American Bankruptcy Institute

Bankruptcy 2024: Views from the Bench

Great Debates

Hon. Marvin P. Isgur, Co-Moderator
U.S. Bankruptcy Court (S.D. Tex.) | Houston

Norman N. Kinel, Co-Moderator
Squire Patton Boggs | New York

Resolved: Opt-out consensual releases are still permissible after *Purdue*.

Hon. Laurel M. Isicoff
U.S. Bankruptcy Court (S.D. Fla.) | Miami

Hon. Deborah L. Thorne
U.S. Bankruptcy Court (N.D. Ill.) | Chicago

Resolved: Solvent debtors are required to pay post-petition interest.

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U.S. Bankruptcy Court (D. Ariz.) | Phoenix

Hon. Michelle M. Harner
U.S. Bankruptcy Court (D. Md.) | Baltimore

2024

ABI VIEWS FROM THE BENCH: GREAT DEBATE #1

Opt-Out Consensual Releases Are Still Permissible After the Supreme Court's Ruling in *Purdue*.

Pro: Hon. Laurel M. Isicoff

U.S. Bankruptcy Court (S.D. Fla.) Miami

Con: Hon. Deborah L. Thorne

U.S. Bankruptcy Court (N.D. Ill.) Chicago

Debate Co-Moderators:

Hon. Marvin P. Isgur, Moderator
U.S. Bankruptcy Court (S.D. Tex.) Houston

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I. INTRODUCTION

The first debate topic—between the Honorable Laurel M. Isicoff and the Honorable Deborah L. Thorne—is whether opt-out consensual releases are still permissible after the Supreme Court's ruling in *Harrington v. Purdue L. P.,* 144 S.Ct. 2071 (U.S. 2024) ("*Purdue*").

II. DISCUSSION

The Supreme Court recently issued its long-awaited decision in *Purdue*, addressing whether nonconsensual third-party releases are permissible under the Bankruptcy Code. In a 5-4 decision, the Court ruled that nonconsensual third-party releases are **not** permitted under the Bankruptcy Code.[2] The nonconsensual third-party releases at issue in *Purdue* stemmed from a desire by the Sackler family to avoid civil lawsuits arising from their ownership and control of Purdue and the company's alleged deceptive marketing practices for OxyContin.

The majority began its legal analysis by looking to section 1123(b) of the Bankruptcy Code, which governs what may be included in a plan. Specifically, the majority focused on the catch-all provision contained in section 1123(b)(6), which provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." The majority found that reading section 1123(b)(6)'s catch-all provision to authorize nonconsensual third-party releases would be radically different from the other powers enumerated in section 1123(b)(1)-(5), all of which concern the rights and responsibilities of a debtor. Relying on the statutory canon of construction *ejusdem generis*, under which a catch-all provision must be read in light of its surrounding provisions, the majority rejected the argument that section 1123(b)(6) provides authority for the bankruptcy court to approve nonconsensual third-party releases.

The majority found three additional reasons, beyond the statutory construction principles discussed above, for why section 1123(b)(6) does not provide authority for approval of nonconsensual third-party releases. *First*, the plan proponents' reading of section 1123(b)(6) would provide a nondebtor (*i.e.*, the Sackler family) with a discharge, which is usually reserved for the debtor alone. *Second*, the releases would afford the Sackler family with a discharge of non-dischargeable claims (*e.g.*, claims for willful and malicious injury) without those individuals agreeing to pay anything approaching the full amount of their assets (which assets, it bears noting, were allegedly pilfered from the company). *Third*, while the Bankruptcy Code provides for nonconsensual third-party releases, it does so only in the context of asbestos cases, *see* section 524(g), thus making it difficult to justify reading section 1123(b)(6) to provide for nonconsensual third-party releases in every context. According to the majority, a policy change allowing for nonconsensual third-party releases is a matter for Congress and not the court to legislate.

For all these reasons, the majority held that the Bankruptcy Code "does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." The court also noted that "because this case involves only a stayed reorganization plan, we do not address whether

[2] Due to the extensive history of this case, the authors assume the readers' familiarity with the underlying facts. A more extensive discussion of the background of the case may be found in Appendix A which is being provided with permission from the author. A copy of the Supreme Court's decision may be found in Appendix B.

our reading of the bankruptcy code would justify unwinding reorganizations plans that have already become effective and been substantially consummated."

The dissent, in issuing a "respectful but emphatical[]" rebuttal of the majority's legal and policy conclusions, declared that the majority's decision "is wrong on the law and devastating for more than 100,000 opioid victims and their families" and that it "rewrites the text of the U.S. Bankruptcy Code." Specifically, the dissent argued that section 1123(b) does not concern only debtors and that section 1123(b)(3) specifically allows for the settlement of claims held by third-parties. Further, the dissent stated that the phrase "appropriate provision" in section 1123(b)(6) was broad and empowered a bankruptcy court to exercise "reasonable discretion." Lastly, the dissent made a parallel and opposite policy argument, stating that the majority's decision will violate the collective-action problem the Bankruptcy Code tries to solve by incentivizing claimants to rush to obtain judgments against the Sackler family, which could deplete the estate through Purdue's indemnification obligations to its officers and directors, leaving nothing left for other creditors or opioid claimants.

Notably, ***the Supreme Court did not opine on the issue of whether for a release to be deemed consensual it must contain an "opt-in" or "opt-out" provision for creditors and parties-in-interest***. *See Purdue,* 144 S.Ct. at 2087–88 ("As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. . . . Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.") Thus, this issue remains open.

In the underlying ruling on *Purdue*, the Second Circuit Court of Appeals suggested that opt-out releases *are* consensual. *See In Re Purdue L.P.,* 69 F.4th 45, 87 (C.A.2, 2023) ("[T]he Trustee also questions whether such a release, without an ability to opt-out, can comply with due process because it effectively denies claimants their day in court. . . . The Trustee's argument would essentially call into question all releases through bankruptcy, including bankruptcy discharges (which are one of the most important features of bankruptcy). We decline to so undermine such a critical component of bankruptcy.")

Within the approximately two and a half months since the Supreme Court's ruling, several courts have addressed the question of whether "opt-out" consensual releases are still permissible in light of *Purdue*. Before reviewing these cases, we look to the foundational cases which set the framework for analyzing third-party releases.

III. What is a Third-Party Release?

Third-party releases are provisions in a plan that release or limit the liability of nondebtor parties to other nondebtor parties. Plan provisions that enjoin future litigation against the released parties for their pre-confirmation actions implement these releases. Third-party releases are increasingly common and released third-parties may include a debtor's principals, guarantors, affiliates, officers, directors, insurers, shareholders and/or creditors.

Prior to *Purdue,* both consensual and nonconsensual third-party releases were approved by various courts. However, with respect to nonconsensual third-party releases, the Supreme Court has now conclusively resolved the issue, holding that they are impermissible under the Bankruptcy Code, which does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants. *Harrington v. Purdue L. P.,* 144 S.Ct. 2071, 2074 (U.S. 2024).

IV. What Does "Opt-In" or "Opt-Out" Mean in the Bankruptcy Context?

While there are variations as to process, an "opt-out" release typically requires parties entitled to vote on the plan and who have received ballots to do so, or nonvoting parties (who are deemed to accept or reject a plan) who have received notice, to check a box *affirmatively indicating that they do not agree to provide the releases which the plan seeks to provide*. In other words, in order not to be deemed to have agreed to the releases, the party must take affirmative action demonstrating a conscious decision to do so. Parties that abstain from voting will typically be deemed to have consented to the releases. In some cases, where no ability to opt-out has even been provided, parties that vote in favor of a plan are also deemed to consent to the releases. In contrast, under an "opt-in" mechanism, *voting and nonvoting parties must check a box affirmatively agreeing to the nondebtor releases*. Any party that does not check the box, or "opt-in," is deemed to be a non-releasing party, including parties who do not return ballots at all.

While historically courts have generally agreed that *consensual* third-party releases are legal as a matter of contract law, they have disagreed about what constitutes consent, or "opting out." Prior to *Purdue,* courts were split throughout the country into three main groups. The first group applied a flexible approach and found consent where creditors abstained from voting but had adequate notice of the consequences of abstaining without opting-out of the release. The second group took the position that the failure of any party to affirmatively opt-out, without more, cannot form the basis of consent to the release of a claim. The third group simply found that a determination of whether consent was provided is based upon the unique facts of each case. Each approach is more fully discussed below.

V. Court Rulings on the Meaning of "Consent" for Opt-Out Releases Prior to *Purdue*

Courts that have approved plans which include opt-out releases focus on the following non-exhaustive factors to determine consent:[3]

a. adequate or meaningful recoveries for creditors;[4]

[3] Marshall S. Huebner and Kate Somers, *Opting Into Opting Out: Due Process and Opt-Out Releases,* ABI JOURNAL, Vol. XLIII, No. 8, August 2024. Source: The American Bankruptcy Institute. A copy of this article is annexed in Appendix C with permission from the ABI.

[4] *In re LATAM Airlines Grp. S.A.*, 2022 WL 2206829, at *46 n.88 (Bankr. S.D.N.Y. 2022).

b. volume of opt-out elections actually received;[5]

c. adequate consideration provided in exchange for the releases;

d. clear and prominent notice of the releases and the opportunity to opt-out;[6]

e. highly publicized nature of the case and the third-party releases, including in cases "of great notoriety" where creditors "knew about the existence of the bankruptcy case [and] knew they would have to act;"[7]

f. active creditor participation;[8]

g. whether creditors had adequate representation, including by official committees;[9] and

h. the unique nature of mass tort bankruptcies and/or integrated settlements that confer broad benefit to all stakeholders.

Many courts have found opt-out releases to be appropriate in the mass tort context.[10] However, approval of opt-out third-party releases on the basis of consent has been inconsistent.

Some courts have taken a flexible approach to approving consensual third-party releases and have found consent where creditors abstained from voting but had adequate notice of the consequences of abstaining without opting out of the release. *See In re DBSD N. Am., Inc.* (holding that "adequate notice is provided in this case, as both the Plan and Disclosure Statement have the third-party release provision set off in bold font, and the ballots set forth in both capitalized and bold text the effect of consenting to the Plan or abstaining without opting out of the release.");[11] *In re Calpine Corp.,* 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) (finding there was due and adequate notice where the "[b]allots explicitly stated that a vote to accept the Plan or abstention from voting without opting out of the releases each constitutes an acceptance and assent to the releases set forth in the Plan and directed parties to the Plan for further information about

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[5] *Id.*

[6] *Id.* at *47.

[7] *In re Insys Therapeutics Inc.*, No. 19-11292 (KG), Confirmation Hr'g Tr. at 110 (Bankr. D. Del. Jan. 17, 2020) (ECF No. 1121).

[8] *In re Cumulus Media Inc*., No. 17-13381, Hr'g Tr. at 158:19-22 (Bankr. S.D.N.Y. May 1, 2018) (ECF No. 749).

[9] *In re Clovis Oncology Inc*., No. 22-11292 (JKS), Hr'g Tr. at 13:21-25; 14:1-7 (Bankr. D. Del. June 9, 2023) (ECF No. 875).

[10] *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504 (Bankr. D. Del. 2022).

[11] *See In re DBSD N. Am., Inc.,* 419 B.R. 179, 217-19 (Bankr. S.D.N.Y. 2009), *aff'd*, 2010 WL 1223109 (S.D.N.Y. Mar 24, 2010), *aff'd in part, rev'd in part on other grounds,* 627 F.3d 496 (2d Cir. Dec. 6, 2010), *opinion issued,* 634 F.3d 79 (2d Cir. 2011).

the release provisions."). Under the flexible approach, affirmative consent is not necessary and the burden is on claimholders to act by affirmatively opting out.

Other courts have taken the position that the failure of any party to affirmatively opt-out, without more, cannot be deemed to constitute consent to the release of a claim. For example, at least two New York bankruptcy courts held that creditors failing to vote did not implicitly consent to third-party releases, explaining that under generally accepted principles of contract law, silence does not imply consent absent a duty to speak. *See In re SunEdison, Inc.,* 576 B.R. 453, 458-61 (Bankr. S.D.N.Y. 2017) (noting that there were a myriad of reasons why the creditor may have not acted with regard to the plan and noting that the debtors "have failed, however, to show that the Non-Voting Releasors' silence was misleading or that it signified their consent to the Release."); *see also In re Chassix Holdings, Inc.,* 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015) (holding that "[c]harging all inactive creditors with full knowledge of the scope and implications of the proposed third party releases, and implying a 'consent' to the third party releases based on the creditors inaction, is simply not realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point."). Similarly, the District Court for the Eastern District of Virginia held that the "[f]ailure to opt out, without more, cannot form the basis of consent to the release of a claim." *See Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 688 (E.D. Va. 2022).

The Bankruptcy Court for the District of Delaware has also produced split decisions on this issue. Some courts have applied the flexible approach adopted in some New York bankruptcy court decisions. *See In re Indianapolis Downs, LLC.,* 486 B.R. 286, 306 (Bankr. D. Del. 2013) (permitting third-party releases where creditors failed to opt-out of the releases, either by abstaining from voting or by voting against the plan but not otherwise opting out of the releases); *US Bank National Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del. 2010)) (holding that unimpaired creditors were bound to a third-party release because they failed to object to the plan, even though the ballot did not give them an opportunity to opt out of the release).

On the other hand, other Delaware bankruptcy courts have required affirmative consent to uphold third-party releases. *See In re Washington Mutual, Inc.,* 442 B.R. 314, 355 (Bankr. D. Del. 2011) (holding that "[f]ail[ure] to return a ballot is not a sufficient manifestation of consent to a third party release," such that only those creditors who affirmatively consented by voting in favor of the plan and not opting out of the releases were bound by the release); *In re Emerge Energy Services LP,* 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) (explaining that "[a] party's receipt of a notice imposing an artificial opt-out requirement, the recipient's possible understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify [as consent]").

Finally, a third group of courts determines whether consent was provided based upon the unique facts of each case. *See e.g., In re Mallinckrodt,* 639 B.R. 837, 879-80 (Bankr. D. Del. 2022) (holding that the use of the opt-out mechanism was a valid means of obtaining consent, while cautioning that this determination is "fact specific" and "the use of opt-outs is not appropriate in every case." The court noted that its ruling may have been different if the notice regarding the ability to opt-out was insufficient, but found that there was "ample evidence in the record that the releasing parties were sent notices in a variety of ways that explained in no uncertain terms that action was required to preserve claims."); *In re Arsenal Intermediate Holdings LLC,* 2023 WL 2655592, at *10 (Bankr. D. Del. Mar. 27, 2023) (holding that while the use of opt-out plans are generally permissible, the unique circumstances of this case required the debtor to provide creditors with additional protections before it would confirm an opt-out plan).

In sum, approval of opt-out releases is a fact intensive endeavor and absent binding precedent, is determined on a case-by-case basis by the court where the case is pending.

VI. Recent Rulings Post *Purdue* Addressing Opt-Out Releases

As the *Purdue* decision did not specifically address whether opt-out consensual third-party releases are permitted, parties have begun testing the limits of the ruling. The office of the United States Trustee (the "U.S. Trustee") has continued filing objections to chapter 11 plans challenging whether releases under these plans are truly consensual and whether an opt-out provision is permissible in light of *Purdue.*

In several cases, the debtors have voluntarily modified the nondebtor release mechanism from an "opt-out" to an "opt-in"—or they were steered into making the change by the court's opinion or direction. A survey of the roster of cases covered by the Reorg publication that have felt *Purdue's* impact is annexed in Appendix D.[12]

In one recent case in the Middle District of Florida, *In re Red Lobster Management,* the debtors filed a disclosure statement and chapter 11 plan proposing consensual opt-out releases. The U.S. Trustee filed an objection to the disclosure statement arguing that the court should not approve it for a variety of reasons, including that: (i) the disclosure statement includes insufficient information to advise a creditor that their rights to third-party releases are stripped by their vote to accept the plan, failure to submit a ballot or failure to check the opt-out box, and (ii) under state law on contracts, silence does not constitute acceptance to be bound by the release. Specifically, the U.S. Trustee argued that "opt-out" releases are nonconsensual and violate *Purdue*. The U.S. Trustee urged the debtors to adopt an "opt-in" mechanism, thereby affirmatively demonstrating a party's consent to granting a nondebtor release.[13] At the hearing to approve the disclosure statement, Judge Grace E. Robson ultimately determined that she would not allow the opt-out provision. She directed the debtors to change the third-party releases in the disclosure statement and plan to an opt-in structure ahead of the confirmation hearing.[14]

Judge Robson reasoned that the *Purdue* decision left open the question of what a consensual release is and noted that there was a split of authority prior to the Supreme Court decision on whether consent must be expressed by an affirmative act. She noted that it is now "clear" that courts cannot authorize third-party releases without parties' consent. The court added that it is a "little bit different" to include a plan provision to try to bind parties by a lack of response. Judge Robson highlighted the U.S. Trustee's argument that New York law applies to the agreements the

[12] This article is reproduced and included in these materials with permission of Reorg.

[13] A copy of the objection is annexed in Appendix E.

[14] Excerpts from the transcript of the hearing on the disclosure statement are annexed as Appendix F.

parties will enter into under the plan and that under New York law silence is not consent unless certain exceptions are met. In this case, Judge Robson said she could not find that a failure to return a ballot or opt-out form shows actual consent, as it could be due to carelessness, mistake or lack of interest.

Further, Judge Robson noted that unsecured creditors would receive an unknown and possibly *de minimis* amount under the plan and expressed concern about creditors receiving no consideration in a case that is "moving quickly." After the hearing, the debtors revised the disclosure statement and plan to remove the opt-out provision. With respect to the releases, the revised plan provided that the third-party releases would be granted by creditors or interest holders that vote to accept the plan, as opposed to those that did not opt-out.

In contrast, in *BowFlex Inc., et. al.,* Case No. 24-12364 (ABA) (Bankr. N.J. Aug. 18, 2024), the debtors filed a chapter 11 plan which included an opt-out nondebtor release provision. The U.S. Trustee argued that requiring parties to opt-out of the releases violated *Purdue*, but Judge Andrew B. Altenburg, Jr. held *that it is incumbent on parties to act to protect their rights*.

In overruling the U.S. Trustee's third-party release objection, Judge Altenburg emphasized that the Supreme Court specifically did not opine on what constitutes "consent" sufficient to grant a nondebtor release. Instead, he noted, the Supreme Court only said that "merely voting" in favor of a plan was insufficient to establish consent. The court concluded that (a) so long as the releasing parties receive notice consistent with due process and the process to opt-out and (b) the consequences were "clear and conspicuous" in the notice, then an opt-out mechanism is appropriate to demonstrate consent to nondebtor plan releases.

The court noted that 94% of the creditors voted in favor of the plan, no general unsecured creditors had objected to the plan and the official committee of unsecured creditors urged creditors to vote in favor of the plan and opt-out. The committee also provided creditors with detailed instructions on how to opt-out. On this basis, the court approved the plan with the opt-out releases.

At least two courts have recently issued written rulings discussing the propriety of opt-out releases post *Purdue*—the bankruptcy court for the Southern District of Texas and the bankruptcy court for the Western District of New York. In *Robertshaw US Holding Corp., et. al.,* Case No. 24-90052 (CL) (Bankr. S.D. Tx Aug. 16. 2024), Judge Christopher Lopez overruled the U.S Trustee's objection to confirmation of the chapter 11 plan. The U.S. Trustee objected to the plan on the basis that the third-party releases should be opt-in as opposed to opt-out, arguing that after *Purdue* having an opt-out provision is "coercive" and otherwise improper. The court overruled the U.S. Trustee's objection for the following reasons.

First, the court noted that *Purdue* does not address consensual releases, which were specifically carved out from the Supreme Court's ruling. Judge Lopez noted that he "will not narrow or expand the scope of the Supreme Court's holding. These words must be read literally." *Robertshaw US Holding Corp., et. al.,* Case No. 24-90052 (CL) (Bankr. S.D. Tx Aug. 16. 2024), *Memorandum Decision on Plan Confirmation* [ECF No. 959] at 28. Second, the court noted that the consensual third-party releases in the Plan are appropriate and it afforded affected parties constitutional due process and a meaningful opportunity to opt-out. Third, Fifth Circuit precedent is clear on what constitutes consent, including opt-out provisions and deems not opting-out of a release as consent. Thus, there was nothing improper with an opt-out feature for consensual third-party releases in the chapter 11 plan. Further, the court noted that the third-party release in the plan satisfied applicable law and the Procedures for Complex Cases in the Southern District of Texas. In *Robertshaw*, the parties-in-interest were provided detailed notice about the plan, the deadline to object to plan confirmation, the voting deadline and the opportunity to opt-out of the third-party releases. Additionally, the debtors published the third-party release language in the Wall Street Journal. In addition, voting records showed that over 100 creditors opted-out of the third-party release. Finally, the court noted that the third-party releases at issue were narrowly tailored to the case. The Debtors submitted an unrefuted declaration which stated that the third-party release,

> is an integral part of the Plan and was a condition of the settlements set forth therein. And the releases were a "core" consideration among the parties to the Restructuring Support Agreement, instrumental in the development of the Plan, and crucial in facilitating and gaining support for the Plan and the chapter 11 Cases by the Released Parties, including the concessions resulting in the elimination of over $640 million in funded debt obligations.

Id. at 30 (internal quotations omitted). Finding that there was no evidence in the record to refute these findings, the court overruled the U.S. Trustee's objection and confirmed the plan. A copy of the ruling is annexed as Appendix G.

Chief Bankruptcy Judge Carl L. Bucki of the Western District of New York recently issued a written ruling in *In re Tonawanda Coke Corporation*, Case No. 18-12156 (CLB) (Bankr. W.D.N.Y. Aug. 27, 2024), sustaining the U.S. Trustee's objection on the basis that contract law does not permit a plan to confer releases on nondebtors when creditors are only entitled to opt-out. This case concerned a chapter 11 plan with a very small distribution to creditors and a large pool of tort claims. The debtor previously operated a coke foundry which accumulated substantial debt from the alleged emission of toxic pollutants. After six-years in chapter 11, the corporate debtor put together $300,000 for distribution among creditors with more than $282 million in unsecured claims and proposed a plan which included debtor and nondebtor releases. Specifically, the proposed plan called for releasing not only the debtor, but also the debtor's officers, directors, shareholders and agents from claims, including claims of tort victims. Nondebtor releases were also earmarked for the debtor's and the committee's professionals, among others. Essentially, whether they voted or not, creditors would be conferring releases unless they elected to opt-out when voting on the plan.

The U.S. Trustee filed an objection to approval of the disclosure statement, contending that the plan with nondebtor releases could not be confirmed unless it was consensual—meaning a creditor elected to *opt-in*. The debtor responded by saying that consent could be inferred by giving creditors the opportunity to *opt-out*. At the time the court held oral argument on the U.S. Trustee's objection, the *Purdue* decision had not yet been rendered. Once the ruling was issued, the court noted that like *Purdue*, the plan at issue contemplated a release from liability for the benefit of various third-parties. The court noted that while *Purdue* did not express a view on what qualifies as a consensual release, Justice Gorsuch remarked that "nothing in the bankruptcy code contemplates (much less authorizes)" nondebtor releases. *Purdue*, 114 S. Ct. at 2088. With nondebtor releases not authorized anywhere in the Bankruptcy Code, Judge Bucki ruled that any such arrangement would be governed instead by state law. Because the debtor is a New York corporation with a sole place of business in New York and nearly all of its creditors conduct business with the debtors in New York or suffered environmental damages as a result of New York activities, the court applied New York law to interpret the releases. Applying New York General Obligations Law § 5-1103 (McKinney 2022)—which requires that an agreement to discharge an obligation must be in writing and signed by the party against whom it would be enforced—Judge Bucki noted that the release effectively becomes nothing more than an unenforceable proposal. On that basis, he sustained the U.S Trustee's objection, without prejudice to the debtors refiling an amended plan which complies with *Purdue.* A copy of the ruling is annexed as Appendix H.

Clearly, there is an evolving legal landscape relating to third-party releases post *Purdue* as more courts issue rulings on the issue.

VII. Potential Workaround to *Purdue?*

Recently, as reported by Reorg, there is at least one Florida bankruptcy judge who appears to have found an exception to the *Purdue* ruling when dealing with nonconsensual third- party releases.

On July 29, 2024, in *In re Bird Global Inc., et. al.,* Case No. 23-20514 (CLC) (Bankr. S.D. Fla. Aug. 2, 2024), Judge Corali Lopez-Castro issued an oral ruling confirming a plan of liquidation which included nonconsensual nondebtor releases. The debtors in *Bird* filed a liquidating plan which provided for nonconsensual releases of tort claims against Bird Scooter Acquisition Corp.—the asset purchaser under a 363 sale—as well as insurers and municipalities. The tort claimants and the U.S. Trustee filed objections to the nondebtor releases and the debtors responded by filing an amended plan that increased the total contributions by nondebtors to a tort claimants' trust to $19.2 million. The debtors asserted that the sum was sufficient to pay all tort claims in full. After the Supreme Court issued its *Purdue* ruling, Judge Lopez-Castro ordered the parties to file supplemental briefing on its impact on the plan.

As reported by Reorg, in their supplemental briefing, the debtors and the parties to be released argued that: (i) *Purdue* was inapposite and inapplicable to their case, because the debtors proposed a plan that would pay the tort claimants in full, whereas in *Purdue,* that was not the case; (ii) the plan does not include any nondebtor releases, because the plan provides for a global settlement of estate claims against the insurers and municipalities and the insurers' and municipalities' contingent and unliquidated indemnification claims against the debtors; (iii) through the settlement, the plan merely channels the tort claims to the trust, meaning that the claims still exist and are not extinguished; and (iv) the settlement was structured as a "sale" of the insurance policies to the insurers for their trust contribution under section 363 of the Bankruptcy Code. The U.S. Trustee agreed with the debtors that *Purdue* did not limit the ability of debtors to settle estate causes of action or dispose of estate assets. Further, the U.S. Trustee clarified that it was not objecting to confirmation on *Purdue* grounds because it understood that the channeling injunction contained in the plan was limited in its effect to the disposition of an estate asset and did not purport to resolve the independent, non-derivative claims of third-parties.

After a hearing on the issue on July 29, 2024, Judge Lopez-Castro ruled that the insurer releases did not implicate *Purdue* and given the broad indemnification claims held by the nondebtors against the debtors, approval of the nonconsensual nondebtor releases in the plan was the right result. The court ruled that the debtors' proposed channeling injunction and bar order was part of a settlement with the insurers and was an important component of the section 363 sale of the insurance policies and the debtors were not relying on section 1123(b)(6). The court also noted that *Purdue* did not deal with claims that would be fully satisfied, which is the case in *Bird*.

The amended confirmation order was promptly appealed to the district court by a group of tort claimants. The appellees also filed a motion for a stay pending appeal, which was denied on August 21, 2024 by the district court. The ruling is now on appeal to the Eleventh Circuit.

ABI VIEWS FROM THE BENCH: GREAT DEBATE #2

Solvent Debtors Are Required to Pay Postpetition Interest

Pro: Hon. Daniel P. Collins

U.S. Bankruptcy Court (D. Az.) Arizona

Con: Hon. Michelle M. Harner

U.S. Bankruptcy Court (D. Md.) Maryland

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[15] These materials have been prepared by Norman Kinel and Tara Peramatukorn of Squire Patton Boggs (US) LLP.

I. The Solvent Debtor Exception

Under the Bankruptcy Code—specifically through the operation of section 502(b)(2)—the general rule is that interest ceases to accrue on a claim once a debtor files for bankruptcy. *Sexton v. Dreyfus*, 219 U.S. 339, 334 (1911). However, over the course of three centuries of bankruptcy law, courts have found that there is an equitable exception to the usual rule in the case of a solvent debtor.[16] Referred to as the "solvent debtor exception," it was developed by 18th century English courts requiring debtors to pay interest to creditors that accrued during bankruptcy before retaining any value for the estate's equity holders.[17] American courts imported this exception and began applying it under the Bankruptcy Act of 1898.[18] As the Bankruptcy Code does not explicitly address the solvent debtor exception, there is an open question as to whether it survived enactment of the Bankruptcy Code.

Courts grappling with this issue have contended with two main questions which are discussed and summarized below: First, whether solvent debtors are required to pay postpetition interest to unsecured creditors and second, if so, at what rate?

II. Solvent Debtors and the Payment of Postpetition Interest

A. Majority Position: Solvent Debtors are Required to Pay Postpetition Interest

The majority position, expressed most recently by the Fifth and Ninth Circuits—and the Second Circuit, in *dicta*—is that the passage of the Bankruptcy Code did not abrogate the solvent debtor exception. These cases, discussed below, find support for their position in the legislative history of section 1124 of the Bankruptcy Code and the protection of creditors' "equitable rights." 11 U.S.C. § 1124(1).

In *In re PG&E Corp*., 46 F.4th 1047 (9th Cir. 2022), in a 2-1 ruling, the Ninth Circuit became the first circuit court (the "PG&E Court") to hold that the solvent debtor exception affords unimpaired creditors of a solvent debtor the equitable right to receive postpetition interest on the allowed amount of their prepetition claims. In reaching this decision, the PG&E Court examined whether the solvent debtor exception had survived the enactment of the Bankruptcy Code and concluded that the "passage of the [Bankruptcy] Code did not abrogate the solvent-debtor exception, any more than passage of the Bankruptcy Act did." *PG&E*, 46 F.4th at 1053.

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16 *In re Ultra Petroleum*, 51 F.4th 138, 150 (5th Cir. 2022).

17 *See, e.g., Bromley v. Goodere* (1743) 26 Eng. Rep. 49, 51-52.

18 *See, e.g., City of New York v. Saper*, 336 U.S. 328, 330 n. 7 (1949).

The PG&E Court found support for its conclusion in the legislative history of section 1124 of the Bankruptcy Code, specifically the repeal of section 1124(3), which provided that a creditor was unimpaired if it was paid the "allowed amount of [its] claim." One court, in *In re New Valley Corp*., 168 B.R. 73, 79-80 (Bankr. D. N.J. 1994), had interpreted section 1124(3) strictly so as to allow a solvent debtor to classify a creditor as unimpaired without paying any postpetition interest. In order to prevent such an "unfair result" from occurring again, Congress repealed section 1124(3) in 1994, which, according to the PG&E Court, confirmed that the unimpaired creditors of a solvent debtor must receive postpetition interest on their claims. *Id*.

Although section 502(b)(2) of the Bankruptcy Code prohibits the inclusion of unmatured interest in an allowed claim, the PG&E Court found that "there is a significant distinction between whether postpetition interest can be part of an allowed claim and whether there are circumstances under which the debtor may be required to pay postpetition interest on an allowed claim." *Id.* at 1059. Thus, "[t]he text of § 502(b)(2) is entirely consistent with the conclusion that, in some instances, a creditor must receive postpetition interest on their allowed claim to be considered unimpaired." *Id*.

Shortly after the PG&E Court's ruling, the Fifth Circuit issued an opinion in *In re Ultra Petroleum*, 51 F.4th 138 (5th Cir. 2022), joining in the PG&E Court's reasoning. The court began with the rule that abrogation of prior bankruptcy practice generally requires an "unmistakably clear" statement from Congress. *Ultra Petroleum*, 51 F.4th at 153-54, citing *Cohen v. de la Cruz*, 523 U.S. 213, 221-22 (1998). In determining whether the solvent debtor exception was "alive and well," the court compared the text of section 502(b)(2) of the Bankruptcy Code with the text of the 1898 and 1938 Bankruptcy Acts and found it "afford[ed] no greater clarity than the 1898 and 1938 Acts, which similarly limited claims for interest to what 'would have been recoverable at' the date the bankruptcy petition was filed—*i.e.*, matured interest." *Id.* at 154-55. Importantly, while noting the nearly identical treatment of unmatured interest under the Bankruptcy Acts and section 502(b)(2) of the Bankruptcy Code, bankruptcy courts had historically applied the solvent debtor exception under the 1898 and 1938 Bankruptcy Acts. With this historical context in mind, the court considered that the text of section 502(b)(2) did not constitute an unambiguous or explicit indication from Congress that it intended a departure from traditional bankruptcy practice. Thus, "the Code did not abrogate the longstanding judicial exception for cases involving solvent debtors." *Id*. at 156.

The Second Circuit, in dicta, appeared to agree with the Fifth and Ninth Circuits in *In re LATAM Airlines Grp. S.A.*, 55 F.4th 377 (2d Cir. 2022). *LATAM* confirmed a plan of reorganization for an insolvent debtor that designated unsecured claims as unimpaired, with such claims being paid in full without any postpetition interest. Certain creditors objected to the plan, arguing that irrespective of a debtor's solvency, a creditor is entitled to postpetition interest to render its claim unimpaired under section 1124(1) of the Bankruptcy Code. In dicta, the Second

Circuit stated that "a claim is impaired under Section 1124(1) only when the plan of reorganization, rather than the Code, alters the creditor's legal, equitable, or contractual rights." *LATAM*, 55 F.4th at 384-85. After considering the statutory history of section 1124, and specifically the repeal of section 1124(3) of the Bankruptcy Code, the Second Circuit concluded that "[a]lthough Section 1124(1) does not expressly refer to solvency, it does protect a creditor's 'equitable rights.' That includes whatever survives of the solvent-debtor exception." *Id*. at 387.

Finally, on September 10, 2024, the Third Circuit issued its ruling in *In re The Hertz Corp.*, Case No. 23-1169 (3rd Cir. Sep. 10, 2024), Opinion, [ECF No. 61] (the "*Hertz Appeal*"). While Judge Thomas L. Ambro, writing for the majority, did not directly address whether the passage of the Bankruptcy Code abrogated the solvent debtor exception, he found that section 502(b)(2) of the Bankruptcy Code did not serve to disallow the award of postpetition interest. Noting that Hertz itself agreed that unsecured creditors may receive postpetition interest on their allowed claims, the court concluded that section 502(b)(2) of the Bankruptcy Code, alone, did not limit the ability of unimpaired creditors to receive postpetition interest. *Hertz Appeal* at 41. Such a reading of "§ 502(b)(2) to disallow *all* post-petition interest, whether *as part of* a claim or *on* a claim, would plainly conflict with § 1129(a)(7)(A)(ii) and § 726(a)(5), which expressly operate to *allow* post-petition interest *on* claims." *Id*.[19]

B. Minority Position: Solvent Debtors are not Required to Pay Postpetition Interest

The minority position is that the passage of the Bankruptcy Code eliminated the solvent debtor exception because it was not expressly preserved in the Code. The minority view takes a textual approach to the question and relies on the express words of section 502(b)(2), which disallows unsecured creditors' claims for unmatured interest.

This minority view was articulated by Judge Mary Walrath in *In re The Hertz Corp*., 637 B.R. 781 (Bankr. D. Del. 2021), overruled on other grounds by *In re The Hertz Corp.*, Case No. 23-1169 (3rd Cir. Sep. 10, 2024), Opinion, [ECF No. 61], where the court found that the common law solvent debtor exception did not survive the passage of the Bankruptcy Code. After considering *Ultra Petroleum*, the express language of the Bankruptcy Code and its legislative history, Judge Walrath found that the solvent debtor exception only survived to the extent it was codified by the Bankruptcy Code in two limited circumstances: (i) under section 506(b), for oversecured creditors; and (ii) under sections 726(a)(5) and 1129(a)(7), for impaired unsecured creditors. Citing *In re PPI Enters. (US), Inc*., 324 F.3d 197, 202-03 (3d Cir. 2003), Judge Walrath also noted that then Third Circuit precedent held that section 1124(1) of the Bankruptcy Code does not mandate that unimpaired creditors receive all of their contract rights where they are expressly disallowed by section 502(b). *Id*. at 799.

[19] A copy of the *Hertz Appeal* is annexed in Appendix I.

This minority view was also articulated by Judge Sandra Ikuta in her dissent in *In re PG&E*, where she argued that the majority's decision was incorrect, as it failed to follow basic principles of statutory construction. Judge Ikuta found that there was nothing in the text of the Bankruptcy Code that entitled unimpaired creditors to pay any postpetition interest. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *PG&E*, 46 F.4th at 1066, citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). According to Judge Ikuta, because the plain text of section 502(b)(2) of the Bankruptcy Code provides that creditors are not entitled to any interest after a debtor files for bankruptcy, by extension "a claim is unimpaired so long as the proposed plan gives the creditor the same legal or contractual right to payment, or right to an equitable remedy, that the creditor had as of the date the petition was filed." *Id*. at 1067-68.

Judge Ikuta noted that her position was supported by Congress' inclusion of the solvent debtor exception in certain circumstances under the Bankruptcy Code, *i.e.*, the best interests test made applicable to impaired creditors by sections 725(a)(5) and 1129(a). And "despite incorporating exceptions to the general rule disallowing post-petition interest into these specific sections, Congress chose not to make a similar exception authorizing an award of post-petition interest to unsecured creditors holding unimpaired claims, regardless of whether the debtor ends up solvent." *Id*. at 1069.

III. The Rate of Postpetition Interest Required

For those courts which have held that the solvent debtor exception continues under the Bankruptcy Code, there is a split over whether interest must be paid at the contract rate or the federal judgment rate. Section 726(a)(5) of the Bankruptcy Code provides a waterfall for the distribution of the property of the estate, which includes the "payment of interest at the legal rate from the date of the filing of the petition" on any claims paid pursuant to the sections 726(a)(1) to (4). At the heart of the split is a disagreement on two issues: (i) whether section 726(a)(5) of the Bankruptcy Code applies to unimpaired creditors; and (ii) if so, the meaning of the phrase "at the legal rate" in section 726(a)(5) of the Bankruptcy Code.

A. Majority Position: Postpetition Interest is Paid at the Contract Rate

The first circuit court to rule that postpetition interest must be paid at the contract rate was the PG&E Court, where it clarified its ruling in *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002), where it held that only the impaired creditors of a solvent debtor are entitled to postpetition interest at the federal judgment rate. In clarifying its prior decision, the PG&E Court stated that section 1124(1) of the Bankruptcy Code preserved a creditor's equitable right to "bargained-for postpetition interest when a debtor is solvent." *Id*. at 1058. In the PG&E Court's view, nothing in the

Bankruptcy Code precludes unimpaired creditors from asserting this equitable right to contractual postpetition interest. *Id*. Although the PG&E Court did not dictate what rate should be imposed on remand, it reasoned that absent compelling equitable considerations, it is the bankruptcy court's role to enforce the creditors' contractual rights in solvent debtor cases. *Id*. at 1064.

In *Ultra Petroleum*, the Fifth Circuit Court of Appeals held that postpetition interest should be paid at the contract rate. In so holding, the court found that the use of the definite article "the" preceding "legal rate" in section 726(a)(5) is not dispositive, because "the [Bankruptcy] Code provides that objecting, impaired creditors must receive '*not less* than' what they would receive in a Chapter 7 liquidation—including 'interest at the legal rate' per § 726(a)(5)—in order for the plan to be 'crammed down' on them." *Ultra Petroleum*, 51 F.4th at 159. This means that the phrase "the legal rate" only "sets a floor—not a ceiling—for what an impaired (and by implication, unimpaired) creditor is to receive in a cramdown scenario." *Id*. Thus, even if "the legal rate" refers to the federal judgment rate, the Bankruptcy Code "does not preclude unimpaired creditors from receiving default-rate postpetition interest in excess of the Federal Judgment Rate in solvent-debtor Chapter 11 cases." *Id*.[20]

In the *Hertz Appeal*, the Third Circuit joined the Fifth and Ninth Circuits in awarding the contract rate of interest. Judge Ambro framed the issue regarding the rate of interest as follows: "Can Hertz use the Bankruptcy Code to force the Noteholders to give up nine figures of contractually valid interest and spend that money on a massive dividend to Stockholders? The answer is no." *Hertz Appeal*, at 26.

The majority opinion centered its judgment on the applicability of the absolute priority rule. Judge Ambro noted that pre-Code solvent debtor practice sprung from the pre-Code absolute priority rule, which was adopted by the modern-day Bankruptcy Code in § 1129(b). *Id*. at 28. While the Third Circuit had only previously applied the absolute priority rule as a procedural protection when § 1129(b) was invoked, the Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) "concluded that it applied everywhere absent a clear statement authorizing a departure." *Id*. at 33. Thus, all creditors, not just dissenting impaired creditors who rely on § 1129(b), are entitled to "treatment consistent with absolute priority absent a clear statement to the contrary." *Id*.

A plan only satisfies the absolute priority rule if it satisfies the fair and equitable test under § 1129(b)(2), which "includes" certain enumerated requirements. The court found that the word "includes" suggests that the full meaning of "fair and equitable" is not limited to the requirements under § 1129(b)(2), but also includes pre-Code absolute priority case law and practice, and "[t]hat

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[20] An article further discussing these cases, entitled "*Should Solvent Debtors Pay Post-Petition Interest at the Contract Rate? Recent Decisions Say 'Yes'*," published in the American Bankruptcy Institute Journal, is reproduced and included in these materials with permission of the American Bankruptcy Institute at Appendix J.

jurisprudence required solvent debtors to pay contract rate interest before making distributions in equity." *Id*. at 37. However, while the absolute priority rule can require payment at the contract rate, that is not always the case, because the rule imposes whatever the *equitable* rate of interest would be in a solvent debtor case. This is because it may not be fair and equitable to pay one creditor the contract rate of interest if it would give them an "inequitable leg up over its peers" if there is not enough to pay all creditors their full rate. *Id*. at 39.

B. Minority Position: Postpetition Interest is Paid at the Federal Judgment Rate

Bankruptcy Judge Christopher Panos also adopted the majority position in *In re Mullins*, 633 B.R. 1 (Bankr. D. Mass. 2021), holding that the term "the legal rate" in section 726(a)(5) of the Bankruptcy Code refers to the federal judgment rate. After analyzing the cases applying the federal judgment rate and parsing the applicable code sections, Judge Panos noted that it was not insignificant that Congress used a definite article, "the," instead of an indefinite article when referring to "*the* legal rate" in section 726(a)(5) of the Bankruptcy Code. *Mullins*, 633 B.R. at 24. Judge Panos also reasoned that applying different rates could result in disparate treatment among similarly situated creditors and increase the administrative burden on bankruptcy courts and costs in the administration of cases. *Id*.

Additionally, prior to the *PG&E* ruling, the Ninth Circuit's decision in *Cardelucci* was the leading case authority supporting the payment of postpetition interest at the federal judgment rate. A discussion of the reasoning in *Cardelucci* is relevant because the decision has been cited by lower courts in other jurisdictions in support of the position that the federal judgment rate of interest applies and its reasoning has yet to be rejected or overruled in those jurisdictions. *See, e.g., In re Garriock*, 373 B.R. 814 (Bankr. E.D. Va. 2007); *In re Robinson*, 567 B.R. 644 (Bankr. N.D. Ga. 2017); *In re Augé*, 559 B.R. 223 (Bankr. D. N.M. 2016); *In re Motiva Performance Engineering LLC*, Case No. 19-12539-t7, 2022 WL 17905336 (Bankr. D. N.M. Dec. 23, 2022).

The Ninth Circuit's *Cardelucci* decision found that the principles of statutory interpretation strongly supported the view that Congress intended that "interest at the legal rate" as stated in section 726(a)(5) of the Bankruptcy Code means interest at the federal judgment rate pursuant to 28 U.S.C. § 1961(a). The court noted Congress' use of the phrase "interest at the legal rate," which replaced the originally proposed language of "interest on claims allowed." Based on the assumption that Congress carefully and intentionally chose such language, the court found that the phrase reflected a choice by Congress to modify the type and amount of interest to be awarded by using the specific phrase of "at the legal rate." *Cardelucci*, 285 F.3d at 1234. The court also considered that Congress used the definite article "the" instead of the indefinite "a" or "an" to indicate its desire for a single interest rate to be used to calculate postpetition interest. *Id*.

Cardelucci also noted two policy reasons supporting Congress' intention that the rate be a uniform interest rate: (i) applying a single, easily determined interest rate to all claims for postpetition interest ensures equitable treatment of creditors; and (ii) application of the federal rate is the most practical and judicially efficient way of allocating remaining assets. *Cardelucci*, 285 F.3d at 1236.

Appendix A

Restructuring GlobalView

SQUIRE PATTON BOGGS

Worldwide Restructuring and Insolvency News

In Purdue Pharma, the Supreme Court Fires a Canon of Construction Through Non-Consensual Third-Party Releases (US)

By Justin Cloyd on June 28, 2024
Posted in US

On June 27, 2024, the Supreme Court ruled in a 5-4 decision that a bankruptcy court does not have the statutory authority to discharge creditors' claims against a non-debtor without the creditors' consent (except in asbestos cases). The decision in *Harrington v. Purdue Pharma* settles a long-standing dispute in the bankruptcy world that will have significant impact on Purdue Pharma and its hundreds of thousands of creditors, and more generally on the bankruptcy practice itself.

The non-consensual third-party releases in the Purdue case stem from a desire of the Sackler family (the "Sacklers") to avoid civil lawsuits arising from their ownership and control of Purdue and the company's deceptive marketing practices of OxyContin. In 2007, a Purdue affiliate pled guilty to a federal felony for misbranding OxyContin as less addictive than other opioids and less subject to abuse. After the plea agreement, the Sacklers began taking as much as 70% of Purdue's yearly revenues, with the family's distributions between 2008 and 2016 totaling approximately $11 billion. Much of these funds were diverted to overseas trusts and family-owned businesses.

Purdue and its affiliates filed Chapter 11 petitions on September 16, 2019. The Sacklers originally proposed to return $4.325 billion of the $11 billion they had withdrawn from the company in exchange for (a) an order extinguishing any claims that the estate may have against family members, including fraudulent transfer claims, and (b) a release and injunction to bar opioid-related claims from being brought against them, including claims for fraud and willful misconduct. Purdue agreed to these terms and included them in its plan of reorganization plan. The bankruptcy court confirmed the plan over the objection of thousands of creditors, including eight States, the District of Columbia, the city of Seattle and various Canadian municipalities and Tribes, but the district court vacated the decision, holding that the bankruptcy court did not have authority to extinguish claims against the Sacklers without the consent of the opioid victims who had brought, or who could subsequently bring, the claims.

Following this ruling, the Sacklers agreed to contribute up to an additional $1.675 billion, and the States and District of Columbia agreed to drop their objections to the plan. The Second Circuit ultimately reversed the district court and revived the bankruptcy court's order confirming the now-modified plan. The U.S. Trustee filed an application with the Supreme Court to stay the Second Circuit's decision, which the Supreme Court granted, and the Supreme Court granted a writ of certiorari to resolve the split among the circuits as to the authority of a bankruptcy court to approve nonconsensual third-party releases.

The majority began its legal analysis by looking to section 1123(b) of the Bankruptcy Code, which governs what may be included in a plan. Specifically, the majority focused on the catch-all provision contained in section 1123(b)(6) which provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." The majority found that reading section 1123(b)(6)'s catch-all provision to authorize non-consensual third-party releases would be a radically different power than the other powers enumerated in section 1123(b)(1)-(5), all of which concern the rights and responsibilities of the debtor. Relying on the statutory canon of construction *ejusdem generis*, under which a catch-all provision must be read in light of its surrounding provisions, the majority rejected the argument that section 1123(b)(6) authorized the bankruptcy court to approve nonconsensual third-party releases.

The majority found three additional reasons, beyond the statutory construction concerns discussed above, why section 1123(b)(6) cannot provide authority to approve the releases. *First*, the plan proponents' reading of section 1123(b)(6) would provide a non-debtor (*i.e.*, the Sacklers) with a discharge, which is usually reserved for the debtor alone. *Second*, the release would afford the Sacklers with a discharge of non-dischargeable claims (*e.g.*, claims for willful and malicious injury) without the Sacklers agreeing to pay anything approaching the full amount of their assets (which assets, it bears noting, were pilfered from the company). *Third*, the Bankruptcy Code provides for nonconsensual third-party releases, but only in the context of asbestos cases, *see* 11 U.S.C. § 524(g), thus making it difficult to justify reading section 1123(b)(6) to provide for nonconsensual third-party releases in every context. According to the majority, a policy change allowing for nonconsensual third-party releases is a matter for Congress and not the court.

For all of these reasons, the majority held that the Bankruptcy Code "does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." Despite this seemingly broad ruling, the majority made clear that its ruling should not be construed to call into question consensual third-party releases. Furthermore, the majority stated that "because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganizations plans that have already become effective and been substantially consummated."

The dissent, in issuing a "respectful but emphatical[]" rebuttal concerning the majority's legal and policy conclusions, declared that the majority's decision "is wrong on the law and devastating for more than 100,000 opioid victims and their families" and that it "rewrites the text of the U.S. Bankruptcy Code." Specifically, the dissent argued that section 1123(b) does not concern only debtors and that section 1123(b)(3) specifically allows for the settlement of claims held by third-parties. Further, the dissent stated that the phrase "appropriate provision" in section 1123(b)(6) was broad and empowered a bankruptcy court to exercise "reasonable discretion." Lastly, the dissent made a parallel and opposite policy argument, stating that the majority's decision will violate the collective-action problem the Bankruptcy Code tries to solve by incentivizing claimants to rush to obtain judgments against the Sacklers, which could deplete the estate through Purdue's indemnification of its officers and directors, leaving nothing left for other creditors or opioid claimants.

In conclusion, the eclectic combination of justices making up the majority and the dissent demonstrate the complexities of the Bankruptcy Code and how sophisticated minds can find equally compelling, but parallel diametrically opposed, legal and policy arguments to support differing conclusions. *Purdue Pharma* has settled the debate of whether the Bankruptcy Code permits nonconsensual third-party releases. However, in bankruptcy circles, the debate of whether the Supreme Court made the right decision in *Purdue Pharma* will likely rage on.

