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Bankruptcy 2025:
Views from the Bench

Supreme Court and Appellate Court Round-Up

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2025

AMERICAN BANKRUPTCY INSTITUTE CONFERENCE

VIEWS FROM THE BENCH | SUPREME COURT AND APPELLATE ROUND-UP

Date: September 26, 2025

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U.S. Bankruptcy Court (S.D.N.Y.)

HON. CRAIG T. GOLDBLATT

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CASE SUMMARIES

U.S. v. Miller, 23-824 (Sup. Ct. Mar. 26, 2025)

Holding: The sovereign immunity waiver under section 106(a) of the Bankruptcy Code does *not* authorize a bankruptcy trustee to sue the federal government for a fraudulent transfer under section 544(b)(1) of the Bankruptcy Code because no actual creditor could sue the government outside of bankruptcy under applicable Utah state law.

Factual Overview: The case centered on an alleged fraudulent transfer to the Internal Revenue Service ("IRS"). Three years before commencing a chapter 7 proceeding, the debtor corporation remitted a $145,000 payment for federal income taxes owed by one of its owners to the IRS. Since the subject transfer was not made within two years of the petition date, the trustee could not sue under section 548(a)(1)(B) of the Bankruptcy Code. To circumvent this limitation, the trustee instead invoked section 544(b)(1) as a basis to initiate a fraudulent transfer action against the IRS under Utah state law. The IRS conceded that all elements of a constructively transfer existed, but nevertheless argued that sovereign immunity would protect it from suit by a creditor, thereby invalidating the trustee's lawsuit under federal law. In contrast, the trustee argued that section 106(a)(1) of the Bankruptcy Code nullified the IRS's alleged sovereign immunity *in toto*.

The Tenth Circuit agreed with the trustee and viewed section 106(a)'s immunity waiver as applying to state-law claims that were pursued through section 544 and relied on precedent from the Ninth and Fourth Circuit which similarly permitted such suits. However, the Seventh Circuit previously adopted the opposite view and held that the actual creditor requirement of section 544(b)(1) (i.e., that a trustee may only initiate the fraudulent transfer action if an unsecured creditor could initiate the action under state law) limited the trustee's rights. The Supreme Court granted certiorari to resolve this circuit split. In an 8-1 opinion penned by Justice Jackson, the Supreme Court ultimately adopted the narrower interpretation which favored the government.

Reasoning: The Supreme Court held that although section 106(a) waives sovereign immunity for certain Bankruptcy Code provisions, this waiver does not negate section 544(b)(1)'s requirement that a trustee may only act if an actual unsecured creditor could have pursued the identical claim. Here, since a hypothetical creditor could not sue the IRS because sovereign immunity was operative via the applicable Utah fraudulent transfer statute, the trustee was similarly precluded from doing so under federal law in a bankruptcy proceeding. Justice Jackson noted that section 106(a) is only jurisdictional - meaning it permits courts to hear certain claims but does not create new substantive rights.

Dissent: In his dissent, Justice Gorsuch stated that the trustee should have been allowed to proceed. Justice Gorsuch believed that section 106(a) prevented the federal government from invoking sovereign immunity in the trustee's action, thereby permitting the trustee to proceed under section

544(b)(1) via state law. Justice Gorsuch made a distinction between sovereign immunity applying in the context of a private creditor pursuing relief in state court versus a trustee pursuing relief in a federal bankruptcy proceeding.

Harrington v. Purdue Pharma L.P., No. 23-124 (Sup. Ct.)

Holding: The Bankruptcy Code precludes chapter 11 plans from releasing non-debtor third parties from liability without consent.

Factual Overview: In conjunction with Purdue's initial proposed plan of reorganization, the Sackler family agreed to pay $4.3 billion to fund the plan, conditioned upon the approved plan including a release for the family from all opioid-related claims and an injunction prohibiting all victims from bringing future civil claims against the Sacklers (these releases and injunction are referred to as "non-consensual third-party releases"). In subsequent negotiations, the Sacklers agreed to increase their contribution to $6 billion.

Following an extensive evidentiary hearing, the bankruptcy court approved Purdue's plan, including the Sackler releases. The district court vacated the decision on grounds that nothing in the Bankruptcy Code permits bankruptcy courts to discharge claims against third parties (such as the Sacklers) without the consent of impacted claimants. The Second Circuit reversed the district court and affirmed the bankruptcy court's approval of Purdue's plan of reorganization, and the appeal to the Supreme Court followed.

Justice Gorsuch wrote the 5-4 majority opinion, joined by Justices Thomas, Alito, Coney Barrett, and Brown Jackson. Justice Kavanaugh authored the dissent, which was joined by Chief Justice Roberts and Justices Sotomayor and Kagan.

Reasoning:

Section 1123(b)(6) of the Bankruptcy Code precludes non-consensual third-party releases.

The core distinction between the Second Circuit's decision and the Supreme Court's ruling is whether section 1123(b)(6) of the Bankruptcy Code can be construed to authorize non-consensual third-party releases. Section 1123(b) enumerates the requirements for confirmation of a chapter 11 plan and contains a "catch-all provision" which states that a plan "may" also "include any other appropriate provision not inconsistent with the applicable provisions of this title." The Second Circuit held that section 1123(b)(6) permits any provision that is not expressly forbidden by the Bankruptcy Code, subject to the judge deeming it "appropriate", and determined that section 1123(b)(6) permits the non-consensual third-party releases since they are not expressly prohibited by the Bankruptcy Code.

The Supreme Court disagreed. The majority reasoned that "catch-all" phrases are not to be interpreted capaciously but rather must be interpreted in light of their context, and read to embrace "only objects similar in nature" to specific examples preceding it. The Supreme Court employed an intertextual statutory interpretation approach and reasoned that the preceding subsections in section 1123(b) concern the rights and responsibilities of a debtor, and any powers conferred by section 1123(b)(6) to release claims without consent of the affected party must relate solely to the debtor. Accordingly, section 1123(b)(6) cannot be interpreted to grant a bankruptcy court with "radically different power" to discharge the debts of a non-debtor without affected claimants' consent.

Discharge is only appropriate for debtors who place all assets on the table for creditors.

The Supreme Court further reasoned that non-debtors could not receive a discharge on the basis that the Bankruptcy Code reserves discharges solely for debtors who place "substantially all of their assets" on the table. The Supreme Court noted a narrow exception to its decision, codified in section 524(g) of the Bankruptcy Code, but not applicable in this scenario, which permits a debtor facing asbestos liability to confirm a plan that contributes assets to a trust and authorizes a bankruptcy court to issue a channeling injunction shielding the debtor and certain non-debtors from current and future liability and directing tort claimants to receive distributions from the res of the trust. The Supreme Court also noted that the scope of discharge under section 524(e) does not typically include claims based on "fraud" or "willful and malicious injury."

History and practice reserve discharge for debtors.

The majority further examined historical practice in support of its argument that section 1123(b)(6) should not be interpreted expansively to discharge claims against non-debtors without affected claimant consent. The Supreme Court examined the historical arc of bankruptcy law from 1800 to the Bankruptcy Code's latest iteration (1978) and determined that the benefits of discharge have historically been reserved to a debtor who offered "a fair and full surrender of [its] property." The majority reasoned that, if Congress had meant to fundamentally alter traditional practice in the current Bankruptcy Code to permit such an expansive discharge power, Congress would have explicitly said so "somewhere in the [c]ode itself."

Narrow ruling.

The Supreme Court explicitly stated that its ruling was intended to be narrow in scope. Notably, the majority ruling did not implicate: (i) "consensual" third-party releases; (ii) the ability of a debtor to settle derivative claims brought by or on behalf of individual claimants; and (iii) plans that had already become effective and been substantially consummated at the time of the ruling.

Dissent: The 54-page dissent criticized the majority for stripping courts of a "critical tool." The dissent focused extensively on policy-related arguments that courts have used to justify non-consensual third-party releases.

Aftermath: Following the Supreme Court's decision, there remain many questions. Below are some examples.

First, the difference between opt-out or opt-in releases and what qualifies as consent. While numerous bankruptcy courts have affirmatively permitted opt-out third-party releases (*see Gol Linhas Aéreas Inteligentes S.A.*, No. 24-10118 (MG) (Bankr. S.D.N.Y. May 22, 2025), *H-Food Holdings, LLC*, No. 24-90586 (ARP) (Bankr. S.D. Tex. Mar. 10, 2025), *Jervois Global Ltd., No.* 25-90002 (CML) (Bankr. S.D. Tex. Mar. 6, 2025), *Zachry Holdings, Inc.*, No. 24-90377 (MI) (Bankr. S. D. Tex. Feb. 26, 2025), *Spirit Airlines, Inc.*, No. 24-11988 (SHL) (Bankr. S.D.N.Y. Feb. 20, 2025) certain bankruptcy courts have held such releases to be impermissible (*see Smallhold Inc.*, No. 24-10267 (CTG) (Bankr. D. Del. Oct. 4, 2024), *Ebix, Inc.*, No. 23-80004 (SE) (Bankr. N.D. Tex. Aug. 2, 2024)).

Second, the impact of the Supreme Court decision on chapter 15 proceedings. Specifically, whether chapter 15 of the Bankruptcy Code authorizes a U.S. bankruptcy court acting under chapter 15 to enter orders enforcing nonconsensual third-party releases approved by a foreign court in a foreign insolvency proceeding. In *In re Crédito Real SAB de CV, SOFOM E.N.R.* No. 25-10208 (Bankr. Del. Apr. 1, 2025)*,* Judge Horan ruled that notwithstanding the Supreme Court's decision, the court was permitted to approve nonconsensual third-party releases found in plans approved in a foreign proceeding. On March 25, 2025, the U.S. International Development Finance Corporation appealed this ruling. As of the date of these materials, the appeal is currently pending in the United States District Court for the District of Delaware (Civil Action No. 25-cv-00371-UNA).

Several weeks later, Judge Martin Glenn of the Bankruptcy Court for the Southern District of New York, reached a similar result in *In re Odebrecht Engenharia e Construção S.A. — Em Recuperação Judicial, et al.,* No. 25-10482 (Bankr. S.D.N.Y. Apr. 21, 2025), and also held that a U.S. court's recognition order was sufficient to permit such a release even if such release was not explicitly contained in a plan or order entered in the foreign insolvency proceeding.

In re Boy Scouts of America, 23-1664 (3d Cir. May 13, 2025)

Holding: Third-party nonconsensual releases were deemed permissible because they were part of a sale, rendering the appeal statutorily moot under section 363(m).

Factual Overview: A key dispute in the *Boy Scouts* case centered on whether the Boy Scouts' plan was equitably moot in light of it being substantially consummated. The SCOTUS *Purdue* decision was issued in June 2024, months before the Third Circuit heard argument in the Boy Scouts' appeal during November 2024.

In this case, the chapter 11 plan entailed the creation of a trust funded by $2.5 billion in "noncontingent assets." The largest portion of such assets, $1.6 billion, was to be funded by insurance companies repurchasing their policies. In exchange for a $1.6 billion cash infusion, the sale agreements stipulated that insurers must have a "complete release" from claims.

Despite all nine creditor classes voting in favor of the plan, a twenty-two day confirmation trial ensued. The plan was confirmed by the bankruptcy court in July 2022 and was subsequently upheld by the district court in March 2023.

Two creditor groups subsequently appealed (during the pendency of the *Purdue* decision) and ultimately requested that the Third Circuit nullify confirmation using *Purdue* as a focal point of reasoning. Two insurance companies also appealed and sought narrower relief that would not vitiate the entire plan.

Reasoning: Judge Cheryl Ann Krause of the Third Circuit Court of Appeals determined that the Boy Scouts' plan was not equitably moot (despite having been substantially consummated) by relying upon section 363(m) of the Bankruptcy Code and the fact that insurance companies repurchased their policies from the debtor. In essence, the Third Circuit Court of Appeals determined that section 363(m) permitted a plan to be implemented that the Supreme Court would no longer permit post-*Purdue*.

Section 363(m) provides that:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Judge Krause held that section 363(m) would not "prohibit the appeal of challenges to all sales and leases, but 'only those challenges that would claw back the sale from a good-faith purchaser.'" Judge Krause determined that the appealing insurance companies were not challenging the insurance policy buyback validity, and accordingly that section 363(m) posed no barrier to the Third Circuit's consideration of the appeal's merits.

Judge Krause rejected the argument that the sale of insurance policies had not occurred on the basis that just because most of the price paid by insurance companies was held in escrow until confirmation by a final non-appealable order. The fact that proceeds were in escrow was not fatal to Judge Krause's contention that a sale had occurred.

Judge Krause determined that a challenge to a section 363(b) sale which is "collateral" to or doesn't otherwise impact "the validity of the sale" falls out of section 363(m)'s scope. When applying this precept to the appeal, Judge Krause ruled that "the nonconsensual third-party releases challenged by the [tort] Claimants go to the heart of the Bankruptcy Court's § 363(b) authorization, so § 363(m) prevents us from disrupting them on appeal."

An important feature of the Third Circuit opinion was Judge Krause's noting that this was an "unusual case" because the Supreme Court delivered Purdue and "abrogate[d] our precedent on that issue" while the appeal was pending. Judge Krause held that "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."

Concurrence: Judge Rendell achieved the same conclusion as Judge Krause but on vastly different grounds. More specifically, Judge Rendell was not willing to "stretch" statutory mootness under section 363(m) but rather relied on equitable mootness.

Judge Rendell stated that section 363(m)'s "..clear indication [is] that it does not apply to sales in reorganization plans as well as the common sense observation that the non-consensual third-party releases were not accomplished by way of the purported § 363 authorization, but by way of plan confirmation."

Judge Rendell further observed that the appeal stemmed from the confirmation order (as opposed to the sale) and highlighted that "the majority's opinion endorses an end run around chapter 11's requirements, including the Supreme Court's holding in *Harrington v. Purdue Pharma L.P.*" Judge Rendell noted that that "§ 363 itself distinguishes between sales under § 363(b) and (c) and sales under a plan." Citing the Fifth and Eleventh Circuits, she said that "several courts have suggested that sales accomplished under plans do not fall within § 363(m)'s ambit."

Judge Rendell noted that "Using § 363(m) to avoid an appeal deprives the sale of any real scrutiny," "goes far beyond what § 363 contemplates," and "shields from review the non-consensual third-party releases that the Supreme Court invalidated in *Purdue*."

More specifically, Judge Rendell would have held that "Section 363(m) clearly contemplates not only an authorized sale, but a sale that has occurred." Noting that "some of the Settling Insurers' agreements included provisions that their sales will not be completed unless and until there is a successful appeal," Judge Rendell stated that the tort claimants' "appeals are not statutorily moot as applied to those sales."

Given the inapplicability of statutory mootness as a vehicle for resolution of the case (since the buybacks of the insurance policies "have not occurred," Judge Rendell stated that "[w]e can avoid these complications if we rely instead on equitable mootness," a "discretionary principle that the circuit courts have unanimously adopted."

"Even where it is applied," Judge Rendell stated that "the reviewing court has discretion to address the merits of the appeal if it wishes." By contrast, Judge Rendell noted that section 363(m) operates as an "on-off" switch that can strip courts "of any ability to review that provision."

Judge Rendell saw "not only error, but mischief, in the majority's approach." Judge Rendell concurred in the result "but believe[d] that equitable mootness is the way we should reason through the dismissal of the [tort] Claimants' appeals."

In re Bestwall LLC, 17-31795 (Bankr. W.D.N.C. Feb. 21, 2024)

Holding: "Financial distress" is not a pre-requisite for a bankruptcy court to establish subject matter jurisdiction; a lack of financial distress does not necessitate dismissal of a chapter 11 bankruptcy case in the 4th Circuit.

Factual Overview: The debtor entity (Bestwall) traces its roots to a 1965 merger between Georgia-Pacific and Bestwall Gypsum. Georgia-Pacific experienced a "divisional merger" in 2017 whereby "old" GP ceased to exist and two companies emerged. Bestwall (bad co) was solely responsible for mass tort liabilities. New GP was the second new company that received all assets of "old" GP but was not saddled with the liabilities.

To rectify its lack of assets, Bestwall was provided a funding agreement from New GP which allowed it to pay liabilities, either in bankruptcy or outside of bankruptcy. Shortly following the bankruptcy proceeding, a preliminary injunction was effectuated which halted lawsuits against nondebtors.

Two previous motions to dismiss filed by the official creditors' committee were denied in this case (yet remain on appeal). The Fourth Circuit upheld the preliminary injunction last year. An individual creditor and the official committee filed the third and fourth motions to dismiss. The individual creditor argued the filing lacked good faith due to the debtor's lack of financial distress and relied on the Third Circuit precedent *In re LTL Management LLC,* 58 F.4th 738, 64 F.4th 84 (3d Cir. Jan. 30, 2023) in which LTL's chapter 11 filing was dismissed to due a lack of "financial distress."

Using the logic of LTL, in *Bestwall*, the official unsecured creditors' committee argued that no subject matter jurisdiction existed due to the lack of financial distress.

Reasoning: Judge Beyer denied the individual creditor's motion on the grounds that (i) the law of the case barred her from re-examining her prior dismissal opinions where she found no absence of good faith; and (ii) she could not reassess the good faith finding because the issue remains on appeal.

With respect to the committee's motion, Judge Beyer stated that their motion advanced a "nuanced argument … that the court does not have constitutional subject matter jurisdiction to hear this case due to the Debtor's lack of financial distress." Nevertheless, Judge Beyer ultimately denied the committee's motion to dismiss.

Judge Beyer noted that no precedent existed (to the Court's knowledge) at any level that explicitly supported the notion that bankruptcy courts lack subject matter jurisdiction unless a debtor exhibits adequate indicia of financial distress. Judge Beyer cited the Third Circuit *LTL* decision (supra, 58 F.4th at 99) for the notion that the bankruptcy court possessed subject matter jurisdiction. Furthermore, Judge Beyer highlighted practical issues that would result if financial distress was a requirement for subject matter jurisdiction, such as a resulting "tension with the goal of getting potential debtors to commence their cases early." Judge Beyer noted that if financial distress were a requirement for filing, Congress "likely" would have added such requirement in section 109. Judge Beyer did not view any need to impose "a harsh new jurisdictional rule because there are other ways for courts to address any perceived abuse by debtors lacking financial distress," listing dismissal for lack of good faith coupled with the court's ability to lift the automatic stay.

Judge Beyer ruled that financial distress is not a requirement for bankruptcy subject matter jurisdiction under the Constitution and held that subject matter jurisdiction for bankruptcy is applicable "to all cases filed under the Bankruptcy Code."

Appeal Status: The *Bestwall* decision was subsequently appealed by the asbestos claimants committee to the Fourth Circuit (*The Official Committee of Asbestos Claimants of Bestwall LLC v. Bestwall LLC*, 24-1493 (4th Cir. 2025)). In a 2-1 opinion, on August 1, 2025, the Fourth Circuit affirmed the bankruptcy court's denial of the motion to dismiss and held that a debtor's solvency does *not* impact whether a bankruptcy court possess subject matter jurisdiction. The Fourth Circuit determined that the only pertinent question for this inquiry was whether the case was "filed under U.S. law." Judge Quattlebaum wrote the opinion and Judge Agee joined (writing a concurring opinion). Judge King wrote the dissenting opinion.

Judge Quattlebaum focused his reasoning on the notion that Congress bestowed jurisdiction over all Chapter 11 filings to U.S bankruptcy courts irrespective of a debtor's finances. The opinion states that "petitions for relief under the Bankruptcy Code – even those filed by solvent debtors – arise under the laws of the United States."

Judge Quattlebaum noted that the Court was not opining on Bestwall's solvency nor on the legitimacy of the Texas two-step and underscored the asbestos claimants committee would be able to challenge these matters during plan confirmation.

In his dissent, Judge King entertained the asbestos claimants committee's view that subject matter jurisdiction was lacking because when the U.S. Constitution was drafted bankruptcy proceedings were limited to parties that were "unable or unwilling to pay their debts." Judge King stated in his dissent that he could not join the majority opinion because he would hold that the bankruptcy court lacked subject-matter jurisdiction over the bankruptcy proceeding and he would reverse the denial of the Committee's motion to dismiss.

In his concurrence, Judge Agee noted that the Committee "fail[ed] to advance any concrete theory of the financial standard ostensibly required for debtors to be permitted to initiate a bankruptcy proceeding under its read of the Bankruptcy Clause." Judge Agee further noted that "there are "innumerable bankruptcy proceedings initiated by debtors who may not be 'actually bankrupt' under either the Committee's or the dissent's wide-ranging and ill-supported interpretations of the phrase."

United States of America v. Goebel, 24-1328 (E.D.N.Y. 2024)

Overview: The United States District Court for the Eastern District of New York denied the Internal Revenue Service's motion for leave to file an interlocutory appeal and instead certified the appeal directly to the Second Circuit. The Court reasoned that certification was required since the appeal "involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States." *See,* 28 U.S.C. §158(d)(2)(A)-(B).

Issues on Appeal:

(1) Whether actions seeking a determination regarding the dischargeability of a tax debt are ripe before the government engages in collection activity or takes any position on the issue; and

(2) if not, whether supplementation pursuant to Rule 15(d) can cure the jurisdictional defect of lack of ripeness by alleging facts that occurred after the initial filing.

