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Mass Tort Bankruptcy Settlements in *Purdue*'s Wake

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After the U.S. Supreme Court's *Purdue* decision,[2] the resolution of claims by third parties against nondebtors, even if they relate closely to claims held by the debtor's bankruptcy estate, cannot be imposed on affected third-party claimants without their consent.[3] *Purdue* did not, however, obviate issues raised in bankruptcy cases by overlapping claims of debtors and third parties against nondebtors.

In mass tort bankruptcies in particular, the importance of third parties' claims that overlap the debtor's claims against current and former owners, directors, officers, affiliates and insurers persists. It is compounded by the fact that the holders of such claims also generally seek a direct recovery from the debtor.

Accordingly, the interests of the debtor, at least its creditors with claims against such third parties, and the nondebtor targets may align: The nondebtors have an incentive to pay more, or at least pay more quickly, for a comprehensive resolution of overlapping claims against them. The debtor and holders of claims against it and related claims against nondebtors thus must weigh such benefits against the alternative risk, cost and delay of piecemeal litigation. For this reason, before *Purdue*, supermajorities of creditors, for the right consideration, generally accepted chapter 11 plans providing for a comprehensive resolution of the debtor's and third parties' claims.[4]

Two recent mass tort cases, *In re the Roman Catholic Diocese of Rockville Centre* and *In re KFI Wind-Down Corp.*, illustrate how debtors, their creditors and third-party targets continue to pursue largely comprehensive settlements using approaches differing from the entirely comprehensive chapter 11 plan resolution overturned by *Purdue*. Both cases address — and both settlements carefully and comprehensively define — claims held by the debtor's estate, which can be settled under § 363(b) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure without creditor consent. The emphasis on this distinction, although not new,[5] is a notable departure from most pre-*Purdue* practice.

For example, the U.S. Court of Appeals for the Second Circuit, in affirming the bankruptcy court's decision in *Purdue*, clearly recognized the distinction between claims of the debtors' estates against nondebtors, which third parties could assert only derivatively, if at all, and third parties' "direct" claims.[6] However, it stated, "We need not define the exact claims [that] fall under the umbrella of direct claims" to approve the settlement based on the trial court's other findings and then-governing precedent.[7] Before *Purdue*, the distinction between estate and direct claims was most relevant in negotiating the allocation of settlement proceeds under a plan among various classes of creditors asserting different types of arguably "direct" claims and those without such claims, based on the relative strength of such claims and the estate's claims. Now, assuming that some direct claims will not be consensually settled under a plan, the allocation issue also may well include determining the appropriate amount of a reserve to hold back for opt-outs with arguably direct claims.

Roman Catholic Diocese of Rockville Centre

On Dec. 4, 2024, Hon. **Martin Glenn** of the U.S. Bankruptcy Court for the Southern District of New York confirmed the Roman Catholic Diocese of Rockville Centre, N.Y.'s joint chapter 11 plan (hereinafter, the "plan").[8] The plan resolved and discharged all childhood sexual-abuse claims against the Diocese *and* its affiliate parishes, which were not initially debtors in bankruptcy but became debtors shortly before the plan was confirmed, as well as resolved competing claims to insurance, by channeling those claims to a trust that will make approximately $323 million from all settlement sources available to abuse claimants.

The Diocese filed its chapter 11 case in October 2020 seeking to achieve a comprehensive