Appendix B

144 S.Ct. 2071
Supreme Court of the United States.

William K. HARRINGTON, United States Trustee, Region 2, Petitioner
v.
PURDUE PHARMA L. P., et al.

No. 23-124
|
Argued December 4, 2023
|
Decided June 27, 2024

Synopsis
Background: Chapter 11 debtors, a privately-held pharmaceutical company and affiliated entities involved in manufacture and promotion of proprietary prescription opioid pain reliever that was the subject of mass tort litigation, sought confirmation of proposed plan of reorganization which, inter alia, contained broad releases of civil claims against non-debtor family members who owned and/or were directors and officers of debtors. United States Trustee (UST), numerous states and municipalities, and others objected. The United States Bankruptcy Court for the Southern District of New York, Robert D. Drain, J., 633 B.R. 53, entered order confirming plan, as modified to limit "shareholder release" of claims against family members. Appeal was taken from that order as well as two merged and related orders. The District Court, Colleen McMahon, J., 635 B.R. 26, vacated confirmation order in pertinent part. Plan proponents appealed and, while appeal was pending, proposed a modified plan. The United States Court of Appeals for the Second Circuit, Lee, Circuit Judge, 69 F.4th 45, reversed the District Court and revived the Bankruptcy Court's order approving the now-modified plan. UST filed application for stay, which the Supreme Court granted and treated as petition for writ of certiorari.

[Holding:] The Supreme Court, Justice Gorsuch, held that the Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants, thereby effectively extending to non-debtors the benefits of a discharge usually reserved for debtors; abrogating *In re Millennium Lab Holdings II, LLC*, 945 F. 3d 126; *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070; *In re Airadigm Communications, Inc.*, 519 F. 3d 640; *In re Dow Corning Corp.*, 280 F. 3d 648; and *In re A. H. Robins Co.*, 880 F. 2d 694.

Court of Appeals' decision reversed and remanded.

Justices Thomas, Alito, Barrett, and Jackson joined.

Justice Kavanaugh filed a dissention opinion in which Chief Justice Roberts and Justices Sotomayor and Kagan joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion to Confirm Plan; Objection to Confirmation of Plan.

West Headnotes (27)

[1] **Bankruptcy** Discharge

Beneath the complexity of the Bankruptcy Code, with its hundreds of interlocking rules about the relations between a debtor and its creditors, lies a simple bargain: a debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors.

[2] **Bankruptcy** Creation of estate; time
Bankruptcy Interest of debtor in general

When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C.A. § 541(a).

1 Case that cites this headnote

[3] **Bankruptcy** The Plan
Bankruptcy Confirmation; Objections

Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win its approval. 11 U.S.C.A. §§ 1121, 1123, 1129, 1141.

1 Case that cites this headnote

[4] **Bankruptcy** Conclusiveness

Once the bankruptcy court issues an order confirming a Chapter 11 plan, that document binds the debtor and its creditors going forward, even those who did not assent to the plan. 11 U.S.C.A. § 1141.

[5] **Bankruptcy** Effect as discharge

Bankruptcy court's order confirming a Chapter 11 plan discharges the debtor from any debt that arose before the date of such confirmation, except as provided in the plan, the confirmation order, or the Bankruptcy Code. 11 U.S.C.A. § 1141(d)(1)(A).

[6] **Bankruptcy** Discharge as injunction

Bankruptcy Effect as discharge

Discharge arising from a bankruptcy court's order confirming a Chapter 11 plan not only releases or voids any past or future judgments on the discharged debt, it also operates as an injunction prohibiting creditors from attempting to collect or to recover the debt. 11 U.S.C.A. § 1141(d)(1)(A).

[7] **Bankruptcy** Effect as to co-debtors, guarantors, and sureties

Generally, a discharge in bankruptcy operates only for the benefit of the debtor against its creditors and does not affect the liability of any other entity. 11 U.S.C.A. § 524(e).

[8] **Bankruptcy** Settlement, adjustment, or enforcement of claims

The Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants, thereby effectively extending to non-debtors the benefits of a discharge usually reserved for debtors; abrogating *In re Millennium Lab Holdings II, LLC*, 945 F. 3d 126; *In re Seaside Engineering & Surveying, Inc.*, 780 F. 3d 1070; *In re Airadigm Communications, Inc.*, 519 F. 3d 640; *In re Dow Corning Corp.*, 280 F. 3d 648; and *In re A. H. Robins Co.*, 880 F. 2d 694. 11 U.S.C.A. §§ 105(a), 1123(b), 1123(b)(6).

2 Cases that cite this headnote

[9] **Bankruptcy** Requisites of Confirmable Plan

Some plan terms set forth in the section of the Bankruptcy Code addressing the contents of Chapter 11 plans are mandatory; others are optional. 11 U.S.C.A. §§ 1123(a), 1123(b).

[10] **Bankruptcy** Carrying out provisions of Code

Section of the Bankruptcy Code authorizing a bankruptcy court to issue any order that is necessary or appropriate to carry out the provisions of the Code serves only to "carry out" authorities expressly conferred elsewhere in the Code. 11 U.S.C.A. § 105(a).

2 Cases that cite this headnote

[11] **Statutes** General and specific terms and provisions; ejusdem generis

When faced with a statutory "catchall" phrase tacked on at the end of a long and detailed list of specific directions, courts do not necessarily afford it the broadest possible construction it can bear; instead, courts generally appreciate that the catchall must be interpreted in light of its surrounding context and read to embrace only objects similar in nature to the specific examples preceding it.

1 Case that cites this headnote

[12] **Statutes** General and specific terms and provisions; ejusdem generis

In construing a catchall phrase, when, for example, a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," courts appreciate that the catchall may reach similar landbound vehicles, perhaps including buses and camper vans, but it does not reach dissimilar "vehicles" such as airplanes and submarines.

1 Case that cites this headnote

[13] **Statutes** General and specific terms and provisions; ejusdem generis

The ancient interpretive principle known as the "ejusdem generis" canon seeks to afford a statute the scope a reasonable reader would attribute to it.

[14] **Bankruptcy** Settlement, adjustment, or enforcement of claims

When Congress authorized "appropriate" plan provisions in catchall provision of the subsection of the Bankruptcy Code addressing terms that may be included in a Chapter 11 plan, it did so only after enumerating five specific sorts of provisions, all of which concern the debtor—its rights and responsibilities, and its relationship with its creditors—and each of which authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor; accordingly, pursuant to the "ejusdem generis" canon, the catchall cannot be fairly read to endow a bankruptcy court with the "radically different" power to discharge the debts of a non-debtor without the consent of affected non-debtor claimants. 11 U.S.C.A. § 1123(b)(6).

1 Case that cites this headnote

[15] **Statutes** Particular Words and Phrases

Statutes Context

In the context of statutory interpretation, the quintessentially context-dependent term "appropriate" often draws its meaning from surrounding provisions.

1 Case that cites this headnote

[16] **Bankruptcy** Rights of Action; Contract Rights Generally

Bankruptcy court may approve a Chapter 11 plan resolving derivative claims because those claims belong to the debtor's estate. 11 U.S.C.A. § 1123(b)(3).

1 Case that cites this headnote

[17] **Corporations and Business Organizations** Nature and Form of Remedy

Corporations and Business Organizations Parties

In a derivative action, the named plaintiff is only a nominal plaintiff; the substantive claim belongs to the corporation.

1 Case that cites this headnote

More cases on this issue

[18] **Statutes** Judicial construction; role, authority, and duty of courts

Statutes Policy behind or supporting statute

No statute pursues a single policy at all costs, and question faced by court in construing a statute is how far Congress has gone in pursuing one policy or another.

[19] **Bankruptcy** Power and Authority

Although bankruptcy law may serve to address some collective-action problems, it does not provide a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms play in addressing them, including, among others, legislation, class actions, multi-district litigation, and consensual settlements.

[20] **Bankruptcy** Power and Authority

Bankruptcy court's powers are not limitless.

1 Case that cites this headnote

[21] **Statutes** Related provisions

When resolving a dispute about a statute's meaning, the Supreme Court sometimes looks for guidance not just in the statute's immediate terms, but in related provisions as well.

[22] **Bankruptcy** Discharge as injunction

Bankruptcy Effect as discharge

Chapter 11 discharge releases the debtor from its debts and enjoins future efforts to collect them, even by those who do not assent to the debtor's reorganization plan. 11 U.S.C.A. §§ 524(a)(1), 524(a)(2), 1129(b)(1), 1141(a).

[23] **Bankruptcy** Effect of Discharge

Bankruptcy Effect as discharge

Generally, the Bankruptcy Code reserves to the "debtor," that is, the entity that files for bankruptcy, the benefit of a Chapter 11 discharge. 11 U.S.C.A. §§ 524(e), 1141(d)(1)(A).

[24] **Bankruptcy** Fraud

Bankruptcy Willful and Malicious Injury

Under the Bankruptcy Code, the discharge a debtor receives is not unbounded; it does not reach, for example, claims based on "fraud" or those alleging "willful and malicious injury." 11 U.S.C.A. §§ 523(a)(2), 523(a)(4), 523(a)(6).

[25] **Bankruptcy** Settlement, adjustment, or enforcement of claims

For asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided in the Bankruptcy Code that, notwithstanding the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, courts may issue an injunction barring any action directed against a third party under certain statutorily specified circumstances. 11 U.S.C.A. §§ 524(e), 524(g)(4)(A)(ii).

More cases on this issue

[26] **Bankruptcy** Construction and Operation

Because, when Congress enacted the Bankruptcy Code, it did not write "on a clean slate," pre-Code practice may sometimes inform court's interpretation of the Code's more "ambiguous" provisions.

1 Case that cites this headnote

[27] **Constitutional Law** Particular Issues and Applications

Members of Congress, not the courts, enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge.

***2074** *Syllabus* [*]

Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses. Respondent Purdue Pharma sits at the center of that crisis. Owned and controlled by the Sackler family, Purdue began marketing OxyContin, an opioid prescription pain reliever, in the mid-1990s. After Purdue earned billions of dollars in sales on the drug, in 2007 one of its affiliates pleaded guilty to a federal felony for misbranding OxyContin as a less-addictive, less-abusable alternative to other pain medications. Thousands of lawsuits followed. Fearful that the litigation would eventually impact them directly, the Sacklers initiated a "milking program," withdrawing from Purdue approximately $11 billion—roughly 75% of the firm's total assets—over the next decade.

Those withdrawals left Purdue in a significantly weakened financial state. And in 2019, Purdue filed for Chapter 11 bankruptcy. During that process, the Sacklers proposed to return approximately $4.3 billion to Purdue's bankruptcy estate. In exchange, the Sacklers sought a judicial order releasing the family from all opioid-related claims and enjoining victims from bringing such claims against them in the future. The bankruptcy court approved Purdue's proposed reorganization plan, including its provisions concerning the Sackler discharge. But the district court vacated that decision, holding that nothing in the law authorizes bankruptcy courts to extinguish claims against third parties like the Sacklers, without the claimants' consent. A divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving a modified reorganization plan.

Held: The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants. Pp. 2081 – 2088.

(a) When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C. § 541(a). Under Chapter 11, the debtor must develop a reorganization plan governing the distribution of the estate's assets and present it to the bankruptcy court for approval. §§ 1121, 1123, 1129, 1141. A bankruptcy court's order confirming a reorganization plan "discharges the debtor" of certain pre-petition debts. § 1141(d)(1)(A). In this case, the Sacklers have not filed for bankruptcy or placed all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge. No provision of the code authorizes that kind of relief. Pp. 2081 – 2087.

(1) Section 1123(b) addresses the kinds of provisions that may be included in a Chapter 11 plan. That section contains five specific paragraphs, followed by a catchall provision. The first five paragraphs all concern the debtor's rights and responsibilities, as well as its relationship with its creditors. The catchall provides that a plan "may" also "include any other appropriate provision not inconsistent with the applicable provisions of this title." All agree that the first five paragraphs do not authorize the Sackler discharge. But, according to the plan proponents and the Second Circuit, paragraph (6) broadly permits any term not expressly forbidden by the code so long as a judge deems it "appropriate." Because provisions like the Sackler discharge are not expressly prohibited, they reason, paragraph (6) necessarily permits them. That is not correct. When faced with a catchall phrase like paragraph (6), courts do not necessarily afford it the broadest possible construction it can bear. *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 512, 138 S.Ct. 1612, 200 L.Ed.2d 889. Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. *Ibid.* Here, each of the preceding paragraphs concerns the rights and responsibilities of the debtor; and they authorize a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. While paragraph (6) doubtlessly confers additional authorities on a bankruptcy court, it cannot be read under the canon of *ejusdem generis* to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected claimants. *Epic Systems Corp.*, 584 U.S. at 513, 138 S.Ct. 1612. And while the dissent reaches a contrary conclusion, it does so only by elevating its view of the bankruptcy code's purported purpose over the text's clear focus on the debtor. Pp. 2081 – 2084.

(2) The code's statutory scheme further forecloses the Sackler discharge. The code generally reserves discharge for a debtor who places substantially all of their assets on the table. § 1141(d)(1)(A); see also § 541(a). And, ordinarily, it does not include claims based on "fraud" or those alleging "willful and malicious injury." §§ 523(a)(2), (4), (6). The Sackler discharge defies these limitations. The Sacklers have not filed for bankruptcy, nor have they placed virtually all their assets on the table for distribution to creditors. Yet, they seek an order discharging a broad sweep of present and future claims against them, including ones for fraud and willful injury. In all of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits. Contrary to the dissent's suggestion, plan proponents cannot evade these limitations simply by rebranding their discharge a "release." Pp. 2084 – 2086.

(3) History offers a final strike against the plan proponents' construction of § 1123(b)(6). Pre-code practice, we have said, may sometimes inform the meaning of the code's more "ambiguous" provisions. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649, 132 S.Ct. 2065, 182 L.Ed.2d 967. And every bankruptcy law cited by the parties and their *amici*—from 1800 until the enactment of the present bankruptcy code in 1978—generally reserved the benefits of discharge to the debtor who offered a "fair and full surrender of [its] property." *Sturges v. Crowninshield*, 4 Wheat. 122, 176, 4 L.Ed. 529. Had Congress meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly "somewhere in the [c]ode itself." *Dewsnup v. Timm*, 502 U.S. 410, 420, 112 S.Ct. 773, 116 L.Ed.2d 903. Pp. 2086 – 2087.

(b) In the end, the plan proponents default to policy. The Sacklers, they say, will not return any funds to Purdue's estate unless the bankruptcy court grants them the sweeping nonconsensual release and injunction they seek. Without the

Sackler discharge, they predict, victims will be left without any means of recovery. But the U. S. Trustee disagrees. As he tells it, the potentially massive liability the Sacklers face may induce them to negotiate for *consensual* releases on terms more favorable to all the claimants. In addition, the Trustee warns, a ruling for the Sacklers would provide a roadmap for tortfeasors to misuse the bankruptcy system in future cases. While both sides may have their points, this Court is the wrong audience for such policy disputes. Our only proper task is to interpret and apply the law; and nothing in present law authorizes the Sackler discharge. Pp. 2086 – 2088.

(c) Today's decision is a narrow one. Nothing in the opinion should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan. Nor does the Court express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, the Court does not address whether its reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, the Court holds only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Because the Second Circuit held otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion. Pp. 2087 – 2088.

69 F.4th 45, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which THOMAS, ALITO, BARRETT, and JACKSON, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which ROBERTS, C. J., and SOTOMAYOR and KAGAN, JJ., joined.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

***2077** **[1]** The bankruptcy code contains hundreds of interlocking rules about " 'the relations between' " a " 'debtor and [its] creditors.' " *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 513–514, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938). But beneath that complexity lies a simple bargain: A debtor can win a discharge of its debts if it ***2078** proceeds with honesty and places virtually all its assets on the table for its creditors. The debtor in this case, Purdue Pharma L. P., filed for bankruptcy after facing a wave of litigation for its role in the opioid epidemic. Purdue's long-time owners, members of the Sackler family, confronted a growing number of suits too. But instead of declaring bankruptcy, they chose a different path. From the court overseeing Purdue's bankruptcy, they sought and won an order extinguishing vast numbers of existing and potential claims against them. They obtained all this without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors. The question we face is whether the bankruptcy code authorizes a court to issue an order like that.

I

A

The opioid epidemic represents "one of the largest public health crises in this nation's history." *In re Purdue Pharma L. P.*, 69 F.4th 45, 56 (CA2 2023). Between 1999 and 2019, approximately 247,000 people in the United States died from prescription-opioid overdoses. *In re Purdue Pharma L. P.*, 635 B.R. 26, 44 (SDNY 2021). The U. S. Department of Health and Human Services estimates that the opioid epidemic has cost the country between $53 and $72 billion annually. *Ibid.*

Purdue sits at the center of these events. In the mid-1990s, it began marketing OxyContin, an opioid prescription pain reliever. 69 F.4th at 56. Because of the addictive quality of opioids, doctors had traditionally reserved their use for cancer patients and those "with chronic diseases." 635 B.R. at 42. But OxyContin, Purdue claimed, had a novel "time-release" formula that greatly diminished the threat of addiction. *Ibid.* On that basis, Purdue marketed OxyContin for use in " 'a much broader range' " of applications, including as a " 'first-line therapy for the treatment of arthritis.' " *Ibid.*

Purdue was a " 'family company,' " owned and controlled by the Sacklers. *Id.*, at 40. Members of the Sackler family served as president and chief executive officer; they dominated the board of directors; and they "were heavily involved" in the firm's marketing strategies. 69 F.4th at 86 (Wesley, J., concurring in judgment). They "pushed sales targets," too, and "accompanied sales representatives on 'ride along' visits to health care providers" in an effort to maximize OxyContin sales. 635 B.R. at 50.

Quickly, OxyContin became " 'the most prescribed brand-name narcotic medication' " in the United States. *Id.*, at 43. Between 1996 and 2019, "Purdue generated approximately $34 billion in revenue ... , most of which came from OxyContin sales." *Id.*, at 39. The company's success propelled the Sacklers onto lists "of the top twenty wealthiest families in America," with an estimated net worth of $14 billion. *Id.*, at 40.

Eventually, however, the firm came under scrutiny. In 2007, a Purdue affiliate pleaded guilty to a federal felony for misbranding OxyContin as " 'less addictive' " and " 'less subject to abuse ... than other pain medications.' " *Id.*, at 48. Thousands of civil lawsuits followed as individuals, families, and governments within and outside the United States sought damages from Purdue and the Sacklers for injuries allegedly caused by their deceptive marketing practices. 69 F.4th at 60.

Appreciating this litigation "would eventually impact them directly," *id.*, at 59, the Sacklers began what one family member described as a " 'milking' program," 635 B.R. at 57. In the years before the 2007 plea agreement, Purdue's distributions to ***2079** the Sacklers represented less than 15% of its annual revenue. *Ibid.* After the plea agreement, the Sacklers began taking as much as 70% of the company's revenue each year. *Ibid.* Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% and leaving it in "a significantly weakened financial" state. 69 F.4th at 59. The Sacklers diverted much of that money to overseas trusts and family-owned companies. 635 B.R. at 71.

B

In 2019, Purdue filed for Chapter 11 bankruptcy. Members of the Sackler family saw in that development an opportunity "to get [their own] goals accomplished." *In re Purdue Pharma L. P.*, No. 19–23649 (Bkrtcy. Ct. SDNY, Aug. 18, 2021), ECF Doc. 3599, p. 35 (testimony of David Sackler). They proposed to return to Purdue's bankruptcy estate $4.325 billion of the $11 billion they had withdrawn from the company in recent years. 69 F.4th at 61. But they offered to do so only through payments spread out over a decade. *Id.*, at 60. And, in return, they sought the estate's agreement on, and a judicial order addressing, two matters. First, the Sacklers wanted to extinguish any claims the estate might have against family members, including for fraudulently transferring funds from Purdue in the years preceding its bankruptcy. *In re Purdue Pharma L. P.*, 633 B.R. 53, 83–84 (Bkrtcy. Ct. SDNY 2021). Second, the Sacklers wanted to end the growing number of lawsuits against them brought by opioid victims (the Sackler discharge). *Ibid.*

The Sackler discharge they proposed comprised a release and an injunction. The release sought to void not just current opioid-related claims against the family, but future ones as well. It sought to ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue. It sought to extinguish not only claims for negligence, but also claims for fraud and willful misconduct. 1 App. 193. And it proposed to end all these lawsuits without the consent of the opioid victims who brought them. To enforce this release, the Sacklers sought an injunction "forever stay[ing], restrain[ing,] and enjoin[ing]" claims against them. *Id.*, at 279. That injunction would not just prevent suits against the company's officers and directors but would run in favor of hundreds, if not thousands, of Sackler family members and entities under their control. *Id.*, at 117–190.

Purdue agreed to these terms and included them in the reorganization plan it presented to the bankruptcy court for approval. In that plan, Purdue further proposed to reorganize as a "public benefit" company dedicated primarily to opioid education and abatement efforts. 633 B.R. at 74. As for individual victims harmed by the company's products, Purdue offered, with help from the Sacklers' anticipated contribution, to provide payments from a base amount of $3,500 up to a ceiling of $48,000 (for the most dire cases, and all before deductions for attorney's fees and other expenses). See 1 App. 557–559, 573–585; 6 App. in No. 22–110 etc. (CA2), p. 1697. For those receiving more than the base amount, payments would come in installments spread over as many as 10 years. 7 *id.*, at 1805, 1812.

Creditors were polled on the proposed plan. Though most who returned ballots supported it, fewer than 20% of eligible creditors participated. 21 *id.*, at 6253, 6258. Thousands of opioid victims voted against the plan too, and many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent. 635 B.R. at 35. "Our system of justice," they wrote, "demands that the ***2080** allegations against the Sackler family be fully and fairly litigated in a public and open trial, that they be judged by an impartial jury, and that they be held accountable to those they have harmed." *In re Purdue Pharma L. P.*, No. 7:21–cv–07532 (SDNY, Oct. 25, 2021), ECF Doc. 94, p. 21 (internal quotation marks omitted). The U. S. Trustee, charged with promoting the integrity of the bankruptcy system for all stakeholders, joined in these objections. So did eight States, the District of Columbia, the city of Seattle, and various Canadian municipalities and Tribes, each of which sought to pursue its own claims against the Sacklers. 635 B.R. at 35.

C

The bankruptcy court rejected the objectors' arguments and entered an order confirming the plan, including its provisions related to the Sackler discharge. 633 B.R. at 95–115. Soon, however, the district court vacated that decision. Nothing in the law, that court held, authorized the bankruptcy court to extinguish claims against the Sacklers without the consent of the opioid victims who brought them. 635 B.R. at 115.

After that setback, plan proponents, including Purdue, members of the Sackler family, and various creditors, appealed to the Second Circuit. While their appeal was pending, they also floated a new proposal. Now, they said, the

Sacklers were willing to contribute an additional $1.175 to $1.675 billion to Purdue's estate if the eight objecting States and the District of Columbia would withdraw their objections to the firm's reorganization plan. 69 F.4th at 67. The Sacklers' proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016. Nor did it begin to reflect the earnings the Sacklers have enjoyed from that sum over time. And the proposed contribution would still come in installments spread over many years. But the new proposal was enough to persuade the States and the District of Columbia to drop their objections to the plan, even as a number of individual victims, the Canadian creditors, and the U. S. Trustee persisted in theirs.

Ultimately, a divided panel of the Second Circuit reversed the district court and revived the bankruptcy court's order approving the estate's (now-modified) reorganization plan. Writing separately, Judge Wesley acknowledged that a bankruptcy court enjoys broad authority to modify debtor-creditor relations. But, he argued, nothing in the bankruptcy code grants a bankruptcy court the "extraordinary" power to release and enjoin claims against a third party without the consent of the affected claimants. *Id.*, at 89 (opinion concurring in judgment). The majority's contrary view, he added, "pin[ned the Second] Circuit firmly on one side of a weighty issue that, for too long, has split the courts of appeals." *Id.*, at 90.

After the Second Circuit ruled, the U. S. Trustee filed an application with this Court to stay its decision. We granted the application and, treating it as a petition for a writ of certiorari, agreed to take this case to resolve the circuit split Judge Wesley highlighted. 600 U. S. ––––, 144 S.Ct. 44, 216 L.Ed.2d 1300 (2023). [1]

***2081** II

[2] **[3]** **[4]** The plan proponents and U. S. Trustee agree on certain foundational points. When a debtor files for bankruptcy, it "creates an estate" that includes virtually all the debtor's assets. 11 U.S.C. § 541(a). Under Chapter 11, the debtor can work with its creditors to develop a reorganization plan governing the distribution of the estate's assets; it must then present that plan to the bankruptcy court and win its approval. §§ 1121, 1123, 1129, 1141. Once the bankruptcy court issues an order confirming the plan, that document binds the debtor and its creditors going forward—even those who did not assent to the plan. § 1141(a).

[5] **[6]** **[7]** Most relevant here, a bankruptcy court's order confirming a plan "discharges the debtor from any debt that arose before the date of such confirmation," except as provided in the plan, the confirmation order, or the code. § 1141(d)(1)(A). That discharge not only releases or "void[s] any past or future judgments on the" discharged debt; it also "operat[es] as an injunction ... prohibit[ing] creditors from attempting to collect or to recover the debt." *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004) (citing §§ 524(a)(1), (2)). Generally, however, a discharge operates only for the benefit of the debtor against its creditors and "does not affect the liability of any other entity." § 524(e).

[8] The Sacklers have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge. They hope to win a judicial order releasing pending claims against them brought by opioid victims. They seek an injunction "permanently and forever" foreclosing similar suits in the future. 1 App. 279. And they seek all this without the consent of those affected. The question we face thus boils down to whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*.

A

[9] For an answer, we turn to § 1123. It addresses the "[c]ontents"—or terms—of the bankruptcy reorganization plan a debtor presents and a court approves in Chapter 11 proceedings. Some plan terms are mandatory, § 1123(a); others are optional, § 1123(b). No one suggests that anything like the Sackler discharge *must* be included in a debtor's reorganization plan. Instead, plan proponents contend, it is a provision a debtor *may* include and a court *may* approve in a reorganization plan.

Section 1123(b) governs that question. It directs that a plan "may":

> "(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> "(2)... provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under [§ 365];

"(3)provide for—

"(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

***2082** "(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6)include any other appropriate provision not inconsistent with the applicable provisions of this title."

[10] We can easily rule out the first five of these paragraphs as potential sources of legal authority for the Sackler discharge. They permit a plan to address claims and property belonging to a debtor or its estate. §§ 1123(b)(2), (3), (4). They permit a plan to modify the rights of creditors who hold claims against the debtor or its estate. §§ 1123(b)(1), (5). But nothing in those paragraphs authorizes a plan to extinguish claims against third parties, like the Sacklers, without the consent of the affected claimants, like the opioid victims. If authority for the Sackler discharge can be found anywhere, it must be found in paragraph (6). That is the paragraph on which the Second Circuit primarily rested its decision below, and it is the one on which plan proponents pin their case here. [2]

As the plan proponents see it, paragraph (6) allows a debtor to include in its plan, and a court to order, *any* term not "expressly forbid[den]" by the bankruptcy code as long as a bankruptcy judge deems it "appropriate" and consistent with the broad "purpose[s]" of bankruptcy. 69 F.4th at 73–74; *post*, at 2109 – 2110 (KAVANAUGH, J., dissenting). And because the code does not expressly forbid a nonconsensual nondebtor discharge, the reasoning goes, the bankruptcy court was free to authorize one here after finding it an "appropriate" provision. See Brief for Sackler Family 19–21; Brief for Purdue 20; *post*, at 2094 – 2096.

[11] **[12]** **[13]** This understanding of the statute faces an immediate obstacle. Paragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions. When faced with a catchall phrase like that, courts do not necessarily afford it the broadest possible construction it can bear. *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 512, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018). Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to "embrace only objects similar in nature" to the specific examples preceding it. *Ibid.* (internal quotation marks omitted). So, for example, when a statute sets out a list discussing "cars, trucks, motorcycles, or any other vehicles," we appreciate that the catchall phrase may reach similar landbound vehicles (perhaps including buses and camper vans), but it does not reach dissimilar "vehicles" (such as airplanes and submarines). See *McBoyle v. United States*, 283 U.S. 25, 26–27, 51 S.Ct. 340, 75 L.Ed. 816 (1931). This ancient interpretive principle, sometimes ***2083** called the *ejusdem generis* canon, seeks to afford a statute the scope a reasonable reader would attribute to it.

[14] Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose. In some circumstances, it may be difficult to discern what a statute's specific listed items share in common. See A. Scalia & B. Garner, Reading Law 207–208 (2012). But here an obvious link exists: When Congress authorized "appropriate" plan provisions in paragraph (6), it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors. Doubtless, paragraph (6) operates to confer additional authorities on a bankruptcy court. See *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). But the catchall cannot be fairly read to endow a bankruptcy court with the "radically different" power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants. *Epic Systems Corp.*, 584 U.S. at 513, 138 S.Ct. 1612; see also *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–647, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012).

[15] The catchall's text underscores the point. Congress could have said in paragraph (6) that "everything not expressly prohibited is permitted." But it didn't. Instead, Congress set out a detailed list of powers, followed by a catchall that it qualified with the term "appropriate." That quintessentially "context dependent" term often draws its meaning from surrounding provisions. *Sossamon v. Texas*, 563 U.S. 277, 286, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011). And we know to look to the statute's preceding specific paragraphs as the relevant "context" here because paragraph (6) tells us so. It permits "any *other* appropriate provision"—that is, "other" than the provisions already discussed in paragraphs (1) through (5). (Emphasis added.) Each of those "other" paragraphs authorizes a bankruptcy court to adjust claims without consent only to the extent such claims concern the debtor. From this, it follows naturally that an "appropriate provision" adopted pursuant to the catchall that purports to extinguish claims without consent should be similarly constrained. See, *e.g.*, *Epic Systems Corp.*, 584 U.S. at 512–513, 138 S.Ct. 1612.

For its part, the dissent does not dispute that the *ejusdem generis* canon applies to § 1123(b)(6). *Post*, at 2105 – 2106; see also Brief for Sackler Family 44; Brief for Purdue 23. But it disagrees with our application of the canon for two reasons. First, the dissent claims, it "is factually incorrect" to suggest that all the provisions of § 1123(b) concern the debtor's rights and responsibilities. *Post*, at 2106. The dissent points out that a bankruptcy estate may settle creditors' "derivative claims" against nondebtors under paragraph (3). *Post*, at 2107 – 2108. And this "indisputable point," the dissent declares, "defeats the Court's conclusion that § 1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against nondebtors." *Post*, at 2107; see Brief for Purdue 24–25.

[16] **[17]** But that argument contains a glaring flaw. The dissent neglects *why* a bankruptcy court may resolve derivative claims under paragraph (3): It may because those claims belong to the debtor's estate. See, *e.g.*, *In re Ontos, Inc.*, 478 F.3d 427, 433 (CA1 2007). In a derivative action, the named plaintiff "is only a nominal plaintiff. The substantive claim belongs to the corporation." 2 J. Macey, Corporation Laws § 13.20[D], p. 13–140 (2020–4 Supp.). And no one questions that Purdue may address in its own bankruptcy plan ***2084** claims "wherever located and by whomever held," § 541(a)—including those claims derivatively asserted by another on its behalf, see § 1123(b)(3). The problem is, the Sackler discharge is nothing like that. Rather than seek to resolve claims that substantively belong to Purdue, it seeks to extinguish claims against the Sacklers that belong to their victims. And precisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property. [3]

[18] **[19]** **[20]** Having come up short on the text of § 1123(b), the dissent pivots to the statute's purpose. *Post*, at 2106. As the dissent sees it, our application of the *ejusdem generis* canon should focus less on the provisions preceding the catchall and more on the overall "purpose of bankruptcy law" in solving "collective-action problem[s]." *Post*, at 2090, 2106 – 2107; see also Brief for Purdue 21. But there is an obvious difficulty with this approach, too. As this Court has long recognized, "[n]o statute pursues a single policy at all costs." *Bartenwerfer v. Buckley*, 598 U.S. 69, 81, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023). Always, the question we face is *how far* Congress has gone in pursuing one policy or another. See *ibid.* So, yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them. And here, the five paragraphs that precede the catchall tell us that bankruptcy courts may have many powers, including the power to address certain collective-action problems when they implicate the debtor's rights and responsibilities. But those directions also indicate that a bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers). [4]

B

[21] When resolving a dispute about a statute's meaning, we sometimes look for guidance not just in its immediate terms but in related provisions as well. See, *e.g.*, *Turkiye Halk Bankasi A. S. v. United States*, 598 U.S. 264, 275, 143 S.Ct. 940, 215 L.Ed.2d 242 (2023). Paragraph (6) itself alludes to this fact by instructing that any plan term adopted under its auspices must not be "inconsistent with the applicable provisions of " the bankruptcy code. Following that direction and looking to Chapter 11 more broadly, we find at least three further reasons why § 1123(b)(6) cannot bear the interpretation the plan ***2085** proponents and the dissent would have us give it.

[22] **[23]** First, consider what is and who can earn a discharge. As we have seen, a discharge releases the debtor from its debts and enjoins future efforts to collect them—even by those who do not assent to the debtor's reorganization plan. §§ 524(a)(1)–(2), 1129(b)(1), 1141(a). Generally, too, the bankruptcy code reserves this benefit to "the debtor"—the entity that files for bankruptcy. § 1141(d)(1)(A); accord, § 524(e); see also §§ 727(a)–(b). The plan proponents and the dissent's reading of § 1123(b)(6) would defy these rules by effectively affording to a nondebtor a discharge usually reserved for the debtor alone.

[24] Second, notice how the code constrains the debtor. To win a discharge, again as we have seen, the code generally requires the debtor to come forward with virtually all its assets. §§ 541(a)(1), 548. Nor is the discharge a debtor receives unbounded. It does not reach claims based on "fraud" or those alleging "willful and malicious injury." §§ 523(a)(2), (4), (6). And it cannot "affect any right to trial by jury" a creditor may have "with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a). The plan proponents and the dissent's reading of § 1123(b)(6) transgresses all these limits too. The Sacklers have not agreed to place anything approaching their full assets on the table for opioid victims. Yet they seek a judicial order that would extinguish virtually all claims against them for fraud, willful injury, and even wrongful death, all without the consent of those who have brought and seek to bring such claims. In each of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits.

[25] Finally, there is a notable exception to the code's general rules. For asbestos-related bankruptcies—and only for such bankruptcies—Congress has provided that, "[n]otwithstanding" the usual rule that a debtor's discharge does not affect the liabilities of others on that same debt, § 524(e), courts may issue "an injunction ... bar[ring] any action directed against a third party" under certain statutorily specified circumstances. § 524(g)(4)(A)(ii). That the code *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context, makes it all the more unlikely that § 1123(b)(6) is best read to afford courts that same authority in *every* context. See, *e.g.*, *Bittner v. United States*, 598 U.S. 85, 94, 143 S.Ct. 713, 215 L.Ed.2d 1 (2023); *AMG Capital Management, LLC v. FTC*, 593 U.S. 67, 77, 141 S.Ct. 1341, 209 L.Ed.2d 361 (2021). [5]

How do the plan proponents and the dissent reply to all this? Essentially, they ask us to look the other way. Whatever limits the code imposes on debtors and discharges mean nothing, they say, because the Sacklers seek a "release," not a ***2086** "discharge." See, *e.g.*, *post*, at 2112 – 2113. But word games cannot obscure the underlying reality. Once more, the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table. Nor is what the Sacklers seek a traditional release, for they hope to have a court extinguish claims of opioid victims without their consent. See, *e.g.*, J. Macey, Corporate Governance: Promises Kept, Promises Broken 152 (2008) ("settlements are, by definition, consensual"); accord, *Firefighters v. Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). Describe the relief the Sacklers seek how you will, nothing in the bankruptcy code contemplates (much less authorizes) it.

C

[26] If text and context supply two strikes against the plan proponents and the dissent's construction of § 1123(b)(6), history offers a third. When Congress enacted the present bankruptcy code in 1978, it did "not write 'on a clean slate.' " *Hall v. United States*, 566 U.S. 506, 523, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)). Recognizing as much, this Court has said that pre-code practice may sometimes inform our interpretation of the code's more "ambiguous" provisions. *RadLAX Gateway Hotel*, 566 U.S. at 649, 132 S.Ct. 2065.

While we discern no ambiguity in § 1123(b)(6) for the reasons explored above, historical practice confirms the lesson we take from it. Every bankruptcy law the parties and their *amici* have pointed us to, from 1800 until 1978, generally reserved the benefits of discharge to the debtor who offered a "fair and full surrender of [its] property." *Sturges v. Crowninshield*, 4 Wheat. 122, 176, 4 L.Ed. 529 (1819); accord, *Central Va. Community College v. Katz*, 546 U.S. 356, 363–364, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006); see, *e.g.*, Bankruptcy Act of 1800, § 5, 2 Stat. 23 (repealed 1803); Act of Aug. 19, 1841, § 3, 5 Stat. 442–443 (repealed 1843); Act of Mar. 2, 1867, §§ 11, 29, 14 Stat. 521, 531–532 (repealed 1878); Bankruptcy Act of 1898, §§ 7, 14, 30 Stat. 548, 550 (repealed 1978). No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected. Surely, if Congress had meant to reshape traditional practice so profoundly in the present bankruptcy code, extending to courts the capacious new power the plan proponents claim, one might have expected it to say so expressly "somewhere in the [c]ode itself." *Dewsnup*, 502 U.S. at 420, 112 S.Ct. 773. [6]

III

Faced with so many marks against its interpretation of the law, plan proponents and the dissent resort to a policy argument. The Sacklers, they remind us, have signaled that they will not return any funds to Purdue's estate unless the bankruptcy court grants them the sweeping nonconsensual release and injunction they seek. Absent these concessions, plan proponents ***2087** and the dissent emphatically predict, "there will be no viable path" for victims to recover even $3,500 each. Tr. of Oral Arg. 100; Brief for Sackler Family 27; see Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 45–46; *post*, at 2089 – 2090, 2098 – 2103, 2115 – 2117.

The U. S. Trustee disputes that assessment. Yes, he says, reversing the Second Circuit may cause Purdue's current reorganization plan to unravel. But that would also mean the Sacklers would face lawsuits by individual victims, States, other governmental entities, and perhaps even fraudulent-transfer claims from the bankruptcy estate. So much legal exposure, the Trustee asserts, may induce the Sacklers to negotiate *consensual* releases on terms more favorable to opioid victims. Brief for Petitioner 47–48. The Sacklers may "want global peace," the Trustee acknowledges, but that doesn't "mea[n] that they wouldn't pay a lot for 97.5 percent peace." Tr. of Oral Arg. 26. After all, the Trustee reminds us, during the appeal in this very case, the Sacklers agreed to increase their contribution by more than $1 billion in order to secure the consent of the eight objecting States. If past is prologue, the Trustee says, there may be a better deal on the horizon. [7]

Even putting that aside, the Trustee urges us to consider the ramifications of this case for others. Nonconsensual third-party releases, he observes, allow tortfeasors to win immunity from the claims of their victims, including for claims (like wrongful death and fraud) they could not discharge in bankruptcy, and do so without placing anything approaching all of their assets on the table. Endorsing that maneuver, the Trustee says, would provide a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system" in future cases "to avoid mass-tort liability." Brief for Petitioner 44–45.

[27] Both sides of this policy debate may have their points. But, in the end, we are the wrong audience for them. As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge. Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make. Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge.

IV

As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, ***2088** *e.g.*, *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated. Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants. Because the Second Circuit ruled otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAVANAUGH, with whom THE CHIEF JUSTICE, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Today's decision is wrong on the law and devastating for more than 100,000 opioid victims and their families. The Court's decision rewrites the text of the U. S. Bankruptcy Code and restricts the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims. As a result, opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation.

Bankruptcy seeks to solve a collective-action problem and prevent a race to the courthouse by individual creditors who, if successful, could obtain all of a company's assets, leaving nothing for all the other creditors. The bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors—and in mass-tort bankruptcies, among the victims. To do so, the Bankruptcy Code vests bankruptcy courts with broad discretion to approve "appropriate" plan provisions. 11 U.S.C. § 1123(b)(6).

In this mass-tort bankruptcy case, the Bankruptcy Court exercised that discretion appropriately—indeed, admirably. It approved a bankruptcy reorganization plan for Purdue Pharma that built up the estate to approximately $7 billion by securing a $5.5 to $6 billion settlement payment from the Sacklers, who were officers and directors of Purdue. The plan then guaranteed substantial and equitable compensation to Purdue's many victims and creditors, including more than 100,000 individual opioid victims. The plan also provided significant funding for thousands of state and local governments to prevent and treat opioid addiction.

The plan was a shining example of the bankruptcy system at work. Not surprisingly, therefore, virtually all of the opioid victims and creditors in this case fervently support approval of Purdue's bankruptcy reorganization plan. And all 50 state Attorneys General have signed on to the plan —a rare consensus. The only relevant exceptions to the nearly universal desire for plan approval are a small group of Canadian creditors and one lone individual.

But the Court now throws out the plan—and in doing so, categorically prohibits non-debtor releases, which have long been a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one. The Court's decision finds no mooring in the Bankruptcy Code. Under the Code, all agree that a bankruptcy plan can nonconsensually release victims' and creditors' claims *against a bankrupt company*—here, against Purdue. Yet the Court today says that a plan can *never* release victims' ***2089** and creditors' claims *against non-debtor officers and directors of the company*—here, against the Sacklers.

That is true, the Court says, even when (as here) those non-debtor releases are necessary to facilitate a fair settlement with the officers and directors and produce a significantly larger bankruptcy estate that can be fairly and equitably distributed among the victims and creditors. And that is true, the Court also says, even when (as here) those officers and directors are indemnified by the company. When officers and directors are indemnified by the company, a victim's or creditor's claim against the non-debtors "is, in essence, a suit against the debtor" that could "deplete the assets of the estate" for the benefit of only a few, just like a claim against the company itself. *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (CA2 2023) (quotation marks omitted).

It therefore makes little legal, practical, or economic sense to say, as the Court does, that the victims' and creditors' claims against the debtor can be released, but that it would be categorically "inappropriate" to release their identical claims against non-debtors even when they are indemnified or when the release generates a significant settlement payment by the non-debtor to the estate.

For decades, bankruptcy courts and courts of appeals have determined that non-debtor releases can be appropriate and essential in mass-tort cases like this one. Non-debtor releases have enabled substantial and equitable relief to victims in cases ranging from asbestos, Dalkon Shield, and Dow Corning silicone breast implants to the Catholic Church and the Boy Scouts. As leading scholars on bankruptcy explain, "the bankruptcy community has recognized the resolution of mass tort claims as a widely accepted core function of bankruptcy courts for decades"—and they emphasize that a "key feature in every mass tort bankruptcy" has been the non-debtor release. A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 974, 977 (2023).

No longer.

Given the broad statutory text—"appropriate"—and the history of bankruptcy practice approving non-debtor releases in mass-tort bankruptcies, there is no good reason for the debilitating effects that the decision today imposes on the opioid victims in this case and on the bankruptcy system at large. To be sure, many Americans have deep hostility toward the Sacklers. But allowing that animosity to infect this bankruptcy case is entirely misdirected and counterproductive, and just piles even more injury onto the opioid victims. And no one can have more hostility toward the Sacklers and a greater desire to go after the Sacklers' assets than the opioid victims themselves. Yet the victims unequivocally seek approval *of this plan*.

With the current plan now gone and non-debtor releases categorically prohibited, the consequences will be severe, as the victims and creditors forcefully explained. Without releases, there will be no $5.5 to $6 billion settlement payment to the estate, and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100. And without the plan's substantial funding to prevent and treat opioid addiction, the victims and creditors bluntly described further repercussions: "more people will die without this Plan." Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 55.

In short: 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 ***2090** 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. The opioid victims and their families are deprived of their hard-won relief. And the communities devastated by the opioid crisis are deprived of the funding needed to help prevent and treat opioid addiction. As a result of the Court's decision, each victim and creditor receives the essential equivalent of a lottery ticket for a possible future recovery for (at most) a few of them. And as the Bankruptcy Court explained, without the non-debtor releases, there is no good reason to believe that any of the victims or state or local governments will ever recover anything. I respectfully but emphatically dissent.

I

To map out this dissent for the reader: Part I (pages 5 to 18) discusses why non-debtor releases are often appropriate and essential, particularly in mass-tort bankruptcies. Part II (pages 18 to 31) explains why non-debtor releases were appropriate and essential in the Purdue bankruptcy. Part III (pages 31 to 52) engages the Court's contrary arguments and why I respectfully disagree with those arguments. Part IV (pages 52 to 54) sums up.

Throughout this opinion, keep in mind the goal of bankruptcy. The bankruptcy system is designed to preserve the debtor's estate so as to ensure fair and equitable recovery for creditors. Bankruptcy courts achieve that overarching objective by, among other things, releasing claims that otherwise could deplete the estate for the benefit of only a few and leave all the other creditors with nothing. And as courts have recognized for decades, especially in mass-tort cases, non-debtor releases are not merely "appropriate," but can be absolutely critical to achieving the goal of bankruptcy—fair and equitable recovery for victims and creditors.

A

Article I, § 8, of the Constitution affords Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" and to "make all Laws which shall be necessary and proper for carrying into Execution" that power.

Early in the Nation's history, Congress established the bankruptcy system. In 1978, Congress significantly revamped and reenacted the Bankruptcy Code in its current form. Bankruptcy Code of 1978, 92 Stat. 2549.

The purpose of bankruptcy law is to address the collective-action problem that a bankruptcy poses. T. Jackson, The Logic and Limits of Bankruptcy Law 12–13 (1986). When a company's liabilities exceed its ability to pay creditors, every creditor has an incentive to maximize its own recovery before other creditors deplete the pot. Without a mandatory collective system, the creditors would race to the courthouse to recover first. One or a few successful creditors could then recover substantial funds, deplete the assets, and drive the company under—leaving other creditors with nothing. See *id*., at 7–19; D. Baird, A World Without Bankruptcy, 50 Law & Contemp. Prob. 173, 183–184 (1987); T. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L. J. 857, 860–868 (1982).

Bankruptcy creates a way for creditors to "act as one, by imposing a *collective* and *compulsory* proceeding on them." Jackson, Logic and Limits of Bankruptcy Law, at 13. One of the goals of Chapter 11 of the Bankruptcy Code in particular is to fairly distribute estate assets among creditors ***2091** "in order to prevent a race to the courthouse to dismember the debtor." 7 Collier on Bankruptcy ¶1100.01, p. 1100–3 (R. Levin & H. Sommer eds., 16th ed. 2023). Chapter 11 is aimed at preserving an estate's value for distribution to creditors in the face of that collective-action problem.

The basic Chapter 11 case runs as follows. After the debtor files for bankruptcy under Chapter 11, the debtor's property becomes property of the bankruptcy estate. 11 U.S.C. § 541. Any litigation that might interfere with the property of the estate is subject to an automatic stay, thus preventing creditors from skipping the line by litigating in a separate forum against the debtor while the bankruptcy is ongoing. § 362.

With litigation paused, the parties craft a plan of reorganization for the debtor. The Code grants the bankruptcy court sweeping powers to reorganize the debtor company and ensure fair and equitable recovery for the creditors. For example, the plan may authorize selling or retaining the company's property; merging or consolidating the company; or amending the company's charter. § 1123(a)(5). The subsection at issue here, § 1123(b), also authorizes many other kinds of provisions that bankruptcy plans may include. [1] Most relevant for this case, as I will explain, the reorganization plan may impair and release "any class of claims" that creditors hold against the debtor. § 1123(b)(1). The plan may also settle and release "any claim or interest" that the debtor company holds against non-debtors. § 1123(b)(3). And the plan may include "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. § 1123(b)(6).

To address any collective-action or holdout problem, the bankruptcy court has the power to approve a reorganization plan even without the consent of every creditor. If creditors holding more than one-half in number (and at least two-thirds in amount) of the claims in every class accept the plan, the court can confirm the plan. §§ 1126(c), 1129(a)(8)(A). A plan is "said to be confirmed consensually if all classes of creditors vote in favor, even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. That the bankruptcy system considers a plan with majority (even if not unanimous) support to be "consensual" underscores that the bankruptcy system is designed to benefit creditors collectively and prevent holdout problems.

Confirmation of the plan "generally discharges the debtor from all debts that arose before confirmation." *Id.*, ***2092** ¶1100.09[2][f], at 1100–42 (citing § 1141(d)). And all creditors are bound by the plan's distribution, even if some creditors are not happy and oppose the plan. *Ibid.*

B

This is a mass-tort bankruptcy case. Mass-tort cases present the same collective-action problem that bankruptcy was designed to address. "Without a mandatory rule that consolidates claims in a single tribunal, tort claimants would rationally enter a race to the courthouse." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 997 (2023). And the "plaintiffs who bring successful suits earlier are likely to drain the firm's resources, while inconsistent judgments could result in inequitable payouts even among plaintiffs who ultimately do collect." *Id.*, at 994.

For many decades now, bankruptcy law has stepped in as a coordinating tribunal in significant mass-tort cases. When a company that is liable for mass torts files for bankruptcy, the bankruptcy system enables (and requires) the mass-tort victims who are seeking relief from the bankrupt company to work together to reach a fair and equitable distribution of the company's assets.

