitions filed with the court for completeness or forming a committee, and others that are quasi-executive such as reporting suspected bankruptcy fraud to the Federal Bureau of Investigation. While on the one hand the U.S. Trustee is designed to be independent, on the other having an arm of the executive branch serving as a watchdog for bankruptcy cases is an oddity that cannot be overlooked."*
      - Lindsey Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. Rev. 1297 (2020).
  - While the appropriate role of the UST can be debated, there can be no debate that the positions taken by the UST can, and do, have a substantial impact on bankruptcy cases – including positions that drive up the cost of the case and even threaten the "success" of the case.

Role of the United States Trustee

- UST Statutory Standing
  - Section 307 of the Bankruptcy Code provides "The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title."
  - In addition, 28 U.S.C. § 586 sets out specific duties for the UST, which include, among others:
    - (3)(a) – supervision over the administration of cases and trustees in cases . . . under title 11 by, whenever the UST considers it to be appropriate,
    - (B) – monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court . . . comments with respect to such plans and disclosure statements;
      - (E) monitoring creditors' committees appointed under title 11;
      - (G) monitoring the progress of cases under title 11 and taking such actions as the UST deems appropriate to prevent undue delay in such progress; and
    - (5) perform the duties prescribed for the Unites States Trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe.

Role of the United States Trustee

- UST Statutory Standing (cont.)
  - Bankruptcy courts appear to be in agreement that the general grant of power conveyed by section 307 is not limited by the specific grant of authority under 28 U.S.C. § 586. Rather, according to these courts, these provisions afford the UST broad power to appear and be heard on any issue in any case or proceeding under title 11, when the UST believes the relief requested is contrary to what is permitted under the Bankruptcy Code. See, e.g., 2 COLLIER ON BANKRUPTCY P. 307.02.
    - *In re South Beach Sec.*, Inc. 606 F.3d 366, 371 (7th Cir. 2010) (United States Trustee has the right to object to a plan of confirmation because the "[UST] can be a party in interest when he seeks to protect the rules and procedures of bankruptcy, over which he is the congressionally ordained watchdog – he has a statutory interest in making sure that bankruptcy law isn't abused.");
    - *In re Parsley*, 384 B.R. 138, 146 (Bankr. S.D. Tex. 2008) ("[T]he UST, on its own, has the right to be heard on any issue of its choosing.");
    - *In re Dow Corning Corp.*, 194 B.R. 147 (Bankr. E.D. Mich. 1996) ("One of the [UST's] principal rasions d'etre is to guard and protect the bankruptcy system . . . The United States Trustee now monitors such activities and *objects not because parties in interest may be harmed by the action, but merely to protect the integrity of the system*") (emphasis in original);
    - *In re Houghton Mifflin Harcourt Publ'g Co.*, 474 B.R. 122, 137 (Bankr. S.D.N.Y. 2012) (UST had standing pursuant to section 307 to move under section 1406 to change the venue of the case);
    - *In re Youk-See*, 450 B.R. 312, 322 (Bankr. D. Mass. 2012) (UST had standing and authorization to conduct Rule 2004 examinations because the non-exhaustive grant of specific powers under 28 U.S.C. § 586 did not limit the general grant of authority to "raise" and be heard on "any issue" under section 307); and
    - *Bank of Am., N.A., v. Lashinsky (In re Ahl)*, 2012 U.S. Dist. LEXIS 63612 at * 7–13 (D. Ariz., May 7, 2012) (finding that although there is no specific grant of authority for the UST to object to proofs of claim, section 307 provides the requisite authority).

Role of the United States Trustee

- UST Statutory Standing (cont.)
  - Accordingly, unlike other litigants in a bankruptcy case who must meet the aggrieved person standard for standing (*i.e.*, have an economic stake in the outcome of a dispute) to appeal an adverse decision from the bankruptcy court, multiple appellate courts have held the UST automatically has standing to appeal, despite having no economic interest in the outcome because its standing arises statutorily from its duty to enforce the bankruptcy law in the public interest. See, e.g.—
    - *Walton v. Houlihan, Lokey, Howard & Zukin (In re UA Theatre Co.)*, 315 F.3d 217, 225 (3d Cir. 2003) ("A lack of pecuniary interest in the outcome of a bankruptcy proceeding does not deny the U.S. Trustee standing.");
    - *Adams v. Zarnel (In re Zarnel)*, 619. F.3d 156, 163 (2d Cir. 2010) ("While the pecuniary interest formulation is an often used and often useful test of standing in the bankruptcy context, it is not the only test . . . [i]nstead, even absent a direct pecuniary interest in the litigation, a public interest [also gives the UST] a sufficient stake in the outcome of a bankruptcy case to confer appellate standing.");
    - *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1991) ("[S]tanding to appeal . . . may arise from the [UST]'s official duty to enforce bankruptcy law in the public interest."); and
    - *In re Plaza Diego Shopping Center, Inc.*, 911 F.2d 820, 824 (1st Cir. 1990) (appellate standing derives from the U.S. Trustee's interest from his statutory responsibility to represent and protect the public)

Role of the United States Trustee

- Purdue Pharma's New Argument
  - In their briefing to the Supreme Court, counsel for the *Purdue Pharma* debtors and unsecured creditors committee (the "Plan Proponents") advanced a new argument – arguing that the UST's role as a watchdog limits its appellate authority to that of an "amicus-type role" whereby the UST may participate and be heard on an appeal in an "existing case or proceeding", but may not "create a case or proceeding."
    - The first prong of the Plan Proponents argument is the plain language of section 307, which provides the UST with the right to "raise", "appear", and "be heard on" any issue in any case or proceeding under title 11.
    - In other words, the Plan Proponents' view is that the UST can file a brief presenting its views on third-party releases in an appeal brought by another party who has met the person aggrieved standard (*i.e.*, has suffered some pecuniary harm), but the UST may not be the party to lodge an appeal.
    - This argument is based on the difference between the statutory grant of standing under section 307, and the standing conferred by Article III of the Constitution. Section 307 may give the UST a right to be heard in bankruptcy cases, but an appeal to an Article III court requires an injury-in-fact – a statutory grant of standing is insufficient. *Raines v. Byrd*, 521 U.S. 811, 829 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").
    - The second prong of the Plan Proponents' argument focuses on the difference between the United States Trustee System and the United States of America as a party in interest in a bankruptcy case. They argue that the UST does not represent the USA in bankruptcy, is not appointed by the President with the advice and consent of the Senate, and is not tasked with exercising the executive enforcement power of the United States. Rather, they argue that the UST is simply an "advisory watchdog" whose duties do not include representing the United States or enforcing Federal law.

