AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

What Courts and Practitioners Have Done in the Wake of *Purdue*

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CONCURRENT WORKSHOP

2025

Creative Alternatives in the Post-Purdue World

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July 24-27, 2025

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Analysis of *Harrington v. Purdue Pharma L.P.*

What did it hold, what did it do, what did it say?
What did it not say?

Harrington v. Purdue Pharma L.P. Background

- Purdue filed for bankruptcy in 2019 after thousands of lawsuits were filed against it for injuries and deaths stemming from their product OxyContin, which fueled the opioid crisis.
- Chapter 11 plan was confirmed in 2021. The Sackler family, who owned and controlled Purdue, agreed to contribute $4.325 billion in exchange for non-consensual releases from all opioid liability.
- Certain states and the U.S. Trustee's office appealed. The district court held that nothing in the law authorizes bankruptcy courts to extinguish claims against third parties, like the Sacklers, without the claimants' consent.
- The Sacklers increased their contribution to $5.5-6 billion and the states dropped their objection to the plan.
- Purdue appealed to the Second Circuit. A divided panel reversed the district court and revived the bankruptcy court's order approving the now-modified plan.
- The U.S. Trustee's office appealed to the United States Supreme Court. The Court granted certiorari due to a circuit split regarding the issue of whether bankruptcy courts can grant third-party releases without the consent of claimants.

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Holding

- Outside of § 524(g), the Bankruptcy Code does not authorize nonconsensual, third-party releases.
  - The only possible authorization for a nonconsensual, third-party release is § 1123(b)(6) allowing "any other appropriate provision not inconsistent with the applicable provisions of this title."
  - "Catchall" encompasses only provisions similar to the preceding list.
  - Nothing in § 1123(b) suggests authority to adjust or release claims against a non-debtor without consent of claimant.
  - Giving a non-debtor a release even broader than a bankruptcy discharge conflicts with the fundamental bargain of bankruptcy law: a debtor receives a discharge in exchange for filing a case, proceeding honestly and placing assets on the table for creditors.

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The Dissent

by Justice Kavanaugh, joined by Chief Justic Roberts, Justice Sotomayor, and Justic Kagan

The Dissent

- Justice Kavanaugh "respectfully but empathetically" dissented, finding the majority decision restricted "the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims."
- Purdue's plan was "a shining example of the bankruptcy system at work."
- "Despite the broad term 'appropriate' in the statutory text, despite the longstanding precedents approving mass-tort bankruptcy plans with non-debtor releases like these, despite 50 state Attorneys General signing on, and despite the pleas of the opioid victims, today's decision creates a new atextual restriction on the authority of bankruptcy courts to approve appropriate plan provisions."
- "Devastating for more than 100,000 opioid victims and their families."

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The Dissent
Continued

Non-debtor releases appropriate in many mass-tort bankruptcies

- The non-debtor release is meaningful in that it ensures victim and creditor recovery in the face of multiple collective-action problems.
- In Purdue's case, the non-debtor release (i) protected Purdue's estate from the risk of being depleted by indemnification claims, and (ii) operated as a settlement of potential claims against the Sacklers and thus enabled the Sacklers' large settlement payment to the estate.
- Without the settlement payment, Purdue's estate is worth approx. $1.8 billion, the United States would recover its $2 billion superpriority claim first, and victims and other creditors would be left with nothing (citing In re Purdue Pharma L.P., 633 B.R. 53, 58 (Bkrtcy. Ct. SDNY 2021).
- The Sacklers did not receive a bankruptcy discharge – a discharge in bankruptcy is different from non-debtor releases. A debtor in bankruptcy receives a discharge where most of their pre-petition debts are released, and non-debtor releases "do not offer the umbrella protection of a discharge in bankruptcy" (citing Johns- Manville Corp., 837 F.2d 89, 91 (CA2 1988)).

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The Dissent

Conclusion

- The bankruptcy system and non-debtor releases have been indispensable to solving mass-tort cases as evidenced by cases involving asbestos, the Boy Scouts, the Catholic Church, silicone breast implants, the Dalkon Shield [A.H. Robins, Inc.], and others.
- "The Court's decision today jettisons a carefully circumscribed and critically important tool that bankruptcy courts have long used and continue to need to handle mass-tort bankruptcies going forward."
- "Only Congress can fix the chaos that will now ensue. The Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue."

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Other Issues?

Availability of Third-Party Releases for Non-Asbestos Claims?

