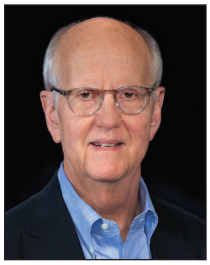
By David R. Kuney[1]

Why *BSA* Is a "Dangerous Transactional Precedent": The Reemergence of § 363



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The Third Circuit Court of Appeals issued its decision in *In re Boy Scouts of America* on May 13, 2025.[2] This decision is likely to be one of the most important decisions dealing with the import of the U.S. Supreme Court in *Purdue Pharma*. It is also likely to provoke much debate and disagreement over a debtor's ability to argue that an appellate challenge to plan confirmation can be rendered statutorily moot under 11 U.S.C. § 363(m) if the plan and a related sale of the debtor's assets are found to be an "integrated transaction."

The dissent labeled the outcome a "dangerous transactional precedent." Some will see the decision as engrafting an unjustified new theory of mootness that will limit appellate review of unlawful plans. The decision appears to resurrect *sub rosa* plans and permits what such cases as *Jevic* and *Lionel* found to be improper.

Background

The Third Circuit's decision dismissed as moot the appeal of the Dumas & Vaughn (D&V) claimants and the Lujan claimants — two separate groups of survivors of alleged sexual abuse, going back several decades, by the Boy Scouts of America (BSA). Both claimants appealed from the order of the U.S. District Court in March 2023, which affirmed the confirmation of the BSA plan.[3] The appeals court argued that the district and bankruptcy courts had improperly approved the BSA plan because it authorized nonconsensual third-party releases, notwithstanding that the Supreme Court in *Harrington v. Purdue*[4] had held that identical nondebtor releases were impermissible and unauthorized by the Bankruptcy Code.

The motions to dismiss the appeal were based on both statutory and equitable mootness. The panel decision rested entirely on statutory mootness under § 363(m).[5] The majority's reliance on statutory mootness is at the heart of why the *Boy Scouts*' case may properly be viewed as "dangerous transactional precedent."[6] However, the majority cautioned that "our analysis of the claims of the Lujan and D&V Claimants should not be read, by negative implication or otherwise, to suggest that those claims are equitably moot."[7]

No one disputed that the BSA plan contained nonconsensual third-party releases. BSA maintained during the course of the proceedings that the "cornerstone" of its reorganization plan was the inclusion of nondebtor, nonconsensual releases. That "cornerstone" was, however, unlawful.

In *Purdue*, the Supreme Court held that "the Bankruptcy Code does not authorize a [nonconsensual] release and injunction" as part of a reorganization plan under chapter 11.[8] Justice Brett Kavanaugh's dissent was emphatic: "The Court decides today to reject the plan by holding that nondebtor releases are categorically impermissible as a matter of law ... [and] ... are *never* allowed as a matter of law."[9] The U.S. Bankruptcy Court for the District of Delaware concurred: "The nonconsensual third-party release is now *per se unlawful*."[10]

The Third Circuit panel acknowledged the unlawfulness of the BSA plan: "If proposed today, the Plan would be unconfirmable in the wake of *Purdue* and the Lujan and D&V Claimants could not have their claims released without consent."[11] Expressing much the same thought, the court further stated, "So were the Plan proposed today, we harbor little doubt that the Bankruptcy Court would neither authorize the Insurance Policy BuyBack nor confirm the Plan with its impermissible releases."[12]

Thus, both the Supreme Court and Third Circuit recognized the intrinsic unlawfulness of the BSA plan. Nevertheless, instead of reaching the merits, the Third Circuit dismissed the appeal on the grounds of statutory mootness, relying on § 363(m). The panel majority adopted the argument advanced