Role of the United States Trustee

- Purdue Pharma's New Argument (cont.)
  - In response to this attack, the UST's argument focuses on the decisions of the *Walton*, *Zarnel*, *Clark* and *Diego Shopping Center* appellate courts.
    - It points out that every circuit court of appeal that has considered the issue of the UST's appellate standing has held that section 307 "grants the UST standing to appeal regardless of the government's financial interest" because the UST's authority to appeal emanates from its responsibility to ensure that "bankruptcy cases are conducted according to the Bankruptcy Code." *See, e.g.*, *In re Revco D.S., Inc.*, 898 F.2d 498, 499-500 (6th Cir. 1990).
    - In addition, the UST argues that the plain language of section 307 includes the authority to "raise" any issue in any case under title 11. The right to "raise" an issue includes the right to appeal an issue. Moreover, section 1109(a) of the Code gives the SEC the right to raise issues in a bankruptcy proceeding but not to appeal any adverse judgment. Had Congress intended to foreclose the UST's ability to appeal in section 307, it would have clearly said so, as it did in section 1109(a).
    - Lastly, the UST urges that Plan Proponents' Article III standing argument lacks merit because Congress has the authority to confer standing upon the United States, acting through a federal officer or agency to "pursue the public's interest without infringing on Article III of the Constitution. *Director v. Newport News Shipbuilding & Dry Dock.*, 514 U.S. 122, 132 (1995). The UST is an officer of the executive branch subject to removal by the Attorney General under 28 U.S.C. 581(c).

Role of the United States Trustee

- FTX Examiner Dispute
  - Another recent example of this tension played out in the Third Circuit's decision *in FTX Trading Ltd., et al., v. Andrew R. Vara*, Case No. 23-2297 (3d Cir. 2024). In *FTX*, the UST moved for the appointment of an examiner under section 1104(c), arguing that the court's appointment of an examiner was mandatory upon request by the UST or a party in interest.
    - The UST's argument was twofold. *First*, the UST looked to the plain language of the statute which it interpreted as requiring the court to order the appointment of an examiner (*i.e.* "shall order the appointment") when certain predicate conditions were met.
    - *Second*, the UST advanced a number of policy-based arguments including:
      - A public report of the examiner's findings could reveal the "wider implications" of FTX's unprecedented collapse, which would be beneficial to the public interest;
      - The appointment of an examiner could allow for a faster and more cost-effective resolution of the bankruptcy proceedings. The examiner could conduct the investigation while the new CRO focused on stabilizing the debtors' businesses; and
      - The appointment of an examiner was appropriate because of various conflicts of interest and intercompany claims that existed between debtors Alameda Research and FTX Trading. Ltd.
    - The UST was opposed by the debtors, the unsecured creditors committee and the foreign representative of the FTX affiliates undergoing insolvency proceedings in the Bahamas (the "Opposing Parties").

Role of the United States Trustee

- <u>FTX Examiner Dispute</u> (cont.)
    - In addition to their own statutory construction argument, the Opposing Parties argued that the examiner appointment would be:
        - A source of substantial and unwarranted cost, to the detriment of creditors;
        - Duplicative of the unsecured creditors committee's own investigation; and
        - An unnecessary distraction, which would only serve to undermine broader efforts to stabilize the debtors' business and finances.
    - The bankruptcy court agreed with the Opposing Parties, finding that the examiner's appointment was neither mandatory nor warranted in this case; however, this decision was overturned by the Third Circuit on appeal – notwithstanding that many of the case issues had been resolved pursuant to a global settlement and a plan was on file at the time of the decision. The Third Circuit held that the bankruptcy court had no discretion to deny an examiner's appointment when the statutory predicates were present.
- <u>What Is/Should be the Role of the United States Trustee?</u>
    - In other words, just because the UST *can* appear and be an active litigant in a given case, it begs the question of whether it *should*.

Exculpation

- Plan Exculpations Generally
  - Exculpation of parties involved in chapter 11 cases is a common feature of chapter 11 plans—intended to shield the key parties in a case from suit regarding actions taken in connection with the chapter 11 cases.
    - Unlike releases, exculpation clauses limit the scope of an exculpated party's liability for conduct during the course of the bankruptcy case (*i.e.*, typically to gross negligence, willful misconduct, or fraud).
  - Exculpation provisions have generally been approved provided the scope of the provision is not overbroad. The appropriate scope of the exculpation has become a "hot button" issue with the United States' Trustee's Office, as a circuit split has developed in recent years.

Exculpation

- Circuit Split on the Scope of Plan Exculpations
  - In 2020, the Ninth Circuit held in *Blixseth* that nothing in the Bankruptcy Code precludes "narrowly tailored" plan exculpations of non-debtors that have been integral to the plan process. *See Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020). [1]
    - The Ninth Circuit view is that exculpation provisions are appropriate tools in chapter 11 plans and that section 1123(b)(6) of the Code provides plan proponents the flexibility to craft exculpations that are not otherwise inconsistent with the other provisions of the Bankruptcy Code. *In re Astria Health*, 623 B.R. 793 (Bankr. E.D. Wash. 2021).
  - In contrast, the Fifth Circuit rejected the view that 1123(b)(6) and section 105 sweep so broadly as to allow non-debtor exculpations. Instead, it held that section 524(e) "categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." *NexPoint Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management*, *L.P.*), 48 F.4th 419 (5th Cir. 2022) (citing to *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009).

1 The Third Circuit in *In re PWS Holding Corp.* (228 F.3d 224, 246-47 (3d Cir. 2000)) similarly found that plan exculpation provisions were not prohibited by section 524(e) of the Bankruptcy Code and that a plan's exculpation provision is permitted to "set[] forth the appropriate standard for liability that would apply." Notably, however, many Bankruptcy Courts in the District of Delaware, nevertheless, limit such exculpation provisions to estate fiduciaries.

Exculpation

- Circuit Split on the Scope of Plan Exculpations (cont.)

  - The decision in *Highland Capital* is now on appeal to the Supreme Court on the question of whether section 524(e) of the Code serves as an absolute bar on exculpation of non-debtors. The Supreme Court's decision remains pending.

    - Notably, the United States as *amicus curiae* recommended that the Court's decisions in *Highland Capital* be held pending the Court's decision in *Harrington v. Purdue Pharma L.P.*, No. 23-124, and NexPoint Asset Mgt submitted a supplemental brief wherein it agreed with that recommendation because, "[a]s the Solicitor General explains, *Purdue* presents issues closely related to the ones at issue in these two petitions. The Court's decision in *Purdue* may therefore shed light on the proper disposition of these cases." Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. at 2, *NexPoint Advisors, L.P. v. Highland Capital Management, L.P.* (No. 22-669).

Exculpation

- Recent Cases in the Southern District of New York

  - Non-debtor exculpations are widely accepted in the Southern District of New York; however, the UST has, and continues to, formally and informally object to plan exculpation provisions in chapter 11 plans.