Factual Overview: Chapter 7 debtor Laura Charlene Goebel filed a bankruptcy petition on September 2, 2022. On October 23, 2022, the debtor initiated an adversary proceeding against the IRS seeking a declaratory judgment that her "income tax obligations for the calendar years 2008 through 2018 and all penalties and interest associated therewith, [are] dischargeable obligations pursuant to § 523(a)(1) of the Bankruptcy Code."

On March 14, 2023 the government filed a complaint in the District Court for the Eastern District of New York seeking a monetary judgment for the debtor's tax liability for years 2010 through 2018 and argued that the debtor ""willfully attempted . . . to evade or defeat" tax collection within the meaning of 11 U.S.C. § 523(a)(1)(C).

On April 21, 2023, the government filed a motion in the bankruptcy court seeking to dismiss the adversary complaint or for the bankruptcy court to abstain from the case via 28 U.S.C. § 1334(c) on the basis that: (1) the case was not ripe at the time Goebel filed the adversary complaint because the Government had not taken any position regarding the dischargeability of her tax debts; and (2) in any event, the Declaratory Judgment Act's bar on relief "with respect to Federal taxes" precludes Plaintiff's claims."

The bankruptcy court denied the government's motion on the basis that (1) Goebel may cure any ripeness issue by supplementing the adversary complaint pursuant to Fed. R. Civ. P. 15(d) to allege facts that rendered the case ripe after the initial filing; and (2) the Declaratory Judgment Act does not preclude the relief sought by Goebel. The bankruptcy court elected not to abstain from the case on the grounds of safeguarding a debtor's "fresh start in bankruptcy. The government then filed an interlocutory appeal.

Reasoning: Judge Dora L. Irizarry began her analysis by examining the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. Judge Irizarry noted that BAPCPA provides a vehicle for "leapfrogging the district court in the appeals process" and noted that BAPCPA permits circuit courts to hear a final or interlocutory appeal of a bankruptcy court order "if the bankruptcy court, the district court . . . or all the appellants and appellees (if any) acting jointly" certify that one or more of the following circumstances exists:

(1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2)(A).

A district court if compelled to certify such appeals on its own if "the district court . . . determines" that an enumerated circumstance exists, "then the . . . district court . . . *shall* make the certification" to the circuit court. *Id.* (emphasis added). The circuit court then determines, in its own discretion, whether to "authorize[] the direct appeal . . .". 28 U.S.C. § 158(d)(2)(A).

Judge Irizarry reasoned that an enumerated circumstance compelling certification existed, namely that no controlling Second Circuit or Supreme Court precedent existed at the time of the opinion that has addressed the underlying ripeness issue presented here. Judge Irizarry noted that ripeness is jurisdictional in nature and that the Second Circuit "never squarely [has] addressed whether events occurring after the filing of a complaint may cure a jurisdictional defect that existed at the time of initial filing."

Additionally, Judge Irizarry held that the bankruptcy court's ruling regarding the Declaratory Judgment Act also involves an issue for which there is no controlling decision from the Second Circuit or Supreme Court. More specifically, the Declaratory Judgment Act permits courts to declare the rights and obligations of any "case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or [certain tariff issues]." 28 U.S.C. § 2201(a) (emphasis added).

However, the debtor's adversary complaint sought discharge "pursuant to § 523(a)(1) of the Bankruptcy Code," which is not one of the enumerated exceptions to the bar on relief "with respect to Federal taxes." Adversary Complaint ¶ 1. The bankruptcy court held that the Declaratory Judgment Act does not preclude dischargeability determinations pursuant to § 523; however, Judge Irizarry noted the bankruptcy court relied on out-of-circuit cases to reach this determination. Given the lack of any Second Circuit or Supreme Court authority which has addressed this issue, Judge Irizarry certified the issue regarding the scope of the Declaratory Judgment Act's bar on relief "with respect to federal taxes" for direct appeal to the Second Circuit.

Coney Island Auto Parts Unlimited Inc. v. Burton, 24-808 (Sup. Ct.)

Introduction: On June 6, 2025, the Supreme Court granted certiorari to determine whether a time limit exists for a Rule 60(b)(4) motion to set aside a judgment for lack of personal jurisdiction over the defendant.

Factual Overview: The *Coney Island* case involved a chapter 11 debtor who initiated an adversary proceeding to recover $50,000 in unpaid invoices. The debtor mailed the summons and complaint addressed to the defendant at the corporation's address; however, the papers were not addressed to any corporate officer given the corporation listed itself as agent for service of process.

The bankruptcy court previously entered a default judgment for the debtor prior to the chapter 11 case being converted to a chapter 7 proceeding. Five years after the default judgment was entered, the chapter 7 trustee attached the defendant's bank account. Six years after entry of judgment, the defendant moved to set aside the judgment under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b)(4).

The bankruptcy court did not decide whether the judgment was void for failure to address papers to a corporate officer. Instead, the bankruptcy court denied the motion to void the judgment on the basis that the delay in filing the Rule 60(b)(4) motion was unreasonable. Rule 60(b)(4) permits the court to "relieve a party . . . from a final judgment [or] order." Rule 60(c) goes on to say, "A motion under Rule 60(b) must be made within a reasonable time . . . ."

The district court and Sixth Circuit affirmed.

The narrow inquiry before the Supreme Court case is whether the "reasonable time" requirement is applicable to void judgments which never had personal jurisdiction.

Question Presented: Whether Federal Rule of Civil Procedure 60(c)(1) imposes any time limit to set aside a void default judgment for lack of personal jurisdiction.

At the time of preparing these materials, the petition had been granted but briefing had not yet occurred on the issues.

Wells Fargo Bank N.A. v. Hertz Corp. (In re Hertz Corp.), 23-1169 (3d Cir. Sept. 10, 2024), Pending Cert Petition, 23-1169 and 23-1170

Holding: Make-whole fees fit the dictionary definition of interest and are the economic equivalent of interest and therefore disallowed under section 502(b)(2) unless the debtor is solvent.

Factual Overview: The debtors' plan paid all of Hertz's pre-petition debt, but did not pay creditors make-whole fees. Make-whole fees guarantee lenders a minimum return, no matter how quickly a borrower pays them back.

Make-whole fees are considered unmatured interest under section 502(b)(2) if they are mathematically equivalent to the unmatured interest that creditors would have received had the debtor redeemed the notes on their redemption date, and the make whole feels meet the dictionary and caselaw definition of interest (i.e., "[t]he cost of having the use of another person's money for a specified period" or "compensation for the use of another person's money for a specified period").

Therefore, as a general matter, make-whole fees are unmatured interest and are disallowed. However, when a debtor is solvent, creditors are entitled to interest that accrues after the filing of the bankruptcy petition. A secondary issue in the case was whether creditors were entitled to be paid post-petition interest at the federal judgment rate, or the contract rate agreed upon.

Reasoning: The Third Circuit found that because the Supreme Court has set forth the absolute priority rule as a pre-Bankruptcy Code principle, and Congress included the same principle in section 1129(b), that the absolute priority rule must be a general principal of the Code. Therefore, the Bankruptcy Code can require payment of the contract rate interest in solvent debtor cases otherwise the creditor would be impaired, which violates the absolute priority rule, unless the bankruptcy court determines that there are "compelling equitable considerations" against awarding Noteholders their contract rates.

Specifically, the Court held that "[t]o comply with the absolute priority rule, and thus fulfill the Plan's promise to "leave[ ] unaltered the [Noteholders'] legal, equitable, and contractual rights[,]" § 1124(1), Hertz must pay the post-petition interest at the Notes' applicable contract rate …"

Aftermath: A petition for writ of certiorari was filed April 4, 2025 with the Supreme Court. The question presented: "Whether an unwritten pre-Code exception overrides the Bankruptcy Code's express statutory text and allows creditors in solvent-debtor cases to recover amounts that the Code explicitly disallows." As of the date of these materials, the petition for certiorari remains pending and the Solicitor General was invited to file a brief in the case expressing the views of the United States.

Chenault-Vaughan Family Partnership Ltd. V. MDC Reeves Energy LLC (In re MTE Holdings LLC), 23-1916 (3d Cir. May 7, 2025)

Holding: Magistrate judges may enter final orders in bankruptcy appeals if consent of the parties and a referral by a district court exists.

Factual Overview: The bankruptcy matter involved an adversary proceeding in Delaware between a royalty interest holder in oil and gas property and the site operator. The bankruptcy judge ruled in favor of the operator when granting summary judgment.

The royalty interest holder appealed to a magistrate judge. In a May 7, 2025 opinion, Judge Arianna Freeman of the Third Circuit Court of Appeals stated that "the parties consented to proceed before a Magistrate Judge for all proceedings, including final judgment." Judge Freeman underscored that the magistrate judge raised the question of her jurisdiction *sua sponte*.

The magistrate judge upheld the bankruptcy court's judgment on the merits, but caveated that her ruling should be deemed a report and recommendation if she lacked jurisdiction to issue a final order.

Reasoning: Judge Freeman noted that the Court's "jurisdiction to hear this appeal turns on whether the Magistrate Judge has jurisdiction to enter a final judgment in the bankruptcy appeal." Judge Freeman's analysis hinged on 28 U.S.C. § 636(c) which states:

> Notwithstanding any provision of law to the contrary — (1) Upon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

Judge Freeman held that the magistrate judge possessed requisite jurisdiction and affirmed in part and remanded in part the opinion for additional proceedings on non-jurisdictional matters.

In re Congoleum Corp., 23-1295 (3d Cir. Aug. 22, 2025)

Holding: The bankruptcy court's reopening of a debtor's bankruptcy case twenty-two years after entry of the confirmation order to determine that an affiliate of the debtor was not responsible for environmental liabilities was proper.

Factual Overview: Congoleum Corporation was a flooring company that first filed for chapter 11 in 2003 in response to almost 100,000 asbestos-related personal injury claims. In Congoleum's first chapter 11 case, a confirmation order was entered which memorialized a settlement between the debtor and an insurer, Century Indemnity Company ("Century"). As part of the Century settlement, Congoleum included language in the settlement agreement stating that the debtor was the sole successor in interest to the Congoleum Flooring Business (the "CFB") (i.e., the business line which produced products containing asbestos) and that Bath Iron Works Corporation ("BIW"), a shipbuilding facility management entity owned by one of the debtor's corporate predecessors, was not responsible for any liabilities linked to the CFB.

The district court withdrew reference to the bankruptcy court and entered a confirmation order in 2010 which provided that (i) "Nothing in the Confirmation Order or Plan shall be construed as releasing or relieving any Entity of any liability under any Environmental Law" and (ii) "In support of the Century Settlement and the Century Approval Order, the Court finds that the following Century Additional Named Insured have no responsibility for any of the liabilities of the [CFB] (as defined in the Century Settlement):. . . . Bath Iron Works Corp." (the "BIW Finding"). After the plan went effective, the district court referred the case to the bankruptcy court again, and the case was subsequently closed.

Seven years later, Congoleum was defending against environmental contamination at its Kearny, New Jersey facility and impleaded BIW in environmental litigation (DVL, Inc. v. Congoleum Copr., No 17-4261, 2018 WL 4027031, at *2 (D.N.J. Aug. 23, 2018) (the "DVL Litigation") and claimed BIW, not Congoleum, was responsible for environmental contamination. Occidental Chemical Corporation ("Occidental"), a creditor of the debtor, filed a similar lawsuit against BIW seeking contribution for environmental damage remediation costs from the CFB.

Congoleum sought bankruptcy protection a second time in 2020 and a new bankruptcy judge presided over the second chapter 11 proceeding. BIW initiated an adversary proceeding against Congoleum in the second bankruptcy and sought a declaration that Congoleum was bound by the BIW Finding. The bankruptcy court granted BIW's motion for summary judgment and held that BIW, pursuant to the BIW Finding, was not responsible for the CFB liabilities. In June 2021, Congoleum dismissed its claim against BIW in the DVL Litigation on the basis of the bankruptcy court's enforcement of the BIW Finding. Shortly after this dismissal, BIW requested Occidental to dismiss its civil complaint on the basis of the bankruptcy court's order. Occidental refused and filed for summary judgment in August 2021. BIW responded in August 2021 by moving to reopen Congoleum's 2003 bankruptcy case and sought the entry of an order affirming that, under the BIW Finding, BIW was not responsible for CFB's liabilities. The 2003 Congoleum bankruptcy case was transferred to the same bankruptcy judge who presided over the 2020 bankruptcy case.

The bankruptcy court granted BIW's motion to reopen Congoleum's 2003 bankruptcy case and held the BIW Finding bound Occidental. On appeal, the district court reversed on numerous grounds, such as (i) the district court was best situated to interpret the 2010 confirmation order because the confirmation order was entered by the district court; (ii) good cause did not exist to reopen the 2003 bankruptcy case because the debtor's bankruptcy estate wouldn't be impacted (iii) the issues raised in BIW's motion were pending in Occidental's lawsuit against BIW, and the motion was filed more than a decade after the case was closed; and (iv) the BIW Finding constituted an impermissible third-party release under CERCLA.

BIW timely appealed, and the Third Circuit initially affirmed the district court's judgment. BIW then petitioned for rehearing, and the petition for rehearing was granted and resulted in the vacatur of the Third Circuit's prior opinion which affirmed the district court.

Reasoning: The Third Circuit determined that the bankruptcy court possessed subject matter jurisdiction over this matter because resolution of the dispute over the BIW Finding was a core proceeding and because the district court did not withdraw the reference of the 2010 confirmation order to the bankruptcy court. The Third Circuit relied on 28 USC §157(b)(2)(L) as the basis for its characterization of this as a core proceeding because it resolution related to the interpretation and enforcement of the Confirmation Order.

Next, the Third Circuit determined that the bankruptcy court did not err in granting the motion to reopen Congoleum's 2003 bankruptcy case. The Third Circuit examined 11 USC §350(b) which grants bankruptcy courts authority to reopen a bankruptcy case "*to administer assets, to accord relief to the debtor, or for other cause.*" The Third Circuit determined that the bankruptcy court, as opposed to the district court, was best situated to resolve the BIW Finding dispute as it required "careful analysis of the history of this bankruptcy case." The Third Circuit examined Third Circuit precedent for the proposition that cause to reopen a bankruptcy case under §350(b) exists if the bankruptcy court is required to interpret / enforce a provision of a confirmation order related to a settlement agreement that it had previously confirmed. The Third Circuit held that while the impact on a bankruptcy estate or the administration of the debtor's asserts are factors which may militate in favor of granting a motion to reopen, they are not necessary predicates under §350(b) and that, to hold otherwise would otherwise would nullify §350(b)'s "for other cause" provision" by rendering it redundant with other provisions.

The Third Circuit also held the bankruptcy court correctly concluded that BIW did not unduly delay the filing of its motion to reopen Congoleum's 2003 bankruptcy case. The Third Circuit held that BIW grounded its reasoning on the fact that BIW diligently reopened the case one month after Occidental communicated it would continue to litigate its claim against BIW despite the bankruptcy court's upholding of the BIW Finding. The Third Circuit determined that this "minor delay" did not prejudice Occidental and held that BIW exerted requisite diligence needed to reopen Congoleum's 2003 bankruptcy case.

Next, the Third Circuit addressed numerous arguments raised by Occidental relating to service. The Third Circuit upheld the bankruptcy court's determination that Occidental was bound by the 2003 Confirmation Order since Occidental was a creditor who received adequate and actual notice of the Confirmation Order and the Century settlement.

Occidental argued service was improper because of the Plan's statement that nothing in the Plan or Confirmation Order "release[ed] or reliev[ed] any Entity of any liability under any Environmental Law" was inconsistent with the BIW Finding. The Third Circuit disagreed and held the BIW Finding simply provided that BIW, in addition to other insureds, "have no responsibility for any of the liabilities of the [CFB]." The Third Circuit concluded these provisions did not conflict / did not amount to an impermissible third-party release because the BIW Finding was merely a determination that BIW was not responsible for the CFB's liabilities (i.e., it did not extinguish those liabilities, nor did the Plan expressly effectuate such release of existing liability).

Finally, the Third Circuit ruled that res judicata barred Occidental's collateral attacks against the BIW Finding.

Dissent: Judge Paul B. Matey dissented from the majority opinion. Judge Matey first began his analysis examining the historical power to reopen bankruptcy cases under the Bankruptcy Code. Judge Matey examined the Bankruptcy Act of 1898 which permitted a bankruptcy case to be reopened if the case had not been "fully administered." Judge Matey highlighted that in 1938, the reopening power was amplified via amendments to the Bankruptcy Code to permit reopening for "cause shown." In 1973, the Bankruptcy Rules added "other good cause" as a another basis for reopening which extended to the 1978 Bankruptcy Code by virtue of "for other cause" in 11 USC §350(b). However, Judge Matey viewed this concept and the advisory committee's note to signify that "other good cause" was intended to be narrow in scope and still require the need for opening to have nexus to the administration of the bankruptcy estate.

Judge Matey viewed the reopening power as a mechanism to ensure active state court actions do not infringe on federal bankruptcy cases. Judge Matey did not believe that "for other cause" granted bankruptcy courts a roving commission to transfer judicial power from an Article III court to determine cases and controversies tangential or collateral to a bankruptcy case. In other words "for other cause" was not boundless.

Judge Matey also disagreed with the Third Circuit's conclusion that the bankruptcy court was best situated to resolve the BIW Finding dispute and noted that the 2010 Confirmation Order was entered by the district court after the bankruptcy judge had made a series of errors, thereby rendering the trial judge well-equipped to confirm its meaning.

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ROCHELLE DAILY WIRE ARTICLES[2]

Harrington v. Purdue Pharma L.P., No. 23-124 (Sup. Ct.)

Supreme Court Reverses Purdue: No Nondebtor, Third-Party, Nonconsensual Releases

Justice Gorsuch for the majority bans third-party releases broader than a discharge for those who don't surrender all their assets to the court.

In a 5/4 decision, the Supreme Court reversed the Second Circuit's *Purdue* decision and declined an invitation to anoint chapter 11 as the remedy for deficiencies in the state and federal tort systems.

In his 20-page majority opinion June 27, Justice Neil M. Gorsuch defined the question before the Court as "whether a court in bankruptcy may effectively extend to nondebtors the benefits of a Chapter 11 discharge usually reserved for debtors." He held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."

Justice Gorsuch telegraphed the outcome when he said in the very first paragraph that the owners and executives of the opioid manufacturer were aiming for absolution from claims against them "without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors."

The Profit by the Owners from Opioids

Justice Gorsuch recited the facts and procedural history, focusing on the profits that the owners and managers of the Purdue opioid manufacturer had realized in the years leading up to the filing of the company's chapter 11 case in 2019. In the years before the opioid crisis grabbed national attention, the owners and managers received some 15% of company revenue, compared to about 70% each year after 2007. Ultimately, they received distributions of about $11 billion.

In the original chapter 11 plan, the owners proposed to contribute $4.325 billion, spread over 10 years, in exchange for nonconsensual "releases" of all claims, present and future, that might be brought against them. Justice Gorsuch noted that "thousands" of "opioid victims" voted against the plan. The U.S. Trustee, eight states and others opposed confirmation of the plan.

The bankruptcy court confirmed the plan over objections by the U.S. Trustee, eight states and others. On appeal, the district court reversed and vacated the decision confirming the plan. *In re Purdue Pharma, L.P.*, 635 14 B.R. 26 (S.D.N.Y. 2021). To read ABI's report, **click here**.

[2] The following materials are republished from the Rochelle Daily Wire which is online with the American Bankruptcy Institute (ABI). We thank Bill Rochelle and the ABI for allowing us to include these summaries in our materials. These materials are also available online with the ABI.

After reversal in district court, the owners contributed another $1.675 billion to the plan to alleviate objections from states. Justice Gorsuch said that the owners' "proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016."

On the debtor's appeal, the Second Circuit reversed and reinstated the plan over a dissent. *Purdue Pharma LP v. City of Grand Prairie (In re Purdue Pharma LP)*, 69 F.4th (2d Cir. May 30, 2023). To read ABI's report, **click here**.

The U.S. Trustee filed an application with the Supreme Court for a stay pending appeal. The Court treated the application as a petition for *certiorari* and granted the petition in August along with a stay. The Court heard argument on December 4.

The Merits and Section 1123(b)(6)

Before turning to Section 1123(b)(6) and the principal reason for reversing the Second Circuit, Justice Gorsuch noted that the owners "have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge."

If there were any basis for a discharge in favor of nondebtors, Justice Gorsuch said it would be found in Section 1123(b)(6). It provides that a chapter 11 plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title."

The plan proponents argued before the Court that the releases were permissible because they were nowhere prohibited in the Bankruptcy Code. As a so-called catchall subject to the *ejusdem generis* canon, Justice Gorsuch said that the subsection is "not necessarily" given the broadest possible construction but "must be interpreted in light of its surrounding context."

"Viewed with that much in mind," Justice Gorsuch said, "we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose." Rather, he said that "the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." The other subsections in Section 1123(b), he said, authorize releases "without consent only to the extent such claims concern the debtor."