- The *Purdue* Court also recognized an additional potential exception to the prohibition on nonconsensual third-party releases—where the proposed plan provides for full payment of the claims being released. *See Purdue*, 144 S. Ct. at 2088 ("Nor do we have occasion today to … pass upon a plan that provides for the full satisfaction of claims against a third-party non-debtor.")

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Other Issues

- *Purdue* distinguished release of claims belonging to the estate, including derivative claims.
- What constitutes a claim belonging to the estate? *See, e.g., In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020); In re Tronox Inc., 855 F.3d 84 (2d Cir. 2017); *In re Whittaker, Clark, & Daniels*, No. 23-13575 (MBK), 2024 WL 3811311
- (Bankr. D.N.J. Aug. 13, 2024)
- The Third Circuit, In re: Emoral, Inc., No. 13-1467 (3d Cir. 2014), in a 2-1 decision, set forth the standard in the Third Circuit for what constitutes a claim belonging to the estate versus a claim that belongs to the claimant which cannot be channeled.
- So is the claim a "generalized" claim which belongs to the Estate or is it a personalized claim for the creditor?
- Emoral, while followed by the Third Circuit, is not favored by many Courts and seems to be reluctantly tolerated. Perhaps it might be revisited in the future by the Third Circuit or other Appellate Courts.

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Claims Belonging to the Estate

"In sum, all Successor Liability Claims seek—in some fashion—to impute Debtors' liability to a non-debtor entity. The harms alleged and the factual allegations necessary to establish a Successor Liability Claim—whether it is based on 'mere continuation' theory, product line exception,' or any other legal basis—are not unique to any one creditor. Given the factual overlaps and identical harms alleged, the Court concludes that the Successor Liability Claims are not direct claims under the *Emoral* test, no matter the theory under which they are pursued. As a result, they are property of the estate under § 541(a)(1) and § 541(a)(7) [by way of § 544(a)(1)], and at this juncture, the Debtors are the appropriate parties to bring these claims."

- *In re Whittaker, Clark, & Daniels*, No. 23-13575 (MBK), 2024 WL 3811311, at *16 (Bankr. D.N.J. Aug. 13, 2024).

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Open Issue

- What constitutes a plan that provides for "full satisfaction" of claims against a third-party non-debtor?

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Post Purdue:
Extending the Automatic Stay to Non-Debtors

The Automatic Stay

- By its terms the automatic stay protects only debtors
- Section 105(a) allows the bankruptcy court to issue necessary orders to carry out the provisions of the Code. Courts can use this to extend the automatic stay to non-debtors when it is essential for the debtor's reorganization
- Likelihood of success on the merits – when seeking to extend the automatic stay to non-debtors, debtors must demonstrate a likelihood of success on the merits of their reorganization plan

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The Automatic Stay
Continued

Debtors may seek to extend the automatic stay to non-debtors in a variety of situations:

- Current management/directors
- Corporate parent and/or affiliates
- Indemnitors
- Other third party tortfeasors

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Post-Purdue Case Law

Post-*Purdue* Case Law

- Post-Purdue case law indicates that Purdue should not be interpreted as a bar to granting preliminary injunctions enjoining suits against non-debtors
- However, courts will examine the likelihood of success on the merits
  - Following *Purdue* "success on the merits" cannot be based on the likelihood that the non-debtor would be entitled to a non-consensual third-party release through the plan process.
- But a preliminary injunction may still be granted if the Court concludes that (a) providing the debtor's management a breathing spell from the distraction of other litigation is necessary to permit the debtor to focus on the reorganization of its business *or*(b) because it believes the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors. Both of those outcomes may be viewed as "success on the merits" for this purpose.

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In re Parlement Technologies, Inc.

- Judge Craig T. Goldblatt of the U.S. Bankruptcy Court for the District of Delaware
- Debtor sought to extend the automatic stay to its former officers as co-defendants in certain state court litigations during the pendency of the bankruptcy
- Held: when debtors are seeking a preliminary injunction to extend the automatic stay to non-debtors, they will not succeed when making the argument that they will have a "likelihood of success" in getting nonconsensual third-party releases under a plan, which was a possibility before *Purdue*.