  - The objections principally focus on three issues: (i) the exculpation extends beyond the scope of exculpation contemplated under the Bankruptcy Code under section 1125(e), (ii) the exculpation seeks to exculpate non-estate fiduciaries, and (iii) the exculpation seeks to exculpate acts beyond the temporal period of the petition date through the effective date of the plan.

    - *See, e.g.*, *In re Genesis Global Holdco, LLC,* Case No. 23-20063 (SHL) (Bank. S.D.N.Y. Jan. 29, 2024) [Docket No. 1202]; *In re Celsius Network LLC, et al.*, Case No. 22-10964 (MG) (Bankr. S.D.N.Y. Aug. 4, 2023) [Docket No. 3182]; *In re Times Square JV LLC, et al.*, Case No. 22-11715 (JPM) (Bankr. S.D.N.Y. Mar. 14, 2023) [Docket No. 240]; *In re Rockley Photonics Holdings Limited*, Case No. 23-10081 (LGB) (Bankr. S.D.N.Y. Feb. 23, 2023) [Docket No. 58]; *In re LATAM Airlines Group S.A., et al.*, Case No. 20-11154 (JLG) (Bankr. S.D.N.Y. Apr. 29, 2022) [Docket No. 5176].

  - These objections, coupled with the pending appeal of Highland Capital, have been successful in achieving numerous concessions that narrow the scope of plan exculpations, as seen in the dispute raised in *In re Voyager Digital Holdings.*, 649 B.R. 111 (Bankr. S.D.N.Y. 2023).

Exculpation

- Voyager Digital Holdings Case Example:
  - In *Voyager*, the UST filed an objection to the exculpations included in the Debtors' Plan arguing that: (i) it was not appropriate to include the Released Voyager Employees as Exculpated Parties; that only fiduciaries should be exculpated, (ii) the exculpation inappropriately expanded section 1125(e), (iii) the exculpation should be limited to claims relating to court approved transactions, and (iv) that the exculpation should carveout malpractice claims to ensure that violations of the Rules of Professional Conduct are not exculpated.
  - In addition to the UST objection, the United States Attorney filed a further objection arguing that the exculpation language impermissibly limited the ability of governmental entities to challenge the plan transactions post-confirmation and would "peremptorily foreclose the rights of Governmental Units against the [d]ebtors and non-debtors, including their rights to enforce important federal and state laws that protect public health safety and welfare."
  - The court overruled the objections of both the UST and the United States Attorney. However in crafting the exculpation used in the final order, the court narrowed the proposed language significantly to:
    - 1. Provide an exculpation only for liability based on the negotiation, execution and implementation of any transactions or actions approved by the Bankruptcy Court in the Chapter 11 Cases (excluding fraud, willful misconduct or gross negligence and specifically excluding any exculpation for violations of the Rules of Professional Conduct)
    - 2. Provide an exculpation for certain rebalancing transactions contemplated by the plan, to the extent that the exculpated parties carryout these transactions in the manner provided for in the plan. However, the court did limit the exculpation so as to allow governmental units to potentially enjoin the rebalancing transactions to the extent that the transactions infringe on their police power enforcement authority.
    - 3. Lastly, the exculpated parties themselves was limited from all directors and officers to those whose conduct was reviewed by the special committee in its investigation.

Exculpation

- Takeaways from Voyager Digital
  - The Voyager Digital bankruptcy court decision, which remains on appeal in the Southern District of New York, raises several questions as to the acceptable scope of plan excupation provisions, including:
    - 1. The inclusion of non-estate fiduciaries;
    - 2. The temporal scope of the acts that may be exculpated—
      - i. whether those parties integrally involved in distributions/implementation of the Plan should be exculpated in connection with such acts;
      - ii. whether prepetition acts integral to formulation of the plan should be exculpated under the plan;
    - 3. Whether the government may be bound by exculpation of certain parties, so long as it is not prevented from enforcement of its police and regulatory powers.
  - The Supreme Court's ruling in *Highland Capital* may or may not bring further clarity to these issues.

Opt-In vs. Opt-Out Plan Releases

- Comparison of Opt-Out vs Opt-In
  - An opt-out release provision requires the creditor to affirmatively opt-out from providing releases to certain third parties associated with the debtor's case. The opt-out (and where there is an opt-in) is an option on the ballot for the chapter 11 plan. If the creditor fails to opt-out, they are deemed to have consented to the releases and the causes of action held by that creditor against third parties are released.
  - An opt-in does the opposite. The opt-in requires the creditor to make an affirmative choice on the ballot to provide the release to associated third parties. If the creditor fails to do so either by declining to make the election or by doing nothing, then those claims are deemed to have not been released, and the claims remain live and assertable against the relevant third parties even after the plan is confirmed.

Opt-In vs. Opt-Out Plan Releases

- UST Favors the Opt-In
  - The UST's standard position is in favor of the opt-in. As noted by the UST at the *Purdue Pharma* oral argument, "the U.S. Trustee's position has been that opt-in consents are necessary for the waiver of property rights" – a category which includes causes of action held by the creditor against non-debtor third parties.
    - This viewpoint is based on the policy that consensual third-party releases are contracts between the consenting creditors and the debtors.
    - For a contract to arise, there must be consent, and consent can be express or manifested by conduct. *In re SunEdison, Inc.*, 576 B.R. 453, 459 (Bankr. S.D.N.Y. 2017). However, under traditional notions of contract law, silence does not equal an express consent and is not generally regarded as conduct that manifests consent. *Id*. at 460-61.
  - In addition, the UST has expressed concern that the average creditor will not understand the gravity of releasing a claim, and—as evidenced by the large number of ballots that are not returned— an opt-out release structure may leave many creditors unaware that they are releasing potentially valuable claims.
  - Finally, UST objections also routinely focus on the Second Circuit decision in *Deutsche Bank AG. v. Metromedia Fiber Network Inc., (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005), which noted that third-party releases are only to be used in "rare and unusual circumstances." The UST has argued that the *Metromedia* decision was intended to limit the usage of consensual third-party releases and yet they have become commonplace in major chapter 11 restructurings.

Opt-In vs. Opt-Out Plan Releases

- Major Case Parties Generally Favor the Opt-Out
  - From a practical standpoint, the opt-out approach promotes efficiency and finality in chapter 11 cases. Non-debtor parties involved in a restructuring (DIP lenders, exit lenders, directors and officers, professionals, creditors playing an active role) want assurances they will not be exposed to future liability for issues resolved in or related to the case up through the plan effective date. They do not want to be subject to liability for their efforts in the chapter 11 case.
    - It is also customary for the releases to have carveouts for fraud, gross negligence and willful misconduct, which provide a measure of protection to creditors relinquishing claims.
  - Many creditors ignore and/or do not return ballots. Thus, opt-in procedures, as opposed to opt-out procedures, require a level of creditor participation that ignores the practical reality of chapter 11 practice, where a significant portion of creditors choose not to participate in the chapter 11 process.