1 Judge Drain served for more than 20 years as a U.S. Bankruptcy Judge for the Southern District of New York, and he is a past member of ABI's Board of Directors.
2 *Harrington v. Purdue Pharma LP*, 603 U.S. 204 (2024).
3 This article does not discuss what constitutes such consent, a still-evolving issue post-*Purdue*.
4 The authors hope that attempts to further curtail parties' ability to negotiate and implement such collective solutions — *see* the Non-Debtor Release and Prohibition Act, S. 5415/H.R. 9223, 118th Cong. (2024) — would not ignore the wishes of most actual parties to such cases to at least consider a collective resolution. This is especially so if courts continue to develop ways to provide claimants the opportunity to address publicly, in a court setting, the harm that they believe was done to them, as was an element of the overruled *Purdue* settlement and has since occurred in certain of the diocesan bankruptcies. *See, e.g.*, Alex Mann & Jonathan M. Pitts, "Clergy Abuse Survivors Testify in Catholic Church Bankruptcy Case: Do You See Me Now?," *Baltimore Sun* (May 21, 2024), baltimoresun.com/2024/05/20/clergy-abuse-survivors-testimony (last visited Jan. 23, 2025; subscription required to view article).
5 *See, e.g., St. Paul Fire & Marine Ins. Co. v. PepsiCo. Inc.*, 884 F.2d 688 (2d Cir. 1989).
6 *In re Purdue Pharma LP*, 69 F.4th 45, 70-71 (2d Cir. 2023), *cert. granted sub nom., Harrington v. Purdue Pharma LP*, 144 S. Ct. 44, 216 L. Ed. 2d 1300 (2023), *rev'd and remanded sub nom., Harrington v. Purdue Pharma LP*, 603 U.S. 204.
7 *In re Purdue Pharma LP*, 69 F.4th at 70, n.15, 79.
8 *In re The Roman Catholic Diocese of Rockville Centre, New York (In re Rockville Centre)*, No. 20-12345 (MG) (Bankr. S.D.N.Y. Dec. 4, 2024), ECF No. 3465.

settlement with hundreds of abuse survivors, insurers and other related parties, including its affiliated parishes. The parishes, it was argued, were responsible for abuse claims along with the Diocese and also claimed coverage under the Diocese's insurance policies, which complicated realizing on this major source of recovery.

Although they did not originally file for bankruptcy relief, the parishes were prepared to negotiate and contribute to a settlement in exchange for a pre-*Purdue* release through a chapter 11 plan, including to release their claims to insurance in return for an agreed payment under their policies, insurers similarly were open to a collective settlement under a plan, but were reluctant to agree to a noncomprehensive settlement that did not involve the parishes and possible claims by the survivors directly against them or the policies.

Negotiation of such a plan was difficult, protracted, and further delayed by the *Purdue* appellate process, so much so that the Diocese raised the prospect of dismissing its case. Chief Bankruptcy Judge Glenn pushed back, though, directing the parties to a final mediation and noting the serious impact of further delay on the survivors. This mediation resulted in an economic settlement among the Diocese, parishes, insurers and claimants. As importantly, it did so with two post-*Purdue* concepts that enabled a largely collective resolution.

Structure of the Settlement

First, as part of the mediated comprehensive settlement, the Diocese, parishes and abuse claimants negotiated and implemented a resolution of their claims against the insurers under which the insurers bought back their insurance policies for approximately $88 million, with that amount to be contributed to an abuse claimant trust under a plan. In summary, the settlement provided that:

- The buyback of the policies under § 363(b) was free and clear of rights, claims and interests in and against the policies under § 363(f) (with a related release by the parishes of their claimed rights under the policies).[9]
- Under the sale and settlement as originally proposed, abuse claimants were required to release any potential direct claims they might have against the insurers or the policies as a condition to receiving payment of the insurance settlement sale proceeds from the claimant trust under the plan. After pushback from the U.S. Trustee on the basis that such condition was not sufficiently voluntary, the plan was amended:

> (a) to clearly define third-party "direct" claims to the insurance proceeds and against the insurance companies, making it clear that they do not include claims through, or derivative of, the debtors, which, as noted, were separately sold and released by the debtors; and
> (b) to set aside a negotiated reserve of $32 million of insurance settlement/sale proceeds allocated to address potential abuse claimants' direct claims against the insurers or the policies, with cash being released from the reserve into the trust as certain threshold numbers of claimants executed releases in favor of the insurers, including releases of their direct claims (if any).

As a result, the U.S. Trustee dropped its objection.