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Coast to Coast Leasing, LLC

- Judge Jacqueline P. Cox of the U.S. Bankruptcy Court for the Northern District of Illinois held that
- A bankruptcy court may still grant a preliminary injunction if the court concludes that "'(a) providing the debtor's management a breathing spell from the distraction of other litigation is necessary to permit the debtor to focus on the reorganization of its business or (b) because it believes the parties may ultimately be able to negotiate a plan that includes a consensual resolution of the claims against the non-debtors.'"
  - The court held that the extension of the automatic stay was appropriate where the principals potentially facing litigation were going to be instrumental in the reorganization process, both through their intention to fund a plan of reorganization and through their continued attention, time and effort to the debtor's reorganization efforts.

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In re A.H. Robins, Inc.

- A seminal case standing in favor of third-party releases is In re A.H. Robins Co., Inc.. The Fourth Circuit affirmed a plan that contained third party releases in part because the plan provided for full satisfaction of claims. A.H. Robins was forced into bankruptcy due to mass tort product liability claims stemming from a contraceptive device, the Dalkon Shield. The court conducted an estimation proceeding and concluded that the sum of $2.475 billion would be sufficient to pay in all full all Dalkon Shield personal injury claims.
- A.H. Robins proposed a plan of reorganization, which included a trust fund of $2.475 billion for full payment of all Dalkon Shield claims.
- The plan channeled all Dalkon Shield claims to the trust and released all parties contributing funds to the trust from any further liability to Dalkon Shield claimants.
- On appeal, certain claimants objected to the channeling injunction and argued that the bankruptcy court lacked authority to enjoin claims against any entity other than A.H. Robins. In its decision upholding the non-consensual releases and related injunction, the Fourth Circuit emphasized that no party challenged the sufficiency of the insurance policies to fully pay the impacted claims.
- The Fourth Circuit held that a bankruptcy court "has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors." Because allowing claimants to pursue claims against third parties would defeat the interests of other creditors by disrupting the plan, the Fourth Circuit analogized to the marshalling doctrine and approved the third party releases.
- Thus, in the Fourth Circuit, non-consensual releases provided as part of a full-payment plan remain viable.

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In re Boy Scouts of America

- In the Boy Scouts chapter 11 case direct abuse claimants are paid in full pursuant to the chapter 11 plan proposed by the Boy Scouts. This finding was affirmed by the United States District Court for the District of Delaware. Pursuant to Judge Silverstein's findings, distributions from the trust constitute payment of full amount of recoverable damages. And because the survivors' legal right to compensation for their injuries is satisfied under the Boy Scouts' plan and TDP, the survivors may not pursue any others for further recovery on "Direct Abuse Claims" (i.e., holders of direct sexual abuse claims against the Boy Scouts) by operation of law.
- The payment in full inquiry is heavily factual, complicated by the fact that tort claims are unliquidated, and generally requires expert testimony on claim valuation and forecasting, availability of insurance proceeds, and asset valuation.
- In finding that holders of abuse claims would be paid in full under the Boy Scouts' chapter 11 plan, the Court relied heavily on the analyses performed by the debtor's expert on claim valuation, mass tort matrixes, and trust distribution structures.
- Similarly, the Boy Scouts' insurance expert provided testimony on available insurance coverage.
- Considering all the evidence presented, the bankruptcy court found it "more likely than not" that Direct Abuse Claims would be paid in full.

In re Boy Scouts of America
Continued

- The Third Circuit affirmed the Plan which had third party releases which were violative of the holdings in Purdue. The Third Circuit said that if the Plan had been considered by the Bankruptcy Court post-Purdue it would not be confirmable.
- As a result, the Third Circuit held that the Plan could go forward and continue to pay claimants. The Court also found that the Plan had been substantially consummated.
- The Third Circuit also determined that the appellant's claims were moot but did not address equitable mootness.

In Re Red River Talc, LLC, No. 4:24-bk-90505, US Bankruptcy Court, SDTX

- There were several factors that caused the dismissal of the Red River case, one in particular being that the Court found that Red River did not propose a "full pay" plan.
- How a "full pay" plan is determined to comply with Purdue is an open question, but the Red River plan did not, per Judge Lopez.
- The Bankruptcy Court rejected the notion that "full pay" in a tort case would comply with Purdue when the plan could pay tort claimants values determined by taking averages of settlements from certain firms and rejecting other settlements.

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Purdue's Impact on Releases and Exculpation (?)

Releases and Exculpation

- Estate Releases:
  - An estate release extinguishes claims held by the debtor(s) against identified non-debtor parties.
  - The claims subject to an estate release may arise before or during the administration of a chapter 11 case.
  - Estate releases generally are not controversial, as they are specifically authorized by Bankruptcy Code section 1123(b)(3)(A).
  - Courts evaluate a proposed estate release using the standard employed for approving settlements under Bankruptcy Rule 9019. Therefore, absent unusual circumstances, a court will approve an estate release, unless the decision to authorize the release falls below the lowest point in the range of reasonableness.

