The Rule of the Deal: Bankruptcy Bargains and Other Misnomers

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Practice under chapter 11 depends on bargaining and negotiation to produce a plan of reorganization for the corporate debtor. Because this bargaining occurs behind closed doors, its dynamics are opaque. In most cases, this is not a problem because we infer that quasi-private ordering will produce greater economic recoveries for more claimants, even as it may occasionally distort or deviate from positive law (the "rule of the deal").

This article assesses the rule of the deal in the normatively difficult bankruptcy of opioid-maker Purdue Pharma. The most notorious deal in that case was the nonconsensual "release" of hundreds of individuals and entities for direct liability for their alleged role in Purdue Pharma's twice-confessed federal drug-marketing crimes, including the Sackler family, who own the company and controlled it until shortly before bankruptcy.

Less attention has been paid to deals that made those releases virtually inevitable from the outset. This article fills that gap, explaining how "ex ante" and "ex post" bankruptcy bargains—a governance change, a stipulation, and a settlement with the Department of Justice—made it practically impossible for creditors to resist those releases. This had implications for the rule of law, and for the economic outcomes of the case.

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In the interest of transparency, I was involved peripherally in the *Purdue Pharma* case in several capacities, including as pro bono counsel to Peter Jackson, whose daughter Emily died after taking a single OxyContin in 2006. In addition, because much of the source material in this article comes from pleadings and transcripts in the *Purdue Pharma* bankruptcy case and appeals therefrom, I will abbreviate citations to documents from the main case (*In re Purdue Pharma, L.P. et al.,* case no. 19-23649 (RDD) (Bankr. S.D.N.Y. 2019)), as follows: "[title of document] [page] [(date)], [Bankr. electronic case filing number]." This article is dedicated to the memory of Matthew Adam Gray. Errors and omissions are mine alone.

The conduct of bankruptcy proceedings not only should be right but must seem right.[1]

Freedom of contract means, among other things, never having to say you are sorry.[2]

Is chapter 11 governed by the rule of law—or the rule of the deal?

By "rule of law" I adopt Margaret Jane Radin's straightforward definition: "first, there must be rules; second, those rules must be capable of being followed."[3] "Rule of the deal," by contrast, describes bankruptcy's strong appetite for bilateral bargains—deals—among small groups of strategically placed stakeholders that can distort or deviate from positive law. These bankruptcy bargains may be "ex ante," as in the "restructuring support agreement" (RSA) early in a case, or "ex post," as in settlement or asset-sale agreements midway through a case. They are log-rolled through the case to gain momentum toward a "grand bargain" that makes a plan of reorganization implementing those deals practically inevitable.

These bankruptcy bargains are not usually troublesome. They have long been the lifeblood of chapter 11 practice. They are also the subject of a large body of literature, which focuses mostly on their economic implications, and which typically asks whether they are coercive, or efficient, or—trickier—both?[4]

But they can be problematic in what I will call "social debt" bankruptcies. Social debt is financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and accountability.

The chapter 11 reorganization of opioid maker Purdue Pharma, the subject of this article, is perhaps the most notorious example of a "social

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[1] Knapp v. Seligson (*In re* Ira Haupt & Co.), 361 F.2d 164, 168 (2d Cir. 1966).

[2] Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578 (1985).

[3] *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989) (discussing LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969)); *see also* AMERICAN BAR ASSOCIATION, Rule of Law, https://www.americanbar.org/groups/public_education/resources/rule-of-law/ (last visited Oct. 5, 2021) ("The rule of law is a set of principles, or ideals, for ensuring an orderly and just society.").

[4] I discuss some of this literature *infra* Part 1.2.

debt" bankruptcy. In addition to other opioid makers (e.g., Endo[5]), other examples include organizational liability for large-scale sexual assault (e.g., over thirty Catholic organizations,[6] The Boy Scouts of America[7]), and alleged contributions to the crisis of gun violence (e.g., InfoWars[8]). "Social debt" is, in short, Ronald Coase's famous problem of *social cost*—externalities—writ very large.[9]

The most important questions in social debt bankruptcies will involve transparency and accountability: how did the misconduct occur, and do we have some confidence that those responsible have, in fact, been held accountable in a legally and socially acceptable way? Often, these questions will be answered by collateral litigation, such as individual prosecutions or tort lawsuits. Those other processes involve adversity and confrontation over basic questions of liability where the rule of law is often at a premium. By their nature, they will produce information about the underlying allegations, and determine individual liability or innocence.

The rule of the deal, by contrast, focuses on maximizing creditor payouts. The rule of law and the rule of the deal are both necessary features of the legal system—almost everything settles—but social debt bankruptcies require more of the former than the latter.

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[5] *In re* Endo Int'l PLC, No. 22-22549 (Bankr. S.D.N.Y. filed Aug. 16, 2022). Other opioid bankruptcies include those of Mallinckrodt and Insys. *See In re* Mallinckrodt PLC, 639 B.R. 837 (Bankr. D. Del. 2022); *In re* Insys Therapeutics, Inc., No. 19-11292, 2021 WL 5016127 (Bankr. D. Del. July 21, 2021).

[6] *See, e.g., Catholic Dioceses in Bankruptcy*, PA. STATE L. ELIBRARY (May 2022), https://elibrary.law.psu.edu/bankruptcy/ [https://perma.cc/L92B-G2KL]; *see also* Jonathan C. Lipson, *When Churches Fail: The* Diocesan *Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 369–70 (2006) (discussing early diocesan Chapter 11 reorganizations).

