GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Anne Fleming Research Professor and
Professor of Law

Written Testimony of

Adam J. Levitin
Professor of Law
Georgetown University Law Center

Before the Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
United States House of Representatives

"Oversight of the Bankruptcy Code, Part I:
Confronting Abuses of the Chapter 11 System"

July 28, 2021
10:00 am

Witness Background Statement

Adam J. Levitin is an Anne Fleming Research Professor and a Professor of Law at the Georgetown University Law Center, in Washington, D.C., where he teaches courses in bankruptcy, commercial law, contracts, and finance regulation. He is the author of *Business Bankruptcy: Financial Restructuring and Modern Commercial Markets* (2nd ed. Wolters Kluwer 2018), *Consumer Finance: Markets and Regulation* (Wolters Kluwer 2018), and, with Susan M. Wachter, *The Great American Housing Bubble* (Harvard University Press, 2020).

Professor Levitin has previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute, and as Special Counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program (TARP). Professor Levitin has also previously served on Consumer Financial Protection Bureau's Consumer Advisory Board.

Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College. In 2013 he was awarded the American Law Institute's Young Scholar's Medal.

Professor Levitin has not received any Federal grants or any compensation in connection with his testimony, and he is not testifying on behalf of any organization. The views expressed in his testimony are solely his own.

© 2021, Adam J. Levitin

Executive Summary

Chapter 11 is now over 40 years old. In the decades since its enactment, financial markets and bankruptcy practice have changed substantially. While chapter 11 is generally a well-functioning system, it is in need of a tune-up to address a number of problems and abuses of the system have manifested themselves with regularity in recent years.

In particular, my testimony focuses on six problematic developments in chapter 11:

1. Creditors being forced to release their claims against non-debtors, who have not had to undergo the bankruptcy process.
2. Debtors hand-picking the judge to hear their cases, a phenomenon that has resulted in 57% of large public bankruptcy cases in 2020 being heard by just three of the nation's 375 bankruptcy judges.
3. Bankruptcy court decisions not being subject to appellate review, particularly due to a doctrine known as "equitable mootness" that courts use to refuse to hear appeals once money has begun to be paid under chapter 11 plans.
4. Debtors circumventing of the protections of the plan confirmation process through pre-plan transactions that lock in terms of plans
5. Insiders of debtors engaging in aggressive fraudulent transfers prior to filing of bankruptcy, knowing that they will only have to return at most a fraction of the looted assets to the debtor.
6. Debtors paying large bonuses to executives immediately before filing for bankruptcy ("payday before mayday").

The first five of these six trends are on display in opioid manufacturer Purdue Pharma's bankruptcy. Under Purdue's plan, opioid victims and other creditors will be forced to release their claims not just against Purdue, but also against Purdue's owners, the billionaire Sackler family. The Sacklers will wipe out their liabilities without having to file for bankruptcy themselves, and without opioid victims ever having their day in court. The Sacklers will never have to face their creditors, make a full disclosure of their assets, or make all of their assets available for their creditors. Despite receiving allegedly billions in fraudulent transfers from Purdue, the Sacklers will emerge from Purdue's bankruptcy richer than they went in to it.

How did this happen? The key to the Sacklers getting away with it is that Purdue abused the local bankruptcy case assignment rules to hand-select the judge it wanted to hear the case, knowing that the judge was likely to approve the release of the Sacklers. The shape of Purdue's restructuring plan—which has always hinged on the release of the Sacklers—was then all but locked in under the terms of a settlement between Purdue and the Department of Justice. And given the fact that any appeal of the releases of the Sacklers will likely be denied as equitably moot, confirmation of Purdue's plan by the hand-picked judge next month will likely be the end of the matter.

This process and the assured outcome are both wrong. I urge this Subcommittee to consider reforms to chapter 11 to prevent such future travesties of justice.

© 2021, Adam J. Levitin

Full Written Testimony

Chairman Cicilline, Ranking Member Buck, Members of the Committee:

Good morning. Thank you for inviting me to testify at this hearing. My name is Adam Levitin. I am a Professor of Law at the Georgetown University, where I teach courses in bankruptcy, commercial law, and consumer finance. I appear hear today as an academic who studies the bankruptcy system, without any personal financial interest at issue.

In a couple of weeks, a bankruptcy court in White Plains, New York, will hold a hearing to confirm the chapter 11 reorganization plan of Purdue Pharma, the manufacturer of OxyContin, a highly addictive opioid. Purdue is a closely held company owned by the immensely wealthy Sackler family, whose names grace major museums. The Sacklers functioned, according to the Department of Justice, Purdue's "de facto CEO."[1] The Sacklers also received as much as $13 billion in dividends and other payments from Purdue over the years, including after Purdue's contribution to the opioid crisis became clear.[2]

Purdue has proposed funding its plan primarily through a $4.275 billion contribution from the Sackler family, to be paid out over ten years. The Sacklers agreed to this contribution in exchange for a release not only of Purdue's claims against them, but also for a release of any claims Purdue's *creditors*—that is opioid victims—have against them.

If Purdue's plan is approved, the Sacklers—who have never filed for bankruptcy—will get the equivalent of a discharge of their liabilities related to the opioid crisis. What's more, the release of the Sacklers bind all of Purdue's creditors, regardless of their consent.[3]

In short, the Sacklers will get the benefits of bankruptcy without having to go through the bankruptcy crucible. They will not have to make public disclosure of the finances under penalty of criminal law. They will not have to surrender control of their assets to an independent trustee. And they will not have to surrender all of their wealth to their creditors other than the minimal assets exempted by the Bankruptcy Code.

To the contrary, the Sacklers will walk away from Purdue—and the misery of the opioid crisis—billionaires several times over. Their precise wealth is unknown, but the payments they will make to opioid victims do not even amount to the interest they would otherwise earn over the next ten years on the funds they took out of Purdue.[4] And, the Sacklers will likely seek to take a $4.275 billion tax deduction for their contribution to the Purdue bankruptcy plan.[5] In other words, the Sacklers will emerge from their Purdue bankruptcy settlement even richer than when they went into it.

While $4.275 billion is an enormous amount of money to most people, it needs to be put in context of what the Sacklers will retain. If the Sacklers did indeed take out billions from Purdue when they knew it was facing enormous liabilities for the opioids it produced, they should be required to give it all back. That they are able to settle for perhaps a third of their haul is a sign that fraudulent transfer law is in desperate need of strengthening.

Meanwhile, the opioid victims—governmental units and private parties—will be denied their opportunity to have their day in court. They will never have an opportunity to seek to hold the Sacklers liable for the harms they allegedly caused because of the release in

© 2021, Adam J. Levitin

the Purdue plan. Instead, they will get a small cash payment: those who died from opioid overdoses will be offered between $32,000 and $48,000, while other opioid victims will get as little as $3,500.[6]

This outcome is wrong as a moral matter.

The result is also inconsistent with the Bankruptcy Code. Bankruptcy is, of course, a system for making the best of a bad situation. It is a system that is focused on how to equitably divide too small a pie among too many mouths. Indeed, even if the Sacklers' entire fortunes were at Purdue's disposal, there would still be far too little money to ever remedy the harms of opioids. Bankruptcy law has never dealt well with questions of moral justice—it is fundamentally a financial process that reduces all manner of obligation to cold, hard dollars, which are then allocated according to the Bankruptcy Code's priority structure. This financial logic has an unavoidable mismatch with the dignitary and expressive justice goals of tort law.

Yet the Bankruptcy Code's procedural requirements offer some protection to tort victims' non-monetary interests, insofar as they require that anyone who wants relief from liability through the bankruptcy process must undergo the bankruptcy ordeal. The non-debtor releases in *Purdue Pharma*—and in many other high profile cases, such as Boy Scouts of America and USA Gymnastics and various Catholic dioceses—deprive tort victims of both their day in court against the released parties and their procedural rights in bankruptcy.

I raise the example of Purdue because it includes a number of features that are unfortunately typical of contemporary large case chapter 11 practice:

(1) it has a non-debtor release of questionable legality—circuits are split on whether non-debtor releases are ever allowed, much less when done non-consensually;

(2) the release will likely be approved by a bankruptcy judge hand-picked by the debtor; and

(3) the release will also likely evade appellate review because of the equitable mootness doctrine.