1 The author has filed *amicus curiae* briefs in the *Boy Scouts* case on behalf the D&V claimants.
2 *In re Boy Scouts of Am.*, 137 F.4th 126 (3d Cir. 2025).
3 *In re Boy Scouts of Am. and Delaware BSA LLC*, 650 B.R. 87 (D. Del. 2023), *affirming In re Boy Scouts of Am. and Delaware BSA LLC*, 642 B.R. 504 (Bankr. D. Del. 2022).
4 *Harrington v. Purdue Pharma LP*, 144 S. Ct. 2071 (2024).
5 "The reversal or modification on appeal of an authorization under subsection (b) ... does not affect the validity of a sale or lease under such subsection to an entity that purchased ... in good faith ... unless such authorization and such sale or lease were stayed pending appeal."
6 *Boy Scouts*, 137 F.4th at 175 (Rendell, J., concurring).
7 *Id.* at 173. The law professor *amici* questioned the justifiable reliance based in part on the contribution by the settling insurers being placed into escrow.
8 *Purdue*, 144 S. Ct. 2088.
9 *Id.* at 2014 (Kavanaugh, J., dissenting).
10 *In re Smallhold Inc.*, 665 B.R. 704, 709 (Bankr. D. Del. 2024).
11 *Boy Scouts*, 137 F.4th at 170.
12 *Id.* at 158, n.19.

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by BSA that it could evade the holding in *Purdue* because the reorganization plan incorporated what was considered to be a "sales" transaction under § 363(b),[13] which thus meant, according to the panel, that § 363(m) applied. The purported sale was nested in a settlement agreement and release (the "settlement agreements") with a group of insurers (the "settling insurers") who agreed to "buy back" their insurance policies;[14] that the buybacks were a "sale" under § 363(b); that the sale and the reorganization plan were part of the "same transaction" and, hence, "integral" to one another; and that as an integrated transaction, the unlawful reorganization plan provision was immune from appellate review under § 363(m).[15]

In applying § 363(m), the panel held that once there is a good-faith finding, and provided that the sale has not been stayed, the court must determine "whether a remedy can be fashioned that will not affect the validity of the sale."[16] It continued, "We have little difficulty concluding that the relief they seek would affect the validity of the sale."[17] The panel relied primarily on *In re Energy Future Holdings*[18] for the proposition that even if the confirmation order "authorized and directed" the buyback, it still qualifies as a sale under § 363(b).[19]

Significantly, this "affecting the validity of the sale" test supplanted the test for whether the plan provision was lawful based on the confirmation standards — as distinct from the standard used to approve a sale. Based on this notion that the sale was integral to the reorganization plan, BSA argued — and the panel majority apparently agreed — that § 363(m) "operates independently of the substantive issues addressed in *Purdue* regarding the permissible contents of a Chapter 11 Plan."[20] Thus, although the sale was embodied within the reorganization plan,[21] and there is no statutory mootness provision that pertains to a plan, the panel majority held that § 363(m) applied with respect to the issue of mootness.

It is precisely this notion that § 363(m) operates independently of the provisions that pertain to plan confirmation (including § 1123(b)(6), which was the core provision in *Purdue*) that is likely to be the most troublesome issue in future cases. This so-called "independence" eliminates the legal standard for confirmation that *Purdue* held governs the unlawfulness of third-party releases, and it effectively excuses compliance with the Bankruptcy Code provisions on plan confirmation.

The decision drew a sharp and lengthy concurrence from Hon. Marjorie Rendell, whose 15-page concurrence identifies the "errors" of the majority in permitting § 363(m) to function as a constraint on appellate review of a chapter 11 plan.[22] "I see not only error, but mischief in the majority's approach."[23] "Taken to its logical conclusion, the majority's reasoning would allow § 363(m) to swallow Chapter 11's requirements, including those clarified in *Purdue*.... So long as a court authorizes an intra-plan sale under § 363, the other plan provisions are shielded from review, as they may have conceivably affected the purchase price."[24]

In addition, "What happened here goes far beyond what § 363 contemplates," wrote Judge Rendell. "Rather than merely protecting the purchaser's 'newly acquired property interest' ... the majority shields from review the nonconsensual third-party releases that the Supreme Court invalidated in *Purdue*.... Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide."[25]

Section 363 Cannot Operate as a Form of Discharge/Release that Is Immune from Appellate Review