In many cases, there is no workable alternative other than bankruptcy for achieving fair and equitable recovery for mass-tort victims. "Outside of bankruptcy," victims face "significant administrative costs" of multi-district litigation, "which has limited coordination mechanisms and no tools for binding future claimants." *Id.*, at 1005. And multi-district litigation cannot "solve the collective action problem because dissenting claimants can opt out of settlements even when super majorities favor them." *Ibid.*

Bankruptcy, on the other hand, reduces administrative costs and allows all of the affected parties to come together, pause litigation elsewhere, invoke procedural safeguards including discovery, and reach a collective resolution that considers both current and future victims. Cf. Federal Judicial Center, E. Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 6 (2000) ("bankruptcy reorganizations provide an inherently fairer method of resolving mass tort claims" than alternative of class-action settlements).

In some cases—including mass-tort cases—it is not only the debtor company, but rather another closely related person or entity such as officers and directors (non-debtors), who may hold valuable assets and also be potentially liable for the company's wrongdoing.

But it may be uncertain whether the victims can recover in tort suits against the non-debtors due to legal hurdles or difficulty reaching the non-debtors' assets. In those cases, a settlement may be reached: In exchange for being released from potential liability for any wrongdoing, the non-debtor must make substantial payments to the company's bankruptcy estate in order to compensate victims. As long as the settlement is fair, the non-debtor's settlement payment will benefit victims "by enlarging the pie of recoverable funds" in the bankruptcy estate. Casey & Macey, 90 U. Chi. L. Rev., at 1001. And it will reduce administrative costs, because the victims' claims against both the debtor and the non-debtor may be resolved "at the same time and in the same tribunal." *Id*., at 1002.

The non-debtor's settlement payment into the estate can also solve a collective-action problem. Bringing the non-debtor's assets into the bankruptcy estate enables those assets to be distributed fairly and ***2093** equitably among victims, rather than swallowed up by the first victim to successfully sue the non-debtor. *Id*., at 1002–1003.

A separate collective-action problem can arise when the insolvent company's officers and directors are indemnified by the company for liability arising out of their job duties. In such cases, "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (CA2 2023) (quotation marks omitted). If not barred from doing so, the creditors could race to the courthouse against the indemnified officers and directors for basically the same claims that they hold against the debtor company. If successful, such suits would deplete the company's assets because a judgment against the indemnified officers and directors would likely come out of the debtor company's assets.

Another similar collective-action problem can involve liability insurance, a kind of indemnification relationship where the insurer is on the hook for tort victims' claims against the debtor company. See B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 375–376 (1989). The insurance assets—meaning assets to the limits of the debtor's insurance coverage—are usually a key asset for the bankruptcy estate to compensate victims. But tort victims also "may have direct action rights against the insurance carrier, even, in some cases, bypassing the debtor-insured." 5 Collier, Bankruptcy ¶541.10[3], at 541–60. If victims brought their claims directly against the insurer for the same claims that they hold against the estate, one group of victims could obtain from the insurer the full amount of the debtor's coverage. That would obviously prevent the insurance money from being used as part of the bankruptcy estate. See Zaretsky, 55 Brooklyn L. Rev., at 376–377, 394–395.

To address those various collective-action problems, bankruptcy courts have long found non-debtor releases to be appropriate in certain complex bankruptcy cases, especially in mass-tort bankruptcies. Indeed, that is precisely why non-debtor releases emerged in asbestos mass-tort bankruptcies in the 1980s. See *id*., at 405–414; Casey & Macey, 90 U. Chi. L. Rev., at 998–999; see, *e.g*., *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (CA2 1988). And that is precisely why non-debtor releases have become such a well-established tool in mass-tort bankruptcies in the decades since.

For example, after A. H. Robins declared bankruptcy in 1985 in the face of massive tort liability for injuries from its defective intrauterine device, the Dalkon Shield, nearly 200,000 victims filed proof of claims. *In re A. H. Robins Co.*, 88 B.R. 742, 743–744, 747 (ED Va. 1988), aff'd, 880 F.2d 694 (CA4 1989). A plan provision releasing the company's directors and insurance company ensured that the estate would not be depleted through indemnity or contribution claims, or claims brought directly against the directors or insurer. 88 B.R. at 751; 880 F.2d at 700–702. Preventing the victims from engaging in "piecemeal litigation" against the non-debtor directors and insurance company was the only way to ensure "equality of treatment of similarly situated creditors." 88 B.R. at 751. Therefore, the Bankruptcy Court found (and the Fourth Circuit agreed) that the release was "necessary and essential" to the bankruptcy's success. *Ibid*.; see 880 F.2d at 701–702. The plan ultimately provided for the victims to recover in full, and they overwhelmingly approved the plan. *Id*., at 700–701.

A non-debtor release provision was similarly essential to resolve hundreds of thousands of victims' tort claims against Dow Corning Corporation, which declared ***2094** bankruptcy in 1995 in the face of liability for its defective silicone breast implants. See *In re Dow Corning Corp.*, 287 B.R. 396, 397 (ED Mich. 2002). The non-debtor release provision prevented the victims from suing Dow Corning's insurers and shareholders for their tort claims—which would have depleted Dow Corning's shared insurance assets and other estate assets. *Id*., at 402–403, 406–408. The non-debtor release provision was "essential" to the bankruptcy reorganization because the reorganization hinged "on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *In re Dow Corning Corp.*, 280 F.3d 648, 658 (CA6 2002); 287 B.R. at 410–413.

The need for such a tool to deal with complex bankruptcy cases has not gone away. Far from it. Indeed, without the option of bankruptcy with non-debtor releases, "tort victims in several recent high-profile cases would have received less compensation; the compensation would have been unfairly distributed; and the administrative costs of resolving their claims would have been higher." Casey & Macey, 90 U. Chi. L. Rev., at 979; see also Brief for Law Professors in Support of Respondents as *Amici Curiae* 21–25; Brief for Certain Former Commissioners of the American Bankruptcy Institute's Commission To Study the Reform of Chapter 11 as *Amici Curiae* 9–11; Brief for Association of the Bar of the City of New York as *Amicus Curiae* 9, 11–15.

Consider two recent examples that ensured recovery for the victims of torts committed by the Boy Scouts of America and by several dioceses of the Catholic Church. In both cases, a national or regional organization was the debtor in the bankruptcy. But that organization shared its liability and its insurance policy with numerous other legally separate and autonomous local entities. Without a coordinating mechanism, a victim's (or group of victims') recovery against one local entity could have eaten up all of the shared insurance assets, leaving all of the other victims with nothing. Brief for Boy Scouts of America as *Amicus Curiae* 9–14, 17–19; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 9–22.

Bankruptcy provided a forum to coordinate liability and insurance assets. A non-debtor release provision prevented victims from litigating outside of the bankruptcy plan's procedures. And the provision therefore prevented one victim or group of victims from obtaining all of the insurance funds before other victims recovered. As a result, in each case, the local entities were able to pool their resources to create a substantial fund in a single bankruptcy estate to compensate victims substantially and fairly. Brief for Boy Scouts of America as *Amicus Curiae* 11–12, 20–21; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 5–6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 15–16.

As those examples show, in some cases where various closely related but distinct parties share liability or share assets (or both), bankruptcy "provides the *only* forum in the U. S. legal system where a unified and complete resolution of mass-tort cases can reliably occur in a manner that results in a fair recovery and distribution for all claimants." Brief for Association of the Bar of the City of New York as *Amicus Curiae* 15. And the bankruptcy system could not do so without non-debtor releases.

C

The Bankruptcy Code gives bankruptcy courts authority to approve non-debtor releases to solve the complex collective-action problems that such cases present. As ***2095** noted above, a Chapter 11 reorganization plan may release creditor claims against debtors. § 1123(b)(1). And a plan may settle and release debtor claims against non-debtors. § 1123(b)(3).

In addition, the plan may also include "any other appropriate provision not inconsistent with the applicable provisions of " the Code. § 1123(b)(6). Section 1123(b)(6) provides ample flexibility for the reorganization plan to settle and release creditor claims against non-debtors who are closely related to the debtor. For example, officers and directors may be indemnified by the debtor company; in those cases, creditor claims against indemnified non-debtors are essentially the same as creditor claims against the debtor business itself. Or the non-debtors may reach a settlement with the victims and creditors where the non-debtors pay a settlement amount to the estate, which in some cases may be the only way to ensure fair and equitable recovery for the victims and creditors. The non-debtor releases—just like debtor releases under § 1123(b)(1) and non-debtor releases under § 1123(b)(3)—can be essential to preserve and increase the estate's assets and can be essential to ensure fair and equitable victim and creditor recovery.

The key statutory term in § 1123(b)(6) is "appropriate." As this Court has often said, "appropriate" is a "broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 752, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (quotation marks omitted). Because determining propriety requires exercising judgment, the inquiry must include a degree of "flexibility." *Ibid.* The Court has explained on numerous occasions that the "ordinary meaning" of a statute authorizing appropriate relief "confers broad discretion" on a court. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); see also, *e.g.*, *Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 446, 106 S.Ct. 3019, 92 L.Ed.2d 344

(1986) (plurality opinion) (Title VII "vest[s] district courts with broad discretion to award 'appropriate' equitable relief "); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("In directing the district court to impose an 'appropriate' sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion"). Because the "language is open-ended on its face," whether a provision is "appropriate is inherently context dependent." *Tanzin v. Tanvir*, 592 U.S. 43, 49, 141 S.Ct. 486, 208 L.Ed.2d 295 (2020) (quotation marks omitted).

By allowing "any other appropriate provision," § 1123(b)(6) empowers a bankruptcy court to exercise reasonable discretion. That § 1123 confers broad discretion makes eminent sense, given "the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Such flexibility is important to achieve Chapter 11's ever-elusive goal of ensuring fair and equitable recovery to creditors. See §§ 1129(a)(7), (b)(1).

The catchall authority in Chapter 11 therefore empowers a bankruptcy court to exercise its discretion to deal with complex scenarios, like the collective-action problems that plague mass-tort bankruptcies. Non-debtor releases are often appropriate—indeed are essential—in such circumstances.

And courts have therefore long found non-debtor releases to be appropriate in certain narrow circumstances under § 1123(b)(6). Indeed, courts have been approving such non-debtor releases almost as long as the current Bankruptcy Code ***2096** has existed since its enactment in 1978. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff 'd, 837 F.2d at 90; *A. H. Robins Co.*, 88 B.R. at 751, aff 'd, 880 F.2d at 696. Historical and contemporary practice demonstrate that non-debtor releases are especially appropriate when (as here) non-debtor releases and corresponding settlement payments preserve and increase the debtor's estate and thereby ensure fair and equitable recovery for creditors.

Over those decades of practice, courts have developed and applied numerous factors for determining whether a non-debtor release is "appropriate" in a given case. § 1123(b)(6); see H. Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 771–773 (1982) (noting the common-law-like process by which factors important to a discretionary decision develop over time). Those factors reflect the fact that determining whether a non-debtor release is "appropriate" is a holistic inquiry that depends on the precise facts and circumstances of each case. And the factors have served to confine the use of non-debtor releases to well-defined and narrow circumstances—precisely those circumstances where the collective-action problems arise.

For instance, since the 1980s, the Second Circuit has been a leader on the non-debtor release issue. See, *e.g.*, *Johns-Manville Corp.*, 837 F.2d 89 (1988); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (1992); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2005). Over time, the Second Circuit has developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case.

First, and critically, the court must determine whether the released party is closely related to the debtor—for example, through an indemnification agreement—where "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F.4th at 78 (quotation marks omitted). Second, the court must determine if the claims against the non-debtor are "factually and legally intertwined" with claims against the debtor. *Ibid.* Third, the court must ensure that the "scope of the releases" is tailored to only the claims that must be released to protect the plan. *Ibid.* Fourth, even then, the court should approve the release only if it is truly "essential" to the plan's success and the reorganization would fail without it. *Ibid.* Fifth, the court must consider whether, as part of the settlement, the non-debtor party has paid "substantial assets" to the estate. *Ibid.* Sixth, the court should determine if the plan provides "fair payment" to creditors for their released claims. *Id.*, at 79. Seventh, the court must ensure that the creditors "overwhelmingly" approve of the release, which the Second Circuit defined as a 75 percent "bare minimum." *Id.*, at 78–79 (quotation marks omitted). [2]

Factors one through four ensure that the releases are necessary to solve collective-action problems that threaten the bankruptcy and prevent fair and equitable recovery for the victims and creditors. Factor five makes sure that the releases are not a free ride for the non-debtor. Factor six ensures that the victims and creditors receive fair compensation. Together, factors five and six assess whether ***2097** there has been a fair settlement given the probability of victims' and creditors' recovery from the non-debtor and the likely amount of any such recovery. And factor seven ensures that the vast majority of victims and creditors approve, meaning that the release is solving a holdout problem.

As the Courts of Appeals' comprehensive factors illustrate, § 1123(b)(6) limits a bankruptcy court's authority in important respects. A non-debtor release must be "appropriate" given all of the facts and circumstances of the case. And as the history of non-debtor releases illustrates, the appropriateness requirement confines the use of non-debtor releases to narrow and relatively rare circumstances where the releases are necessary to help victims and creditors achieve fair and equitable recovery.

As long as every class of victims and creditors supports the plan by a majority vote in number and at least a two-thirds vote in amount, the plan is "said to be confirmed consensually," "even if some classes have dissenting creditors." 7 Collier, Bankruptcy ¶1129.01, at 1129–13. And the Courts of Appeals have allowed non-debtor releases only when there is an even higher level of supermajority victim and creditor approval. In the mass-tort bankruptcy cases, most plans have easily cleared that bar and received close to 100 percent approval. *E.g.*, *Johns-Manville Corp.*, 68 B.R. at 631 (95 percent approval); *A. H. Robins Co.*, 880 F.2d at 700 (over 94 percent approval); *Dow Corning*, 287 B.R. at 413 (over 94 percent approval); 69 F.4th at 82 (over 95 percent approval here). So in reality, as opposed to rhetoric, the non-debtor releases in mass-tort bankruptcy plans, including this one, have been approved by all but a comparatively small group of victims and creditors.

In every bankruptcy of this kind, moreover, the plan nonconsensually releases victims' and creditors' claims *against the debtor*. The only difference with non-debtor releases is that they release victims' and creditors' claims not against the debtor but rather against non-debtors who are closely related to the debtor, such as indemnified officers and directors.

II

In this case, as in many past mass-tort bankruptcies, the non-debtor releases were appropriate and therefore authorized by 11 U.S.C. § 1123(b)(6) of the Code. The non-debtor releases were needed to ensure meaningful victim and creditor recovery in the face of multiple collective-action problems.

A

Purdue Pharma was a pharmaceutical company owned and directed by the extended Sackler family. Brothers Arthur, Mortimer, and Raymond Sackler purchased the company in 1952. Since then, Purdue has been wholly owned by entities and trusts established for the benefit of Mortimer Sackler's and Raymond Sackler's families and descendants, and those families also closely controlled Purdue's operations.

In the 1990s, Purdue developed the drug OxyContin, a powerful and addictive opioid painkiller. Purdue aggressively marketed that drug and downplayed or hid its addictive qualities. OxyContin helped people to manage pain. But the drug's addictive qualities led to its widespread abuse. OxyContin played a central role in the opioid-abuse crisis from which millions of Americans and their families continue to suffer.

Starting in the early 2000s, governments and individual plaintiffs began to sue Purdue for the harm caused by OxyContin. In 2007, Purdue settled large swaths of those ***2098** claims and pled guilty to felony misbranding of OxyContin.

But within the next decade, victims of the opioid crisis and their families, along with state and local governments fighting the crisis, began filing a new wave of lawsuits, this time also naming members of the Sackler family as defendants. Today, those claims amount to more than $40 *trillion* worth of alleged damages against Purdue and the Sacklers. (For perspective, $40 trillion is about seven times the total annual spending of the U. S. Government.)

As the litigation by victims and state and local governments mounted, the U. S. Government then brought federal criminal and civil charges against Purdue. The U. S. Government has not brought criminal charges against any of the Sacklers individually. Nor have any States brought criminal charges against any of the Sacklers individually.

As to the criminal charges against Purdue, the company pled guilty to conspiracy to defraud the United States, to violate the Food, Drug, and Cosmetic Act, and to violate the federal anti-kickback statute. As part of the global resolution of the charges, Purdue agreed to a $2 billion judgment to the U. S. Government that would be "deemed to have the status of an allowed superpriority" claim in bankruptcy. 17 App. in No. 22–110 etc. (CA2), p. 4804. The U. S. Government agreed not to "initiate any further criminal charges against Purdue." 16 *id.,* at 4798.

Unable to pay its colossal potential liabilities, Purdue filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The ensuing case exemplified the flexibility and common sense of the bankruptcy system at work.

The proceedings were extraordinarily complex. The case involved "likely the largest creditor body ever," and the number of claims filed—totaling more than 600,000—was likely "a record." *In re Purdue Pharma L. P.*, 633 B.R. 53, 58 (Bkrtcy. Ct. SDNY 2021). Further complicating matters was the need to allocate funds between, on the one hand, individual victims and the hospitals that urgently needed relief and, on the other hand, government entities at all levels that urgently needed funds for opioid crisis prevention and treatment efforts. *Id*., at 83.

Aided by perhaps "the most extensive discovery process" that "any court in bankruptcy has ever seen," the parties engaged in prolonged arms-length negotiations. *Id*., at 85–86. They ultimately agreed on a multi-faceted compensation plan for the victims and creditors and reorganization plan for Purdue. Under that plan, Purdue would cease to exist and would be replaced with a new company that would manufacture opioid-abatement medications. And approximately $7 billion would be distributed among nine trusts to compensate victims and creditors and to fund efforts to abate the opioid crisis by preventing and treating addiction.

To determine how to allocate the $7 billion, the victims and creditors then engaged in a series of "heavily negotiated and intricately woven compromises" and devised a "complex allocation" of the funds to different classes of victims and creditors. *Id*., at 83, 90. In the end, more than 95 percent of voting victims and creditors approved of the distribution scheme.

That plan would distribute billions of dollars to communities to use exclusively for prevention and treatment programs. And $700 to $750 million was set aside to compensate individual tort victims and their families. 1 App. 561. Opioid victims and their families would each receive somewhere between $3,500 and $48,000 depending on the category of claim and level ***2099** of harm. *Id*., at 573–584; 6 App. in No. 22–110 etc. (CA2), at 1695.

B

Under the reorganization plan, victims' and creditors' claims *against Purdue Pharma* were released (even if some victims and creditors did not consent). As in other mass-tort bankruptcies described above, a related and equally essential facet of the Purdue plan was the non-debtor release provision. Under that provision, the victims' and creditors' claims *against the Sacklers* were also released. As a result, Purdue's victims and creditors could not later sue either Purdue Pharma or members of the Sackler family (the officers and directors of Purdue Pharma) for Purdue's and the Sacklers' opioid-related activities.

The non-debtor release provision prevented a race to the courthouse against the Sacklers. As a result, the non-debtor release provision solved two separate collective-action problems that dogged Purdue's mass-tort bankruptcy: (i) It protected Purdue's estate from the risk of being depleted by indemnification claims, and (ii) it operated as a settlement of potential claims against the Sacklers and thus enabled the Sacklers' large settlement payment to the estate. That settlement payment in turn quadrupled the amount in the Purdue estate and enabled substantially greater recovery for the victims.

I will now explain both of those important points in some detail.

First, and critical to a proper understanding of this case, the non-debtor release provision was essential to *preserve* Purdue's existing assets. By preserving the estate, the non-debtor release provision ensured that the assets could be fairly and equitably apportioned among all victims and creditors rather than devoured by one group of potential plaintiffs.

How? Pursuant to a 2004 indemnification agreement, Purdue had agreed to pay for liability and legal expenses that officers and directors of Purdue faced for decisions related to Purdue, including opioid-related decisions. See *In re Purdue Pharma L. P.*, 69 F.4th 45, 58–59 (CA2 2023). That indemnification agreement covered judgments against the Sacklers and related legal expenses.

As explained above, the Sacklers wholly owned and controlled Purdue, a closely held corporation. The Sacklers "took a major role" in running Purdue, including making decisions about "Purdue's practices regarding its opioid products." 633 B.R. at 93. In short, the Sacklers potentially shared much of the liability that Purdue faced for Purdue's opioid practices. See *In re Purdue Pharma, L. P.*, 635 B.R.

26, 87 (SDNY 2021) (claims against the Sacklers are "deeply connected with, if not entirely identical to," claims against Purdue (quotation marks omitted)); see also 633 B.R. at 108.

But due to the indemnification agreement, if victims and creditors were to sue the Sacklers directly for claims related to Purdue or opioids, the Sacklers would have a reasonable basis to seek reimbursement from Purdue for liability and litigation costs. So Purdue could potentially be on the hook for a substantial amount of the Sacklers' liability and litigation costs. In such indemnification relationships, "a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." 69 F.4th at 78 (quotation marks omitted).

As a real-world matter, therefore, opioid-related claims *against the Sacklers* could come out of the same pot of Purdue money as opioid-related claims *against Purdue*. So releasing claims against the Sacklers is not meaningfully different from ***2100** releasing claims against Purdue itself, which the bankruptcy plan here of course also mandated. Both sets of releases were necessary to preserve Purdue's estate so that it was available for all victims and creditors to recover fairly and equitably. Otherwise, the estate could be zeroed out: A few victims or creditors could race to the courthouse and obtain recovery from Purdue or the Sacklers (ultimately the same pot of money) and thereby deplete the assets of the company and leave nothing for everyone else.

To fully understand why both sets of releases were necessary —against Purdue and against the Sacklers—suppose that the plan did *not* release the Sacklers from opioid- and Purdue-related liability. Victims' and creditors' opioid-related claims *against Purdue* would be discharged in Purdue's bankruptcy (even without their consent). But any victims or creditors could still sue *the Sacklers* for essentially the same claims.

Suppose that a State or a group of victims sued the Sacklers and received a large reward. The Sacklers "would have a reasonable basis to seek indemnification" from Purdue for judgments and legal expenses. *Id.*, at 72. Therefore, any liability judgments and litigation costs for certain plaintiffs in their suits *against the Sacklers* could "deplete the *res*" of *Purdue's* bankruptcy—meaning that there might well be nothing left for all of the other victims and creditors. *Id.*, at 80. Even if the Sacklers' indemnification claims against Purdue were unsuccessful, Purdue would "be required to litigate" those claims, which would likely diminish the *res*, "no matter the ultimate outcome of those claims." *Ibid.*

Every victim and creditor knows that a single judgment by someone else against the Sacklers could deplete the Purdue estate and leave nothing for anyone else. So every victim and creditor would have an incentive to race to the courthouse to sue the Sacklers. A classic collective-action problem.

The non-debtor releases of claims against the Sacklers prevented that collective-action problem in the same way that the releases of claims against Purdue itself prevented the identical collective-action problem. Both protected Purdue's assets from being consumed by the first to sue successfully. And the non-debtor releases were narrowly tailored to the problem. The non-debtor releases enjoined victims and creditors from bringing claims against the Sacklers only in cases where Purdue's conduct, or the victims' or creditors' claims asserted against Purdue, was a legal cause or a legally relevant factor to the cause of action against the Sacklers. 633 B.R. at 97–98 (defining the release to encompass only claims that "directly affect the *res* of the Debtors' estates," such as claims that would trigger the Sacklers' "rights to indemnification and contribution"); see also *id.*, at 105. In other words, the releases applied only to claims for which the Sacklers had a reasonable basis to seek coverage or reimbursement from Purdue.

The non-debtor release provision therefore released claims against the Sacklers that are essentially the same as claims against Purdue. Doing so preserved Purdue's bankruptcy estate so that it could be fairly apportioned among the victims and creditors.

Second, the non-debtor releases not only *preserved* the existing Purdue estate; those non-debtor releases also greatly *increased* the funds in the Purdue estate so that the victims and creditors could receive greater compensation.

Standing alone, Purdue's estate is estimated to be worth approximately $1.8 billion—a small fraction of the sizable claims ***2101** against Purdue. *Id.*, at 90; 22 App. in No. 22–110 etc. (CA2), at 6507. If that were all the money on the table, the Bankruptcy Court found, the victims and creditors "would probably recover nothing" from Purdue's estate. 633 B.R. at 109. That is because the United States holds a $2 billion "superpriority" claim, meaning that the United States would be first in line to recover ahead of all of the victims and other creditors. The United States' claim would wipe out Purdue's entire $1.8 billion value. "As a result, many victims of the opioid crisis would go without any assistance." 69 F.4th at 80.

So for the victims and other creditors to have any hope of meaningful recovery, Purdue's bankruptcy estate needed more funds.

Where to find those funds? The Sacklers' assets were the answer. After vigorous negotiations, a settlement was reached: In exchange for the releases, the Sacklers ultimately agreed to make significant payments to Purdue's estate—between $5.5 and $6 billion. Adding that substantial amount to Purdue's comparatively smaller bankruptcy estate enabled Purdue's reorganization plan to distribute an estimated $7 billion or more to the victims and creditors—thereby quadrupling the size of the estate available for distribution. With that enhanced estate, the plan garnered 95 percent support from the voting victims and creditors. That high level of support tends to show that this was a very good plan for the victims and creditors. Because it led to that high level of support, the Sacklers' multi-billion-dollar payment was critical to creating a successful reorganization plan.

That payment was made possible by heavily negotiated settlements among Purdue, the victims and creditors, and the Sacklers. Most relevant here, in exchange for the Sacklers agreeing to pay billions of dollars to the bankruptcy estate, the victims and creditors agreed to release their claims against the Sacklers. The settlement—exchanging releases for the Sacklers' $5.5 to $6 billion payment—enabled the victims and creditors to avoid "the significant risk, cost and delay (potentially years) that would result from pursuing the Sacklers and related parties through litigation." 1 App. 31.

Indeed, after a 6-day trial involving 41 witnesses, the Bankruptcy Court found that the settlement provided the best chance for the victims and creditors to ever see any money from the Sacklers. See 633 B.R. at 85, 90. (That is a critical point that the Court today whiffs on.) Indeed, the Bankruptcy Court found that the victims and creditors would be unlikely to recover from the Sacklers by suing the Sacklers directly due to numerous potential weaknesses in and defenses to the victims' and creditors' legal theories. See *id*., at 90–93, 108. Even if the suits were successful, the Bankruptcy Court expressed "significant concern" about the ability to collect any judgments from the Sacklers due to the difficulty of reaching their assets in foreign countries and in spendthrift trusts. *Id*., at 89; see also *id*., at 108–109.

For those reasons, the Bankruptcy Court concluded that the $5.5 to $6 billion settlement payment and the releases were fair and equitable and in the victims' and creditors' best interest. *Id*., at 107–109, 112. The settlement amount of $5.5 to $6 billion was "properly negotiated" and "reflects the underlying strengths and weaknesses of the opposing parties' legal positions and issues of collection." *Id*., at 93. [3]

***2102** From the victims' and creditors' perspective, "suing the Sacklers would have been a costly endeavor with a small chance of success. From the Sacklers' perspective, defending those suits would have been a costly endeavor with a very small chance of a large liability." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1004 (2023). So as in many litigation settlements, the parties agreed to the $5.5 to $6 billion settlement in light of that "very small chance of a large liability." *Ibid*.

Importantly, the victims and creditors—who obviously have no love for the Sacklers—insisted on the releases of their claims against the Sacklers. Tr. of Oral Arg. 61, 93; Brief for Respondent Official Committee of Unsecured Creditors of Purdue Pharma L. P. et al. 10. Why did the releases make sense for the victims and creditors?

For starters, the releases were part of the settlement and enabled the Sacklers' $5.5 to $6 billion settlement payment. Moreover, without the releases, some of Purdue's victims and creditors—maybe a State, maybe some opioid victims—would sue the Sacklers directly for claims "deeply connected with, if not entirely identical to," claims that the victims and creditors held against Purdue. 635 B.R. at 87 (quotation marks omitted). To be sure, the Bankruptcy Court found that those suits would face significant challenges. But the victims and creditors were understandably worried, as they explained during the Bankruptcy Court proceedings, that the Sacklers would "exhaust their collectible assets fighting and/or paying ONLY the claims of certain creditors with the best ability to pursue the Sacklers in court." 1 App. 76. And if even a *single* direct suit against the Sacklers succeeded, the suit could potentially wipe out much if not all of the Sacklers' assets in one fell swoop—making those assets unavailable for the Purdue estate and therefore unavailable for all of the other the victims and creditors.

In sum, if there were no releases, and victims and creditors were therefore free to sue the Sacklers directly, one of three things would likely happen. One possibility is that no lawsuits against the Sacklers would succeed, and no victim or creditor would recover any money from them. And without the $5.5 to $6 billion settlement payment, there would be no recovery from Purdue either. Another possibility is that a large claim or claims would succeed, and the Sacklers would be indemnified by Purdue—thereby wiping out Purdue's estate for all of the other victims and creditors. Last, suppose that a large claim succeeded and that the Sacklers were not indemnified for that liability. Even in that case, only a few victims or creditors would be able to recover from the Sacklers at the expense of fair and equitable distribution to the rest of the victims and creditors.

As the Second Circuit stated, without the releases, the victims and creditors "would go without any assistance and face an uphill battle of litigation (in which a single claimant might disproportionately recover) without fair distribution." 69 F.4th at 80. Another classic collective-action problem.

In short, without the releases and the significant settlement payment, two separate collective-action problems stood in the way of fair and equitable recovery for the victims and creditors: (1) the Purdue estate would not be preserved for the victims ***2103** and creditors to obtain recovery, and (2) the Purdue estate would be much smaller than it would be with the Sacklers' settlement payment. The releases and settlement payment solved those problems and ensured fair and equitable recovery for the opioid victims.

C

For those reasons, the Bankruptcy Court found that without the releases and settlement payment, the reorganization plan would "unravel." 633 B.R. at 107, 109. All of the "heavily negotiated and intricately woven compromises in the plan" that won the victims' and creditors' approval, *id*., at 90, would "fall apart for lack of funding and the inevitable fighting over a far smaller and less certain recovery with its renewed focus on pursuing individual claims and races to collection." *Id*., at 84. There simply would not be enough money to support a reorganization plan that the victims and creditors would approve.

Absent the releases and settlement payment, the Bankruptcy Court found, the "most likely result" would be liquidation of a much smaller $1.8 billion estate. *Id*., at 90. In a liquidation, the United States would recover first with its $2 billion superpriority claim, taking for itself the whole pie. And the victims and other creditors "would probably recover nothing." *Id*., at 109.

Given that alternative, it is hardly surprising that the opioid victims and creditors almost universally support Purdue's Chapter 11 reorganization plan and the non-debtor releases. That plan promised to obtain significant assets from the Sacklers, to preserve those assets from being depleted by litigation for a few, and to distribute those much-needed funds fairly and equitably.

As a result, the opioid victims' and creditors' support for the reorganization plan was *overwhelming*. Every victim and creditor had a chance to vote on the plan during the bankruptcy proceedings. And of those who voted, more than 95 percent approved of the plan. *Id*., at 107.

Since then, even more victims and creditors have gotten on board. Now, all 50 States have signed on to the plan. The lineup before this Court is telling. On one side of the case: the tens of thousands of opioid victims and their families; more than 4,000 state, city, county, tribal, and local government entities; and more than 40,000 hospitals and healthcare organizations. They all urge the Court to uphold the plan.

At this point, on the other side of this case stand only a sole individual and a small group of Canadian creditors. [4]

Given all of the extraordinary circumstances, the Bankruptcy Court and Second Circuit concluded that the non-debtor releases here not only were appropriate, but were essential to the success of the plan. The Bankruptcy Court and Second Circuit thoroughly analyzed each of the relevant factors before reaching that conclusion: First, the released non-debtors (the Sacklers) closely controlled and were indemnified by the company. 69 F.4th at 79. Second, the claims against the Sacklers were based on essentially the same facts and legal theories as the claims against Purdue. ***2104** *Id*., at 80. Third, the releases were essential for the reorganization to succeed, because the releases protected the Purdue estate from indemnification claims and expanded the Purdue estate to enable victim and creditor recovery. *Id*., at 80–81. Fourth, the releases were narrowly tailored to protect the estate from indemnification claims. *Ibid*. Fifth, the releases secured a substantial settlement payment to significantly increase the funds in the estate. *Id*., at 81. Sixth, that enhanced estate allowed the plan to distribute "fair and equitable" payments to the victims and creditors.

Id., at 82 (quotation marks omitted). And seventh, for all those reasons, the victims and creditors do not just urgently and overwhelmingly approve of the releases, they all but demanded the releases. *Ibid.*

Congress invited bankruptcy courts to consider exactly those kinds of extraordinary circumstances when it authorized bankruptcy plans to include "any other appropriate provision" that is "not inconsistent" with the Code. § 1123(b)(6).

III

The Court decides today to reject the plan by holding that non-debtor releases are categorically impermissible as a matter of law. That decision contravenes the Bankruptcy Code. It is regrettable for the opioid victims and creditors, and for the heavily negotiated equitable distribution of assets that they overwhelmingly support. And it will harm victims in pending and future mass-tort bankruptcies. The Court's decision deprives the bankruptcy system of a longstanding and critical tool that has been used repeatedly to ensure fair and sizable recovery for victims—to repeat, recovery for *victims*—in mass torts ranging from Dalkon Shield to the Boy Scouts.

On the law, the Court's decision to reject the plan flatly contradicts the Bankruptcy Code. The Code explicitly grants broad discretion and flexibility for bankruptcy courts to handle bankruptcies of extraordinary complexity like this one. For several decades, bankruptcy courts have been employing non-debtor releases to facilitate fair and equitable recovery for victims in mass-tort bankruptcies. In this case, too, the Bankruptcy Court prudently and appropriately employed its discretion to fairly resolve a mass-tort bankruptcy.

At times, the Court seems to view the Sacklers' settlement payment into Purdue's bankruptcy estate as insufficient and the plan as therefore unfair to victims and creditors. If that were true, one might expect the fight in this case to be over whether the non-debtor releases and settlement amount were "appropriate" given the facts and circumstances of this case. 11 U.S.C. § 1123(b)(6).

Yet that is not the path the Court takes. The Court does not contest the Bankruptcy Court's and Second Circuit's conclusion that a non-debtor release was necessary and appropriate for the settlement and the success of Purdue's reorganization—the best, and perhaps the only, chance for victims and creditors to receive fair and equitable compensation. Indeed, no party has challenged the Bankruptcy Court's factual findings or made an argument that non-debtor releases were used inappropriately in this specific case.

Instead, the Court categorically decides that non-debtor releases are *never* allowed as a matter of law. The text of the Bankruptcy Code does not remotely support that categorical prohibition. [5]

As explained, § 1123(b)(6)'s catchall authority affords bankruptcy courts broad ***2105** discretion to approve "any other appropriate provision not inconsistent with the applicable provisions" of the Bankruptcy Code. Recall that § 1123(b)(1) expressly authorizes releases of victims' and creditors' claims against the debtor company—here, against Purdue. And recall that § 1123(b)(3) expressly authorizes settlements and releases of the debtor company's claims against non-debtors—here, against the Sacklers. Section 1123(b)(6)'s catchall authority is easily broad enough to allow settlements and releases of the same victims' and creditors' claims against the same non-debtors (the Sacklers), who are indemnified by the debtor and who made a large settlement payment to the debtor's estate. After all, the Second Circuit stated that in indemnification relationships "a suit against the non-debtor is, in essence, a suit against the debtor." *In re Purdue Pharma L. P.*, 69 F.4th 45, 78 (2023) (quotation marks omitted). And even when the officers and directors are not indemnified, the releases may enable a settlement where the non-debtor makes a sizable payment to the estate that can be fairly and equitably distributed to the victims and creditors, rather than being zeroed out by the first successful suit.

A

So how does the Court reach its atextual and ahistorical conclusion? The Court primarily seizes on the canon of *ejusdem generis*, an interpretive principle that "limits general terms that follow specific ones to matters similar to those specified." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 294, 131 S.Ct. 1101, 179 L.Ed.2d 37 (2011) (quotation marks and alteration omitted). But the Court's use of that canon here is entirely misguided.

The *ejusdem generis* canon "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*." A. Scalia

& B. Garner, Reading Law 199 (2012); see also *id*., at 200–208 ("trays, glasses, dishes, or other tableware"; "gravel, sand, earth or other material"; and numerous other similar lists (quotation marks omitted)); W. Eskridge, Interpreting Law 77 (2016) ("automobiles, motorcycles, and other mechanisms for conveying persons or things" (quotation marks omitted)).

As a general matter, as Justice Scalia explained for the Court, a catchall at the end of the list should be construed to cover "matters not specifically contemplated—known unknowns." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009). That is the "whole value of a generally phrased residual clause." *Ibid*. Or stated otherwise, the ***2106** fact that "a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (quotation marks omitted).

The *ejusdem generis* canon can operate to narrow a broad catchall term in certain circumstances. The canon "parallels common usage," reflecting the assumption that when "the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, Reading Law, at 199. The canon in essence "implies the addition" of the term "similar" in the catchall so that the catchall does not extend so broadly as to defy common sense. *Ibid*. Rather, the catchall extends to similar things or actions that serve the same statutory "purpose." *Id*., at 208.

Here, the Court applies the canon to breezily conclude that there is an "obvious link" through §§ 1123(b)(1)–(5) that precludes a non-debtor release provision being approved under § 1123(b)(6). *Ante,* at 2083. The obvious link, according to the Court, is that plan provisions must "concern *the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ibid*.

As an initial matter, the Court does not explain why its supposed common thread excludes the non-debtor releases at issue here. Those releases obviously "concern" the debtor in multiple overlapping respects. *Ibid*. As explained, Purdue's bankruptcy plan released the Sacklers only for claims based on *the debtor's* (Purdue's) misconduct. See 69 F.4th at 80 (releasing only claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). The releases therefore applied only to claims held by *the debtor's* victims and creditors. And the releases protected *the debtor* from indemnification claims. So the non-debtor releases here did not just "concern" the debtor, they were critical to the debtor's reorganization.

So the Court's purported "link" manages the rare feat of being so vague ("concerns the debtor"?) as to be almost meaningless —and if not meaningless, so broad as to plainly cover non-debtor releases. It is hard to conjure up a weaker *ejusdem generis* argument than the one put forth by the Court today.

In any event, even on its own terms, the Court's *ejusdem generis* argument is dead wrong for two independent reasons. First, the Court's purported common thread is factually incorrect as a description of (b)(1) to (b)(5). Second, and independent of the first point, black-letter law says that the *ejusdem generis* canon requires looking at the "evident purpose" of the statute in order to discern a common thread. Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78. And here, the Court's purported common thread ignores (and indeed guts) the evident purpose of § 1123(b).

First, the Court's purported common thread is factually incorrect. The Court says that the "obvious link" through paragraphs (b)(1) to (b)(5) is that all are limited to "*the debtor*—its rights and responsibilities, and its relationship with its creditors." *Ante,* at 2083. But in multiple respects, that assertion is not accurate.

For one thing, paragraph (b)(3) allows a bankruptcy court to modify the rights of debtors with respect to *non-debtors*. Under (b)(3), a bankruptcy court may approve a reorganization plan that settles, adjusts, or enforces "any claim" that the debtor holds against non-debtor third parties. That provision allows the debtor's estate to ***2107** enter into a settlement agreement with a third party, where the estate agrees to release its claims against the third party in exchange for a settlement payment to the bankruptcy estate. And the bankruptcy court has the power to approve such a settlement if it finds the settlement fair and in the best interests of the estate. The bankruptcy court may later enforce that settlement. See generally 7 Collier on Bankruptcy ¶1123.02[3] (R. Levin & H. Sommer eds., 16th ed. 2023).

Importantly, in some cases, including this one, the debtor's creditors may hold derivative claims against that same non-debtor third party for the same "harm done to the estate." 69 F.4th at 70 (quotation marks omitted). So when the debtor settles with the non-debtor third party, that settlement also extinguishes the creditors' derivative claims against the non-debtor. And the creditors' consent is not necessary to do so.

To connect the dots: A plan provision settling the debtor's claims against non-debtors under (b)(3) therefore *nonconsensually extinguishes creditors' derivative claims against those non-debtors*. That fact alone defeats the Court's conclusion that §§ 1123(b)(1)–(5) deal only with relations between the debtor and creditors. If a plan provision under (b)(3) can nonconsensually release some of the creditors' derivative claims against a non-debtor, a plan provision under the catchall in (b)(6) that nonconsensually releases some of the creditors' direct claims against those same non-debtors is easily of a piece—basically the same thing.

This case illustrates the point. Some of the more substantial assets of Purdue's estate are fraudulent transfer claims worth $11 billion that Purdue holds against the non-debtor Sacklers. *In re Purdue Pharma L. P.*, 633 B.R. 53, 87 (Bkrtcy. Ct. SDNY 2021). Under (b)(3), as part of its reorganization plan, Purdue settled the fraudulent transfer claims with the non-debtor Sacklers. The Bankruptcy Court approved that settlement as fair and equitable. *Id.*, at 83–95. That settlement resolved the claims that likely would have had "the best chance of material success among all of the claims against" the Sacklers. *Id.*, at 109; see also *id.*, at 83.

Notably, the result of that settlement was to also *nonconsensually* extinguish the victims' and creditors' derivative fraudulent transfer claims against the Sacklers. In the absence of the bankruptcy proceeding, victims and creditors could have litigated the fraudulent transfer claims themselves as derivative claims. But because Purdue settled the claims under § 1123(b)(3), the victims and creditors could no longer do so.

Moreover, not all victims and creditors consented to the release of those derivative claims. But no one disputes that the Bankruptcy Code authorized that nonconsensual non-debtor release of derivative claims. See 69 F.4th at 70 (that conclusion is "well-settled").

The plan therefore released both the estate's claims against the Sacklers *and* highly valuable derivative claims that the victims and creditors held against the Sacklers. Paragraph (b)(3) therefore demonstrates that § 1123(b) reaches beyond just creditor-debtor relationships, particularly when the relationship between creditors and other non-debtors can affect the estate. That indisputable point alone defeats the Court's conclusion that § 1123(b)'s provisions relate only to the debtor and do not allow releases of claims that victims and creditors hold against non-debtors.

The Court tries to sidestep that conclusion by distinguishing derivative claims from direct claims. Releases of derivative ***2108** claims, the Court says, are authorized by paragraph (b)(3) "because those claims belong to the debtor's estate." *Ante,* at 2083. No doubt. But the question then becomes whether releases of direct claims under (b)(6)'s catchall are relevantly similar to releases of derivative claims that all agree are authorized under (b)(3). The answer in this case is yes. Here, both the derivative and direct claims against the Sacklers are held by the same victims and creditors, and both the derivative and direct claims against the Sacklers could deplete Purdue's estate.

The Court's purported common thread is further contradicted by several other kinds of non-debtor releases that "are commonplace, important to the bankruptcy system, and broadly accepted by the courts and practitioners as necessary and proper" plan provisions under § 1123(b)(6). Brief for American College of Bankruptcy as *Amicus Curiae* 3.

Three examples illustrate the point: consensual non-debtor releases, full-satisfaction non-debtor releases, and exculpation clauses.

Consensual non-debtor releases are routinely included in bankruptcy plans even though those releases apply to claims by victims or creditors against non-debtors—just like the claims here. And it is "well-settled that a bankruptcy court may approve" such consensual releases. 69 F.4th at 70; see also Brief for American College of Bankruptcy as *Amicus Curiae* 5–7.

Consensual releases are uncontroversial, but they are not expressly authorized by the Bankruptcy Code. So the only provision that could possibly supply authority to include those releases in the bankruptcy plan is the catchall in § 1123(b)(6).

The Court today does not deny that consensual releases are routine in the bankruptcy context and that courts have long approved them. See *ante*, at 2087 – 2088. But where, on the Court's reading of the Bankruptcy Code, would the bankruptcy court obtain the authority to enter and later enforce that consensual release?

One suggestion is that the authority comes from the parties' consent and is akin to a "contractual agreement." Tr. of Oral Arg. 33. But that theory does not explain what provision of the Bankruptcy Code authorizes consensual releases *in bankruptcy plans*. After all, contracts are enforceable under state law, ordinarily in state courts. But in bankruptcy, consensual releases are routinely part of a reorganization plan with voting overseen by the bankruptcy court and conditions enforceable by the bankruptcy court. See Brief for American College of Bankruptcy as *Amicus Curiae* 4–7.

To reiterate, the only provision that could provide such authority is § 1123(b)(6). So if the Court thinks that a consensual release can be part of the plan, even the Court must acknowledge that § 1123(b)(6) can reach creditors' claims against non-debtors.

The Court's purported common thread is still further contradicted by yet another regular bankruptcy practice: full-satisfaction releases. Full-satisfaction releases provide full payment for creditors' claims against non-debtors and then release those claims. When a full-satisfaction release is included in a reorganization plan, the bankruptcy court exercises control over creditors' claims against non-debtors.

Again, the only provision that could possibly supply authority to include those full-satisfaction releases in a bankruptcy plan is the catchall in § 1123(b)(6). Any contract-law theory would not work for full-satisfaction releases, given that holdout creditors often refuse to consent to full-satisfaction releases. See, *e.g.*, ***2109** *In re A. H. Robins Co.*, 880 F.2d 694, 696, 700, 702 (CA4 1989); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B.R. 87, 115–116, 141 (D.Del. 2023). So if full-satisfaction releases are to be allowed, § 1123(b)(6) must be read to reach creditor claims against non-debtors, even without consent.

The Court does not deny that consensual non-debtor releases and full-satisfaction releases might be permissible under § 1123(b)(6). *Ante*, at 2087 – 2088. If they are permissible, then the Court's purported *ejusdem generis* common thread is thoroughly eviscerated because those releases involve claims by victims or creditors against non-debtors, just like here. (And if the Court instead means to hold open the possibility that consensual and full-satisfaction releases are actually impermissible, then its holding today is even more extreme than it appears.)

Exculpation clauses are yet another example. Exculpation clauses shield the estate's fiduciaries and other professionals (non-debtors) from liability for their work on the reorganization plan. See Brief for American College of Bankruptcy as *Amicus Curiae* 9. Without such exculpation clauses, "competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful restructuring." *Id.*, at 11; see also Brief for Highland Capital Management, L. P. as *Amicus Curiae* 3–5. For that reason, bankruptcy courts routinely approve exculpation clauses under § 1123(b)(6). For exculpation clauses to be allowed, however, § 1123(b)(6) must be read to reach creditor claims against non-debtors. So exculpation clauses further refute the Court's purported common thread.

The fact that plan provisions under § 1123(b)(6) can reach non-debtors finds still more support in this Court's only case to analyze the catchall authority in § 1123(b)(6), *United States* v. *Energy Resources Co*. The plan provision in *Energy Resources* ordered the IRS, a creditor, to apply the debtor's tax payments to trust-fund tax liability before other kinds of tax liability. *United States v. Energy Resources Co.*, 495 U.S. 545, 547, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990). Importantly, if the debtor did not pay the trust-fund tax liability, then non-debtor officers of the company would be on the hook. *Ibid.* So the plan provision served to protect the company's non-debtor officers from "personal liability" for those taxes. *In re Energy Resources Co.*, 59 B.R. 702, 704 (Bkrtcy. Ct. D.Mass. 1986). In exchange for that protection, a non-debtor officer contributed funds to the bankruptcy plan. *Ibid.*

Echoing the Court today, the IRS objected to that plan, arguing that the bankruptcy court exceeded its authority under (b)(6) in part because there was no provision in the Code that expressly supported the plan provision. *Energy Resources*, 495 U.S. at 549–550, 110 S.Ct. 2139. But this Court disagreed with the IRS and approved the plan based on the "residual authority" in (b)(6). *Id.*, at 549, 110 S.Ct. 2139.

The plan provision in *Energy Resources* operated akin to a non-debtor release: It reduced the potential liability of a non-debtor (the non-debtor's officers) to another non-debtor (the IRS). *Energy Resources* therefore further demonstrates that plan provisions under § 1123(b)(6) can affect creditor–non-debtor relationships.

In sum, the Court's statement that § 1123(b) reaches only "*the debtor*—its rights and responsibilities, and its relationship with its creditors," *ante,* at 2083, is factually incorrect several times over. Paragraphs 1123(b)(3) and (b)(6) already allow plans to affect creditor claims against non-debtors, such as through releases of creditors' derivative claims, consensual ***2110** releases, full-satisfaction releases, and exculpation clauses. And this Court's precedent in *Energy Resources* confirms the point. The Court's *ejusdem generis* argument rests on quicksand.

Second, independent of those many flaws, the Court's entire approach to *ejusdem generis* is wrong from the get-go. When courts face a statute with a catchall, it is black-letter law that courts must try to discern the common thread by examining the "evident purpose" of the statute. Scalia & Garner, Reading Law, at 208; see also *Begay v. United States*, 553 U.S. 137, 146, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (defining common thread "in terms of the Act's basic purposes"); Eskridge, Interpreting Law, at 78 ("statutory purpose" helps identify the common thread in *ejusdem generis* cases). [6]

Importantly, this Court has already explained that the purpose of § 1123(b) is to grant bankruptcy courts "broad power" to approve plan provisions "necessary for a reorganization's success." *Energy Resources*, 495 U.S. at 551, 110 S.Ct. 2139. *Energy Resources* demonstrates that the common thread of § 1123(b) is bankruptcy court action to preserve the estate and ensure fair and equitable recovery for creditors. See, *e.g.*, *Pioneer Investment Services Co. v. Brunswick Associates L. P.*, 507 U.S. 380, 389, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); J. Feeney & M. Stepan, 2 Bankruptcy Law Manual § 11:1 (5th ed. 2023).

As explained at length above, to maximize recovery, the Court must solve complex collective-action problems. And for a bankruptcy court to solve all of the relevant collective-action problems, §§ 1123(b)(1)–(5) give the bankruptcy court broad power to modify parties' rights without their consent—most notably, to release creditors' claims against the debtor. § 1123(b)(1). Under that provision, the Purdue plan released the victims' and creditors' claims *against Purdue* in order to prevent a collective-action problem in distributing Purdue's assets—and thereby to preserve the estate and ensure fair and equitable recovery for victims and creditors.