[7] *See In re* Boy Scouts of Am., No. 20-10343-LSS, 2021 BL 391582 (Bankr. D. Del. 2021). Others include USA Gymnastics and the Weinstein Company. *See In re* USA Gymnastics, No. 18-09108-RLM-11, 2020 WL 1932340 (Bankr. S.D. Ind. Apr. 20, 2020); *In re* Weinstein Co. Holdings LLC, No. 18-10601, 2021 BL 337722 (Bankr. D. Del. Aug. 10, 2022).

[8] Rachna Dhanrajani, Akriti Sharma & Kanishka Singh, *Alex Jones' Infowars Files for Bankruptcy in U.S. Court*, REUTERS (Apr. 18, 2022, 4:36 AM), https://www.reuters.com/business/media-telecom/alex-jones-infowars-files-bankruptcy-us-court-2022-04-18 [https://perma.cc/ZE6S-ALB2].

[9] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase saw externalities as a question of institutional choice: If I want to stop you from polluting, I can use government (courts or regulators), or I can cut a deal with you. The latter choice—private order rather than public force—was provocative because it was both counterintuitive and yet often true: externalities are routinely resolved through negotiated agreements, sometimes characterized as "bribing" or "lumping it." *See, e.g.,* Wendy J. Gordon & Tamar Frankel, *Enforcing Coasian Bribes for Non-Price Benefits: A New Role for Restitution*, 67 S. CAL. L. REV. 1519, 1571 (1994).

Unfortunately, *Purdue Pharma* was the opposite. The case has received extraordinary attention, including congressional scrutiny,[10] front page coverage in *The New York Times*,[11]and even three episodes of *Last Week Tonight with John Oliver*[12] for "nondebtor releases" (NDRs) that would give Purdue Pharma's owners, the wealthy and secretive Sackler family, the "global peace" they have long sought for their alleged role in the opioid crisis (the "Sackler Releases").[13]

A nondebtor release "operate[s] as a bankruptcy discharge arranged without a filing and without the safeguards of the Bankruptcy Code."[14] Thus, as others have observed, *Purdue Pharma* would give the Sacklers the benefits of bankruptcy without its burdens, including obligations of transparency (financial disclosure) and accountability (giving most assets to creditors).[15]

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[10] Congress has held two major hearings on the case. *See* Press Release, *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic*, H. Comm. on Oversight and Reform, Dec. 17, 2020, https://oversight.house.gov/legislation/hearings/the-role-of-purdue-pharma-and-the-sackler-family-in-the-opioid-epidemic (last visited Aug. 2, 2022); Press Release, *Oversight of the Bankruptcy Code, Part 1: Confronting Abuses of the Chapter 11 System,* H. Comm. on the Judiciary July 28, 2021, https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4672 (last visited Aug. 2, 2022). It has also spurred proposed legislation. *See, e.g.*, Nondebtor Release Prohibition Act of 2021, H.R. 4777 (2021) (Rep. Nadler): Stop Shielding Assets from Corporate Known Liability by Eliminating Non-debtor Releases [SACKLER] Act, H.R. 2096 (2021) (Rep. Maloney).

[11] Jan Hoffman, *Judge Overturns Purdue Pharma's Opioid Settlement*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/purdue-pharma-opioid-settlement.html.

[12] Rosy Cordero, '*Last Week Tonight': John Oliver Calls Out Purdue Pharma for Its Role in Opioid* Crisis, DEADLINE (Aug. 8, 2021), https://deadline.com/2021/08/last-week-tonight-john-oliver-talks-purdue-pharma-opioid-crisis-1234811259/. The larger story of the Sacklers, Purdue Pharma, and the overdose crisis have been the subject of several books and two television shows. *See, e.g.*, BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018); GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA (2020); PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (Knopf Doubleday Publishing Group, Kindle ed. 2021); *The Crime of the Century* (HBO 2022), https://www.hbo.com/documentaries/the-crime-of-the-century; *Dopesick* (HULU 2021), https://press.hulu.com/shows/dopesick/.

[13] As United States District Judge McMahon explained when vacating the releases, "[t]he Sacklers offered to contribute toward a settlement, but if – and only if – every member of the family could 'achieve global peace' from all civil (not criminal) litigation." *In re* Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[14] Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005).

[15] *See, e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 962 (2022); William Organek, *"A Bitter Result": Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 102 (2022); Lindsey Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1188 (2022).

The Sackler Releases are as hot as bankruptcy gets. Critics call them an "outrage,"[16] "lawless,"[17] "shocking,"[18] a "grift,"[19] and flatly unconstitutional.[20] Among other things, they are not authorized by any provision of the Bankruptcy Code, may exceed bankruptcy court authority, and may violate due process.[21] Proponents counter that they are "necessary" and that creditors voted for them by large majorities when they approved Purdue Pharma's plan of reorganization.[22] In any case, they may say, governments—who were the most assertive of Purdue Pharma's 600,000 creditors—were actively involved, ameliorating concerns about the "social" nature of the debt at issue in the case.

As of this writing, it is not clear whether the Sacklers will "get away with it."[23] Although the Bankruptcy Court in *Purdue Pharma* approved the Sackler Releases, the District Court reversed on grounds that the Bankruptcy Code does not permit them.[24] The case is pending before the Second Circuit Court of Appeals, which may use it to clarify its position on NDRs, having previously worried that they might be "abused," but neither forbidding nor permitting them.[25]

Although *Purdue Pharma* has generated great heat, there has been less light. Wanting is an explanation of the dynamics that produced the Sackler

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[16] Brubaker, *supra* note 15, at 962.