Opt-In vs. Opt-Out Plan Releases

- Courts Approving the Opt-Out
  - In decisions authorizing the opt-out approach, courts reason that so long as the information and directions provided in the ballot regarding the opt-out procedures are clear, and the consequences for failure to exercise the opt-out procedures are clear, then due process requirements for "consent" have been met. For example:
    - *In re LATAM Airlines Grp. S.A.,* 2022 Bankr. LEXIS 1725 at * 147 (Bankr. S.D.N.Y. 2022) (approving opt-out procedures where "[t]he Debtors have provided very clear and prominent notice and explanation of the opt-out [p]rocedures applicable to Non-Debtor Releases").
    - *In re Avianca Holdings S.A.*, 632 B.R. 124, 137 (Bankr. S.D.N.Y. 2021) (finding opt-out procedure appropriate for creditors who have the right to vote but fail to return a ballot where the procedures clearly explain that the opt-out box must be checked for third party release to be approved).
    - *In re 21st Century Oncology Holdings Inc.*, Case No. 17-22770 (RDD) Hr'g Tr. 43:6-11 (Bankr. S.D.N.Y. Jan. 9, 2018) [Docket No. 926] (confirming plan and approving third-party releases as consensual where the procedures noted that creditors that abstained from voting or voted to reject the plan but did not opt-out of the release on their ballot would be deemed to release).
  - The key to securing a court's approval for the opt-out approach is clarity. Where there is a clear and prominent explanation of what the creditor's rights are and will be in the case of action or inaction, courts have found that releasing creditors have given their informed consent and accordingly have approved the opt-out procedures over the UST's objection.
  - Decisions approving the opt-out approach often cite to Judge Chapman's decision in *In re Cumulus Media Inc.*, 17-13381 (Bankr. S.D.N.Y. Feb. 1, 2018), Tr. Of Hr'g at 27-28, which noted that:
    - *"Inaction is action under appropriate circumstances. When someone is clearly and squarely told if you fail to act your rights will be affected, that person is then given information that they will need to do something or else. That is not a trap."*

Opt-In vs. Opt-Out Plan Releases

- Opt-In Cases
  - The courts in *In re Chassix Holdings.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015) and *In re SunEdison, Inc.*, 576 B.R. 453, 459 (Bankr. S.D.N.Y. 2017) adopted the opt-in approach and both decisions are often cited by the UST when it objects to opt-outs.
  - The policy underlying both decisions was that the opt-in approach ensures that traps are not laid for unwary creditors – a creditor must be fully aware that it is providing the releases (note, these decisions pre-date *Cumulus* and the other cases cited above).
  - In *Chassix*, the debtors sought to implement an opt-out where creditors who chose to take no action were deemed to have "consented" to the releases. *Id*. at 80.
  - The *Chassix* court reasoned that charging all inactive creditors with full knowledge of the scope and implications of the proposed third-party releases and implying "consent" to the releases based on inaction would be unrealistic, unfair, and would stretch the meaning of consent beyond its breaking point. *Id*. Specifically, the *Chassix* court noted:
    - *"If a creditor who votes in favor of a plan have [sic] implicitly endorsed and consented to third party release that are contained in that plan, then by that same logic a creditor who votes to reject a plan should also be presumed to have rejected the proposed third party releases that are set forth in the plan. The additional opt out requirement in the context of this case, would have been little more than a court-endorsed trap for the careless or inattentive creditor."*

Opt-In vs. Opt-Out Plan Releases

- Opt-In Cases (cont.)
  - Similarly, in *SunEdision*, which cited *Chassix* approvingly, the court noted that contract law did not place a duty to speak upon creditors in a chapter 11 case. Specifically, the *SunEdision* court noted:
    - *"The Debtors' argument that the Non-Voting Releasors' silence should be deemed their consent to the Release is not persuasive because the Debtors have not identified the source of their duty to speak. The Debtors do not contend that an ongoing course of conduct with their creditors gave rise to a duty to speak. Furthermore, the Debtors do not argue that creditors understood that if they accepted a distribution under the Plan they were duty-bound to object or accept the Release."*

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Opt-In vs. Opt-Out Plan Releases

- Unimpaired vs Impaired Creditors
  - Opt-in/out issues have been impacted by the impairment status of the creditor under the plan.
  - An unimpaired class of creditors is conclusively presumed to have accepted the terms of the plan of reorganization. 11 U.S.C. § 1126. Because of this Code provision, a debtor need not solicit an acceptance by the creditors in an unimpaired class. *In re Chateaugay Corp.*, 150 B.R. 529, 542 (Bankr. S.D.N.Y. 1993).
  - At least one court has taken the view that just as an unimpaired creditor is deemed to have accepted the plan, the unimpaired creditor is also deemed to consent to the third-party release even though it does not get to vote on the plan and has no opportunity to opt out (unlike impaired creditors).
    - *In re Indianapolis Downs.*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) ("In this case, the third-party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases.").

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Opt-In vs. Opt-Out Plan Releases

- Unimpaired vs Impaired Creditors (cont.)
  - Other courts have found the opt-out approach acceptable for unimpaired creditors.
    - *U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (finding opt-out release approach permissible for unimpaired creditors because "[N]o creditor or interest holder whose rights are affected by the 'deemed acceptance' language has objected to the Plan . . . [T]he silence of the unimpaired classes on this issue is persuasive . . . . The unimpaired classes are being paid in full and have received adequate consideration for the release.").
    - *Avianca Holdings*, 632 B.R. at 136 (finding opt-out release approach for unimpaired creditors sufficient to constitute consent).
    - *In re Times Square JV LLC.*, Case No. 22-11715, (Bankr. S.D.N.Y. Apr. 12, 2023), Tr. Of Hr'g at 46 (finding opt-out release approach for unimpaired creditors sufficient to constitute consent because "creditors were provided with notice of the third-party releases and with the ability to opt out if so desired.").
  - Underlying these cases is the same general reasoning for opt-out procedures for impaired creditors – the unimpaired creditor was given adequate and clear notice of the consequences and decided not to act.