The non-debtor release provision approved under § 1123(b)(6) does the same thing and serves that same statutory purpose. As discussed above, the victims' and creditors' claims against the non-debtor Purdue officers and directors (the Sacklers) are essentially the same as their claims against Purdue. The claims against the Sacklers rest on the same legal theories and facts as the claims against Purdue, largely the Sacklers' opioid-related decisions in running Purdue. And the Sacklers are indemnified by Purdue's estate for their liability. So any liability could potentially come out of the Purdue estate just like the claims against Purdue itself.

Therefore, the nonconsensual releases against the Sacklers are not only of a similar genus, but in effect *the same thing* as the nonconsensual releases against Purdue that everyone agrees § 1123(b)(1) already authorizes. Both were necessary to ***2111** preserve the estate and prevent collective-action problems that could drain Purdue's estate, and thus both were necessary to enable Purdue's reorganization plan to succeed and to equitably distribute assets. And without the releases, there would be no settlement, meaning no $5.5 to $6 billion payment by the Sacklers to Purdue's estate. That would mean either that no victim or creditor could recover anything from the Sacklers (or indeed from Purdue), or that only a few victims or creditors could recover from the Sacklers at the expense of fair and equitable distribution to everyone else.

The statute's evident purpose therefore easily answers the *ejusdem generis* inquiry here. Absent other limitations and restrictions in the Code, § 1123(b)(6) authorizes a bankruptcy court to modify parties' claims that could otherwise threaten to deplete the bankruptcy estate when doing so is necessary to preserve the estate and provide fair and equitable recovery for creditors.

In light of the "evident purpose" of § 1123(b) to preserve the estate and ensure fair and equitable recovery for creditors in the face of collective-action problems, Scalia & Garner, Reading Law, at 208; see Eskridge, Interpreting Law, at 78, the Court's *ejusdem generis* theory simply falls apart.

In sum, for each of two independent reasons, the Court's *ejusdem generis* argument fails. First, its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of § 1123(b).

B

Despite the fact that non-debtor releases address the very collective-action problem that the bankruptcy system was designed to solve, the Court next trots out a few minimally explained arguments that non-debtor release provisions are "inconsistent with" various provisions of the Bankruptcy Code, including: (i) § 524(g)'s authorization of non-debtor releases in asbestos cases; (ii) § 524(e)'s statement that debtors' discharges do not automatically affect others' liabilities; and (iii) the Code's various restrictions on bankruptcy discharges. None of those arguments is persuasive.

First, the Court cites § 524(g), which was enacted in 1994 to expressly authorize non-debtor releases in a specific context: cases involving mass harm "caused by the presence of, or exposure to, asbestos or asbestos-containing products." § 524(g)(2)(B)(i)(I). From the fact that § 524(g) allows non-debtor releases in the asbestos context, the Court infers that non-debtor releases are prohibited in other contexts. *Ante,* at 2085 – 2086.

But the very text of § 524(g) *expressly precludes* the Court's inference. The statute says: "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. Congress expressly authorized non-debtor releases in one specific context that was critically urgent in 1994 when it was enacted. But Congress also enacted the corresponding rule of construction into binding statutory text to "make clear" that § 524(g) did not "alter" the bankruptcy courts' ability to use non-debtor release mechanisms as appropriate in other cases. 140 Cong. Rec. 27692 (1994).

Keep in mind that Congress enacted § 524(g) in the early days of non-debtor releases, soon after bankruptcy courts began approving non-debtor releases in asbestos cases. See, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 621–622 (Bkrtcy. Ct. SDNY 1986), aff 'd, ***2112** 837 F.2d 89, 90 (CA2 1988); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268, 272, 278–279 (ND Ill. 1990). Section 524(g) set forth a detailed scheme sensitive to the specific needs of asbestos mass-tort litigation that was then engulfing and overwhelming American courts. For example, because asbestos injuries often have a long latency period, asbestos mass-tort bankruptcies needed to account for unknown claimants who could come out of the woodwork in the future. See Bankruptcy Reform Act of 1994, 108 Stat. 4114–4116; *In re Johns-Manville Corp.*, 68 B.R. at 627–629.

But as explained above, throughout the history of the Code and at the time § 524(g) was enacted, bankruptcy courts were also issuing non-debtor releases in other contexts as well, such as in the Dalkon Shield mass-tort bankruptcy case. *A. H. Robins Co.*, 880 F.2d at 700–702; see also, *e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (CA2 1992) (securities litigation context). Congress therefore made clear that enacting § 524(g) for the urgent asbestos cases did not disturb bankruptcy courts' preexisting authority to issue such releases in other cases.

Bottom line: The Court's reliance on § 524(g) directly contravenes the actual statutory text.

Second, the Court cites § 524(e), which states that a plan's discharge of the debtor "does not affect the liability of any other entity on ... such debt." By its terms, § 524(e) does not purport to preclude releases of creditors' claims against non-debtors. (And were the rule otherwise, even consensual releases would be prohibited as well.)

Notably, Congress changed § 524(e) to its current wording in 1979. Before 1979, the statute arguably did preclude releases of claims against non-debtors who were co-debtors with a bankrupt company. See 11 U.S.C. § 34 (1976 ed.) (repealed Oct. 1, 1979) ("The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt" (emphasis added)). But Congress then changed the law. And the text now means only that the discharge of the debtor does not *itself* automatically wipe away the liability of a non-debtor. Section 524(e) 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. As the American College of Bankruptcy says, "Section 524(e) is agnostic as to third-party releases." Brief for American College of Bankruptcy as *Amicus Curiae* 6, n. 3; see also *In re Airadigm Communications, Inc.*, 519 F.3d 640, 656 (CA7 2008).

Third, citing §§ 523(a), 524(a), and 541(a), the Court says that the plan improperly grants a "discharge" to the Sacklers. *Ante,* at 2079, 2084 – 2086. And the Court suggests that giving the Sacklers a "discharge" in Purdue's bankruptcy plan in exchange for $5.5 to $6 billion allows the Sacklers to get away too easy—without filing for bankruptcy themselves, without having to comply with the Code's various restrictions, and without paying enough. See *ante,* at 2084 – 2086. That point also fails.

To begin, the premise is incorrect. The Sacklers did not receive a bankruptcy discharge in this case. Discharge is a term of art in the Bankruptcy Code. *Wainer v. A. J. Equities, Ltd.*, 984 F.2d 679, 684 (CA5 1993); J. Silverstein, Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations, 23 Emory Bkrtcy. Developments J. 13, 130 (2006). When a debtor in bankruptcy receives a discharge, most (if not all) of their ***2113** pre-petition debts are released, giving the debtor a fresh start. See § 1141(d)(1) (Chapter 11 discharge relieves the debtor "from any debt that arose before the date of " plan confirmation, with narrow exceptions); *Taggart v. Lorenzen*, 587 U.S. 554, 556, 558, 139 S.Ct. 1795, 204 L.Ed.2d 129 (2019). The Sacklers did not receive such a discharge.

As courts have always recognized, non-debtor releases are different. Non-debtor releases "do not offer the umbrella protection of a discharge in bankruptcy." *Johns-Manville Corp.*, 837 F.2d at 91. Rather, non-debtor releases are accompanied by settlement payments to the estate by the non-debtor. So non-debtor releases are simply one part of a settlement of pending or potential claims against the non-debtor that arise out of some torts committed by the debtor. They are in essence a traditional litigation settlement. They are not a blanket discharge for the non-debtor.

Here, therefore, the releases apply only to certain claims against the Sacklers—namely, those "that arise out of or relate to" Purdue's bankruptcy. *Ibid*.; see 69 F.4th at 80 (releasing the Sacklers only for claims to which Purdue's conduct was "a legal cause or a legally relevant factor to the cause of action" (quotation marks omitted)). And the non-debtor releases were negotiated in exchange for a significant settlement payment that enabled *Purdue's* bankruptcy reorganization to succeed.

In short, the releases do not grant discharges to non-debtors and cannot be disallowed on that basis.

Next, the Court suggests that the Sacklers must file for bankruptcy themselves in order to be released from liability. That, too, is incorrect. Nowhere does the Code say that a non-debtor may be released from liability only by filing for bankruptcy. On the contrary, § 1123(b)(3) of the Code already expressly allows a bankruptcy plan to release a non-debtor from liability to the debtor.

The Court's suggestion that a non-debtor must file for bankruptcy in order to be released from liability not only is directly at odds with the text of the Code, but also is at odds with reality. Non-debtor releases are often used in situations where it is not possible or practicable for the non-debtors to simply file for individual bankruptcies. This case is just one example. The "Sacklers are not a simple group of a few defendants" that could simply have declared one bankruptcy. 633 B.R. at 88. They are "a large family divided into two sides, Side A and Side B, with eight pods or groups of family members within those divisions," many of whom live abroad (beyond bankruptcy jurisdiction). *Ibid*. And their assets are spread across trusts that are likely beyond the jurisdiction of U. S. courts as well. *Ibid*.; see also *id*., at 109.

Likewise, in many other mass-tort bankruptcy cases, released non-parties could not simply declare their own bankruptcies either. Insurers, for example, cannot declare bankruptcy just because a policy limit is reached. B. Zaretsky, Insurance Proceeds in Bankruptcy, 55 Brooklyn L. Rev. 373, 394–395, and n. 60 (1989). And in cases involving hundreds of affiliated entities who share liability and share insurance, such as the Boy Scouts and the Catholic Church, it would be almost impossible to coordinate assets and ensure equitable victim recovery across hundreds of distinct bankruptcies. Section § 1123(b)(6) provides bankruptcy courts with flexibility to deal with such situations by approving appropriate non-debtor releases. See Brief for Boy Scouts of America as *Amicus Curiae* 18–20; Brief for Ad Hoc Group of Local Councils of the Boy Scouts of America as *Amicus Curiae* 6; Brief for U. S. Conference of Catholic Bishops as *Amicus Curiae* 3–4, 17–22.

***2114** The Court next says that the non-debtor release allowed the Sacklers to bypass certain restrictions on discharges—for example, that individual debtors are generally not discharged for fraud claims, § 523(a). That argument fails for the same reason. Non-debtor releases are part of a negotiated settlement of potential tort claims. They are not a discharge. And nothing in § 523(a) prohibits a debtor's reorganization plan from *releasing* non-debtors for fraud claims. Indeed, it is undisputed that Purdue's bankruptcy could release the Sacklers from at least some fraud claims—namely, the fraudulent transfer claims—under § 1123(b)(3). No provision in the Code forbids releasing other fraud claims against the Sacklers, too. The Court's concern that the releases apply to claims for "fraud," *ante,* at 2085 – 2086, therefore falls flat.

In all of those scattershot arguments, the Court seems concerned that the Sacklers' $5.5 to $6 billion settlement payment was not enough. To begin with, even if that were true, it would not be a reason to *categorically* disallow non-debtor releases as a matter of law, as the Court does today. In any event, that concern is unsupported by the record and contradicted by the Bankruptcy Court's undisputed findings of fact. The Bankruptcy Court found that the creditors' and victims' ability to recover directly from any of the Sacklers in tort litigation was far from certain. So as in other tort settlements, the settlement amount here reflected the parties' assessments of their probabilities of success and the likely amount of possible recovery. The Court today has no good basis for its subtle second-guessing of the settlement amount.

And lest we miss the forest for the trees, keep in mind that the victims and creditors have no incentive to short their own recoveries or to let the Sacklers off easy. They despise the Sacklers. Yet they strongly support the plan. They call the settlement a "remarkable achievement." Brief for Respondent Ad Hoc Group of Individual Victims of Purdue Pharma, L. P. et al. 2. And given the high level of victim and creditor support, the Bankruptcy Court emphasized: "[T]his is *not* the Sacklers' plan," and "anyone who contends to the contrary" is "simply misleading the public." 633 B.R. at 82.

The Court today unfortunately falls into that trap. And it is rather paternalistic for the Court to tell the victims that they should have done better—and then to turn around and leave them with potentially nothing.

C

Finally, the Court suggests that non-debtor releases are not "appropriate" because they are inconsistent with history and practice. That, too, is seriously mistaken.

Importantly, Congress did not enact the current Bankruptcy Code—and with it, § 1123(b)(6)—until 1978. Bankruptcy Code of 1978, 92 Stat. 2549. For nearly the entire life of the Code, courts have approved non-debtor release provisions like this one. So for decades, Chapter 11 of the Code has been understood to grant authority for such releases when appropriate and necessary to the success of the reorganization. [7]

***2115** The Court's citations to pre-Bankruptcy Code cases are an off-point deflection and do not account for important and relevant changes made in the current Bankruptcy Code. For example, unlike the former Bankruptcy Act of 1898, the modern Bankruptcy Code grants courts jurisdiction over "suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307, n. 5, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995); see 28 U.S.C. §§ 157(a), 1334(b) (giving bankruptcy courts jurisdiction over any litigation "related to" the bankruptcy).

Under the current Bankruptcy Code, it is well settled that Chapter 11 bankruptcies can and do affect relationships between creditors and non-debtors who are intimately related to the bankruptcy. For example, under the modern Bankruptcy Code, bankruptcy courts routinely use their broad jurisdiction and equitable powers to stay any litigation—even litigation entirely between third parties—that would affect the bankruptcy estate. *Celotex*, 514 U.S. at 308–310, 115 S.Ct. 1493.

The longstanding practice of staying litigation that could affect the bankruptcy estate is similar in important respects to non-debtor releases. In each situation, a provision of the Code provides an explicit authority: to stay litigation involving the debtor, § 362, and to release claims involving the debtor, §§ 1123(b)(1), (3). And in each, the bankruptcy court invokes its broad jurisdiction and equitable power to "augment" that authority, extending it to litigation and claims against non-debtors that might have a "direct and substantial adverse effect" on the bankruptcy estate. *Celotex*, 514 U.S. at 303, 310, 115 S.Ct. 1493.

In short, the common and long-accepted practice of staying litigation that could affect the bankruptcy estate shows that under the modern Code, bankruptcy courts can and do exercise control over relationships between creditors and non-debtors. The Court's reliance on pre-Code practice is misplaced. [8]

IV

As I see it, today's decision makes little sense legally, practically, or economically. It upends the carefully negotiated Purdue bankruptcy plan and the prompt and substantial recovery guaranteed to opioid victims and creditors. Now the opioid victims and creditors are left holding the bag, with no clear path forward. To reiterate the words of the victims: "Without the release, the plan will unravel," and "there will be no viable path to any victim recovery." Tr. of Oral Arg. 100.

The Court does not say what should happen next. The Court seems to hope that a new deal is possible, with the Sacklers buying off the last holdouts.

But even if it were true that the parties could eventually reach a new deal, that outcome would likely come at a cost. Future negotiations and litigation would mean additional litigation expense that eats away at the recovery that the opioid victims and creditors have already negotiated, as well as years of additional delay ***2116** even though victims and family members want and need relief *now*.

And more to the point, without non-debtor releases, a new deal will be very difficult to achieve. By eliminating nonconsensual non-debtor releases, today's decision gives every victim and every creditor an absolute right to sue the Sacklers. Some may hold out from any potential future settlement and instead sue because they want to have their day in court to hold the defendants accountable, or because they want to try to hit the jackpot of a large recovery that they can keep all to themselves. Moreover, because every victim and creditor knows that the Sacklers' resources are limited, they will now have an incentive to promptly sue the Sacklers before others sue. To be sure, the victims and creditors would face an uphill climb in any such litigation, the Bankruptcy Court found, so it may be that no one will succeed in tort litigation against the Sacklers, meaning that no one will get anything. But even if just one of the victims or creditors—say, a State or a group of victims—is successful in a suit against the Sacklers, its judgment "could wipe out all of the collectible Sackler assets," which in turn could also deplete Purdue's estate and leave nothing for any other victim or creditor. *Id*., at 103. That reality means that everyone has an incentive to race to the courthouse to sue the Sacklers pronto—the classic collective-action problem.

Because some victims or creditors may hold out from any potential future settlement for any one of those reasons and instead still sue, the Sacklers are less likely to settle with anyone in the first place. Maybe the clouds will part. But in a world where nonconsensual non-debtor releases are categorically impermissible, any hope for a new deal seems questionable—indeed, the parties to the bankruptcy label it "pure fantasy." Brief for Debtor Respondents 4.

The bankruptcy system was designed to prevent that exact sort of collective-action problem. Non-debtor releases have been indispensable to solving that problem and ensuring fair and equitable *victim recovery* in multiple bankruptcy proceedings of extraordinary scale—not only opioids, but also many other mass-tort cases involving asbestos, the Boy Scouts, the Catholic Church, silicone breast implants, the Dalkon Shield, and others.

The Court's apparent concern that the Sacklers' settlement payment of $5.5 to $6 billion was not enough should have led at most to a remand on whether the releases were "appropriate" under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not). But instead the Court responds with the dramatic step of repudiating the plan and eliminating non-debtor releases altogether.

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. The text of the Bankruptcy Code does not come close to requiring such a ruinous result. Nor does its structure, context, or history. Nor does hostility to the Sacklers—no matter how deep: "Nothing is more antithetical to the purpose of bankruptcy than destroying estate value to punish someone." A. Casey & J. Macey, In Defense of Chapter 11 for Mass Torts, 90 U. Chi. L. Rev. 973, 1017 (2023). Gutting this longstanding bankruptcy court practice is entirely counterproductive, and simply inflicts still more injury on the opioid victims.

Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision. Only Congress can fix the ***2117** 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. I respectfully dissent.

All Citations

603 U.S. ----, 144 S.Ct. 2071, 73 Bankr.Ct.Dec. 159, 2024 Daily Journal D.A.R. 5818, 30 Fla. L. Weekly Fed. S 451

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 For examples of decisions on both sides of the split, compare *In re Pacific Lumber Co.*, 584 F.3d 229 (CA5 2009); *In re Lowenschuss*, 67 F.3d 1394 (CA9 1995); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (CA10 1990), with *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (CA3 2019); *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (CA11 2015); *In re Airadigm Communications, Inc.*, 519 F.3d 640 (CA7 2008); *In re Dow Corning Corp.*, 280 F.3d 648 (CA6 2002); *In re A. H. Robins Co.*, 880 F.2d 694 (CA4 1989).

2 The Sacklers suggest that, if 11 U.S.C. § 1123(b) does not permit a bankruptcy court to release and enjoin claims against a nondebtor without the affected claimants' consent, § 105(a) does. See Brief for Mortimer-Side Initial Covered Respondents 19 (Brief for Sackler Family). That provision allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of " the bankruptcy code. § 105(a). As the Second Circuit recognized, however, "§ 105(a) alone cannot justify" the imposition of nonconsensual third-party releases because it serves only to " 'carry out' " authorities expressly conferred elsewhere in the code. 69 F.4th 45, 73 (2023) (quoting § 105(a)); see also 2 R. Levin & H. Sommer, Collier on Bankruptcy ¶105.01[1], p. 105–6 (16th ed. 2023). Purdue concedes this point, Brief for Debtor Respondents 19, n. 5 (Brief for Purdue), as do several other plan proponents, see, *e.g.*, Brief for Respondent Ad Hoc Committee 29. Necessarily, then, our focus trains on § 1123(b)(6).

3 In an effort to blur this distinction, the dissent points out that the Sackler discharge covers claims for which Purdue's conduct is a "legally relevant factor." *Post*, at 2105 – 2106 (quoting 69 F.4th at 80). But that does not alter the fact that the Sackler discharge would extinguish *the victims*' claims against *the Sacklers*. Those claims neither belong to Purdue nor are they asserted against Purdue or its estate. The dissent disregards these elemental distinctions. See, *e.g.*, *post*, at 2114 (conflating the estate's power to settle its own fraudulent transfer claims against the Sacklers with the power to extinguish those of the victims against the Sacklers).

4 The dissent characterizes our analysis of paragraph (6) as "breez[y]," as if the analysis would be correct if only it were belabored. *Post*, at 2105 – 2106. And yet it is the dissent that relegates the text of the relevant statute, § 1123(b), to a pair of footnotes bookending a 25-page exposition on collective-action problems and public policy, one that precedes any effort to engage with our statutory analysis. See *post*, at 2091, n. 1, 2104 – 2105, n. 5.

5 The dissent claims that, in making this observation, we defy § 524(g)'s directive that "[n]othing in [it], or in the amendments made by [its addition to the bankruptcy code], 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; see *post*, at 2111 – 2112. That charge misunderstands the point. We do not read § 524(g) to "impair" or "modify" authority previously available to courts in bankruptcy. To the contrary, we simply understand § 524(g) to illustrate how Congress might proceed if it intended to confer upon bankruptcy courts a novel and extraordinary power to extinguish claims against third parties without claimants' consent. See *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017).

6 The dissent declares pre-code practice irrelevant to the task at hand and insists the power to order nonconsensual releases has been settled by "decades" of bankruptcy court practice. *Post*, at 2089, 2090, 2091 – 2092, 2093 – 2094, 2114 – 2115. But in resisting the notion that pre-code practice may inform our work, the dissent defies our precedents. And in appealing to "decades" of lower court practice, the dissent

seems to forget why we took this case in the first place: to resolve a longstanding and deeply entrenched disagreement between lower courts over the legality of nonconsensual third-party releases. See n. 1, *supra*.

7 The parties likewise spar over whether, absent the Sacklers' discharge, the family could deplete the estate by asserting indemnification claims against the company. Plan proponents and the dissent point to a 2004 agreement that commits Purdue to cover certain liability and legal expenses the Sacklers incur. Brief for Purdue 10; *post*, at 2098 – 2101. But here again, the Trustee sees things differently. He underscores the plan proponents' concession that the 2004 agreement "does not apply if a court determines the Sacklers 'did not act in good faith.' " Reply Brief 16. And, he adds, bankruptcy courts have a variety of statutory tools at their disposal to disallow or equitably subordinate any potential indemnification claims the Sacklers might pursue. *Ibid.* (citing §§ 502(e)(1)(B), 510(c)(1)).

1 The full text of § 1123(b) provides that "a plan may—

"(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

"(2)subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

"(3)provide for—

"(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6)include any other appropriate provision not inconsistent with the applicable provisions of this title."

2 Other Courts of Appeals have used similar factors for evaluating non-debtor releases. See, *e.g.*, *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070, 1079–1081 (CA11 2015); *National Heritage Foundation, Inc. v. Highbourne Foundation*, 760 F.3d 344, 347–351 (CA4 2014); *In re Dow Corning Corp.*, 280 F.3d 648, 658–661 (CA6 2002).

3 The Court implies that some victims could recover from the Sacklers in tort litigation up to the total of their combined assets, and that the Sacklers are somehow getting off easy by paying only $5.5 to $6 billion. But the Court's belief is not rooted in reality given the Bankruptcy Court's undisputed factual findings to the contrary: Large tort recoveries against any of the Sacklers were (and remain) far from certain—and in any event would produce recoveries for only a few and leave other victims with nothing.

4 The regional United States Trustee for three States, a Government bankruptcy watchdog appointed to oversee bankruptcy cases in those States, also opposes the plan for reasons that remain mystifying. The U. S. Trustee purports to look out for victims and creditors, but here the victims and creditors made emphatically clear that the "U. S. Trustee does not speak for the victims of the opioid crisis" and is indeed thwarting the opioid victims' efforts at fair and equitable recovery. Tr. of Oral Arg. 93.

5 To remind the reader of § 1123(b)'s lengthy text: A "plan may—

"(1)impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

"(2)subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

"(3)provide for—

"(A)the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

"(B)the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

"(4)provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

"(5)modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

"(6)include any other appropriate provision not inconsistent with the applicable provisions of this title."

6 The Court protests that we are looking to the "purpose" of the statute. But in *ejusdem generis* cases, courts are *required* to look at "purpose" in order to determine the common link, as Scalia and Garner and Eskridge all say, and as *Begay* indicated. That is longstanding black-letter law. And even outside the *ejusdem generis* context, the Court's allergy to the word "purpose" is strange. After all, "words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation" and "purposive interpretation is not that the former never considers purpose. It almost always does," but "the purpose must be derived from the text." A. Scalia & B. Garner, Reading Law 56 (2012).

7 See, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 624–626 (Bkrtcy. Ct. SDNY 1986), aff 'd, 837 F.2d 89, 90, 93–94 (CA2 1988); *In re A. H. Robins Co.*, 88 B.R. 742, 751 (ED Va. 1988), aff 'd, 880 F.2d 694, 700–702 (CA4 1989); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268, 272, 278–279 (ND Ill. 1990); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (CA2 1992); *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 938 (Bkrtcy. Ct. WD Mo. 1994); *In re Dow Corning Corp.*, 280 F.3d 648, 653 (CA6); *In re Airadigm Communications, Inc.*, 519 F.3d 640, 655–658 (CA7 2008); *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070, 1081 (CA11 2015); *In re Boy Scouts of Am. and Del. BSA, LLC*, 650 B.R. 87, 112, 135–143 (D.Del. 2023). I could add dozens more citations to this footnote. But the point is clear.

8 The Court insists that pre-Code practice "may inform our work." *Ante*, at 2086, n. 6. But pre-Code practice certainly does not play a role when that practice has been superseded by an express provision of the modern Bankruptcy Code.

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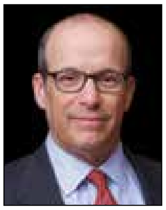
Appendix C

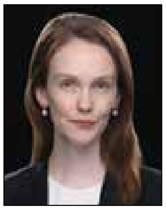
Litigator's Perspective

By Marshall S. Huebner and Kate Somers

Opting Into Opting Out: Due Process and Opt-Out Releases



Marshall S. Huebner
Davis Polk & Wardwell LLP; New York



Kate Somers
Davis Polk & Wardwell LLP; New York

Marshall Huebner is a partner with Davis Polk & Wardwell LLP in New York and is co-head of the firm's Restructuring Group. Kate Somers is an associate in the same office.

Mass tort bankruptcies often involve complex and interrelated settlements where the primary payors — including insurers, former owners or co-tortfeasors — are not the debtors themselves. Finality and the resolution of litigation, including releases from third parties and the debtors, are often the only ways to achieve a value-maximizing (and invariably largely consensual) outcome for creditors.

Now that the U.S. Supreme Court has issued its ruling barring nonconsensual releases, there will — absent legislative change — be an even greater focus on (and need for) other types of releases with respect to third parties, including both opt-out and opt-in releases. Provided that factors are satisfied, opt-out releases (a mechanic on a ballot or notice of nonvoting status that allows claimants to check a box to opt out of nondebtor releases in a reorganization plan) will likely be the best available pathway for effectuating the will of — and providing the best available recovery to — creditors and victims.

For good reason, the overwhelming majority of courts that have considered the issue have held that opt-out releases are permissible in appropriate circumstances. These decisions focus on a small number of appropriate factors to ensure fairness and that due process has been satisfied.[1] Virtually all of the cases declining to approve opt-out releases did so because these same factors were not satisfied on the facts before them.

This also comports with Federal Rule of Civil Procedure 23(b)(3) class actions, where courts have agreed that "it seems fair for the silent to be considered as part of the class."[2] Appellate courts around the nation have expressed serious reservations regarding whether Civil Rule 23 permits certification of an *opt-in* class, and have recognized the benefit of opt-out settlements in class actions, in part because requiring "individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people — especially small claims held by small people — who for one reason or another ... will simply not take the affirmative step."[3]

Simply stated, due process (as well as care and concern for victims) weighs strongly in favor of opt-out over opt-in procedures. Creditors' rights are far better preserved by an opt-out mechanism that allows them to participate in the deal unless they expressly decline where (1) reorganization plans negotiated by multiple fiduciaries and creditor representatives provide enhanced recoveries to claimants in exchange for consenting to third-party releases; (2) the consideration provided in exchange for the release is substantial; (3) settlements result from fair, arm's-length negotiations; and (4) there is appropriate notice of the right to opt out. This is especially true for less sophisticated or not separately represented claimants: The notion that they were unable to timely opt out (a one-page form), but desire to prosecute a lawsuit in lieu of accepting their plan recovery, is illogical and unsupportable.

Factors in Support of Opt-Out Releases in Appropriate Circumstances

Bankruptcy courts have focused on the following entirely sensible factors in deciding whether opt-out releases are appropriate on the facts before them:

1. adequate or meaningful recoveries for creditors;[4]
2. volume of opt-out elections actually received;[5]
3. adequate consideration provided in exchange for release;
4. clear and prominent notice of the release and the opportunity to opt out;[6]
5. highly publicized nature of the case and the third-party releases, including in cases "of great notoriety" where creditors "knew about the existence of the bankruptcy case [and] knew they would have to act";[7]
6. active creditor participation;[8]

1 Both Second Circuit opinions in *Purdue* suggest that opt-out releases are consensual. *See In re Purdue Pharma LP*, No. 22-110, at 83 (2d Cir. May 30, 2023) (ECF No. 978-1) ("[T]he Trustee also questions whether such a release, without an ability to opt out, can comply with due process because it effectively denies claimants their day in court."); *see also id.* at 87-88 (concurrence) ("Finally, the Release is nonconsensual; *it binds consenting and objecting parties, without providing an opt-out option to those who object.*") (emphasis added).

2 *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (citing Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 *Harv. L. Rev.* 356, 397-98 (1967)); *see also Philipps Petroleum Co. v. Shutts*, 472 U.S. 797 at 813, n.4 (1985).

3 *Id.*

4 *In re LATAM Airlines Grp. SA*, No. 20-11254 (JLG), 2022 Bankr. LEXIS 1725, at 144 n.88 (Bankr. S.D.N.Y. June 18, 2022).

5 *Id.*

6 *Id.* at 144.

7 Hr'g Tr. at 110: 10-17, *In re Insys Therapeutics Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 17, 2020) (ECF No. 1121).

8 Hr'g Tr. at 158:19-22, I*n re Cumulus Media Inc.*, No. 17-13381 (Bankr. S.D.N.Y. May 1, 2018) (ECF No. 749).

7. whether creditors had adequate representation, including by official committees;[9] and
8. the unique nature of mass tort bankruptcies and/or integrated settlements that confer broad benefit to all stakeholders.

Many courts have found opt-out releases to be appropriate in the mass tort context.[10] Even the U.S. Trustee's Office has started coming around of late.[11]

Where these factors are satisfied, it defies reason to assume that creditor silence should be deemed a rejection, rather than an acceptance, of a negotiated settlement. Moreover, as the *Mallinckrodt* court explained, the notion of deemed consent by failure to act "is utilized throughout the judicial system."[12] The court continued, "in bankruptcy ... [d]ebtors send out bar date notices, and if claimants fail to file a proof of claim by a certain time, they lose the right to assert a claim," concluding that it would be reasonable to apply this principle "in the same manner to properly noticed releases within a plan of reorganization."[13] Several dozen bankruptcy courts around the nation have applied similar reasoning in approving opt-out releases.

Hon. **Mary F. Walrath** of the U.S. Bankruptcy Court for the District of Delaware, one of the only judges to have held opt-out releases to be categorically impermissible other than for creditors voting in favor of the plan (in 2011's *Washington Mutual* case),[14] recently has approved them at least twice. In *Clarus Therapeutics*, she approved opt-out releases for voting creditors "given [the] sufficient opportunity to opt out of any releases," finding that "the releases as to them are fair and consensual."[15] In *EYP Group*, Judge Walrath found releases consensual as to claimants that (1) voted to accept; (2) were deemed to accept and did not object to the releases; or (3) voted to reject and did not opt out.[16]

The two other cases (out of dozens that take the opposite view) most frequently cited as categorically opposing opt-out releases may well not be, for while the *Ascena* court so states, the majority of the decision examined the very aforementioned factors, suggesting that opt-out releases may have been denied for case-specific reasons.[17] In particular, the notice of the *Ascena* opt-out release provision was found to be wholly inadequate,[18] the releasing parties received "nothing more than illusory consideration" in exchange for providing the release,[19] the releasing parties lacked adequate representation, and negotiation of the release settlement was not done at arm's length.[20]

We do not believe that there are any other categorical rejection decisions. For example, *Chassix*, often mis-cited as one, expressly acknowledged that "[c]ircumstances may justify a different approach in different cases."[21] Hon. **Michael E. Wiles** of the U.S. Bankruptcy Court for the Southern District of New York noted that on the facts before him, "relatively small recoveries ... could easily have prompted an even higher-than-usual degree of inattentiveness or inaction."[22] More recent decisions have distinguished *Chassix* on this basis, noting that "projected meager recoveries" in that case made it "likely that unsecured creditors did not focus on the fact that the plan called for them to take action not to grant the nondebtor releases."[23]

Civil Rule 23(b)(3)

In *Chassix*, Judge Wiles opined that while "in the class-action context there is a public policy that favors the consolidation of similar cases" and "justifies the imposition of a rule that binds class members who have not affirmatively opted out," no such policy exists "in favor of making third-party releases applicable to as many creditors as possible."[24] As an initial matter, his position seems inapposite to mass tort cases, which have tens of thousands of victims with similar claims. In these cases, opt-in procedures might not be feasible.

In *Mallinckrodt*, Hon. **John T. Dorsey** of the U.S. Bankruptcy Court for the District of Delaware distinguished cases that did not "involve mass tort bankruptcies like this one."[25] As he explained, "the sheer volume and complexity of the issues presented in cases like these require creative solutions which often build upon each other or depend on the success of each other in a way that unraveling one will cause all to fall apart."[26]

Justice Sonia Sotomayor's reasoning during oral arguments in *Purdue* further supports this position. Contemplating "thousands, if not hundreds of thousands, maybe millions of personal injury claims" in *Purdue*, she asked the U.S. Trustee what consent would look like "in a case like this."[27] Addressing the suggestion that an opt-in election evidencing affirmative consent should always be required, Justice Sotomayor replied, "So, basically, you're [saying] that there really is no way to do this in bankruptcy right now, because I don't know how an opt-in process ... would actually work."[28]

In *Ascena*, the court concluded that none of the protections of Civil Rule 23 existed in chapter 11, opining, *inter alia*, that "the absent releasing party does not enjoy counsel that will represent his best interests in his stead."[29] This is not so: Creditors in bankruptcy cases benefit from

9 Hr'g Tr. at 13:21-25; 14:1-7, *In re Clovis Oncology Inc.*, No. 22-11292 (JKS) (Bankr. D. Del. June 9, 2023) (ECF No. 875).
10 *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022); *In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504 (Bankr. D. Del. 2022).
11 U.S. Trustee Objection, *In re Amyris Inc.*, No. 23-11131 (Bankr. D. Del Jan. 18, 2024) (ECF No. 1154) (acknowledging *Mallinckrodt* and *Boy Scouts* and that "not all decisions from this District have required affirmative consent for third-party releases").
12 *Mallinckrodt*, 639 B.R. at 879.
13 *Id.*
14 *In re Wash. Mut. Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011).
15 Hr'g Tr. at 8:17-20, *In re Clarus Therapeutics Holdings Inc.*, No. 22-10845 (Bankr. D. Del. Feb. 8, 2023) (ECF No. 322).
16 Confirmation Order ¶ T, *In re EYP Grp. Holdings Inc.*, No. 22-10367 (Bankr. D. Del. Nov. 1, 2022) (ECF No. 568); *see also* Plan ¶¶ 1.1.122, 6.5.
17 *Patterson v. Mahwah Bergen Retail Grp. Inc.*, 636 B.R. 641 (E.D. Va. 2022) ("*Ascena*").
18 *Id.* at 659 (noting that bankruptcy court "did not order that any notice or opt-out forms be sent to all of the Releasing Parties" and ordered publication of "general notice of the confirmation hearing in *USA Today* and *The New York Times*" for one single day).
19 *Id.* at 687.
20 *Id.* at 686 (noting that bankruptcy court "expressly rejected the ability of certain absent releasing parties to have a party and counsel represent their best interests").
21 *In re Chassix Holdings Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015).
22 *Id.* at 80.
23 *In re LATAM Airlines Grp. SA*, No. 20-11254 (JLG), 2022 Bankr. LEXIS 1725, at *144 n.88 (Bankr. S.D.N.Y. June 18, 2022) (noting that in *LATAM*, releasing parties were "receiving exponentially greater recovery" than in *Chassix*).
24 *In re Chassix Holdings Inc.*, 533 B.R. at 78.
25 *Mallinckrodt*, 639 B.R. at 881.
26 *Id.*
27 Hr'g Tr. at 15:6-14, *William K. Harrington, U.S. Trustee v. Purdue Pharma LP*, No. 23-124 (U.S. Dec. 4, 2023).
28 *Id.* at 16:2-9, 12-13.
29 *Ascena*, 636 B.R. at 686-87.

continued on page 63

Litigator's Perspective: Due Process and Opt-Out Releases

from page 27

a multitude of protections that collectively ensure that due process is satisfied, including representation by two statutory fiduciaries and other organized creditor groups, statutorily mandated notice under § 1125 of the Bankruptcy Code, opportunities to participate and be heard throughout a case, and the myriad protections of § 1129, including that the plan be in the best interests of *all* creditors, and that they receive more than they would in a liquidation.

Provided that the factors supporting opt-out releases are satisfied, opt-outs are far more protective of creditor interests than a mandatory opt-in. This is particularly true where creditors stand to receive increased recoveries in exchange for granting third-party releases. For example, the *Endo* plan featured different release mechanics for different classes: "sophisticated" creditors (including secured creditors and tribes) would be granted third-party releases if they declined to opt out, whereas general unsecured creditors and personal-injury victims would only be granted releases if they voted in favor of the plan or opted in.[30] Certain of these creditors received a four-times-the-recovery multiplier for granting the third-party release, either by opting in or declining to opt out, as applicable.[31]

Ironically, the U.S. Trustee in *Endo* did not object to opt-outs for "sophisticated" creditors and was seemingly a central participant in negotiating the releases.[32] However, barring the opt-out for smaller creditors was tragically detrimental to them. Counsel to the official committee of *Endo* opioid claimants explained:

> [T]he U.S. Trustee's position regarding the release provisions has the result of penalizing personal-injury victims who do not either vote in favor of the Plan or affirmatively "opt in" to the third-party releases by depriving them of a significant portion of their recovery (while not doing the same for political subdivisions or any other non-individual Opioid Claimants). The U.S. Trustee presumably took this position because it did not want to allow personal-injury victims to unwittingly grant third-party releases ... notwithstanding the outsized importance of Plan recoveries to such claimants relative to the potentially released claims against third-party defendants — claims [that] personal-injury victims likely would not bring if they did possess them in light of the costs of litigation relative to the speculative recoveries on such claims in this particular case.... The U.S. Trustee must believe that its position in this case (and others) is actually helping personal-injury victims; the [official committee of unsecured creditors] disagrees.[33]

As in Civil Rule 23(b)(3) class actions — which require opt-outs and likely bar opt-ins — the *Endo* victims would have been far better served with an opt-out provision, which would have quintupled their plan recoveries unless they opted out. Instead, because they had to opt in to get the multiplier, many victims inadvertently lost out on 80 percent of their plan recoveries — for nothing. This grievous harm is as avoidable as it is incomprehensible.

Conclusion

Much is lost when silent creditors are denied plan recoveries in exchange for illusory rights to retain direct claims they will almost surely never bring. The irrational assumption that silence can constitute rejection but not acceptance of a fair deal harms creditors and victims. Due process, and justice itself, is far better served where — in appropriate cases — statutory fiduciaries overseen by courts can opt in to opt-outs, and opt out of using opt-ins. abi

30 Confirmation Brief, *In re Endo Int'l plc*, No. 22-22549 (JLG), at 120 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3787).
31 Fourth Amended Joint Chapter 11 Plan, *Endo Int'l* (Bankr. S.D.N.Y. March 18, 2024) (ECF No. 3849), at Art. IV.
32 Confirmation Brief, *Endo Int'l* at 120 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3787).
33 Statement of the Official Comm. of Opioid Claimants in Support of Confirmation, *Endo Int'l* ¶ 8, n.10 (Bankr. S.D.N.Y. March 7, 2024) (ECF No. 3785).

Appendix D

Reorg

2024-08-20 09:52:23

Bankruptcy Industry Update
Purdue Pharma
Boy Scouts of America

The Nondebtor Release Landscape One Month After the Purdue Pharma Ruling

Fri 08/02/2024 01:53 PM EDT

Legal Analysis: David Zubkis

The ultimate fate of so-called "third-party" releases has been the subject of much speculation in the lead-up to the U.S. Supreme Court's *Purdue Pharma* decision. On June 27, the high court held that bankruptcy courts lack the power to grant nonconsensual releases of nondebtors' claims against other nondebtors in a chapter 11 plan. In the last month, courts, debtors and stakeholders have had a chance to digest and implement *Purdue*, providing a somewhat clearer picture of the ruling's impact on the chapter 11 landscape.

So far, the most common application of *Purdue* has come from the Office of the U.S. Trustee, which continues its yearslong attack on "opt-out" nondebtor releases in chapter 11 plans. The UST maintains that "opt-out" releases are nonconsensual - violating *Purdue* - and that an "opt-in" mechanic is required to show a party's consent to granting a nondebtor release.

An opt-out release typically requires plan voting parties receiving ballots, or nonvoting parties (who are deemed to accept or reject a plan) receiving notices, to check a box stating that they agree to the releases. Parties that abstain from voting will typically be deemed to have consented to releases as well. In some cases, parties that vote in favor of a plan are also deemed to consent to releases, with no ability to opt out.

In contrast, under an "opt-in" mechanic, voting and nonvoting parties must check a box affirmatively agreeing to the nondebtor release.

In several cases, the debtors have voluntarily modified the nondebtor release mechanic from an "opt-out" to an "opt-in" - or they were steered into making the change by the court's opinion or direction. This effectively shifted the default status of parties who do not respond; they grant the nondebtor release under the opt-out structure but no longer do so under the opt-in mechanic.

At least one court, however, overruled a UST objection to an opt-out release structure, signaling that *Purdue* may not be the death knell for opt-out mechanics that it could have been. Apart from attacks on consent mechanics, some interested parties have also attempted to wield *Purdue* on a broader scale, including exculpation clauses and relief afforded to third parties under chapter 15.

A survey of the roster of cases covered by Reorg that have felt *Purdue*'s impact is below:

Case Name	Jurisdiction	Discussion
2u Inc.	Southern District of New York	Although there was no mention of *Purdue* or a specific objection to the prepackaged plan's nondebtor release provision, Judge Michael Wiles directed the debtors to replace the plan's opt-out procedures with an opt-in release mechanic. The judge also told the debtors to remove the "deemed to reject" classes from parties granting the nondebtor release.

Bird Global Inc.	Southern District of Florida	Judge Corali Lopez-Castro confirmed the debtors' plan, overruling objections from tort claimants asserting personal injury claims against municipalities, which are subject to a channeling injunction and bar order under the plan. The court rejected tort claimants' argument that the opt-out nondebtor release by voting creditors as well as nonvoting parties amounts to a nonconsensual discharge of claims in violation of *Purdue*. The court sided with the debtors' view that the cases are distinguishable from *Purdue* because the plan provides for "full satisfaction" of all tort claims, and the channeling injunction and bar order are part of a settlement with the insurers and a section 363 sale of the insurance policies.
BowFlex Inc.	District of New Jersey	The UST objects to the plan of liquidation, arguing that the opt-out nondebtor release should be struck. "Merely" providing an opt-out option is insufficient to establish consent to third-party releases by voting and nonvoting parties, the UST argues.
Boy Scouts of America	District of Delaware/ U.S. Court of Appeals for the Third Circuit	The U.S. Court of Appeals for the Third Circuit has granted the Lujan claimants' request to file supplemental briefing on the effect of the *Purdue* decision on the claimants' appeal of the Boy Scouts confirmation order. Earlier, a number of appealing parties requested a stay halting further implementation of the plan pending the Supreme Court's ruling in *Purdue*, but the stay request was denied.
CalAmp Corp.	District of Delaware	The UST and SEC objected to the plan, arguing that the release of shareholders' claims was nonconsensual under *Purdue*. The UST and SEC emphasized that although shareholders would not receive distributions under the plan, shareholders were still required to affirmatively opt out of the releases. The debtors subsequently removed the shareholder releases from the plan.
Ebix Inc.	Northern District of Texas	Judge Scott W. Everett took confirmation of the Ebix debtors' plan under advisement on July 30. The judge said he needed time to consider the opt-out nondebtor releases opposed by the UST, but he does not "have an issue with any other part of the plan." Judge Everett said he will issue his confirmation ruling on Aug. 2.
Fairmont San Jose	District of Delaware/ U.S. Court of Appeals for the Third Circuit	The reorganized debtors filed a writ of certiorari asking the Supreme Court to determine whether allegedly nonconsensual third-party plan releases of the debtors' attorneys that are not objected to and become part of a confirmed and substantially consummated plan are "nevertheless invalid and unenforceable" under *Purdue*. The reorganized debtors argue there is no basis under the Bankruptcy Code to release debtors' attorneys from malpractice claims when the attorneys allegedly did not obtain the debtors' "informed" consent or advise the debtors to seek independent counsel.
Highland Capital Management LP	Northern District of Texas/ U.S. Court of Appeals for the Fifth Circuit	On July 2, the Supreme Court denied petitions for certiorari focused on the exculpation clause in the Highland Capital Management plan. Both reorganized Highland and NexPoint Advisors, an affiliate of Highland's founder and former CEO James Dondero, asked the Supreme Court to review the issue. In supplemental briefs, the parties acknowledged that *Purdue* does not expressly address exculpation clauses, but argued that the issues are "tightly interwoven." They also pointed to a circuit split between the Ninth and Fifth circuits on whether the Bankruptcy Code treats exculpation clauses "the same as, or differently from, third-party releases affecting prepetition claims."

Invitae Corp.	District of New Jersey	Judge Michael Kaplan confirmed Invitae's plan, rejecting the UST's objection to the opt-out nondebtor release. In overruling the objection, Judge Kaplan said he incorporates “relevant rulings” on the issue from BlockFi and Bed Bath & Beyond.
Red Lobster Management	Middle District of Florida	Judge Grace E. Robson approved Red Lobster's disclosure statement on the condition that the debtors replace the opt-out nondebtor release structure with an opt-in mechanic. Judge Robson said that in the wake of the *Purdue* decision, it is now “clear” that courts cannot authorize third-party releases without parties’ consent. The UST had objected to the opt-out releases, arguing that post-*Purdue* it is “clear" that "merely" voting for a plan is insufficient to evince a claimant’s affirmative consent to third-party releases.
Rite Aid Corp.	District of New Jersey	Judge Michael Kaplan confirmed the plan after the debtors changed the opt-out nondebtor release (opposed by the UST) to an opt-in release. The *Purdue* decision came down during the confirmation hearing.
Robertshaw	Southern District of Texas	The UST objected to nondebtor releases in the plan, arguing that they are not consensual under *Purdue* because creditors must opt out rather than affirmatively opting in.
SouthRock Capital Ltda.	Southern District of Texas	Creditors invoked *Purdue* in objecting to the extension of the stay to the chapter 15 debtors' founder and controlling shareholder. The creditors argued that the Supreme Court's reasoning - that the “catch-all” provision in section 1123 of the Bankruptcy Code precludes parties from an “end-run” around limits on nondebtor releases - should be applied to a similar catch-all provision in section 1521. According to the creditors, because the statute on its “face” allows for relief “concerning a debtor and only a debtor,” it should not be read to permit relief to nondebtors “absent some clear indication in the text of the statute that such relief is permissible.” The matter was mooted when the debtor withdrew its stay extension request.
SVB Financial Group	Southern District of New York	The UST objected to the nondebtor releases despite the debtors' pivot to an opt-in structure. The UST argued that the late addition of the ad hoc cross-over group to the list of released parties improperly imposed a nonconsensual nondebtor release on parties that had opted into the releases at the voting deadline before the ad hoc crossover group was added. The UST also asserted that the plan injunction improperly barred parties from pursuing a broad array of claims not released under the plan, and because there was no mechanism for voting parties to opt into or out of the injunction, the provision operated as a “back door” around *Purdue*. The debtors resolved the objection ahead of the confirmation hearing by agreeing to remove the ad hoc crossholder group from the released parties definition and limiting the claims subject to the injunction.
Thrasio	District of New Jersey	The debtors' co-founder and former co-CEO is seeking a stay pending his appeal of the debtors’ confirmation order, arguing that the plan contains nonconsensual nondebtor releases and injunctions prohibited under *Purdue*. He asserts that the confirmation order must be vacated and the plan “withdrawn, either in whole, or at least in part” with respect to provisions invalidated by *Purdue*. Judge Christine M. Gravelle confirmed the plan on June 18 (before the *Purdue* ruling) and overruled the UST's objection, finding the release consensual because claimants had “ample opportunity and process” to opt out of the releases.The judge emphasized that the opt-out procedures were on “every notice that went out” “in bold print inside a box” that “warned” creditors about the plan’s exculpation and release provisions, and that the releases themselves have been “out there” since the petition date as part of the debtors’ initial plan.