[17] *See generally* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANKR. L. REV. 247 (2022).

[18] Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J. FORUM 409, 411 (2021).

[19] Simon, *supra* note 15, at 1188.

[20] Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 430 (2022).

[21] *See, e.g.,* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances,* 100 TEX. L. REV. 1079, 1083 (2022) (discussing due process); Brubaker, *supra* note 15, at 968–70 (discussing jurisdiction).

[22] *See In re* Purdue Pharma, L.P., 635 B.R. 26, 37 (S.D.N.Y. 2021) *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) ("Debtors and those who voted in favor of the Plan … insist that they are a necessary feature of the Plan.").

[23] Kara Swisher, Sway, *How the Sacklers Got Away With It*, N.Y. TIMES (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/opinion/sway-kara-swisher-patrick-radden-keefe.html?showTranscript=1; Gerald Posner & Ralph Brubaker, *The Sacklers Could Get Away With It,* N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html.

[24] *See Purdue Pharma*, 635 B.R. at 26, *rev'g* 633 B.R. 53.

[25] In *In re Metromedia,* the Second Circuit warned (but did not hold) that an NDR "lends itself to abuse." Deutsche Bank A.G. v. Metromedia Fiber Network, Inc., (*In re* Metromedia Fiber Network, Inc.), 416 F. 3d 136, 141 (2d Cir. 2005).

Releases, to guide courts in future appeals in *Purdue Pharma* and in other similar cases.[26]

This article aims to fill the gap. It draws on primary case documents to show how bankruptcy bargains in *Purdue Pharma* made the Sackler Releases practically inevitable from the outset: (i) the selection of corporate agents, professionals, and a judge likely to implement a settlement framework that the Sacklers had agreed to with a small group of Purdue Pharma's 600,000 creditors before bankruptcy; (ii) a preliminary injunction and stipulation in which creditor representatives ceded important leverage against the Sacklers; and (iii) a settlement in 2020 with the Department of Justice (DOJ) that, as a practical matter, foreclosed all options other than the Sackler Releases.

Existing literature has no account for bankruptcy bargains in social debt cases. Nor could it, I argue here, because the logic of bankruptcy theory, doctrine, and practice seek to solve a problem of *remedy*—priority in right of distribution—whereas social debt bankruptcies may also involve the predicate question of *liability*. In *Purdue Pharma,* for example, the key question for many was about the truth of allegations that the Sacklers had knowingly sought to "turbocharge" the market for opioids, even after their company had previously pled guilty to federal drug-marketing charges.[27]

Perversely, perhaps tragically, Purdue Pharma's bankruptcy bargains not only undercut transparency and accountability; they were also a bad deal. It is not clear, for example, that it was the Sackler Releases that added value, but instead the resistance by creditors to them, as would be the case in any ordinary bargaining. Here, court-ordered mediations did result in the Sacklers increasing the face amount of their proposed contribution, but the net present value did not increase much because the payment period was

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[26] The most thorough effort to explain *Purdue Pharma* appears in Levitin, *supra* note 21. Professor Levitin argues that *Purdue Pharma* is the product of coercive restructuring devices like "restructuring support agreements," forum shopping, and a failure of appellate review. *Id.* at 1084. These are fair concerns, but, as I explain in an invited review of his paper, coercive restructuring devices and forum shopping are, themselves, products of the rule of the deal, and *Purdue Pharma* has been the subject of appellate review. Jonathan C. Lipson, *Response: First in Time; First Is Right: Comments on Levitin's Poison Pill*, 101 TEXAS L. REV. ONLINE (2022), available at https://texaslawreview.org/first-in-time-first-is-right-comments-on-levitins-poison-pill/ [https://perma.cc/5VVZ-58W5]. The present article goes further, explaining both how coercive devices worked in an especially inappropriate environment (a social debt bankruptcy) and how bankruptcy doctrine and theory produced this outcome. I leave the important question of failed appellate review to other work (and other cases, where it remains a serious problem).

[27] *See* Press Release, H. Comm. on Oversight and Reform, Maloney and DeSaulnier Release Documents Following DOJ Settlement with Purdue Pharma and Sackler Family, https://oversight.house.gov/news/press-releases/maloney-and-desaulnier-release-documents-following-doj-settlement-with-purdue (last visited July 10, 2022) (releasing documents about Purdue Pharma, Sacklers and McKinsey & Co.).

extended, while the projected value of the company—which creditors would "own" through a trust structure—declined significantly, according to monthly operating reports in the case.[28]

Nor should this be surprising. Chapter 11 already gives debtors in possession significant advantages, in particular control of decisions about a plan of reorganization and whether (and how) to litigate estate causes of action. Early bargains in *Purdue Pharma* further tilted the playing field in favor of the deal the Sacklers wanted, so resistance to it was hampered. Creditors were divided about that deal, and the subsidiary deals that would lead to it. The Sacklers would understandably want to take advantage of chapter 11's deal culture and a fragmented creditor body. The rule of the deal could force them together. But this assumed that a deal on terms framed by the Sacklers was the only option.

It did not have to be this way. Chapter 11 has mechanisms that can address problems of transparency and accountability. In *Purdue Pharma*, for example, these could have included a bellwether trial against the Sacklers; more fulsome disclosure of the results of investigations by estate fiduciaries (or the appointment of an examiner to do so); or simply a line-item on the ballot permitting creditors to opt out of the Sackler Release—thus treating it as the contract term it purports to be. None of these things happened, fueling public concern about the case.