Justice Gorsuch said that "no one (save perhaps the dissent) thinks [that the catchall] provides a bankruptcy court with a roving commission to resolve all such problems that happen its way."

Other Grounds for Reversal

In the Bankruptcy Code, Justice Gorsuch found three other grounds for reversal. First, the Code reserves discharges for the debtor. Second, the Code requires the debtor to submit all of the debtor's assets to the court. Furthermore, he said, a discharge is not "unbounded," because some claims are exempted from discharge. The Purdue plan, he said, "transgresses all these limits too."

Third, Justice Gorsuch pointed to Section 524(g)(4)(A)(ii) and said that the Code authorizes nondebtor releases "but does so in only one context," namely, plans dealing with asbestos.

Saying that "word games cannot obscure the underlying reality," Justice Gorsuch rejected the idea that the plan just gave releases to the owners, not discharges.

Prior Law

"History" offers a "third" ground for dismissal, Justice Gorsuch said, observing that "pre-code practice may sometimes inform our interpretation of the code's more 'ambiguous' provisions." From 1800 to 1978, he said,

No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected.

As far as policy is concerned, Justice Gorsuch noted arguments going both ways. If a policy decision were to be made, "it is for Congress to make," he said.

What the Opinion Does Not Decide

Justice Gorsuch devoted the last page of his decision to noting what the opinion does not decide. First, he said,

Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here.

Likewise, he said that the decision does not say "what qualifies as a consensual release," nor does the decision "pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor." The statement appears to express no view on whether a consensual release must be "opt-in" rather than "opt-out."

Of significance with respect to plans already confirmed, Justice Gorsuch said, "because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated." The statement is pertinent to the confirmed Boy Scouts plan, where an appeal is pending in the Third Circuit. The statement is another way of saying that the opinion says nothing about the validity of the doctrine of equitable mootness.

Holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants," Justice Gorsuch reversed and remanded.

The Lengthy Dissent

Joined by Chief Justice John G. Roberts, Jr., Sonia Sotomayor and Elena Kagan, Justice Brett Kavanaugh "respectfully" dissented in a 54-page opinion. However, he was dissenting "respectfully but emphatically," which became evident with his choice of language, as the reader will see below.

Justice Kavanaugh said that the majority's decision was "wrong on the law and devastating for more than 100,000 opioid victims and their families." Chapter 11, he said, was designed to prevent a race to the courthouse by vesting "bankruptcy courts with broad discretion to approve 'appropriate' plan provisions. 11 U.S.C. § 1123(b)(6)."

In the case at hand, he said that "the Bankruptcy Court exercised that discretion appropriately — indeed, admirably." It was, he said, a "shining example of the bankruptcy system at work." In making a categorical preclusion of nondebtor releases for "no good reason," he said that the majority "now throws out . . . a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one."

Justice Kavanaugh said that mass torts "present the same collective-action problem that bankruptcy was designed to address," by preventing "victims from litigating outside of the bankruptcy plan's procedures." He found authority for the releases in Section 1123(b)(6), saying that the word "appropriate" was broad and all-encompassing authority that "empowers a bankruptcy court to exercise reasonable discretion." He said that the majority's decision "flatly contradicts the Bankruptcy Code" and that the Code "does not remotely support that categorical prohibition."

In terms of history, Justice Kavanaugh said that "courts have been approving such nondebtor releases almost as long as the current Bankruptcy Code has existed since its enactment in 1978." He lauded the Second Circuit for having "developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case."

Judge Kavanaugh said that the majority's use of the *ejusdem generis* canon was "dead wrong" for two reasons. "First," he said, "its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of § 1123(b)."

The majority should not have relied on Section 524(g), Justice Kavanaugh said, because the "very text of § 524(g) expressly precludes the Court's inference." He quoted the statute as follows: "'Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.' 108 Stat. 4117, note following 11 U.S.C. § 524."

Justice Kavanaugh disagreed with the majority's belief that a release was the same as a discharge. He pointed out that the release only pertains to claims related to Purdue.

Concluding his dissent, Justice Kavanaugh said that the majority's opinion "makes little sense legally, practically, or economically." Pointing to Boy Scouts, the Catholic Church cases, breast implants, Dalkon Shield and others, he said that nondebtor releases "have been indispensable to solving that problem and ensuring fair and equitable victim recovery."

Justice Kavanaugh said that the "Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue." If the majority believed that $5.5 billion to $6 billion from the owners was not enough, he said that the Court "at most" should have remanded for the lower courts to decide "whether the releases were 'appropriate' under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not)."

Note: Justice Kavanaugh said that the U.S. Trustee opposed the plan "for reasons that remain mystifying."

Parlement Technologies Inc., 24-10755 (Bankr. D. Del. July 15, 2024)

Delaware Judge Explains How to Obtain a PI Protecting Nondebtors After Purdue

In the first decision on the topic after Purdue, Delaware's Judge Goldblatt denied the debtor's motion for a preliminary injunction to stop a lawsuit against nondebtors.

Writing the first decision on a question left open by the Supreme Court in its *Purdue* decision last month, Delaware's Bankruptcy Judge Craig T. Goldblatt declined to enter a preliminary injunction at the outset of a chapter 11 case that would have barred suits against the debtor's former officers.

Judge Goldblatt's July 15 opinion could be read to mean that nondebtor injunctions after *Purdue* will not be permissible without showing that an injunction is necessary for the success of the chapter 11 effort. However, the opinion is not a *per se* bar to preliminary injunctions stopping suits against nondebtors.

The Prepetition Suit

The corporate debtor had operated a website known as Parler. Three years before the chapter 11 filing in April, a former executive sued the debtor and some of its former executives in state court in Nevada, alleging that the website was removed from the "app store" for having failed to stop the site from being used to incite violence. The suit also claimed that the defendants had schemed to oust him and deprive him of his interest in the company.

Some of the defendants asserted their rights of indemnification in cross claims against the debtor. After the bankruptcy filing, the debtor removed the suit to federal district court in Nevada.

In chapter 11, the debtor filed a motion asking Judge Goldblatt to impose a 60-day preliminary injunction barring the plaintiff from suing the former officers. Among other things, the debtor contended that the indemnification obligations meant that the suit was in substance a suit against the company and that answering discovery requests would distract management from prosecution of a chapter 11 plan.

At the outset of his opinion, Judge Goldblatt said that "cases have long recognized that bankruptcy courts may enter a preliminary injunction that operates to stay actions against non-debtors."

The Effect of *Purdue*

The landscape on nondebtor injunctions changed when the Supreme Court handed down its decision in *Harrington v. Purdue Pharma L.P.*, 219 L. Ed. 2d 721 (Sup. Ct. June 27, 2024). To read ABI's report, click here. To watch ABI's webinar on *Purdue*, click here.

As Judge Goldblatt said, the Supreme Court "held in *Purdue Pharma* that non-debtors may not receive permanent injunctive relief in the form of a third-party release, under a plan of reorganization, even when a bankruptcy court finds that the release is necessary to facilitate the debtor's reorganization."

The *Purdue* decision, Judge Goldblatt said, "raises the question [of] whether courts may grant third parties the protection of a preliminary injunction." While *Purdue* "does not preclude the entry of such a preliminary injunction," he said that it "does affect how courts should consider what is meant by 'likelihood of success on the merits' when applying the traditional four-factor test applicable to requests for preliminary injunctions."

After *Purdue*, "success on the merits" cannot mean the likelihood of obtaining nondebtor, nonconsensual, third-party releases. However, Judge Goldblatt said that preliminary injunctions "may still be granted if the Court concludes that" management needs a breathing spell from outside litigation or the parties might be able to negotiate a plan with consensual releases. "Both of those outcomes," he said, "may be viewed as 'success on the merits' for this purpose."

The Four-Part Test for PIs After *Purdue*

The requisites for obtaining a preliminary injunction are: (1) likelihood of success on the merits; (2) irreparable harm; (3) harm to the defendant; and (4) the public interest. To be successful in the Third Circuit, the movant must establish the first two factors. The court will consider the third and fourth factors only if the first two have been shown.

Judge Goldblatt began application of the four-part test for preliminary injunctions by analyzing "likelihood of success" and what the term means after *Purdue*. "Some" pre-*Purdue* cases, like the Third Circuit's decision in *WR Grace*, "focused more on avoiding the harm that the litigation against the third parties could cause to the debtor without directly addressing the debtor's right to obtain permanent relief," Judge Goldblatt said.

Judge Goldblatt read the pre-*Purdue* cases to imply "that 'success on the merits' is the debtor's successful confirmation of a plan of reorganization," not the likelihood of obtaining a permanent injunction.

Likewise, Judge Goldblatt pointed to the Fourth Circuit's *A.H. Robbins* decision as justifying an injunction by stopping interference with reorganization. He saw "nothing" in *Purdue* to require reconsideration of *WR Grace* or *A.H. Robbins* in terms of justification for a preliminary injunction, as opposed to a permanent injunction.

Applying the Four-Part Test

Judge Goldblatt said that none of the arguments proffered by the debtor "demonstrates that there is anything sufficiently exceptional about the circumstances here to warrant the entry of a preliminary injunction." He explained why.

First, regarding indemnification rights, Judge Goldblatt said that dilution of the recoveries by other creditors "is not, without more, a sufficient basis to conclude that minimizing the debtor's indemnity obligation is critical to the success of this bankruptcy case." Furthermore, security interests covering all of the debtor's properties could make indemnification rights "wholly beside the point."

Judge Goldblatt concluded that "the debtor has not met its burden of proving that the preliminary injunction . . . is necessary to the success of the bankruptcy case."

Second, regarding responding to discovery in the Nevada suit, Judge Goldblatt read caselaw as "suggest[ing] that the cost of participating in discovery will not in the typical case be a basis for granting a third-party injunction."

Third, with regard to diverting the attention of management from the reorganization, Judge Goldblatt noted that the defendants were all former officers. He was "unaware of any case in which a court granted a preliminary injunction . . . in the absence of the members of management being named as parties in the third-party action."

Fourth, the debtor contended that judgment against the former officers would have a collateral estoppel effect on the debtor. Judge Goldblatt dismissed the argument because the debtor was only seeking a 60-day injunction, and no trial could be held in Nevada in such a short time.

Conclusion

Summing up, Judge Goldblatt said that the debtor had not shown that a preliminary injunction would be "critical to the success of the bankruptcy case" or that the absence of an injunction would result in irreparable harm. "Because the debtor cannot establish these factors," he said that it was "essentially the end of the analysis."

Even if he were to employ the entire four-factor analysis, Judge Goldblatt said he still would not issue a preliminary injunction. So, he denied the motion for a preliminary injunction.

Observation

Although the debtor lost in the case before Judge Goldblatt, his opinion is a checklist showing debtors in the future what they must show to warrant a preliminary injunction. For debtors generally, the opinion looks to be more of a win than a loss.

Diocese of Buffalo, N.Y. v. JMH 100 Doe (In re Diocese of Buffalo, N.Y.), 20-01016 (Bankr. W.D.N.Y. Sept. 30, 2024)

No More Injunctions Barring Suits Against Nondebtors in a Diocese Sexual Abuse Case

An opinion by Bankruptcy Judge Carl L. Bucki might be read, incorrectly, to mean that Purdue precludes preliminary injunctions stopping suits against nondebtors.

Bankruptcy Judge Craig T. Goldblatt of Delaware wrote an opinion in July explaining how a chapter 11 debtor, after *Purdue*, can obtain a preliminary injunction halting lawsuits against nondebtors. *Parlement Technologies Inc.*, 661 B.R. 722 (Bankr. D. Del. July 15, 2024). To read ABI's report, click here.

Chief Bankruptcy Judge Carl L. Bucki of Buffalo, N.Y., wrote an opinion that might be read to mean that preliminary injunctions protecting nondebtors are no longer available after *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). To read ABI's report on *Purdue*, click here.

This writer understands Judge Bucki's September 30 opinion more properly to mean that the bankruptcy court will not issue a preliminary injunction protecting nondebtors when the chapter 11 case is almost five years old; there is no plan, and the creditors' committee and the debtor are at an impasse, despite years of mediation.

Seven Prior Injunctions

The Diocese of Buffalo, N.Y., filed a chapter 11 petition in February 2020, looking to resolve some 800 lawsuits asserting sexual abuse claims against the diocese and nondebtor affiliates like schools and parishes.

Promptly after the chapter 11 filing, the debtor commenced an adversary proceeding to halt lawsuits against nondebtor, affiliated entities. Seven times, Judge Bucki granted preliminary injunctions stopping lawsuits against affiliates that were not covered by the automatic stay.

Most recently, Judge Bucki granted a preliminary injunction in January 2024. At the time, the Second Circuit's decision in *Purdue* meant that the diocese might be able to confirm a plan with nonconsensual releases for nondebtors. However, argument in *Purdue* had been held in the Supreme Court one month before.

Recognizing that the Supreme Court might ban nonconsensual releases, Judge Bucki structured the injunction he issued in January to expire after the decision in *Purdue*. When the Supreme Court reversed the Second Circuit in *Purdue* and barred nonconsensual releases of nondebtors, the diocese filed a new motion seeking a preliminary injunction covering all of the diocese's affiliates.

Grounds for Preliminary Injunctions

Judge Bucki recited Second Circuit standards in nonbankruptcy cases for preliminary injunctions. Basically, there must be a likelihood of success on the merits, or serious questions with the balance of hardship tipping "decidedly" in favor of the plaintiff. In addition, the plaintiff must show the likelihood of irreparable harm.

In the case before him, Judge Bucki found "neither a likelihood of success nor serious questions for litigation." However, the debtor argued that Section 105(a) provides the basis for an injunction covering affiliates not protected by the Section 362 automatic stay.

Judge Bucki responded by pointing to language in Section 105(a), which provides that the "court may issue any order . . . that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. Among the applicable provisions of the Code, he identified Section 1106(a)(5), which says that a debtor "shall" file a plan "as soon as practicable."

"Recognizing this need to develop a plan," Judge Bucki said that he had "relied on section 105(a) in [his] four most recent decisions granting a temporary stay of all litigation against parishes and affiliates." After *Purdue*, though, he said that the debtor could no longer propose a plan with nonconsensual releases.

Judge Bucki recognized that nothing in *Purdue* "expressly prohibits a temporary stay of litigation against parishes and affiliates." However, he went on to say that "the outcome in *Purdue Pharma* strikes the rationale for any further such injunction."

According to Judge Bucki, three years of mediation failed to produce a plan, and the debtor reported a "breakdown in negotiations" with the official creditors' committee. Although the debtor might succeed with a plan having consensual releases, the judge said he could not "foresee the likely development of a fully consensual plan."

Judge Bucki denied the motion for a preliminary injunction, finding "insufficient justification to use section 105 for the purpose of granting a stay of all lawsuits against parishes and affiliates."

Observations

Out of context, some language in Judge Bucki's opinion could be taken to mean that preliminary injunctions stopping lawsuits against nondebtors are no longer available after *Purdue*.

After almost five years in chapter 11, Judge Bucki could not see the likelihood of a consensual plan conferring releases on nondebtors. This writer therefore interprets the opinion to mean that injunctions might issue earlier in cases where the possibility of a plan is alive and well.

In *Parlement*, Judge Goldblatt saw no *per se* bar to preliminary injunctions stopping suits against nondebtors.

Presumably, a debtor at the outset of a chapter 11 case could demonstrate the four factors required by Judge Goldblatt for issuance of a preliminary injunction stopping lawsuits against nondebtors. Judge Goldblatt did not interpret "success on the merits" to require the likelihood of confirming a plan with nonconsensual releases.

In re Hopeman Brothers Inc., 24-32428 (Bankr. E.D. Va. Jan. 24, 2025)

In '363' Sales, Three Courts Say Purdue Doesn't Bar Injunctions Protecting Buyers

For a sale 'free and clear,' nondebtors can be enjoined from suing.

Following the *Purdue* decision from the Supreme Court last year, three bankruptcy courts have permitted sales of estate property to bar suits against nondebtor purchasers of estate assets.

The third decision came on January 24 from Bankruptcy Judge Keith L. Phillips of Richmond, Va., in a case involving insurance policies covering asbestos claims.

The debtor was a shipyard that went out of business in the 1980s but was saddled with 126,000 lawsuits for exposure to asbestos. By the time the debtor filed a chapter 11 petition last year, only 2,700 claims remained.

The debtor had several insurance policies that had not been exhausted. Apparently, there were disputed coverage questions. The debtor and the insurers entered into a settlement agreement where the insurers bought back the policies with effect as though "the policies had never been issued," Judge Phillips said.

The settlement agreement contained an injunction that would bar anyone with a claim against the debtor from suing the settling insurers. Over objection from the U.S. Trustee and another shipyard that was a co-defendant alongside the debtor in some lawsuits, Judge Phillips had approved the settlement providing for a sale of the policies under Section 363.

The other shipyard filed a notice of appeal together with a motion for a stay pending appeal, which Judge Phillips denied in his January 24 opinion.

Purdue Doesn't Apply to 363 Sales

In the Fourth Circuit on a motion for a stay pending appeal, Judge Phillips said that the appellant must show (1) a likelihood of success on the merits, (2) irreparable harm if the stay is denied, (3) that the other party will not be substantially harmed by the stay, and (4) that the public interest will be served by a stay.

First, Judge Phillips addressed the likelihood of success on appeal. He characterized the other shipyard as contending that *Purdue's* limitation on nondebtor injunctions also applies to Section 363 sales. *See Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). To read ABI's report, click here.

Judge Phillips began by citing authorities for the principle that bankruptcy courts may sell estate property "free and clear" by enjoining creditors from suing the purchaser. In bankruptcy cases, he said that "[i]nsurers and their insureds who have filed chapter 11 cases because of mass tort claims often enter into settlement agreements characterized as 'buyback' transactions to obtain funds to pay claimants." Buybacks, he said, are "entered into to facilitate an orderly distribution of funds to asbestos-related claimants while avoiding extensive litigation costs associated with resolving disputes over coverage issues."

Judge Phillips cited a decision by Bankruptcy Judge Corali Lopez-Castro of Miami, who, he said, "acknowledged that *Purdue* did not call into question negotiated settlements governed by Bankruptcy Rule 9019 or the sale of the Debtors' insurance policies under § 363." *In re Bird Global, Inc.*, 23-20514 (Bankr. S.D. Fla.).

Judge Phillips sided with Judge Lopez-Castro. He said that allowing "a creditor to independently pursue its claim against property of the debtor after it been sold in bankruptcy would have a chilling effect on the sale of assets in bankruptcy. *Purdue* was not intended to thwart that process."

Judge Phillips found "noting" in *Purdue* to suggest "that the protections afforded a buyer pursuant to § 363, including the ability of the purchaser to obtain the asset free of the claims of the debtor's creditors, were intended to be abrogated."

Next, Judge Phillips cited a decision by Bankruptcy Judge Martin Glenn of New York who, he said, approved "a settlement agreement containing releases and injunctions." Judge Glenn "was not persuaded by the argument urged by the United States Trustee that *Purdue* is applicable in the context of a § 363 sale in addition to the context of plan confirmation."

Finding no likelihood of success on appeal, Judge Phillips went on to find no irreparable harm besetting the other shipyard while finding "substantial" harm to the debtor were there a stay pending appeal. In terms of public policy, he decided that "public policy is best served by preserving the finality of sales in bankruptcy."

Judge Phillips denied the motion for a stay pending appeal.

In re Hal Luftig Co. Inc., 22-11617 (Bankr. S.D.N.Y. Feb. 24, 2025)

Purdue Doesn't Preclude Injunctions from Protecting Nondebtors for the Life of a Plan

New York's Judge John Mastando saw no reason a Subchapter V plan couldn't enjoin lawsuits against nondebtors for the life of a five-year plan.

Although nondebtor, third-party releases are no longer permissible in chapter 11 plans after *Purdue*, Bankruptcy Judge John P. Mastando, III, of New York decided that a Subchapter V plan may contain a preliminary injunction barring suits against a nondebtor for the five-year life of the plan.

The corporate debtor was a notable Broadway producer. An individual was the sole owner and president of the corporate debtor.

Claiming it had not received its share of the income from a pair of productions, an investor initiated an arbitration against the corporate debtor and the owner. The arbitrator gave the investor an award of $2.6 million against the debtor and the owner, jointly and severally. The district confirmed the award, which was automatically stayed for 30 days.

On the 29th day, the debtor corporation filed a chapter 11 petition under Subchapter V. The debtor filed an adversary proceeding and persuaded Judge Mastando to enter a preliminary injunction preventing the investor from enforcing the arbitration award against the owner.

The debtor filed a chapter 11 plan that would have given the owner a release from liability on the arbitration award. In return, the plan required the owner to supply $600,000 toward payments under the plan.

In an opinion in November 2023, Judge Mastando found authority to confirm the plan over objections by the investor and the U.S. Trustee. However, he read the Second Circuit's decision in *In re Purdue Pharma LP*, 69 F.4th 45 (2d Cir. May 30, 2023), *cert. granted sub nom. Harrington v. Purdue Pharma L.P.*, No. (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023), as requiring him to issue a report and recommendation to the district court regarding confirmation of the plan. *See In re Hal Luftig Co.*, 655 B.R. 508 (Bankr. S.D.N.Y. Nov. 22, 2023). To read about the bankruptcy court's rationale for imposing a nonconsensual, nondebtor release, click here.