Opt-In vs. Opt-Out Plan Releases

- Alternative View of Unimpaired and Releases
  - Some courts have adopted the view that a creditor who is nominally identified as "unimpaired" by the plan is still "impaired" under section 1124(1) if they will be deemed to grant a release - because they are being asked to release a property interest (i.e., the causes of action against third parties).
    - In *Chassix.*, 533 B.R. at 81, the court noted that "[i]f a creditor must release a claim against a third party under a plan, it is difficult to understand how such a creditor could properly be considered to be 'unimpaired' by the Plan in the first place. Because these nominally unimpaired creditors were being asked to release an interest in property, the court found these creditors to be impaired;
    - Similarly in *In re Trident Holding Company, LLC*, Case No. 19-10384, (Bankr. S.D.N.Y. May 2, 2019), Tr of Hr'g at 25, the court noted that "just saying that [a creditor is] unimpaired doesn't necessarily mean that the [creditor] consented to giving a release, which is essentially – it means you leave the bankruptcy case with less than you had coming into it. So it's not really consistent with the notion of being unimpaired."

Non-Estate Professional Fee Requests

- While estate professionals must be retained under the standards set forth in section 327 of the Code, non-estate professionals in a chapter 11 case (DIP lenders, exit lenders, ad hoc groups, RSA parties, indenture trustees, adverse litigation parties, *etc.*) often are entitled to reimbursement under a settlement, an RSA agreement or a plan, and seek to be paid under the standards set forth in section 363, Bankruptcy Rule 9019, and/or pursuant to the confirmation of a plan under section 1129 (as permitted under section 1123).

- <u>The Bankruptcy Code</u>

  - Section 363(b) of the Code provides that the debtor in possession "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate."

  - Bankruptcy Rule 9019 provides that: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."

  - Section 503(b)(3)(D) of the Code provides that "[a]fter notice and a hearing, there shall be allowed administrative expenses…including the actual, necessary expenses…incurred by a creditor…in making a substantial contribution in a chapter 11 case."

Non-Estate Professional Fee Requests

- <u>Section 503(b) Approach</u>
  - Section 503 delineates categories of claims that are entitled to elevated priority as "administrative expenses." These administrative expense holders incur costs while acting for the benefit of the entire bankruptcy estate, rather than their own interests. As a result, they should be compensated by the estate for these expenses.
  - The UST often argues that section 503(b) provides the exclusive means by which non-estate professionals may be paid.
    - The UST has argued that keeping non-estate professionals' payments cabined to section 503(b) protects the integrity of the Bankruptcy Code because section 503(b) is a specific application statute governing administrative expense payments from the estate. It argues that 503(b) should control over section 363(b), because the latter is a general application statute. See *Objection of the United States Trustee to Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization of Stearns Holdings LLC, Pursuant to Chapter 11 of the Bankruptcy Code*, Case No. 19-12226, [ECF No. 336 at 10]; *Objection of the United States Trustee to the Confirmation of the [Genesis] Debtors' Amended Joint Chapter 11 Plan*, Case No. 23-10063, [ECF No. 1202 at 17].
  - In *Lehman Bros. Holdings Inc.*, 508 B.R. 283 (S.D.N.Y. 2014), District Judge Sullivan adopted the UST position, holding that section 503 is the "exclusive" avenue for payment of administrative expenses and non-estate professional fees and expenses can be paid under section 503 only if they made a "substantial contribution" to the estate. *Id.* at 289-91.
  - The substantial contribution analysis imposes a heightened standard, with one court describing substantial contribution awards as being made only for "extraordinary actions that lead to an actual and demonstrable benefit for the estate." *In re Granite Partners*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997).

Non-Estate Professional Fee Requests

- <u>Section 503 Evidentiary Standard</u>
  - For a payment to be authorized as a substantial contribution under Section 503, the claimant must demonstrate by a preponderance of the evidence that contributions: (i) were a direct and significant benefit to the estate; (ii) advanced the entire bankruptcy process (not just the outcome); (iii) moved the case toward a successful reorganization. *Bedford JV, LLC v. Sky Lofts, LLC*, 2013 WL 4735643 at * 6 (E.D.N.Y. Sept 3, 2013).
  - This is a fact-intensive inquiry. Courts can consider corroborating testimony as well as firsthand observations of services. *Granite*, 213 B.R. at 447.

Non-Estate Professional Fee Requests

- Contrary Position – Business Judgment and the Rule of Reasonableness
  - However, in contrast to the holding in *Lehman Brothers*, many courts routinely accept the notion that other provisions of the Bankruptcy Code, namely 11 U.S.C. §§ 363, 365, 1123(b)(6) and 1129(a)(4), and Fed. R. Bankr. P. 2019 can be used to support payment of non-estate professional fee and expense requests.
    - *In re Purdue Pharma L.P*., 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (rejecting the UST position that Section 503 is the exclusive avenue for payment of non-estate professionals' fees and expenses);
    - *In re Adelphia Commc'ns Corp*., 441 B.R. 6 (Bankr. S.D.N.Y. 2010) ("[S]ection 503(b) does not provide, in words or substance, that it is the only way by which [non-estate professional fees] may be absorbed by the estate. Thus, the Court is free to look to other provisions of the Code that might authorize payment.");
    - *In re AMR. Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013) ("Therefore, the Court concludes that the professional fees contemplated by [the Plan] are permitted under Sections 1129(a)(4) and 1123(b)(6).");
    - *In re Stearns Holdings*, LLC, 607 B.R. 781 (Bankr. S.D.N.Y. 2019) (finding that non estate professionals may be paid pursuant to Bankruptcy Rule 9019);
    - *In re Sabine Oil & Gas Corp*., 555 B.R. 180 (Bankr. S.D.N.Y. 2016) (approving settlement that included payment of non-estate professional fees under Bankruptcy rule 9019); and
    - *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022) (approving settlement that was included in a plan of reorganization under 1129(a)(4)).

Non-Estate Professional Fee Requests

- Sections 363 and 365 – The "Business Judgment Approach"
  - Under this approach, payment of non-estate professionals' fees and expenses is analyzed using the business judgment standard.
  - Pursuant to section 363(b), a debtor may use property of the estate outside the ordinary course of business if there is a sound business reason to do so. See *Genco Shipping.*, 509 B.R. at 464 ("The standard used for judicial approval of the use of estate property outside the ordinary course of business is also the business judgment of the debtor.").
  - Similarly, pursuant to section 365, a court will approve the assumption of an executory contract "upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment." *In re MF Global Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012).
    - For a court to approve an application for payment under the business judgment approach, it must "expressly find from the evidence presented before [it] at the hearing a good business reason to grant the application." *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d. Cir. 1983). In doing so, the court must "consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders. *Id*.
    - A debtor "must support the motion [under section 365] with evidence—usually in the form of a declaration or affidavit—demonstrating that [assumption] of the contract falls within the proper exercise of the [debtors'] business judgment." *MF Global,* 466 B.R. at 242.