These three factors have an insidious interplay. It doesn't matter that the non-debtor release is of questionable legality because Purdue hand-picked the judge for its case, knowing that the judge—Robert D. Drain—has previously approved non-consensual releases of non-debtor. In today's chapter 11 system, that is game, set, and match because the equitable mootness doctrine generally prevents appellate review of key matters.[7]

My written testimony addresses each of these issues in turn, followed by discussion of three other troubling trends in large case chapter 11 practice:

(4) the use of *sub rosa* plans through financing agreements, asset sales, restructuring support agreements, and settlement to evade the safeguards of the plan confirmation process;

(5) inadequate settlements of brazen fraudulent transfers for the benefit of the debtor's owners; and

(6) the payment of "payday before mayday" bonuses to insiders on the eve of bankruptcy.

© 2021, Adam J. Levitin

I. Non-debtor Releases

Non-debtor releases (sometimes called third-party releases) are among the most controversial issues in chapter 11 bankruptcy. These releases have been a central feature of a number of recent and pending mass tort bankruptcies besides Purdue's:

- releases of insurers and non-debtor parishes from sex abuse-related claims in various Catholic diocese bankruptcies;
- releases of insurers and officers and directors and Harvey Weinstein personally from claims relating to Harvey Weinstein's sexual misconduct in Weinstein Co.'s bankruptcy;[8]
- proposed releases of non-debtor local councils and various affiliated organizations from sex abuse-related claims in Boy Scouts of America's bankruptcy;
- proposed releases of non-debtor parties, including the US Olympic and Paralympic Committee from sex abuse-related claims in USA Gymnastics' bankruptcy.

It would be a mistake, however, to see the issue of non-debtor releases as something specific to mass tort bankruptcies. While non-debtor releases have been used on occasion for some time, they were historically rare. Today, however, they have become a standard part of chapter 11 practice, observable in all manner of cases.

Sometimes the non-debtor releases are consensual, at least in some sense (creditors might have to affirmatively opt-out in some instances), but sometimes the releases are non-consensual, binding all creditors irrespective of objection. With such non-consensual releases, non-Article III bankruptcy judges are administering a remedy that is unavailable to Article III district judges presiding over class actions.[9]

Likewise, sometimes the releases are provided in exchange for a contribution to the debtor's plan—as with the Sacklers in *Purdue Pharma*. But often non-debtors receive releases in exchange for contributing absolutely nothing. That is the case in *Purdue Pharma* with the myriad non-Sackler parties covered by the releases, from Purdue's bankruptcy attorneys to Purdue's officers, board members, directors, agents, co-promoters, third-party sales representatives, investment bankers, and consultants.[10] All these parties will be released by Purdue's creditors without paying a cent for it.

The Bankruptcy Code does not expressly provide for a discharge of liabilities of any party other than the debtor. Instead, aside from a special channeling injunction provision for asbestos bankruptcies,[11] the discharge provisions of the Code relate only to the debtor.[12] Indeed, the Code expressly provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[13] As a result, some circuits forbid non-debtor releases entirely.[14]

The position is sensible—a discharge is the benefit offered as an incentive for debtors to undergo the bankruptcy process. Without the bankruptcy process, a discharge is arguably an unconstitutional taking of a property right—litigation claims—from creditors.

Other circuits, however, permit them in "unique" or "unusual" or "rare" circumstances.[15] These circuits recognize that non-debtor releases may be critical to the success of a plan of reorganization, as they sometime are given in exchange for funding

© 2021, Adam J. Levitin

necessary to effectuate a plan or to preserve relationships that are important to the reorganized debtor's business going forward. In other words, the reorganization imperative trumps due process rights because recoveries for many parties might be lower in a liquidation. Examples of when non-debtor releases have been authorized include:

- mass tort cases, where the enjoined claims were "channeled" to a settlement trust fund rather than extinguished;[16]
- cases where the enjoined claims were against an insurer or guarantor, such that the enjoined claims would otherwise indirectly impact the debtor's reorganization because of the third-party's right to indemnity or contribution from the debtor;[17]
- cases involving releases for acts or omissions in connection with the bankruptcy itself;[18]

Courts that allow non-debtor releases note that they are not expressly forbidden and are implicitly permitted by both the general powers of the bankruptcy court and the statutory authorization for bankruptcy plans to include "any...appropriate provision not inconsistent with the" Bankruptcy Code.[19] These courts impose a range of tests regarding the permissibility of the releases.[20]

Notably, however, the courts have held that such releases are allowed have often done so while denying the actual releases before them, while holding open the possibility of allowing releases in other circumstances.[21] Even in circuits where third-party releases have been approved by the circuit court, lower courts remain divided, and the trend since 2001 has been "toward limiting broad third-party releases, except under unique circumstances or precluding them altogether, especially in favor of a corporate debtor's directors and officers."[22] The concern, as the Second Circuit noted, third-party releases are "a device that lends itself to abuse."[23]

While non-debtor releases may, as a practical matter, be quite useful to debtors, the convenience argument proves too much. It might be convenient for a debtor to have his divorce settlement approved by the bankruptcy court, but if a court lacks jurisdiction, it cannot enter an order. Non-debtor releases are fundamentally inconsistent with the Bankruptcy Code and present serious due process concerns.

The Bankruptcy Code offers a discharge to *debtors*. In order to get such a discharge, debtors must: (1) come clean about their finances to the world; (2) face claims from creditors, which can be allowed or disallowed by the court; (3) make all of their assets available to creditors; and (4) risk the possibility of a change of ownership and management in the course of the bankruptcy. Non-debtors, however, are able to obtain releases in the bankruptcy process without bearing any of these costs. At most, non-debtors are required to make a financial contribution in exchange for their release, and not always even that.

Bankruptcy means that the debtor enters the fishbowl: it must disclose substantial detail about its finances. The bankruptcy disclosure process means that creditors and other parties in interest can express an informed view about whether to support or oppose any deal offered: if a creditor thinks that a debtor has the ability to pay more, the creditor can always vote against the debtor's reorganization plan.

© 2021, Adam J. Levitin

No such disclosure process exists with non-debtor releases. While non-debtor releases are sometimes given in exchange for a financial contribution to the bankruptcy estate from the non-debtor, there is no transparency of information about the non-debtor's finances that allows creditors to evaluate the non-debtor's ability-to-pay.

When a debtor files for bankruptcy, it is also a realization event: any purported debts the debtor owes, even those not yet due, can be addressed in the bankruptcy. If the debtor disputes a debt, the court must decide whether the claim on that debt will be allowed or not. This means that there is an individualized adjudication process for each creditor on each claim.

In contrast, with a non-debtor release, there is no adjudication process, not even in the form of a claim estimation. The non-debtor release process does not give creditors any opportunity to test the strength of their theories of liability against non-debtors prior to the release. This makes it impossible to fairly value the claims that are being released and to know if a contribution from a non-debtor is commensurate with the claims being released.

Moreover, creditors vary in their appetite for risk. Some creditors might be happy to take a small, sure-thing contribution to a plan from a non-debtor in exchange for a release, but others might want to take a risk and litigate their claims against the non-debtors. Non-debtor releases deny creditors that are willing to litigate their claims against non-debtors their day in court.

Additionally, some creditors, particularly in mass tort cases, are concerned about more than a financial recovery; they want dignitary justice: a clear record of responsibility that vindicates the fact that they are victims of others' deliberate or callous wrongdoing. There is no opportunity to vindicate this sort of dignitary interest with a non-debtor release, as no wrong-doing is ever admitted.

In bankruptcy, debtors put all of their assets on the line. They also face the possibility that existing management will be replaced and that the ownership of the debtor will be transferred to creditors. When non-debtors get such a release in bankruptcy, they face no such hazards.

At the very least, non-debtor releases are inconsistent with the current structure of the Bankruptcy Code. More generally, they present serious concerns about whether they are beyond the subject matter jurisdiction of the bankruptcy court and are fundamentally inconsistent with due process.