Appendix E

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:	Chapter 11 Cases
Red Lobster Management, LLC,	Case No. 6:24-bk-02486-GER
	Jointly Administered with
Red Lobster Restaurants, LLC,	Case No. 6:24-bk-02487-GER
RLSV, Inc.,	Case No. 6:24-bk-02488-GER
Red Lobster Canada, Inc.,	Case No. 6:24-bk-02489-GER
Red Lobster Hospitality, LLC,	Case No. 6:24-bk-02490-GER
RL Kansas, LLC,	Case No. 6:24-bk-02491-GER
Red Lobster Sourcing, LLC,	Case No. 6:24-bk-02492-GER
Red Lobster Supply, LLC,	Case No. 6:24-bk-02493-GER
RL Columbia, LLC,	Case No. 6:24-bk-02494-GER
RL of Frederick, Inc.,	Case No. 6:24-bk-02495-GER
Red Lobster of Texas, Inc.,	Case No. 6:24-bk-02496-GER
RL Maryland, Inc.,	Case No. 6:24-bk-02497-GER
Red Lobster of Bel Air, Inc.,	Case No. 6:24-bk-02498-GER
RL Salisbury, LLC,	Case No. 6:24-bk-02499-GER
Red Lobster International Holdings LLC,	Case No. 6:24-bk-02500-GER

Debtors.
____________________________________/

U.S. TRUSTEE'S LIMITED OBJECTION TO DEBTORS' EXPEDITED MOTION FOR ENTRY OF AN ORDER (I) CONDITIONALLY APPROVING DISCLOSURE STATEMENT FOR THE PROPOSED JOINT CHAPTER 11 PLAN OF RED LOBSTER MANAGEMENT LLC AND ITS DEBTOR AFFILIATES, (II) APPROVING THE SOLICITATION AND VOTING PROCEDURES WITH RESPECT TO CONFIRMATION OF THE PROPOSED JOINT CHAPTER 11 PLAN OF RED LOBSTER MANAGEMENT LLC AND ITS DEBTOR AFFILIATES, AND (III) GRANTING RELATED RELIEF
[DKT 634]

Mary Ida Townson, the United States Trustee for Region 21 submits this limited objection to Debtors' expedited motion for approval of the disclosure statement and the solicitation and voting procedures to the extent Debtors utilize ballots containing an "opt-out" procedure as well as votes in favor of the Plan to obtain "consent" to the third-party releases and utilize no option to affirmatively consent to the exculpation provisions. The U.S. Trustee has not had sufficient time to fully evaluate all issues that may give rise to objections to the Disclosure Statement (and Plan), particularly as to the third-party release and exculpation provisions to which we will likely object. Therefore, the U.S. Trustee reserves all rights to raise any, and all, statutory, constitutional, and caselaw arguments with respect to approval of the Disclosure Statement and Plan confirmation.

BACKGROUND

1. On July 19, 2024, Debtors moved the Court on an expedited basis to approve the Disclosure Statement and solicitation and voting procedures (the "Motion"). [Dkt. 634]

2. The Court set a hearing on the Motion for July 26, 2024. [Dkt. 641]

3. As reflected in the Disclosure Statement and proposed ballot, the Plan includes certain injunctions arising from third-party releases (the "Releases") and exculpations ("Exculpations"). *Discl.* Sec. 5.5(a)(3)-(a)(5); *Motion* ¶32.

4. The Plan defines "Released Party" as each of: (a) the Debtors' Professionals; (b) the current officers of each of the Debtors and the Debtors' current manager and/or director, Mr. Lawrence Hirsch; (c) the DIP Lenders and the DIP Agent and their respective Related Parties; (d) the Prepetition Term Loan Parties and their respective Related Parties; (e) the Purchaser; (f) the Committee and those individual members of the Committee, solely in their capacities as such, who do not opt out of the release provided for herein; (g) the Committee's Professionals; (h) the Plan Administrator and GUC Trustee; and (i) in each case, the respective Related Persons of each of the foregoing Persons. *Plan,* p.12.

5. The Plan defines Releasing Party as each of: (a) the officers of each of the Debtors, the members of any board of managers of each Debtor and the managing members (or comparable governing bodies or Persons) of any Debtor; (b) the DIP Lenders and the DIP Agent; (c) the

Prepetition Term Loan Parties; **(d) all holders of Claims that (A) vote to accept the Plan, (B) vote to reject the Plan and do not elect to opt out of the releases contained in Article VIII of the Plan, or (C) do not vote on the Plan and do not elect to opt out of the releases contained in Article VIII of the Plan**; (e) the Purchaser; (f) the Committee and those individual members of the Committee, solely in their capacities as such, who do not opt out of the release provided for herein; and (g) the Plan Administrator and GUC Trustee. *Plan*, pp.12-13(emphasis added).

6. The Plan defines Exculpated Parties as: (a) the directors and officers of each of the Debtors and the members of any board of managers or directors of each Debtor, and in each case, who served the Debtors in such capacities at any time between the Petition Date and the Plan Effective Date; (b) all Professionals and agents retained by the Debtors in the Debtors' Chapter 11 Cases; (c) the Committee and those individual members of the Committee who do not opt out of the release provided for herein; (d) all Professionals and agents retained by the Committee in the Debtors' Chapter 11 Cases; (e) the Plan Administrator and GUC Trustee; and (f) in each case, the respective Related Persons of each of the foregoing Persons. *Plan*, p.6.

7. The Plan has two classes of creditors deemed unimpaired and therefore not entitled to vote: Class 1- miscellaneous secured claims, and Class 2- other priority claims. *Plan*, pp. 22-23; *Motion*, p. 6.

8. The Debtors have over 100,000 parties listed on their noticing matrix. These parties include current and former employees, vendors, landlords, certain customers, litigation claimants, interest holders, taxing authorities, insurers, and other similar parties in interest. *Motion*, ¶14. This includes the tens of thousands of past and current employees with only General Unsecured Claims arising from their deferred compensation retirement accounts.

9. Under the Plan, General Unsecured Creditors are treated as follows:

> On the Plan Effective Date, each holder of an Allowed Class 4 General Unsecured Claim (except for deficiency Claims held by a holder of a Prepetition Term Loan Claim) shall receive, in accordance with the GUC Trust Documents, its Pro Rata Share of the beneficial interests in the GUC Trust and the right to receive its respective Pro Rata Share of any available GUC Litigation Proceeds or other GUC Trust Assets, if any. Holders of Allowed General Unsecured Claims against more than one Debtor shall be treated as having a single Allowed General Unsecured Claim solely for purposes of any Distribution. The treatment set forth herein with respect to the holders of Allowed Class 4 Claims (except for deficiency Claims held by a holder of a Prepetition Term Loan Claim) shall be in full and final satisfaction of the Allowed Class 4 Claims. Notwithstanding anything to the contrary contained in this Plan, no Distribution shall be made to Prepetition Term Loan Lenders on account of Allowed Class 4 Claims and the Prepetition Term Loan Lenders shall not be beneficiaries of the GUC Trust.

Plan, p. 24; *Motion*, p. 5.

Accordingly, General Unsecured Creditors will likely only recover if the GUC Litigation Trust is successful in pursuing claims against the direct and indirect equity holders and/or prior management. If the GUC Litigation Trust is unsuccessful pursuing or collecting on such claims, the General Unsecured Creditors may receive nothing.

10. The Debtors propose to obtain “consent” to the third-party Releases by utilizing an opt-out procedure. *Discl.* p.69. The Debtors provide no procedure for opting in or opting out of the Exculpations. *Discl.* pp.69-70.

11. Debtors seek Court approval to deem the following to have consented to the releases: all holders of Claims who

> (a) vote to accept the Plan;
>
> (b) vote to reject the Plan but do not check a box on page twelve of the ballot indicating the election **not** to grant the releases;
>
> (c) abstain by returning their ballot without indicating acceptance or rejection of the Plan and do not check the opt out box; and
>
> (d) fail to return the ballot and fail to check the opt out box.

Specifically, the proposed Ballot states:

IMPORTANT INFORMATION REGARDING
CERTAIN RELEASES BY HOLDERS OF CLAIMS:

IF YOU VOTE TO *ACCEPT* THE PLAN, YOU WILL BE DEEMED TO GRANT THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN (REPRODUCED ABOVE), REGARDLESS OF WHETHER YOU CHECK THE BOX IN ITEM 3 BELOW.

IF YOU VOTE TO *REJECT* THE PLAN AND DO NOT CHECK THE BOX IN ITEM 3 BELOW, YOU WILL BE DEEMED TO CONSENT TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *ABSTAIN* FROM VOTING ON THE PLAN AND SUBMIT A BALLOT *WITHOUT* CHECKING THE BOX IN ITEM 3 BELOW, YOU WILL BE DEEMED TO CONSENT TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *ABSTAIN* FROM VOTING ON THE PLAN AND WISH TO OPT OUT OF THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN, YOU MUST SUBMIT A BALLOT IN WHICH YOU HAVE *CHECKED* THE BOX IN ITEM 3 BELOW IN ORDER TO NOT BE BOUND BY THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

IF YOU *FAIL TO SUBMIT* A BALLOT, YOU WILL BE DEEMED TO HAVE CONSENTED TO THE RELEASES SET FORTH IN ARTICLE VIII.A.3 OF THE PLAN.

Motion, Ex.1-A, p.12.

12. Debtors will also provide an opt-out form to unimpaired creditors with no right to vote as part of the Non-Voting Status Notice. *Motion*, Ex. 4-1.

ARGUMENT

Nonconsensual third-party releases are not authorized under the United States Bankruptcy Code. *Harrinton v. Purdue Pharma*, *L. P.*, 144 S. Ct. 2071, 2082–88 (2024). This limited objection is focused on the improper use of an opt-out procedure and votes on the Plan in the Disclosure Statement and ballots to strip creditors of rights against third parties without their consent.

A. The Disclosure Statement Fails to Adequately Explain the Basis for Imposing Third-Party Releases and Exculpations on Creditors Who Vote to Accept the Plan or Who Reject the Plan, Abstain from Voting, Fail to Vote, or Cannot Vote, But Do Not Affirmatively Opt-Out of the Releases

The Plan purports to treat votes in favor of the economic treatment in the Plan as votes in favor of the third-party releases, but a "court must ascertain whether the creditor unambiguously manifested assent to the release of the nondebtor from liability on its debt." *In re Arrowmill Dev. Corp*., 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (Gindin, C.J.). "'A creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings[.]'" *In re Elsinore Shore Assocs*., 91 B.R. 238, 247 (Bankr. D.N.J. 1988) (Gambardella, J.) quoting *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (analyzing section 16 of the Bankruptcy Act of 1898, precursor to 11 U.S.C. § 524(e)). The Disclosure Statement does not describe any basis for treating a vote on the Plan as consent to a release.

In addition, the Disclosure Statement states that creditors who vote to reject the Plan are still bound by the Releases unless they take the additional step of opting out. *Discl.* p.3; pp.68-69. It also states that creditors who abstain from voting (by returning a ballot without indicating their vote for or against the Plan), creditors who simply fail to return their ballots, and unimpaired creditors not entitled to vote, are all still bound by the Releases unless they opt-out. *Discl.* p.3 The Disclosure Statement does not, however, explain why such creditors should have their rights against third parties stripped away for failing to take additional steps.

The Disclosure Statement also states that all creditors are bound by the Exculpation clause. *Discl.* pp.69-70. Exculpation clauses are merely a type of third-party release and standards for consensual third-party releases apply. *See SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying)*, 780 F.3d 1070 (11th Cir. 2015) (analyzing an exculpation clause under the same standard as applies to any other type of third-party release); *In re Stein Mart, Inc.*, 629 B.R. 516, 524 (Bankr. M.D. Fla. 2021) (relying on *Seaside Eng'g* and explaining that third-party releases, bar orders, and exculpation clause are all akin and analyzed under the same standard).

Accordingly, hereinafter for the sake of efficiency, references in the the U.S. Trustee's argument to "Releases" under the Disclosure Statement and Plan incorporates the Exculpations even if not specifically noted therein.

(i) The Court Should Reject the Disclosure Statement to the Extent it Fails to Explain Why Creditors' Rights as to Third Party Releases are Stripped By Their Votes for the Plan, Silence, or Failure to Check an Opt-Out Box

As an initial matter, given the *Purdue Pharma* Court's emphasis on obtaining a claimant's consent before its claims are "bargained away" or otherwise "extinguished", it is clear that merely voting for a plan is not sufficient to evince a claimant's affirmative consent to third-party releases. *Harrington v. Purdue Pharma L.P.*, 219 L. Ed. 2d 721, 735-36 (2024). *See, e.g.*, *In re Congoleum Corp*., 362 B.R. 167, 194 (Bankr. D.N.J. 2007) (Ferguson, J.) ("[T]his Court agrees with those courts that have held that a consensual release cannot be based solely on a vote in favor of a plan."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 507 (Bankr. D.N.J. 1997) (Gindin, C.J.) ("[I]t is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan". . . . Thus, the court must ascertain whether the creditor unambiguously manifested assent to the release of the nondebtor from liability on its debt."); *In re Elsinore Shore Assocs*., 91 B.R. 238, 247 (Bankr. D.N.J. 1988) (Gambardella, J.) ("'A creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings[.]'") (quoting *Union Carbide Corp. v. Newboles*, 86 F.2d 593, 595 (7th Cir. 1982)) (analyzing section 16 of the Bankruptcy Act of 1898, precursor to 11 U.S.C. § 524(e)); *id*. at 252 (holding that, as "[a] voluntary election to release non-debtors is not present in the present plan before the court . . . the release provisions in the Second Amended Joint Plan are prohibited by the Bankruptcy Code and relevant case law").

Moreover, in *Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015), the court described an opt out requirement for a rejecting creditor as "little more than a Court-endorsed trap for the careless or inattentive creditor." *Id.* Indeed, deeming voters who rejected a plan to have consented to releases "would defy common sense" *Id*. at 81.

The court in *Chassix* explained further that "opt-out" and "deemed consent" voting rules are to "aid the parties in compiling a broader set of third-party releases than might be obtained if a different "affirmative consent" approach were adopted. *Chassix Holdings* at 78. The court stated:

> Finding "consent" in these circumstances is to some extent a legal fiction. We know from experience that many creditors and interest holders who receive disclosure statements and solicitation materials simply will not respond to them, either because they elect not to read them at all or for other reasons.

Id.

This was a particular concern in the *Chassix Holdings* case because "the relatively small recoveries that were initially proposed, and the widely publicized fact that other creditor groups endorsed the Plan, could easily have prompted an even higher-than-usual degree of inattentiveness or inaction among affected creditors in these cases." *Id.* at 80. "Furthermore, many creditors may simply have assumed that a package that related to the Debtors' bankruptcy case must have related only to their dealings with the Debtors and would not affect their claims against other parties." *Id.* at 80-81.

The court stated strongly that charging inactive creditors with understanding the scope and affect of the proposed third-party releases was beyond realistic or fair:

> Charging all inactive creditors with full knowledge of the scope and implications of the proposed third party releases and implying a "consent" to the third party releases based on the creditors' inaction, is simply not realistic or fair, and **would stretch the meaning of "consent" beyond the breaking point**. *See In re Washington Mut. Inc.,* 442 B.R. 314, 355 (Bankr. D. Del. 2011)(holding that "inaction" was not a sufficient manifestation of consent to support a release).

Id. at 81 (emphasis added).

Similarly, the court in the Delaware bankruptcy case *In re Emerge Energy Servs. LP* held "a waiver cannot be discerned through a party's silence or inaction unless specific circumstances are present. A party's receipt of a notice imposing an artificial opt-out requirement, the recipient's *possible* understanding of the meaning and ramifications of such notice, and the recipient's failure to opt-out simply do not qualify." *In re Emerge Energy Servs. LP*, Case 19-11563 (KBO), 2019 WL 7634308 (Bankr. D. Del. Dec. 05, 2019).

The circumstances of this case warrant consideration of similar concerns addressed in *Chassix Holdings*. Recoveries of General Unsecured Creditors in this case may be relatively small or possibly nonexistent. It will be clear to General Unsecured Creditors that under the Plan they only recover if the GUC Litigation Trust is successful in pursuing claims against the direct and indirect equity holders and/or prior management. If the GUC Litigation Trust is unsuccessful pursuing such claims, or can simply not collect on a judgment, the General Unsecured Creditors may receive nothing.

This small and possibly non-existent recovery for General Unsecured Creditors might prompt the higher-than-usual degree of inattentiveness or inaction that concerned the court in *Chassix Holdings*, especially if the recovery and assent of other creditor bodies becomes widely publicized as many aspects of this case have become. Under those circumstances, the Releases may impact particularly the tens of thousands of past and current employees with only unsecured claims arising from their deferred compensation retirement accounts.

The court in *In re SunEdison* examined whether creditors that abstained from voting can be deemed to accept releases. *In re SunEdison*, 576 B.R. 453, 461 (Bankr. S.D.N.Y 2017). The Court held that creditors that abstained from voting did not consent to non-debtor releases under the debtor's plan. After examining contract principles, the court found, among other things, that silence does not constitute consent unless it has the effect to mislead. *Id.* at 459. Accordingly, because creditors that abstain from voting have no duty to speak, the court stated that "implying a 'consent' to the third-party releases based on the creditors' inaction, is simply not realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point." *SunEdison*, 576 B.R. at 461 (quoting *Chassix*, 533 B.R. at 81). *But see, In re DBSD N. Am., Inc.*, 419 B.R. 179, 217-19 (Bankr. S.D.N.Y. 2009), aff'd, No. 09 CIV. 1016 (LAK), 2010 U.S. Dist. LEXIS 33253, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010); aff'd in part, rev'd in part, 627 F.3d 496 (2d. Cir. 2010)(holding that consent may be found when a disclosure statement or voting ballet warned that a failure to vote against the plan would be deemed consent to releases).

As to unimpaired creditors with no vote, the *Chassix Holdings* court held that unimpaired creditors cannot be deemed to have consented to third-party releases, because, among other things, "[i]f a creditor must release a claim against a third party under a plan (as a condition to whatever payment or other treatment the plan provides for the creditor's claim against the debtor), it is difficult to understand how such a creditor could properly be considered to be 'unimpaired' by the Plan in the first place."

Therefore, the Court should reject the Disclosure Statement to the extent it fails to explain why creditors' rights as to the Releases are stripped by their mere vote on the Plan, silence, or failure to check an opt-out box.

(ii) State Law on Contracts Also Supports Finding that Silence is not Acceptance

Contract principles govern whether a release is consensual. *In re SunEdison, Inc.*, 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017). Contract principles apply because a third-party release is basically a settlement agreement between a claimant and a defendant. The "general rule of contracts is that silence cannot manifest consent." *Patterson et al. v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 686 (E.D. Va. 2022).

Applying black letter contract principles to opt-out releases in a chapter 11 plan in *Mahwah*, the Court found that contract law does not support consent by failure to opt-out. *Mahwah*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on 'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent." *Id.* at 688.

Pursuant to the Plan, New York law applies to all agreements entered into in connection with the Plan. *Plan*, p.17. This does not necessarily require that issues arising in connection to underlying Third-Party Claims and Third-Party Releases are to be governed by the laws of any particular state. The law of the state in which such claims arise between the non-debtors would govern the contracts between those non-debtors. Debtors cannot unilaterally change choice of law principles for nonparties.

Nevertheless, a review of New York law finds that silence is not acceptance even if an offer sets that condition. *See Karlin v. Avis*, 457 F.2d 57,62 (2d Cir. 1972). "Thus, the offeror cannot ordinarily force the other party into a contract saying, "If I do not hear from you by next Tuesday, I shall assume you accept." *In re Sun Edison*, 576 B.R. 453, 458 (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW ON CONTRACTS § 2-18, AT 83 (3d ed. 1987)). An exception to this rule may exist where party has a duty to speak due to an ongoing course of conduct, the offeree accepts benefits of the offer despite the opportunity to reject them, or when silence will have the effect of misleading. *See e.g., Weiss v. Macy's Retail Holdings, Inc.*, 265 F. Supp. 3d 358 (S.D.N.Y. 2017).

The bankruptcy court in *In re Sun Edison* analyzed extensively the question of whether creditors have a duty to speak in the context of accepting bankruptcy plan third party releases under

New York law. *In re Sun Edison*, 576 B.R. 453, 458-461. The court held that the creditors had no duty to speak. It explained:

> The Debtor's argument that 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 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.
>
> * * * *
>
> Moreover, the creditors received the same percentage distribution whether they accepted the Plan, rejected the Plan, or did not vote.

Id. at 460.

Therefore, because silence is not acceptance under New York law, and creditors have no duty to respond, the Court should reject the Disclosure Statement to the extent it fails to explain why the creditors' rights as to the Releases are stripped by their silence or failure to check an opt-out box.

CONCLUSION

The Disclosure Statement and solicitation procedure should be rejected. Consent should be demonstrated through an unequivocal **opt-in** procedure under which no party would be deemed to have granted a third-party release unless the party affirmatively opted to do so in a way that was separate from the party's vote with respect to the Plan.

Dated: July 25, 2024

Respectfully submitted,

Mary Ida Townson,
United States Trustee for Region 21

/s/ William J. Simonitsch
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been served electronically through CM/ECF on July 25, 2024, to all parties having appeared electronically in the instant matter.

/s/ William J. Simonitsch
William J. Simonitsch, AUST

Appendix F

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF FLORIDA

Case No. 24-bk-02486-ger

- x

In the Matter of:

RED LOBSTER MANAGEMENT LLC,

Debtor.

- x

United States Bankruptcy Court

George C. Young Federal Courthouse

400 W. Washington Street

Orlando, FL 32801

July 26, 2024

10:00 a.m.

B E F O R E :

HON GRACE E. ROBSON

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re 1) Debtor's Expedited Motion for Approval (I) Conditionally Approving Disclosure Statement for the Proposed Joint Chapter 11 Plan of Red Lobster Management LLC and Its Debtor Affiliates, (II) Approving the Solicitation and Voting Procedures with Respect to Confirmation of the Proposed Joint Chapter 11 Plan of Red Lobster

Disclosure Statement (Doc #633)

Exhibit B to Disclosure Statement (Doc #651)

-Zurich American's Response to and Reservation of Rights of the Zurich Companies with Respect to Joint Chapter 11 Plan for Red Lobster Management LLC and its Debtor Affiliates and Disclosure Statement for the Joint Chapter 11 Plan of Red Lobster Management LLC and its Debtor Affiliates (Doc #660)

-US Trustee's Limited Objection (Doc #681)

HEARING re Debtor's Expedited Motion for Entry of an Order (I) Approving Claims Objection Procedures and (II) Authorizing Additional Claim Objection Categories For Omnibus Claims Objections (Doc #652)

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

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BY: WILLIAM SIMINITCH

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BY: BRADFORD SANDLER (TELEPHONICALLY)

ALSO PRESENT:

LARA ROESKE FERNANDEZ, Creditor Fortress Credit Corp.

KELSEY ERIN BURGESS, Creditor Wells Fargo Bank, National Association

P R O C E E D I N G S

CLERK: All rise. The United States Bankruptcy Court in the Middle District of Florida is now in session. Honorable Grace E. Robson presiding. God save the United States and this honorable court.

THE COURT: Okay. Good morning. Please be seated. All right. For those on Zoom, please keep your videos turned off and your microphones muted unless you are called to speak. We're here on the Red Lobster Management, LLC and related cases, case number 24-2486. I guess I'll take appearances in the courtroom. So who wants to start? Ms. Burgess? Ms. Fernandez?

MS. BURGESS: Good morning, Your Honor. Kelsey Burgess on behalf of Wells Fargo.

THE COURT: Good morning. Ms. Fernandez.

MS. FERNANDEZ: Good morning, Your Honor. Lara Fernandez on behalf of Fortress Investment Group.

THE COURT: Okay. Mr. Siminitch.

MR. SIMINITCH: Good morning, Your Honor. William Siminitch, the United States Trustee.

THE COURT: Okay. Good morning. All right. So we're here on a number of matters. I just want to announce before we start that I do have an emergency hearing that's been set for 10:30 because there's a foreclosure sale scheduled for 11:00, so we may have to take a pause during the hearing this morning, and then we'll have to come back to it.

So okay. So that being said, we're here on the Debtor's motion to approve -- conditionally approve the disclosure statement and to approve procedures related thereto, as well as the Debtor's motion regarding approving some claim objection procedures and additional categories for omnibus claim objections. So I see Mr. Dutson there. Good morning.

MR. DUTSON: Good morning, Your Honor.

THE COURT: Good morning. I do note I believe the U.S. Trustee did file an objection to the approval of the disclosure statement and some of the procedures related thereto.

MR. SIMINITCH: Yes, Your Honor.

THE COURT: Okay. But let me ask Mr. Dutson first. I don't know if you've had a chance to negotiate anything with the U.S. Trustee's Office.

MR. DUTSON: Thank you, Your Honor. For the record, Jeff Dutson with King & Spalding on behalf of the Debtors. We've engaged with discussions with U.S. Trustee's Office. I don't know that we have a resolution of the objection. I think from the Debtor's view, first and foremost, we view these issues as issues that should be resolved in connection with confirmation. But I'll let Mr.

Siminitch speak to their view.

THE COURT: Okay. So you're saying the Debtor is willing to take the risk that an opt-out is deemed consent and then only find out at the confirmation hearing that it's not?

MR. DUTSON: Yes, Your Honor. We've been impacted here under the substance of our view.

THE COURT: Yeah.

MR. DUTSON: But we view that it -- it's our view that we'll prevail at confirmation. We think that the release is nearly tailored and appropriate given the circumstances, and we think the opt-out provision is completely in line with provisions and procedures used in this state and throughout the country.

We also don't view them as impacted in any way by the recent Purdue decision, so we're comfortable proceeding on that basis, understanding that U.S. Trustee's Office has reserved its right with respect to those issues.

THE COURT: Okay. So all right. So then do you -- well, okay. Should we do the claim objection procedures first? Because that might be the easier, less controversial request.

MR. DUTSON: That sounds good to me, Your Honor. I'll yield the screen to Mr. Singerman if that's okay with the Court.

solicitation.

MR. SIMINITCH: Yes, Your Honor.

THE COURT: Okay.

MR. SIMINITCH: We're really -- William Siminitch for the United States Trustee. We're really focused, as the Court indicated, solely on the issue of consent to third-party releasees, which in our view includes the exculpation provision since exculpation is simply a third-party release -- a version of a third-party release for post-petition rather than prepetition, so the same standard applies.

There was some discussion earlier in the hearing as to time for this matter to be heard, and whether it's appropriate now or should be later, and I think Your Honor was sort of picking upon what our concern is. It's that if this issue wasn't raised until confirmation or not determined until confirmation, essentially the horse is already out of the barn, right? And the Debtor would be contending with the issue of re-balloting or amending the plan.

So to establish the baseline, it does come from Purdue Pharma, although we're not relying on Purdue Pharma. So Purdue held that the bankruptcy court -- bankruptcy code does not authorize a release or injunction that as part of a reorganization under Chapter 11 effectively seeks the discharge claims against a non-Debtor without the consent of effective claimants.

Now, Purdue did not however state a view on what qualifies as consensual, which is what we're dealing with here today. Is the opt-out provision consensual?

The UST's position is that the disclosure statement and voting procedures communicates to creditors inaccurate information enacts -- and enacts an improper procedure for obtaining third-party releases. Opt-out and deemed consent -- deemed consent being what's implied here with those who vote for the plan and then don't have the opportunity to opt out of the release. Deemed consent is insufficient to obtain consent, and the creditors should be instead given the opportunity to opt in.

As described by the Court in Chassix Holding 533 B.R. 64 (Bankr. S.D.N.Y. 2015), an opt-out requirement is little more than a court-endorsed trap for the careless or inattentive creditor. Opt-out just helps the Debtor compile a broader set of third-party releases that might be obtained if an affirmative consent method were used instead.

So this plan contains injunctions arising from these third-party releases and exculpations. We've got different categories of creditors affected here, but the main issue sort of overlaps everyone.

So you've got the category of those who vote no but don't check the opt-out box. As stated in the Court in

Chassix Holding, deeming creditors who rejected a plan to have consented to releases would defy common sense.

But what we're really talking about here where they were talking about not checking a box, or not returning a ballot, or abstaining, which was defined in the plan as returning a ballot but not actually marking anything on it, is silence.

The plan is governed by New York law, and under New York law, silence is not contractual acceptance. We discussed at length in our objection the bankruptcy opinions in Chassix Holding 533 B.R. 64 (Bankr. S.D.N.Y. 2015), Emerge Energy Services out of Delaware, and SunEdison 576 B.R. 453 (Bankr. S.D.N.Y. 2017) that all discuss how accepting silence, whether that be by failing to check an opt-out box, or abstaining from voting, or being ineligible to vote would stretch the meaning of consent to the breaking point.

The Court in Chassix also had an insightful comment as to unimpaired and ineligible voting classes stating that if a creditor must release a claim against a third-party under a plan as a condition to whatever payment or other treatment the plan provides for the creditor's claim against the Debtor, it is difficult to understand how such a creditor could possibly be considered unimpaired by the plan in the first place.

And so those who vote yes on the plan who do not then have the opportunity to opt out of the releases, the Court should follow cases like in re Congoleum Corp., 362 B.R. 167 (Bankr. D.N.J. 2007) and Arrowmill Development Corp. 211 B.R. 497 (Bankr. D.N.J. 1997), which found Courts should not treat votes in favor of the economic treatment of the plan as votes in favor of third-party releases because "a Court must ascertain whether the creditor unambiguously manifested assent to the release of the non-Debtor from liability on its debt."

Therefore, we ask Your Honor is that the disclosure statement and solicitation procedures should be rejected. Consent should be demonstrated through an unequivocal opt-in procedure under which no party would be deemed to have granted a third-party release -- whether it be as a release defined in a plan or exculpation as defined in a plan -- unless the party affirmatively opted to do in a way that was separate from the party's vote with respect to the plan.

THE COURT: Okay. So Mr. Dutson.

MR. DUTSON: Thank you, Your Honor. Jeff Dutson with King & Spalding on behalf of the Debtors. I think once again, the point we would make, Your Honor, is this really is a confirmation hearing issue and something that should be addressed at that time. The Debtors are comfortable moving forward, and I believe the other parties in interest, including the committee and our term lenders now that are supportive of the plan are supportive of moving forward on this basis and addressing this issue at confirmation.

Our colleagues at the U.S. Trustee's Office referred to Purdue. Purdue is very careful -- the Supreme Court was very careful in that decision to say what it was not deciding, and that decision does not have an impact on what constitutes consent.

And Courts again in this state and throughout the country, both before and after the Purdue ruling, have found that an opt-out form that's clear, that alerts creditors and anyone voting on the plan what the consequences of not opting out is constitutes consent for purposes of a third-party release. We are very much in line with the standard practice on that point.

With respect to our exculpation, the case cited by the U.S. Trustee's Office with respect to exculpation Stein Mart, that -- although it referred to exculpation, that was a different provision than the provision we have here. Our provision does not -- that case included a release within the exculpation provision.

Here, we are being very clear that the only parties entitled to exculpation, entitled to a declaration from this Court that no wrongdoing has been done during this case -- the only parties are the estate fiduciaries, the Debtors, the Debtor's professionals, the (indiscernible), the committee members, committee -- and other estate professionals.

And we're not seeking an exculpation clause that goes prior to the petition date. It's very clear the we're talking about activity that was on the petition date and afterwards, activity that's been done under this Court's supervision by, again, fiduciaries acting to maximize the value of this estate, and in the context of this plan, we believe the exculpation is appropriate.

Certainly happy to provide further briefing on this topic in advance of confirmation, and to address any other issues raised by the U.S. Trustee's Office. We know that they've only had, I think, seven days to review this, so we're happy to continue that discussion.

Also happy to brief the issue for the Court, but we do think that both of these provisions are firmly in line with standard Chapter 11 practice and also unimpaired and unimpacted by the recent decision in Purdue.

THE COURT: Okay. So all right. So then let's talk briefly about the exculpation first, which is -- so in your view, is it -- is it a release, or is it a -- parameters under which professionals would be held liable? I mean, it's -- I think in -- because a lot of times I want to look at more of the substance over a label, right? So if --

MR. DUTSON: Yeah.

THE COURT: If the U.S. Trustee's argument is it's akin in this form to a third-party release, and there are other cases that have approved it -- obviously not the Stein Mart case because that was just the -- the only exclusion was for actual fraud. But here, I think the exculpation says other than willful misconduct, gross negligence, those things are not included in what's being exculpated. And to me, it seems like it is limited in time.

The only issue I had with that was more the scope of it because the definition also includes related persons, and then related persons -- which I don't know if it's intended to be a related party -- related person is the same definition, but I guess I'm asking a question presuming it's the same. Because then that seems to incorporate a broader scope of parties or people. So can you discuss that a little bit?

MR. DUTSON: Yes, Your Honor. So that is a typo. The related parties should be related persons, and the order that we uploaded this morning is -- addresses that and fixes that typo.

To the extent that the Court believes that that definition goes beyond the estate fiduciaries, I don't think the Debtors would have any objection taking a look back at that particular definition.

Again, the intent of this provision is with respect to the -- again, the estate fiduciaries have been working post-petition to maximize the value of this -- these estates working under the supervision of this Court.

And as the Court pointed out, as is completely consistent with our standard Chapter 11 practice, we have excluded willful misconduct, gross negligence, and fraud. So to the extent someone was hiding something or anything like that, that's not impacted by this exculpation clause.

THE COURT: Okay. So you're saying the Debtors would be willing to delete from the definition of exculpated parties related persons?

MR. DUTSON: Your Honor, I think that would work for the Debtors. This obviously impacts the committee as well, so happy to hear them on a different view. We had not had a chance to confer on this exact point.

THE COURT: Okay. All right. I mean, I guess related person could stay in there for purposes of the other definition, like for released parties. But for purposes of the exculpated parties, if that's carved out, then the way I view the exculpation provision in the plan is more of a standard of care versus a release. So I would be -- I don't have any problem with that.

So okay. Then the -- so the real issue to me is the opt-out/opt-in issue. And I know I have a -- the emergency hearing in a couple of minutes, but I've reviewed all of -- or as many cases as I could between when the motion was filed and today's hearing, including cases that were cited by the U.S. Trustee and its objection as well as the cases that go the other way.

I'm not -- I know that there were some cases that were pending on this issue post-Purdue. So Mr. Dutson, I think you mentioned that there were some cases that approved the procedure post-Purdue. Can you tell me what those --

MR. DUTSON: Yes, Your Honor. The one that comes to mind is the Invitae decision that was post-Purdue in new Jersey. I believe it was just within the past few weeks. That addressed this exact issue, whether an opt-out provision constituted consent.

And again, the point made by the Court and made by the Debtors here today is the Supreme Court decision was very careful not to disrupt the status quo with established practice on these issues. The ruling was about whether non-consensual releases were permitted. It didn't go to what constitutes consent. They went out of their way to say they're just not going to address that.

And so our view is the Supreme Court deliberately did not disturb the status quo and is preserving the existing practice, which is consistent also with class action law and other areas of the law where this isn't about silence.

This isn't a Debtor saying, "Hey, we have a plan, and we're going to put a notice of it in Wall Street Journal. We're not going to tell anyone what's in it, and you have to come find out. We are going out and serving these creditors and these parties in interest with very clear notices that are very conspicuously state what is going on and give them the ability to opt out of these releases.

THE COURT: Okay. Well, I mean, I know you're saying it preserves that status quo, and I acknowledge the Supreme Court explicitly left open the issue of what is a consensual release. But pre-Purdue, there was still a split of authority.

Maybe the majority of courts did approve it, but there were certainly not an insignificant number of courts that did not approve it. To me, it seems -- here, you're seeking approval of third-party releases, post-Purdue, that prior to Purdue, the courts could at least -- in certain jurisdictions were authorized to issue third-party releases over -- without a party's consent.

Now the law is clear that bankruptcy courts cannot do that, so to me, it is a little bit different to include in a provision, in a plan and then try to bind parties by lack of response.

So all right. So with that, I'll continue in a minute, but let me take my emergency 10:30, and then we'll go back -- come back to this.

(Recess)

THE COURT: Okay. Let's go back to Red Lobster, case number 24-2486. Okay. So like I said, I have reviewed the cases. I've reviewed Purdue Pharma case, and as I said earlier, that case did -- the Supreme Court did leave open the question of what is consensual release, and like I said, there is a split of authority that existed prior to Purdue as whether consent must be expressed by an affirmative act versus can be implied by silence.

The U.S. Trustee does point out that the Debtor's plan provides that New York law is what is to apply, and under the -- under New York law, there is -- silence is not consent unless there are -- there are three exceptions: the ongoing course of conduct; whether there are benefits that are accepted by the offeree in this case, which would be claimants or creditors and despite an opportunity to reject, they -- the offer is -- knowing that the offer expects compensation; and then the third exception is whether the offeror has given the offeree, the Debtor has given here the creditors, a reason to understand that the silence will constitute acceptance, and that being silent is basically an intent to accept the offer. And that exception really requires some element of deception or misleading.

Here, I can't find that a failure to return a ballot or an opt-out form could be attributed to an actual consent to a release. I mean, it could be carelessness, inattentiveness, mistake, or just, like I said, lack of interest.

Here, the disclosure statement shows that creditors are receiving an unknown and possibly de minimis distribution, so I also have concerns that there's lack of consideration, especially for a third-party claim where it's one thing for the rights and obligations bound between the parties, meaning the Debtors and creditors.

But to third parties, especially in light of Purdue, people may think, "Well, there's no condition under which or circumstance under which a bankruptcy court is going to approve a third-party release.

Here, the case has also been moving quickly. You know, it's a big case. It's moving fast. Time frames have been shortened. The claim's bar date has not yet even run, so I think that the third-party release is a fundamentally different type of provision than other types of provisions.

And because bankruptcy courts can only adjust the relationship between a creditor or an equity holder and the

Debtor, not third parties, I'm not going to impose a duty to opt out. So you might as well change it now and not risk later if you know that I'm not going to be approving it down the road.

And like I said, as to the exculpation, that I'm okay with because it seems to me it's limited. With the removal of the related persons from the definition, it's limited to estate professionals, those involved with the plan, and limited in time. So to me, it seems more like a standard of care, and it does except out the actual fraud, gross negligence, and willful misconduct.

So that being said, there are other issues I think that the U.S. Trustee pointed out, meaning the disclosure statement doesn't contain adequate information as to why the releases are in there in the first place. I mean, it recites the provisions and says this is what's going to happen, but it doesn't necessarily discuss like why is that there, and why giving a vote is giving a release.

That being said, I'm okay with the idea that an acceptance of the plan is consenting to the release. But as to parties that either don't vote or turn in a blank ballot and are deemed to accept, they need to specifically opt in. So that's my view of it.

And I also think that maybe Article 2 of the disclosure statement should include -- maybe you'll want to include reasons why a party would want to opt in.

I also did not see any discussion of the carveout that was negotiated for unsecured creditors, which may be something that the Debtors want to include in the disclosure statement.

Also, there are on pages 83 and 84, there's references to -- let me pull up the page -- being able to satisfy voting requirements under the RSA as a Class 3 and 4. I think that's a typo. So if you look at Document 633, page 83 at the bottom, subparagraph (f) in Section 7.2, it references --

MR. DUTSON: That's correct, Your Honor. Thank you --

THE COURT: Okay. All right.

MR. DUTSON: -- for noting that.

THE COURT: And yeah. So I don't know if you already caught that in the redline, which I didn't get a chance to look at. But that was something there. And then -- okay. So then I guess you're going to have to make edits to incorporate the -- my ruling on that requiring opt-in versus allowing opt-out.

MR. SIMINITCH: Your Honor, if I can ask for clarification?

THE COURT: Yeah.

MR. SIMINITCH: So you had mentioned people who don't vote. You mentioned people who submit a blank ballot, the abstaining category. I'm assuming "don't vote" includes either were eligible but failed to vote as well as those that were ineligible to vote, such as they were considered unimpaired, and therefore under the existing procedure, it would -- even if they're ineligible to vote, they get sent the opt-out form.

THE COURT: Right. So they should be getting an opt-in form.

MR. SIMINITCH: In form. Correct.

MR. DUTSON: Okay.

MR. SIMINITCH: And then the one category not mentioned -- or I didn't hear you mention, Your Honor -- was rejecting creditors. In other words, they voted no. Are they -- my understanding based on the totality of your ruling is if you vote no to the plan, you would still have to opt in.

THE COURT: Correct. So a reject -- I'm not deeming a rejection a consent. I'm deeming a reject -- just like an acceptance will be a consent to the release, a rejection is going to be a rejection of the release unless they opt in.

MR. SIMINITCH: Thank you, Your Honor.

THE COURT: So yeah. So just to, I guess, recap, an acceptance will be deemed consent to the release.

Otherwise, the parties who are unimpaired -- which I also agree with the judges that said that if you're imposing a requirement to opt out or you're going to be bound to release claims, that's not really unimpaired.

So this -- my ruling basically keeps them unimpaired. They should get an opt-in form. Those who are impaired and deemed to reject also should get the opt-in form because they're not going to be -- I'm not deeming them to consent to the release. And then rejection, same thing. They're not consenting unless they opt in.

You may want to also add to the ballot the definition of a related party to the extent it's included because that is included as part of the definition of released party, even if it's removed from the definition of exculpated party.

And okay, so then another thing is the Exhibit 2, which is the confirmation notice. I think to the title of the notice -- I think you should add references to the releases and injunctions. And then on generally all of the exhibits, just update or correct the Court's website, so -- if you haven't done so already.

I think that covers the scope of the -- I didn't have any other issues with any of the other dates or procedures. Mr. Siminitch, did you have any other concerns?

MR. SIMINITCH: Nothing else, Your Honor.

Appendix G

United States Bankruptcy Court
Southern District of Texas

ENTERED
August 16, 2024
Nathan Ochsner, Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	CASE NO: 24-90052
ROBERTSHAW US HOLDING CORP., *et al.*,	§	
Debtors.	§	Jointly Administered
	§	CHAPTER 11

MEMORANDUM DECISION ON PLAN CONFIRMATION
(RE: ECF NO. 857)

Robertshaw and its affiliates ("**Robertshaw**") specialize in creating solutions used in everyday appliances. It is likely that your refrigerator, clothes washer, dryer, dishwasher, cooking range, or central heating system includes a Robertshaw product. The company employs over 5,000 people across many countries. And all of their U.S. inventory is located in facilities in Laredo and Brownsville, Texas.

Before these chapter 11 cases started, Robertshaw experienced significant business and financial challenges ranging from supply chain issues to increased material, labor, and logistics costs. At the same time, Robertshaw was also embroiled in a bitter dispute about liability management transactions with certain lenders and its equity sponsor.

Robertshaw started these chapter 11 cases in February 2024 to pursue a value maximizing sale of assets and to resolve claims asserted in prepetition lawsuits about the liability management transactions. Over the past six months, much has happened. The Court has addressed debtor-in-possession financing issues, bidding procedures for an auction for the sale of substantially all of Robertshaw's assets, approved a sale for the assets with a credit bid, and presided over an adversary proceeding involving liability management disputes. Everything has been hotly contested.

The Court now considers confirmation of the *First Amended Joint Plan of Liquidation of Robertshaw US Holding Corp. and its Affiliated Debtors Under Chapter 11 of the Bankruptcy Code* ("**Plan**"). The Plan is supported by an ad hoc group of Robertshaw's secured creditors, its equity sponsor, and the Official Committee of Unsecured Creditors ("**UCC**"). All objections have been resolved except from two objectors.

Invesco Senior Secured Management, Inc. and certain related funds ("**Invesco**") object to plan confirmation for several reasons, including a global settlement with the UCC embodied in the Plan, plan classification under Bankruptcy Code § 1122, unfair discrimination under § 1129(b)(1), and plan feasibility under § 1129(a)(11). Separately, the U.S. Trustee alleges the opt-out feature for consensual third-party releases under the Plan is improper in light of the recent U.S. Supreme Court decision in *Harrington v. Purdue Pharma, L.P.*, 144 S. Ct. 2071 (2024). For the reasons stated below, each of the objections is overruled. The Court confirms the Plan.

Jurisdiction and Venue

The Court has jurisdiction under 28 U.S.C. § 1334(b). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(L). The Court has constitutional authority to enter final orders and judgments. *Stern v. Marshall*, 564 U.S. 462, 486–87 (2011).

Background

The record ("**Record** ") established to support confirmation of the Plan includes:

All documents identified on Robertshaw's Amended Witness and Exhibit List (ECF Nos. 868, 870), including:

- the Plan;
- Disclosure Statement related to the Plan;
- Settlement Term Sheet with the UCC;
- First Amended Plan Supplement;
- Declaration Alex Orchowski of Kroll Restructuring Administration LLC, including the voting and tabulation reports annexed to the declaration ("**Voting Report**");
- Declaration of Stephen Spitzer of AlixPartners (as modified on the record at the hearing);
- Declaration of Scott D. Vogel, Independent Director (as modified on the record at the hearing);
- Declaration of Neil Goldman, Independent Director (as modified on the record at the hearing); and
- Declaration of Andrew Scruton of FTI Consulting, Inc.

All documents identified on the Witness and Exhibit List (ECF No. 839) filed by One Rock Capital Partners, LLC ("**One Rock**"), including all documents filed in Adversary Case No. 24-03024 (the adversary proceeding about the liability management transactions).

All documents identified on the Witness and Exhibit List (ECF No. 840) filed by the Ad Hoc Group (defined below), including:

- June 20, 2024 Memorandum Decision and Order (Adv. Proc. No. 24-03024, ECF No. 351);
- Super-Priority Credit Agreement, dated May 9, 2023 (Adv. Proc. No. 24-03024, ECF No. 2-1);
- Trial Day 2 (May 24, 2024) Transcript (Adv. Proc. No. 24-03024, ECF No. 325);
- Trial Day 4 (May 29, 2024) Transcript (Adv. Proc. No. 24-03024, ECF No. 336); and
- Trial Day 5 (May 30, 2024) Transcript (Adv. Proc. No. 24-03024, ECF No. 339).

All documents identified on Invesco's Witness and Exhibit List (ECF No. 836), including all documents filed in these chapter 11 cases.

No objecting party elected to cross examine a witness or offer counter-fact or expert testimony at the confirmation hearing. So all statements in the Declarations referenced above in support of plan confirmation (as modified on the record at the confirmation hearing) are unrefuted.

The undisputed evidence admitted into the Record in support of confirmation demonstrates, by a preponderance of the evidence, that the Plan is confirmable and should be confirmed. The Plan satisfies all applicable requirements under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Plan is in the best interests of Robertshaw and the estates.

All consensual resolutions to objections to confirmation—including an objection from the U.S. Trustee about exculpations in the Plan—as stated on the record at the confirmation hearing are in the best interests of Robertshaw and the estates and supported by the Record. All objections to confirmation that were not withdrawn or resolved by agreement at or before the confirmation hearing are overruled for the reasons stated below.

The findings and conclusions in this Memorandum Decision are the Court's findings of fact and conclusions of law under Bankruptcy Rule 7052, made applicable to Plan confirmation under Bankruptcy Rule 9014. Factual and legal conclusions will be treated as such; however they are labeled.

Below is a brief background about important matters in these chapter 11 cases that relate to Plan confirmation. Much of the background about the prepetition litigation and a significant adversary proceeding are detailed in the Court's June 2024 decision in Adv. No. 24-03024 ("**Adversary Decision**"). The Record includes the Adversary Decision and all documents admitted in the adversary proceeding.[1] Many important facts in the Adversary Decision are repeated below to provide a thorough description.

Robertshaw's Prepetition Liability Management Transactions and Related History with Prepetition Lenders

In 2018, an affiliate of One Rock acquired Robertshaw from its prior sponsor.[2] The purchase was financed with $510 million in first-lien term loans under a First-Lien Credit Agreement, $110 million in second-lien term loans under a Second-Lien Credit Agreement (together, the "**Original Credit Agreements**"), and about $260 million of equity.[3] To finance operations, Robertshaw entered a separate asset-based revolving facility maturing in December 2023 ("**ABL Facility**").[4]

I. The May 2023 Uptier Transaction

In May 2023, Robertshaw negotiated a liability management transaction with Bain Capital Credit, LP on behalf of certain of its managed funds ("**Bain Capital**"), Canyon Capital Advisors LLC on behalf of certain of its managed funds ("**Canyon Capital**"), Eaton Vance Management on behalf of certain of its managed funds ("**Eaton Vance**") (collectively, the "**Ad Hoc Group**"), and Invesco under the Original Credit Agreements.[5] Invesco and the Ad Hoc Group formed an ad hoc group to reach "Required Lender" status. The lenders proposed a transaction through which the parties would amend the Original Credit Agreements to (i) execute a new Super-Priority Credit Agreement ("**SPCA**"), (ii) provide $95

[1] Footnotes 2 through 68 are all citations to documents in Adversary Proceeding Case No. 24-03024, which were admitted under the witness and exhibit list filed at ECF No. 839 in Case No. 24-90052. Trial transcripts from the Adversary Proceeding are referenced throughout this decision as Tr.2 (ECF No. 325), Tr.3 (ECF No. 340), Tr.4 (ECF No. 336), Tr.5 (ECF No. 339), and Tr.6 (ECF No. 346).
[2] Tr.3 10:2–11.
[3] Tr.3 10:2–11.
[4] ABL Credit Agreement, Joint Exhibit 1, ECF No. 250-11.
[5] Tr.4 65:4–22, 407:2–14.

million of new First-Out New Money Term Loans, and (iii) allow participating lenders to exchange their existing first- and second-lien loans under the Original Credit Agreements for Second-Out and Third-Out Term Loans under the SPCA ("**May Transactions**").[6] This type of liability management transaction is often called an uptier. It was realized through a series of transactions in a short time span, the steps of which were laid out in advance.[7] The SPCA is governed by New York law.[8]

The SPCA adopted much of the same (or similar) language as the Original Credit Agreements, while making some changes thought prudent by the participating lenders then to try to protect their position.[9] This included adding blockers to protect against some future lender-on-lender type actions, but not all.[10] Matthew Brooks, a managing director at Invesco, testified that they "*limited* the ability to do another uptier" but outright "*eliminated* the ability to do any sort of dropdown transactions."[11] The SPCA did not materially change the definition of "Required Lender." Required Lender status, as the parties understood it, was designed to be fungible—whichever party or group meets the status may fluctuate from time to time as debt is bought or traded or ad hoc groups form and dissemble.[12] The dispositive authority on which party or group holds enough debt to be Required Lender is a register maintained by an Administrative Agent.[13]

The SPCA defines "Required Lender" to mean "[l]enders having Loans representing more than 50.0% of the sum of the total First-Out New Money Term Loans and Second-Out Term Loans at such time."[14] Section 9.02 of the SPCA allows Required Lenders to amend the SPCA, subject to enumerated exceptions (commonly referred to as "sacred rights").[15] Required Lender status gives lenders the right to, among other things, (i) agree with Robertshaw, as "Borrower," to incur additional "Indebtedness," including, but not limited to, the issuance of more term loans under the SPCA; (ii) consent to or waive any breaches, defaults, or "Events of Default";

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[6] Super-Priority Credit Agreement at Recitals, ECF No. 250-1.
[7] Tr.4 306:3–307:18.
[8] Super-Priority Credit Agreement, § 9.10, Joint Exhibit 1, ECF No. 250-1.
[9] Tr.4 256:13–258:21, 409:22–410:15.
[10] Tr.4 409:22–410:15.
[11] Tr.4 409:22—410:15.
[12] Tr.4 256:13—260:15.
[13] Super-Priority Credit Agreement, § 9.05(b)(iv), Joint Exhibit 1, ECF No. 250-1; Tr.4 25:22–25.
[14] Super-Priority Credit Agreement, § 1.01 "Required Lender," Joint Exhibit 1, ECF No. 250-1.
[15] Super-Priority Credit Agreement, § 9.02(b)(A), Joint Exhibit 1, ECF No. 250-1.

and (iii) direct the Administrative Agent to pursue remedies in the event of a breach, default, or Event of Default.[16]

Around July 2023, Invesco acquired more than 50% of the total First-Out and Second-Out Term Loans issued in connection with the May Transactions and obtained Required Lender status.[17] The Ad Hoc Group did not know about this change.[18] Invesco met the Required Lender criteria because it owned a majority of the First-Out Term Loans but not the Second-Out Loans.[19] So the status was arguably fragile. Another lender (or group of lenders) could buy up the majority of the Second-Out Term Loans and Robertshaw could pay down some of the First-Out Term Loans. In that case, Invesco would cease to be a Required Lender.