Non-Estate Professional Fee Requests

- Section 1123(b)(3) Approach
    - Under Section 1123(b)(3), a court may approve the settlement of claims and interests as part of the debtor's plan and any settlement is analyzed under the standard of Bankruptcy Rule 9019. *In re NII Holdings, Inc*., 536 B.R. 61, 98 (Bankr. S.D.N.Y. 2015) ("Courts analyze settlements under section 1123 by applying the same standard applied under Rule 9019 of the Bankruptcy Rules, which permits a court to 'approve a compromise or settlement.'").
        - For a court to approve a settlement in a plan under section 1123(b)(3), it must find that it is fair and equitable and in the best interests of the estate. *In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). The Rule 9019 settlement standard requires a court "to apprise itself of the relevant facts and law so that it can make an informed and intelligent decision," with the business judgment of the debtor being factored into the court's analysis. *JP Morgan Chase Bank, N.A., v. Charter Commcns Operating LLC (In re Charter Commcns,)*, 419 B.R. 221, 252 (Bankr. S.D.N.Y. 2009). Ultimately however, the standard is reasonableness. *In re Rosenberg*, 419 B.R. 532, 536 (Bankr. E.D.N.Y. 2009).

Non-Estate Professional Fee Requests

- Section 1123(b)(6) and 1129 (a)(4) Approach – "The Rule of Reasonableness"
    - Fees and expenses of estate professionals may also be paid under section 1129(a)(4). *In re Texaco Inc*., 84 B.R. 893, 907-08 (Bankr. S.D.N.Y. 1988). Pursuant to this section there must be: (i) a disclosure of the proposed payment; and (ii) a reasonableness analysis by the court. *In re Journal Register Co*., 407 B.R. 520, 537 (Bankr. S.D.N.Y. 2009).
    - Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of the [Bankruptcy Code]."
        - Reasonableness under section 1129(a)(4) will "vary from case to case and, among other things, will hinge to some degree on who makes the payments at issue, who receives those payments, and whether the payments are made from the assets of the state." *Mabey v. Southwestern Elec. Power Co., (In re Cajun Elec. Power Coop., Inc.)*, 150 G.3d 503, 517 (5th Cir. 1999).
        - Under *Adelphia Commc'ns Corp.*, which concluded that section 503(b) "does not provide, in words or substance, that it is the only way by which fees…may be absorbed by an estate," the court further reasoned that payment of fees and expenses pursuant to a plan was not inconsistent with section 503(b), and that section 1123(b)(6) is plainly a broad grant of authority. 441 B.R. at 14-19.
        - Thus, taken together, sections 1123(b)(6) and 1129(a)(4) authorize a plan proponent to include in its plan a provision for the payment of fees and expenses and authorize the court to approve the payments as part of the plan, provided they are reasonable.

Sealing Personally Identifiable Information

- Competing Interests in Section 107:
  - The recent cryptocurrency bankruptcy cases of *Voyager*, *Genesis*, *Celsius*, *Bittrex* and *FTX*, have placed the issue of redaction of personally identifiable information into a new spotlight. How should the courts balance the public's right of access against the right of case constituents to protect their safety and their property?
  - In the resulting debate, the U.S. Trustee has generally argued in favor of greater preservation of public access, whereas debtors and creditors' committees have favored greater protection of creditors' property and privacy rights.
  - Section 107 of the Bankruptcy Code incorporates a balancing test that weighs the long held view that court records are presumptively open to public review against the privacy concerns of individuals and the commercial concerns of entities.
    - Section 107(a) incorporates the common law right of public access to court records that was noted by the Supreme Court *in Nixon v. Warner Commc'ns Inc,* 435 U.S. 589 (1978).
    - Such access is "rooted in the public's First Amendment right to know about the administration of justice." *In re Motors Liquidation Co.*, 561 B.R. 36, 41 (Bankr. S.D.N.Y. 2016).
    - However, the right to public access to court records is "not absolute." *Nixon*, 435 U.S. at 598; *Motors Liquidation*, 561 B.R. at 42, and sections 107(b) and 107(c) codify exceptions to this presumption of public access.
    - More specifically, section 107 requires that the right of public access recognized by section 107(a) be balanced against the debtor's financial interest in protecting commercially sensitive information under 107(b)(1) and/or the privacy and safety concerns of individuals participating in the chapter 11 process under 107(b)(2) and 107(c).

Sealing Personally Identifiable Information

- Section 107(b)
  - Section 107(b) is framed in mandatory terms and provides that "on request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may . . . protect an entity with respect to a trade secret or confidential research, development or commercial information."
  - Section 107(b)(1) does not afford the court any discretion when its criteria are met by a moving party. Rather, the moving party must only show that the information sought to seal "is confidential" or "commercial" in nature. *In re Genesis Global Holdco.*, 652 B.R. 618, 632 (Bankr. S.D.N.Y. 2023).
    - Commercial information is "information . . . so critical to the entity seeking the protective order that its disclosure will unfairly benefit the entity's competitors. *Id.* (citing *In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011)).
      - For example, in *FTX* Judge Dorsey invoked section 107(b)'s "commercial information" standard as one basis on which to grant the debtors' and unsecured creditors committee's joint motion to redact certain customer names and addresses from publicly filed documents. Overruling objections from the UST, as well as media intervenors *Bloomberg*, *Dow Jones*, *New York Times*, and *Financial Times*, the Court noted that customer names and lists were valuable assets of the estate that were necessary for the maximization of value for creditors. The court noted:
      - "[I]t goes without saying that a customer list in any bankruptcy case is something that is protected by 107(b) as a trade secret. Companies hold those things very closely and don't want them disclosed." *In re FTX Trading Ltd.*, Case No. 22-11068 (Bankr. D. Del. Jan. 11, 2023) [Hr'g Tr. 103:1-5; ECF No. 489.]
      - Similarly, in *Bittrex,* Judge Shannon granted the debtors' redaction request based on, among other grounds, the debtors' declarant's observation that the customer lists were "commercial information" deserving of protection, which the debtors intended to sell during the course of the cases.
      - Lastly, in the *Cred* case, Judge Dorsey granted section 107(b) relief based upon a finding that a creditor list had intrinsic value and that its disclosure would affect the ability of the debtors to market and sell that list. *In re Cred Inc.*, Case No. 20-12836 (Bankr. D. Del. Dec. 18, 2020) [Hr'g Tr. 113:20–25; 114:1–16; ECF No. 277.]