This article makes three contributions. Part 1 describes the theory, doctrine, and practice of ex ante and ex post bankruptcy bargains. It shows that the former can be coercive and the latter are subject to standards focused on asset values and distributions. The deeper problem is that these mechanisms solve problems of remedy where liability is assumed or not controversial. They cannot, however, answer questions of liability in social debt bankruptcies. Part 2 describes key bankruptcy bargains in *Purdue Pharma* leading to the Sackler Releases. Part 3 exposes contradictions of the rule of the deal as implemented in *Purdue Pharma*, the most important of which was that creditors "agreed" to the Sackler Releases. It also offers brief thoughts on what could have happened differently.

1. THE LAW AND THEORY OF THE DEAL

[28] *See* discussion in Part 3.2.

Chapter 11 reorganization favors consensus over conflict.[29] But, it can be a coercive process.[30] It forces all stakeholders in the debtor into a single forum in which supermajority voting can radically alter individual rights through a confirmed plan of reorganization. That plan, and deals leading to it, presumptively seek to maximize the value of the debtor's assets, through doctrines that focus chiefly on distributive rights, such as the relative priorities of creditors' claims to the debtor's value. These doctrines work reasonably well when underlying liability is not in serious dispute. But, they tell us little about how to resolve disputed liability for social debt.

1.1 THE LAW AND PRACTICE OF BANKRUPTCY BARGAINS

Bankruptcy bargains can be struck at roughly two different moments: the beginning or middle of the case. We can call them "ex ante" and "ex post" because they will precede or embody a case-resolving deal, which is then implemented in a plan of reorganization.[31] Ex ante bargains often seek to set the rules of the road, such as through "restructuring support agreements" or case stipulations.[32] Ex post bankruptcy bargains may settle major disputes or sell major assets. The first will guide the trajectory of the case; the second will for most practical purposes determine the distributive outcome.

1.1.1 Ex Ante Bargains—Restructuring Support Agreements

Debtors may enter bankruptcy with prenegotiated deals in hand or strike them at the beginning of the case. These may take the form of

[29] Settlements are "a normal part of the process of reorganization," Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 130 (1939)), and are generally favored in bankruptcy proceedings. *In re* Motors Liquidation Co., 555 B.R. 355, 364–65 (Bankr. S.D.N.Y. 2016) ("Settlements and compromises are favored in bankruptcy as they minimize costly litigation and further parties' interests in expediting the administration of the bankruptcy estate." (citing Myers v. Martin (*In re* Martin), 91 F.3d 389, 393 (3d Cir. 1996))).

[30] Levitin, *supra* note 21, at 1088.

[31] I recognize that this is a stylized distinction. The important point is that *ex ante* agreements tend to focus on control of the reorganization, whereas *ex post* agreements focus on outcomes.

[32] *See* Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593, 593–94 (2017); Memorandum Opinion Approving the Plan Support Agreement, *In re* Residential Capital, LLC, 12-12020, 2013 WL 3286198, at *20 (Bankr. S.D.N.Y. June 27, 2013); Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169, 173 (2018). RSAs evolved from other mechanisms, such as term sheets, debtor-in-possession financing agreements, and plan support agreements. RSAs may contain commitments to vote for particular types of plans. For a discussion of their features in debtor in possession loan agreements, see, e.g., Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis,* 37 YALE J. ON REG. 651, 653 (2020) (discussing "extraordinary inducements" in debtor-in-possession financing agreements).

prebankruptcy bond workouts,[33] case financings,[34] "back-stop" agreements,[35] or, more generally, "restructuring support agreements" (RSA).[36]

RSAs mark a significant development in practice, a "quiet revolution," according to Professor Douglas Baird.[37] Under an RSA, key stakeholders may pre-commit to support the debtor's proposed plan of reorganization, provided that the case and the plan satisfy certain criteria.[38] Bankruptcy courts will approve an RSA if it reflects a reasonable exercise of business judgment by management.[39]

In the past, negotiations with creditors would be more open-ended, would involve a broader group of creditors, and would be embodied in the plan itself, instead of earlier deals approved by the court. Now, "[i]nstead of bargaining that all are free to join, there is a sequence of two-party bargains, beginning with the key players (typically key creditors and the debtor). Each bargain fixes the share of the participating creditor."[40] These bargains are the building blocks of the rule of the deal.

Critics worry that these ex ante bargains may be "coercive."[41] They are often developed by a small group of key stakeholders, and presented on an "emergency" basis to a judge who has little familiarity with the background facts, but good reason to worry that if she fails to approve the deal, the case may collapse before it even starts.[42] They are then log-rolled through other constituencies whose support the original participants believe they need.

This presents several concerns, the most obvious of which is that those in any given deal may have little interest in protecting those outside of it.

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[33] William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1600 (2018).

[34] Tung, *supra* note 32, at 653 (discussing coercive financing agreements). Debtor-in-possession financings are subject to special approval rules under, e.g., Bankruptcy Code section 364, which are beyond the scope of this article.

[35] *In re* LATAM Airlines Grp. S.A., No. 22-CV-2556 (JMF), 2022 WL 1471125, at *2 (S.D.N.Y. May 10, 2022) (summarizing terms of backstop agreement).

[36] Janger & Levitin, *supra* note 32, at 174–75.

[37] Baird, *supra* note 32, at 593–94.

[38] *Id.*; Memorandum Opinion Approving the Plan Support Agreement, *In re* Residential Cap., LLC, 12-12020, 2013 WL 3286198, at *20 (Bankr. S.D.N.Y. June 27, 2013); Janger & Levitin, *supra* note 32, at 173.