II. Invesco Led Amendment Nos. 1-4

Robertshaw faced another liquidity crunch in the Fall of 2023, despite its efforts to implement a turnaround plan supported by the company's advisors and One Rock.[20] A key component of this plan involved improving its customer relationships and contracts.[21] To address its liquidity issues and continue forward, it was close to entering into the "**Brigade Deal**," which would have refinanced the ABL facility set to mature in December 2023 and provided a cash infusion to Robertshaw to make interest payments due under the SPCA.[22]

Invesco found it troubling that, though it was Required Lender, the company sought financing from an outside source it believed to be a historically "difficult counterparty."[23] Invesco reached out through joint counsel to the ad hoc group that participated in the May Transactions to inform Robertshaw that it would not support the Brigade Deal.[24] Invesco also believed the ad hoc group of lenders disbanded once the SPCA was effective.[25] So it did not inform the other lenders that it had retained separate counsel to start working on amendments to the SPCA because Robertshaw had missed an interest payment, and the grace period was almost up.[26]

[16] Super-Priority Credit Agreement, § 9.02, Joint Exhibit 1, ECF No. 250-1.
[17] Tr.4 321:6–10.
[18] Tr.4 167:5–23, 322:1–23.
[19] Tr.4 15:19–16:3, 322:2–23; Plaintiff Exhibit 78 at 2786, ECF No. 243-29.
[20] Tr.3 32:22–34:23.
[21] Tr.3 32:22–34:23.
[22] Tr.6 10:1–11:25, 12:6–19.
[23] Tr.4 54:8–55:21, 335:7–336:13.
[24] Tr.4 336:22–347:5.
[25] Tr.4 68:6–69:22, 320:3–16.
[26] Tr.4 74:22–75:4, 77:1–17, 164:24–165:7, 168:20–169:8.

Invesco and Robertshaw entered into Amendment No. 1 on October 5, 2023.[27] It extended Robertshaw's grace period to make the missed interest payment due at the end of September to October 13.[28] Without this amendment, failure to make the payment by October 6, 2023 would have resulted in an "Event of Default."[29]

At the same time, the parties discussed a proposal for Robertshaw to enter into a new ABL facility. Invesco offered Robertshaw a bridge loan of $17 million in the form of additional First-Out Term Loans in exchange for Robertshaw's agreement to negotiate two other financing transactions with Invesco, including (i) a new $40 million "delayed draw term loan facility" conditioned upon Robertshaw's agreement to "repurchase" (i.e., uptier)[30] "100% of the Invesco owned Third-Out Term Loans at par" through "open market purchases" and (ii) a new $73.4 million ABL facility under which Invesco would exchange its Third-Out Term Loans for "New ABL Loans."[31] The Ad Hoc Group was not informed about this Amendment, the missed interest payment which necessitated the Amendment, or the financing proposal.[32]

Invesco and Robertshaw failed to negotiate the terms of Invesco's financing proposal. On October 13, 2023, Invesco and Robertshaw executed Amendment No. 2.[33] Invesco agreed to provide Robertshaw with the $17 million bridge loan in the form of new incremental First-Out Term Loans to make the missed interest payment. Mr. Brooks from Invesco testified that Invesco understood that Required Lenders could amend § 6.01 of the SPCA to allow for additional "Indebtedness"—which is permitted in Amendment No. 2.[34] To the extent this new "Indebtedness" could breach the terms of the SPCA, Invesco waived all potential defaults.[35] Invesco also committed to provide an additional $40 million term loan if certain conditions were met, but it set a November 8 deadline for Robertshaw to refinance the ABL Facility. It also included the potential for a new liability management transaction

[27] Amendment No. 1 To Super-Priority Credit Agreement at Preamble, Plaintiff Exhibit 1, ECF No. 242-1.
[28] Amendment No. 1 To Super-Priority Credit Agreement, §3, Plaintiff Exhibit 1, ECF No. 242-1.
[29] Amendment No. 1 To Super-Priority Credit Agreement at Preamble, Plaintiff Exhibit 1, ECF No. 242-1.
[30] Plaintiff Exhibit 323 at 3, ECF No. 248-35; Tr.4 283:9–284:21.
[31] Plaintiff Exhibit No. 61, ECF No. 243-11.
[32] Plaintiff Exhibit 64, ECF No. 243-14; Plaintiff Exhibit 62, ECF No. 243-12; Tr.4 348:16—351:21; Tr.4 359:3–361:23.
[33] Tr.4 362:5–363:8.
[34] Tr.4 268:5–22.
[35] Amendment No. 2 To Super-Priority Credit Agreement, §7, Plaintiff Exhibit 2, ECF No. 242-2.

for Invesco's Third-Out Loans. The Ad Hoc Group were not informed about this Amendment.

Robertshaw and Invesco failed to reach agreement on the terms of a new ABL facility, and the December 2023 existing ABL Facility maturity loomed. So the parties executed Amendment No. 3, which extended the November 8 deadline to November 10. The Ad Hoc Group were not informed about this Amendment.

Invesco and Robertshaw then signed Amendment No. 4 in November 2023. In exchange primarily for an extension of the time to declare an Event of Default under the SPCA until December 13, Robertshaw would start a chapter 11 bankruptcy case by no later than January 2, 2024 and, as a debtor in possession, to:

- Negotiate, in good faith, a debtor in possession financing facility, a restructuring support agreement, and a stalking horse purchase agreement with Invesco.[36]
- Confirm that the board of its parent had directed their professionals to begin the above negotiations.[37]
- Deliver to Invesco a wind-down budget following the close of the stalking-horse sale, a list of critical vendors to be paid by the debtor in possession financing along with justifications for those payments, a summary of Robertshaw's executory contracts along with recommendations regarding their treatment.[38]

Amendment No. 4 also required Robertshaw to appoint an "Independent Director" to the Board of Directors of Robertshaw's parent company. It gave the "Independent Director" sole authority to negotiate the terms of the bankruptcy milestones laid out in the Amendment.[39] Invesco selected Neal Goldman.[40] The Ad Hoc Group were not informed about this Amendment.

[36] Amendment No. 4 To Super-Priority Credit Agreement, §7(e), Plaintiff Exhibit 4, ECF No. 242-4.
[37] Amendment No. 4 To Super-Priority Credit Agreement, §7(f)(i), Plaintiff Exhibit 4, ECF No. 242-4.
[38] Amendment No. 4 To Super-Priority Credit Agreement, §7(f)(v), Plaintiff Exhibit 4, ECF No. 242-4.
[39] Amendment No. 4 To Super-Priority Credit Agreement, §7(f)(iv)(2), Plaintiff Exhibit 4, ECF No. 242-4.
[40] Tr.2 10:11–12:12.

Invesco was aware of Robertshaw's aversion to filing on January 2, which would have interfered with its existing turnaround plan—particularly the customer relations component.[41] There were discussions of a non-bankruptcy path.[42] Invesco ultimately declined to a discuss out-of-court alternatives until Robertshaw signed Amendment No. 4.[43] Taking his fiduciary duty as independent director seriously, Mr. Goldman instructed Robertshaw's advisors to look for alternative solutions.[44]

Invesco directed the administrative agent in writing not to post any of these amendments.[45] Based on conversations with Mr. Brooks, advisors for Robertshaw believed it would jeopardize negotiations around an out-of-court deal with Invesco if Robertshaw posted the amendments.[46] Around November 15, the Ad Hoc Group learned about the amendments when a third party casually mentioned them to an employee at Bain Capital.[47] Counsel for the Ad Hoc Group then reached out to the Administrative Agent on November 16 demanding that the amendments be posted. Amendment Nos. 1–4 were posted later that day.

III. The December Transactions and Amendment No. 5

After discovering the Invesco-led Amendments and looming bankruptcy, the Ad Hoc Group started working with Robertshaw and One Rock on alternative financing solutions and ultimately submitted a proposal.[48] The board's advisors presented an analysis of the relative benefits of the December Transactions compared to filing for bankruptcy on January 2. The record is undisputed that the company desperately needed the additional liquidity and runway provided by the December Transactions. Based on that analysis, the board, including Mr. Goldman, voted to approve the transactions.[49] The December Transactions consisted of six sequential steps:

[41] Tr.2 20:20–21:19; Tr.3 37:1–41:14.
[42] Tr.3 37:1–41:14; Joint Exhibit 25, ECF No. 250-29; Plaintiff Exhibit 91, ECF No. 243-43.
[43] Plaintiff Exhibit 91, ECF No. 243-43.
[44] Tr.2 11:3–12, 14:2–15:17.
[45] Tr.5 246:23–247:7; Deposition Testimony of Administrative Agent (Jennifer Anderson), ECF No. 312-1 at 4.
[46] Tr.6 63:7–24.
[47] Tr.4 172:2–173:3, 378:20–379:25.
[48] Plaintiff Exhibit 148, ECF No. 244-51.
[49] Tr.2 15:25–20:14, 166:8–23; Plaintiff Exhibit 247, ECF No. 246-47.

First, Range Parent's ("**Holdings**")[50] parent, Range Investor LLC, formed RS Funding Holdings, LLC ("**RS Funding**").[51] Holdings is Robertshaw's parent. Range Investor holds 100% of the voting interest in RS Funding.[52] Robertshaw holds 100% of the economic interest in RS Funding.[53]

Second, on December 11, the Ad Hoc Group and One Rock loaned $228.3 million to RS Funding ("**RS Funding Credit Agreement**").[54]

Third, exercising its power as 100% voting interest owner, Holdings instructed RS Funding to distribute the proceeds of the $228.3 million loan to Robertshaw.[55]

Fourth, Robertshaw used the funds from RS Funding to (i) pay off the outstanding $30 million ABL Facility in full; (ii) voluntarily prepay $117.6 million of the outstanding First-Out Term Loans; and (iii) pay an additional $30.7 million in required make-whole payments to the holders of First-Out Term Loans.[56] The prepayment was made to the Administrative Agent, who, in turn, disbursed the funds to the appropriate First-Out Term Loan Lenders and recorded the prepayment in the register.[57] After the prepayment, the register maintained by the Administrative Agent reflected that the Invesco no longer owned more than 50% of the combined First- and Second-Out Term Loans needed to maintain Required Lender status.[58] The Ad Hoc Group now held Required Lender status.[59]

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[50] Super-Priority Credit Agreement at Preamble, Joint Exhibit 1, ECF No. 250-1.
[51] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[52] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[53] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[54] Plaintiff Exhibit 148 at 5, ECF No. 244-51.
[55] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[56] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[57] Tr.4 315:17–317:1.
[58] Plaintiff Exhibit 16, ECF No. 242-20.
[59] Plaintiff Exhibit 16, ECF No. 242-20.

> *Fifth*, the Ad Hoc Group, as Required Lenders, executed Amendment No. 5 to the SCPA.[60] This Amendment authorized Robertshaw to issue $228 million in incremental debt.[61]
>
> *Sixth*, once the conditions precedent to Amendment No. 5 were either met or waived, Robertshaw issued $218 million in new First-Out and Second-Out Loans.[62] Robertshaw returned an equivalent amount to RS Funding, which repaid the loan under the RS Funding Credit Agreement.[63]

Invesco received over $90 million. It tried to reject the prepayment (and now holds the funds in protest in escrow).[64] But the Administrative Agent, tasked with disbursing funds in accordance with the register, disbursed the funds to Invesco.[65] Invesco sent notice of an Event of Default under the SCPA to Robertshaw based on this allegation on December 11, 2023.[66]

Invesco challenged the prepayment as violating the SPCA because not all the proceeds were used to pay off existing indebtedness, and they were not distributed pro rata among all tranches of debt. Instead, a portion of the RS Funding cash distribution was added to Robertshaw's balance sheet, and some was used to pay off the ABL. Only the First-Out Term Loans received a prepayment. This allegedly violated § 2.11(b)(iii) and (vi) of the SPCA.

IV. Invesco Files Suit in New York State Court

Less than two weeks after the execution of Amendment No. 5, Invesco filed a complaint in the Supreme Court of the State of New York, asserting claims for (i) breach of the SPCA against Robertshaw and the Ad Hoc Group; (ii) breach of the covenant of good faith and fair dealing against Robertshaw and the Ad Hoc Group; (iii) tortious interference with contract against One Rock; and (iv) intentional and constructive fraudulent transfer against the Ad Hoc Group and One Rock. Invesco also sought a preliminary injunction "(i) enjoining any transactions or arrangements purportedly requiring only the consent or direction of the Ad Hoc Group and/or One Rock, including but not limited to those in Amendment No. 5,

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[60] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[61] Amendment No. 5 To Super-Priority Credit Agreement, Plaintiff Exhibit 5, ECF No. 242-5.
[62] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[63] Plaintiff Exhibit 148 at 7, ECF No. 244-51.
[64] Tr.4 315:17–317:1; Tr.5 15:16–21.
[65] Tr.4 315:17–317:1.
[66] Plaintiff Exhibit 348, ECF No. 248-67.

(ii) enjoining the execution of Amendment No. 5 by the Administrative Agent, and (iii) reinstating of Amendment No. 4."[67]

The New York State Court did not rule on Invesco's motion before the petition date in these bankruptcy cases. This litigation is currently stayed.

V. Robertshaw Starts Bankruptcy Cases and the Invesco Adversary

Robertshaw started these bankruptcy cases on February 15, 2024. Robertshaw, One Rock, and the Ad Hoc Group started Adversary No. 24-03024 on the same day, seeking a declaration that the transactions, including Amendment No. 5, were valid and enforceable and that neither the Ad Hoc Group nor Robertshaw breached the SPCA by entering into them. One Rock also sought a declaration that it did not tortiously interfere with the SPCA under New York law.

Invesco filed two counterclaims seeking declaratory judgment against Robertshaw that it breached the SPCA and that Invesco was still Required Lender.[68]

After a full evidentiary trial, the Court issued the Adversary Decision. The Court found that the members of the Ad Hoc Group and One Rock were the Required Lenders under the SPCA. And the SPCA as amended by Amendment No. 5 was valid and enforceable. The Court also held that the Ad Hoc Group did not breach the SPCA, there was no breach any implied duty of good faith and fair dealing under New York law, and One Rock did not tortiously interfere with the SPCA under New York law.

The Court, however, did find that Robertshaw breached the SPCA by failing to remit 100% of the "Net Proceeds" of the $228 million loan from One Rock and the Ad Hoc Group to RS Funding. Invesco had a right to file a proof of claim in the main bankruptcy case for any alleged monetary damages arising out the breach.

Invesco filed the proof of claim. Robertshaw, the Ad Hoc Group, and One Rock objected. The Court conducted an evidentiary hearing on August 2, 2024 and took the matter under advisement.

[67] Plaintiff Exhibit 170, ECF No. 245-20.
[68] Invesco's Answer, Affirmative Defenses, and Counterclaims at 39, ECF No. 45.

VI. The Guardian Action

There was also prepetition litigation about the May Transactions. In November 2023, certain prepetition lenders sued Robertshaw, the Ad Hoc Group, and Invesco (which was aligned with the current Ad Hoc Group on this uptier) in New York State Court ("**Guardian Action**"). The Guardian Action was removed to this Court on the petition date (Adv. No. 24-03025).

In March 2024, the parties agreed on a global settlement of all claims asserted in the Guardian Action and the related adversary proceeding. In April 2024, the parties agreed to a joint stipulation staying the adversary proceeding pending negotiation of definitive documentation of the settlement.

The Asset Auction and Sale Order

In March 2024, the Court entered an order approving Robertshaw's bidding procedures, including designation of a "Stalking Horse Bidder" (ECF No. 359). The Stalking Horse Bidder is an entity formed by or on behalf of the Ad Hoc Group and One Rock. This order established a bid deadline and auction procedures. Ultimately, neither Invesco nor any other party submitted a competing bid. So the auction was cancelled and the Stalking Horse bid was designated as the "Successful Bid."

In June 2024, the Court entered an order approving the sale of the North American Debtors' assets to the Stalking Horse Bidder (a/k/a "**Purchaser**") on the terms described in the Asset Purchase Agreement ("**Sale Order**") (ECF No. 681). The Asset Purchase Agreement includes aggregate consideration of (i) a credit bid under § 363(k) of the Bankruptcy Code for about $286 million, comprised of the principal amount of $217 million of Prepetition Secured Super-priority Claims plus accrued and unpaid interest, and about $65 million in DIP financing obligations; (ii) payment of a "Post-Effective Date Amount"; and (iii) assumption of Assumed Liabilities (as defined in the Asset Purchase Agreement).

In July 2024, Invesco sought a stay of the Sale Order pending appeal. The Court denied the motion. On August 12, 2024, the U.S. District Court for the Southern District of Texas entered an order staying the Sale Order, on an interim basis, pending full briefing and a decision on whether a stay pending appeal is merited (ECF No. 944).

Summary of the Plan

In June 2024, the Court entered an order approving the Disclosure Statement for the Plan, established the deadline for objecting to confirmation of the Plan, and the confirmation hearing date (ECF No. 676).

This a liquidating chapter 11 plan. Under the Sale Order, Robertshaw intends to sell substantially all assets to Purchaser. The Plan provides for required distributions, appointment of a plan administrator to make distributions and wind up Robertshaw's estates, and a liquidating trust to administer and liquidate retained causes of action.

Under the Plan, voting classes receive the following treatment:

• Class 5 (General Unsecured Claims) will receive (a) a pro rata share of the GUC Recovery Pool (about $11 million net of Go-Forward Claims described below), and (b) its pro rata share of proceeds (if any) realized from the liquidation trustee's pursuit of retained causes of action;

• Class 6 (Funded Debt Deficiency Claims) will receive their pro rata share of a Funded Debt Deficiency Claim Pool (about $10 million), subject to the waterfall provisions of the SPCA, including treatment of interest whether accruing pre or postpetition and whether or not allowed, with the following specific treatments:

o Class 6a (First-Out Funded Debt Deficiency Claims) will also receive a pro rata share of proceeds (if any) realized from the liquidation trustee's pursuit of retained causes of action;

o Classes 6b (Second-Out), 6c (Third-Out), 6d (Fourth-Out), and 6e (Fifth-Out) Funded Debt Deficiency Claims will receive treatment as described for all Class 6 Claims; and

o Classes 6f (Sixth-Out) and 6g (Seventh-Out) Funded Debt Deficiency Claims will receive treatment as described for all Class 6 Claims, but also subject to intercreditor agreements.

In addition,

Class 3 (Prepetition Secured Super-priority Claims) will receive, through an ownership interest in Purchaser, allocable share of the purchased assets and will receive no additional recovery on account of this Claim; and

Class 10 (Existing Equity Interests) will be cancelled, released and extinguished on the effective date.

The Plan also incorporates the terms of a settlement with the UCC ("**Committee Settlement**").

Summary of the Committee Settlement

The Committee Settlement includes the following high-level key terms:

- Plan confirmation is a condition precedent to consummation of the sale transaction;

- Purchaser will assume prepetition General Unsecured Claims held by a creditor that provides, or will provide, goods and services necessary to the operation of Robertshaw's business after consummation of the sale transaction, as determined by Robertshaw and Purchaser, in consultation with the UCC ("**Go-Forward Trade Claims**");

- all claims or causes of action—other than retained causes of action owned by Robertshaw's estates and arising under § 547 of the Bankruptcy Code—will be discharged, released, and enjoined;

- in consideration for certain releases and exculpations in the Plan, the Ad Hoc Group and One Rock will (a) redirect any proceeds on account of the SPCA and (b) cause Purchaser to contribute to Robertshaw cash sufficient to fund administrative claims, priority tax claims, and cash to be earmarked for, a "GUC Recovery Pool" equal to $11 million;

- in settlement of any derivative or other claims that could be pursued by or on behalf of the estates against the Ad Hoc Group and One Rock, among others, holders of unsecured deficiency claims related to the SPCA (other than the Ad Hoc Group and One Rock), Sixth Out Credit Agreement, and Seventh Out Credit Agreement will share in a $10 million "Funded Debt Deficiency Pool" to be contributed by Purchaser;

- contingent on approval of the Committee Settlement and consummation of the sale transaction, the Ad Hoc Group and One Rock will not receive any payment from the Funded Debt Deficiency Claim Pool on account of First-Out Funded Debt Deficiency Claims or, with limited exceptions, Second-Out Funded Deficiency Claims; and

- holders of administrative and priority tax claims will receive cash to satisfy their claims in full.[69]

[69] Scruton Decl. ¶ 13, ECF No. 868-25.

Summary of Invesco and U.S. Trustee Objections to the Plan

According to Invesco, the Committee Settlement is not in the best interest of Robertshaw's estates and creditors, the Plan improperly classifies unsecured claims in violation of § 1122 of the Bankruptcy Code, the Plan unfairly discriminates against Classes 6b and 6c in violation of § 1129(b)(1), and the Plan is not feasible in violation of § 1129(a)(11). Separately, the U.S. Trustee alleges the opt-out feature for third-party releases under the Plan should be rejected in light of the recent U.S. Supreme Court decision in *Harrington v. Purdue Pharma*.

Invesco's Objections are Overruled

I. The Committee Settlement is Approved

Interpreting the Bankruptcy Code begins with analyzing the text. *See Whitlock v. Lowe* (*In re DeBerry*), 945 F.3d 943, 947 (5th Cir. 2019) ("In matters of statutory interpretation, text is always the alpha."); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'") (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). The legal test is the same one used to consider settlements under Bankruptcy Rule 9019. That is whether the settlement is fair, equitable, and in the best interest of the estate. *Off. Comm. of Unsecured Creditors v. Moeller* (*In re Age Ref., Inc.*), 801 F.3d 530, 540 (5th Cir. 2015) (citation omitted). In determining whether a settlement is fair and equitable, the Fifth Circuit applies a three-part test: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise, including (i) the best interests of creditors, with proper deference to their reasonable views and (ii) the extent to which the settlement is truly the product of arm's-length bargaining, and not of fraud or collusion. *Id.* (citations omitted).

For the first factor above, a bankruptcy court does not have to conduct a "mini-trial" to determine the "probable outcome of any claims waived in the settlement." *Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Co-op., Inc.* (*In re Cajun Elec. Power Co-op., Inc.*), 119 F.3d 349, 356 (5th Cir. 1997) (citation omitted). Instead, a court must "apprise [itself] of the relevant facts and law so that

[it] can make an informed and intelligent decision." *Id.* "Great judicial deference is given to the [debtor's] exercise of business judgement." *GBL Holding Co. v. Blackburn/Travis/Cole, Ltd.* (*In re State Park Bldg. Grp., Ltd.*), 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005) (citation omitted). Thus, approval of a settlement agreement is a matter within the sound discretion of the bankruptcy court. *See United States v. AWECO, Inc.* (*In re AWECO, Inc.*), 725 F.2d 293, 297 (5th Cir. 1984), *cert. denied*, 469 U.S. 880 (1984).

Invesco says the Committee Settlement is not in the best interest of Robertshaw's estates or creditors. Invesco believes Robertshaw may pursue fraudulent transfer claims against One Rock and the Ad Hoc Group based on the December Transactions that may yield up to $228 million for the benefit of creditors. Invesco says the Committee Settlement releases these parties for about $21 million with no colorable rationale. According to Invesco, there is a high probability of success on constructive fraudulent transfer claims against One Rock and the Ad Hoc Group. Invesco also believes that there are many badges of fraud to establish that transfers were made with actual intent to hinder, delay, or defraud creditors. Not surprisingly, Invesco also says pursuing these claims will not be expensive or complicated because, among other things, the elements are "easily established," related issues have been adjudicated efficiently, and the Ad Hoc Group and One Rock have sufficient funds to satisfy a judgment.[70]

Robertshaw, the UCC, the Ad Hoc Group, and One Rock urge the Court to approve the Committee Settlement. They introduced unrefuted evidence in the Record about the UCC and Robertshaw's separate investigations and evaluation of potential claims and causes of action, including the December Transactions. They claim the Committee Settlement is fair, equitable, and in the best interest of the estates and creditors. The Court agrees.

Two investigations were conducted that strongly support approving the Committee Settlement. The first started in December 2023 when Robertshaw's Board of Directors established a "Restructuring Committee" consisting of two independent directors—Neil Goldman and Scott D. Vogel.[71] Robertshaw also retained Weil, Gotshal & Manges LLP to assist with an investigation about potential claims Robertshaw may hold against different parties, including avoidance actions.[72]

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[70] Invesco's Obj. ¶¶ 48, 73.
[71] Vogel Decl. ¶ 7, ECF No. 868-23.
[72] Vogel Decl. ¶¶ 7, 17.

At the direction of the Restructuring Committee, Weil conducted a thorough investigation into the transactions leading up to the petition date, including the transactions that Invesco alleges are fraudulent transfers.[73] During its investigation Weil reviewed more than 16,000 documents, conducted interviews with Robertshaw's Board, senior management, and advisors, attended depositions in connection with the adversary proceeding about the December Transactions.[74] Weil also researched potential claims held by Robertshaw against any of the proposed released parties under the Plan. Potential claims included avoidance actions and breach of fiduciary duty claims against Robertshaw's Board and officers.[75]

In June 2024, Weil explained its findings to the Restructuring Committee in two parts and gave members a chance to ask questions.[76] Weil explained its findings to Goldman and Vogel about potential claims arising out of the May Transactions and Amendment Nos. 1-4 of the SPCA.[77] Then, Weil presented its findings about the December Transactions to Vogel but not Goldman. Goldman recused himself from consideration of matters related to the December Transactions because he served as an independent director during the relevant time and would receive a release under the Plan related to these Transactions.[78] Goldman and Vogel analyzed all aspects of the proposed releases under the Plan, except about the December Transactions (which only Vogel assessed).[79]

Based on a review of the factual record, Weil's findings and recommendations, the Restructuring Committee determined that viable causes of action held by Robertshaw against any of the Released Parties did not exist or that pursuing such claims had minimal value on a cost-adjusted basis.[80] So these claims held little value in light of the Committee Settlement. [81] Based on the Restructuring Committee's proposal, the full Robertshaw Board approved the Committee Settlement.[82]

The UCC also conducted its own investigations, and reached the same conclusion. The UCC—working with its counsel and financial advisors—evaluated potential causes of action held by Robertshaw for the potential benefit of unsecured

[73] *See* Vogel Decl. ¶ 17.
[74] Vogel Decl. ¶ 17.
[75] Vogel Decl. ¶ 17.
[76] Vogel Decl. ¶ 18.
[77] Vogel Decl. ¶ 19.
[78] Vogel Decl. ¶ 19.
[79] Vogel Decl. ¶ 21.
[80] Vogel Decl. ¶ 22; Aug. 2, 2024 Tr. 21:4–12.
[81] Vogel Decl. ¶ 22; Aug. 2, 2024 Tr. 21:4–12.
[82] Vogel Decl. ¶ 23; Aug. 2, 2024 Tr. 21:4–12.

creditors.[83] That included causes of action that could be brought against One Rock and Robertshaw's current and former directors and officers.[84] It also included potential claims the UCC could be entitled to bring on behalf of the estate, including fraudulent transfer claims.[85] During its investigations, the UCC, through its counsel, reviewed thousands of documents, participated in numerous depositions, held an in-person meeting with Invesco representatives and counsel, and met with Robertshaw's independent directors to gain an understanding of their views on potential claims.[86]

The UCC prepared an adversary complaint and was prepared to seek standing to pursue causes of action against One Rock, the Ad Hoc Group, and Invesco.[87] The UCC also considered potential settlements, including a global settlement with One Rock, the Ad Hoc Group, and Invesco.[88] Ultimately, after weeks of negotiations, the UCC executed a settlement agreement with Robertshaw, the Ad Hoc Group, and One Rock.[89]

The UCC considered the factors below in entering into the Committee Settlement:

- the merits of the potential estate claims and causes of action identified in its draft complaint;
- the costs versus the benefits of litigating such claims and causes of action;
- the merits of potential safe harbor defenses to the fraudulent conveyance claims;
- the risk that viewing the steps of the December Transactions as an integrated transaction would undermine the chances of prevailing on a fraudulent transfer claim; [90]

[83] Scruton Decl. ¶ 7.
[84] Scruton Decl. ¶ 7.
[85] Scruton Decl. ¶ 8.
[86] Scruton Decl. ¶ 8.
[87] Scruton Decl. ¶ 8.
[88] Scruton Decl. ¶ 11.
[89] Scruton Decl. ¶ 11.
[90] Fraudulent transfer law generally requires a court to analyze each transaction separately. But there is an equitable doctrine that allows courts to "dispense with the structure of structures of a transaction or series of transactions." *See, e.g.*, *In re Maxus Energy Corp.*, 641 B.R. 467, 531–32 (Bankr. D. Del. 2022). The potential net effect of these transactions in a fraudulent transfer context

- the fact that holders of Funded Debt Deficiency Claims may be subject to disallowance, subordination, and other claims that could affect their ability to receive a recovery on account of their Claims under the Plan; and

- the fact that there were no other bids for the sale of Robertshaw's assets such that litigation with the Ad Hoc Group and One Rock might threaten the sale transaction, Robertshaw's ability to exit chapter 11, and future of Robertshaw as a go-forward business.[91]

After a careful and thorough investigation and analysis, the UCC concluded that the probability of a successful recovery for all unsecured creditors was uncertain, and the attendant risk and expenses of litigation weighed in favor of the certainty of the Committee Settlement.[92]

Based on the Record, the Court approves the Committee Settlement. It is fair and equitable, and in the best interest of Robertshaw's estates and creditors. The probability of success in litigating fraudulent transfer claims about the December Transactions is complex and will require analyzing many disputed issues of fact and law.

This Court conducted a trial about the December Transactions, but that will not streamline many fact intensive issue related to solvency, intent to hinder, delay, or defraud creditors, and reasonably equivalent value. Complicating matters more, the transferee in the December Transactions was an entity named RS Funding, which eventually merged into Robertshaw and no longer exists. Moreover, establishing badges of fraud in intentional fraudulent transfer cases is inherently fact intensive. And the focus would be on Robertshaw's alleged fraudulent intent as the transferor, not the Ad Hoc Group or One Rock's intent. There is no assurance Robertshaw would prevail.

Furthermore, the Record shows that Robertshaw engaged in the December Transactions to afford itself "time and runway" to, among other things, negotiate with customers, implement their out-of-court restructuring efforts, or, in the worst-case scenario, negotiate the terms of a chapter 11 plan that would benefit all stakeholders.[93] This Court also previously found in the Adversary Decision that the

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could mean that Robertshaw received reasonably equivalent value, which would negate a constructive fraudulent transfer claim.

[91] Scruton Decl. ¶ 15. Again, Invesco had a full and fair opportunity to participate in the auction for the sale of Robertshaw's assets and elected no to do so.

[92] *See* Scruton Decl. ¶¶ 13, 17.

[93] Goldman Decl. ¶ 9.

members of the Ad Hoc Group and One Rock engaged in the December Transactions to, among other things, increase Robertshaw's liquidity and allow the company to continue its turnaround plan and that One Rock did not tortiously interfere with the SPCA.

The negotiations between the UCC and other settlement parties were the product of extensive arm's-length bargaining. The UCC is a true independent party who actively participated in these cases and considered the interest of all unsecured creditors. No one also disputes that the Restructuring Committee acted independently. There is also no evidence of fraud or collusion here. The Restructuring Committee and the UCC conducted extensive analysis about potential claims, potential defenses to these claims, and the probability of success. They independently concluded that potential defendants have meritorious defenses and the cost to litigate fraudulent transfer claims about the December Transactions will be complicated, expensive, and long.

The Court considered the paramount interest of the estates and creditors, including Invesco and every creditor who rejected the Plan. A meaningful and certain recovery now rather than the uncertainty of a complex litigation, including what happens to the business during such litigation and the proposed sale of Robertshaw's assets, reflects Robertshaw's sound exercise of business judgment.

The Court approves the Committee Settlement.

II. The Plan Properly Classifies Claims Under Section 1122 of the Bankruptcy Code

Section 1122(a) of the Bankruptcy Code provides that a "plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Substantially similar claims may be separately classified for "good business reasons." *Bank N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 229, 251 (5th Cir. 2009) (quoting *Phoenix Mut. Life Ins. v. Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274, 1281 (5th Cir.1991), *cert. denied,* 506 U.S. 821 (1992)). But it "may only be undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired, assenting class of claims." *Greystone*, 995 F.2d at 1279. Robertshaw bears the burden of proving classification is proper by a preponderance of the evidence. *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II* (*In re Briscoe Enters., Ltd., II*) 994 F.2d 1160, 1165 (5th Cir. 1993). Based on the Record, the Court finds the classification scheme in the Plan complies with the requirements of § 1122(a).

Invesco argues that there is "no apparent business justification for the Plan's separate classification of General Unsecured Claims and Funded Debt Deficiency Claims" because the general unsecured creditors in Class 5 includes unsecured claims that are not Go-Forward Trade Claims.[94] The unrefuted evidence, however, proves otherwise.

The Spitzer Declaration, as modified at the confirmation hearing, established that the vendor community for Robertshaw's business is relatively small and specialized.[95] And Robertshaw's "ability to maintain good relationships with vendors has certain value for the company's ongoing relationship even if [Robertshaw] does not utilize their services on a go-forward basis."[96] Also, the "majority of Holders of General Unsecured Claims are trade creditors who have the potential to reestablish a relationship with [Robertshaw] in the future."[97] So even if some trade creditors in Class 5 are not Go-Forward Trade Claims now, there is still reason to believe that "[Robertshaw] may need to utilize several of the class five creditors in the Debtors' day-to-day operations going forward."[98]

There is another reason. Each Class 6 Deficiency Class's right to recovery against Robertshaw is determined by the waterfall provisions in the SPCA. The Plan's classification scheme mirrors the waterfall in the SPCA keeping like claims with like claims and the legal relations among the parties intact. In other words, claims "which share common priority and rights against the debtor's estate" have been classified together. *Save Our Springs (S.O.S.) All., Inc. v. WSI (II)-COS, L.L.C.,* (*In re Save Our Springs (S.O.S.) All., Inc.*), 632 F.3d 168, 174 (5th Cir. 2011).

Along with treating each sub-class of Funded Debt Deficiency Claims as a separate voting class, the separate legal rights as between the General Unsecured Claims in Class 5 and the Funded Debt Deficiency Claims in Class 6(b) and 6(c) justify their separate classification too. The claims in Class 6 derive from the SPCA and Class 5 claims derive from Robertshaw's business operations.

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[94] Invesco's Obj. ¶ 88.
[95] Spitzer Decl. ¶ 22, ECF No. 868-22.
[96] Aug. 2, 2024 Tr. 31:18–32:13.
[97] Spitzer Decl. ¶ 21.
[98] Aug. 2, 2024 Tr. 30:14–31:5, 32:4–13.

Thus, the Plan separately classifies Claims based on valid business and legal reasons. The classifications were not proposed to create a consenting impaired class or to manipulate class voting. The Plan satisfies § 1122.

III. The Plan Does Not Discriminate Unfairly in Violation of Section 1129(b)(1) of the Bankruptcy Code

Section 1129(a) of the Bankruptcy Code says that a bankruptcy court shall confirm a plan only if all the requirements under subsection (a) are met. 11 U.S.C. § 1129(a). Section 1129(a)(8) requires all impaired classes to vote for the plan. But that's not the end of the analysis. Section 1129(b) permits plan confirmation, despite § 1129(a)(8), if all (i) other requirements under 1129(a) are met and (ii) the plan does not discriminate unfairly, and is fair and equitable, with respect to an impaired non-accepting class. 11 U.S.C. § 1129(b)(1). So a plan may discriminate between classes, but it cannot discriminate unfairly. Invesco notes that Classes 6b and 6c Funded Debt Deficiency Claims rejected the Plan.[99] So Robertshaw bears the burden to prove by a preponderance of the evidence that the Plan does not discriminate unfairly against these Classes.

The Bankruptcy Code does not define what it means to "discriminate unfairly." Courts generally assess unfair discrimination based on the facts and circumstances presented in the case. *See, e.g.*, *In re Idearc Inc.*, 423 B.R. 138, 160 (Bankr. N.D. Tex. 2009), aff'd, 662 F.3d 315 (5th Cir. 2011). In other words, "for payment to be preferred to one creditor or class over others, the [c]ourt must find an articulable basis for the preference." *In re Mortg. Inv. Co. of El Paso, Tex.*, 111 B.R. 604, 614–15 (Bankr. W.D. Tex. 1990). Some courts have utilized multi-factor tests[100] or rebuttable presumption tests[101] as an analytical framework to assess unfair discrimination. They are helpful considerations, but could be construed to either create additional burdens on the debtor to satisfy this prong or appear to repeat standards already required in other parts of § 1129 required for confirmation. The text requires a plan not to unfairly discriminate against an impaired non-accepting class. Thus, Robertshaw must articulate a basis for discriminating between two classes and show by a preponderance of the evidence that such discrimination is not unfair to impaired rejecting classes.

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[99] Invesco's Obj. ¶ 76.

[100] *In re Creekside Landing, Ltd.,* 140 B.R. 713, 716 (Bankr. M.D. Tenn. 1992) ((1) Whether the discrimination is supported by a reasonable basis, (2) Whether the debtor can confirm and consummate a plan without the discrimination, (3) Whether the discrimination is proposed in good faith, and (4) The treatment of the classes discriminated against)).

[101] *In re Sentry Operating Co. of Tex., Inc.,* 264 B.R. 850, 863 (Bankr. S.D. Tex. 2001) (using rebuttable presumption multi-factor test).

Invesco argues Robertshaw cannot satisfy its burden with respect to Classes 6b and 6c as compared to the percentage recovery to holders of Class 5 General Unsecured Claims. It argues that Classes 6b and 6c are of equal rank and priority with General Unsecured Claims and Go-Forward Trade Claims in Class 5 because they are all unsecured, non-priority claims. Based on the Disclosure Statement, Class 6b creditors are estimated to receive a 5% recovery and Class 6c creditors may receive no recovery.[102] But Class 5 creditors are estimated to recover about 40% and Go-Forward Trade Claims will recover 100%.[103] And, unlike holders of Go-Forward Trade Claims, other Class 5 creditors will supposedly not contribute in any way to Robertshaw's business in the future. The Court disagrees with Invesco. Based on the unrefuted Record, the Plan does not discriminate unfairly against the dissenting classes.[104]

First, the evidence shows that there is a business justification for the discrimination. Go-Forward Claims are being paid by Purchaser and will provide future business to the company. Many other holders of general unsecured claims are potential trade vendors that Robertshaw may do business with in the future.[105] Discriminating between trade claims that may give rise to future business dealings compared to Funded Debt Claims, for which the evidence shows will not contribute similarly on a go-forward basis, [106] does not amount to unfair discrimination. There is no material evidence in the Record proving otherwise.

Second, no unsecured creditor is entitled to a greater recovery than they are receiving under the Plan. The liquidation analysis confirms this point.[107] Robertshaw is selling substantially all assets to Purchaser—including cash. Moreover, the final order approving debtor in possession financing (ECF No. 357) provides that the Prepetition First Out Super-Priority Secured Parties (as defined in the order) hold valid liens on "substantially all of the assets" of Robertshaw.[108] So the only unencumbered cash available for distribution to unsecured creditors will come from Purchaser as a gift.

[102] Invesco's Obj. ¶ 39; Disclosure Statement at 42, ECF No. 868-16.
[103] Spitzer Decl., Exhibit. B.
[104] For the reasons stated above, the Plan satisfies any of these other unfair discrimination standards.
[105] Spitzer Decl. ¶ 21.
[106] Spitzer Decl. ¶ 21.
[107] Spitzer Decl., Exhibit A.
[108] *See* DIP Order ¶ E.1(a)(i), (ii), ECF No. 357.

As part of the Committee Settlement, Purchaser will provide the cash to pay Class 5 General Unsecured Claims and Class 6 Funded Debt Deficiency Claims.[109] Purchaser will provide $10 million for Class 6 Claims to be disbursed on a pro rata basis in accordance with the SPCA and $11 million for Class 5.[110] Senior creditors may share proceeds with junior creditors as long as the junior creditors receive what they would have received otherwise without such sharing. *In re MCorp Financial, Inc.*, 160 B.R. 941, 960 (S.D. Tex. 1993); *see also In re Nuverra Evtl. Sols., Inc.*, 590 B.R. 75, 95 (D. Del. 2018). Here, based on § 506(c) of the Bankruptcy Code, the Funded Debt Deficiency Claims are junior to the Prepetition Secured Super Priority Claims credit bid.

Under the Committee Settlement the Ad Hoc Group and One Rock also agree to waive any recovery on account of their respective Class 6a Claims and allow value to flow to Class 6b Claims.[111] Under § 2.18(b) of the SPCA, Prepetition First-Out Term Loans recover in full before Prepetition Second Out Term Loans and junior tranches. So the remaining First-Out Funded Debt Deficiency Claims will recover in full the allowed amounts of their claims, and the excess value will flow to Class 6b. The Ad Hoc Group and One Rock also agree to waive any recovery on account of their Class 6b Claims.[112] As a result, the non-waiving holders in Class 6b are estimated to receive a greater recovery on account of their Claims.[113] According to the unrefuted Spitzer Declaration, "because the Ad Hoc Group holds approximately 51% of the Prepetition Second Out Term Loans, they are essentially providing $20 million of value to the Funded Debt Deficiency Claim Pool."[114] Non-waiving holders of claims in these and other Class 6 creditors may also receive increased recovery from retained causes of action.

For these reasons, there are business and legally sound reasons for the treatment afforded to Class 5 and Class 6. The Plan does not unfairly discriminate against any dissenting classes. Section 1129(b)(1) is satisfied.

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[109] Spitzer Decl. ¶ 71; Plan at 3 (definition of "Additional Sale Consideration").
[110] *See* Plan at 3 (definition of "Additional Sale Consideration"); Spitzer Decl. ¶ 71; Vogel Decl. ¶ 10(c), (d).
[111] Vogel Decl. ¶ 11.
[112] Vogel Decl. ¶ 11.
[113] Spitzer Decl. ¶ 12, Exhibit B.
[114] Spitzer Decl. ¶ 12 n.4.

IV. The Plan is Feasible Under Section 1129(a)(11) of the Bankruptcy Code

Section 1129(a)(11) requires that confirmation "of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

This is a liquidating chapter 11 plan. So feasibility is established when the liquidation itself is feasible. *See e.g., In re Heritage Org., L.L.C.*, 375 B.R. 230, 311 (Bankr. N.D. Tex. 2007). Funding from Purchaser will be disbursed in accordance with Plan. Any remaining assets, including retained causes of action, will be administered through the plan administrator or the liquidation trust.[115] Robertshaw and its professionals analyzed the ability to meet obligations under the Plan and project that there are sufficient amounts to pay professional fee claims, administer the wind down of Robertshaw's estates, and make required Plan distributions.[116] And Article V.F of the Plan says that if there is a shortfall Purchaser will fund the extra amounts to the "Additional Sale Consideration, the Professional Fee Escrow Amount, and the Wind-Down Reserve."[117]

Invesco argues that the Plan is not feasible "because it does not account for at least $118.4 million to $154.4 million in damages and indemnifiable and reimbursable expenses that Invesco has asserted in its proof of claim, which are secured and must be paid before the Ad Hoc Group and One Rock's credit bid may be consummated."[118] This Court recently held a separate evidentiary hearing about Invesco's proof of claim. Invesco's lack of evidence coupled with bedrock New York law cause Invesco to hold only an unsecured claim that will not impact Plan feasibility. The Court will issue a separate decision detailing its findings of fact and conclusions of law on Invesco's proof of claim. The Plan complies with § 1129(a)(11).

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[115] Spitzer Decl. ¶ 70.
[116] Spitzer Decl. ¶ 71.
[117] Spitzer Decl. ¶ 71; *see also* Plan at 36 ("[I]f the Retained Cash is insufficient to fund the Additional Sale Consideration, the Professional Fee Escrow Amount and the Wind-Down Reserve, the Purchaser shall fund all necessary additional amounts on or prior to the Effective Date.").
[118] Invesco's Obj. ¶ 92.

The U.S. Trustee's Objection is Overruled

The Supreme Court's recent decision in *Harrington v. Purdue Pharma* resolved a circuit-split about non-consensual third-party releases in chapter 11 plans. The Court held that the Bankruptcy Code does not "authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue Pharma*, 144 S. Ct. at 2088. Even before *Purdue*, Fifth Circuit case law appeared to prohibit non-consensual third-party releases. *See Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746 (5th Cir. 1995); *In re Pac. Lumber Co.*, 584 F.3d 299. So *Purdue* did not change the law in this Circuit.

The Plan does not include non-consensual third-party releases like the ones addressed in *Purdue*. It contains consensual ones. So the *Purdue* decision does not apply here. The U.S. Trustee provided comments to Robertshaw on the Plan solicitation materials before they were approved by this Court.[119] Now it objects to the consensual third-party releases on the basis of the *Purdue* decision. The Trustee wants to use the *Purdue* holding as an opportunity to advance its long-held position that consensual third-party releases in a plan should require an opt-in feature, rather than an opt-out.

To be clear, the Trustee does not object to consensual third-party releases in a chapter 11 plan, it just wants opt-in versus opt-out. The Trustee says that *Purdue* clarifies that third-party releases are between two nondebtors (but that was always the case). The Trustee also says the opt-outs are "coercive" and otherwise improper. Robertshaw, the Ad Hoc Group, One Rock, and the UCC argue the third-party releases are appropriate under the law.

The Trustee's objection is overruled for several reasons. First, the *Purdue* decision was about non-consensual third-party releases and the Supreme Court said nothing should cast doubt on consensual ones:

> As important as the question we decide today are ones we do not. ***Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan***; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. *See, e.g.*, *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047

[119] Aug. 2, 2024 Tr. 123:12–19.

> (CA7 1993). ***Nor do we have occasion today to express a view on what qualifies as a consensual release*** or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor . . . ***Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants***.

Purdue Pharma, 144 S. Ct. at 2087–88 (emphasis added).

A few important points here. Nothing is construed to question consensual third-party releases offered in connection with a chapter 11 plan. There was also no occasion for the Supreme Court to express a view on what constitutes a consensual release. The Supreme Court confined its decision to the question presented. This Court will not narrow or expand the scope of the Supreme Court's holding. These words must be read literally.

Second, contrary to the Trustee's position, the consensual third-party releases in the Plan are appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out. There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan. *See, e.g.*, *In re Arsenal Intermediate Holdings, L.L.C.*, No. 23-10097 (CTG), 2023 WL 2655592, at *6–8 (Bankr. D. Del. Mar. 27, 2023).[120] And what constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled in this District. *See, e.g.*, *Cole v. Nabors Corp. Servs., Inc.* (*In re CJ Holding Co.*), 597 B.R. 597, 608–09 (S.D. Tex. 2019). Hundreds of chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out. And, again, *Purdue* did not change the law in this Circuit.

The third-party releases in the Plan satisfy applicable law and the Procedures for Complex Cases in the Southern District of Texas. Parties in interest were provided detailed notice about the Plan, the deadline to object to plan confirmation, the voting deadline, and the opportunity to opt out of the third-party releases. The Disclosure Statement included a detailed description about the third-

[120] The U.S. Supreme Court and the Fifth Circuit have also approved opt-outs in non-bankruptcy cases like class actions as providing consent. *See, e.g.*, *Phillips Petroleum Co. v. Irl Shutts*, 472 U.S. 797, 811–12 (1985) (approving opt-out); *Seacor Holdings, Inc. v. Mason, (In re Deepwater Horizon)*, 819 F.3d 190 (5th Cir. 2016) (same).

party releases and the opt-out.[121] The Affidavit of Service dated July 26, 2024, also shows ballots were sent to holders of Claims in voting classes 5, 6a, 6b, 6c, 6d, 6e, 6f, and 6g.[122] All ballots provided claimants an opportunity to opt out. Non-voting parties in Classes 1, 2, 3, 4, 7, 8, 9, and 10 received a Notice of Non-Voting Status that offered a chance to opt out too.[123] The ballots and the Notice of Non-Voting Status allowed parties to carefully review and consider the terms of the third-party release and the consequences of electing not to opt-out. Each of the ballots advises in bold, that:

> **If you submit your Ballot without this box checked, or if you do not submit your Ballot by the Voting Deadline, you will be deemed to consent to the releases contained in Article X.C of the Plan to the fullest extent permitted by applicable law.**[124]

Robertshaw also caused the third-party release language to be published in the Wall Street Journal.[125] The Voting Report shows that over 100 creditors opted out of the third-party releases.[126] Based on the Record, the third-party release language is specific enough to put releasing parties on notice of the types of claims released. And that the opt-out worked. There is no evidence in the Record of coercion or confusion alleged by the Trustee.