Recommended fix: *Amend the Bankruptcy Code to either (1) expressly prohibit all non-debtor releases or (2) to permit them only in narrow circumstances, namely upon a finding that there is substantial supermajority support from all affected classes and a contribution from the released parties equal to the expected value of the released claims, adjusted to reflect the cost and delay of such litigation. Alternatively, expressly prohibit non-debtor releases of claims held by governmental units and impose an additional cancellation of indebtedness tax penalty on the recipients of releases of claims held by private parties.*

© 2021, Adam J. Levitin

II. JUDGE PICKING

When Purdue Pharma filed for bankruptcy, it did not file in Connecticut, where it is headquartered, or in Rhode Island or North Carolina, where it has substantial manufacturing operations. Nor did it file in Delaware, where most of its entities are incorporated. Instead, it filed in the Southern District of New York, claiming that venue by virtue of the fact that the non-equity general partner in some of its entities partnerships was a New York corporation.

Forum shopping has long been a problem in bankruptcy, but Purdue did not merely forum shop into the district of its choice. It also hand-picked its judge: Robert D. Drain, the only bankruptcy judge sitting in the White Plains Division of the Bankruptcy Court for the Southern District of New York. Even before Purdue filed, it knew its case would be assigned to Judge Drain. The pleadings Purdue filed immediately after it filed its petition contain a blank for the case number, but already have Judge Drain's initials in the caption box.

How did Purdue know that it was getting Judge Drain? Because the court's implementation of the Case Management/Electronic Case Filing system automatically assigned to Judge Drain any case where the debtor indicated that the White Plains division was appropriate. Under the local bankruptcy rules of the Southern District of New York, cases are supposed to be assigned to the White Plains division if the debtor's address—excluding post office boxes—on the bankruptcy petition is in Westchester or Rockland Counties.[24] Other cases are randomly assigned among the seven judges sitting in Manhattan.

The address on Purdue's petition was in Stamford, Connecticut.[25] So why did Purdue claim that the White Plains division was appropriate? Because 198 days before filing for bankruptcy (just outside the 180 day requirement under the bankruptcy venue statute[26]), Purdue changed the service of process address for its non-equity general partner to an address in Westchester County, New York.[27] Purdue has never conducted any business at that address, making it little more than a post office box.

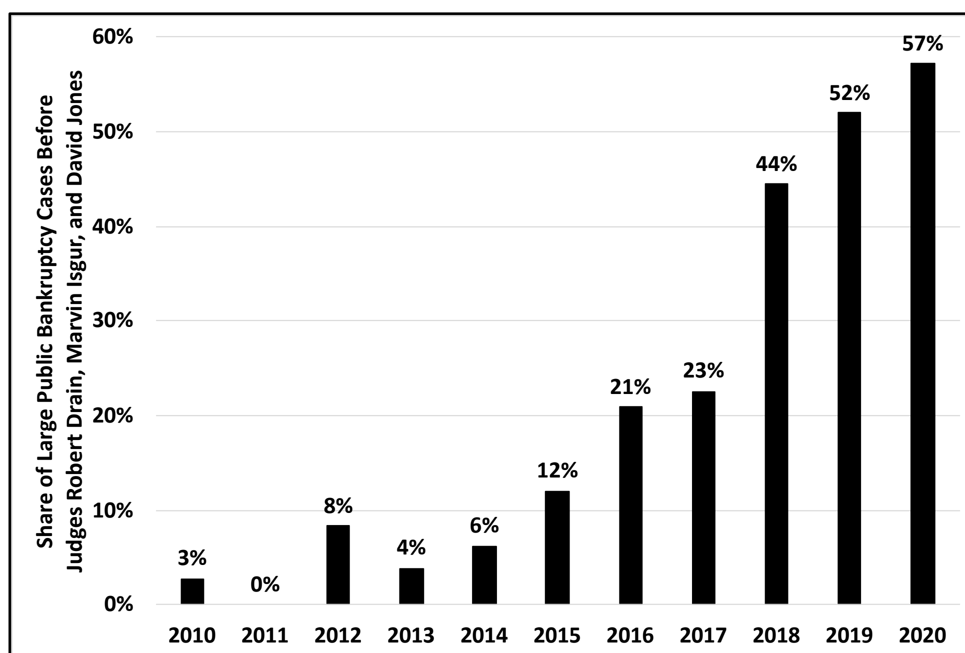
We cannot be sure exactly why Purdue wanted Judge Drain, but the fact that Purdue took pains to seek out a particular judge is concerning because it is part of a broader trend of judge-picking that has emerged in large chapter 11 cases. As Figure 1, below, shows, the situation has become so extreme that last year 57% of all large, public company bankruptcy cases ended up before just three of the country's 375 bankruptcy judges: Judge Drain, and Judges Marvin Isgur and David R. Jones in Houston, Texas.[28] Judge Jones in particular, presided over 39% of all megacases filed in 2020.

Judge Drain, meanwhile has in recent years attracted more large bankruptcy cases to the White Plains courthouse than have gone to all seven bankruptcy judges who sit in Manhattan, with many debtors engaging in the rental of short-term or virtual office space in Westchester County just to be able to maneuver their cases into his courtroom.[29]

This sort of concentration of large, public company bankruptcy cases before just a few judges is unprecedented and troubling.

© 2021, Adam J. Levitin

Figure 1. Share of Large, Public Company Bankruptcy Cases Before Three Judges[30]



While forum shopping is generally a problem, judge shopping is much more problematic. There are three problems with judge shopping. First, it creates an indelible appearance of impropriety that undermines confidence that impartial justice is being done.

Second, debtors' ability to engage in judge shopping facilitates competition among judges to attract large cases. Most judges do not want more cases, much less complicated ones; they already have busy enough dockets. But a handful of judges are perceived by the chapter 11 debtors bar as eager to attract large bankruptcy cases to their courtrooms. These judges have to "compete" in order to attract such cases. The competition for big cases by a handful of bankruptcy judges has undermined the integrity of the chapter 11 bankruptcy system.

The judicial competition for big cases is not subtle. For example, the Bankruptcy Court for the Southern District of Texas, for example, has implemented a "complex case" system that assigns all large chapter 11 cases to either Chief Judge David R. Jones or Judge Marvin Isgur. The district's other three judges do not handle any of the large bankruptcy cases, even though they were appointed by the Circuit Court of Appeals to handle all bankruptcy cases.

The goal of the complex case system is in Judge Isgur's words, to be "more consumer friendly"—with "consumer" here meaning large businesses that are shopping for a bankruptcy filing venue.[31] The key feature of the complex case system is that it funnels all large chapter 11 cases filed in the district to just two judges, which creates a high degree of certainty about who the judge will be and thus the treatment the debtor can expect. Indeed, that seems to be the only reason for having a special complex case panel.

More important than any feature of the complex case system, however, is the signal it sends. Setting up the complex case system is a way of indicating to the bar that the judges in

© 2021, Adam J. Levitin

Houston are eager to compete to get their business. Thus, the advisory panel for the complex case system includes numerous attorneys who are not even admitted to practice in Texas.[32]

Once debtor's counsel (and other case placers) perceive that a judge (or district) wants to land big cases, that tells them all that they need to know: the only way a judge can be sure to continue to attract such large cases is to rule in the debtor's favor on all major issues and to be accommodating to the debtor's counsel on matters such as scheduling and fee approval. A judge that fails to do that becomes known as "unpredictable" and will be unable to attract large cases. To be clear: these judges surely believe that they are doing their level best to just call balls and strikes in their cases, but if they disappoint debtor's counsel, business will go elsewhere.

Lest this sound abstract, consider the relationship between bankruptcy powerhouse Kirkland & Ellis LLP and the Delaware bankruptcy court. In the years prior to 2017, Kirkland had previously regularly filed 3-4 large cases in Delaware annually, never going more than a few months without filing a case.[33] Delaware got over have of Kirkland filings in these years. Kirkland, however, ran into trouble in its representation of Samson Resources in Delaware. First, the bankruptcy judge said that he was "furious" regarding the terms on which lenders consented to let the debtor use their collateral during the bankruptcy.[34] Next, the judge denied a fee application for hours Kirkland billed defending its own services.[35] And then in March 2017, the judge exploded in court at Kirkland attorneys from for pulling a sharp move on a *pro se* creditor in the case: "You can't treat these people like this. I will not allow it. I will shut this whole F'ing case down prior to this. Get out of your own way. I need a recess."[36]

After this incident, Kirkland withdrew its business from Delaware: 327 days elapsed before Kirkland's next Delaware filing, resulting in an unprecedented gap of 616 days between Kirkland filings in Delaware.[37] During this time, Kirkland filed 14 megacases filed in other venues, particularly Houston, New York, and Richmond.[38] The message was clear—give us grief, and we'll take our business elsewhere.