[39] *See, e.g.*, *In re* Genco Shipping & Trading Ltd., 509 B.R. 455, 464 (Bankr. S.D.N.Y. 2014) (recognizing "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company" (quoting Off. Comm. of Subordinated Bondholders v. Integrated Res., Inc. (*In re* Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (internal citations omitted))).

[40] *Id.*

[41] Levitin, *supra* note 21, at 1088.

[42] *See generally* Jacoby, *supra* note 18.

Professor Melissa Jacoby has argued that chapter 11 is a "package deal," and thus that "à la carte" deals for particular constituencies violate the premises and spirit of reorganization.[43] It is, however, not clear how much we can or should expect creditors to be their siblings' keepers. Judge Goldblatt recently observed that "nothing in the law [] requires holders of syndicated debt to behave as Musketeers."[44] He was responding to the observation (by a state court judge) that syndicated lenders may sometimes evince a "spirit of … all for one, one for all."[45]

Perhaps. But who, realistically, expects lenders negotiating the deal to act as musketeers for tort creditors? What incentive would they have to bring the tort creditors into an RSA?

Being left out of an ex ante bargain is not the only problem. Perhaps a greater problem (because potentially more coercive) is that ex ante bargains can mute, rearrange, or displace formal protections for all creditors built into the Bankruptcy Code.

Take the power to seek an examiner. Section 1104(c) of the Bankruptcy Code provides that a bankruptcy court "shall" order the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor … ."[46]

Congress created the role of the examiner to provide "special protection for the large cases having great public interest … to determine fraud or wrongdoing…."[47] Examiners' reports in cases such as *Enron*, *Worldcom*, and *Lehman Brothers* performed "an important public service in explaining the spectacular and unanticipated collapses of these firms."[48]

Yet, prior research has found that examiners are "vanishingly rare in most cases, large or small"[49] because "neither managers nor investors

[43] *Id.* at 411 ("Bankruptcy à la carte extracts the tools of Chapter 11 meant to be available only as part of a package deal and redistributes the benefits.").

[44] *In re* TPC Grp. Inc., No. 22-10493 (CTG), 2022 WL 2498751, at *12 (Bankr. D. Del. July 6, 2022) ("To the extent such holders want to be protected against self-interested actions by borrowers and other holders, they must include such protections in the terms of their agreements.").

[45] *Id.* (quoting Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp., 72 Misc. 3d 1218(A), 150 N.Y.S.3d 894 (N.Y. Sup. Ct. 2021)).

[46] 11 U.S.C. § 1104(c).

[47] *See* 124 CONG. REC. S17, 403-34 (daily ed. Oct. 6, 1978) (statement of Senator DeConcini) (quoted in COLLIER ON BANKRUPTCY, App. 14.4(f)(iii) (15th ed., rev 2002)).

[48] *See* Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 9 (2016).

[49] *Id.* at 5.

(creditors) want this sort of oversight of the process."[50] Courts and system participants "worry that examiners could simply be expensive fishing expeditions."[51]

Still, creditor protections like examiners "could ameliorate the problems of agency cost and systemic integrity that concerned Congress when it created chapter 11, and that persist today in new but perhaps equally problematic forms."[52] Even the credible threat of their use can be a bargaining chip whose value can be compromised by an RSA. To empower insiders to contract them away at the beginning may thus be a problem.

Yet, they are often contracted away. In the chapter 11 reorganization of opioid maker *Endo*, for example, the debtor agreed in its RSA to object to any motion seeking the appointment of an examiner, or converting or dismissing the case.[53] If such relief were sought and approved, it would be a "termination event" under the RSA.[54] A later effort to appoint an examiner would not necessarily end the case—but it would threaten a foundational deal in it.[55] As discussed in Part 2, below, *Purdue Pharma* had a similar dynamic.

Problematic or not, appellate courts have little enthusiasm for second-guessing a bankruptcy court's approval of an ex ante bargain. In the recent *LATAM Airways* case, for example, certain creditors aligned with management entered into a "backstop" agreement under which they agreed to support exit financing for the debtors in exchange for millions of dollars in fees.[56]

On appeal, appellants argued that these agreements had the effect of resolving certain key questions about the debtor's reorganization, which should be addressed under a plan of reorganization. The appellees (the debtor) argued that the orders approving the backstop agreement were not appealable final orders. The District Court, sitting in an appellate capacity, considered the question "a close one," but agreed with the debtor—these were questions for a later day.[57] The later day was the confirmation of a plan

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[50] *Id.* at 6.

[51] *Id.* at 14.

[52] *Id.* at 10.

[53] Notice of Filing of Restructuring Support Agreement, *In re* Endo Int'l plc, et al., Case No. 22-22549-jlg, [ECF 20] at § 4(a)(v), p. 17 (Bankr. S.D.N.Y. Aug. 17, 2022).

[54] *Id.* at § 7(c)(ii) p. 32.

[55] As noted below, an examiner for a limited purpose was ultimately sought and appointed in *Purdue Pharma* notwithstanding a case stipulation and other efforts to deter such a request.

[56] *In re* LATAM Airlines Grp. S.A., No. 22-CV-2556 (JMF), 2022 WL 1471125 (S.D.N.Y. May 10, 2022).

[57] *Id.*, at *6.

that largely implemented the backstop agreement, and which was virtually impossible to challenge.

Ex ante bankruptcy bargains are not always problematic. Their coercive costs must be measured against their benefits, including that they can reduce time and expense, and encourage the creativity of the parties to the deals. That creativity can advance chapter 11's larger consensus goal of maximizing wealth for all. To the extent the interests of stakeholders are adequately represented—and that will often be a key issue—they presumably agree because they perceive these deals to provide certainty in the reorganization process and, in any case, there may be no realistic alternative.