The Rejected R&R

The U.S. Trustee and the investor objected to the report and recommendation. District Judge Denise Cote sustained their objections in an 11-page opinion in March 2024. *See In re Hal Luftig Co.*, 657 B.R. 704 (S.D.N.Y. March 19, 2024). To read ABI's report, click here.

Having issued her decision before the Supreme Court decided *Purdue*, Judge Cote stopped short of precluding nonconsensual, nondebtor releases in all Subchapter V cases. However, she found that the case failed one of the Second Circuit's *Purdue* factors, which required that the impacted class must have voted "overwhelmingly." *Purdue*, *supra*, 69 F.4th at 78-79. In the case before her, the affected class had rejected the plan.

Judge Cote remanded for "further proceedings consistent with this Opinion." She held, "Resolving these issues through a nonconsensual release within the Debtor's bankruptcy is not permissible." *Hal Luftig*, *supra*, 657 B.R. at 709.

On Remand

On return to bankruptcy court, the debtor dropped the idea of a nondebtor release, naturally. Instead, the revised plan extended the preliminary injunction protecting the owner until the closure of the chapter 11 case, dismissal, or the grant or denial of discharge. The injunction applied only to the investor's claims against the owner.

Both unsecured classes voted against the plan, including the class with the investor and its claim, which by that time had risen to $2.9 million.

Conceding that the plan satisfied the other confirmation requirements for a nonconsensual plan under Section 1129(a) as incorporated by Section 1191, the investor argued that the plan was not "fair and equitable" and thus failed to comply with Section 1191. More particularly, the investor contended that the plan was "untenable" under the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.*, 602 U.S. 204 (2024). To read ABI's report, click here.

Dealing with the investor's confirmation objection in his February 24 opinion, Judge Mastando cited Second Circuit authority for the notion that a preliminary injunction may cover nondebtors under Sections 362(a) and 105(a). *Queenie, Ltd. v. Nygard Int'l.*, 321 F.3d 282 (2d Cir. 2003). Furthermore, he said that the "Supreme Court did not address the bankruptcy courts' authority to grant non-consensual third party automatic stay extensions in *Purdue Pharma*."

Judge Mastando said it was an issue of first impression as to whether a nondebtor preliminary injunction could be extended for the life of a chapter 11 plan. In part, he found the answer in Section 362(c)(4), where the Code provides that the automatic stay continues in a chapter 11 case until a discharge is granted or denied.

Given that the plan's stay extension was consistent with Section 362(c)(4), Judge Mastando held that the longer "duration [of the stay] does not render the relief facially impermissible." Next, he ruled that the extended stay satisfied the four requirements for a preliminary injunction.

Judge Mastando closed his opinion by examining whether the longer stay duration made the plan unfair and inequitable. As to the investor's idea "that *Purdue Pharma* prohibits bankruptcy courts from, as part of a plan, temporarily enjoining creditors' collection efforts against non-debtors," he said that the argument was "without merit." He also rejected the idea that the stay extension "'amounts to a discharge' over the life of the Third Amended Plan."

Judge Mastando explained that the investor was not left without recourse. The claim remains valid, he said, and the investor could pursue the claim after the debtor's discharge. He similarly "reject[ed] the argument that such relief 'goes against all concepts of fairness and equity.'"

Overruling the objection and awaiting submission of an order confirming the plan, Judge Mastando said it was "inappropriate to impose any requirement that would effectively allow an objecting unsecured creditor to derail an otherwise confirmable plan . . . solely because that creditor holds the largest unsecured claim against the estate."

In re Spirit Airlines Inc., 24-11988 (Bankr. S.D.N.Y. March 7, 2025)

Opt-Out Plan Confirmed with Impaired Creditors Almost Unanimous in Support

In the Spirit Airlines reorganization, no creditors with an economic interest had opposed confirmation of a plan with opt-out releases for nondebtors.

Confirming the chapter 11 plan for Spirit Airlines, Bankruptcy Judge Sean Lane of New York wrote an opinion that could be read to mean that the Supreme Court's *Purdue* decision in June did not affect pre-existing authority in the Southern District of New York allowing so-called opt-out plans to confer releases on nondebtors.

The March 7 decision by Judge Lane differs from the *Smallhold* opinion by Delaware's Bankruptcy Judge Craig T. Goldblatt, who excised releases from creditors who did not vote and were not given a chance to opt out. However, Judge Goldblatt allowed releases to be given by creditors who voted for or against the plan, if they did not opt out. *In re Smallhold Inc.*, 665 B.R. 704 (Bankr. D. Del. Sept. 25, 2024). To read ABI's report, click here.

The Opt-Out Plan

The debtor negotiated a "prepackaged" chapter 11 plan. Among other things, the plan converted $800 million of notes into new equity, included a $350 million backstopped equity offering, was financed in part by a new revolving credit facility, and paid priority and unsecured claims in full or left them unimpaired.

Senior noteholders were impaired by the plan but voted 100% in favor of the plan. In another impaired class, holders of convertible notes voted 95.5% in number and almost 100% in amount in favor of the plan. Naturally, existing equity interests were extinguished and deemed to have rejected the plan.

Judge Lane had held a confirmation hearing and entered an order on February 20 confirming the plan. He found that the plan satisfied the requirements for confirmation. However, he left open the question of whether the plan's nondebtor releases were permissible following the Supreme Court's decision in *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024). To read ABI's report on *Purdue*, click here.

In his March 7 opinion, Judge Lane explained why the opt-out plan was permissible after *Purdue*.

SEC and U.S. Trustee Alone Object

The plan contained releases in favor of the major nondebtor players in the reorganization. With the opportunity to opt out, the plan contained releases binding unimpaired creditors along with the impaired senior and convertible noteholders. Notably, 98.1% of the senior and convertible noteholders had consented in writing to the releases by having signed the restructuring support agreement negotiated before filing.

Simplified, the plan provided that creditors would have consented to the nondebtor releases by (1) voting for or against the plan without checking the opt-out box on the ballot, (2) abstaining from voting but not checking the opt-out box, or (3) failing to submit a form with the opt-out box checked. Judge Lane said that 190 opt-out elections had been received.

The only objections to the releases came from the U.S. Trustee and the Securities and Exchange Commission. The U.S. Trustee took the position that *Purdue* requires affirmative consent. The SEC took a narrower approach by contending that the failure to return a ballot not was evidence of consent.

Almost All Impaired Creditors Had Written Consents

Addressing the objections, Judge Lane began by saying that "*Purdue Pharma* made it clear that *consensual* third-party releases were not the subject of its decision." [Emphasis in original.] He went on to say that "*Purdue Pharma* expressly declined to discuss how parties may manifest their consent to third-party releases."

Judge Lane defined an opt-out plan as one where the creditor doesn't return a form with the opt-out box checked. An opt-in plan is one where the party must return a form and check a box indicating consent to granting releases.

Reviewing cases decided before *Purdue*, Judge Lane said that "the majority of judges" in New York did not require opting in, as long as the parties were given "clear and prominent notice and explanation of the releases and [were] provided an opportunity to decline to grant them."

In cases decided after *Purdue*, Judge Lane cited *In re Roman Cath. Diocese of Syracuse*, 2024 Bankr. LEXIS 2807, at *5 (Bankr. N.D.N.Y. Nov. 14, 2024), as allowing creditors to evidence consent by having been given the opportunity to opt out. To read ABI's report, click here. Next, he cited *In re Tonawanda Coke Corp.*, 662 B.R. 220, 223 (Bankr. W.D.N.Y. 2024), where the ability to opt out wasn't enough. However, *Tonawanda* involved a chapter 11 plan with a tiny distribution and large tort claims. To read ABI's report, click here.

"Given the weight of the authority in this Circuit," Judge Lane held "that the proposed Third-Party Releases here are consensual — and the proposed opt-out mechanism permissible." Among other things, he noted that the releases were "clearly worded and prominently presented in all of the Plan materials." Distinguishing *Tonawanda*, he said that the case before him was "not a situation where the affected parties have little or no economic incentive to pay attention to the bankruptcy, such as where a creditor is receiving no recovery or a *de minimus* one."

Of perhaps most importance, Judge Lane noted that the only impaired creditors granting releases were parties to the restructuring support agreement that had been signed by 98.1% of the holders of impaired claims. "As for parties who voted on the Plan but did not exercise the opt-out," he said, "those parties have manifested their intent by taking the affirmative act of voting on the Plan while declining to exercise the opt-out."

For Judge Lane, the "most difficult" category included creditors who were not voting but were deemed to have accepted the plan, and those who could have voted but didn't. For those groups, he said that they had been given "a clear and prominent vehicle for opting out." Furthermore, he said "that no concerns as to the Third-Party Releases were raised by the Committee, which represents all unsecured creditors (and thus all of the classes of creditors who are being asked to provide the Third-Party Releases)."

Factually, Judge Lane distinguished pre-*Purdue* cases relied on by the objectors.

Authorities Outside the Second Circuit

Following *Purdue*, Judge Lane said that "the majority of courts outside this jurisdiction have permitted an opt-out mechanism for a consensual release given circumstances similar to those presented here." He cited *In re Lavie Care Ctrs*., 2024 Bankr. LEXIS 2900 (Bankr. N.D. Ga. Dec. 5, 2024); and *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024). To read ABI's reports, click here and here. Judge Lane said that the "Objectors rely on several cases outside the Second Circuit that are distinguishable from the facts here."

Judge Lane considered the objectors' reliance "on the thoughtful discussion of releases" by Bankruptcy Judge Goldblatt in *Smallhold*. There, he said that parties who "did not have the opportunity to vote on the plan could not be found to consent to the third-party release, notwithstanding the ability to opt out." *Smallhold*, he said, could not be reconciled with authorities in the Fifth Circuit, where nonconsensual third-party releases have never been permitted. Courts in that circuit, he said, "have routinely allowed consensual releases using an opt-out mechanism before *Purdue Pharma*."

Analogy to Contract Law

Judge Lane ended his 47-page opinion by addressing the U.S. Trustee's contention that the releases were not permissible as a matter of contract law, similar to the analysis by Judge Goldblatt in *Smallhold*. He said that the Restatement (Second) of Contracts "clearly recognizes that silence and/or inaction may constitute consent" in three circumstances.

Prominently, Judge Lane said that "silence and inaction will constitute acceptance of an offer when 'the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.' Restatement (Second) of Contracts § 69(1)(b)." The exception, he said, was "tricky" when applied to nonvoting creditors.

However, Judge Lane found no reason to decide the question as a matter of contract law "given the Court's conclusions above that consent exists as to these creditors under applicable federal bankruptcy law."

Approving the releases "and the opt-out mechanism in the Plan," Judge Lane directed the parties to submit an order consistent with the confirmation order.

Observations

Judge Lane's opinion is an excellent survey of pre- and post-*Purdue* caselaw on opt-in versus opt-out. The opinion, however, may have limited precedential value because no one with an economic interest opposed the releases. Moreover, noteholders with an economic interest had given virtually unanimous written consents to the releases.

Keeping in mind that general unsecured creditors were unimpaired, Judge Lane's decision might be seen as standing for the principle that nondebtor releases are permissible when impaired creditors are overwhelmingly in favor of the releases and everyone else is paid in full.

In re Odebrecht Engenharia e Construção S.A., 25-10482 (S.D.N.Y. April 21, 2025)

After Purdue, Two Courts Still Permit Broad Nonconsensual Releases in '15'

Bankruptcy courts in New York and Delaware believe that Purdue did not change the law and that nondebtor releases and exculpations are still permissible in chapter 15 cases.

Aligning himself with an April 1 decision by Bankruptcy Judge Thomas M. Horan of Delaware, New York's Bankruptcy Judge Martin Glenn approved additional, "appropriate" relief in a chapter 15 case with expansive nondebtor releases and exculpations. The releases and exculpations were broader than those granted by the foreign debtor's home court in Brazil.

Judge Glenn said that *Harrington v. Purdue Pharma L.P.*, 602 U.S. 204 (2024), "did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15." To read ABI's report on *Purdue*, click here.

Nondebtor Releases and Exculpations

The Brazilian debtors were construction companies with more than 17,000 employees and operations "primarily" in Brazil, Judge Glenn said in his April 21 opinion. The debtors began restructuring proceedings in Brazil in June 2024. With all voting creditor classes in support, the debtors obtained the Brazilian court's approval of a restructuring plan in March 2025.

The Brazilian plan discharged all claims against the debtors "and their officers, directors, agents, employees and representatives." One week after approval of the plan in Brazil, the debtors filed a chapter 15 petition in New York seeking foreign main recognition and approval of discretionary relief under Sections 1507 and 1521.

As part of requested discretionary relief, the debtors wanted "their officers, directors, agents, employees and representatives" to have no liability for "any action or inaction taken" in connection with the Brazilian case or the chapter 15 case, except for fraud, gross negligence or willful misconduct. The released parties included nondebtors like the noteholders' indenture trustee, clearing agents and the custodian of the U.S.-issued notes.

As part of requested discretionary relief, the debtors also wanted the U.S. court to issue a permanent injunction barring "all persons" from taking action in the territorial U.S. that would interfere with the implementation of the Brazilian plan.

There were no objections to the grant of foreign main recognition. Only the U.S. Trustee objected to the two proposed grants of discretionary relief. Judge Glenn described the U.S. Trustee as contending that the "limitation on liability is inappropriate because it is a 'veiled exculpation clause[]' [that] goes beyond the relief granted by the Brazilian court, [with] no statutory basis for granting the limitation."

The U.S. Trustee also argued that the debtors wanted the U.S. court to grant "impermissible nonconsensual third-party releases." According to the U.S. Trustee, both features were not "appropriate relief" permissible under Section 1521(a).

Existing Caselaw

Addressing the objections, Judge Glenn cited authorities for the proposition that the discretion to grant "appropriate relief" under Section 1521(a) is "exceedingly broad." The limitation, he said, is in Section 1506, which permits the court to refuse to take an "action [that] would be manifestly contrary to the public policy of the United States."

Looking to chapter 11 caselaw for guidance, Judge Glenn said it is well settled that exculpations may protect estate fiduciaries and that those who are not estate fiduciaries may be exculpated if they were actively involved in all aspects of the chapter 11 case and made "significant contributions."

In chapter 15 cases, Judge Glenn said, "Courts in this district have long enforced foreign restructuring plans in Chapter 15 cases which include nonconsensual third-party releases, most doing so pursuant to sections 1507 and 1521 of the Code." He added, "Exculpations have been granted by courts in this district in Chapter 15 cases, including protection of non-fiduciaries."

With regard to the law since *Purdue* was handed down, Judge Glenn said.

To read ABI's report on *Crédito Real*, click here.

Broad Enforcement Powers

The U.S. Trustee contended that both provisions sought by the debtors provide "relief beyond the scope provided by the Brazilian Confirmation Order and the [Brazilian] Plan," Judge Glenn said. The judge responded by saying that U.S. courts in chapter 15 cases "are not limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization."

"The relief provided in the Recognition Order," Judge Glenn said, "puts an enforcement mechanism in the U.S. order that prevents disgruntled creditors who are bound by the [Brazilian] Plan from suing in the U.S. to recover on claims that are barred by the [Brazilian] Plan." He said that courts "in this district are not bound" by contrary authority from the Fifth Circuit in *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012).

Judge Glenn found that the "exculpation provision in the [recognition] Order is, therefore, integral to the recognition and enforcement of the [Brazilian] Plan" and that "the exculpation provision in the [recognition] Order complies with the requirements courts place on exculpation provisions in Chapter 11 cases."

Nondebtor Releases

The debtors conceded that neither the Brazilian plan nor the Brazilian court order approving the plan contained nondebtor releases. To the U.S. Trustee's argument that the additional relief included impermissible nondebtor releases, Judge Glenn said that "Judge Horan's recent opinion in *Crédito Real* provides a lucid explanation [for] why courts can enforce nonconsensual third-party releases found in foreign plans of reorganization."

Judge Glenn pointed out the difference between Section 1123(b)(6), applicable in *Purdue*, and Section 1521(a), which governs in chapter 15 cases. He said that Section 1123(b)(6) "enumerates boundaries," whereas Section 1506 has only one boundary by saying that the court may grant no relief "manifestly contrary" to U.S. public policy. He said that *Purdue* "cannot be read to hold that nonconsensual third-party releases are 'manifestly contrary to' U.S. public policy such that they would be barred by section 1506."

"Following the logic of *Crédito Real* and *Purdue*," Judge Glenn held, "the text of section 1521 permits the grant of a nonconsensual third-party release in support of a foreign debtor's plan of reorganization."

Judge Glenn ended his opinion by stating the holding more broadly:

To summarize, (1) the plain text of Chapter 15, (2) caselaw under its predecessor (section 304), and (3) pre-*Purdue* caselaw in this district all support a finding that courts can, pursuant to section 1521 of the Code, issue orders pursuant to their discretionary powers under section 1521 which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court.

Judge Glenn granted foreign main recognition with an order containing releases and exculpations for nondebtors.

Observations

Among the courts of appeals, the Fifth Circuit is the most adamant in limiting the breadth of releases and exculpations in favor of nondebtors. *See Highland Capital Management Fund Advisors LP v. Highland Capital Management LP (In re Highland Capital Management LP),* 132 F.4th 353 (5th Cir. March 18, 2025). To read ABI's report, click here.

In re GOL Linhas Aéreas Inteligentes SA, 225-4610 (S.D.N.Y. June 5, 2025)

No Stay Pending Appeal on Nondebtor Opt-Out Releases in a Chapter 11 Plan

The debtor agreed not to raise equitable mootness on an appeal only challenging nondebtor opt-out releases.

The U.S. Trustee Program's appeal from confirmation of the chapter 11 plan for Gol Linhas Aéreas is evidently a test case to find out what qualifies as a "consensual," nondebtor release following *Purdue*. Does the ability to opt out constitute consent, or does consent require an affirmative action by a creditor, such as opting in?

Denying a motion for a stay pending appeal, District Judge Denise Cote of New York didn't throw cold water on the U.S. Trustee. To the contrary, she did say in her opinion that the consent question "raises a sufficiently serious legal issue that deserves resolution."

This writer doesn't put much stock in Judge Cote's June 5 opinion in terms of discerning which way the wind blows on opt in or opt out, because the debtor and the official creditors' committee agreed not to argue that confirmation was equitably moot as to the nondebtor releases. Also, there are issues afoot about nondebtor releases beyond those raised in the instant appeal.

The Opt-Out Releases

The debtor was a large Brazilian airline with about $4 billion in funded debt. The chapter 11 plan included nondebtor releases in favor of the creditors' committee and its members, along with creditors and groups of creditors who were engaged in financing and negotiating the plan.

The plan also had an exculpation for the released parties and a broadly worded injunction barring creditors and "parties in interest" from taking action to interfere with implementation of the plan.

Judge Cote said that the releases were linked "to the bankruptcy proceeding, the Debtors, and financial transactions related to the bankruptcy."

The plan gave creditors the option of opting out by checking a box on the ballot. Judge Cote said that about 400 creditors opted out of granting the releases.

Over objection from the U.S. Trustee, Bankruptcy Judge Martin Glenn confirmed the plan in an opinion on May 22. *In re GOL Linhas Aéreas Inteligentes SA*, 24-10118, 2025 BL 177061 (Bankr. S.D.N.Y. May 22, 2025). To read ABI's report, click here. The U.S. Trustee immediately filed a notice of appeal and a motion for a stay pending appeal, appealing only the nondebtor releases.

While the stay motion was pending in bankruptcy court, Judge Cote said that the debtors and the committee "agreed that they would not argue to the Bankruptcy Court or any future court with respect to [the U.S. Trustee's] appeal that the appeal was equitably moot." When Judge Glenn denied the motion for a stay, the U.S. Trustee sought a stay pending appeal from Judge Cote.

Judge Cote imposed an interim stay while the parties submitted briefs. After holding a hearing, she vacated the interim stay and denied the motion for a stay.

Serious Issues About Nondebtor Releases

For a stay pending appeal under Bankruptcy Rule 8007, Judge Cote said that the two "most critical" issues are the likelihood of success on appeal and irreparable injury.

Regarding the merits and the likelihood of success on appeal, Judge Cote referred to how Judge Glenn had "held that third-party releases can be a part of chapter 11 plans pursuant to § 1123(b)(6) of the Code, even after *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024)."

On opt in versus opt out, the U.S. Trustee argued that consent requires "explicit consent" and that silence does not constitute consent under New York contract law. Judge Cote referred to how Judge Glenn had "observed that applying state contract law 'would lead to chaos.'"

Judge Cote quoted Judge Glenn as having said that the question of implied consent "'is a serious one' that has generated a split among courts and that deserve[s] a decision from reviewing courts." Following "Judge Glenn's lead" on the merits, she said that the "appeal raises a sufficiently serious legal issue that deserves resolution."

Although she didn't say so explicitly, Judge Cote appears to have decided that the U.S. Trustee satisfied the first requirement for a stay pending appeal by demonstrating a serious issue about the merits.