The third-party releases are also narrowly tailored to this case. They consensually release parties from claims and causes of action based on or relating to, among other things, Robertshaw and the bankruptcy estates, Robertshaw's capital structure, the chapter 11 cases, the purchase, sale, or rescission of the purchase or sale of any asset or security of Robertshaw, the May Transactions, the December Transactions, the SPCA and related agreements (including intercreditor agreements), Robertshaw's in or out-of-court restructuring and recapitalization efforts, the Sale Order, the Disclosure Statement, the DIP Order, the DIP documents, and the Plan and related agreements.[127] There is also an important carve-out for Released Claims unrelated to Robertshaw, claims preserved by the Plan or related documents, or claims arising from an act or omission judicially determined by a final order to have constituted actual fraud, gross negligence,

[121] Disclosure Statement at ii, v, 5, 58, 61.
[122] Aff. Service, ECF No. 812.
[123] *See* Aff. Service at 136–39.
[124] *See* Aff. Service at 26, 41, 55, 69, 83, 97, 111, 125.
[125] *See* Certificate Publication, ECF No. 728.
[126] *See* Orchowski Decl. ¶ 12, ECF No. 868-21.
[127] Plan at 65.

willful misconduct, or criminal conduct (other than with respect to or relating to the adversary actions).[128]

Furthermore, based on the unrefuted Declaration of Stephen Spitzer, the third-party release "is an integral part of the Plan and was a condition of the settlements set forth therein."[129] And the releases were a "core" consideration "among the parties to the Restructuring Support Agreement, instrumental in the development of the Plan, and crucial in facilitating and gaining support for the Plan and the chapter 11 Cases by the Released Parties, including the concessions resulting in the elimination of over $640 million in funded debt obligations."[130] There is no evidence in the Record to refute these findings. Thus, the third-party releases are consensual and narrowly tailored. The UCC—an active participant in these cases with a fiduciary duty to all unsecured creditors—doesn't oppose the opt-out for the releases either. The U.S. Trustee's objection is overruled.[131]

Conclusion

For the reasons stated above, the Plan, including the Committee Settlement, satisfies all requirements under the Bankruptcy Code and applicable law. The Plan preserves and creates value for all stakeholders, including trade creditors on a go-forward basis. It also allows a company with a proud American history of operating for over 100 years to emerge from chapter 11 and saves jobs. The Court confirms the Plan. The Court will issue a separate confirmation order incorporating this Memorandum Decision.

Signed: August 16, 2024

Christopher M. Lopez

Christopher Lopez
United States Bankruptcy Judge

[128] *Id.*
[129] Spitzer Decl. ¶ 60.
[130] Spitzer Decl. ¶ 60; *see also* Vogel Decl. ¶ 30.
[131] The U.S. Trustee and Invesco stated at the confirmation hearing that certain language in the Plan could be construed to still bind a third-party subject to the releases even if they opted out. To avoid any such confusion, the Confirmation Order will state that any party who opted out of the third-party releases in the Plan is not bound by such releases.

Appendix H

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re
TONAWANDA COKE CORPORATION BK 18-12156 CLB

Debtor. DECISION & ORDER

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Carl L. Bucki, Chief U.S.B.J., W.D.N.Y.

In this Chapter 11 case, the United States Trustee objects to a disclosure statement on grounds that it seeks to advance a plan that is not confirmable in its present format. The issue is whether the debtor may assume consent to a third-party release except in those instances where a creditor expressly opts out of that proposal.

Until October of 2018, Tonawanda Coke Corporation maintained a coke foundry along the Niagara River in Tonawanda, New York. By then, the corporation had accumulated substantial debt, much of it related to the alleged emission of toxic pollutants. On October 15, 2018, at about the time that it was terminating operations, the Corporation filed a petition for relief under Chapter 11 of the Bankruptcy Code. Since that filing, the debtor in possession has completed the liquidation of its property. Hoping to implement a distribution, Tonawanda Coke Corporation filed a Second Amended Disclosure Statement and Plan on March 5, 2024. In its Disclosure Statement, the debtor reports that it now has approximately $300,000 available for distribution on account of filed and scheduled unsecured claims totaling in excess of $282 million.

The Office of the United States Trustee presented several objections to the Disclosure Statement. All have been resolved except one. In its Plan, the debtor proposes that with regard to the claims of unsecured creditors and tort victims, a general release be given to "the Debtor, its interest holders, the members of the Committee and each of their respective directors, officers, shareholders, members, partners, agents, employees, representatives, attorneys and other professionals, subsidiaries and affiliates, and any successor in interest in any of them." This arrangement would be conditioned, however, on the right of any creditor to "opt out" of the general release. At the hearing to consider approval of the Disclosure Statement, the trustee argued that third-party releases were permitted only upon creditor consent and that such consent could occur only with an affirmative "opt in" by each creditor.

At the time of argument before this Court, the Supreme Court had not yet rendered its decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. __, 144 S.Ct. 2071 (2024). Anticipating the relevance of that case, we deferred any decision on the Disclosure Statement until after the Supreme Court had provided its guidance. Now, with the benefit of higher authority, we address the process for securing consent to a third-party release.

Discussion

After the commencement of a case, the proponent of a plan may not solicit its acceptance unless there is transmitted to creditors "the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing by the court as containing adequate information." 11 U.S.C. § 1125(b). Implicitly, such adequate information includes a representation that the proposed plan is one that can be confirmed. Consequently, the Court may decline to approve a disclosure statement that aims to solicit votes in favor of an unconfirmable plan.

In *Harrington v. Purdue Pharma L.P.,* the Supreme Court held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." 144 S.Ct. at 2088. Like Purdue Pharma, Tonawanda Coke Corporation proposes a plan that contemplates a release from liability for the benefit of various third parties. The debtor argues, however, that any requirement for consent would be satisfied by allowing creditors to opt out of a general release. We disagree.

In its decision in *Harrington v. Purdue Pharma*, the Supreme Court declined "to express a view on what qualifies as a consensual release." 114 S.Ct. at 2088. Nonetheless, the Court observed that "nothing in the bankruptcy code contemplates (much less authorizes) it." *Id.* at 2086. Hence, any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent. Not authorized by any provision of the Bankruptcy Code, any such consensual agreement would be governed instead by state law.

The debtor is a New York Corporation whose principal and only place of business is in that state. All or nearly all of its creditors either transacted business with the debtor during the course of its operations in New York, or suffered environmental damages as a result of activities in New York. With regard to the adequacy of consent, therefore, the choice of law falls in the present instance to New York.

To each creditor, Tonawanda Coke Corporation already owes far in excess of any proposed distribution. Any payment under the plan serves as consideration for pre-petition obligations. No further consideration is given on account of the separate liabilities of the non-debtor beneficiaries of the releases. Indeed, the plan contemplates the same distribution whether or not a creditor opts out of the release. Essentially, creditors are being asked to give releases to third parties for no consideration. Consent for this arrangement is therefore governed by the following provisions of the New York General Obligations Law:

> "An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any . . . obligation . . . shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or

> discharging such . . . obligation . . . shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent."

N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 2022). Under this standard, a failure to opt out will not suffice to bind a creditor. Rather, the creditor must affirmatively sign a writing under which it expressly agrees to discharge the non-debtor parties. *See also Matter of Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400 (1942). Without such a writing from each affected creditor, the release becomes a mere proposal that no one can enforce.

Even aside from the specific requirements for a writing under the General Obligations Law, we find that the debtor's plan would be deficient in securing the consent of creditors. "Consent and failure to object are not synonymous." *In re Arch Hospitality, Inc.*, 530 B.R. 588, 591 (Bankr. W.D.N.Y. 2015). In many Chapter 11 cases, only a small percentage of creditors will cast ballots on confirmation of a plan. Many who do vote may overlook the box indicating a preference to deny a release to third parties. Absent a writing expressly agreeing to a release of non-debtors, creditors have not given consent as required by the Supreme Court in *Harrington v. Purdue Pharma*.

Conclusion

In its recent decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. __, 144 S.Ct. 2071 (2024), the Supreme Court held that a Chapter 11 Plan can provide a release for the benefit of non-debtors only with the consent of affected creditors. We find that the mere ability to opt out of a release is insufficient to establish that consent. Consequently, the debtor's proposed plan is not confirmable in its present form. By failing to report this problem, the Disclosure Statement is similarly deficient. The objection of the United States Trustee is therefore sustained. The request of Tonawanda Coke Corporation to approve the Second Amended Disclosure Statement is denied, but without prejudice to presenting a further amended plan and disclosure statement that conforms with the guidelines recited herein.

So ordered.

Dated: August 27, 2024
Buffalo, New York

Carl L. Bucki

Hon. Carl L. Bucki, Chief U.S.B.J., W.D.N.Y.

FILED
AUG 27 2024
BANKRUPTCY COURT
BUFFALO, NY

Appendix I

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1169

In re: The Hertz Corporation, et al.,
Reorganized Debtors

Wells Fargo Bank, N.A., as Indenture Trustee

Appellant

v.

The Hertz Corporation; Dollar Rent A Car, Inc.; Dollar Thrifty Automotive Group, Inc.; Donlen Corporation; DTG Operations, Inc.; DTG Supply, LLC; Firefly Rent A Car LLC; Hertz Car Sales LLC; Hertz Global Services Corporation; Hertz Local Edition Corp.; Hertz Local Edition Transporting, Inc.; Hertz System, Inc.; Hertz Technologies, Inc.; Hertz Transporting, Inc.; Rental Car Group Company, LLC; Smartz Vehicle Rental Corporation; Thrifty Car Sales, Inc.; Thrifty, LLC; Thrifty Insurance Agency, Inc.; Thrifty Rent A Car System, LLC; and TRAC Asia Pacific, Inc.

U.S. Bank National Association, as Indenture Trustee

v.

The Hertz Corporation

Appeal from the United States Bankruptcy Court
for the District of Delaware
(No. 21-50995)
Bankruptcy Judge: Honorable Mary F. Walrath

Argued on October 25, 2023

Before: KRAUSE, PORTER, and AMBRO, Circuit Judges

(Opinion filed September 10, 2024)

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OPINION OF THE COURT

AMBRO, Circuit Judge

Bankruptcy is a lesson in leverage. It involves money and to whom it goes. The more advantage (leverage) a party has, the more it influences who gets paid. In a Chapter 11 case, the parties with more leverage control the reorganization, while those with less often must sit on the sidelines and await their fate. The debtors here, able to pay their creditors in full, believe they have the leverage to deny their unsecured noteholders more than a quarter billion dollars of interest they promised to pay pre-bankruptcy, all while giving lower priority equityholders four times that amount. Does the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*,[1] give the debtors enough leverage to do that?

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[1] Unless otherwise noted, citations to § <•> are to the Bankruptcy Code.

The debtors say so because of the Bankruptcy Code's general rule barring interest accruing post-petition (in bankruptcy lingo, "unmatured interest"). That is one way the Code deals with the difficult distributional problems of the typical case, where there is not enough money to go around. But this is not the typical case. At the end of the reorganization, the debtors here were so flush that they paid their former stockholders (the "Stockholders") roughly $1.1 billion. While the parties agree that the Code requires debtors to pay post-petition interest if they are solvent, they disagree whether this entitles creditors to post-petition interest at the federal judgment rate or the contract rate—a dispute with teeth, because the latter exceeds the former by more than 30 times in this case.

What happened here is that the Hertz Corporation and certain affiliates (collectively, "Hertz"), crippled by the COVID pandemic, filed for protection under Chapter 11 of the Bankruptcy Code in May 2020. To give a sense of its then-bleak prospects, Hertz warned in an SEC filing of "a significant risk that the [Stockholders] will receive no recovery under the Chapter 11 [c]ases and that our common stock will be worthless." Hertz Glob. Holdings, Inc., Prospectus Supplement (to Prospectus Dated June 12, 2019) S-4 (2020), https://perma.cc/9RJE-R6KT (June 15, 2020).

As the economy recovered, however, so did Hertz's financial prospects. It emerged from bankruptcy a year later via a confirmed plan of reorganization (the "Plan") that sold the company to a group of private equity funds. The Plan promised to leave all of Hertz's creditors unimpaired—in other words, it would not alter any of their rights. (Compare that to a normal bankruptcy plan, which typically discharges creditors' claims for cents on the dollar.) Therefore, none of Hertz's creditors could vote on the Plan; as a matter of law, they were all conclusively presumed to accept it.

To be precise, the Plan paid off Hertz's pre-petition debt, including unsecured bonds maturing biennially from 2022 to 2028 (the "Notes"). But the Plan did not pay holders of the Notes (the "Noteholders"[2]) contract rate interest for Hertz's time in bankruptcy. Instead, it paid interest for that period at the much lower applicable federal judgment rate. Hertz also did not pay the Noteholders certain charges provided in the Notes, specifically, variable fees (calculated using financial formulas) designed to compensate lenders for their lost profits when a borrower pays them back ahead of schedule. These fees are generically called make-wholes. (To distinguish between make-wholes generally and the particular make-whole fees at issue here, we call the latter the "Applicable Premiums"—their title under those Notes.) If Hertz had redeemed the Notes in mid-2021 without filing for Chapter 11, it would have owed the Noteholders the

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[2] Wells Fargo Bank, National Association is nominally the appellant here, not the Noteholders. It participates only in its capacity as indenture trustee under the Notes. As the real parties in interest are the Noteholders, we instead refer to them in this opinion.

U.S. Bank National Association also appeals in its capacity as indenture trustee for other unsecured notes; its only issue is whether Hertz should have paid post-petition interest on its notes at their contract rate rather than the federal judgment rate. Beyond adopting the arguments made by the Noteholders, it did not offer any arguments of its own.

Applicable Premiums and contract rate interest, combined totaling more than $270 million. The savings effectively went to the Stockholders: The Plan gave them roughly four times that amount in a combination of cash and equity in the reorganized Hertz. The Noteholders, unsurprisingly, object to that result.

Among the issues we address are two questions of bankruptcy law unresolved in this Circuit: Does § 502(b)(2)'s prohibition on claims "for unmatured interest" cover make-whole fees like the Applicable Premiums, and does the Bankruptcy Code as a whole require solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate?[3]

Hertz argues that make-whole fees are the economic equivalent of interest and must be disallowed under § 502(b)(2). It concedes, however, that the Bankruptcy Code requires solvent debtors to pay unimpaired creditors like the Noteholders post-petition interest, but, in its view, only at the federal judgment rate. So the company tells us the Noteholders received everything they were entitled under the Code.

[3] Throughout this opinion, we refer to contract rate interest. But we really mean the applicable non-bankruptcy rate, whatever it may be. *See, e.g., Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047, 1064 (9th Cir. 2022) (solvent debtor exception may require award of "contractual or state law default" interest). Hertz does not contest the Notes' validity under governing state law (New York), hence our use of the contract rate here.

The Noteholders disagree. They claim the Applicable Premiums should not be disallowed as unmatured interest because they do not fit the dictionary definition of that term. In any event, they say that pre-Bankruptcy Code caselaw grants them an equitable right to payment in full (*i.e.*, both contract rate interest and the Applicable Premiums) because Hertz is solvent. So, since the confirmed Plan classified them as unimpaired, they must receive interest at the contract rate. Per the Noteholders, if we side with Hertz and cancel the otherwise enforceable fees and interest at issue, we will bless an outcome anathema to our law—a windfall to the Stockholders, who sit at the lowest rung of payment priority, by letting them "pocket[] hundreds of millions of dollars that Hertz had promised to [pay] the Noteholders" that it "could easily afford to repay . . . in full[.]" Noteholder Br. 1. They reject Hertz's view that we are addressing only subtleties of insolvency law and see this dispute as more fundamental.

We determine that the Applicable Premiums must be disallowed under § 502(b)(2), for they fit both the dictionary definition of interest and are its economic equivalent. But we agree with the Noteholders that they have a right to receive contract rate interest and the Applicable Premiums because Hertz was solvent. Thoughtful opinions issued by the Fifth and Ninth Circuits in quite similar cases support the Noteholders. *Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022), *cert. denied,* 143 S.Ct. 2495 (2023); *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047 (9th Cir. 2022), *cert. denied*, 143 S.Ct.

2492 (2023).[4] We end as they do, though for us the primary support for that result is in absolute priority, "bankruptcy's most important and famous rule[.]" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (quoting Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 Va. L. Rev. 1235, 1236 (2013)). Allowing Hertz to cancel more than a quarter billion dollars of interest otherwise owed to the Noteholders, while distributing a massive gift to the Stockholders, would impermissibly "deviate from the basic priority rules . . . the Code establishes for final distributions of estate value in business bankruptcies." *Jevic*, 580 U.S. at 455.

I. Background

A. Procedural History

Hertz's Plan proposed to pay the Noteholders about $2.7 billion, reflecting the Notes' principal, contract rate interest that accrued before Hertz filed for bankruptcy, post-bankruptcy interest at the federal judgment rate (as applied in this case, 0.15% annually), and certain other fees. It would not pay them post-petition interest at the contract rate or any fees for redeeming the Notes early, including the Applicable Premiums. The Plan offered the Stockholders a package of

[4] The parties never cite the Second Circuit's ruling in *In re LATAM Airlines Group S.A.,* which also examined post-petition interest in solvent debtor cases. 55 F.4th 377 (2d Cir. 2022), *cert. denied*, 143 S.Ct. 2609 (2023). In our view, that discussion was *dicta*, as the decision "affirm[ed] the Bankruptcy Court's finding that [the debtor] was insolvent." *Id.* at 389.

stock, warrants, and cash that it valued in the aggregate at around $1.1 billion. App. 1514-15; Bankr. D.I. 4759 at 12, 18-19.[5]

Hertz and the Noteholders were aware of their disputes about contract rate interest and early redemption fees but did not let those issues delay emergence from Chapter 11. Instead, the Plan designated the Noteholders unimpaired, reserved their right to litigate their disagreements post-confirmation, and committed to pay whatever was necessary to ensure they were unimpaired under the Plan. The Noteholders were not allowed to vote on the Plan because, as unimpaired creditors, they were conclusively presumed to accept it. § 1126(f). The Plan was confirmed in early June 2021, and Hertz emerged from Chapter 11 later that month.

In July 2021, the Noteholders filed a complaint seeking payment of post-petition interest at the contract rate, the Applicable Premiums, and the flat fees for early redemptions found in the 2022 and 2024 Notes. The Bankruptcy Court dismissed their claims for contract rate interest. It concluded that, as unimpaired creditors of a solvent debtor, they were entitled to interest at the "legal rate," per §§ 1129(a)(7)(A)(ii) & 726(a)(5), and that rate is the federal judgment rate. The Court rejected the Noteholders' argument that a "solvent debtor exception," following from pre-Bankruptcy Code

[5] Specifically, the Plan offered the Stockholders $1.53 in cash per share (with approximately 156 million shares outstanding, that was about $240 million), 3% of reorganized Hertz's equity (valued at $141 million), and warrants for further equity that the Plan estimated were worth $769 million. Bankr. D.I. 4759 at 12, 18-19.

caselaw, required Hertz to pay them interest at the contract rate. It also dismissed their claims for flat redemption fees on the 2022 and 2024 Notes because those fees were not triggered as a matter of contract law. But over Hertz's objection, it concluded the opposite as to the Applicable Premiums. While Hertz also argued those Premiums were disallowed by § 502(b)(2)'s prohibition on claims for unmatured interest, the Bankruptcy Court did not then resolve that issue. Whether the claims were for interest for purposes of § 502(b)(2), it explained, was a "factual" question that required record development. App. 31.

After discovery, Hertz and the Noteholders cross-moved for summary judgment on that issue. Because the Bankruptcy Court concluded that the "economic substance" of the Applicable Premiums was interest, it disallowed the claims of the Noteholders. App. 73. They moved for reconsideration on post-petition interest in light of the intervening decisions in *Ultra* and *PG&E*, which both required solvent debtors to pay unimpaired creditors post-petition interest at the contract rate. The Bankruptcy Court did not change its mind: It had "considered all [the] arguments" on post-petition interest "and simply reached a different conclusion from that reached by the Fifth and Ninth Circuits." App. 77. It then *sua sponte* certified its decision for direct appeal to us. 28 U.S.C. § 158(d)(2). We agreed to review the appeal rather than requiring the parties to proceed first in the District Court.

The Noteholders ask us to reverse the Bankruptcy Court by ruling that Hertz owes them the fixed redemption fee on the 2024 Notes, the Bankruptcy Code does not prohibit payment of the Applicable Premiums, and (as unimpaired creditors of the very solvent Hertz) they are entitled to post-petition interest at the contract rate.

B. Jurisdiction, Standard of Review

We have jurisdiction under 28 U.S.C. § 158(d). The Bankruptcy Court's rulings on Hertz's motion to dismiss and the cross-motions for summary judgment are both subject to our plenary review. *In re Klaas*, 858 F.3d 820, 827 (3d Cir. 2017).

II. Analysis

A. The 2024 Notes' Fee

The Noteholders appeal the ruling that they were not entitled to an early redemption fee on the 2024 Notes.[6] Those Notes required Hertz to pay a flat fee if they were redeemed "after October 15, 2019 and prior to maturity[.]" App. 520. We agree with the Bankruptcy Court; this fee was not triggered because the 2024 Notes by their terms matured when Hertz filed bankruptcy and their redemption followed around a year later when it left Chapter 11.

True, the Bankruptcy Court's ruling allows Hertz to redeem the 2024 Notes well before 2024 without a fee. But, viewed in the complex context of modern leveraged finance, that is not as "bizarre" a result as the Noteholders suggest.

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[6] In their papers, the Noteholders concede that they are not owed an early redemption fee on the 2022 Notes. Noteholder Br. 53 n.10.

Noteholder Br. 54. Those Notes only mature early upon an acceleration approved by the lenders or a bankruptcy filing, which would not happen unless the lenders threatened to accelerate. There is fierce debate whether borrowers should pay fees in that case, and both sides have valid points.[7] So this result, likely stemming from extensive negotiations around the terms of the 2024 Notes as a whole, is not absurd. That background illustrates why, given our limited familiarity with the intricacies of technical debt contracts, we should rule based on their terms alone, not our (perhaps uninformed) views of fairness. *Cf. Cortland St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 198 (N.Y. 2018) (bonds must be enforced "according to the plain meaning of [their] terms" (citation omitted)). What might appear fair to an unfamiliar court could be unfair when understood in full.

The Noteholders also argue that certain provisions of the 2024 Notes "refer to maturity arising 'on acceleration' or 'otherwise[,]'" so maturity here must mean the day they are

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[7] *See* Matt Levine, *Bond Covenants and Skeptic Skepticism*, Bloomberg: Money Stuff (Jan. 12, 2017, 9:23 A.M.), https://www.bloomberg.com/opinion/articles/2017-01-12/bond-covenants-and-skeptic-skepticism; *compare* Adam Cohen, *The End of Covenants: The "No Premium on Default" Language Is Spreading Like Wildfire – Your Future Covenant Enforcement Is Being Destroyed*, Covenant Rev., (Jan. 11, 2017) (claiming borrowers will abuse creditors if bonds do not require early redemption fees upon default), *with* Steven A. Cohen et al., Wachtell, Lipton, Rosen & Katz, *Default Activism in the Debt Markets* (2018), https://perma.cc/82EL-PBJX (alleging that aggressive lenders are demanding early redemption premiums in response to technical defaults).

scheduled to mature in 2024. Noteholder Br. 54. We disagree. The referenced sections of the 2024 Notes do not use the word "maturity" but the defined term "Stated Maturity," which means "the fixed date [here, October 15, 2024] on which the payment of principal . . . is due[.]" App. 404. That is different from maturity, which occurs whenever a debt obligation "become[s] due." *Mature*, Black's Law Dictionary (12th ed. 2024). And, when interpreting contracts, we read defined and undefined terms as having distinct meanings. *See Derry Fin. N.V. v. Christiana Cos., Inc.*, 797 F.2d 1210, 1214-15 (3d Cir. 1986); *see also Robertshaw US Holding Corp. v. Invesco Senior Secured Mgmt. Inc. (In re Robertshaw US Holding Corp)*, No. 24-90052, Adv. No. 24-03024, slip op. at 11-14 (Bankr. S.D.Tex. June 20, 2024) (deciding debt dispute on the basis that "subsidiary" and "Subsidiary" have different meanings in the same document).

In sum, Hertz never promised to pay the Noteholders a fee in this situation. Contract law does not bind parties to promises they did not make. If the commercially sophisticated Noteholders think this outcome is unfair, they should not have agreed to the terms of the 2024 Notes that compel it. *Cf. Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 434 (N.Y. 2013) ("[H]ad these sophisticated business entities . . . intended [a different result], they easily could have included a provision to that effect[.]" (citations omitted)).

B. The Applicable Premiums

We turn to whether the Bankruptcy Court should have allowed the Noteholders' claims for the Applicable Premiums, which were triggered by Hertz's early payoff of the 2026 and 2028 Notes when it emerged from bankruptcy in 2021.

A bit of corporate finance knowledge is helpful here. Many bonds—including the 2026 and 2028 Notes—pay interest semi-annually via so-called coupons while outstanding. So, if a bond is redeemed before its scheduled maturity, lenders lose interest they otherwise would have received. In a compromise, many bonds—again, including the Notes—allow borrowers to redeem them before they are scheduled to mature in return for a flat fee. William J. Whelan III, *Bond Indentures and Bond Characteristics* in Leveraged Financial Markets: A Comprehensive Guide to High-Yield Bonds, Loans, and Other Instruments 171, 173 (William F. Maxwell & Mark R. Shenkman eds., 2010). It offers some compensation for lost interest income, but it does not attempt to be an exact substitute. We refer to this fee as the "Redemption Fee," and the first date when a borrower can redeem a bond by paying the Redemption Fee as the "Redemption Date." (The charge at issue for the 2024 Notes was a Redemption Fee.) But the 2026 Notes have a Redemption Date in August 2022 and the 2028 Notes' Redemption Date is in January 2023. Both Redemption Dates fall after Hertz's redemption of the Notes in June 2021—so, by contract, Hertz could not simply pay a Redemption Fee to rid itself of those Notes at that time.

However, there is another early release mechanism. Bonds sometimes allow borrowers to pay them off before the Redemption Date if lenders are "made whole," *i.e.*, if they receive the present value of the profits they would have booked in the alternate world where they were paid off on the Redemption Date. These make-whole fees guarantee lenders a minimum return, no matter how quickly a borrower pays them back. *See* Davis Polk & Wardwell LLP, *Creditor's Guide to Make-Whole Enforceability in Bankruptcy* 7 (2d ed.

2023), https://perma.cc/HZ2U-RL4F (a "make-whole provision ensures that creditors receive a minimum return on their investment . . . independent of when the debt instrument is repaid"); *In re Energy Future Holdings Corp. (EFH II)*, 842 F.3d 247, 250-51 (3d Cir. 2016) (make-wholes are "meant to give the lenders the interest yield they expect" in the event of an early redemption); *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 801-02 (2d Cir. 2017) (make-wholes provide "additional compensation to make up for the interest [lenders] would not receive" if bonds are redeemed early).

As noted above, the Applicable Premiums are make-whole fees. While their language appears complicated,[8] their

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[8] For readers interested in digging deeper, we offer the relevant text from the 2026 Bonds below (the 2028 Bonds are substantially identical).

> "Applicable Premium" means, with respect to a 2026 Note at any Redemption Date . . .[,] the excess of (A) the present value at such Redemption Date, calculated as of the date of the applicable redemption notice, of (1) the redemption price of such 2026 Note on August 1, 2022 (such redemption price being that described in Section 6(a)), plus (2) all required remaining scheduled interest payments due on such 2026 Note through such date (excluding accrued and unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate plus 50 basis points, over (B) the principal amount of such 2026 Note on such Redemption Date . . . .

App. 662 (cleaned up).

substance is not. The Premiums are made of three parts: interest coupons owed through the Redemption Date, the Redemption Fee, and a present value discount.[9] They seek to ensure that Noteholders receive the return they expected for their investment in the Notes Hertz redeemed before their Redemption Date.

With that background, we can now consider the parties' positions. Hertz argues that the Applicable Premiums must be

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To clarify further, the Applicable Premiums can be calculated by summing (a) the present value of a redemption on the Redemption Date (*i.e.*, principal and Redemption Fee) and (b) the present value of unaccrued interest through the Redemption Date, and then subtracting (c) the Notes' undiscounted principal. Ross Hallock, *The Math of Make-Wholes*, Covenant Rev., May 22, 2023, at 10. Doing some math, the Applicable Premiums can be restated as (a) the present value of the Redemption Fee and unpaid interest minus (b) the present value discount applicable to the early payment of the Notes' principal.

[9] To redeem the Notes before their scheduled maturity, Hertz must also pay all accrued but unpaid interest. App. 662. (This is interest for the time the Notes have been outstanding since the last payment: for example, if Hertz paid interest on April 1 and redeemed the Notes on July 31, this would be interest from April through July.) But because we require Hertz to pay post-petition contract rate interest, *infra* Section II.C, there will be no accrued but unpaid interest owing on the Notes after our decision. Thus, we ignore that requirement in our discussion above.

disallowed under § 502(b)(2)'s explicit prohibition on claims for unmatured interest because that is exactly what they are. By contrast, the Noteholders say the Applicable Premiums are not interest at all. Before us, Hertz does not dispute the Bankruptcy Court's conclusion that it owes the Applicable Premiums under the terms of the relevant Notes. The Noteholders do not dispute that the Applicable Premiums did not accrue before Hertz's bankruptcy filing and therefore are unmatured as a matter of bankruptcy law. Whether the Applicable Premiums are interest is the issue here. The Bankruptcy Court, for its part, ruled that the Applicable Premiums were interest in "economic reality[.]" App. 73.

Because make-whole fees are common in bonds and can be quite large, Chapter 11 debtors and creditors have repeatedly and vigorously disputed whether they must be paid in bankruptcy. *See, e.g.*, *Ultra*, 51 F.4th at 144 (challenge to $201 million make-whole); *EFH II,* 842 F.3d at 252 ($431 million make-whole); *MPM*, 874 F.3d at 805 (nearly $200 million make-whole). Practitioners and academics have written extensively on the subject as well, including the issue here—whether make-whole fees must be disallowed under § 502(b)(2) as "unmatured interest[.]"[10]

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[10] We found many articles on the subject helpful, including the pieces below (ordered by publication date): Scott K. Charles & Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 537 (2007); Patrick M. Birney, *Toward Understanding Make-Whole Premiums in Bankruptcy*, 24 Norton J. of Bankr. L. and Prac., no. 4, 2015; Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016; Sam Lawand, *Make-Whole Claims in Bankruptcy*, 27 Norton J. of Bankr. L. and Prac., no.

There are two common approaches to this question. One suggests that the appropriate analysis is whether a make-whole fee best fits within dictionary and caselaw definitions of interest. *See, e.g.*, *In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480-81 (Bankr. D. Del. 2011). The other approach, reflecting a concern that the definitional test puts form over substance, asks whether the make-whole at issue is the economic equivalent of interest. *Ultra*, 51 F.4th at 145-46 (warning the definitional approach is "susceptible to easy end-runs by canny creditors").

The Bankruptcy Court used the latter approach, concluded the Applicable Premiums are the economic equivalent of interest, and disallowed the Noteholders' claims. Hertz backs that rationale to us. The Noteholders primarily argue that the Applicable Premiums are not interest using the definitional approach, though they also disclaim any economic equivalency.[11] To us, the Applicable Premiums are interest

4, 2018; Bruce A. Markell, *Dead Funds and Shipwrecks:* Ultra Petroleum, 39 Bankr. L. Letter, no. 4, 2019; Douglas G. Baird, *Making Sense of Make-Wholes*, 94. Am. Bankr. L.J. 567 (2020).

[11] The Noteholders also cite non-bankruptcy cases concluding that prepayment penalties are not interest. They particularly draw our attention to *Prudential Ins. Co. of Am. v. Comm'r of Internal Revenue*, 882 F.2d 832, 837 (3d Cir. 1989), where we "reject[ed the] position that prepayment charges are interest equivalents." Appealing language, but on further review the case is not relevant—the question was whether "prepayment charges upon the retirement of certain corporate mortgages should be characterized as long-term capital gain" or interest

under both approaches, though they must be disallowed under § 502(b)(2) if they fit under either. We handle each in turn.

The Noteholders' implicit definitional argument, boiled down, is that interest is a fee accruing while borrowed money is used. By contrast, the Applicable Premiums do not slowly and steadily accrue over the life of the Notes; they come into being fully formed upon an early redemption. In their words, the Applicable Premiums are "not compensation for Hertz's ongoing use of the Noteholders' money," one of their preferred definitions of interest, "but rather compensation for the termination of Hertz's obligations to the Noteholders[.]" Noteholder Br. 45 (emphasis omitted).

The problem with the Noteholders' definitional approach is that the definitions are broader than that. Look at their prime cases on the subject. *Deputy v. du Pont* defines interest as "compensation for the use or forbearance of money." 308 U.S. 488, 498 (1940). *Love v. State* marks it as "the cost of having the use of another person's money for a specified period[.]" 583 N.E.2d 1296, 1298 (N.Y. 1991) . Black's Law Dictionary says it is "[t]he compensation fixed by agreement or allowed by law for the use or detention of money,

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for tax purposes. *Id.* at 833. As *Prudential* demonstrates, whether a prepayment charge is interest for purposes of another field of law does not automatically resolve the question for bankruptcy. Subject-specific considerations irrelevant in bankruptcy may have driven the analysis in those cases. And, in any event, many non-bankruptcy decisions agree with our broader view of interest. *See* Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016 (citing cases).

or for the loss of money by one who is entitled to its use; esp[ecially] the amount owed to a lender in return for the use of borrowed money." *Interest*, Black's Law Dictionary (12th ed. 2024). *See* Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016 (collecting definitions of interest and concluding that "payments which the lender collects for itself" above cash actually extended are interest).

These definitions of interest do not require that a charge accrue daily or be contingent on "ongoing" use of money. Contrary to the Noteholders' claims that the Applicable Premiums are not definitionally interest, they are "compensation" Hertz committed to pay (upon a contingency) in order to borrow (*i.e.*, use) the Noteholders' money. That the relevant contingency occurred—redemption of the Notes and the early return of the Noteholders' capital—does not change this conclusion. *Cf. Ultra*, 51 F.4th at 146 & n.8. To state it even from the Noteholders' perspective, the Applicable Premiums are among the suite of fees they extracted from Hertz in return for their credit. So Hertz's commitment to pay them was "compensation" for its use of their funds.[12]

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[12] Supporting our conclusion, several decisions have held that original issue discount must be disallowed under § 502(b)(2) to the extent unmatured. *See, e.g.*, *In re Pengo Indus*., 962 F.2d 543, 546 (5th Cir. 1992); *In re Chateaugay Corp.*, 961 F.2d 378, 380-81 (2d Cir. 1992). It is an amount tacked on to principal above the cash extended to a borrower. *Ultra*, 51 F.4th at 147 n.9. (For example, a loan with $100 of "principal" in return for an advance of $90 has $10 of original issue discount.) Like a make-whole, original issue discount is a large fee that does not accrue over time—rather, it is owing

The Noteholders also claim that the Applicable Premiums are definitionally not interest because they reflect the "reinvestment costs" that the Noteholders will suffer from redeploying their capital earlier than anticipated. Noteholder Br. 42. Presuming the Applicable Premiums perfectly match the Noteholders' reinvestment costs, we still conclude they must be disallowed under the definitional approach because a claim can simultaneously fit both the definition of interest and something else. *In re Dr.'s Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 706 (Bankr. N.D. Ill. 2014) (rejecting "false dichotomy" between describing a make-whole fee as liquidated damages or interest "because [it] may well be both"); *Ultra*, 51 F.4th at 148 ("interest labeled 'liquidated damages' is still interest" for § 502(b)(2) analysis). Interest by any other name does, in fact, smell as sweet. [13]

(but not due) the day funds are extended. But courts rule that it is interest because it is "paid to compensate for the delay and risk involved in the ultimate repayment of monies loaned." *Chateaugay*, 961 F.2d at 381.

[13] Without prejudging any case, we note that creditors are hard at work creating new forms of make-wholes that may also be interest by another name. *See, e.g.*, Elizabeth R. Tabas, *et al*., *Equity-Like Sweeteners Go Mainstream*, Am. Bar Ass'n: Bus. L. Today (Oct. 12, 2023), https://perma.cc/E45H-T3ZE (discussing growth of multiple on invested capital and internal rate of return-based make-wholes instead of "traditional" make-wholes "expressly calculated by reference to future interest").

This case is a good example. The Noteholders describe their reinvestment costs as the losses they will suffer when "reinvest[ing] their prepaid principal in a less-advantageous market environment." Noteholder Br. 42. That is, the reinvestment costs are the unmatured interest the Noteholders will not recover in the market.

We also think the Applicable Premiums (which, to repeat, are composed of interest coupons owed through the Redemption Date, the Redemption Fee, and a present value discount) are the economic equivalent of interest. They are mathematically equivalent to the unmatured interest the Noteholders would have received had Hertz redeemed the Notes on their Redemption Dates. We take each component in turn.

The coupons that would come due before the Redemption Date are no doubt interest. Applying the logic we used above, the Redemption Fee is interest; it is a fee for the Noteholders' profit that Hertz agreed to as a condition for issuing the Notes. The Bankruptcy Court reached the same result, noting that the Redemption Fee is equal to "one semi-annual interest payment" on the Notes. App. 74. To the Noteholders, this is "entirely arbitrary" because a larger Redemption Fee without a superficial similarity to a coupon would survive under that logic. Noteholder Br. 50. But our conclusion that the Redemption Fee is interest—because it is a fee for the Noteholders' ultimate return that Hertz committed to pay in exchange for the right to use the Notes' principal—has nothing to do with its relationship to the Notes' annual interest rate: § 502(b)(2) would disallow unmatured Redemption Fees of $0.01 and $1 billion alike.

That leaves the significant present value discount (accounting for early payment of principal, coupons, and the Redemption Fee). Correctly adjusting for present value, however, does not defeat the mathematical identity. Because a "dollar today is worth more than a dollar tomorrow," *Ultra*, 51 F.4th at 148, discounts are applied to early payments to account for risk of default and the time value of money, thus making sure that lenders receive the benefit of their bargain—the value they would expect to receive through a scheduled, rather than premature, paydown. If early payments were not discounted, lenders would receive an unjustified windfall. In other words, accounting for present value makes the Applicable Premiums even more mathematically equivalent to the disallowed unmatured interest by correctly pegging its actual worth. Applying a present value discount is not sufficiently "transformative" to turn the sum of interest coupons and the Redemption Fee into something other than interest. *Id.*

In any event, a claim for less than all the unmatured interest owed by a debtor (like the Applicable Premiums, here discounted by present value) is still a claim for unmatured interest. Self-imposed discounts do not defeat § 502(b)(2).

To sum up, § 502(b)(2) disallows a claim for unmatured interest if it is either definitionally interest or its economic equivalent. Because the Applicable Premiums are both, the Bankruptcy Court correctly disallowed the Noteholders' claims for those Premiums.

C. Solvent Debtors and Post-Petition Interest

Despite our holding above, does the Bankruptcy Code as a whole nonetheless require solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate? It is a technical question of bankruptcy law, and we give that issue its nuanced due below. We can rephrase it in a way that makes the answer predictable: Can Hertz use the Bankruptcy Code to force the Noteholders to give up nine figures of contractually valid interest and spend that money on a massive dividend to the Stockholders? The answer is no. As the Supreme Court told us more than a century ago, "the rule is well settled that stockholders are not entitled to any share . . . until all the debts of the corporation are paid." *Chi., Rock Island & Pac. R.R. v. Howard*, 74 U.S. 392, 409-10 (1868).

We start, however, with the Fifth and Ninth Circuits' decisions on which the parties spend a significant portion of their briefs. *Ultra* and *PG&E* are close analogues, each involving solvent debtors who sought to save immense amounts by paying unimpaired unsecured creditors post-petition interest at the federal judgment rate instead of the higher rates applicable outside bankruptcy. In both cases, the creditors won.

The Fifth and Ninth Circuits took similar approaches to the issue. Both Courts found in Supreme Court decisions a requirement to respect pre-Code practice absent a clear statement in the Bankruptcy Code, *Ultra*, 51 F.4th at 153-54; *PG&E*, 46 F.4th at 1057-58, concluded that pre-Code practice required solvent debtors pay contract rate interest, *Ultra*, 51 F.4th at 150-52; *PG&E*, 46 F.4th at 1053-55, and decided that the enacted Bankruptcy Code did not clearly reject that tradition, *Ultra*, 51 F.4th at 154-56; *PG&E*, 46 F.4th at 1058-59. They therefore ruled that the Code gives creditors of solvent debtors the equitable right to contract rate interest "before allocation of surplus value" to equityholders "absent compelling equitable considerations[.]" *PG&E*, 46 F.4th at 1064 ; *Ultra*, 51 F.4th at 159-60.

The *PG&E* Court backstopped its decision with the Bankruptcy Code's logic of impairment. 46 F.4th at 1060-61. "[I]mpaired" creditors—those whose bundle of "legal, equitable, and contractual rights" are "[]altered" by a bankruptcy plan—are entitled to a host of procedural protections. Bankruptcy Code § 1124(1). (The classic impaired creditor receives cents on the dollar for its claims.) The Ninth Circuit thought limiting unimpaired creditors to interest at the federal judgment rate ran contrary to the Code's system of impairment; doing so would offer PG&E the best of both worlds by "pay[ing the relevant unimpaired creditors] the same, reduced interest rate as impaired creditors, while depriving them of the statutory protections that impaired creditors enjoy." *PG&E*, 46 F.4th at 1061. The Court rejected this effort to let equity "have its cake and eat it too"; it could not let PG&E "reap[] a windfall of hundreds of millions of dollars" at creditors' expense while denying them both the statutory protections offered to impaired creditors and their equitable right to contract rate interest. *Id.*

Hertz primarily challenges those decisions by suggesting they misread Supreme Court precedent. Rather than require us to continue pre-Code practices absent a clear statement to the contrary, Hertz says the Supreme Court relegates historical bankruptcy law to a minor role; it is a mere "tool of construction" relevant only when the Code is genuinely ambiguous. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000). Instead, the Circuits impermissibly used it as an "extratextual supplement[,]" *id.*, to require contract rate interest without reference to the Bankruptcy Code's actual text.

But we do not think those decisions disregard *Hartford* or the statutory text. As the *PG&E* court correctly noted, pre-Code solvent debtor practice sprung from the pre-Code absolute priority rule. 46 F.4th at 1054. And, as we explain below, the Bankruptcy Code adopted the pre-Code version of that rule. So the common law absolute priority rule is not an "extratextual supplement" to the Bankruptcy Code. It is an enacted part of it that we must respect.

What is that rule? Our quote from *Chicago, Rock Island & Pacific* at the beginning of this section sums it up well: in bankruptcy, equity comes after debt (unless the latter consents). The absolute priority rule serves as an essential governor on the bankruptcy process to protect creditors. "Shareholders retain substantial control" over the debtor during Chapter 11, which gives them a "significant opportunity for self-enrichment at the expense of creditors." *In re DBSD N. Am., Inc.*, 634 F.3d 79, 100 (2d Cir. 2011). One of those opportunities comes from the debtor's functionally exclusive right[14] to propose the plan of reorganization that determines

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[14] Debtors have the exclusive right to file a plan for the first 120 days of a case, a period that can be extended for up to 18 months. Bankruptcy Code §§ 1121(a) & (d). They often obtain significant extensions of the exclusivity period. Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investments, 330 (2005) ("[B]ankruptcy courts usually will

creditors' ultimate treatment. *Id.*; *see* Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investments, 329-31 (2005) (Exclusivity is a "powerful weapon wielded by management in the battle with creditors[.]"). A "danger inherent in any reorganization plan proposed by a debtor" (including this Plan proposed by Hertz) is that it might "turn out to be too good a deal for the debtor's owners." *Bank of Am. Nat'l Tr. and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (citing H.R. Rep. No. 93-137, pt. 1, at 225 (1973)); *DBSD*, 634 F.3d at 100 (noting that debtor's proposed plan offered its shareholder almost thirty times more value than "unsecured creditors . . . despite the latter's technical seniority").

History proves that to be a substantial risk. Around the turn of the 20th century, American railroad owners used so-called "equity receiverships" to restructure otherwise untenable debts.[15] A combination of pro-management receivers and bank-controlled "protective committees" gave a

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have a predisposition toward allowing the debtor time to present a plan[.]"); Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. Chi. L. Rev. 1, 9 (2023) (Bankruptcy courts often "grant[] managers serial extensions of the exclusivity period[.]"). Hertz had the exclusive right to propose a plan through the whole case. Bankr. D.I. 3905 (extending exclusivity period through July 2021, more than a year after Hertz filed for bankruptcy).

[15] While the 1898 Bankruptcy Act was in force at that time, it only contemplated corporate liquidation. Amendments in the 1930s added business reorganization procedures. *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 448-49 (1940).

sliver of corporate insiders (including equity) near-complete control of the reorganization. William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565, 567-68 (1934); John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich. L. Rev. 963, 969-71 (1989). The result of these equity-controlled reorganizations was that outside creditors were wiped out, while insider equityholders retained control of a reinvigorated business. Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 74-77 (1991) [hereinafter Markell, *Absolute Priority*]; David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America*,* 56-69 (2001).

The Supreme Court unequivocally rejected those tactics, most prominently in *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913). It ruled that creditors have "superior rights against the subordinate interests of . . . stockholders . . . . [Therefore,] [a]ny device . . . whereby stockholders [of an insolvent business] were preferred before the creditor [is] invalid." *Id.* at 504. *Boyd* is seen as announcing the absolute priority rule, which promptly "thereafter passed into the language and lore of the corporate lawyer." Ayer, *supra*, at 973.[16] Applied in bankruptcy, it

[16] But perhaps it was announced earlier. *See Chi., Rock Island & Pac. R.R.*, 74 U.S. at 409-10; *Louisville Tr. Co. v. Louisville, New Albany & Chi Ry. Co.*, 174 U.S. 674, 684 (1899) ("[T]he familiar rule [is] that the stockholder's interest in the [bankrupt company] is subordinate to the rights of creditors. . . . [A]ny arrangement of the parties by which the subordinate rights [are] secured at the expense of . . . creditors comes within judicial denunciation.").

prevents business owners, "the most junior claimants[,]" from recovering anything "unless creditors . . . are paid in full" or consent. Markell, *Absolute Priority*, *supra* at 72.

Today, the absolute priority rule is housed in § 1129(b). That section protects impaired creditors from overreaching plans. Unlike unimpaired creditors, whose rights are left unaltered and thus are "conclusively presumed" to accept a proposed plan, § 1126(f), impaired creditors may vote on it. A plan rejected by a class of impaired creditors can nonetheless be approved, but only if a court finds that it is "fair and equitable" to that class, with the burden on the plan proponent. § 1129(b); *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II.)*, 994 F.2d 1160, 1168-70 (5th Cir. 1993). That process is known as "cramdown." *See generally* Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133 (1979) [hereinafter Klee, *Cram Down*].[17] In practical terms, that offers plan proponents a choice: "compensate creditors in full[,]" leaving them unimpaired, or confirm a plan paying them less (*i.e.*, impairing them) in the face of "the Code's substantive and procedural protections" for impaired creditors—including the ballot box and § 1129(b). *PG&E*, 46 F.4th at 1061.

With that throat-clearing complete, we turn to our case. The Plan promised to pay the Noteholders whatever amount was necessary to "render [them u]nimpaired" (*i.e.*, to leave

[17] In addition, a gateway requirement for a cramdown of an impaired rejecting class of creditors is that there be an acceptance of that plan by another class of impaired creditors. § 1129(a)(10).

their rights unaltered). App 1512. Hertz submits that the "critical question . . . is [what interest rate] an unimpaired class in a solvent debtor case is entitled to." Tr. of Oral Arg. at 30. But that "elides the antecedent question of what constitutes unimpairment in the first place." *PG&E*, 46 F.4th at 1062.[18]

A creditor is impaired if its treatment violates the absolute priority rule because every creditor has a right to treatment consistent with that principle. This squarely follows the Supreme Court's recent decision in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017). There, a debtor sought to pay friendly junior creditors while giving nothing to hostile creditors with higher priority. *Id.* at 459-60. It could not do so via a plan, because this distribution would violate the Bankruptcy Code's absolute priority rule. *Id.* at 460-61. So it instead obtained an order from the Bankruptcy Court dismissing the case and distributing the cash to the junior creditors. *Id.* at 461. Our Court affirmed, reasoning that "Congress codified the absolute priority rule . . . in the specific context of plan confirmation . . . [,] and neither Congress nor the Supreme Court has ever said that the rule applies" to dismissals. *Off. Comm. of Unsecured Creditors v. CIT*

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[18] Hertz's position may have been supported by former § 1124(3), which declared creditors unimpaired if they received "cash equal to . . . the allowed amount" of their claim. But, after a bankruptcy court used that section to deny post-petition interest to an unimpaired creditor in a solvent debtor case, Congress promptly repealed it. *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 205-06 (3d Cir. 2003) (discussing legislative overruling of *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994)).