But in cases involving social debt, ex ante bargains can be problematic because they involve a level of public interest that may be in tension with the private-ordering goals of the RSA.

1.1.2 Ex Post Bargains

Ex post bargains are major transactions during a case short of or leading to a plan of reorganization, such as the compromise of a disputed significant claim or the sale of material assets of the debtor. While there are concerns about coercion here, as well, doctrine focuses on distribution: Will the deal alter or impair priority in right of payment? This is obviously salient in the ordinary commercial case. But it may be tangential when there are analytically prior and important questions of liability, as may be the case in social debt bankruptcies.

The Supreme Court's opinion in *TMT Trailer Ferry* expressed the standard for settlements, and in so doing recruited the language of priority, by requiring that they be evaluated to determine whether they are "fair and equitable."[58] This phrase, derived from over one hundred years of caselaw, is synonymous with absolute priority, and is codified in Bankruptcy Code section 1129(b).[59]

In *TMT,* a bankrupt shipping company had granted liens that a bankruptcy trustee investigated and initially concluded were avoidable as fraudulent transfers.[60] Later, the trustee decided to compromise the claim by paying it in full, over time, under a plan of reorganization. Over objections from unsecured creditors, the trial court (acting as a bankruptcy court) approved these settlements.[61]

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[58] Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

[59] 11 U.S.C. § 1129(b).

[60] 390 U.S. at 424.

[61] *Id.* at 432.

Before the Supreme Court, the central question was whether this compromise should have been approved. If the fraudulent transfer claim had merit, the settling creditor in *TMT* would have lost its lien (and thus priority), increasing distributions to (junior) general unsecured creditors. In reversing the lower courts, the Court stated that "a proposed compromise forming part of a reorganization plan [must be] fair and equitable."[62] To make this determination, the *TMT* Court held that the lower court should "compare the terms of the compromise with the likely rewards of litigation."[63]

This advice, to compare the terms of the settlement to the prospects of litigation, leaves much to the imagination. While courts should assess the likelihood of successful litigation on the merits, the "most important consideration" is priority.[64] Courts have thus concluded under *TMT* that they should not "conduct a mini-trial on the merits of the settlement or otherwise resolve disputed issues of law or fact underlying the settlement."[65] Instead, they should "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'"[66]

Bankruptcy courts do this well as to claims against the debtor and estate causes of action. They routinely assess disputes that involve a fight over distribution in an environment where underlying liability—e.g., unpaid loans—is not seriously in dispute. In *TMT,* the litigation was an avoidance

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[62] *Id.* at 424.

[63] *Id.* at 425. Notably, in that case, the Supreme Court *reversed* the lower courts' decision to approve a settlement following extensive investigations by a bankruptcy trustee into allegations of self-dealing by certain parties in connection with a plan of reorganization approved by the lower courts. The Court explained—

> Fourteen days of hearings were held, 2,200 pages of testimony transcribed, and some 60 exhibits collected. [the trustee's] report from this investigation covers 40 pages in the original record. He concluded that the debtor's business had been 'wrecked by gross mismanagement, by unwise and unsound expansion financed primarily through the sale of securities in disregard of the protective provisions of the Securities Act of 1933,' and that the debtor had substantial causes of action against holders of the Caplan mortgage. Upon the recommendation of Anderson, the trial court vacated its order confirming the 1959 plan, and the Court of Appeals affirmed."

Id. at 421.

[64] *Id.* at 464 ("[W]hether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019.").

[65] *In re* Ditech Holding Corp., 606 B.R. 544, 623 (Bankr. S.D.N.Y. 2019).

[66] Cosoff v. Rodman (*In re* W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983) (citation omitted); *see also* O'Connell v. Packles (*In re* Hilsen), 404 B.R. 58, 70 (Bankr. E.D.N.Y. 2009) ("[T]he court must make an informed and independent judgment as to whether a proposed compromise is 'fair and equitable' after apprising itself of 'all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.'" (quoting *TMT*, 390 U.S. at 424)).

action. In the leading Court of Appeals decision, *Iridium*, it was a priority-skipping settlement.[67] It is less clear, however, whether or how a bankruptcy court can assess potentially novel or normatively difficult direct causes of action against nondebtors, such as those at issue in *Purdue Pharma.*

Concerns about coercion persist as to ex post bargains, too. Case-transforming sales of assets have sometimes been considered problematic on grounds that they were a plan "sub rosa," a plan of reorganization in substance, but without the procedural protections of disclosure, voting and so on which we ordinarily see at the apex of a case.[68]

Although ex post bargains have become routine, the Supreme Court drew the line in *Jevic,* striking a "structured dismissal" which would have reordered the priority of final distributions outside of a plan.[69] The Court's main concern in *Jevic* was not distributive, but instead procedural: "the distributions at issue here more closely resemble proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards."[70] The Court did not specify what those safeguards are, but I have argued elsewhere they had to include mechanisms that preserve participation, predictability, and procedural integrity, such as plan disclosure, classification, and voting.[71]

Justice Breyer recognized that "consent" might have overcome much of what was wrong in *Jevic.*[72] But, outside a plan, "consent" in the chapter 11 context can be hard to determine.[73] In any case, the whole point of

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[67] *See* Motorola v. Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007).