Sealing Personally Identifiable Information

- Section 107(c)
  - Section 107(c), by contrast, grants to courts substantial discretion where the privacy and property rights of individuals are at risk.
    - Section 107(c)(1), added to the Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, "broadened the situations in which the court could protect individuals from disclosure of sensitive information in light of the emerging problem of identity theft." 2 *Collier on Bankruptcy* ¶ 107.LH[2] (16th ed.).
  - It mandates the protection of "personally identifiable information" where the court finds that "disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property." *In re Celsius Network LLC.*, 644 B.R. 276, 289 (Bankr. S.D.N.Y. 2022).
    - The balancing act at play with section 107(c) is between court access and individual creditor security. In the cryptocurrency cases, this debate has most often focused on the scope of the protection to be afforded––should such protection be limited to mailing and email addresses, or can it extend more broadly to actual creditor names?
    - Debtors and creditors' committee have argued for both addresses and names, with the UST arguing that the protection should extend no further than addresses.
    - The balancing act at play with section 107(c) is between court access and individual creditor security.

Sealing Personally Identifiable Information

- Section 107(c) (cont.)
  - Courts have resolved this debate in different ways, but a consensus has begun to form, as illustrated below, that, where there is any threat of injury to a creditor, then mailing addresses and email addresses should be redacted, but, by contrast, names of individual creditors should not be redacted unless there has been a compelling showing of potential monetary or bodily harm.
    - ***Voyager Digital.*** In the *Voyager Digital* case, for example, Judge Wiles authorized the sealing of mailing and email addresses, but he did not permit individual names to be sealed. *In re Voyager Digital Holdings, Inc.*, Case No. 22-1094 (Bankr. S.D.N.Y. July 8, 2022) (ECF No. 54).
    - ***Celsius.*** In the *Celsius* case, Judge Glenn delivered a similarly mixed ruling, authorizing the debtors and the creditors' committee to redact the home addresses and email addresses of "individual creditors," but requiring the names of individual creditors and the physical and email addresses of business entity creditors to be filed publicly. *In re Celsius Network LLC*, 644 B.R. 276 (Bankr. S.D.N.Y. 2022).
    - ***FTX***. In the *FTX* case, Judge Dorsey paired his ruling that customer names and lists were "valuable assets of the estate" with a ruling that the *FTX* debtors could redact the names of customers that are natural persons (but not business entities) under section 107(c) because the evidence established that disclosure of individual customer names would "provide malefactors with a menu of potential targets." *In re FTX Trading Ltd*., Case No. 22-11068 (Bankr. D. Del. Jan. 11, 2023) [Declaration by Jeremy A. Sheridan; ECF No. 1325].
    - During the *FTX* argument, the *FTX* debtors and creditors' committee pointed to fallout from the *Celsius* ruling unsealing customer names as indicative of the risks to *FTX* customers if their names were disclosed because, after the unsealing ordered by Judge Glenn, *Celsius* customers were targeted by numerous phishing and scamming attempts.

Sealing Personally Identifiable Information

- Section 107(c) (cont.)
    - On June 22, 2023, the U.S. Trustee and the Media Intervenors filed a notice of appeal as to the *FTX* court's ruling on the on the redaction motion, which appeal is still pending. *In re FTX Trading Ltd*., Case No. 22-11068 (Bankr. D. Del. June 22, 2023) [Notices of Appeal; ECF No. 1688, 1846].
    - ***Genesis***. In the *Genesis* case, Judge Lane permitted the redaction of both email addresses and customer names in part because "[t]he publication of names alone has been found to heighten the risk of identity theft and other harm," especially in the cryptocurrency context. *In re Genesis Global Holdco.*, 652 B.R. 618, 637 (Bankr. S.D.N.Y. 2023).
    - Judge Lane predicated his section 107(c) ruling on a finding that "redaction of the individual lenders' names is important because contact information––including home addresses could easily be found on the internet through just use of their names." 652 B.R. at 637.
    - ***Bittrex.*** In the *Bittrex* case, Judge Shannon granted Bittrex's request to seal its customer list and the names it contained under sections 107(c) on the ***independent*** ground that publication of the customer names would give rise to "manifest risk" of identity theft, scams and phishing attempts aimed at customers. *In re Desolation Holdings LLC*, Case No. 23-10597 (Bankr. D. Del. June 8, 2023) [Tr. at 78:1-2; Order, ECF No. 116].
    - Judge Shannon's ruling was based on a finding that the crypto industry's "primary purpose" of allowing "immediate instantaneous and effectively untraceable transfers of value" differentiates it from other industries and gives rise to "more material risk of loss and injury to stakeholders. In re Desolation Holdings LLC, Case No. 23-10597 (Bankr. D. Del. June 8, 2023) [Tr. At 70:22-71:3].

Faculty

John R. Ashmead is a partner with Seward & Kissel LLP and heads its Corporate Restructuring and Bankruptcy Group in New York and specializes in workouts, chapter 11 liquidations and foreign insolvency proceedings, where he represents trustees, agents, creditors committees, lenders, bondholders and other creditors, borrowers, equityholders, directors, acquirers and debtors. In addition to restructurings, his engagements include bankruptcy litigation, private equity and strategic investments, acquisitions, plan sponsorship and structured finance transactions. Mr. Ashmead was recognized as a leading lawyer in bankruptcy by *New York Super Lawyers* from 2010-23 and *The Best Lawyers in America from* 2022-24, and he was highly ranked by *Chambers USA* from 2019-23. He also is a Fellow of the American College of Investment Counsel. Mr. Ashmead has been involved in numerous distressed shipping matters advising company-side, lenders, investors and creditors in workouts, chapter 11 and chapter 15 cases and in foreign insolvency proceedings, including in matters involving TOISA, International Shipholding, Nautilus Holdings, OSG, TMT, Harvey Gulf and Hanjin. He appears before bankruptcy courts nationwide. Mr. Ashmead regularly authors articles in and lectures on the bankruptcy and restructuring area. In addition, he is a contributor to Seward Kissel's Corporate Restructuring Bankruptcy blog, Back in (the) Black. Mr. Ashmead previously clerked for Hon. Cornelius Blackshear of the U.S. Bankruptcy Court for the Southern District of New York from 1990-992 He is empaneled as a mediator in the U.S. Bankruptcy Court in Delaware. Mr. Ashmead received his B.S. in 1987 from St. John's University and his J.D. from Brooklyn Law School in 1990.

Lauren C. Doyle is a partner with Milbank LLP in New York and a member of the firm's Financial Restructuring Group. She regularly represents companies, creditors' committees, lenders and other strategic parties in chapter 11 and out-of-court restructurings in the U.S. and globally. Ms. Doyle has experience representing clients across the capital structure, negotiating restructuring plans, sales, DIP financings, exit financings and cross-border transactions. Her engagements have ranged across a wide array of industries, including energy, telecom, satellite, shipping, chemicals, paper, aviation, financial services, automotive, consumer goods and retail. Ms. Doyle is a member of the New York City Bar Association's Bankruptcy and Corporate Reorganization Committee, and she has been recognized by Legal Media Group's *2022 Expert Guides* as one of the Top Women in Business Law in the area of Restructuring & Insolvency, has been featured on *Benchmark Litigation*'s "40 under 40 Hot List" for the last three years, and was shortlisted for *Euromoney*'s Women in Business Law Awards for "Best in Restructuring & Insolvency." In 2019, she was named an Outstanding Young Restructuring Lawyer by *Turnarounds & Workouts*. Ms. Doyle received her B.A. from the University of Wisconsin and her J.D. from Stanford University.