Irreparable Injury and the Equities

The demonstration of irreparable injury is where the U.S. Trustee came short. Because the debtor agreed not to raise equitable mootness in defense of an appeal on nondebtor releases, Judge Cote found that the U.S. Trustee "has therefore failed to carry its burden to show irreparable harm, which is essential to its success on this motion."

Judge Cote also found that the balance of the equities "tips decidedly against a stay," because bankruptcy financing was expiring and creditors "will also be significantly harmed." She denied the stay pending appeal.

Observations

Stay tuned for the main event: Judge Cote's decision on the merits. Because it's New York where nondebtor stays are in the DNA, this writer is not expecting a reversal either by Judge Cote or the Second Circuit.

On the *Gol* appeal, the U.S. Trustee apparently is not contending that the bankruptcy court lacks statutory power or authority to issue nondebtor releases. Although not raised on this appeal, the question is whether Section 1123(b)(6) grants the bankruptcy court power to impose releases on nondebtors. In terms of statutory authority, does it matter whether the claim against a nondebtor would be a direct claim or a derivative claim? Perhaps it does matter.

The question of power or authority is another issue worthy of review in some court sometime, but personal jurisdiction is another issue that was not raised in the *Gol* appeal.

Does the bankruptcy court have personal jurisdiction over creditors to grant releases in favor of released parties? Is it sufficient that the bankruptcy court had *in rem* jurisdiction over the debtor's property to impose releases on nondebtors who have neither filed claims nor appeared in the bankruptcy case? Does filing a claim equal consent to personal jurisdiction for imposition of a release in favor of a nondebtor?

There is another issue, too: Does the bankruptcy court have constitutional authority to issue a final order with a nondebtor release, or must the bankruptcy court issue a report and recommendation? Again, does it matter whether the claims are direct or derivative?

This writer believes that the ultimate fate of nondebtor opt-out releases may turn on whether the claims being barred are direct or derivative.

U.S. v. Miller, 23-824 (Sup. Ct. March 26, 2025)

Supreme Court Holds: § 106(a) Doesn't Waive Sovereign Immunity for § 544(b) Suits

In an 8-1 opinion, the Supreme Court holds that the waiver of sovereign immunity under Section 106(a) does not extend to suits brought by a trustee under state law standing in the shoes of an actual creditor.

In an 8-1 decision written by Justice Ketanji Brown Jackson, the Supreme Court resolved a split of circuits by holding that Section 106(a) does not permit a bankruptcy trustee to sue the federal government for receipt of a fraudulent transfer under state law and Section 544(b)(1), because no actual creditor could sue the government outside of bankruptcy.

In her 19-page opinion for the Court on March 26, Justice Jackson saw the "actual creditor" requirement in Section 544(b)(1) as bringing sovereign immunity back into play as a defense for the Internal Revenue Service, even though Section 106(a) waives sovereign immunity for suits under Section 544.

The Fraudulent Transfer to the IRS

The case arose from an often-occurring fraudulent transfer to the Internal Revenue Service: A corporation paid $145,000 in federal income taxes owed by one of its owners. The corporation ended up in bankruptcy three years later. Because the transfer did not occur within two years of filing, the chapter 7 trustee could not sue under Section 548(a)(1)(B).

The 7 trustee therefore invoked Section 544(b)(1) to sue the IRS for receipt of a fraudulent transfer under Utah law. The section allows a trustee to "avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an [allowable] unsecured claim."

The government agreed there was an actual creditor and admitted the elements of a constructively fraudulent transfer. However, the government contended that sovereign immunity would have prevented an actual creditor from suing the IRS outside of bankruptcy, thus disabling the trustee from suing under Section 544(b)(1).

Responding, the trustee argued that the waiver of sovereign immunity as to Section 544 contained in Section 106(a) allowed suit based on a state-law claim. The subsection provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in" 59 sections of the Bankruptcy Code, including Section 544.

On cross motions for summary judgment, Bankruptcy Judge R. Kimball Mosier of Salt Lake City ruled in favor of the trustee and entered judgment for $145,000. *Miller v. United States (In re All Resort Group Inc.)*, 617 B.R. 375 (Bankr. D. Utah 2020). The district court affirmed. *See U.S. v. Miller*, 20-00248, 2021 BL 340200 (D. Utah Sept. 08, 2021). To read ABI's report on the district court's affirmance, **click here**. The IRS appealed to the circuit.

Tenth Circuit Affirms

The Tenth Circuit affirmed in *U.S. v. Miller*, 71 F.4th 1247 (10th Cir. June 27, 2023). Focusing on the language in Section 106(a), the Denver-based appeals court noted that Congress "abrogated" immunity "with respect to" Section 544. The circuit court cited Supreme Court authority for the proposition that "with respect to" has a "broadening effect." To read ABI's report, **click here**.

The Tenth Circuit's opinion deepened an already existing circuit split. The Ninth and Fourth Circuits had already held that the waiver of immunity in Section 106(a) allows claims against the government under state law for recovery of fraudulent transfers. *See In re DBSI, Inc.*, 869 F.3d 1004 (9th Cir. 2017); and *Cook v. U.S. (In re Yahweh Center Inc.),* 27 F.4th 960 (4th Cir. 2022). To read ABI's reports, **click here** and **here**.

The Seventh Circuit held to the contrary in 2014 in *In re Equip. Acquisition Res. Inc.*, 742 F.3d 743 (7th Cir. 2014). The Seventh Circuit reasoned that Section 106(a) did not modify the actual creditor requirement in Section 544(b). As it turns out, Justice Jackson followed the Seventh Circuit's approach.

To resolve the circuit split, the Court granted the government's petition for *certiorari*. The appeal was argued on December 2, 2024. To read ABI's report on oral argument, **click here**.

Section 106 Is Only Jurisdictional

Justice Jackson began her analysis of the merits by citing the *Collier* treatise for the idea that a trustee is "powerless" in the absence of an actual creditor who could have sued. "This 'actual creditor' requirement serves as an important check on the trustee's §544(b) powers," she said.

Justice Jackson saw the "dispute [as] turn[ing] on the interplay between §106(a) and §544(b) of the Bankruptcy Code." Referring to Section 548(a), she conceded that "§106(a) waives the Government's sovereign immunity with respect to the federal cause of action created by §544(b)."

Justice Jackson began her analysis from the proposition that waivers of sovereign immunity are jurisdictional "but do not themselves typically create any new substantive rights against the Government."

On the topic of substantive rights, Justice Jackson said that Section 106 is "merely jurisdictional." She quoted Section 106(a)(5), which says, "Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." The trustee's theory, she said, "would thus transform that statute from a jurisdiction-creating provision into a liability-creating provision."

The 'Text' and 'Structure'

Having decided that Section 106 does not create substantive rights, Judge Jackson turned to the "text and structure of §106 and §544[, which] make clear that §106(a)'s waiver of sovereign immunity does not operate to modify §544(b)'s substantive requirements."

If Section 106(a) were to modify the elements of a claim under Section 544(b), Justice Jackson said it "would necessarily give the trustee a substantive claim for relief against the Government that does not 'otherwise exis[t]' under §544(b) or Utah law."

Justice Jackson noted that the actual creditor requirement is "unique" to Section 544(b) and "reflects a deliberate congressional choice to tie the trustee's rights under subsection (b) to the rights of an actual creditor under 'applicable law.'" She observed that "Section 544(b) was expressly 'derived' from §70e of the Bankruptcy Act of 1898, which had long been understood to give trustees the same rights as creditors under state law."

Given the "long-settled understanding of the trustee's §544(b) powers," Justice Jackson said it "would be so anomalous to treat §106(a) as expanding the trustee's rights beyond those of an actual creditor."

"Even if the language and logic of §544 and §106(a)" broadened the sovereign immunity waiver, Justice Jackson said "that our precedents would still foreclose that reading," because "Congress must use unmistakable language to abrogate sovereign immunity." *Financial Oversight and Management Bd. for P. R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 342 (2023)."

'Close, but No Cigar'

Justice Jackson said that the trustee had a "slightly" better argument in saying that a narrow "reading of §106(a) would blunt the impact of Congress's decision to include §544 on the list of provisions subject to §106(a)'s immunity waiver." She paraphrased the trustee as contending that "the Government's reading of §106(a) effectively robs the immunity waiver of any meaningful purpose with respect to §544; it simply grants federal courts jurisdiction over a set of inherently unwinnable claims."

Justice Jackson was "not persuaded." Even if Section 106(a) would let the trustee win "under §544(b), [the trustee] might still prevail against the Government under §544's other subprovision — subsection (a)." She noted that "subsection (a), unlike subsection (b), does not contain an actual-creditor requirement."

In addition, Justice Jackson said that Section 106(a) has an "independent function" by "grant[ing] federal courts jurisdiction to hear §544(b) claims brought against state governments" in states that have waived sovereign immunity "under their own fraudulent-transfer statutes."

Justice Jackson ended her opinion by reversing the Tenth Circuit and holding:

Section 106(a) of the Bankruptcy Code abrogates sovereign immunity for the federal cause of action created by §544(b). It does not take the additional step of abrogating sovereign immunity for whatever state-law claim supplies the "applicable law" for a trustee's §544(b) claim.

The Dissent

Justice Neil M. Gorsuch wrote a three-page dissent.

Apart from the question of sovereign immunity, Justice Gorsuch began from the concession that a fraudulent transfer claim existed under Utah law. He continued:

Thus, under "applicable law," the relevant transfers are "voidable," and the bankruptcy trustee can use §544(b)(1) to set them aside. That remains true even though the trustee must sue the United States to void the relevant transfers, because §106(a)(1) bars the government from raising a sovereign-immunity defense in the trustee's action.

Justice Gorsuch asked whether "the federal government [could] defeat the claim by raising the affirmative defense of sovereign immunity?" He answered his own question by saying, "With respect to a private creditor pursuing relief in state court, the answer is yes. With respect to a trustee pursuing relief in a federal bankruptcy proceeding, the answer — thanks to §106(a)(1) — is no."

Justice Gorsuch "respectfully" dissented, saying he would "agree with the majority of circuits to have considered the question that bankruptcy trustees may avoid fraudulent transfers to the United States under §544(b)."

In re Boy Scouts of America, 23-1664 (3d Cir. May 13, 2025)

The 'Dissent' in Boy Scouts Favored Using Equitable Mootness to Uphold Nondebtor Releases

The circuit courts are diverging on the utility of equitable mootness to avoid reversing confirmation of chapter 11 plans.

In the third and last of our reports on the May 13 *Boy Scouts of America* opinions by the Third Circuit, we're covering the 16-page concurrence by Circuit Judge Marjorie O. Rendell that reads like a dissent.

Judge Rendell reached the same result — upholding the plan's nonconsensual, nondebtor releases — by reaching the polar opposite conclusions on statutory mootness and equitable mootness. Where the majority saw the tort claimants' appeals as statutorily moot under Section 363(m), she said they weren't. Where the majority didn't see equitable mootness, she did.

Judge Rendell saw the majority's statutory mootness opinion as "fundamentally flawed." Instead, she said she would have dismissed the tort claimants' appeals as "equitably moot," because equitable mootness "is firmly rooted in our precedent, and, as counsel for [the debtor] urged at oral argument, if ever there were a case crying out for application of the doctrine, this is it."

Statutory Mootness

Judge Rendell explained why she was unwilling to "stretch" statutory mootness under Section 363(m). The subsection reads:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Judge Rendell described the "first fundamental flaw in the majority's" opinion on Section 363(m) as follows:

[T]he statute's clear indication [is] that it does not apply to sales in reorganization plans as well as the common sense observation that the non-consensual third-party releases were not accomplished by way of the purported § 363 authorization, but by way of plan confirmation.

Judge Rendell noted it was an "appeal from the confirmation order, not the sale," and that "the majority's opinion endorses an end run around Chapter 11's requirements, including the Supreme Court's holding in *Harrington v. Purdue Pharma L.P.*" She said that "§ 363 itself distinguishes between sales under § 363(b) and (c) and sales under a plan." Citing the Fifth and Eleventh

Circuits, she said that "several courts have suggested that sales accomplished under plans do not fall within § 363(m)'s ambit."

"If that is not enough," Judge Rendell said, "some of the Settling Insurers constructed the 'sale' of their policies such that they will not occur until the Confirmation Order is affirmed on appeal, meaning that the majority's approach will not finally resolve this case." She added:

This arrangement was almost certainly crafted in an attempt to insulate the Plan and Confirmation Order from appellate review — otherwise, the buybacks of the insurance policies would have been confirmed, as is typical, by § 1123(a)(5)(D), which allows a plan to sell "all or any part of the property of the estate, either subject to or free of any lien." 11 U.S.C. § 1123(a)(5)(D).

More succinctly, Judge Rendell said, "Using § 363(m) to avoid an appeal deprives the sale of any real scrutiny," "goes far beyond what § 363 contemplates," and "shields from review the non-consensual third-party releases that the Supreme Court invalidated in *Purdue*."

Judge Rendell said that the majority's opinion "sets a dangerous transactional precedent, one that will result in Article III courts not having the capacity to review Confirmation Orders if the parties agree to call key intra-plan transactions 'sales.' Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide."

Judge Rendell would have held that "Section 363(m) clearly contemplates not only an authorized sale, but a sale that has occurred." Observing that "some of the Settling Insurers' agreements included provisions that their sales will not be completed unless and until there is a successful appeal," she concluded that the tort claimants' "appeals are not statutorily moot as applied to those sales."

Equitable Mootness

Because "statutory mootness does not finally resolve this case" given that the buybacks of the insurance policies "have not occurred," Judge Rendell said, "[w]e can avoid these complications if we rely instead on equitable mootness," a "discretionary principle that the circuit courts have unanimously adopted."

"Even where it is applied," Judge Rendell said, "the reviewing court has discretion to address the merits of the appeal if it wishes." By contrast, she said that Section 363(m) operates as an "on-off" switch that can strip courts "of any ability to review that provision."

Judge Rendell saw "not only error, but mischief, in the majority's approach." She concurred in the result "but believe[d] that equitable mootness is the way we should reason through the dismissal of the [tort] Claimants' appeals."

Observations

Recall the *Serta Simmons* decision in late December, where the Fifth Circuit called equitable mootness a "judge-created doctrine of pseudo-abstention," not a matter of "real mootness" that "implicates our jurisdiction under Article III." *Excluded Lenders v. Serta Simmons Bedding LLC (In re Serta Simmons Bedding LLC)*, 125 F.4th 555, 585 (5th Cir. Dec. 31, 2024).

Although the Fifth Circuit's reversal of the *Serta Simmons* confirmation order might cost some secured creditors millions of dollars, the appeals court said, "We will not save such sophisticated parties from the consequences of their actions." *Id*. at 588.

By admitting that the plan flaunted *Purdue*, were all three Third Circuit judges on the *Boy Scouts* appeal politely recommending that the Supreme Court rule on equitable mootness?

Third Circuit Upholds Boy Scouts' Nonconsensual Releases, Purdue Notwithstanding

Listen to Article

The Third Circuit majority upheld nondebtor, nonconsensual releases because they were part of a sale, making the appeal statutorily moot under Section 363(m).

With a minor modification, the Third Circuit upheld confirmation of the Boy Scouts of America's chapter 11 plan and its nonconsensual, nondebtor, third-party releases that would no longer be permissible following the Supreme Court's *Purdue* decision, which came down while BSA's appeal was pending in the circuit.

In a 62-page opinion on May 13, Circuit Judge Cheryl Ann Krause decided that the Boy Scouts' plan was not equitably moot, even though the plan was substantially consummated. Nonetheless, she upheld the plan by ruling that confirmation of the plan was statutorily moot under Section 363(m) because insurance companies bought back their policies from the debtor.

"If proposed today," Judge Krause said, "the [BSA] Plan would be unconfirmable in the wake of *Purdue*." In other words, Section 363(m) allowed implementation of a plan that the Supreme Court no longer permits.

Circuit Judge Marjorie O. Rendell wrote a 16-page concurring opinion that reads like a dissent. In her view, the plan was not statutorily moot under Section 363(m). She would have reached the same result and upheld confirmation given her belief that the appeal was equitably moot. In other words, the judges were split on equitable mootness.

The Third Circuit's *Boy Scouts* decision ranks in importance with opinions from the Supreme Court and covers more territory than a typical Supreme Court decision. Given the breadth of the *BSA* decision, we will report today on Section 363(m), because statutory mootness was the principal basis for upholding confirmation. Subsequently, we will describe why the majority decided that equitable mootness did not require dismissal of the appeal. Separately, we will report the concurrence by Judge Rendell.

Will Section 363(m) become a workaround to permit nonconsensual, nondebtor releases? Will equitable mootness survive a trip to the Supreme Court?

The Insurance Policy Buyback

Laying out the facts and the plan in detail, Judge Krause said that the Boy Scouts had paid $150 million by 2019 to resolve 250 sexual abuse suits. When it became evident that the organization could not defend the suits individually, the Boy Scouts filed a chapter 11 petition in Delaware in early 2020. When the deadline for claims arrived, there were over 82,000 claims with a maximum value of $3.6 billion.

With help from mediation, the debtor constructed a plan with a trust funded by almost $2.5 billion in "noncontingent assets." The largest chunk, $1.6 billion, would come from insurance companies buying back their policies. In return for the $1.6 billion, the sale agreements required the insurers to have a "complete release" from abuse claims. Judge Krause described them as "nonconsensual third-party releases."

All nine classes of voting creditors were in favor of the plan. Dealing with objections, the bankruptcy court held a 22-day confirmation trial, heard from 26 witnesses and took more than 1,000 exhibits. The bankruptcy judge wrote a 269-page opinion confirming the plan in July 2022.

The district court upheld confirmation in a 155-page opinion in March 2023, given that nondebtor releases were permissible under Third Circuit precedent. *National Union Fire Insurance Co. of Pittsburgh v. Boy Scouts of America (In re Boy Scouts of America)*, 650 B.R. 8 (D. Del. March 28, 2023). To read ABI's report, **click here**.

Two groups of creditors with sexual abuse claims appealed, asking the Third Circuit to set aside confirmation altogether under the authority of *Purdue*, among other theories. Two insurance companies also appealed, seeking more narrow relief that would not overturn the entire plan.

Purdue came down from the Supreme Court in June 2024, after the district court's affirmance. The Third Circuit heard argument in the Boy Scouts' appeal in November 2024, following *Purdue*.

Jurisdiction

On the merits, Judge Krause first established that the bankruptcy court had "related to" jurisdiction to impose nondebtor releases. In the Third Circuit, the existence of "related to" jurisdiction turns on whether the outcome could have a "conceivable" effect on the bankruptcy estate.

Judge Krause had little difficulty finding effects on the estate. Were tort claimants at liberty to sue insurers, the pool of coverage would be reduced, leaving the Boy Scouts with less insurance to pay claims. Likewise, the Scouts had indemnity obligations to nondebtors that would arise were there lawsuits against nondebtors.

Finding conceivable effects, Judge Krause held that "the Bankruptcy Court properly exercised related-to jurisdiction over these third-party claims."

Statutory Mootness

The debtor's "first argument" to uphold confirmation, Judge Krause said, was based on statutory mootness under Section 363(m). The subsection reads:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

If other prerequisites for the application of Section 363(m) are present, Judge Krause said that the court cannot declare a sale moot if there is relief that would not affect the validity of the sale. On the other hand, if appellate relief "would necessarily affect the sale's validity, the relief is unavailable, so the appeal must be dismissed."

Quoting Third Circuit authority, Judge Krause said that the subsection "does not prohibit the appeal of challenges to all sales and leases, but 'only those challenges that would claw back the sale from a good-faith purchaser.'"

With regard to the appeals mounted by the two insurance companies, Judge Krause said they were not challenging the validity of the insurance policy buyback. Therefore, she said, "§ 363(m) poses no barrier to our consideration of the merits of their appeal."

It was a different story for the tort claimants aiming to overturn the entire plan. For them, Judge Krause had "little difficulty concluding that the relief they seek would affect the validity of the Insurance Policy Buyback authorized by the Confirmation Order" because they wanted to "vacate the Plan in its entirety" and in the process unwind "the sale of BSA's insurance policies."

Whether the sale of the insurance policies had actually occurred was a bone of contention, because most of the price paid by the insurance companies was being held in escrow until confirmation was upheld by a final order no longer subject to appeal. Judge Krause rejected the argument, saying that "the fact that every last cent has not been handed over does not mean a sale has not occurred."

Judge Krause also rejected the argument that Section 363(m) did not apply because the sale was part of a plan, not a freestanding sale. She said that the Third Circuit had "dispatched this argument years ago."

The tort claimants contended that they were not seeking to overturn the sale, only the nondebtor releases. Judge Krause dismissed the contention, saying that "the Settling Insurers would receive less than they bargained for in exchange for their cash contribution to the Settlement Trust, which 'would materially increase . . . the purchase price.'"

Of perhaps more substance, the tort claimants argued that statutory mootness would immunize plans from appellate review whenever a plan was combined with a sale. Judge Krause responded as follows:

Our decision does not read § 363(m) to immunize from appellate review all facets of a plan whenever a § 363(b) sale is involved. Put differently, a challenge to a § 363(b) sale that is "collateral" to or would not otherwise "affect the validity of the sale" falls outside the ambit of § 363(m) [citation omitted], and given the breadth of issues a reorganization plan may resolve that do not necessarily implicate the terms of a § 363(b) sale, *see* 11 U.S.C. § 1123(a) – (b), the vast majority of challenges, no doubt, will fall into this category.