Third, judge-shopping has resulted in a concentration of cases before just a few judges, which produces a repeat-player dynamic. Attorneys know that they are very likely to end up appearing before one of the handful of judges who seek big cases. The last thing these attorneys want to do is anger those judges. This means that attorneys are less likely to make motions that they know the judge does not want made (such as for an examiner in *Purdue* or challenging venue or the disinterestedness of debtor's counsel). The effect is to undermine the adversary system that is premised on attorneys being zealous advocates for their clients. Instead, the repeat player dynamic means that attorneys are incentivized to pull their punches. Indeed, it is for this very reason that you will not hear a word in public from chapter 11 attorneys regarding the problems of judge-shopping: they know they are likely to appear before one of the judges they are implicitly criticizing.

Some might suggest that debtors are steering their cases before particular judges because of those judges' skill, expertise, and experience. This claim should be rejected out of hand for three reasons. First of all, every federal bankruptcy judge should capable of handling any bankruptcy case, be it under chapter 7, 9, 11, 12, 13, or 15 of the Bankruptcy Code.

© 2021, Adam J. Levitin

Bankruptcy judges are selected by the Courts of Appeals on a non-partisan, merit basis, with substantial input from the bar. The result is any incredibly high quality bench with deep expertise.

Second, if one looks at the patterns of judge-shopping, it has not been to more experienced judges, but actually away from them. Historically, Delaware and the judges sitting in Manhattan in the Southern District of New York were the favored destination for bankruptcy filings. In the last five years, however, that is not where big cases have been flowing. Instead, they have gone primarily to Judge Drain in White Plains and to the two judges on the complex case panel in Houston. The Delaware and Manhattan judges are not less experienced or skilled, but neither venue can guarantee a particular judge.

Third, in recent years a phenomenon has emerged of super-speed, “drive-thru” bankruptcies. These are pre-packaged bankruptcies that have plans confirmed in less than 28 days—the default minimum required by the Federal Rules of Bankruptcy Procedure. In some cases, the plans have been confirmed in less than 24 hours.[39]

There is no possibility for a judge to exercise any skill or expertise in a case that proceeds at such a frenetic pace. The judge can ask some questions, but ultimately, there is no opportunity for a judge to do anything but get out of the way and rubber stamp the case.

Since 2017, there have been nine cases confirmed in less than 28 days.[40] Not a single one complied with the procedures for accelerating a case’s timelines.[41] Every one of these high-speed bankruptcies went through one of three courtrooms—that of Judge Robert D. Drain in White Plains, New York, that of Judge Marvin Isgur in Houston, Texas, and that Chief Judge David R. Jones in Houston, Texas—the three most notoriously shopped judges in the nation. Debtors are not shopping for judges based on judicial expertise. Debtors don’t want great judges. Debtors want judges who are great *for them*.

Use and abuse of courts’ geographic divisions and local rules enable debtors to pick the judge they believe will be favorably inclined to rule their way on key issues. As the next section discusses, even if those decisions push or overstep the boundaries of what is legally permissible, the judge’s decisions are likely to evade appellate review. Such a system upsets chapter 11’s carefully calibrated balance between debtor and creditor rights and gives debtors and their favored creditor allies free rein to use bankruptcy to trample disfavored creditors, such as tort victims, like the opioid victims in Purdue.

Recommended fix: *Reform the bankruptcy venue statute to limit forum shopping in general, and require random case assignment within districts for all chapter 11 cases, excluding subchapter V small business cases, where it should be permissible to consider in case assignment the geographic convenience of court divisions to the debtor.*

III. Illusory Appellate Review

The U.S. legal system is based on the assumption of the general availability of appellate review. Judges are fallible, and appellate review is critical both as a check on judicial mistake and bias and as a mechanism for ensuring consistency among lower courts. In bankruptcy, however, appellate review is often an illusory right. As an initial matter, the Bankruptcy Code

© 2021, Adam J. Levitin

itself limits remedies in the event of a successful appeal of a sale or financing order, prohibiting the reversal of such transactions.[42]

Appeals always involve some delay and costs but bankruptcy is fundamentally different than other areas of law in both respects. As of the third quarter of 2020, federal courts of appeals took a median time of over 9 months to dispose of cases from the time of filing.[43]

Resolution of bankruptcy appeals is potentially slower because bankruptcy often involves an additional level of appellate review. Whereas appeals from the district court go to the court of appeals in a regular case, appeals from the bankruptcy court generally go to either to the district court or to a special bankruptcy appellate panel, and then to the circuit, depending on the circuit.[44] The additional level of appellate review can further delay resolution of an appeal.

The time to resolution of an appeal is not the full story, however. An appeal cannot be taken unless it is of a "final judgment, order, and decrees".[45] Appeals, however, must be taken within 14 days of the entry of a final order.[46] There is a lack of clarity, however, regarding exactly what constitutes a final order, and the consequences of misidentification are serious. As the Supreme Court has observed:

> An erroneous identification of an interlocutory order as a final decision may yield an appeal over which the appellate forum lacks jurisdiction. Conversely, an erroneous identification of a final order as interlocutory may cause a party to miss the appellate deadline.[47]

Until there is a final order, the aggrieved party can do nothing, which is a problem as the issue may well become moot due to other developments in the case. For example, the denial of plan confirmation is not an appealable final order.[48] If a debtor's plan is denied confirmation, it cannot appeal, and the debtor might lose plan exclusivity and another plan might be confirmed that will not be unwound if the first plan turns out to have been wrongfully denied confirmation. The requirement of a final order in order for a party to be able to take an appeal means that certain extremely important rulings in bankruptcy cases cannot be appealed in any timely fashion and may never be appealable.

Costs of appeals are also different in bankruptcy. Appeals generally often require the posting of a supersedeas bond,[49] which can be an onerous undertaking for the appellant even in normal conditions. In a bankruptcy, however, if an appeal is taken of plan confirmation the bond might have to be for the entire value to be distributed under the plan, rather than the amount actually in dispute because a successful appeal could result in the reversal of an entire plan, not just a change in the payment to the appellant. Posting a supersedeas bond for the entire plan amount is an impossible requirement in many cases.

Likewise, when an appeal can be taken, the delay before it is decided can create liquidity pressure on the parties. This is especially true in bankruptcy, where an appeal affects not just the liquidity of the parties to the appeal, but of all the parties in the bankruptcy. That delay, however, may affect parties in different ways economically. For example, the appeal of any matter prior to plan confirmation is more likely to put liquidity strains on creditors than on the debtor because with the exception of adequate protection payments and critical vendor payments, debtors do not pay creditors during the course of a bankruptcy, and the

© 2021, Adam J. Levitin

automatic stay will remain in place preventing collection efforts against the debtor. An appeal extends the time during which a creditor is not paid anything. Even if the creditor might prevail on the appeal, the lost liquidity in the interim can be preclusive.

The delay from an appeal imposes time-value costs on parties. Outside of bankruptcy this is sometimes addressed through post-judgment interest that will continue to accrue during the appellate process. But such post-judgment interest in inapplicable to many bankruptcy appeals because they do not involve the question of whether one party is liable to another, but rather whether an order of the bankruptcy court authorizing some action by the debtor was proper. There is no special compensation for time-value in most bankruptcy appeals. Instead, the only time-value compensation that applies are the regular bankruptcy rules regarding accrual of post-petition interest, and in bankruptcy unsecured claims do not accrue post-petition interest.[50] That makes any delay of payment, including delay caused by an appeal, painful for the holders of unsecured claims; these creditors will never receive any compensation for delay.