Grp./Bus. Credit, Inc. (In re Jevic Holding Corp), 787 F.3d 173, 183 (3d Cir. 2015) (citing § 1129(b)(2)).

The Supreme Court reversed. Whereas our Court saw the absolute priority rule as a procedural protection that applied only when § 1129(b) is invoked (where the Code explicitly mentions it), the Supreme Court concluded it applied everywhere absent a clear statement authorizing a departure. *Jevic*, 580 U.S. at 465. It "expect[ed] to see some affirmative indication of intent if Congress actually meant to [authorize] backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits[.]" *Id.* "[S]imple statutory silence," the Court declared, is not enough to allow a "major departure" from the Code's basic principle. *Id.* In other words, the Bankruptcy Code entitles every creditor—not just the dissenting impaired creditors who can invoke § 1129(b)[19]—to treatment consistent with absolute priority absent a clear statement to the contrary. *Id.* That sounds like a right to us, at least for purposes of the Bankruptcy Code.[20]

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[19] *Contra* App. 48 (Bankruptcy Court here announcing that the absolute priority rule is not relevant in this case because § 1129(b)(2) "on its face is not applicable to unimpaired creditors"). The Second Circuit concluded in *LATAM* that "the absolute priority rule comes into effect only when a class of impaired creditors votes to reject a plan[.]" 55 F.4th at 388 (citing *DBSD*, 634 F.3d at 105). But the opinion never discusses the Supreme Court's decision in *Jevic*.

[20] The bundle of rights that impairment considers reflects adjustments required by the Bankruptcy Code. *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d

This conclusion tracks the basic principles of impairment in bankruptcy. "Congress define[d] impairment in the broadest possible terms," *L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc.* (*In re L & J Anaheim Assocs.)*, 995 F.2d 940, 942 (9th Cir. 1993) (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 418 (7th Cir. 1984)), to ensure that creditors affected by a bankruptcy plan can vote on it. *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 203 (3d Cir. 2003). If receiving payment in full a few months after confirmation renders a creditor impaired under § 1124(1), *W. Real Est. Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (In re Vill. at Camp Bowie I, L.P.)*, 710 F.3d 239, 243-46 (5th Cir. 2013), it must be the case that a creditor faced with a plan denying it bankruptcy's fundamental protection (in the Noteholders' case, to the tune of hundreds of millions of dollars) is affected enough to be impaired under that subsection.[21]

197, 204 (3d Cir. 2003). Contrary to the Noteholders' argument, this means that disallowance by § 502(b)(2) does not result in impairment. *Id.*; *Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res. (In re Ultra Petroleum Corp.)*, 943 F.3d 758, 763-64 (5th Cir. 2019); *PG&E.*, 46 F.4th at 1063 n.11; *LATAM*, 55 F.4th at 384-85. That is not to say that a creditor is impaired without the benefit of a procedural protection offered by the Code—the language of *Jevic* compels that conclusion as to the absolute priority rule.

[21] While not briefed by the parties, we note the effective consequence of classifying the Noteholders impaired. They would have been the sole impaired class of creditors under the Plan**,** and so would have had the veto power awarded by § 1129(a)(10). Without their consent, Hertz could not confirm

That result also flows from *Jevic*'s condemnation of "backdoor means" to defeat the absolute priority rule. 580 U.S. at 465. The Bankruptcy Code offers a creditor consent at the ballot box as a "front door" to confirm a plan that violates absolute priority. § 1129(a)(8); Markell, *Absolute Priority*, *supra* at 88-89. Concluding that absolute priority is a right that must be respected in the § 1124(1) analysis directs noncompliant plans through the front door, as *Jevic* intended. Ruling as Hertz requests, by contrast, leaves the back door wide open in solvent debtor cases like this one and gives plan proponents the unintended power to force creditors to accept a "priority-violating" distribution. *Jevic*, 580 U.S. at 465; *cf. PG&E,* 46 F.4th at 1061 (rejecting "a reading of the Code that permits . . . end-run[s]" around creditor protections to benefit equity). Creditors could be compelled to accept—without even the chance to vote or explicit statutory authorization—treatment that falls so short of the Code's basic guarantees that it could not be "crammed down" on them if they rejected it at the polls. § 1129(b); *Off. Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 677-80 (6th Cir. 2006). That theory also lacks explicit statutory support and is therefore contrary to *Jevic*.

Accordingly, the Noteholders' right to treatment consistent with absolute priority must be honored to leave them unimpaired. Hertz still maintains that any such right does not require post-petition interest at the contract rate. In its view, we cannot rule based on the principle announced in *Boyd*—that equity cannot recover until debt is paid in full—because the

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the Plan. It seems plausible to think the Noteholders would not have accepted a penny less than their contractual entitlement.

Code's treatment of absolute priority lists "very specific principles about . . . priorities," and that list is silent on post-petition interest. Tr. of Oral Arg. at 47. It argues there is a "common law absolute priority rule," *id.*, following *Boyd* and its progeny, and a separate absolute priority rule enumerated in the Code that we are bound to follow. § 1129(b)(2). But we reject this view because no such dichotomy exists. In fact, the Bankruptcy Code incorporates the common law absolute priority rule articulated in *Boyd*.

As noted above, a plan satisfies the enacted absolute priority rule only if it is "fair and equitable." § 1129(b). "Congress chose [those] words with care. . . . [They] stand proxy for over a century of judicial decision-making, and over half a century of legislative guidance." *Collier on Bankruptcy* ¶ 1129.03[4] (16th ed. 2024). That is not just the commentary of a well-regarded treatise; it is supported by legislative history. Markell, *Absolute Priority, supra*, at 88-89 & n.134; Klee, *Cram Down*, *supra* at 142. And, much more importantly, it tracks the language of the statute.

When interpreting "fair and equitable" in the Bankruptcy Act (the Code's immediate predecessor), the Supreme Court concluded that those words incorporated the common law absolute priority rule. *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 118-19 (1939) (fair and equitable is a "term of art" that includes *Boyd* and its progeny); Markell, *Absolute Priority, supra* at 85 & nn.102-04. Congress very deliberately included those exact words in the Bankruptcy Code. And the Supreme Court is clear: When Congress imports into a statute a "judicially created concept," it takes that concept whole unless it makes its contrary "intent specific," a rule "followed . . . with particular care in construing" the Bankruptcy Code. *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986). We thus see Congress's choice to reuse "fair and equitable" as deliberately incorporating the common law absolute priority rule into the enacted Bankruptcy Code.

Further support comes from the precise language of § 1129(b)(2), which notes that the fair and equitable test "includes" certain enumerated requirements. But that does not reflect an intent to limit absolute priority to just the listed conditions: "Includes" in the Bankruptcy Code is "not limiting." § 102(3). So a plan is not automatically fair and equitable under the Bankruptcy Code merely because it complies with the requirements in that section. *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1352 (5th Cir. 1989) (citing *In re D & F Constr., Inc.*, 865 F.2d 673, 675 (5th Cir. 1989)); *Collier on Bankruptcy* ¶ 1129.03[4][b][ii] (16th ed. 2024); Kenneth N. Klee, *Cram Down II*, 64 Am. Bankr. L.J. 229, 229-31 (1990). The use of "includes" suggests that the full meaning of fair and equitable is located elsewhere; as explained above, it is found in pre-Code absolute priority caselaw and practice. [22]

That jurisprudence required solvent debtors to pay contract rate interest before making distributions to equity. *See, e.g.*, *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 527-28 (1941) (citing absolute priority cases, including

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[22] The Second Circuit disagreed in *LATAM*, 55 F.4th at 388-89 (concluding that the absolute priority rule's requirements are fully codified in § 1129(b)(2)). But *LATAM* does not address the specific language of the Code, which controls our analysis here.

Boyd);[23] *see generally PG&E*, 46 F.4th at 1054 (pre-Code solvent debtor jurisprudence flowed from "[t]he common-law absolute priority rule"); Chaim J. Fortgang & Lawrence P. King, *The 1978 Bankruptcy Code: Some Wrong Policy Decisions*, 56 N.Y.U. L. Rev. 1148, 1159 (1981) (the Bankruptcy Act's absolute priority rule required "post-petition interest . . . at the full, contractually agreed-upon rate" before equityholders could recover). Reviewing "three centuries of bankruptcy law," the *Ultra* Court saw a simple rule: "When a debtor can pay its creditors interest on its unpaid obligations in keeping with the valid terms of their contract, it must." 51 F.4th at 150.

That makes sense. To repeat, the absolute priority rule requires creditors' obligations be paid in full before owners, with junior rights to the business, take anything at all. So it should be no surprise that several thoughtful decisions conclude that the Bankruptcy Code's absolute priority rule, which incorporates common law and Bankruptcy Act jurisprudence, can require payment of contract rate interest in solvent debtor cases. *Dow Corning*, 456 F.3d at 678-80; *In re Energy Future Holdings Corp. (EFH I)*, 540 B.R. 109, 117-18 (Bankr. D. Del. 2015); *In re Mullins*, 633 B.R. 1, 10-16 (Bankr.

[23] The Bankruptcy Court's opinion suggests *Consolidated Rock* is inapplicable here because the creditors in that case had collateral for their claims, unlike the Noteholders. App. 46-47. But the logic of *Consolidated Rock* does not focus on the security held by the lenders; rather, it emphasizes the amounts the junior stockholders will recover. 312 U.S. at 527 (noting that the "plan does not satisfy the fixed principle of the *Boyd* case").

D. Mass. 2021); *cf. PG&E*, 46 F.4th at 1060-61. We join their reasoning.

But while the absolute priority rule can require payment of contract interest in solvent debtor cases, it does not always do so. Rather, it imposes the equitable rate of post-petition interest, whatever that may be. *See, e.g.*, *Dow Corning*, 456 F.3d at 678-80; *EFH I*, 540 B.R at 117-18. This equitable concern is not for former owners. Rather, courts primarily worry that paying one creditor contract rate interest might give it an inequitable leg up over its peers if there is not enough to pay everyone their full rate. *See, e.g.*, *PG&E*, 46 F.4th at 1064. The ordinary course, with which we generally agree, thus would be to remand to the Bankruptcy Court and ask it to determine whether any "compelling equitable considerations" counsel against awarding the Noteholders their contract rate. *Id.* (citations omitted).

For two reasons, however, we do not do so here. The first is procedural: Hertz never suggested we remand to the Bankruptcy Court rather than award the Noteholders their requested interest. Our forfeiture doctrine counsels against rewarding that choice. *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146-48 (3d Cir. 2017).

The second is equitable. In the normal case, the equitable rate of post-petition interest will be determined before plan confirmation—*i.e.*, before the money goes out the door. But here, the Stockholders received $1.1 billion in value from Hertz when the Plan went effective more than three years ago. No party suggests we can unscramble that egg. So our equitable calculus must reflect that the Stockholders already took their dividend. Therefore, the equities demand the

Noteholders recover post-petition interest at the contract rate. It would be profoundly unfair to scrimp on the Noteholders' interest when the junior Stockholders already received a billion dollar distribution. To be clear, the post-petition interest we award includes the Applicable Premiums, which Hertz persuaded us were contractual interest accruing after the bankruptcy filing. *Supra II.B*; *Ultra*, 51 F.4th at 160 ("[T]he traditional solvent-debtor exception compels payment of the Make-Whole Amount[.]"); *cf. Dow Corning*, 456 F.3d at 680 ("[T]here is a presumption that default interest should be paid to unsecured claim holders in a solvent debtor case.").

Our result is supported by the requirement that we interpret the Bankruptcy Code "holistic[ally.]" *United Sav. Ass'n of Tex. v Timbers of Inwood Forest Assoc's,* 484 U.S. 365, 371 (1988). We do so with an eye to "produc[ing] a substantive effect that is compatible with the" Code. *Id.* Hertz's theory that the Noteholders should not recover contract rate interest creates significant tensions with the Code's basic structure. We briefly note two of them. First, when a plan sticks only one class of creditors with losses, it cannot be confirmed over their objection. § 1129(a)(10). That "critical confirmation requirement[]" prevents "abuse of creditors" by ensuring that plan proponents cannot force one unlucky class to bear the entire brunt of the bankruptcy against its will. *John Hancock Mut. Life Ins. Co v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993). Hertz's proposed result would do just that by forcing the Noteholders alone to sacrifice over their vigorous dissent. Concluding they are impaired by payment of interest at the federal judgment rate makes (a)(10) effective in this case by protecting them from a plan that, at their expense alone, pays everyone else. Second, impaired rejecting creditors of solvent debtors may receive contract rate interest through the absolute priority rule. *Dow Corning*, 456 F.3d at 678-680.[24] But, under Hertz's rule, unimpaired creditors like the Noteholders would receive only the federal judgment rate. In effect, they would recover significantly less than is fair and equitable (and so less than objecting impaired creditors must receive). And "creditors who are *unimpaired* . . . cannot be treated any worse than *impaired* creditors, who at least get to vote[.]" *Ultra*, 51 F.4th at 158 (emphases in original); *PG&E*, 46 F.4th at 1060-61; *EFH I*, 540 B.R. at 123.

Our colleague dissenting in part believes that we offer short shrift to § 502(b)(2), which "plainly disallows" post-petition interest in any form. Partial Dissent 1. Not so. Even Hertz agrees that "[u]nsecured creditors may indeed receive post-petition interest *on* their allowed claims" in a solvent debtor case like this one. Hertz Br. 30 (emphasis in original). That concession "forecloses the notion that § 502(b)(2) alone limits unimpaired creditors' ability to collect post[-]petition interest," *PG&E*, 46 F.4th at 1059. This must be the case because "reading . . . § 502(b)(2) to disallow *all* post-petition interest, whether as *part of* a claim or *on* a claim, would plainly conflict with § 1129(a)(7)(A)(ii) and § 726(a)(5), which expressly operate to *allow* post-petition interest *on* claims." *Ultra*, 51 F.4th at 159 n.27 (emphases in original)*; see also EFH I*, 540 B.R. at 111 ("[T]here is a distinction between the payment of interest *on an allowed claim* as opposed to *as an*

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[24] *Contra* App. 53 (Bankruptcy Court stating that "[i]f the Noteholders had been treated as impaired and [rejected] the Plan, they would have received . . . post-petition interest in accordance with sections 1129(a)(7) and 726(a)(5)[,]" which the Bankruptcy Court concluded awarded interest only at the federal judgment rate).

allowed claim. . . . The claim itself does not change. What may change is what the holder of a claim is entitled to receive under a confirmed plan.") (emphases in original); *In re Dow Corning Corp.*, 244 B.R. 678, 685 (Bankr. E.D. Mich. 1999) ("[S]ince § 502(b)(2) speaks only to claim *allowance* . . ., [it] does not rule out the possibility of interest *on* allowed claims pursuant to § 1129(b).") (emphasis in original); *Mullins*, 633 B.R. at 15.

III. Conclusion

The Noteholders loaned Hertz billions and received back a contractually valid promise to pay fees and interest. The COVID pandemic resulted in a liquidity crisis and a Chapter 11 filing. Bankruptcy gave the then-insolvent Hertz, among other things, the opportunity to disallow claims for interest not yet mature at its filing. But the pandemic's vice eased and the bounceback to Hertz's business made it so financially strong at confirmation of its Plan a year later that Hertz concedes it must pay post-petition interest on the Noteholders' allowed claims. But at what rate? Two holdings in similar circuit court cases say it is the rate imposed by the relevant nonbankruptcy law. We agree and expand further on our primary reasoning for that result.

With more than a quarter billion dollars at stake, it is no shock that Hertz looked to maximize its leverage over the Noteholders rather than simply giving in. Its argument was creative and reflects a deep familiarity with the details of the Bankruptcy Code. But it misses the bigger picture. The Code does not award leverage arbitrarily. Rather, it assigns leverage in ways that ensure the "plan will achieve a result consistent with the objectives and purposes of the . . . Code." *Madison Hotel*, 749 F.2d at 425 (internal quotation marks omitted).

And there is no question that Hertz's proposal—paying the Noteholders a fraction of the interest they were contractually promised, while distributing more than a billion dollars to the Shareholders—is contrary to those objectives and purposes. Once again, "the familiar rule [is] that the stockholder's interest in the [bankrupt company] is subordinate to the rights of creditors. . . . [A]ny arrangement of the parties by which the subordinate rights . . . [are] secured at the expense of . . . creditors comes within judicial denunciation." *Louisville Tr. Co. v. Louisville, New Albany & Chi. Ry. Co.*, 174 U.S. 674, 684 (1899). The accretional array of cases, topped by *Jevic*, carries this "fixed principle," *Boyd*, 228 U.S. at 507, through to today. Marbled in the Bankruptcy Code, it disfavors nonconsensual distributions to equity over creditors.

So it should be no surprise in this solvent debtor case that Hertz's strategic maneuvering comes to naught. The Code's careful design does not give Hertz enough leverage to subvert that law's foundational goals. We thus affirm in part and reverse in part the Bankruptcy Court's decisions. To comply with the absolute priority rule, and thus fulfill the Plan's promise to "leave[] unaltered the [Noteholders'] legal, equitable, and contractual rights[,]" § 1124(1), Hertz must pay the post-petition interest at the Notes' applicable contract rate, including the Applicable Premiums on the 2026 and 2028 Notes.

PORTER, *Circuit Judge*, concurring in part and dissenting in part.

I join the majority's opinion except for Part II.C, which holds that Hertz must pay the Applicable Premiums and post-petition contract-rate interest to the Noteholders. The Fifth and Ninth Circuits have reached the same result as the majority. *See Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022); *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047 (9th Cir. 2022). But I largely agree with the dissents in those cases, which recognize that the Bankruptcy Code plainly disallows claims "for unmatured interest" like the Noteholders' claims for the Applicable Premiums and post-petition interest. 11 U.S.C. § 502(b)(2); *see Ultra*, 51 F.4th at 160–64 (Oldham, J., dissenting); *PG&E*, 46 F.4th at 1065–75 (Ikuta, J., dissenting). To the extent that the majority's reasoning tracks that of the Fifth and Ninth Circuits, I have little to add to those thoughtful dissents. But to the extent that it differs, I write separately.

I

The majority's core argument concerns 11 U.S.C. § 1124, which governs when "a class of claims or interests is impaired under a plan." A class of claims is unimpaired if, "with respect to each claim or interest of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." *Id.* § 1124(1). Hertz's Plan promised to pay the Noteholders' claims "in the amount necessary to render them unimpaired." J.A. 12.

To honor that promise, the majority concludes that Hertz must pay contract-rate interest. That is because, according to the majority, one of the "rights" protected under § 1124(1) is treatment consistent with bankruptcy law's "absolute priority rule." Roughly speaking, the absolute priority rule requires creditors to be paid in full before equityholders receive a penny. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464–65 (2017) (explaining the rule and describing it as "fundamental to the Bankruptcy Code's operation"). Because Hertz has paid over $1 billion to its former equityholders, the majority believes that Hertz must pay its creditors' claims in full to render them unimpaired, including the Applicable Premiums and post-petition interest to which the Noteholders are contractually entitled.

I disagree with the majority for two reasons. First, treatment consistent with the absolute priority rule is not one of the "rights" protected under § 1124(1). Impairment does not depend on whether the Plan alters *any* of the Noteholders' "legal, equitable, and contractual rights," regardless of the legal source from which the right springs. *Id.* It depends on whether the Plan alters the "rights to which" the Noteholders' *claims* "entitle[]" the Noteholders. *Id.* Here, the rights to which the Noteholders' claims entitle them do not include the right to treatment consistent with absolute priority. *See PG&E*, 46 F.4th at 1073 (Ikuta, J., dissenting) ("[T]he language of § 1124(1) . . . explains only when a *claim* is impaired" and "does not [otherwise] describe when a *holder's* equitable rights have been impaired[.]"). The Code defines a "claim" as any "right to payment" and any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). These are the "rights to which" a claim "entitles [its] holder," *id.* § 1124(1), and they may include "equitable rights such as restitution" and "quantum meruit," *see PG&E*, 46 F.4th at 1074 (Ikuta, J., dissenting). But the Noteholders' right to treatment consistent with absolute priority is a "procedural protection," Maj. Op. 33, not a substantive "right to payment" or "right to an equitable remedy for breach of performance," § 101(5). Assuming that the absolute-priority right exists, it flows from a legal source other than the Noteholders' claims—like pre-Code practice, the Code itself, or background principles of bankruptcy law—and therefore is irrelevant to impairment under § 1124(1). *See* Maj. Op. 33 (stating that "the Bankruptcy Code," not claims themselves, "entitles every creditor . . . to treatment consistent with absolute priority").[1]

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[1] Interestingly, Hertz believes that it must pay post-petition interest *on* the Noteholders' claims at the federal judgment rate to render them unimpaired. This view rests in part on the premise that § 502(b)(2) disallows post-petition interest as part of a claim but does not affect post-petition interest accruing on an allowed claim. *See, e.g.*, *Ultra*, 51 F.4th at 159 n.27. However, I see "no [textual] basis for the . . . interpretation of § 502(b)(2) as prohibiting interest *as part of* an allowed claim but not prohibiting interest *on* a claim once it is allowed." *PG&E*, 46 F.4th at 1067 (Ikuta, J., dissenting). While some other provisions in the Code provide for post-petition interest on allowed claims, 11 U.S.C. § 726(a)(5), I tend to view such provisions as "exceptions to [a] general rule disallowing post-petition interest," *PG&E*, 46 F.4th at 1067 (Ikuta, J., dissenting), not as evidence that § 502(b)(2) does not generally apply to post-petition interest on allowed claims. In any event, we need not decide whether Hertz could have paid no post-petition interest whatsoever without impairing the Noteholders' claims. Hertz paid post-petition interest at the federal judgment rate to the Noteholders and does not ask the Noteholders to return that amount. Following the principle of party presentation, I would "rely on the parties to frame the issues for decision" and hold only that

Second, even if § 1124(1) implies the Noteholders' right to treatment consistent with absolute priority, the Noteholders' claims are nevertheless unimpaired because it is the Code that alters the Noteholders' right, not the Plan. *See Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 204 (3d Cir. 2003) ("[A] creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on . . . rights."). It is the Code, not the Plan, that disallows the Noteholders' claims for the Applicable Premiums and post-petition contract-rate interest, § 502(b)(2), resulting in treatment that the majority deems inconsistent with absolute priority.

II

In making the argument discussed in the previous section, the majority relies on *Jevic* to support the proposition that treatment consistent with absolute priority is "a right . . . for purposes of the Bankruptcy Code." Maj. Op. 33. But the majority separately appears to rely on *Jevic* for an argument that does not depend on impairment under § 1124(1). My colleagues describe the *Jevic* Court as "conclud[ing]" that absolute priority "applie[s] everywhere absent a clear statement authorizing a departure." Maj. Op. 33. Under this view, Hertz might be required to pay contract-rate interest because the Code does not clearly state that absolute priority should be violated here, regardless of whether the Noteholders' claims are impaired under § 1124(1).

Jevic dealt with a bankruptcy court's power to dismiss a case under 11 U.S.C. § 1112(b). Ordinarily, a dismissal results in a restoration of the pre-petition status quo, "revest[ing]

Hertz need not pay more than it has already paid. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

the property of the estate in the entity in which such property was vested immediately before the commencement of the case." *Id.* § 349(b)(3). But the Code permits a bankruptcy court, "for cause," to "order[] otherwise," *id.* § 349(b), in a so-called "structured dismissal." The bankruptcy court in *Jevic* ordered a structured dismissal "that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors." 580 U.S. at 454. This dismissal violated the absolute priority rule as codified for Chapter 7 liquidations and Chapter 11 plans because it compensated low-priority creditors before mid-priority creditors received anything on their $8.3 million claim. *Id.* at 460; *see* 11 U.S.C. §§ 725, 726, 1129.

The Supreme Court held that the bankruptcy court lacked the power to order such a dismissal. *Jevic*, 580 U.S. at 464. As the majority emphasizes, the Court noted "[t]he importance of the priority system," which requires "more than simple statutory silence if, and when, Congress were to intend a major departure." *Id.* at 465. But the Court did not rest its decision on that reasoning alone, proceeding to observe that there is scant basis for "priority-violating" structured dismissals in the Code. *Id.* The Code's baseline is for dismissals to return the parties to the pre-petition status quo, which does not violate absolute priority. *Id.* at 466. Deviations from this baseline are permitted only "for cause." § 349(b). The Court considered "cause" to be "to weak a reed upon which to rest [a] weighty . . . power" like a priority-violating dismissal. *Jevic*, 580 U.S. at 466. It reached this conclusion because of the meaning of "cause" in context, which "appears designed to give courts the flexibility to make the appropriate orders to protect rights acquired in reliance on the bankruptcy case," not to "make general end-of-case distributions of estate assets" that violate priority. *Id.* (internal quotation marks and quoted source omitted).

I disagree that *Jevic* requires Hertz to pay contract-rate interest for at least two reasons. First, the posture of this case is distinguishable from that of *Jevic*. There, the bankruptcy court exercised a power without any express basis in the Code, thereby violating absolute priority, so the Supreme Court concluded that the bankruptcy court was not so empowered. *Jevic*, 580 U.S. at 464–67. Here, the Code expressly *disempowers* courts from allowing claims for post-petition contract-rate interest over an objection. § 502(b)(2). The majority concludes that because this disempowerment violates absolute priority, we may disregard it and wield power that the Code expressly withholds from us. I find no support for that conclusion in *Jevic*, where the bankruptcy court was not expressly empowered to violate absolute priority.

Second, even if the majority is correct that Hertz violates the common law absolute priority rule, Hertz's violation differs significantly from the violation in *Jevic*. There, the structured dismissal violated the *codified* absolute priority rules for Chapter 7 liquidations and Chapter 11 plans, insofar as low-priority creditors were paid something but some mid-priority creditors were paid nothing. *Jevic*, 580 U.S. at 460. Here, Hertz has not violated the codified absolute priority rules because it has paid the Noteholders' allowed claims in full. For both Chapter 7 liquidations and Chapter 11 plans, codified absolute priority requires payment of allowed claims, not payment of disallowed contractual entitlements. *See, e.g.*, § 726(a)(3) (giving third priority to "payment of any *allowed* unsecured claim proof of which is tardily filed" (emphasis added)); § 1129(b)(2)(B)(i) (requiring, for a plan to be "fair and equitable," that each unsecured creditor "receive or retain on account of such claim property of a value . . . equal to the *allowed* amount of such claim" (emphasis added)). Hertz's Plan therefore fits comfortably with the codified absolute priority rules that were violated in *Jevic* and on which that opinion was based.

For those two reasons, even assuming that *Jevic* announces a clear-statement rule, it does not apply to the facts here. Instead of a clear-statement rule, I would apply the Supreme Court's typical approach to harmonizing pre-Code practice with the Code's text, under which pre-Code practice "can be relevant to the interpretation of an ambiguous text" but is irrelevant if there is "no textual ambiguity." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). Because the Code's disallowance of the Noteholders' claims is clear and unambiguous,[2] I would not use the common law absolute priority rule as an "extratextual supplement" to supplant § 502(b)(2). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000).

III

In addition to their arguments regarding impairment and *Jevic*, my colleagues appeal more generally to policy. They argue that treating the Noteholders as unimpaired and allowing Hertz to pay them less than contract-rate interest would produce odd results. For example, they argue that the unimpaired Noteholders would be treated worse than impaired, dissenting creditors, insofar as the latter would be entitled to "fair and equitable" treatment that would include contract-rate interest. My

[2] Assuming that *Jevic*'s clear-statement rule applies here, it is satisfied because § 502(b)(2) disallows post-petition interest with "unmistakabl[e]" clarity. *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998).

colleagues may well be correct that "unimpaired creditors [will] be treated worse than impaired creditors" under Hertz's interpretation, but we are bound to "enforce[] the Code's express terms" regardless of such policy considerations. *PG&E*, 46 F.4th at 1075 (Ikuta, J., dissenting).

* * *

For these reasons, I respectfully concur in part and dissent in part.

Appendix J

Feature

By Shane G. Ramsey and John T. Baxter

Should Solvent Debtors Pay Post-Petition Interest at the Contract Rate? Recent Decisions Say "Yes"

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Two recent decisions from the Fifth and Ninth Circuit Courts of Appeals have addressed a question that does not arise often: In a solvent-debtor chapter 11 case, is the debtor required to pay post-petition interest (or "pendency interest") to unsecured creditors to render such claims unimpaired? If so, what is the applicable rate of interest to use? In addition, a subsequent decision from the Second Circuit, while not ultimately reaching the issue, favorably cited the recent Fifth and Ninth Circuit decisions.

Solvent-Debtor Exception

The default rule in bankruptcy law is that interest ceases to accrue on a claim once a debtor has filed for bankruptcy.[1] This rule is one of necessity; in most chapter 11 cases, the debtor cannot pay all of its creditors, therefore payment of post-petition interest would diminish the value of the estate and result in disparate treatment of creditors.[2]

Accordingly, 18th century English courts developed the solvent-debtor exception, which required bankrupts to pay interest that accrued during bankruptcy before retaining value from an estate.[3] In turn, American courts imported this doctrine and applied it under the Bankruptcy Act of 1898.[4]

The solvent-debtor exception was not codified, instead existing as a common law exception to the Bankruptcy Act's prohibition on the collection of post-petition interest as part of a creditor's claim.[5] Courts interpreted the exception as flowing from the purpose of bankruptcy law to ensure an equitable distribution of assets.[6] Under this exception, creditors of a solvent debtor were entitled to be made whole, including receiving post-petition interest, before surplus value was returned to the bankrupt.[7]

History of Post-Petition Interest in Solvent-Debtor Cases Under the Bankruptcy Code

Most modern case law recognizes that unsecured creditors of solvent debtors are entitled to post-petition interest on their claims if they are to be deemed unimpaired.[8] In solvent-debtor cases where interest on an unsecured claim is required, the applicable language is less clear on what rate of interest should apply. Section 726(a)(5) of the Bankruptcy Code refers to interest at "the legal rate," which, unfortunately, is not particularly helpful. Courts that have addressed this issue have concluded that the "legal rate" of interest means either the contract rate[9] or federal statutory rate[10] set forth in 28 U.S.C. § 1961.[11]

However, some cases have held that creditors of solvent debtors are not entitled to post-petition interest at any rate at all, on the grounds that the solvent-debtor exception did not survive the Code's enactment. These cases, however, are in the minority.

Ninth Circuit's Decision in *PG&E*

In *In re PG&E Corp.*,[12] the Ninth Circuit ruled that a solvent debtor's chapter 11 plan must pay pendency interest to unsecured creditors to render their claims unimpaired. In so doing, the court opined: "[P]ursuant to the solvent-debtor exception, unsecured creditors

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1 *See Sexton v. Dreyfus*, 219 U.S. 339, 344, 31 S. Ct. 256, 55 L. Ed. 244 (1911); 11 U.S.C. § 502(b)(2).

2 *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163-64, 67 S. Ct. 237, 91 L. Ed. 162 (1946). But such concerns do not exist when a bankrupt has sufficient funds to pay all outstanding debts. *See Johnson v. Norris*, 190 F. 459, 462 (5th Cir. 1911) (emphasizing that default rule halting accrual of interest during bankruptcy "was not intended to be applied to a solvent estate").

3 *See, e.g., Bromley v. Goodere*, (1743) 26 Eng. Rep. 49, 51-52; 1 Atkyns 75, 79-81.

4 *See, e.g., City of New York v. Saper*, 336 U.S. 328, 330 n.7, 69 S. Ct. 554, 93 L. Ed. 710 (1949) (recognizing solvent-debtor exception).

5 *See* Bankruptcy Act of 1898, ch. 541, § 63, 30 Stat. 544, 562-63 (repealed) (stating that allowed claim excludes "costs incurred and interests accrued after the filing of the petition").

6 *See Johnson*, 190 F. 459, 466; *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir. 1982) (calling exception "fair and equitable"). The common law absolute-priority rule requires that a creditor be "made whole" before junior interests take from the bankruptcy estate.

7 *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 529 (7th Cir. 1986).

8 *See In re New Valley Corp.*, 168 B.R. 73, 81 (Bankr. D.N.J. 1994) (holding that "a solvent debtor is not required to pay post-petition interest on claims of unsecured creditors who are unimpaired"); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213(d), 108 Stat. 4106, 4125-26 (overruling *New Valley* by repealing 11 U.S.C. § 1124(3) (1988) and, in effect, requiring payment of post-petition interest for unsecured creditors to be unimpaired).

9 *See, e.g., Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1, 7 (1st Cir. 2007) ("This is a solvent-debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations."); *In re Dow Corning Corp.*, 456 F.3d 668, 680 (6th Cir. 2006) ("[T]here is a presumption that default interest should be paid to unsecured claimholders in a solvent-debtor case."); *Dvorkin Holdings LLC*, 547 B.R. 880, 893-94 (N.D. Ill. 2016) (rejecting argument that federal judgment rate applied and awarding interest at contract rate).

10 The Federal Judgment Rate is calculated "from the date of the entry of the judgment, at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." *See* 28 U.S.C. § 1961.

11 *See, e.g., In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (holding that creditor was entitled to interest on its allowed unsecured claim at federal judgment rate rather than contract rate); *In re RGN-Grp. Holdings LLC*, 2022 WL 494154, *6 (Bankr. D. Del. Feb. 17, 2022) (holding that creditor was entitled to interest on its allowed unsecured claim at federal judgment rate rather than contract rate).

12 46 F.4th 1047 (9th Cir. 2022), *reh'g denied*, No. 21-16043 (9th Cir. Oct. 5, 2022), *stayed pending petition for cert.*, No. 21-16043 (9th Cir. Oct. 27, 2022).

possess an 'equitable right' to post-petition interest [under § 1124(1) of the Bankruptcy Code] when a debtor is solvent."

Regarding the applicable rate of interest, the Ninth Circuit, in reversing the lower court, held that there is a presumption that the pendency interest to be paid to unsecured creditors should be based on the contractual or default rate, not the federal judgment rate, absent contrary and compelling equitable considerations.

In reaching its holding, the Ninth Circuit first addressed whether its prior decision in *In re Cardelucci*[13] was controlling in the case before it. Both the bankruptcy and district courts below held that *Cardelucci* established a broad rule that all unsecured claims in a solvent-debtor bankruptcy are entitled only to post-petition interest at the federal judgment rate, regardless of impairment status.

The Ninth Circuit in *PG&E* rejected this holding, reasoning that "*Cardelucci* merely held that the phrase 'interest at the legal rate' in § 726(a)(5) refers to the federal judgment rate as defined by 28 U.S.C. § 1961(a)." Section 726(a)(5) "only applies to impaired chapter 11 claims via the best-interests test. *Cardelucci* therefore does not tell us what rate of post-petition interest must be paid on plaintiffs' unimpaired claims."[14] The Ninth Circuit continued, "*Cardelucci* provides no textual basis for applying § 726(a)(5) to unimpaired claims, nor could it."[15] As a result, the Ninth Circuit declined to read *Cardelucci* as establishing the broad rule advocated for by PG&E. According to the court, "*Cardelucci* merely held that the phrase 'interest at the legal rate' in § 726(a)(5) refers to the federal judgment rate. But this holding does not answer what rate of interest is required where § 726(a)(5) does not apply — including for unimpaired claims."[16]

The court concluded by holding "that the equitable solvent-debtor exception — and its core principle that creditors should be made whole when the bankruptcy estate is sufficient — persists under the Code. Accordingly, under the Code, unsecured creditors of a solvent debtor retain an equitable right to post-petition interest pursuant to their contracts, subject to any other equities in a given case. A failure to compensate creditors according to this equitable right as part of a bankruptcy plan results in impairment."[17]

Fifth Circuit's Decision in *Ultra Petroleum*

A little over a month later, the Fifth Circuit issued a ruling in *Ultra Petroleum Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors (In re Ultra Petroleum Corp.)*[18] addressing the same issue. Just as the Ninth Circuit did in *PG&E*, the Fifth Circuit concluded that in a solvent-debtor case, "[c]reditors are entitled to what they bargained for," meaning that creditors in that case with claims based on contracts were entitled to pendency interest at the default contract rate.

In so doing, the court considered the interplay between §§ 1129(a)(7) and 726(a)(5) of the Bankruptcy Code. Section 1129(a)(7) provides that a bankruptcy court can "cram down" a plan on impaired creditors, over their objection, if they "will receive or retain under the plan ... not less than the amount that [they] would so receive or retain if the debtor were liquidated under chapter 7." In turn, § 726(a) governs what the creditors would get if the debtor were liquidated in a chapter 7 case. Section 726(a) provides a waterfall for the distribution of a debtor's assets in a chapter 7 liquidation. Before a solvent debtor's equityholders get any of the estate's leftovers, § 726(a)(5) says that creditors are to be paid interest on their claims "at the legal rate" from the petition date.

In *Ultra Petroleum*, the debtor relied on the phrase "legal rate" to support its argument that the "legal rate" must be the federal judgment rate. In support of its arguments, the debtors relied on the Ninth Circuit's decision in *Cardelucci*. The Fifth Circuit, like the Ninth Circuit in *PG&E*, rejected the application of *Cardelucci*, noting that the reference to "the legal rate" was not dispositive because, according to the court, the textual reference to "the legal rate" merely "sets a floor — not a ceiling — for what an impaired (and by implication, unimpaired) creditor is to receive in a cram-down scenario."[19] Thus, "even if 'the legal rate' is the Federal Judgment Rate, the Code does not preclude unimpaired creditors from receiving default-rate post-petition interest in excess of the Federal Judgment Rate in solvent-debtor Chapter 11 cases."[20]

These two decisions are a departure from numerous lower court decisions forming the majority rule that the federal judgment rate is the applicable rate of interest in solvent-debtor cases.[21] With these recent decisions from the Fifth and Ninth Circuits, all five of the circuit courts of appeals to have addressed the issue agree that the contract rate is the applicable rate of interest in solvent-debtor cases.[22]

Second Circuit's Decision in *LATAM*

In *In re LATAM Airlines Grp. SA*,[23] the U.S. Court of Appeals for the Second Circuit favorably discussed portions of *Ultra Petroleum* and *PG&E*, stating, "We find these authorities persuasive. We therefore join the Third, Fifth, and Ninth Circuits and hold that a claim is impaired under Section 1124(1) only when the plan of reorganization, rather than the Code, alters the creditor's legal, equitable, or contractual rights."[24] Ultimately, however, the court did not address the extent to which the solvent-debtor exception survived the Bankruptcy Code's enactment, because the court deferred to and affirmed the bankruptcy court's determination that the debtor was insolvent.

13 285 F.3d 1231 (9th Cir. 2002).
14 *PG&E Corp.*, 46 F.4th at 1056.
15 *Id.* (internal citations omitted).
16 *Id.* at 1056-57 (internal citations omitted).
17 *Id.* at 1061.
18 51 F.4th 138 (5th Cir. 2022), *reh'g denied*, No. 21-20008 (5th Cir. Nov. 15, 2022).
19 *Id.* at 158.
20 *Id.* at 158-59.
21 *See, e.g., In re RGN-Grp. Holdings LLC*, 2022 WL 494154, *6 (Bankr. D. Del. Feb. 17, 2022) (holding that creditor was entitled to interest on its allowed unsecured claim at federal judgment rate rather than contract rate); *In re Cuker Interactive LLC*, 622 B.R. 67, 69 (Bankr. S.D. Cal. 2020) (holding that because construing solvent debtor-exception to require payment of contract-rate interest might be problematic in cases with significant number of creditors where several interest rates might apply, leading to an administrative morass and different treatment of creditors in same class, pendency interest must be paid at federal judgment rate); *In re Mullins*, 633 B.R. 1, 16 (Bankr. D. Mass. 2021) (to satisfy best-interests test, which incorporates § 726(a)(5)'s dictate that interest be paid at "the legal rate" in case involving sufficient assets, pendency interest must be paid at federal judgment rate).
22 *See, e.g., Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1, 7 (1st Cir. 2007) ("This is a solvent debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations."); *In re Dow Corning Corp.*, 456 F.3d 668, 680 (6th Cir. 2006) ("[T]here is a presumption that default interest should be paid to unsecured claimholders in a solvent debtor case."); *In re PPI Enters. (U.S.) Inc.*, 324 F.3d 197, 207 (3d Cir. 2003) (holding that failure to pay post-petition interest on claim "could not qualify for nonimpairment under § 1124(1) because the failure to pay post-petition interest does not leave unaltered the contractual or legal rights of the claim").
23 2022 WL 17660057 (2d Cir. Dec. 14, 2022).
24 *Id.* at *5.

continued on page 54

Should Solvent Debtors Pay Post-Petition Interest at the Contract Rate?

from page 13

Takeaways

As a result of these three decisions, lower courts throughout the nation may soon start departing from the majority rule and adopting the reasoning of these circuit courts of appeals. While there may be some baseline appeal to the current majority approach in that it keeps the meaning of "the legal rate" consistent across sections of the Bankruptcy Code, the current trend toward the contractual rate is the more reasoned viewpoint. The purpose of the solvent-debtor exception is to ensure that all creditors are treated fairly where there are sufficient assets to fully fund all claims. By potentially reducing undersecured creditors' interest rate accrual by reverting to the federal rate, these creditors would be in a worse position than they were prior to the bankruptcy — a statement that cannot be said of the debtor's other creditors, whose claims would remain the same.

Accordingly, creditors' and debtors' attorneys alike need to be aware of this current trend when confronting a solvent-debtor case. The ease of imposing the federal interest rate is being eschewed in favor of the fairer contractual rate. While this unquestionably benefits secured creditors, there is no real detriment to debtors, as they are merely held to the obligations that they contractually agreed to prior to the bankruptcy case. abi

Faculty

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18 and is presently a conflicts judge in the Districts of Guam, Hawaii and Southern California. Previously, Judge Collins was a shareholder with the Collins, May, Potenza, Baran & Gillespie, P.C. in Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. He was the 2023 president of the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, is on the Ninth Circuit's Trial Improvement Committee, is on the JCUS's Bankruptcy Judges Advisory Group, and served on ABI's Board of Directors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Hon. Michelle M. Harner is a U.S. Bankruptcy Judge for the District of Maryland in Baltimore, appointed in 2017. Prior to her appointment to the bench, she was the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law, where she taught courses in bankruptcy and creditors' rights, business associations, business planning, corporate finance and the legal profession. Judge Harner lectured frequently during her academic career on various topics involving corporate governance, financially distressed entities, risk management and related legal issues. Her academic scholarship is widely published, with her publications appearing in, among others, the *Vanderbilt Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, *Minnesota Law Review*, *Indiana Law Journal*, *Fordham Law Review* (reprinted in *Corporate Practice Commentator*), *Washington & Lee Law Review*, *William & Mary Law Review*, *University of Illinois Law Review*, *Arizona Law Review* (reprinted in *Corporate Practice Commentator*) and *Florida Law Review*. Judge Harner has served as the Associate Reporter to the Advisory Committee on the Federal Rules of Bankruptcy Procedure, the Reporter to the ABI Commission to Study the Reform of Chapter 11, and most recently chaired the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts. She also served as the Robert M. Zinman ABI Resident Scholar for the fall of 2015. She most recently served as the chair of the Dodd-Frank Study Working Group for the Administrative Office of the U.S. Courts, and she is currently serving as a member of the Advisory Committee on the Federal Rules of Bankruptcy Procedure and an associate editor of the *American Bankruptcy Law Journal*. Judge Harner is an elected conferee of the National Bankruptcy Conference, an elected Fellow of the American College of Bankruptcy, and an elected member of the American Law Institute. She previously was in private practice in the business restructuring, insolvency, bankruptcy and related transactional fields, most recently as a partner at the Chicago office of the international law firm Jones Day. Judge Harner received her B.A. *cum laude* from Boston College in 1992 and her J.D. *summa cum laude* from The Ohio State University College of Law in 1995.

Hon. Marvin P. Isgur is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Feb. 1, 2004, and reappointed on Feb. 1, 2018. He also served as Chief Judge from 2009-2012. Judge Isgur serves as adjunct faculty at the University of Houston Law Center. Between 1978 and 1990, he was an executive with a large real estate development company in Houston. From 1990 until 2004, he represented trustees and debtors in chapter 11 and chapter 7 cases, as well as various parties in 14 separate chapter 9 bankruptcy cases. Judge Isgur has written over 500 memorandum opinions. He was one of the first judges to issue opinions interpreting the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. Judge Isgur is a volunteer with the Houston Urban Debate League, a nonprofit organization that works in partnership with the Houston Independent School District to bring policy debate to high school students. He is one of the principal organizers of the annual University of Texas Consumer Bankruptcy Conference and is a frequent speaker at continuing education programs. Judge Isgur received his bachelor's degree from the University of Houston in 1974, his M.B.A. with honors from Stanford University in 1978, and his J.D. with high honors from the University of Houston in 1990.

Hon. Laurel Myerson Isicoff is a U.S. Bankruptcy Judge for the Southern District of Florida in Miami, initially appointed on Feb. 13, 2006. She served as Chief Judge from October 2016 until October 2023. Judge Isicoff serves on the Judicial Conference Committee on the Administration of the Bankruptcy System. Judge Isicoff serves on the Judicial Conference Committee on the Administration of the Bankruptcy System and on its subcommittee on Diversity, Equity and Inclusion. She serves as vice president of the American College of Bankruptcy, is a member of its *Pro Bono* Committee and is a past chair of its Judicial Outreach Committee, and from 2021-22 she co-chaired the College's Commission on Diversity, Equity and Inclusion. In recognition of that service, as well as her long-standing commitment to diversity, equity and inclusion, she received the inaugural DEI Excellence Award from the College. In further recognition of her contributions to DEI, she was awarded the 2023 NCBJ DEI Leadership Award from the National Conference of Bankruptcy Judges. Judge Isicoff currently serves as judicial chair of the *Pro Bono* Committee of the Business Law Section of the Florida Bar and is a member of the Florida Bar Standing Committee on *Pro Bono*. Prior to becoming a judge, she specialized in commercial bankruptcy, foreclosure and workout matters, both as a transactional attorney and litigator for 14 years with the law firm of Kozyak Tropin & Throckmorton, after practicing for eight years with Squire, Sanders & Dempsey, now known as Squire Patton Boggs. After graduating from law school, Judge Isicoff clerked for Hon. Daniel S. Pearson at the Florida Third District Court of Appeal before entering private practice. She is a past president of the National Conference of Bankruptcy Judges and of the Bankruptcy Bar Association (BBA) of the Southern District of Florida, and, until she took the bench, she served as the chair of the *Pro Bono* Task Force for the BBA. Judge Isicoff speaks extensively on bankruptcy around the country, and is committed to increasing *pro bono* service, diversity, equity and inclusion, and financial literacy for all. She received her J.D. from the University of Miami School of Law in 1982.

Norman N. Kinel is a partner in Squire Patton Boggs' Restructuring & Insolvency Practice group in New York and is national chair of the firm's Creditors' Committee Practice. With more than 30 years of experience as a bankruptcy practitioner, he has successfully represented and litigated on behalf of clients in some of the nation's largest and most intricate bankruptcy cases, involving numerous industries. Mr. Kinel regularly represents debtors, creditors, bondholders, trustees and committees of creditors, equityholders and retirees. He also often advises clients in out-of-court default, workout and restructuring matters. Mr. Kinel has experience in bankruptcy asset sales and mergers and acquisitions, as well as cross-border insolvency proceedings. His practice includes complex bankruptcy litigation and appeals involving contested confirmations of plans, DIP financing, cash collateral and adequate protection, relief from the automatic stay, assumption and rejection of executory contracts and leases, exclusivity and substantive consolidation. He also has litigation expertise in connection with director and officer liability, breach of fiduciary duty, fraudulent conveyance and preferential transfer actions. Mr. Kinel is listed on the Register of Mediators of the U.S. Bankruptcy Courts for the

Southern and Eastern Districts of New York and the District of Delaware, and was a court-approved mediator in the *Lehman Brothers* cases. He received his undergraduate degree in 1980 from Yeshiva University and his J.D. in 1983 from American University Washington College of Law.

Hon. Deborah L. Thorne is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on Oct. 22, 2015. Prior to joining the bench, she was a partner in the Chicago office of Barnes & Thornburg LLP, where she was a member of its Financial Insolvency and Restructuring Department. Her practice included the representation of creditors and other parties in insolvency proceedings, and she frequently served as a federal equity receiver in commodity fraud cases brought by the Commodity Futures Trading Commission. In addition, she co-chaired the Women's Initiative for the firm. Judge Thorne is past chair of the Chicago Bar Association Bankruptcy and Restructuring Committee and past chair of the Bankruptcy Committee for the Seventh Circuit Bar Association. She previously served as ABI's Vice President-Communications and Information Technology and is the author of ABI's *The Preference Defense Handbook: The Circuits Divided* and a co-author of its *Interrupted! Understanding Bankruptcy's Effects on Manufacturing Supply Chains*. Judge Thorne is a Fellow of the American College of Bankruptcy. She served as Education Committee chair for the National Conference of Bankruptcy Judges from 2019-20 and as its president from 2021-22. Judge Thorne is included in *The Best Lawyers in America* in the area of bankruptcy and creditor/debtor rights law, is recognized as a Leading Lawyer in Illinois, and has been recognized by *Illinois Super Lawyers* every year since 2003. For seven years, she chaired Women Employed, a Chicago nonprofit policy organization focused on improving the lives of low-wage women through enhancing access to post-secondary education and improving job quality. Judge Thorne received her B.A. from Macalester College, her M.A.T. from Duke University and her J.D. with honors from Illinois Institute of Technology Chicago-Kent College of Law.