Applying the principles to the case on appeal, Judge Krause said that "the nonconsensual third-party releases challenged by the [tort] Claimants go to the heart of the Bankruptcy Court's § 363(b) authorization, so § 363(m) prevents us from disrupting them on appeal."

Judge Krause dismissed the appeal by the tort claimants who "would strike at the heart of the Insurance Policy Buyback." The appeals by the insurance companies were in a different category that escaped dismissal because they were "collateral to the Insurance Policy Buyback."

At the conclusion of the discussion of statutory mootness, Judge Krause dropped a footnote that ranks as perhaps the most significant statement in the opinion.

It was an "unusual case," Judge Krause said, because the Supreme Court handed down *Purdue* and "abrogate[d] our precedent on that issue" while the appeal was pending. "So were the Plan proposed today," she said, "we harbor little doubt that the Bankruptcy Court would neither authorize the Insurance Policy Buyback nor confirm the Plan with its impermissible releases."

Next

On Monday, we will explain why Judge Krause decided that the appeal was not equitably moot as to the insurance companies who were appealing. She dismissed the appeal as statutorily moot as to the tort claimants who wanted to overturn confirmation altogether.

Question

Assume there's another mass tort case where confirmation requires an insurance buyback, but the insurers refuse to buy back their policies without nonconsensual, nondebtor releases. Are we certain that no bankruptcy court will ever confirm such a plan and that an appellate court won't dismiss the appeal as statutorily moot? Does Section 363(m) override Supreme Court precedent?

Montana v. Blixseth (In re Blixseth), 22-60046 (9th Cir. Aug. 14, 2024)

Sovereign Immunity Is Difficult (Impossible?) to Waive in the Ninth Circuit

Reversing the BAP, the Ninth Circuit held that counsel's oral waiver of sovereign immunity did not bind the state.

The Ninth Circuit bent over backwards to hold that sovereign immunity protects a state from the imposition of compensatory and punitive damages for filing an involuntary bankruptcy petition that was dismissed.

The appeal involved Timothy Blixseth, the former owner of the bankrupt Yellowstone Mountain Club LLC, whose own financial problems spawned a mountain of litigation and appeals. The State of Montana and two other states filed an involuntary bankruptcy petition against Blixseth based on allegedly unpaid taxes.

Two states settled with Blixseth and withdrew as involuntary petitioners. The bankruptcy court dismissed the petition after deciding that Montana's claim was subject to *bona fide* dispute. The district court and the Ninth Circuit both affirmed dismissal.

While the involuntary case was pending, the attorney for Montana answered questions from the bench that appeared to waive the state's sovereign immunity.

After the bankruptcy was dismissed, Blixseth commenced an adversary proceeding under Section 303(i) seeking attorneys' fees, costs and punitive damages. Asserting sovereign immunity, the state moved to dismiss. The bankruptcy court denied the motion to dismiss, ruling that the state had invoked the jurisdiction of the bankruptcy court and had waived sovereign immunity.

The Ninth Circuit Bankruptcy Appellate Panel dismissed the appeal for lack of appellate jurisdiction, believing that the collateral order doctrine did not apply. The state appealed to the Ninth Circuit and won in an August 14 opinion by Circuit Judge Johnnie B. Rawlinson.

Collateral Order and Appellate Jurisdiction

Judge Rawlinson laid out the contours of the collateral order doctrine based on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). She explained that there is appellate jurisdiction with regard to an interlocutory order "if the case finally determines a claim or claims collateral to claims asserted in the underlying action and the collateral claims are 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' *Cohen*, 337 U.S. at 546."

Judge Rawlinson said that the Ninth Circuit and the Supreme Court "have applied *Cohen* and concluded that denials of sovereign immunity are immediately appealable under the collateral order doctrine."

Judge Rawlinson reversed the BAP, found appellate jurisdiction via the collateral order doctrine, and proceeded to the merits.

The Involuntary Petition as a Waiver of Immunity

On the merits, Judge Rawlinson first examined whether the state had waived sovereign immunity by invoking the jurisdiction of the bankruptcy court. Of course, a state that files a proof of claim waives immunity, but Montana never filed a claim, just an involuntary petition.

Judge Rawlinson said she was not "persuaded" that a debtor's claim under Section 303(i) was a compulsory counterclaim following the filing of an involuntary petition, because the claim and the Section 303(i) adversary proceeding did not arise from the same "factual predicate." Similarly, she did not believe that Section 303(i) damages were analogous to Rule 11 sanctions.

Judge Rawlinson saw no waiver based on the filing of the involuntary petition given that "Blixseth's allegations fail the logical relationship test in any event because Blixseth's claim does not arise from the same 'aggregate set of operative facts' as the State's involuntary petition."

Counsel's Waiver of Immunity

Citing the Supreme Court, Judge Rawlinson said that a state must make a "clear" and "unequivocal" declaration to waive immunity.

Judge Rawlinson said that the state's "counsel could not and did not effect an 'unequivocal' waiver of [Montana's] sovereign immunity through his statements to the court." The opinion could be read to mean that counsel does not have authority to waive a governmental unit's immunity.

Katz

Leading Supreme Court authority on the waiver of immunity in bankruptcy cases is *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), where the Court held that the states' ratification of the Constitution containing the Bankruptcy Clause effected a waiver for "core" bankruptcy proceedings.

Proceedings are "core," and there is waiver, in three circumstances: (1) the exercise of exclusive jurisdiction over the debtor's property; (2) the equitable distribution of the estate; and (3) the discharge giving the debtor a fresh start.

With regard to the first and second factors, Judge Rawlinson said that recovering damages under Section 303(i) was a remedial scheme neither necessary to the jurisdiction of the bankruptcy court nor related to the equitable distribution to creditors. Likewise, it did not fall under the third factor because the debtor's Section 303(i) suit aimed to recover costs and was not part of the debtor's fresh start.

Holding that the state properly asserted sovereign immunity, Judge Rawlinson reversed and remanded with instructions to dismiss the debtor's Section 303(i) claims.

In re Bestwall LLC, 17-31795 (Bankr. W.D.N.C. Feb. 21, 2024)

Lack of Financial Distress Doesn't Divest a Court of Subject Matter Jurisdiction

Two North Carolina Courts have held within two months that the Bankruptcy Clause doesn't demand 'financial distress' to establish subject matter jurisdiction.

In the space of two months, two different bankruptcy judges in North Carolina have ruled that a lack of financial distress does not require the dismissal of a chapter 11 case on constitutional grounds.

At the end of December, Bankruptcy Judge J. Craig Whitley of Charlotte, N.C., denied a motion to dismiss a pair of "asbestos" chapter 11 cases by holding that (1) the lack of "financial distress" does not divest the court of subject matter jurisdiction, and (2) there is no violation of the Bankruptcy Clause of the Constitution when the debtor has no "financial distress." *In re Aldrich Pump LLC*, 20-30608, 2023 WL 9016506 (Bankr. W.D.N.C. Dec. 28, 2023). To read ABI's report, **click here**.

In short order, Judge Whitley found "no provisions in the Bankruptcy Code evidencing a congressional intent to impose a jurisdictional insolvency or 'financial distress' requirement to file bankruptcy." He held that the movants' constitutional challenges were "not challenges to the Court's subject matter jurisdiction."

In a 59-page opinion on February 21, Bankruptcy Judge Laura T. Beyer, also of Charlotte, devoted most of her merits discussion to explaining in detail why the lack of financial distress does not deprive the bankruptcy court of subject matter jurisdiction. We recommend reading the opinion in full text to appreciate the wealth of historical detail underpinning Judge Beyer's conclusions.

The Georgia-Pacific Two-Step

Judge Beyer said that the debtor's prefiling history "was unusual and unusually brief."

In 1965, Georgia-Pacific merged with Bestwall Gypsum, whose asbestos-laden products resulted in thousands of lawsuits. GP underwent a Texas divisional merger in 2017 where "old" GP ceased to exist. Two companies arose.

Bestwall became solely responsible for mass tort liability. The second new company, which we shall refer to as New GP, received all of the assets of "old" GP but was not responsible for any asbestos liability.

To account for the paucity of assets, Bestwall was given a funding agreement from New GP enabling it to pay asbestos liabilities, either in bankruptcy or outside of bankruptcy. Soon after the filing, the bankruptcy court entered a preliminary injunction barring lawsuits against nondebtors.

Twice before in the case, Judge Beyer denied dismissal motions by the official creditors' committee. Significantly, they remain on appeal. However, the Fourth Circuit upheld the preliminary injunction last year, finding "related to" jurisdiction in the process. *Official Committee of Asbestos Claimants v. Bestwall LLC (In re Bestwall LLC)*, 71 F.4th 168 (4th Cir. June 20, 2023). To read ABI's report, **click here**.

The New Motions to Dismiss

An individual creditor and the official committee filed what amounted to the third and fourth motions to dismiss.

The individual creditor wanted Judge Beyer to find a lack of good faith given the debtor's absence of financial distress. The creditor was relying in large part on *In re LTL Management LLC*, 58 F.4th 738, 64 F.4th 84 (3d Cir. Jan. 30, 2023), where the Third Circuit dismissed the chapter 11 case of a Johnson & Johnson subsidiary for lack of "financial distress." To read ABI's report on *LTL*, **click here**.

Judge Beyer denied the individual creditor's motion on two grounds: (1) the law of the case precluded her from revisiting her prior dismissal opinions where she found no lack of good faith, and (2) she had no power to revisit good faith because the issue remains on appeal.

The official committee, however, wanted Judge Beyer to rule there was no subject matter jurisdiction, again given the lack of financial distress. Despite the pending appeal, Judge Beyer decided that she could rule because lack of subject matter jurisdiction may be raised at any stage of the case.

History and Practical Considerations

Judge Beyer described the committee's motion as advancing a "nuanced argument … that the court does not have constitutional subject matter jurisdiction to hear this case due to the Debtor's lack of financial distress." Responding, she surveyed U.S. and English bankruptcy law from the eighteenth century to the present and said:

While the language of the Bankruptcy Clause, the history of American bankruptcy law, and the Supreme Court's descriptions of the bankruptcy power do not definitively answer, or even directly address, the question of whether constitutional subject matter jurisdiction requires a debtor in financial distress, the absence of support for the Committee's argument is conspicuous. There are simply no cases at any level (of which this court is aware) that explicitly endorse the proposition that bankruptcy courts do not have subject matter jurisdiction unless a debtor has a sufficient degree of financial distress.

In fact, Judge Beyer cited the Third Circuit for holding in *LRL* that the bankruptcy court had subject matter jurisdiction. *LTL*, *supra*, 58 F.4th at 99.

Judge Beyer identified practical problems were financial distress a jurisdictional requirement. For instance, “a financial distress requirement for subject matter jurisdiction is the tension with the goal of getting potential debtors to commence their cases early.”

If financial distress were necessary for filing, Judge Beyer said that Congress “likely” would have added the requirement in Section 109. She saw “no need for a harsh new jurisdictional rule because there are other ways for courts to address any perceived abuse by debtors lacking financial distress,” listing dismissal for lack of good faith and the court’s ability to lift the automatic stay.

Judge Beyer held “that financial distress is not a prerequisite for bankruptcy subject matter jurisdiction pursuant to the Constitution. Instead, the court joins others that have held that the subject matter jurisdiction for bankruptcy extends to all cases filed under the Bankruptcy Code.”

Judge Beyer denied the new motions to dismiss.

Bestwall LLC v. Official Committee of Asbestos Claimants, 24-1493 (4th Cir. Aug. 1, 2025)

Fourth Circuit Rules on Jurisdiction, not ‘Financial Distress’ for a Chapter 11 Debtor

Fourth Circuit majority and dissenting opinions might be read to suggest that Bestwall could have tough sledding on an appeal from confirmation since the debtor is solvent.

Remember LTL Management, where the Third Circuit dismissed the chapter 11 case of a Johnson & Johnson subsidiary for lack of “financial distress”?

In a split decision, the Fourth Circuit held that the bankruptcy court has subject matter jurisdiction resulting from the Bankruptcy Clause even when the debtor is solvent.

Do the Third and Fourth Circuits disagree about financial distress as a requisite for a chapter 11 debtor?

Answer: No!

As Fourth Circuit Judge A. Marvin Quattlebaum, Jr., said for the majority in an opinion on August 1, the Third Circuit “dismissed LTL’s bankruptcy petition as a bad faith filing” because the J&J subsidiary “was not in financial distress.” In contrast, Judge Quattlebaum’s opinion for the Fourth Circuit opinion isn’t about a bad faith filing. The Fourth Circuit’s majority opinion only deals with jurisdiction, not bad faith, and holds that a debtor’s solvency does not divest the bankruptcy court of subject matter jurisdiction.

We recommend reading the Fourth Circuit opinions in full text at first opportunity. Although the appeals court did not order dismissal of the reorganization of an eminently solvent company, readers might conclude that all three Fourth Circuit judges would dismiss the case when solvency is presented in a different context.

The Fourth Circuit opinion deals with the chapter 11 reorganization of Bestwall, created as a subsidiary of solvent Georgia-Pacific to deal with the companies' asbestos liability. Given the gravity of the opinions, we will offer three reports. Today, we report the majority opinion. Tomorrow, it's the dissent. The day following will be the concurrence.

Bestwall Reborn

Georgia-Pacific, a pulp and paper company, acquired and merged with Bestwall in 1965. Bestwall's products, wallboard and related products, generated decades of asbestos litigation, resulting in $558 million in defense and indemnity costs between 2014 and 2017, according to Judge Quattlebaum's recitation of the facts.

With 64,000 claims pending, Georgia-Pacific effected a Texas divisional merger in 2017. Most of the assets went to Georgia-Pacific along with some liabilities, but Bestwall became the repository for asbestos liability.

Bestwall had some cash and the gypsum plaster business that generated annual cash flow of $18 million. Of significance, Georgia-Pacific agreed to pay Bestwall's expenses of administration in chapter 11 and, if necessary, to fund a Section 524(g) trust to pay asbestos claims in a confirmed chapter 11 plan.

After Bestwall filed a chapter 11 petition in 2017, the official committee of asbestos claimants filed a motion to dismiss, alleging a bad faith filing "because Bestwall wasn't really bankrupt," Judge Quattlebaum said. The bankruptcy court granted Bestwall's motion enjoining suits against Georgia-Pacific and denied the dismissal motion by finding a valid reorganization purpose.

Years later, the committee filed another dismissal motion, this time based on a lack of subject matter jurisdiction. Judge Quattlebaum characterized the committee as arguing "that Bestwall was not 'bankrupt' according to a founding-era understanding of the word" and that bankruptcy was a "constitutional requirement for jurisdiction" that "precedes any statutory requirements for debtors."

In the16-page majority opinion for himself and Circuit Judge G. Steven Agee, Judge Quattlebaum described the bankruptcy court as having denied the motion to dismiss "because the history of bankruptcy legislation has been one of liberalizing bankruptcy access." The bankruptcy court certified a direct appeal, which the circuit accepted.

The Question on Appeal

On the merits, Judge Quattlebaum said that the appeal "is not about the validity of the controversial Texas two-step maneuver . . . [n]or is it about whether a debtor's ability to pay its debts is relevant in a bankruptcy case." He said that solvency or bad faith "may come up at future junctures — at plan confirmation, for example."

"Instead," he said that the "narrow question" on appeal was whether "federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations."

The Appeal Is About Jurisdiction, Not 'Financial Distress'

Addressing the merits, Judge Quattlebaum quoted the Bankruptcy Clause in Article I, Section 8 of the Constitution as authorizing Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." He described the committee as contending that "the meaning of 'bankruptcy' at the founding did not include those able to pay their debts."

Judge Quattlebaum said that the committee was not questioning Bestwall's Article III standing but was "convert[ing] a challenge to the Bankruptcy Code's constitutionality into a jurisdictional question." Jurisdiction, he said, is governed by 28 U.S.C. § 1334, which confers "original and exclusive jurisdiction of all cases under title 11 . . . or arising in or related to cases under title 11."

Refining the question on appeal, Judge Quattlebaum it "really is about Congress's power under Article I of the Constitution to make parties eligible for bankruptcy protection. It's not a question of subject-matter jurisdiction." He immediately said that "no court has ever adopted the Committee's view."

In LTL, Judge Quattlebaum said, the Third Circuit "didn't decide the case on subject-matter jurisdiction grounds" but "determined that LTL — the company formed to own and resolve Johnson & Johnson's talc liabilities — was not in financial distress" and "dismissed LTL's bankruptcy petition as a bad faith filing." In re LTL Mgmt., LLC, 64 F.4th 84, 106 - 110 (3d Cir. Jan. 20, 2023). To read ABI's report on LTL, click here.

"Importantly," Judge Quattlebaum said, the Third Circuit "determined that it had jurisdiction of the appeal under 28 U.S.C. § 158(d)(2)(A) and that the bankruptcy court had jurisdiction under § 157(a) and § 1334(a). See id. at 99." The Third Circuit "said nothing about the Constitution or its bearing on subject-matter jurisdiction over bankruptcies."

Affirming the bankruptcy court's denial of the motion to dismiss, Judge Quattlebaum that that the "Committee may have another chance to renew that argument — at plan confirmation" and "will then have a final order to appeal."

Bestwall Dissenting Opinion Reads Like Dismissal of LTL Mgmt for a Bad Faith Filing

The Bestwall dissenter understands the Bankruptcy Clause as having the 18th century definition of 'bankruptcy,' thus requiring insolvency or inability to pay debts.

Yesterday, we reported how the Fourth Circuit's 16-page majority in Bestwall decided that a chapter 11 debtor's solvency doesn't deprive the bankruptcy court of subject matter jurisdiction under 28 U.S.C. § 1334. In other words, filing a petition gives rise to jurisdiction simply because Section 1334 confers "original and exclusive jurisdiction of all cases under title 11."

Today, we report the 22-page dissent by Circuit Judge Robert Bruce King.

Recall that Bestwall was a creature of a Texas divisional merger where Georgia-Pacific split apart. Asbestos liability went to Bestwall, while parent Georgia-Pacific took most of the assets and gave Bestwall an undertaking to pay the expenses of Bestwall's chapter 11 case and to fund an asbestos trust to be created under a plan confirmed in accord with Section 524(g). Evoking In re LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. Jan. 20, 2023), the majority hinted that solvency might result in dismissal for a bad faith filing, but not for lack of subject matter jurisdiction.

Respectfully dissenting, Judge King opened his opinion by saying that "the majority approves a legal maneuver that fundamentally departs from the central purpose of our Nation's bankruptcy system," which heretofore has provided "a 'fresh start' to the 'honest but unfortunate debtor.'" He said that Bestwall, the debtor, "is no such debtor" but was "an entity manufactured in a corporate boardroom, rather than amid a genuine financial crisis."

To the same effect, Judge King said,

Bestwall entered bankruptcy not because it was financially distressed, but because its parent corporation, Georgia-Pacific, sought to evade tort liability for harm caused by decades of manufacturing and selling dangerous products containing asbestos . . . . In effect, a financially healthy company has placed its tort liabilities to thousands of workers behind a wall of bankruptcy protection, without itself undergoing the scrutiny, transparency, or risk that bankruptcy typically entails.

Later, Judge King said that the right of victims of asbestos exposure "to pursue justice through the tort system of the civil courts . . . has been put on hold by a solvent and profitable enterprise acting through a wholly manufactured bankruptcy proceeding."

Section 1334 Bends to the Bankruptcy Clause

After an opening statement that reads like dismissal for bad faith, Judge King turned to the question on appeal: Does the Bankruptcy Clause of the Constitution mean that insolvent companies alone are eligible for bankruptcy relief? Relevant factually, he noted that Georgia-Pacific paid a $2 billion dividend to its owner before filing and had assets worth $23.8 billion.

Judge King said that the "central flaw . . . in the majority's reasoning is its assumption that Congress's broad grant of jurisdiction under 28 U.S.C. § 1334 can override the Constitution's more limited delegation of power under the Bankruptcy Clause." He said that "Section 1334 does not — and cannot — independently determine what constitutes a 'case' that Congress may authorize under Article I."

By sidestepping the constitutional issue, Judge King said that "the majority permits bankruptcy jurisdiction to be extended to parties who are not actually bankrupt — and, in doing so, open the courthouse doors to a new kind of forum shopping by solvent corporations." Then, he turned to history.

"At the time of the Founding and for well over a century thereafter," Judge King cited authorities for the idea that "bankruptcy was available only to those who could not pay their debts." He said that a "debtor who could pay his debts, therefore, was not what the Founders would have ever considered 'bankrupt.'" As in England, he said that "solvent individuals simply had no claim to protection under such laws. They remained subject to the full force of the ordinary legal processes."

Alluding to the first federal bankruptcy statute adopted in 1800, Judge King said that it "provided no protection to debtors who remained able to meet their obligations." From relevant history, he said,

Bankruptcy, as the Founders understood it, was meant for the financially distressed. It was never intended as a mechanism by which profitable enterprises could transform an honest but unfortunate debtor's shield into a sword for solvent corporations to cut down the rights of injured Americans.