Even when there is a final order that can be appealed and the appellate court actually hears the appeal, the appeal might be denied as "equitably moot." As the Second Circuit has explained, "[e]quitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented."[51] An appeal being equitably moot does not necessarily mean that it is moot in the constitutional sense; a live dispute between the parties might still remain.[52] Instead, as the Third Circuit has clarified:

> the term 'prudential forbearance' more accurately reflects the decision to decline hearing the merits of an appeal because of its feared consequences should a bankruptcy court's decision approving plan confirmation be reversed.[53]

The equitable mootness doctrine expresses a "Humpty-Dumpty" concern: once money starts flowing under a plan, courts are reluctant to reverse anything central to the plan because it's impossible to put Humpty-Dumpty back together again.[54]

The equitable mootness doctrine was originally intended to protect parties that relied on a plan have become effective—buyers, financiers, and recipients of distributions under the plan. Finality lets creditors get on with their lives and facilitates reorganizations by encouraging post-petition investment in the debtor.[55]

Every circuit has embraced the equitable mootness doctrine in some form, although its application varies.[56] Equitable mootness presents an extreme obstacle to bankruptcy appeals, because bankruptcy plans tend to close quickly. It is generally imperative that large financial transactions close quickly. Not only does delay upset parties' economic expectations, but large transactions, including bankruptcy plans, typically involve financing. That financing must be committed in advance, but having it sitting on hold is expensive and risks market conditions changes that give the financiers the right to exit the deal.

While there is usually a business case for a rapid closing and quick effective date of a plan, debtors have also weaponized the equitable mootness doctrine, taking care that plans go effective—and money starts changing hands—as soon as possible after confirmation.[57] This puts pressure on any party that seeks to appeal plan confirmation (or any other order

© 2021, Adam J. Levitin

that becomes final upon plan confirmation) to post an enormous supersedeas bond in order to stay the effectiveness of the plan pending appeal.

Recommended fix: *Create a Federal Court of Bankruptcy Appeals that could hear bankruptcy appeals with the expedition necessary to address the need for fast closing of large financial transactions.*

Bankruptcy cases are different from all other types of federal court cases because they involve a court order approving a major financial transaction—a reorganization plan or possibly an asset sale or financing agreement. Closing speed is critical for large financial transactions; if they are stayed pending a long appeal, the transactions will often collapse. Likewise, unwinding them is not a practical option, as the Bankruptcy Code's limitation of remedies for sales and DIP financings and the equitable mootness doctrine recognize. Regular federal courts of appeals, however, are unlikely to hear bankruptcy appeals with the sort of expedition required.

A similar problem exists at state law for corporate merger and acquisition transactions. Unlike major bankruptcy transactions, these state law transactions do not need court approval, but they are often challenged, and when they are challenged, they present the same difficulty for judicial review, whether by an initial court or an appellate court, as delay can derail the transaction entirely. The solution devised by the Delaware Chancery Court is straightforward: it will enjoin a challenged M&A transaction, quickly hear the case, and render an opinion a few days later. This process is possible in part because the Chancery Court is comprised of jurists who are deeply versed in Delaware corporate law and can therefore grasp the issues before them more quickly and with briefing that does not need to explain basic concepts.

Bankruptcy needs an equivalent specialized court that can hear appeals rapidly. I would urge Congress to consider creating a specialized Federal Court for Bankruptcy Appeals. Such a court could operate much like the Court of Appeals for the Federal Circuit does for patent claims. A specialized court of bankruptcy appeals could operate with more abbreviated procedural deadlines, enabling rapid appellate review for chapter 11 cases. Creating such a court would also help alleviate the case load for the district courts, as they would be relieved of bankruptcy appellate responsibilities. And a specialized court of bankruptcy appeals would create much greater uniformity in bankruptcy law than the current appellate system provides. Because bankruptcy appeals in many circuits go to the district court, fewer cases reach courts of appeals, so there is less circuit level law and thus less certainty.

Irrespective of institutional reform, there should, at the very least, there be expedited appellate review (without a supersedeas bond posting) for certain types of orders, such as DIP financing, asset sales, plan confirmation (or denial), injunctions against collection attempts on nondebtors, and releases of nondebtors for prepetition behavior. This would allow some of the most critical—and controversial—issues in bankruptcy cases to undergo appellate review, helping relieve some of the problems caused by judge-shopping.

© 2021, Adam J. Levitin

IV. *SUB ROSA* PLANS

The basic design of chapter 11 anticipates that the debtor will ultimately confirm a plan of restructuring or liquidation. The plan process is the heart of chapter 11, and it includes a carefully calibrated set of provisions that seek to balance the interests of debtors and competing groups of creditors. The plan process is structured around a creditor vote and includes a number of protections for dissenting creditors.

Today's chapter 11 practice, however, frequently features transactions that aim to end-run the safeguards of the plan process. Transactions such as financing agreements, asset sales, restructuring support agreements, and litigation settlements often include terms that effectively lock in decisions properly reserved for a plan.

For example, it is common for debtor in possession (DIP) financing agreements to include detailed timelines ("milestones") for a bankruptcy case, requiring the sale of certain assets by specific dates, approval of sale procedures by the DIP lender, or the submission or approval of a bankruptcy plan meeting the DIP lender's approval by a specified date.[58] It is also common for DIP loans to restrict the use of the funds, including a prohibition on their use for investigating or litigating against the DIP lender.[59] DIP financing agreements will sometimes provide that the debtor must pay certain parties' legal expenses before paying other creditors.[60] And DIP loans will frequently even dictate the appointment of particular officers for the debtor, determining its governance in bankruptcy.[61] Some DIP financing agreements even go so far as to allocate some of the equity of the to-be-reorganized debtor.[62] The sum of these terms start to look like a restructuring blueprint, rather than a mere provision of financing in bankruptcy, yet the approval of a DIP financing agreement is not subject to the myriad protections of the plan process.

Purdue Pharma illustrates this dynamic of *sub rosa* plans determining the subsequent outcome of the case. Purdue entered into a pair of settlements with the Department of Justice that addressed both the government's civil and criminal claims.[63] As part of the settlement, Purdue and DOJ agreed that a consented-to $2 billion criminal forfeiture judgment would have "the status of an allowed superpriority administrative expense claim…with priority over any and all claims and administrative expenses of any kind".[64] In other words, the criminal forfeiture judgment would get paid ahead of all of Purdue's creditors.[65] DOJ, however, consented, based on its anti-piling policy, to credit distributions in Purdue's bankruptcy to state and local governments up to $1.775 billion against the criminal forfeiture liability.[66] As a result, Purdue's criminal forfeiture liability to DOJ was reduced to only $225 million. This enabled $1.775 billion in bankruptcy distributions to be earmarked for opioid abatement, rather than going into Treasury's general fund.

There was a catch, however: the credit against the distribution to state and local governments would be granted only if Purdue restructured itself into a "public benefit company" or similar entity permitted to consider goals other than profit maximization in its governance.[67] If Purdue were to restructure in some other way or were to liquidate, then Purdue agreed that it would still be liable for the full $2 billion criminal forfeiture, rather than the reduced payment of $225 million.[68] Moreover, the $2 billion criminal forfeiture would still be treated as "an allowed superpriority administrative expense claim".[69] Given the

© 2021, Adam J. Levitin

value of Purdue's assets, a $2 billion superpriority claim for the federal government would likely leave nothing for Purdue's other creditors.[70]

Once the bankruptcy court approved the settlement, the settlement's snapback provision effectively precluded any outcome in the bankruptcy other than Purdue emerging as a "public benefit company," even though a number of states strongly objected to such an outcome, seeing a future Purdue as a public burden company.

Recommended fix: *Create an express prohibition on transactions that function as* sub rosa *plans, including a non-exclusive list of transaction terms that may not be approved outside of the plan process.*

IV. Inadequate Remedies for Fraudulent Transfers

The oldest, and perhaps most central element of insolvency law is the prohibition on "fraudulent transfers"—transfers made with actual intent to hinder, delay, or defraud creditors. Such transfers have been avoidable by creditors since the time of the first Queen Elizabeth,[71] and the Bankruptcy Code continues that tradition, allowing for the avoidance of fraudulent transfers either under a federal bankruptcy provision[72] or under applicable non-bankruptcy law.[73]

In particular, fraudulent transfers are a central part of the private equity business model. Private equity firms acquire target companies by loading the target company up with debt to fund the acquisition. The private equity firm will then try to cut the target company's operating expenses to the bone in order to free up funds to pay the acquisition debt. This means gutting research and development that is essential to the company's long-term health. It also means jettisoning pension obligations when possible.

If things go well, the target company pays off the acquisition debt and the private equity firm now owns the company free and clear, and will take the slimmed down company public again. If things don't go well, however, the target company will end up in bankruptcy. When a bankruptcy seems imminent, private equity firms will often loot their target companies, paying themselves large advisory fees and transferring assets to other entities they control, outside the reach of creditors.[74]

Fraudulent transfers are hardly the remit solely of private equity, however. For example, the billions of dollars of transfers from Purdue Pharma to the Sacklers that occurred once the magnitude of Purdue's potential opioid liability became clear, would appear to be classic fraudulent transfers.