William K. Harrington is the U.S. Trustee for Regions 1 and 2 in New York, appointed to Region 1 on Nov. 8, 2010, and Region 2 on Nov. 26, 2013. Prior to his appointment, he was the Assistant U.S. Trustee for the District of Delaware and practiced bankruptcy and reorganization law at Duane Morris LLP. Prior to joining the Office of the U.S. Trustee, he practiced bankruptcy and reorganization law at Duane Morris LLP. Mr. Harrington is a member of the Boston, Delaware State and American Bar Associations, ABI and the Delaware Bankruptcy American Inn of Court. He received his undergraduate degree from the University of Pennsylvania and his J.D. from Villanova University School of Law.

Marc E. Hirschfield is a partner with Royer Cooper Cohen Braunfeld LLC in New York and leads its Business Restructuring and Bankruptcy group. He has more than 30 years of experience representing parties in bankruptcy proceedings and related litigation throughout the country. He focuses his practice on bankruptcy, business restructuring, creditors' rights, litigation and debt finance. Mr. Hirschfield is also an accomplished debt-finance attorney and regularly represents lenders and borrowers in a variety of debt-finance transactions, including secured, unsecured, unitranche, first-lien/second-lien and senior/mezzanine structures in the forms of term loans, revolving facilities and asset-backed loan facilities. In addition, he is a court-certified mediator and is appointed to mediation panels formed by the U.S. Bankruptcy Courts for the District of Delaware and for the Southern and Eastern Districts of New York. Mr. Hirschfield has been recognized by *The Best Lawyers in America* for Bankruptcy Litigation and by *New York Super Lawyers* since 2011. He is a member of ABI and the Turnaround Management Association, for which he serves on the board of directors for its New York Chapter. Mr. Hirschfield serves as *pro bono* general counsel to and as captain of the Chappaqua Volunteer Ambulance Corps (CVAC), and he is CVAC's First Lieutenant and a member of its board of directors. He also is a New York State Certified Emergency Medical Technician and is included in the National Registry of Emergency Medical Technicians. Mr. Hirschfield received his B.A. with honors and Phi Beta Kappa in 1989 from the State University of New York at Binghamton, and his J.D. *magna cum laude* in 1992 from the State University of New York at Buffalo School of Law, where he was editor of the *Buffalo Law Review* and a member of the Moot Court Board.

Hon. Sean H. Lane is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2010. He previously clerked for Hon. Edmund V. Ludwig, U.S. District Judge for the Eastern District of Pennsylvania, from 1991-92, as well as for Hon. Charles R. Richey, U.S. District Judge for the District of Columbia, from 1992-93. From 1993-97, he practiced with the law firm of BakerHostetler in Washington, D.C., and thereafter served as a trial attorney in the Department of Justice, Civil Division, National Courts Section, until 2000. From 2000 until he was appointed to the bench, Judge Lane served as an assistant U.S. attorney for the Southern District of New York and was also chief of the Tax & Bankruptcy Unit of that office. During his time in the U.S. Attorney's Office, he was awarded the Attorney General's Distinguished Service Award in 2005 and the Henry L. Stimson Medal by the New York City Bar Association in 2008. Judge Lane is a member of the Federal Bar Council and has served as an adjunct professor at both New York University School of Law and Fordham Law School. He received his B.A. from New York University College of Art & Science in 1987 and his J.D. from New York University School of Law in 1991.

Seth H. Lieberman is a partner with Pryor Cashman LLP in New York, chairs its Bankruptcy, Reorganization + Creditors' Rights Group and co-chairs its Corporate Trust Practice. He assists indenture trustees, agents, trade creditors and landlords with distressed and bankrupt companies. Mr. Lieberman takes on creditor engagements in the firm's most significant chapter 11 cases. He has first-chaired indenture trustee and agent representations in the restructurings/bankruptcies of Atlas Financial, Ion Geophysical, Mallinckrodt, Intelsat, Avianca, Carlson Travel and CBL. He also has represented the largest trade creditors as UCC members in the GBG and Neiman Marcus bankruptcies. Mr. Lieberman served on the *Law360* Bankruptcy Editorial Advisory Board in 2016 and 2022. He received his B.A. *magna cum laude* in 1999 from James Madison University and his J.D. *cum laude* from Benjamin N. Cardozo School of Law at Yeshiva University in 2004, where he served as editor-in-chief of the *Cardozo Journal of Conflict Resolution*. While in law school, Mr. Lieberman interned for the

CEO of the American Arbitration Association. Prior to law school, he worked as a case manager in the Washington, D.C., office of JAMS.

Dennis C. O'Donnell is a partner with DLA Piper in New York and has experience in corporate reorganization, chapter 11-related merger and acquisition and bankruptcy-related litigation matters. He has advised committee members in bankruptcy proceedings for Tilden Marcellus, Times Square JV LLC, Clarus Therapeutics, Plastiq Inc., SAS Airlines and Instant Brands. He also has advised committee members or had other roles in the chapter 11 cases of FTX, Yellow Trucking, Amyris, Alpha Latam, PWM and Western Global Airlines. In his practice, Mr. O'Donnell represents debtors, lenders, significant creditors, equityholders, examiners and acquirers in chapter 11 cases, chapter 15 cases, loan restructurings and out-of-court workouts. He has played significant roles in some of the largest and most complex chapter 11 cases of the past 30 years, including Maxwell Communications, Olympia & York, Enron, Refco, Lehman Brothers, TOUSA, Arcapita, Momentive, ResCap, Relativity, LightSquared/Ligado, Avianca, Aeromexico and FTX. Mr. O'Donnell has written and spoken extensively in the U.S. and abroad on current chapter 11, chapter 15, real estate foreclosure and enforcement, and broker/dealer liquidation issues and developments. He is an active member of ABI, TMA and the International Insolvency Institute. Mr. O'Donnell has appeared in federal courts throughout the U.S., including before the U.S. Supreme Court, the Second and Third Circuit Courts of Appeals, and numerous district and bankruptcy courts, as well as at the side of local counsel in matters involving transnational issues in the courts of Canada, England, Hong Kong and Singapore. He received his B.A. in classics and philosophy from Haverford College in 1979 his J.D. from Benjamin R. Cardozo School of Law in 1991, where he was articles editor for the *Cardozo Law Review*.