[68] *In re* Lionel Corp., 722 F.2d 1063, 1069 (2d Cir. 1983) (reversing a bankruptcy court's approval of an asset sale after holding that § 363 does not "gran[t] the bankruptcy judge carte blanche" or "swallo[w] up Chapter 11's safeguards").

[69] Czyzewski v. Jevic Holding Corp. (*In re* Jevic), 580 U.S. 451 (2017) *rev'g* 787 F.3d 173 (3d Cir. 2015); *see also In re* Jevic Holding Corp., No. 14-1465, 2017 WL 1880820, at *1 (3d Cir. May 9, 2017) (vacating and remanding Third Circuit opinion). The Court accepted the definition of "structured dismissal," provided by the American Bankruptcy Institute, as a:

> hybrid dismissal and confirmation order … that … typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case.

Czyzewski, 580 U.S. at 456 (quoting American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 *Final Report and Recommendations* 270 (2014)).

[70] *Czyzewski*, 580 U.S. at 468.

[71] Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 639 (2018) ("*Jevic* reveals that the secret life of priority is not only about distributive rights, but also about process values of participation, predictability, and procedural integrity.").

[72] *Czyzewski,* 580 U.S. at 464 ("Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent? Our simple answer to this complicated question is 'no.'").

[73] Lipson, *supra* note 71, at 631.

nonconsensual nondebtor releases—the core issue in *Purdue Pharma*—is that they are (obviously) not consensual.

1.2 THE SPECIAL PROBLEM OF PERSONAL INJURY/WRONGFUL DEATH TORT CLAIMS

Bankruptcy is chiefly a remedial scheme—a "special remedial scheme," the Supreme Court has said.[74] Among other things, this implies that it is not designed to determine disputed primary liability. Indeed, for creditors who timely file a proof of claim (a simple document asserting the debt), the system presumes the debtor's liability.[75] To litigate whether the debtor is liable for each and every debt that it obviously owes would be wasteful.

This presumption of liability works well with debts arising from broken contracts, such as unpaid loans or for tort liability determined by other courts. It does not work as well with social debt that may be disputed, because such claims will often involve alleged torts. For purposes of payouts, however, the Bankruptcy Code makes no distinction between contract and tort: both usually produce unsecured claims of equal rank against the debtor's assets.[76] Because those assets are probably worth far less than aggregate claims, unsecured creditors can generally hope at best for a pro rata share of their claims, in cash, in new debt, or in stock of the reorganized debtor.

In theory, Congress tried to provide a different process for the *determination* of contingent and unliquidated personal injury tort or wrongful death claims, which may be at issue in social debt cases, by assuring that such claims would be determined by a jury trial in a U.S. district court, rather than a bankruptcy court.[77] In fact, however, such trials

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[74] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999). For a discussion of the phrase, see Jonathan C. Lipson, *"Special": Remedial Schemes and Mass Tort Bankruptcies,* 102 TEXAS L. REV. ___ (forthcoming 2023).

[75] 11 U.S.C. §§ 501–02, 1111 (governing filing of proofs of claims and presumptions of liability). The debtor in possession generally bears the burden of objecting to properly filed claims.

[76] 11 U.S.C. § 101(5) (defining claim). I put to one side questions about the nondischargeability of individual debts for "willful and malicious injury by the debtor to another entity or to the property of another entity" (11 U.S.C. § 523(a)(6)) and the subordination of claims for punitive damages.) (11 U.S.C. § 726(a)(4)).

[77] Bankruptcy judges may hear and determine all cases under title 11 and all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). While "core proceedings" include the confirmation of plans of reorganization (28 U.S.C. § 157(b)(2)(L)), they do not include "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." 28 U.S.C. § 157(b)(2)(B). Indeed, Congress specifically sought to protect the right to an adjudication of such claims outside of bankruptcy, providing that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district

are rare because even a victory is unlikely to significantly improve the payout: the winning plaintiff simply takes her judgment and gets in line to share, pro rata, with all other unsecured creditors.[78]

Although Congress apparently "never contemplated that the bankruptcy process might be used for the resolution of mass tort claims,"[79] the exceedingly broad scope of relief provided by the bankruptcy discharge (and the ability to address future claims) made it appealing to mass tortfeasors (in particular, those with asbestos or medical device liability) in the early 1980s.[80] By 1994, when Congress enacted the "asbestos amendments" to authorize nondebtor releases in cases involving such liability—the only express statutory authorization for NDRs—it understood that chapter 11 could (and perhaps should) aggregate and resolve liability for broad-scale negligence or products liability.[81]

Today, bankruptcy courts openly claim that bankruptcy is better than the tort system. Before being reversed, Judge Kaplan denied a motion to dismiss the chapter 11 case of talc debtor LTL because, among other reasons, "[t]he tort system has struggled to meet the needs of present claimants in a timely and fair manner. The system is ill-equipped to provide for future claimants. The Court has no reason to believe this will differ for the talc plaintiffs here."[82]

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in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5).

[78] It appears that Congress expected jury trials on such claims to be rare. Representative Kastenmeier, a conferee on the salient legislation, explained the intent concerning wrongful death and personal injury tort claims as follows:

> [I]n those rare cases where the parties insist, a personal injury or wrongful death case may be tried to judgment by a district court judge. Finally, the conference report states that in this narrow range of cases the parties do not lose any right to a jury trial that they may have had if the claim had been cognizable outside the bankruptcy context.

130 Cong. Rec. S8989, H7492 (daily ed. July 23, 1984).

[79] Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59, 60 (2012).

[80] Grady v. A.H. Robins Co., 839 F.2d 198, 202 (4th Cir. 1988) ("[L]egislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court.").