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Releases and Exculpation (cont.)

- Exculpation:
  - Exculpation is designed to provide protection for actions taken during the administration of a chapter 11 case, although pre-petition acts relating to the reorganization usually are included in a proposed exculpation. The obvious examples of pre-petition conduct that may be subject to exculpation include the formulation, negotiation, and implementation of the plan of reorganization a court will be asked to confirm, the RSA, PSA, or similar agreement, and other matters directly relating to a proposed reorganization.
  - The beneficiaries of exculpation generally are "estate fiduciaries," including estate professionals, official committees and their members, and a debtor's directors, officers, and key employees.
  - Claims asserted against estate fiduciaries for fraud, gross negligence, and willful misconduct are carved out and are not subject to exculpation.

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Releases and Exculpation (cont.)

- ***Third-Party Releases:***
  - Third-Party Releases extinguish claims held by non-debtor third parties against other non-debtor third parties and may be in favor of creditors and other parties who have contributed to a reorganization (e.g., lender, insider, sponsor).
  - Claims asserted against estate fiduciaries for fraud, gross negligence, and willful misconduct are carved out and are not subject to a third-party release.
  - As discussed earlier, following the Supreme Court's ruling in Purdue, a third-party release must be consensual.
- ***Why do they Matter?***
  - Third-party releases incentivize non-debtors (particularly those that may be subject to litigation for the company's financial downfall) to contribute funding to the reorganization in exchange for the release.
  - Third-party releases provide protection against unpredictable litigation resulting from director and officer indemnification claims.

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Third-Party Release: *What Constitutes Consent?*

- ***Governing law***: State v. Federal Law
  - Purdue did not determine what law (state or federal) applies to the determination of what constitutes a "consensual" release.
  - Courts are split on this question – including some Courts determining that neither option works well.
    - **Federal law** applies "because of the nature of the right at stake. The right which creditors are giving up by consensually releasing claims against third parties in a bankruptcy court is the right to have their claims heard by an Article III court…This is a ***personal constitutional right*** which is protected by ***federal*** Constitutional law." (Hon. Martin Glenn, Gol Linhas)
    - "[A]ny proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent. Not authorized by any provision of the Bankruptcy Code, any such consensual agreement would be governed instead by ***state law***." (Hon. Carl Bucki, Tonawanda Coke Corporation)
    - "[T]he question about whether a creditor has agreed to certain treatment is a matter of ***federal bankruptcy law***, with an already existing and well-developed body of case law on consent in the context of a collective bankruptcy proceeding." (Hon. Sean Lane, Spirit Airlines, Inc.)
    - "Although it seems from the foregoing that assessing the viability of a release based on '***federal law***' might be problematic, assessing it based on **state contract law** is no better." (Hon. Paul Baisier, LaVie Care Centers, LLC)

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Third-Party Release: *What Constitutes Consent? (cont.)*

- **Opt-in v. Opt-out**:
  - ***Opt-In***: A creditor will only be bound by the release if they execute the opt-in form and thereby affirmatively accept the third-party release.
  - ***Opt-Out***: A creditor will be bound by the release unless they affirmatively opt-out of the third-party releases. In this instance, a creditor's failure to act is deemed acceptance of the third-party release.
- **Impact of Vote on Plan**
  - *Vote to Accept Plan*: Courts have generally held that a vote to accept the plan is an affirmative action consenting to the third-party release.
  - *Vote to Reject Plan*: Generally dependent on if the opt-in or opt-out approach is taken.
  - *Non-voting Creditors (Fail to Cast Ballot or Deemed to Accept or Reject)*: Generally dependent on if the opt-in or opt-out approach is taken.