"This historical understanding," Judge King said, "should constrain the modern interpretation of the [Bankruptcy] Clause and the permissible scope of federal bankruptcy jurisdiction." The clause "clearly refers to a legal regime designed only for insolvent debtors, not solvent corporations seeking to evade mass tort liability through complicated corporate restructuring."

"In sum," Judge King said,

[O]ur history and tradition does not support the majority's extension of bankruptcy protections to solvent tort defendants who seek a strategic advantage over their creditors and victims. When bankruptcy is used in that manner, it departs not only from historical practice but from the constitutional limits of the Bankruptcy Clause itself.

Ending his opinion, Judge King said,

[A]ny profitable business facing legal risk could simply offload its tort liabilities into a subsidiary or sister entity, file for bankruptcy, and invoke an automatic stay of litigation, not because it is unwilling or unable to pay its debts, but because it prefers to evade the scrutiny of a jury — as required by the Seventh Amendment — and shirk accountability for its civil wrongdoing.

Appearing to say he would have dismissed the chapter 11 case, Judge King said,

The Bankruptcy Clause should not tolerate a system where a rich and powerful corporate defendant can invoke federal bankruptcy jurisdiction in order to suppress the tort claims of sick and dying victims and evade responsibility for harms caused.

Observations

Although Judge King was unable to persuade his colleagues about jurisdiction, it is difficult to imagine an opinion giving more reasons for dismissing a chapter 11 case as a bad faith filing, akin to the Third Circuit's dismissal in LTL Management for lack of "financial distress."

Judge King seems to have the view that Section 1334 was unconstitutional as applied to Bestwall. If so, is it a constitutional question, a jurisdictional question or a merits question, because he doesn't seem to say that Section 1334 is unconstitutional on its face?

Section 1334 creates federal jurisdiction for "all cases under title 11" and does not seem to be unconstitutional on its face, because title 11 deals with bankruptcies. The constitutional question thus points toward pertinent provisions in the Bankruptcy Code.

Regarding involuntary cases, Section 303(h)(1) seems to require insolvency because it provides that a petition may be filed "only if . . . the debtor is generally not paying such debtor's debts as such debts become due . . . ."

On the other hand, a voluntary petition may be filed under Section 301 "by an entity that may be a debtor under such chapter." Chapters 7, 11 and 13, generally speaking, say nothing about insolvency as a requisite.

Whether or not there's a general requirement for insolvency calls for looking at the words in Section 301 about an entity "that may be a debtor." In nonconstitutional terms, courts could address the merits by deciding whether financial distress or an equivalent is implied by use of the words "may be a debtor." Addressing the merits, courts could avoid the constitutional question of whether the Bankruptcy Clause requires insolvency.

The dissent raises the overriding question of whether constitutional powers granted to the federal government are confined to those within the contemplation of founders in the 18th century, or whether language employed 235 years ago can have modern meanings.

Bestwall Concurrence Believes in 'Liberalization' of Bankruptcy Powers

The concurring opinion in Bestwall could be read to suggest that Circuit Judge G. Steven Agee might have an open mind if a confirmed plan comes to the Fourth Circuit on appeal.

In our previous two reports, we covered Bestwall's majority and dissenting opinions. The majority did not see insolvency as a condition to federal bankruptcy jurisdiction under Section 1334. The dissenter believes that the Constitution's Bankruptcy Clause demands insolvency to invoke bankruptcy jurisdiction.

Today, we cover the seven-page concurring opinion by Circuit Judge G. Steven Agee, who refuted the dissent's belief that the 18th century understanding of "bankruptcy" connotes insolvency in modern times.

Judge Agee began by saying that he "completely agree[d]" with the majority's holding that "'federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations.'" He characterized the dissenter, Circuit Judge Robert Bruce King, as believing that "Congress exceeded its authority under the Bankruptcy Clause in crafting Section 1334" to permit filings by solvent entities.

Judge Agee cited the Supreme Court in 1935 as having said that the power of Congress under the Bankruptcy Clause is not limited by English or colonial law in effect at the time of the adoption of the Constitution. Cont'l Ill. Nat. Bank & Tr. Co. of Chi. v. Chi., Rock Island & P. Ry. Co., 294 U.S. 648, 669 (1935). He quoted the Court for having said that "'the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.'" Id. at 668.

More recently, Judge Agee said that the Supreme Court "reiterated that bankruptcy is difficult to define and includes 'nothing less than "the subject of the relations between [a] debtor and his creditors."'" Siegel v. Fitzgerald, 596 U.S. 464, 473–74 (2022).

Judge Agee said that the dissenter "fails to identify any historical precedent that — as a jurisdictional matter, lest we forget the question presented — applies to support its position." [Emphasis in original.] After 235 years, he thought "there would be at least one case supporting the dissent's vague view; but there are none."

Although chapter 9 requires insolvency, Judge Agee observed that "neither Chapter 7, Chapter 11, nor Chapter 13 includes such a requirement." Given the million cases under chapters 11 and 13 that have been filed in the last five years, he said that "all of these would be unconstitutional and therefore void" if the dissenter's analysis were to prevail.

Judge Agee read the dissent as "simply disagree[ing] with what has colloquially become known as the Texas Two-Step, which it characterizes as 'a corporate sleight-of-hand maneuver.'" He said that "the Texas Two-Step's validity is irrelevant in evaluating whether federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations."

Judge Agee "fully concur[red]" with the majority opinion.

Observation

Among the three opinions, the concurrence by Judge Agee could be read as being most hospitable toward the debtor. Regarding the merits of the Texas Two-Step, he said, "that is a matter within the province of the Congress, not the judiciary."

Was Judge Agee suggesting that a Texas divisional merger gives rise to no offense requiring dismissal and no intentional fraudulent transfer?

In a footnote, he said that "the Committee has filed multiple challenges that have impeded progression to a plan and confirmation hearing." He criticized the committee, "in the eleventh hour," for having moved "to dismiss for lack of subject-matter jurisdiction."

In the same footnote, Judge Agee asked whether delay occasioned by the committee was calculated to raise "valid claims" or reflected a "desire for perceived higher attorneys' fees should the claims be removed and be adjudicated outside of bankruptcy." "Perhaps future review will answer that question," he said.

This writer lauds Judge Agee for not hinting at how he might rule on issues not yet before the court.

Wells Fargo Bank N.A. v. Hertz Corp. (In re Hertz Corp.), 23-1169 (3d Cir. Sept. 10, 2024)

Solvent Debtors in Chapter 11 Must Pay Make-Wholes, Third Circuit Says

The opinion by Circuit Judge Thomas Ambro reads Jevic as animating the solvent-debtor exception to the disallowance of unmatured interest.

Over a dissent, the majority on a Third Circuit panel held in the reorganization of Hertz Corp. that unsecured creditors of a solvent debtor are entitled to post-petition interest at the contract rate rather than the lower federal judgment rate.

Of greater significance, Circuit Judge Thomas L. Ambro held for the majority that a so-called make-whole premium is unmatured interest that is disallowed under Section 502(b)(2) in an ordinary bankruptcy where the debtor is insolvent.

Circuit Judge David J. Porter agreed with the two holdings stated above but disagreed with Judge Ambro's most significant holding for the majority: Unsecured noteholders were entitled to their make-wholes because Hertz was solvent.

After adoption of the Bankruptcy Code, there has been an open question about the survival of the so-called solvent-debtor exception to the disallowance of unmatured interest under Section 502(b)(2). Rather than debate the topic, Judge Ambro reanimated the solvent-debtor exception by reading the Supreme Court's *Jevic* opinion as expanding the absolute priority rule into areas beyond chapter 11 plan confirmation and thereby achieving the same effect as the solvent-debtor exception.

Judge Ambro's Preface

Judge Ambro began his 43-page opinion by discussing how leverage "influences who gets paid." Being able to pay creditors in full and thus deprive everyone of the ability to vote on a plan, Judge

Ambro said that the debtor had leverage to deny unsecured noteholders more than $270 million "while giving lower priority equityholders four times that amount."

In his opinion on September 10, Judge Ambro addressed the question of whether the Bankruptcy Code gave "the debtors enough leverage to do that." With no controlling law in the Third Circuit, Judge Ambro found the answer by asking two questions: (1) Does the Section 502(b)(2) prohibition of unmatured interest cover make-wholes, and (2) does the Bankruptcy Code "as a whole" require unimpaired creditors to receive post-petition interest at the contract rate rather than the lower federal judgment rate?

Answering the first question, Judge Ambro said that a make-whole owed by an insolvent debtor "must be disallowed under § 502(b)(2), [because make-wholes] fit both the dictionary definition of interest and are its economic equivalent." Regarding the second question, he said that the noteholders "have a right to receive contract rate interest and the [make-whole] because Hertz was solvent."

Judge Ambro found support for his conclusions in opinions from the Fifth and Ninth Circuits that reached the same results. *Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022), *cert. denied,* 143 S.Ct. 2495 (2023); *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 2492 (2023). To read ABI's reports on *Ultra* and *PG&E*, **click here** and **here**.

Although Judge Ambro reached the same result as the other two circuits, he said that the "primary support" for his conclusions came from his understanding of the absolute priority rule described by the Supreme Court in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017). To read ABI's report on *Jevic*, **click here**.

As he would explain more fully later in the opinion, Judge Ambro summarized *Jevic's* command of the result in the case before him by saying,

Allowing Hertz to cancel more than a quarter billion dollars of interest otherwise owed to the Noteholders, while distributing a massive gift to the Stockholders, would impermissibly "deviate from the basic priority rules . . . the Code establishes for final distributions of estate value in business bankruptcies." *Jevic*, 580 U.S. at 455.

The Facts

After telling readers how his circuit was ruling, Judge Ambro laid out the facts.

Devastated by the pandemic, Hertz filed a chapter 11 petition in 2020. As the economy quickly rejuvenated, so did Hertz. Insolvent on filing, Hertz became solvent once more, owing $2.7 billion to unsecured noteholders.

The noteholders and all other classes of creditors were unimpaired by the Hertz plan and thus had no right to vote. Although the noteholders were to be paid in full on consummation, the plan gave them post-petition interest at the federal judgment rate of 0.15% rather than the higher contract rate. The plan also took away their make-whole, which was designed to compensate noteholders for early redemption and being forced to reinvest at lower rates of interest.

New investors were effectively buying Hertz. Existing shareholders were cashed out with a package of stock, warrants and cash worth $1.1 billion. In other words, the plan gave noteholders a $270 million haircut while lower-ranking shareholders were taking home $1.1 billion.

To make noteholders unimpaired, the plan gave them the right after confirmation to file a complaint contesting the loss of the make-whole and the contract interest rate. The bankruptcy court dismissed the claim for restoration of the contract rate of interest, concluding that noteholders were only entitled to the federal judgment rate for post-petition interest. The bankruptcy court also disallowed the noteholders' claim for redemption fees, believing they were not triggered a matter of contract law.

After trial, the bankruptcy court concluded that the make-whole was the economic equivalent of interest and was therefore barred by Section 502(b)(2), which disallows claims for "unmatured interest."

Sua sponte, the bankruptcy judge certified her decision for direct appeal. The Third Circuit accepted the appeal. To read ABI's reports on the bankruptcy court's two decisions, *Wells Fargo Bank NA v. Hertz Corp. (In re Hertz Corp.)*, 21-50995, 2022 BL 426983, 2022 Bankr Lexis 3358 (Bankr. D. Del. Nov. 21, 2021); and *Wells Fargo Bank NA v. Hertz Corp. (In re Hertz Corp.)*, 637 B.R. 781 (Bankr. D. Del. Dec. 22, 2021), **click here** and **here**.

No Early Redemption Fee

The notes gave holders a fee if the notes were redeemed before maturity.

Judge Ambro agreed with the bankruptcy court, holding that the fee was not triggered because the notes matured automatically when Hertz file bankruptcy, with redemption occurring one year later when Hertz confirmed the chapter 11 plan.

In short, there was no redemption before maturity and thus no fee.

Judge Ambro said the result was not "absurd" because it flowed from "extensive negotiations" over the terms of the notes. If noteholders believe the result was "unfair," he said they "should not have agreed" to the terms of the notes, he said.

The Make-Whole

Although the language of the make-whole "appears complicated," Judge Ambro said that the substance was not. He described a make-whole as seeking "to ensure that Noteholders receive the return they expected for their investment in the Notes Hertz redeemed before their Redemption Date."

On appeal, Judge Ambro said that the question was whether the make-whole was interest or the economic equivalent of interest, as the bankruptcy judge had found. After analysis, he concluded that the make-whole was both interest and the economic equivalent of interest. More specifically, he said that the make-whole was "mathematically equivalent to the unmatured interest the Noteholders would have received had Hertz redeemed the Notes on their Redemption Dates."

Judge Ambro held that "the Bankruptcy Court correctly disallowed the Noteholders' claims for" the make-whole because "§ 502(b)(2) disallows a claim for unmatured interest if it is either definitionally interest or its economic equivalent."

[Note: Judge Ambro's holding appears to mean that make-wholes are disallowed under Section 502(b)(2) in ordinary chapter 11 cases where the debtors are insolvent. In the next section of the opinion, Judge Ambro discussed the effect of Hertz's solvency on the disallowance of the make-whole. The dissenter did not join the following section of the majority's opinion.]

Solvency, Make-Wholes and Post-Petition Interest

Despite the holdings he had just issued, Judge Ambro asked whether "the Bankruptcy Code as a whole nonetheless require[s] solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate?" He rephrased the question "in a way that makes the answer predictable: Can Hertz use the Bankruptcy Code to force the Noteholders to give up nine figures of contractually valid interest and spend that money on a massive dividend to the Stockholders?"

Judge Ambro devoted the next 17 pages of his opinion to explaining why the "answer is no."

Judge Ambro saw the Fifth and Ninth Circuits as having held that creditors of solvent debtors have an equitable right to the contract rate of interest before surplus value goes to shareholders. He noted how the Ninth Circuit "correctly noted" the solvent debtor exception "sprung from the pre-Code absolute priority rule" and said that the "absolute priority rule serves as an essential governor on the bankruptcy process to protect creditors."

After tracing the history of absolute priority back to *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913), Judge Ambro said that "the absolute priority rule [today] is housed in § 1129(b)." Citing *Jevic* as authority for interpreting the contours of absolute priority, Judge Ambo said that a "creditor is impaired if its treatment violates the absolute priority rule because every creditor has a right to treatment consistent with that principle."

Reversed by the Supreme Court in *Jevic*, Judge Ambro said that the Third Circuit had approved a so-called structured dismissal that violated priorities in bankruptcy distribution. He explained the significance of the *Jevic* reversal as follows:

Whereas our Court saw the absolute priority rule as a procedural protection that applied only when § 1129(b) is invoked (where the Code explicitly mentions it), the Supreme Court concluded it applied everywhere absent a clear statement authorizing a departure. . . . In other words, the Bankruptcy Code entitles every creditor — not just the dissenting impaired creditors who can invoke § 1129(b)19 — to treatment consistent with absolute priority absent a clear statement to the contrary.

Interpreting *Jevic* to require application of absolute priority everywhere, Judge Ambro said that "the Noteholders' right to treatment consistent with absolute priority must be honored to leave them unimpaired." Pre-Code practice, he said, "required solvent debtors to pay contract rate interest before making distributions to equity." Stitching the principles together, he said that "the absolute priority rule requires creditors' obligations be paid in full before owners, with junior rights to the business, take anything at all."

In sum, Judge Ambro held that a make-whole is a form of interest that a solvent debtor must pay in full before distributions to shareholders.

Ordinarily, Judge Ambro said the circuit court would remand for the bankruptcy court to decide whether there were any equitable exceptions to disallow the make-whole, but "we do not do so here," for two reasons.

First, the debtor never sought a remand. Second, the shareholders had already received $1.1 billion. "So," Judge Ambro said, "our equitable calculus must reflect that the Stockholders already took their dividend. Therefore, the equities demand the Noteholders recover post-petition interest at the contract rate."

Ending his opinion, Judge Ambro affirmed in part and reversed in part, ruling that Hertz must pay noteholders' post-petition interest at the contract rate along with the make-whole.

The Dissent

Judge Porter "respectfully" concurred except in the last part of the majority opinion requiring payment of the make-whole and post-petition interest under the *Jevic* interpretation of the absolute priority rule. Citing Section 502(b)(2), he said that "the Bankruptcy Code plainly disallows claims 'for unmatured interest' like the Noteholders' claims for the [make-whole] and post-petition interest."

Judge Porter gave two reasons for his dissent. First, he said that application of absolute priority is not a "right" protected under Section 1124(1), which describes how a claim must be treated if it is to be unimpaired. Like the dissenter in the Ninth Circuit, he said that absolute priority is a "procedural protection" and not a substantive right to payment.

Second, Judge Porter assumed that Section 1124(1) requires "treatment consistent with absolute priority." Nevertheless, he said that the noteholders were unimpaired "because it is the Code that alters the Noteholders' right, not the Plan."

For two other reasons, Judge Porter disagreed with the notion "that *Jevic* requires Hertz to pay contract-rate interest."

First, Judge Porter said that the bankruptcy court had violated the absolute priority rule in *Jevic* by exercising power "without any express basis in the Code." In the Hertz case, he said that "the Code expressly *disempowers* courts from allowing claims for post-petition contract-rate interest over an objection. § 502(b)(2)." [Emphasis in original.]

Second, Judge Porter assumed the majority was correct that "Hertz violate[d] the common law absolute priority rule." In *Jevic*, he said that structured dismissal "violated the *codified* absolute priority rule." [Emphasis in original.] In the Hertz plan, he said that the debtor "has not violated the codified absolute priority rules because it has paid the Noteholders' allowed claims in full."

In sum, Judge Porter said that *Jevic* "does not apply to the facts here." He "would not use the common law absolute priority rule as an 'extratextual supplement' to supplant § 502(b)(2)," because "the Code's disallowance of the Noteholders' claims is clear and unambiguous."

Chenault-Vaughan Family Partnership Ltd. V. MDC Reeves Energy LLC (In re MTE Holdings LLC), 23-1916 (3d Cir. May 7, 2025)

Third Circuit Holds: Magistrate Judges May Issue Final Orders on Bankruptcy Appeals

The Third Circuit splits from Seventh and Tenth Circuit opinions dating from 1987 and 1990.

Creating a circuit split, the Third Circuit held that "a magistrate judge may enter final judgment in a bankruptcy appeal" if there is "consent of the parties and referral by a district court." The Seventh and Tenth Circuits had ruled to the contrary in 1987 and 1990, holding that magistrate judges may not enter final orders in bankruptcy appeals.

The Third Circuit remanded its case to the bankruptcy court for further, substantial proceedings. There may be no petition for *certiorari* or rehearing *en banc*, because both parties were in favor of a final order by the magistrate judge. The Third Circuit had appointed an *amicus* to argue against the appellate power of magistrate judges, but the *amicus* lacks standing to pursue the issue further.

The bankruptcy judge in Delaware was presiding over an adversary proceeding between the holder of a royalty interest in an oil and gas property and the operator of the site. The bankruptcy judge granted summary judgment in favor of the operator.

On the ensuing appeal, Judge Freeman said in her May 7 opinion said that "the parties consented to proceed before a Magistrate Judge for all proceedings, including final judgment." She went on to say that the magistrate judge raised the question of her own jurisdiction *sua sponte*.

On the merits, the magistrate judge affirmed the bankruptcy court, with a proviso that her decision should be taken as a report and recommendation if there were no power to enter a final order.

Pivotal Statutory Amendments

Judge Freeman said that the circuit's "jurisdiction to hear this appeal turns on whether the Magistrate Judge had jurisdiction to enter a final judgment in the bankruptcy appeal." She noted how the circuit had "appointed David R. Kuney, Esq. as *Amicus Curiae* to argue the position that a magistrate judge lacks jurisdiction to issue a final judgment in a bankruptcy appeal." She thanked the "*Amicus* for his service to the Court." Prof. Kuney is an Adjunct Professor at the Georgetown University Law School.

The outcome turned on 28 U.S.C. § 636(c), which provides:

Notwithstanding any provision of law to the contrary — (1) Upon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

Immediately, Judge Freeman noted how the Third Circuit had ruled in 1983, soon after adoption of the Bankruptcy Code, that "a magistrate judge lacked jurisdiction under section 636(c)(1) to issue a final order in a bankruptcy appeal, notwithstanding the consent of the parties. *In re Morrissey*, 717 F.2d 100, 101 (3d Cir. 1983)." However, the statutes then were different.

Judge Freeman said that the appeals court ruled as it did in *Morrissey* because, at the time, 28 U.S.C. § 1334(c) was written to mean that a "district court may not refer an appeal under that section to a magistrate or to a special master." She referred to the preclusion of appeals to magistrate judges as the "Express Prohibition."

In response to the Supreme Court's *Northern Pipeline* decision in 1982 finding the bankruptcy court's jurisdiction to be unconstitutional, Judge Freeman said that Congress "completely rewrote" the bankruptcy court's jurisdiction in 1984 with a new Section 1334. She said that "[t]he Express Prohibition on the referral of bankruptcy appeals to magistrate judges 'was repealed by simple omission,'" quoting the Fifth Circuit in *Minerex Erdoel, Inc. v. Sina, Inc.*, 838 F.2d 781, 785 (5th Cir. 1988).