A core problem with the decision is that it improperly permits § 363 to function as an alternative path to obtaining a release in bankruptcy. A release functions as a discharge and has adjudicative and substantive impact. "[N]onconsensual releases ... discharge the obligations of a debtor in precisely the same manner that confirmation of the plan discharges the debts of the debtor."[26] A release "essentially amounts to a discharge."[27]

Under the panel's decision, a release that is negotiated as part of a sale, but later authorized by a plan, might be immunized from appellate review. A term in the sale that is unlawful in a plan (the release) suddenly becomes lawful when embedded in a sale. This gives § 363 newfound, but nontextual, substantive impact and "stretches" § 363(m) to cover plans.

Section 363(b) cannot be used to authorize a nonconsensual release of third parties. A sale order cannot function as a discharge power, which might be exercised only upon a showing of compliance with the standards for plan confirmation.[28] The authority to release or discharge a claim is found only in § 1142, which contains neither a mootness provision nor other appellate constraint. The release in this case remains unlawful and subject to appellate review.

By focusing solely on whether the appeal affected the "validity of the sale," the Third Circuit created a workaround

13 "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."
14 *See In re Boy Scouts of Am.*, 642 B.R. 504, 538 (Bankr. D. Del. 2022).
15 "[T]he sales of the Abuse Insurance Policies to the Settling Insurers were part of the same transaction and integral to the entire Plan." Settling Insurers' Motion to Dismiss, ECF 123, p. 15.
16 137 F.4th at 149.
17 *Id.*
18 949 F.3d 806 (3d Cir. 2020).
19 *Id.* at 153.
20 Appellees Settling Insurers' Supplemental Brief, ECF 198, p. 14.
21 Appellee's Motion to Dismiss Appeal as Moot, Case No. 23-1664, ECF 124-1, p. 10.
22 Judge Rendell concurred in the result only, saying that she believed that the case should have been resolved by an analysis of equitable mootness.
23 *Boy Scouts*, 137 F.4th at 177.
24 *Id.* at 174.
25 *Id.*
26 Ralph Brubaker, "An Incipient Backlash Against Nondebtor Releases?," 42 No. 2 *Bankr. Law Ltr.* (2022).
27 *Purdue*, 144 S. Ct. at 2074.
28 *See* § 1142(d)(1)(A) (stating that order confirming plan effectuates discharge).

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to compliance with the foundational requirements for plan confirmation. Judge Rendell stated her view that the strategy of having a sale authorized by a plan only (and without a separate sale motion and order) "was almost certainly crafted in an attempt to insulate the Plan and Confirmation Order from appellate review."[29]

Use of a Sale or Settlement to Immunize Appellate Review of Confirmation Orders Is Contrary to *Braniff*, *Lionel* and *Jevic* Principles

The use of § 363 as a restructuring device that functions outside the confirmation standards of chapter 11 has long been rejected by the Supreme Court and numerous appellate courts. The majority recognized the potential application of *Jevic*, *Lionel* and *Braniff*, and stated that these cases do not permit a sale or a settlement to "swallow up Chapter 11's safeguards."[30] Despite specifically "endors[ing]" these doctrines, the concurrence recognized that the majority's decision would permit the same harms that have been repeatedly prohibited by *Jevic*, *Lionel* and *Braniff*. The "*sub rosa* cases are concerned with § 363 being used to skirt Chapter 11's requirements and effectively insulate plans from review."[31] "Likewise, where, as here, a sufficiently important facet of the plan makes up "consideration" for a portion of the debtors' property, a § 363 sale allows debtors to avoid complying with Chapter 11 (here, 11 U.S.C. § 1123(b)(6)) and insulates the plan from appellate review."[32]

Early attempts to bypass the requirements for a valid reorganization plan led to the well-recognized doctrine of *sub rosa* plans, which were found to be invalid. *Braniff* held that "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets."[33]

The Supreme Court later recognized the nearly identical principle holding that a settlement agreement also could not be used to bypass the requirements for plan confirmation. "A Bankruptcy Court's approval of an asset sale [under § 363] does not "gran[t] the bankruptcy judge *carte blanche*" or "swallo[w] up Chapter 11's safeguards."[34]

BSA's sales transaction specified the "terms for adopting a reorganization plan," which included an unlawful nondebtor release. Thus, the reorganization plan had to "scale the hurdles erected in Chapter 11."[35] The panel's ruling that the incorporation of a sale could bypass compliance with the reorganization provisions is in direct contravention to *Jevic*.