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Sampling of Recent Third-Party Release Opinions

Case	Judge	What Constitutes Consent?
Favorable "Opt-Out" Opinions		
LaVie Care Centers, LLC (NDGA)	Honorable Paul Baisier	• Opt-out releases were consensual based on facts and circumstances in this case, but claimants who did not vote or respond to the plan would be given the opportunity to rebut the presumption that they consented to the release. • The Court refused to strictly apply state law or federal law to the issue.
Spirit Airlines, Inc. (SDNY)	Honorable Sean Lane	• Opt-out releases were consensual because, among other reasons, the releases were prominently worded and clearly presented in all plan materials, the releasing creditors had every economic incentive to follow the plan process, and the releases were consistently presented. • The Court applied federal bankruptcy law.
GOL Linhas Aereas Inteligentes S.A. (SDNY)*	Honorable Martin Glenn	• An opt-out structure is a valid form of consent under federal law. The Court found that "consent…can be inferred from inaction *if* there has been constitutionally adequate service of process." • The Court applied federal bankruptcy law.
Roman Cath. Diocese of Syracuse (NDNY)	Honorable Wendy Kinsella	• Opt-out releases were deemed consensual because, among other reasons, (i) the creditors were represented by counsel and had active involvement in the case, (ii) the additional released parties provided $50 million in additional consideration, which resulted in meaningful recoveries to creditors; and (iii) there was risk that using an opt-in procedure would cause the released parties to withdraw their contribution.

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Sampling of Recent Third-Party Release Opinions (cont.)

Case	Judge	What Constitutes Consent?
Favorable "Opt-Out" Opinions		
Tonawanda Coke Corporation (WDNY)	Honorable Carl Bucki	• State law governs determination of consent and, under New York law, creditors are required to "affirmatively sign a writing under which it expressly agrees to discharge the non-debtor parties."
Smallhold, Inc. (DEL)	Honorable Craig Goldblatt	• Failure to opt-out of a third-party release does **not** constitute consent if a creditor was not solicited (*i.e.*, either deemed to reject or approve the plan) • Failure to opt-out of third-party release constitutes consent if a creditor voted on the Plan because "the vote is an affirmative step."
FTX Trading Ltd. (DEL)	Honorable John Dorsey	• A creditor's failure to **opt-out** of the releases constituted consent if they (i) were deemed to accept the plan or (ii) were solicited to vote on the plan because, among other reasons, the releases were narrowly tailored, they do did not include pre-petition conduct, the parties were given individual notice and the releases application is limited in scope. • Creditors that were deemed to reject the plan were required to **opt-in** to the releases.

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Chapter 15

Chapter 15 Overview

- Enacted in 2005 to foster orderly administration of cross-border restructurings
- Provides foreign debtors with access to U.S. courts upon recognition of foreign insolvency proceedings
- Principles of comity/cooperation between jurisdictions are paramount to the purpose and enactment of Chapter 15
- Foreign main v. non-main proceedings

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Chapter 15 & Third Party Releases

- Certain foreign jurisdictions permit non-consensual third party releases
  - Netherlands, U.K., Ireland, Australia, Singapore, Mexico, etc.
  - Often permit releases where there is a "sufficient nexus" between the claims being released and the creditor/debtor relationship
- In Ch 15; cannot be "manifestly contrary to US public policy"
- *Purdue* focused on statutory text of Chapter 11; did not rule on due process / constitutional concerns

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Post-Purdue Chapter 15 Case Law

- *In Re Crédito Real SAB de CV, SOFOM, E.N.R.*, No. 25-10208-TMH, (Bankr. D. Del. April 1, 2025) (Horan, J.) (appeal pending)
  - "Simply put, if permitting third-party releases is a policy decision that Congress can and has made, it cannot also be true that enforcing such releases where principles of cooperation and comity so require in chapter 15 would be 'manifestly contrary to the public policy of the United States.'"
- *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Jud.* (Bankr. S.D.N.Y. Apr. 21, 2025) (Glenn, J.)
  - Observing, *Purdue* "did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15."

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Chapter 15: Opportunities and Challenges

- Undeveloped US case law
- Consistency with interpretations of *Purdue*
- Global/foreign nexus; foreign law re non-consensual releases

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Outside the Code: Non-Bankruptcy Solutions

- Chapter 11 Challenges
  - Uncertainty; Cost; Scope of Relief
- Alternatives in the Market
  - Managing Litigation in the Tort System
  - Divestiture & Sale Processes
  - Insurance Products

Faculty

Brooke Leigh Bean is an associate in the Finance and Restructuring Group at King & Spalding LLP's Atlanta office. She represents corporate debtors in chapter 11 bankruptcy cases throughout the country, as well as banks and other investors in connection with their most complex restructuring, bankruptcy and finance matters. Ms. Bean's practice spans a wide variety of industries, including the restaurant, real estate, health care, energy, transportation and manufacturing industries. She received her Bachelor's degree *summa cum laude* from George Washington University and her J.D. from the University of Virginia School of Law.

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