Judge Freeman said that the new jurisdictional statute presented the appeals court with "a question of first impression in this Circuit under the current statutory regime." Since 1984, she held that "there has been no barrier to magistrate judges' authority to enter final judgments in bankruptcy appeals pursuant to section 636(c) with the consent of the parties."

Citing a Third Circuit opinion in a criminal case, Judge Freeman said that a magistrate judge's jurisdiction is coextensive with the district court's jurisdiction when the parties consent.

Judge Freeman buttressed her reading of the statute "with the reality that magistrate judges function as part of a district court" and with the Third Circuit's holding "that entry of final judgment by a magistrate judge upon consent of the parties, as a general matter, does not violate Article III of the United States Constitution." Furthermore, she said, "The right to an Article III adjudicator is a personal right that is subject to waiver," according to Supreme Court precedent.

Judge Freeman said she "cannot agree" with the Seventh and Tenth Circuits, which held that magistrate judges are not permitted to enter final orders on bankruptcy appeals. *See In re Elcona Homes Corp.*, 810 F.2d 136, 139 (7th Cir. 1987); and *Virginia Beach Fed. Sav. & Loan Ass'n v. Wood*, 901 F.2d 849 (10th Cir. 1990).

Having found jurisdiction, Judge Freeman affirmed in part and remanded in part for further proceedings on issues other than jurisdiction.

In re Congoleum Corp., 23-1295 (3d Cir. Aug. 22, 2025)

On Panel Rehearing, Third Circuit Permits Reopening a 22-Year-Old Case

Reversing its prior decision after rehearing, the Third Circuit allowed a bankruptcy judge to interpret a confirmation decision made 12 years before by a district judge.

Here's something you won't see again for years: The Third Circuit granted rehearing to reconsider a nonprecedential opinion handed down one year ago. In a split decision on August 22, the majority vacated last year's opinion and handed down a new decision with the polar opposite result. The majority reversed the prior opinion right down the line.

In his 32-page opinion for the majority, Chief Circuit Judge Michael A. Chagares broadened the ability of a bankruptcy court to reopen a chapter 11 case filed 22 years before. He also fortified the understanding of what a core proceeding is and the ability of a bankruptcy judge to interpret a confirmation order made by a different judge 15 years earlier. He even said that a bankruptcy judge has the right to interpret a decision by a district judge.

Bankruptcy Court Finds *Res Judicata*

The debtor was a flooring manufacturer that had been operating since the 1880s. The products had contained asbestos. Facing almost 100,000 personal injury claims, the debtor filed a chapter 11 petition for the first time in 2003. The debtor had a former corporate sibling in the shipbuilding business.

As part of the plan for emerging from the first chapter 11 case, the debtor's insurer bought back its policies in a settlement that included an injunction barring anyone from bringing suit under the policies. As part of the settlement approved by the bankruptcy court, the debtor submitted a declaration saying that the shipbuilder had no responsibility for the asbestos claims.

After the settlement in bankruptcy court, the district court withdrew the reference and eventually confirmed a chapter 11 plan in 2010. The plan provided that confirmation would not release any liabilities under environmental law. The confirmation order nevertheless contained a finding that the shipbuilder had no liability for asbestos claims.

A neighboring landowner, whom we shall refer to as the creditor, had notice of the plan, the disclosure statement, the confirmation hearing and the confirmation order. The creditor did not appear at the confirmation hearing and did not object to the finding in the confirmation order that the shipbuilder had no asbestos liability. The plan went effective, and the district court referred the case once again to the bankruptcy court.
Seven years later in environmental remediation litigation, the creditor asserted claims against the shipbuilder.

The debtor filed a second chapter 11 petition in 2020 before a different bankruptcy judge. In the second bankruptcy, the shipbuilder filed an adversary proceeding against the creditor asserting that it had no environmental liability as a consequence of the finding in the 2010 confirmation order. Bankruptcy Judge Michael B. Kaplan of Trenton, N.J., granted summary judgment in favor of the shipbuilder, deciding that the shipbuilder's liability had been actually litigated in the first bankruptcy.

However, the creditor refused to dismiss the separate remediation suit against the shipbuilder. So, on motion by the shipbuilder, the bankruptcy court reopened the 2003 bankruptcy case, and the "old" case was transferred to Bankruptcy Judge Kaplan, who was presiding over the "new" case.
According to the majority opinion by Chief Circuit Judge Chagares, the bankruptcy judge decided that the shipbuilder's lack of liability was *res judicata* and bound the creditor as a consequence of the finding in the 2010 confirmation order. [Note: Throughout, Judge Chagares and the dissenter use the term *res judicata* rather than claim preclusion, so we shall also.]

The district court reversed on appeal, believing that the district court in the remediation litigation was in a better position to decide about the preclusive effect of the confirmation order. The first time around, the same Third Circuit panel affirmed in a nonprecedential opinion on August 1, 2024, by Circuit Judge Matey. To read the circuit's original opinion, click here. Judge Matey would become the dissenter after rehearing.

The shipbuilder moved for rehearing, which the panel granted and took under submission on June 12, 2025. With a dissent, the majority vacated the prior opinion on August 22 and reversed course. One of the judges on the original panel had taken inactive status. On the panel that heard reargument, he was replaced by Circuit Judge Cindy K. Chung.

Jurisdiction to Reopen

The majority first dealt with the bankruptcy court's jurisdiction and discretion to reopen the 2003 chapter 11 case.

On jurisdiction, Judge Chagares stated how the Third Circuit had “repeatedly held” that a bankruptcy court has jurisdiction to interpret its own orders. After confirmation, he said that bankruptcy courts retain “related to” jurisdiction over core matters like confirmation.

The creditor contended the bankruptcy court had no jurisdiction because the district court had entered the confirmation order. Judge Chagares rejected the argument, saying,

[T]his distinction is of no significance because the District Court in this case entered the Confirmation Order while sitting in bankruptcy. Additionally, after the case was referred again to the Bankruptcy Court, it was the Bankruptcy Court, not the District Court, that was tasked with adjudicating the case.

Judge Chagares held that the “motion to reopen was plainly a core bankruptcy proceeding, which included disputes concerning the meaning of the Confirmation Order,” because the shipbuilder had asked the Bankruptcy Court to “interpret and enforce” the confirmation order.

Notably, Judge Chagares rejected the creditor’s contention that a later bankruptcy judge cannot reopen a case to interpret a different bankruptcy judge’s order. He said, “The identity of the judge cannot be a jurisdictional prerequisite because the administrative needs of courts frequently require reassignment of cases.”

Discretion to Reopen

Having found jurisdiction, Judge Chagares turned to the question of whether the bankruptcy court had abused discretion by reopening the 2003 case.

Judge Chagares observed that the bankruptcy judge had presided over a similar dispute in the newer case and that the district court had “no particular familiarity with the issues.” He dismissed the idea that there was no reason to reopen the case when the outcome would not affect the debtor’s estate. He said there was cause to reopen for the interpretation and enforcement of a previously approved settlement and confirmation order.

Judge Chagares found no abuse of discretion in the bankruptcy court’s “well-reasoned decision to reopen bankruptcy proceedings.”

Third Circuit: Confirmation Order Was Res Judicata Between Third Parties

The majority on a Third Circuit panel decided that a confirmation order many years earlier prevented one nondebtor from suing another nondebtor on an issue that wouldn’t affect the debtor’s estate but did entail interpreting the confirmation order.

Yesterday, we reported the Third Circuit’s 2/1 decision on August 22 upholding the bankruptcy court’s jurisdiction and exercise of discretion in reopening a 2003 case to interpret and enforce a chapter 11 confirmation order entered by a *district court* in 2010.

The debtor's chapter 11 plan and confirmation order in 2010 dealt with asbestos liability. The confirmation order included a finding that the debtor's affiliate, a shipbuilder, had no liability for asbestos. Years later, a creditor sued the shipbuilder to share the cost of asbestos remediation. The bankruptcy court in the debtor's second bankruptcy reopened the 2003 case and decided that the 2010 confirmation order was *res judicata* and barred the creditor's assertion of remediation costs against the shipbuilder.

Today, we deal with the portion of the majority opinion by Chief Circuit Judge Michael A. Chagares concerning *res judicata*. [Note: Both Judge Chagares and the dissenter use the term *res judicata*, not claim preclusion, and so shall we.]

Sufficient Notice

The creditor contended it had not received adequate notice and that *res judicata* therefore could not apply. The creditor asserted that its nine boxes of records from the 2003 bankruptcy did not contain the motion to approve the settlement in which the shipbuilder was held to have no asbestos liability. However, the debtor's application for the settlement showed the creditor on two different service lists.

Judge Chagares found that "the record establishes by a preponderance of the evidence that [the creditor] was served with the motion for approval" of the settlement and the settlement order. The creditor conceded that it had notice of the plan, the disclosure statement, the confirmation hearing and the confirmation order but argued that notice of the finding was not "conspicuous." To the contrary, Judge Chagares said that a "review of the draft Confirmation Order, which included the [finding of no liability], would have alerted [the creditor] to the fact that the . . . Settlement included a determination of [the shipbuilder's] liability."

Judge Chagares said that the creditor's due process rights were "more than satisfied."

The Finding Covered Environmental Liabilities

Next, Judge Chagares addressed the question of whether the confirmation finding bound the creditor in the later remediation litigation because the finding said nothing about environmental liabilities. He quoted the finding, which said that the shipbuilder had "no responsibility for any of the liabilities of" the debtor. He went on to say that the finding was "not a third-party release but rather a determination that [the shipbuilder] was never responsible for the [debtor's] liabilities." He noted how the finding never used the word "release," and that the plan explicitly said there were no third-party releases.

Judge Chagares decided that the circuit "must enforce the Confirmation Order's plain, unambiguous meaning: [the shipbuilder] inherited none of the [debtor's] liabilities."

***Res Judicata* Applied**

Having held that the confirmation finding was binding on the creditor, Judge Chagares analyzed whether it was *res judicata*. Quoting the Third Circuit, he said that *res judicata* applies to "'(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.'" Quoting the Supreme Court, he said that "no party may 'relitigat[e] issues that were or could have been raised in' an action resulting in 'a final judgment on the merits of the action.'"

Judge Chagares said that the creditor was a party in the bankruptcy proceedings and "had an opportunity" to litigate the finding, which became a final judgment binding on all creditors. He added that "the application of *res judicata* to confirmation orders occupies a position of 'high importance in the bankruptcy context' because all parties must be able to rely on a confirmation order without worry[ing] that the order is subject to change following post-confirmation challenges by dissatisfied creditors."
Because it was a creditor with notice, Judge Chagares said that the creditor's "lack of participation is irrelevant; 'a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation.'" He added that the finding in the confirmation order "resolved the same issue" as the one raised in the creditor's remediation lawsuit.

Judge Chagares held that the finding in the confirmation order "thus binds [the creditor] and has *res judicata* effect." He summarized the majority's holdings as follows:

The Bankruptcy Court did not err in exercising its jurisdiction to reopen the bankruptcy case because it was asked to interpret and enforce the Confirmation Order, which was entered by a court sitting in bankruptcy. Because the . . . Finding conclusively determined that [the shipbuilder] did not inherit the liabilities of the [debtor] and was a final order binding [the creditor], which had notice of the confirmation and . . . Settlement proceedings, the Bankruptcy Court also did not err in holding that the . . . Finding barred [the creditor's] claims against [the shipbuilder].

Third Circuit Dissenter Says that Bankruptcy Judges 'Assist' Article III Judges

Third Circuit Judge Paul B. Matey dissented from his colleagues who held that a *bankruptcy judge* more than a decade later had the jurisdiction and authority to interpret and enforce a confirmation order signed by a *district judge* after withdrawal of the reference. Remember, the majority had granted panel rehearing and basically reversed a nonprecedential opinion from the year before.

Judge Matey said the panel "reconsidered when a few academics warned the sky was poised to fall." The sky had not fallen "but still the panel changes course and empowers a congressionally created adjudicative body to wrest jurisdiction from an Article III court."

Judge Matey "respectfully" dissented because "Congress created the bankruptcy forum to assist federal judges, not usurp the Article III prerogative.

The Historical Power to Reopen

Judge Matey traced the history of the bankruptcy court's power to reopen closed cases and said that Congress did not write "on a clean slate" in 1978 with adoption of the Bankruptcy Code. He began with the Bankruptcy Act of 1898 and said it allowed reopening a case that had not been "fully administered."

In 1938, the reopening power was expanded to allow reopening for "cause shown." "But broader did not mean boundless," Judge Matey said, "and interpretations soon agreed that cause existed when the bankruptcy estate had not been fully administered — much the same circumstances under which reopening was authorized under the 1898 Act."

Consequently, Judge Matey said, "courts allowed reopening when a debtor concealed assets in the bankruptcy or the assets were previously unreachable." In 1973, he explained that the Bankruptcy Rules added "other good cause," a concept carried over in the 1978 Bankruptcy Code. However, he interpreted the advisory committee's note to mean that "the drafters saw no need to expand the reopening power or remove its connection to administration of the bankruptcy estate, acting narrowly to clarify that reopening was proper to provide relief to the debtor."
"In sum," Judge Matey said, "section 350(b) incorporates the unbroken understanding of a restricted reopening power recognized for nearly ninety years." Section 350(b) provides, "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

More Recent Precedent

"Our precedent does not disturb this conclusion," Judge Matey said. For instance, he said, "we have affirmed bankruptcy reopening for other cause under section 350(b) . . . to ensure [that] active state court actions did not intrude on federal bankruptcy cases."

However, Judge Matey said, "those cases cannot be read to countenance a bankruptcy judge wresting jurisdiction from an Article III court competent and capable of interpreting an order collateral to the bankruptcy."

Judge Matey also disagreed with the majority's belief "that the Bankruptcy Court was "best suited" to consider the motion to reopen." The 2010 confirmation order, he said, "was entered by the District Court exercising its supervisory authority over the bankruptcy judge following a series of errors, leaving the trial judge well-suited to confirm its meaning."

In conclusion, Judge Matey said,

> Today's result stymies the District Court's constitutional and statutory authority while commanding future judges to make way for the "experts." Congress did not promote such protectionism from Article III officials and "the word 'cause' is too weak a reed upon which to rest so weighty a power." *Czyewski v. Jevic Holding Corp.*, 580 U.S. 451, 466 (2017).

Observations

In a footnote citing the withdrawal power of the district court under 28 U.S.C. § 157(d), the majority said, "we respectfully disagree with our dissenting colleague that our holding permits bankruptcy courts to usurp the Article III authority of district courts."

Prof. Ralph Brubaker provided ABI with the following commentary:

> Neither a bankruptcy court nor a district court sitting in bankruptcy can make a factual finding on a third-party claim between two nondebtors, much less enter a binding judgment on that claim, if that claim was never asserted in a way that would actually invoke the court's subject-matter jurisdiction over that claim, i.e., by filing an adversary proceeding that names and serves the party against whom that third-party claim is being made. Bankruptcy discharge is an exception to that principle, but the panel majority in the *Congoleum* case explicitly held that the confirmed plan did not purport to "release" or discharge the claim at issue.

Prof. Brubaker is the James H.M. Sprayregen Professor of Law at the University of Illinois College of Law.

The opinion is *In re Congoleum Corp.*, 23-1295 (3d Cir. Aug. 22, 2025).

Faculty

Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy, as well as a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Rosa J. Evergreen is a partner in the Washington, D.C., office of Arnold & Porter Kaye Scholer LLP in its Bankruptcy and Restructuring group. She has experience in all aspects of bankruptcy and corporate restructuring, including complex chapter 11 cases, asset dispositions and bankruptcy litigation, as well as out-of-court restructurings and receivership cases. Ms. Evergreen has been involved in bankruptcy cases in a wide range of industries across the country, including financial services, retail, real estate, environmental, oil and gas, hospitality and health care. She also has been involved in a number of large bankruptcies, including AbitibiBowater, Adelphia, ASARCO, Borders, Circuit City, Extraction Oil & Gas, General Motors, LandAmerica, Lehman Brothers, Quebecor, Reader's Digest, The PMI Group, Vertis and Windstream. Ms. Evergreen has acted on behalf of corporate debtors, secured and unsecured creditors, bondholders, lenders, trade vendors and suppliers, landlords, contract counterparties, private equity funds, investors and asset-purchasers, and individuals and businesses involved in bankruptcy court litigation. She also has experience advising boards of directors and individual officers and directors in insolvency-related matters. Ms. Evergreen is active in many bankruptcy-related professional organizations, including ABI, the International Women's Insolvency & Restructuring Confederation and Turnaround Management Association. Ms. Evergreen has been recognized in *Chambers USA*, *The Best Lawyers in America*, *Washington, DC Super Lawyers* and *Washingtonian Magazine*. She was named one of 12 "Outstanding Young Restructuring Lawyers" by *Turnarounds & Workouts* for 2017, and she was named one of ABI's "40 under 40" emerging leaders for 2018. In 2023, *The Deal* recognized her as being among the "Top Women in Deal making," and in 2024, she edited *Driving the Recovery Bus: Augmenting Creditor Recoveries Through Claims Brought by a Litigation Trustee*, published by ABI. Ms. Evergreen maintains an active *pro bono* practice and received the DC Bar's Laura N. Rinaldi Pro Bono Lawyer of the Year Award for 2018. Prior to joining Arnold & Porter, she was a law clerk to Hon. Stephen C. St. John of the U.S. Bankruptcy Court for the Eastern District of Virginia. Ms. Evergreen received her B.A. from Georgetown University and her M.B.A. and J.D. from William & Mary.

Hon. Craig T. Goldblatt is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in April 2021. Prior to his appointment, he was a bankruptcy litigator in the Washington, D.C., office of WilmerHale, where his practice primarily involved the representation of financial institutions and other commercial creditors in complex bankruptcy litigation and appeals. Earlier in his career, Judge Goldblatt clerked for Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit and Hon. David H. Souter of the U.S. Supreme Court. He is a Conferee in the National Bankruptcy Conference (for which he serves as Secretary) and is a vice president of the American College of Bankruptcy. He also has been active on the Business Bankruptcy Committee of the American Bar Association's Business Law Section. Judge Goldblatt has served on the Education Committee of the National Conference of Bankruptcy Judges and as an adjunct professor at Georgetown University Law Center and George Washington University Law School, where he teaches classes focused on bankruptcy law. He has helped coach teams of law students (from George Washington University Law School, Howard Law School and Temple Law School) in the Duberstein Moot Court Competition for each of the past seven years. Judge Goldblatt received his Bachelor's degree *magna cum laude* from Georgetown University in 1990 and his J.D. with honors from the University of Chicago Law School in 1993, where he served as comment editor of the *University of Chicago Law Review*.

Hon. Paul R. Hage is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on Sept. 30, 2024. Prior to his appointment to the bench, he was co-chair of the bankruptcy group at Taft, Stettinius & Hollister, LLP, where he practiced for 18 years. Judge Hage serves on ABI's Executive Committee as Secretary and as an Executive Editor of the *ABI Journal*. He is a Fellow in the American College of Bankruptcy and serves as co-director of the Conrad B. Duberstein National Bankruptcy Moot Court Competition. In 2017, Judge Hage was selected as a member of ABI's inaugural "40 Under 40" class. He received his bachelor's degree from James Madison College at Michigan State University, his J.D. from Loyola University Chicago School of Law and his LL.M. in bankruptcy from St. John's University School of Law.

Hon. David S. Jones is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 19, 2021. He handles a varied docket that has included numerous chapter 15 matters, as well as the Revlon bankruptcy and several cases involving aviation and aircraft financing. Judge Jones previously clerked for Hon. Morris E. Lasker, U.S. District Judge for the Southern District of New York, from 1990-92, and was in private practice in New York from 1992-96. From 1996 until he was appointed to the bench, he served as an Assistant U.S. Attorney for the Southern District of New York, and at different times served as the chief of the U.S. Attorney's Office's Tax and Bankruptcy Unit, the Office's chief civil appellate attorney and as deputy chief of the Civil Division. Judge Jones was awarded the Justice Department's Director's Award and the New York City Bar Association's Henry L. Stimson Medal, among other awards. He also served as an instructor at the National Advocacy Center, and as an evaluator of U.S. Attorney's Offices throughout the nation. Judge Jones received his A.B. *magna cum laude* from Brown University in 1985 and his J.D. *cum laude* from Harvard Law School in 1990.

Bill Rochelle is ABI's editor-at-large, based in New York. He joined ABI in 2015 and writes every day on developments in consumer and reorganization law. For the prior nine years, Mr. Rochelle was the bankruptcy columnist for Bloomberg News. Before turning to journalism, he practiced bankruptcy law for 35 years, including 17 years as a partner in the New York office of Fulbright & Jaworski LLP. In addition to writing, Mr. Rochelle travels the country for ABI, speaking to bar groups and professional organizations on hot topics in the turnaround community and trends in consumer bankruptcies. He earned his undergraduate and law degrees from Columbia University, where he was a Harlan Fiske Stone Scholar.