A recent trend in fraudulent transfers has been to utilize a type of transaction called a divisive merger or corporate division in which a company splits into two or more entities, allocating the original company's assets and liabilities as desired among the successor entities. A divisive merger can be used to split off a company's liabilities from its assets: the liabilities are put in a new successor entity (BadCo), while the assets go to another successor entity (GoodCo). BadCo then files for bankruptcy, having no assets to pay its creditors, while GoodCo continues to operate as normal.

© 2021, Adam J. Levitin

While this sort of transaction appears to be a classical fraudulent transfer, it has been utilized prior to filing for bankruptcy by debtors in several recent asbestos bankruptcy cases because of a unique feature of Delaware and Texas corporate law that arguably exempts such transactions from fraudulent transfer law.[75] Delaware and Texas law both provide that a divisive merger operates without there being an assignment or transfer.[76] The deemed lack of transfer gives the non-bankrupt entity (GoodCo) an argument that it was not the recipient of a fraudulent transfer, as there was no transfer. It is far from clear that the Delaware or Texas would be determinative of whether there is in fact a transfer for fraudulent transfer law purposes, particularly under the federal fraudulent transfer statute, but the lack of law on point will surely reduce whatever GoodCo has to pay to settle fraudulent transfer litigation in exchange for a release in BadCo's bankruptcy. Cases involving this sort of transaction (called a "Texas Two-Step" or "Wilmington Waltz") are still pending, but if the strategy is successful, it will surely be widely replicated.

Even in a case when there are clear fraudulent transfers, the beneficiaries of those transfers rarely (if ever) return 100¢ on the dollar. Instead, fraudulent transfer litigation typically results in settlements of low tens of cents on the dollar. Thus, the Purdue bankruptcy estate settled with the Sacklers for $4.275 billion, a fraction of the funds (perhaps as much as $13 billion) that the Sacklers took out of the company. In Caesars Entertainment's bankruptcy, a settlement for 66¢ on the dollar was considered a remarkable achievement for creditors.[77]

The problem here should be clear: there is no disincentive to engage in fraudulent transfers. If the effective penalty for engaging in a fraudulent transfer is having to return only a small fraction of the transfer, why wouldn't debtors' owners and insiders engage in fraudulent transfers all the time. If they don't get caught they keep everything, and if they get caught, they still get to keep most of the benefit. A few states have criminal provisions for fraudulent transfers, but that is the exception. And because fraudulent transfers are not generally criminal and do not constitute actual fraud (they are now often called "voidable transfers"), there is no ethical impediment for attorneys advising clients to engage in actual fraudulent transfers. As long as fraudulent transfer law remains toothless, we will see companies looted by their owners whenever bankruptcy looms on the horizon.

Recommended fix: *Amend section 546 of the Bankruptcy Code to lengthen the statute of limitations for fraudulent transfers. Amend section 550 of the Bankruptcy Code to provide for treble damages for actual fraudulent transfers. Provide a criminal penalty for actual fraudulent transfers involving business entities and aiding and abetting liability. Consumer cases should be exempted from criminal provisions, however, because the threat of criminal prosecution could be too readily abused against consumers.*

V. PAYDAY BEFORE MAYDAY

A troubling phenomenon that has appeared in a number of recent bankruptcy cases is the payment of bonuses to the debtor's executives on the eve of filing for bankruptcy. This phenomenon has become common enough to have a name: "payday before mayday." Examples include Hertz, JC Penney, and Neiman Marcus.[78]

© 2021, Adam J. Levitin

Bankrupt companies often face challenges retaining talent: it can be demoralizing to work for a bankrupt company; the company's future is uncertain; the bankruptcy process can be a hassle or a distraction. The Bankruptcy Code, however, makes it exceedingly difficult to offer retention bonuses to "insiders," a group that includes the debtor's officers and directors. While the term "officer" is not defined, it undoubtedly covers all C-suite executives with "officer" in their titles.

The Code prohibits retention payments unless the court finds that (1) the insider's services are essential to the survival of the debtor; (2) the executive has a bona fide job offer at another business at the same or greater rate of compensation; and (3) that the payment is no more than 10x the amount of the average retention bonus paid to nonmanagement employees in that year. As a result of these restrictions, no debtor has even attempted, to the best of my knowledge, to make a post-bankruptcy retention payment to an insider. In order to do so, the debtor would have to require the officer or director to obtain an equal or better job offer, something no debtor would want to do.

While debtors have instituted key employee retention programs (KERPs) for non-insider executives, the only way to compensate C-suite executives and directors for sticking around with the bankruptcy company is through key employee incentive programs (KEIPs). Whereas a KERP pays the employee simply for remaining employed, a KEIP pays the employee upon the achievement of certain performance goals. If the goals are set too low, however, a KEIP can function as a disguised KERP.

Rather than deal with KEIPs, however, debtors have increasingly turned to making payments to insiders on the eve of bankruptcy. While unseemly, this practice is currently perfectly legal; the Bankruptcy Code does not apply until the debtor files for bankruptcy.

Recommended fix: *Provide that retention bonuses paid within 90 days before a bankruptcy filing are deemed to be fraudulent transfers and avoidable under section 548 of the Bankruptcy Code.*

CONCLUSION

The chapter 11, the system is, as a whole, an outstanding one. But the chapter 11 exists today largely in the form it was created in 1978. In the past four decades, financial markets have undergone a wholesale transformation: there is now an enormous market in distressed debt, including bankruptcy claims, such that creditors routinely trade in and out of bankruptcies. Credit derivatives now exist that enable parties to bet on, and profit from, businesses' misfortunes. Debtors now typically file for bankruptcy with liens covering all their assets, which limits their options for financing a bankruptcy. And many debtors end up in bankruptcy because they were acquired by private equity firms that first saddled them with acquisition debt from leveraged buyouts and then proceeded to loot them. Chapter 11 is now long overdue for a tune-up to ensure that it continues to fulfill its promise of providing a fair and efficient method for dealing with the inevitable reality of business failure.

© 2021, Adam J. Levitin

[1] Brian Mann, *Critics Want Sacklers to Face Criminal Charges for Role in Opioid Crisis*, NPR.ORG, Nov. 25, 2020.

[2] Jared S. Hopkins & Andrew Scurria, *Sacklers Received as Much as $13 Billion in Profits from Purdue Pharma*, WALL ST. J., Oct. 4, 2019. Purdue's investigation found $10.347 billion in cash transfers to the Sacklers, as well as substantial non-cash transfers. Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma, L.P. and Its Affiliated Debtors *In re Purdue Pharma, L.P.,* No. 19-23649-rdd (Bankr. S.D.N.Y. June 3, 2021) (Dkt. No. 2983), at 144-145 [hereinafter Purdue Disclosure Statement].

[3] A bankruptcy plan binds all creditors, irrespective of their consent. 11 U.S.C. § 1141(a). Whether a third-party release is binding upon non-consenting creditors has divided courts. *See infra* notes 14-15.

[4] Patrick Raden Keefe, *How Did the Sacklers Pull This Off?*, N.Y. TIMES, July 14, 2021. If one assumes a 5% annually compounded rate of return for the Sacklers on $10.347 billion in cash transfers, the Sacklers will, at the end of their 10 years of payment, have $786 million more than when they started. If one assumes an 8% annually compounded rate of return, the Sacklers will, at the end of their 10 years of payment, have $5.34 billion more than when they started.

[5] Eight Plan Supplement Pursuant to the Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma, L.P. and Its Affiliated Debtors *In re Purdue Pharma, L.P.,* No. 19-23649-rdd (Bankr. S.D.N.Y. July 8, 2021) (Dkt. No. 3121), at 837 (Form of Settlement Agreement, § 4.01) (agreeing to treat the Sacklers' contribution as a "restitution" payment, which would make it eligible for a tax deduction as a business expense under 26 U.S.C. § 162(f)(2)).

[6] Purdue Disclosure Statement, *supra* note 2, at 8-9.