The Proper Test for Mootness Is the Availability of Effective Relief

As previously noted, the majority cautioned that it was not holding or implying that equitable mootness applied to the claims of the D&V claimants or Lujan. Judge Rendell was concerned that statutory mootness was being used "to offer a parallel route by which to avoid review of otherwise-justiciable appeals."[36]

Neither statutory mootness nor equitable mootness should permit the inclusion of an unlawful plan provision to escape appellate review and reversal when appropriate. The proper limit to appellate review is modeled on the following constitutional standard: Is there a "case or controversy" that is appropriate for federal appellate jurisdiction, and is there any conceivable effective remedy that might be considered? If so, the appellate court should and must review the merits, or remand the case to determine whether there is an effective remedy. Even if § 363(m) can somehow be appended to apply to plans, the Supreme Court has held that § 363(m) is to be narrowly viewed as a "constraint" only on the kind of remedy, and not as a jurisdictional barrier to appellate review.[37]

Conclusion

The *Boy Scouts* decision is worthy of close attention, as its impact will likely be significant. Despite the panel's admonition that a similar plan or sale would not be approved "today," it seems possible that others will try to achieve a similar result.[38] Given the ease of replication of what made this case "too late" for appellate review, it seems more likely that the decision will be, as Judge Rendell stated, a "plan-drafting guide."

Section 363(m) is said to promote finality in sales, but not to protect unlawful plan provisions. To the argument that there must be some finality and certainty, bankruptcy courts should be far more cautious about granting early-case extensions of the automatic stay that enjoin litigation against nondebtor third parties, and instead should permit the nonbankruptcy litigation to liquidate abuse claims and to proceed up to the point of judgment. In addition, courts should consider more liberal use of stays pending appeal so that the debtor cannot "run out the clock" to preclude appellate review under a mootness theory, as well as require that consensual plans must be "opted into." abi

29 *Boy Scouts*, 137 F.4th at 173.
30 *Id.* at 155.
31 *Id.* at 171 (citing *PBGC v. Braniff Airways Inc. (In re Braniff Airways Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983); *In re Lionel Corp.*, 722 F.2d 1063, 1069 (2d Cir. 1983)).
32 *Id.*
33 700 F.2d 935, 940.
34 *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 469 (2017).
35 *In re Cont'l Air Lines Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).
36 *Boy Scouts*, 137 F.4th 170-71.
37 The panel's failure to properly apply *MOAC Mall* was addressed throughout the briefing, including Supplemental Post-*Purdue* Brief of Appellants Dumas & Vaughn Claimants, Case No. 23-1666, ECF 207, p. 32; Lujan Claimants' Petition for Rehearing *En Banc*, Case No. 23-1664, ECF 271-1, p. 3. *MOAC Mall Holdings LLC. v. Transform Holdco LLC*, 143 S. Ct. 927, 929 (2023), applying the rationale of *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). ("A case remains live '[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation,' and it 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'").
38 *See, e.g., In re Hopeman Bros. Inc.*, 667 B.R. 101 (Bankr. E.D. Va. Jan. 24, 2025); *Wright v. Bird Global*, Case No. 24-CV-23086-RAR (S.D. Fla. Aug. 21, 2014); *Roman Cath. Diocese of Rockville Ctr.*, 665 B.R. 71 (Bankr. S.D.N.Y. 2024) ("Indeed, the Debtor asserts that the [U.S. Trustee]'s attempts at extending the Supreme Court's *Purdue* ruling, which addressed third-party releases solely in the plan confirmation context, to sale orders is an 'overreach.'").