Second, the settlement used the amended procedural guidelines adopted by the Southern District of New York for "rapid" prepackaged chapter 11 cases[10] for the parishes to obtain their own bankruptcy discharges in return for their settlement contributions. Thus, having negotiated a comprehensive settlement with the abuse claimants, the parishes filed for bankruptcy on Dec. 2, 2024, joining the Diocese as debtors under the plan and with the plan already having been voted on.[11] Within a little more than a day, on Dec. 4, 2024, the joint plan was confirmed after being accepted by nearly 99 percent of the approximately 75 percent of abuse claimants who voted.[12]

KFI Wind-Down Corp.

Parties in the pending chapter 11 case of *KFI Wind-Down Corp.* (f/k/a Kidde-Fenwal Inc.) propose to use both bankruptcy and nonbankruptcy settlements to relatively comprehensively resolve claims by the debtor and thousands of third-party plaintiffs against nondebtors. The proposed chapter 11 plan[13] would settle estate claims against the debtor's indirect parent and related parties (collectively, "Parent"). In addition, Parent and counsel for certain groups of plaintiffs in a pending mass tort multidistrict litigation (MDL) proceeding have agreed to a proposed opt-out class-action settlement of such plaintiffs' "direct claims" against Parent that will be overseen by and subject to the approval of the U.S. District Court for the District of South Carolina presiding over the MDL.

KFI filed its chapter 11 case in May 2023, by which time it was a defendant in thousands of lawsuits related to its former firefighting aqueous film-forming foam (AFFF) product, which allegedly caused "forever chemical"-related injuries with claimed damages in excess of its net worth (although KFI has consistently disputed its liability and damage exposure). These lawsuits were consolidated with thousands of similar actions against other "forever chemical" defendants in the MDL. Certain of the defendants in the MDL had settled much of their exposure to certain types of AFFF claims, either before or after the bankruptcy filing, in opt-out class-action settlements, which gave some indication of the aggregate settlement "worth" of similar claims (although each defendant's products differed from the others), as well as the reasonably expected number of opt-outs.

The debtor had three main assets: (1) its remaining, non-AFFF business, which it marketed and sold in a § 363(b) sale in July 2024; (2) claims to insurance related to its and its predecessors' AFFF products and business, which insurers

9 This approach with respect to an insurance settlement was also recently approved by the U.S. Bankruptcy Court for the Eastern District of Virginia. *In re Hopeman Bros.*, 2025 Bankr. LEXIS 132, at *11-13 (Bankr. E.D. Va. Jan. 24, 2025).

10 These "rapid prepacks" are defined as cases where the debtor seeks confirmation of a plan in less than 14 days. *See* General Order M-634 (Bankr. S.D.N.Y. May 31, 2024) (the "SDNY Guidelines").

11 *See* Mot. of Additional Debtors for Entry of an Order Directing Joint Administration of Related Chapter 11 Cases and Granting Related Relief, *In re the Roman Catholic Diocese of Rockville Centre*, No. 20-12345 (MG), ECF No. 3462. The SDNY Guidelines, consistent with § 1126(b) of the Bankruptcy Code, contemplate conditional approval of a disclosure statement and voting on a prepackaged chapter 11 plan before the bankruptcy filing date; thus the parishes filed for chapter 11 relief knowing the outcome of the balloting on the plan, which had taken place within the time contemplated by the Federal Rules of Bankruptcy Procedure for voting.

12 Mem. of Law in Supp. of Confirmation ¶¶ 4, 12, *In re the Roman Catholic Diocese of Rockville Centre*, No. 20-12345 (MG), ECF No. 3446.

13 The hearing on the disclosure statement for the plan is currently scheduled for Feb. 12, 2025, but is subject to further possible adjournment.

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have disputed;[14] and (3) claims and causes of action against Parent, as well as against the 2013 purchaser (AFFF purchaser) of its AFFF business. The estate's claims against Parent included claims for successor liability, alter-ego/veil-piercing, vicarious liability and alleged assumption of liability under various agreements.