[7] While it is theoretically possible that Judge Drain will deny confirmation of Purdue's plan, it is incredibly unlikely. If Judge Drain had any concerns about the confirmability of Purdue's plan, he would not have allowed Purdue's case to stretch on for nearly two years at a cost of nearly a half billion dollars of legal expenses. *See* Jeremy Hill & Dawn McCarty, *With $2300 Phone Calls, Purdue Runs Up Huge Bankruptcy Tab*, BLOOMBERG, May 11, 2021.

[8] Weinstein's victims may retain their claims against him, but only if they forgo their claims against all other parties and accept a substantially lower payment in the bankruptcy.

[9] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (providing for a right to opt-out of monetary damage class actions under FED. R. CIV. PROC. 26(b)(3)).

[10] Purdue Disclosure Statement, *supra* note 2, at 33-34 (defining "Released Parties" and "Related Parties").

[11] 11 U.S.C. § 524(g).

[12] 11 U.S.C. §§ 524(e), 1141(d).

[13] 11 U.S.C. § 524(e).

[14] *See* Landsing Diversified Properties v. First Nat'l Bank & Trust Co. of Tulsa (*In re* Western Real Estate Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1991); Matter of Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995); Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009). Matters are more complex in the 9th Circuit. The court has three times refused to approve non-debtor releases. Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985); *In re* American Hardwoods, 885 F.2d 621(9th Cir. 1989); Resorts Int'l, Inc v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401 (9th Cir. 1995). Yet it has more recently permitted narrow exculpation of post-petition acts by parties related to the plan approval process without repudiating those earlier precedents. Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020).

[15] *See* MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89 (2d Cir. 1988); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989); SEC v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992); Gillman v. Continental Airlines (*In re* Continental Airlines), 203 F.3d 203, 211 (3d Cir. 2000); Class Five Nevada Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002); *In re* Combustion Eng'g, Inc., 391 F.3d 190, 236-37 (3d Cir. 2004), *as amended* (Feb. 23, 2005); Deutsche Bank AG v. Metromedia Fiber Network, Inc (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005); Airadigm Commc'n, Inc. v. Fed. Commc'n Comm'n (*In re* Airadigm Commc'n, Inc.), 519 F.3d 640, 657 (7th Cir. 2008); *In re* Ingersoll, Inc., 562 F.3d 856 (7th Cir. 2009); Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 711 (4th Cir. 2011); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 351 (4th Cir. 2014); SE Prop. Holdings v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying), F.3d 1070, 1079 (11th Cir. 2015); *In re* Millennium Lab Holdings II, LLC, 945 F.3d 126 (3d Cir. 2019) (finding no constitutional issue with third-party releases); Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020).

[16] MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89 (2d Cir. 1988); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989); Class Five Nevada Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002);

[17] *See* MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89 (2d Cir. 1988); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

[18] Airadigm Commc'n, 519 F.3d at 647; Blixseth v. Credit Suisse, 961 F.3d 1074 (9th Cir. 2020).

[19] 11 U.S.C. §§ 105(a), 1123(b)(6).

[20] *Cf.* Class Five Nevada Claimants, 280 F.3d at 658 (articulating a 7-factor test) *with* Metromedia Fiber Network, Inc., 416 F.3d at 142 ("this is not a matter of factors and prongs. No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.").

[21] Gillman, 203 F.3d at 211-14; Class Five Nevada Claimants, 280 F.3d 648; Metromedia Fiber Network, Inc., 416 F.3d at 143; Nat'l Heritage Found., Inc. 760 F.3d at 351; *In re* Combustion Eng'g, Inc., 391 F.3d at 236-37.

[22] Michael Etkin & Nicole M. Brown, *Third-Party Releases?—Not So Fast! Changing Trends and Heightened Scrutiny*, 29 AIRA J. 22, 29 (2015).

[23] *Id.*, 416 F.3d at 141-42.

[24] Local Bankr. R. 1073-1 (Bankr. S.D.N.Y. 2019).

[25] Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Purdue Pharma, Inc.,* No. 19-23648 (Bankr. S.D.N.Y. Sept. 15, 2019) (Dkt. No. 1).

[26] 28 U.S.C. § 1408.

© 2021, Adam J. Levitin

[27] Letter from Sen. Tammy Baldwin (D-Wis.) to the Board of Directors of Purdue Pharma, Inc., Sept. 29, 2020, *at* https://on.wsj.com/3nuW1dC; Certificate of Incorporation of Purdue Pharma, Inc., Oct. 2, 1990; Certificate of Change of Purdue Pharma, Inc., Mar. 1, 2019.

[28] In particular, 39% of large public company cases filed in 2020—a particularly high year for filings—ended up before Chief Judge Jones of the SDTX bankruptcy court. Author's calculations using the UCLA-LoPucki Bankruptcy Research Database. 22 megacases ended up with Chief Judge Jones. *Id.* His closest competitor among the 375 bankruptcy judges nationwide (347 authorized by statute plus 28 recalled from retirement) was his Houston colleague, Judge Isgur, who had only 6. *Id.* Judge Drain came in fourth nationwide with 3, having been bested by Judge Karen Owens in Delaware, with 4 cases. *Id.*

[29] Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J., Aug. 13, 2020.

[30] Author's calculations using the UCLA-LoPucki Bankruptcy Research Database. The UCLA-LoPucki Bankruptcy Research Database does not have complete judge assignment for 2019 and 2020 cases in SDTX, so I hand-collected judge assignments for those years from the dockets of the cases in the UCLA-LoPucki Bankruptcy Research Database.

[31] Mark Curriden, *Meet the judge who save the Texas bankruptcy practice*, THE TEXAS LAWBOOK, Sept. 1, 2020.

[32] General Order 2021-06, Complex Case Administration (Bankr. S.D. Tex. July 1, 2021) *at* https://bit.ly/3BITuF0.

[33] Author's analysis of 2014-2020 debtor's counsel and filing city retention data from BankruptcyData.com.

[34] *See* Stephanie Gleason, *Big Law Firm's New Strategy in Retail Bankruptcies? Avoid Delaware*, YAHOO FINANCE, June 28, 2017, *at* https://yhoo.it/2OuiNH5.

[35] *Id.*

[36] Mar. 1, 2017 Hr'g Tr., *In re* Samson Resources Corp., No. 15-11934 (CSS) (Bankr. D. Del.) at 14:4-15.

[37] Author's analysis of 2014-2020 debtor's counsel and filing city retention data from BankruptcyData.com.

[38] *Id.*

[39] McGuire Woods, *Usain "Belk"—The Fastest Prepack Alive?*, Mar. 5, 2021, *at* https://bit.ly/3iQwU4z.

[40] *In re Southcross Holdings* LP, No. 16-20111 (MI) (Bankr. S.D. Tex. 2016) (petition filed Mar. 27, 2016, plan confirmed Apr. 11, 2016); *In re ROUST Corp.*, No. 16-23786 (RDD) (Bankr. S.D.N.Y. 2017) (petition filed Dec. 30, 2016, plan confirmed Jan. 10, 2017); *In re Global A&T Electronics, Ltd.*, No. 17-23931 (RDD) (Bankr. S.D.N.Y. 2017) (petition filed on Dec. 17, 2017, plan confirmed on Dec. 22, 2017); *In re FullBeauty Brands Holdings Corp.*, No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019) (petition filed on Feb. 3, 2019, plan confirmed on Feb. 7, 2019); *In re SunGard Availability Services Capital, Inc.*, No. 19-22915 (RDD) (Bankr. S.D.N.Y. 2019) (petition filed on May 1, 2019, plan confirmed on May 3, 2019); *In re Sheridan Holding Company I, LLC*, No. 20-31884 (DRJ) (Bankr. S.D.Tex. 2020) (petition filed on Mar. 23, 2020, plan confirmed on Mar. 24, 2020); *In re Mood Media Corporation*, No. 20-33768 (MI) (Bankr. S.D. Tex. 2020) (petition filed on July 30, 2020, plan confirmed on July 31, 2020); *In re Belk Corp.*, No. 21-30630 (MI) (Bankr. S.D.Tex.) (petition filed on Mar. 23, 2021, plan confirmed on Mar. 24, 2021).

[41] There was no motion to shorten notice deadlines filed under Federal Rule of Bankruptcy Procedure 9006(c) in any of these cases.

[42] 11 U.S.C. §§ 363(m), 364(e).

[43] Admin. Office of the U.S. Courts, U.S. Court of Appeals-Judicial Caseload Profile, Sept. 30, 2020, https://bit.ly/3buVTIM.

[44] 28 U.S.C. § 158(a)-(d). In some instances, an appeal may be taken directly to the court of appeals. 28 U.S.C. § 158(d)(2); FED. R. BANKR. PROC. 8004(e).

[45] 28 U.S.C. § 158(a).

[46] 28 U.S.C. § 158(c)(2); FED. R. BANKR. PROC. 8002(a).

[47] Ritzen Group, Inc. v. Jackson Masonry, LLC, 589 U.S. ___ (2020) (resolution of a lift stay motion is a final order).

[48] Bullard v. Blue Hills Bank, 575 U.S. 496 (2015) (court order denying confirmation of a proposed chapter 13 plan is not a final order because it did not conclusively resolve the proceeding because an amended or new plan could still be proposed).

[49] FED. R. BANKR. PROC. 8007(c).

[50] *See* 11 U.S.C. § 502.

[51] Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 143-145 (2d Cir. N.Y. 2005).

[52] *In re* Tribune Media Co., 799 F.3d 272, 277 n.3 (3d Cir. 2015).

[53] *Id.*

[54] *See, e.g.*, Castaic Partners II, LLC v. Daca-Castaic LLC (*In re* Castaic Partners II, LLC) 823 F.3d 966, 968 (9th Cir. 2016) ("Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to unscramble the eggs.").

[55] JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (*In re* Transwest Resort Props.), 801 F.3d 1161 (9th Cir. 2015) (Smith, J. dissenting).

[56] Ryan Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 J. BANKR. L. & PRAC. 1, Art. 2 (2010).

[57] Nordhoff Investments v. Zenith Electronics, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) (noting that "equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges.").

[58] Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REG. 651, 654 (2020).

[59] ADAM J. LEVITIN, *BUSINESS BANKRUPTCY: FINANCIAL RESTRUCTURING AND MODERN COMMERCIAL MARKETS* 407 (2018).

[60] *See, e.g.*, *In re Indianapolis Downs*, 486 B.R. 286 (Bankr. D. Del. 2013) (court approved payment in full of professionals' fees of restructuring support agreement signatories because the court had previously authorized such fees under the order authorizing the DIP financing).

[61] *See* Tung, *supra* note 58, at 670 n.81.

[62] *See, e.g.*, Motion of Debtors for Entry of Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV)

© 2021, Adam J. Levitin

Granting Adequate Protection to Prepetition Secured Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final hearing, and (VII) Granting Related Relief, Exhibit B, *In re Chinos Holdings, Inc.*, 20-32181 (Bankr. E.D. Va. May 4, 2020) (Dkt. 31) at ¶ 22 (providing for the parties backstopping the DIP Facility to receive a $40 million fee "paid in New Common Shares issued at the transaction enterprise value" $1.75 billion on the effective date of the plan. The Unsecured Creditors Committee claimed an enterprise valuation of $2.941 billion, suggesting that the real value of the backstop fee might be substantially higher. *See* Notice of Filing of (I) Unredacted Province Expert Group; (II) Redacted Expert Report of the Michel-Shaked Group and Executive Summary Thereof; And (III) Revised Proposed Order, Exhibit A, *In re Chinos Holdings, Inc.*, 20-32181-klp (Bankr. E.D. Va. Aug. 13, 2020) at 5 (Dkt. No. 767)).

[63] U.S. Department of Justice, Press Release, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family, Oct. 21, 2020, *at* https://bit.ly/2XsW1QI.

[64] Purdue Pharma L.P. Plea Agreement, Oct., 20, 2020, *at* https://bit.ly/39C6yPp, at 8-9 [hereinafter Purdue Plea Agreement]. Bankruptcy law does not provide for "superpriority administrative expense claims"—an administrative expense is a distinct category from a claim—nor does it expressly authorize superpriority payments in settlements. Nevertheless the idea is clear—DOJ would be paid at the head of the line.

[65] Secured claims would have priority over the forfeiture judgment, but Purdue, unusually, has no secured creditors. Purdue Pharma, L.P. Statement of Financial Affairs, *In re Purdue Pharma*, *L.P.,* No. 19-23649-rdd (Bankr. S.D.N.Y. Oct. 29, 2019) (Dkt. No. 358), at 8; Purdue Pharma, L.P., Schedule D, Statement of Financial Affairs, *In re Purdue Pharma*, *L.P.,* No. 19-23649-rdd (Bankr. S.D.N.Y. Oct. 29, 2019) (Dkt. No. 357), at 164.

[66] Purdue Plea Agreement, *supra* note 64, at 8.

[67] *Id.* Settlement Agreement, dated Oct. 21, 2020, between the United States and Purdue Pharma, L.P., *at* https://bit.ly/2Xvmugx, at ¶ III.8.f.

[68] Purdue Plea Agreement, *supra* note 64, at 10 ("In the event that the Bankruptcy Court does not confirm a plan of reorganization in the Purdue Bankruptcy that provides for the emergence from the Purdue Bankruptcy of a public benefit company (or entity with a similar mission), then (i) Purdue shall not be entitled to the Forfeiture Judgment Credit, and (ii) the United States shall retain the full amount of the Forfeiture Judgment as an allowed superpriority administrative expense claim.").

[69] *Id.*

[70] Motion of Debtors Pursuant to 11 U.S.C. § 105 and FED. R. BANKR. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States , *In re Purdue Pharma*, *L.P.,* No. 19-23649-rdd (Bankr. S.D.N.Y. Oct. 21, 2019) (Dkt. No. 1828), at ¶ 2 (hereinafter "Settlement Motion") (noting that the "criminal forfeiture judgment alone could leave the Debtors with no viable alternative to liquidation, and satisfaction of such a judgment would leave little to no recovery for other creditors.").

[71] The Fraudulent Conveyances Act 1571 (13 Eliz 1, c5).

[72] 11 U.S.C. § 548.

[73] 11 U.S.C. § 544(b).

[74] Recent cases with notable fraudulent transfer allegations include Purdue, Caesars Entertainment, Neiman Marcus, PetSmart, iHeart Media, J.Crew, Acosta, Cirque d'Soleil, Windstream, Travelport. *See* MAX FRUMES & SUJEEET INDAP, *THE CAESARS PALACE* COUP (2021); Mitchell Mengden, *The Development of Collateral Stripping by Distressed Borrowers*, 16 CAP. MARKETS L.J. 56, 57 n.4 (2020); Lord Locke LLP, *In Desperate Times…Travelport Puts $1.15 Billion in Collateral Value Beyond the Reach of Its Creditors*, JDSupra, June 1, 2020, *at* https://bit.ly/3x8LklA. Brad Cheek, *Tearin' up iHeart: The Recent Trend with Troubled Companies and The Unrestricted Subsidiary Transfer Tactic*, 23 N.C.BANKING INST. 271 (2019).

[75] Divisive mergers have been used by debtors prior to filing for bankruptcy in BestWall, No. 17-31785 (W.D.N.C.), DBMP LLC, No. 20-30080 (W.D.N.C.), Aldrich Pump, LLC, No. 20-30608 (W.D.N.C.), and Paddock Enterprises., LLC, No. 20-10028 (Bankr. D. Del.). Johnson & Johnson is supposedly considering using this tactic to address its talc liabilities. Mike Spector, Jessica Dinapoli & Dan Levine, *Exclusive: J&J exploring putting talc liabilities into bankruptcy*, Reuters, July 19, 2021, *at* https://reut.rs/3y9Sfwa.

[76] Del. Limited Liability Company Act, § 18-217(l)(8); Tex Bus. Oversight Code § 10.008(a)(2).

[77] *See* MAX FRUMES & SUJEEET INDAP, *THE CAESARS PALACE* COUP 285 (2021)

[78] Mike Spector, Tom McGinty & Rachel Feintzeig, *In Trouble and Paying Out*, Wall St. J., Dec. 3, 2012, *at* https://on.wsj.com/3x1bNBG; Abha Bhattarai & Daniela Santamariña, *Bonuses before bankruptcy: Companies doled out millions to executives before filing for Chapter 11*, Wash. Post Oct. 26, 2020, *at* https://wapo.st/3iUfMec. *See also* Jared A. Ellias, *Regulating Bankruptcy Bonuses*, 92 S. CAL. L. REV. 654 (2019).

© 2021, Adam J. Levitin