At the same time, certain plaintiffs in the MDL, as well as other claimants against the debtor, including U.S. states, asserted potential direct claims against Parent. For its part, Parent asserted rights under insurance policies shared with the debtor and contested the debtor's rights to the proceeds of certain other assets that were sold in the July 2024 transaction. Following a months'-long mediation,[15] the debtor, Parent, the plaintiffs' executive committee appointed in the MDL, and the official committee of unsecured creditors in the bankruptcy case agreed to the filing of a plan-support agreement,[16] the terms of which are incorporated into KFI's chapter 11 plan, which the debtor also filed on Dec. 20, 2024.[17]

The plan proposes to establish a settlement trust to be funded by payments by Parent in exchange for, among other consideration, a release of the estate's claims against it. When this resolution was negotiated, MDL PEC counsel also agreed with Parent on a settlement of certain types of alleged direct claims against Parent in the MDL, to be substantially contemporaneously sought for approval through an opt-out class settlement process in the MDL (although approval and consummation of that settlement are not conditions to the effectiveness of the chapter 11 plan). Other potential direct claims against Parent, primarily by state governments but also by other categories of AFFF plaintiffs, are not currently proposed to be settled in the MDL or otherwise substantially contemporaneously with the plan-confirmation process.

Structure of the Estate Settlement

Under the KFI plan, the debtor would release its estate's claims against Parent in exchange for Parent's substantial funding over five years of a plan-settlement trust to make distributions in respect of allowed claims. As with the *Rockville Centre* plan, KFI's proposed plan meticulously defined the estate's claims in keeping with applicable law on "estate claims" in contrast with third parties' "direct" claims.[18] In addition, Parent and the debtor would implement a cooperation and proceeds-sharing arrangement related to the recovery of shared insurance, to be pursued and distributed by a plan-settlement trust.[19] Because the plan would specifically not propose the release of direct claims of third parties against Parent, including those of U.S. states, the plan also meticulously defines such "direct" claims.

Conclusion

Both *Rockville Centre* and *KFI Wind-Down Corp*. highlight the value that debtors, creditors and third parties continue to see in the global, or near-global, resolution of such disputes after *Purdue*. In large measure, obtaining such a resolution involves carefully examining the debtor's claims for resolution in the bankruptcy case, as well as considering means to resolve "direct" claims through other collective or largely resolution processes and the establishment of appropriate settlement reserves for direct claims. abi

Editor's Note: *ABI held a webinar shortly after the Supreme Court issued its decision in* Purdue. *To listen to the abiLIVE recording, please visit abi.org/newsroom/videos. ABI also published a digital book,* The Purdue Papers, *a compilation of 3,500+ pages of* amicus *briefs, petitions and other related background material. To order your downloadable copy, visit store.abi.org.*

14 Parties believe that there are potentially billions of dollars in available coverage under insurance policies for the period before its 2013 sale of the AFFF business.
15 It now seems almost a given that the complexity of resolving overlapping claims in the mass tort bankruptcy context warrants mediation.
16 *In re KFI Wind-Down Corp.*, No. 23-10638 (LSS) (Bankr. D. Del. Dec. 20, 2024), ECF No. 1570.
17 *Id.* at ECF No. 1753.
18 *See Emoral Inc. v. Diacetyl (In re Emoral Inc.)*, 740 F.3d 875 (3d Cir. 2014), *cert. denied sub nom., Diacetyl v. Aaroma Hldgs. LLC*, 135 S. Ct. 436 (2014); *TPC Grp. Litig. v. SK Second Rsrv. LP (In re Port Neches Fuels LLC)*, 660 B.R. 177 (D. Del. 2024) (each addressing what constitutes a "direct" claim as opposite to claim that is property of debtor's estate).
19 Parent's settlement with the estate also involves consideration related to the allocation of the July 2024 sale proceeds that is not relevant to this article.