[81] "Congress in the Bankruptcy Reform Act of 1994, Pub. L. 103–394, § 111(a), amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability." Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 (1999) (citing 11 U.S.C. §§ 524(g), (h)).

[82] *In re* LTL Mgmt., LLC, 637 B.R. 396, 412 (Bankr. D.N.J. 2022). Judge Kaplan was reversed by the Third Circuit. *In re* LTL Mgmt., LLC, 58 F.4th 738 (3d Cir. 2023).

1.3. THE THEORY OF THE DEAL

Although the Third Circuit disagreed, there may be truth to Judge Kaplan's assertion. Professor Jay Westbrook has observed that wealth maximization is a "consensus" goal that few scholars would challenge.[83] Plaintiffs who insist on "pristine due process rights" may do so at the expense of "substantial monetary compensation."[84]

1.3.1 Contract Debates in Bankruptcy

Creative deal-making in bankruptcy finds strong advocates among "contractualists," loose adherents of "law and economics." This position is probably the dominant body of bankruptcy scholarship, and insists that bankruptcy is and should be governed by a norm of economic efficiency above all else.

The most influential early expression of contractualism is the so-called "creditors' bargain" articulated by Professors Thomas Jackson and Douglas Baird and their followers.[85] The creditors' bargain is hypothetical, "a bargain that rational creditors would have reached ex ante to [] divide the debtor's assets."[86] Bankruptcy law, on this view, should seek to maximize wealth by permitting the parties to renegotiate in the light of their prebankruptcy entitlements, which bankruptcy should take as given.

While no bankruptcy scholar would wholly disclaim free contract or wealth maximization, many have been skeptical of the creditors' bargain model. Critics have objected that it lacks empirical support,[87] normative

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[83] Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 821 (2004) (noting that "the maximization of distributions to beneficiaries is a consensus goal").

[84] Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005). Ironically, the hero in Cabraser's version of the story was the limited fund settlement class action struck down by the Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and the villain was the "endless waiting that characterizes asbestos bankruptcies." Today, it would appear that the plaintiffs' personal injury bar and tort reformers have come together to see the speedy virtues of bankruptcy as superior to the "black hole" of multidistrict litigation.

[85] THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 32–33 (1986) [hereinafter JACKSON, LOGIC AND LIMITS] (developing "creditor's bargain" theory); *see also* Anthony T. Kronman & Thomas H. Jackson, *Secured Financings and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

[86] Ziad Raymond Azar, *Bankruptcy Policy: An Empirical Investigation of 50 Jurisdictions Worldwide*, 82 AM. BANKR. L.J. 407, 407–08 (2008).

[87] *See, e.g.*, Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Corporations*, 141 U. PA. L. REV. 669 (1993); Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR L.J. 499 (1999).

force,[88] or basis in law.[89] Before she became a United States Senator, Elizabeth Warren argued that bankruptcy law in fact does and should reflect "competing—and sometimes conflicting—values."[90] Wealth maximization is one such policy, but so too are process values of participation, outcome predictability and procedural integrity,[91] all of which can prevent abuse, and none of which is costless. More recent scholars continue to contest contractualism,[92] asserting that it is a "fallacy."[93]

Nevertheless, the economic position has strong appeal given the distributive orientation of bankruptcy doctrine. The diffusion of countervailing positions has made it difficult for opponents of neoclassical economics to marshal a consolidated response. It is easy enough to challenge the predicates of economic analysis—few truly believe in "homo economicus" unbound[94]—but "freedom of contract" is a catchy cry, and realist alternatives struggle to gain traction.[95]

1.3.2 The "New Bargaining Theory" and the Problem of Holdouts

The latest salvo in these debates is reflected in the view that chapter 11 implements a "New Bargaining Theory," as Professor Anthony Casey would have it. This holds that chapter 11 exists to solve problems of "incomplete contracting," and should do so by creating a "renegotiation framework designed to minimize the parties' ability and incentives to hold-

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[88] *See, e.g.*, Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75 (1996); Susan Block-Leib, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001). The most trenchant philosophical critique came in David Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1354 (1987) (reviewing JACKSON, LOGIC AND LIMITS, *supra* note 85).

[89] *See, e.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987).

[90] *See, e.g.*, *id.*

[91] Lipson, *supra* note 71, at 633 (arguing that "process values" in Supreme Court bankruptcy precedent reflect concerns about "stakeholder participation, outcome predictability, and procedural integrity").

[92] "Bankruptcy is ultimately a distributional exercise," Adam Levitin argues, and "[t]he shape of bankruptcy law is an expression of distributional norms… and interest group politics, rather than an exercise in economic efficiency." Adam Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1405 (2012).

[93] Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 B.Y.U. L. REV. 759, 766 (2013) ("The modern approach to commercial bankruptcy reorganization in the U.S. is built upon a theoretical assumption (what I call the 'Efficiency Fallacy') that compromise and negotiation in Chapter 11 naturally lead to efficient restructuring outcomes.").

[94] For a fun explanation, see Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003).

[95] I have argued elsewhere that opponents of contractualism offer no alternative theory of contract, "perhaps worried that any effort to develop a direct response would give contractualism greater dignity than it deserves." Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 243 (2016).

each other up."[96] The challenge, on this view, is that there will be strong incentives for some creditors to hold out, which "will lead to a collapse in bargaining where no deal is ever struck."[97]

Combating holdouts, on this view, "relies heavily on judicial discretion and procedural measures."[98] But this discretion can permit coercion and, in any case, will lead judges to focus on the distributive consequences of the deals presented to them, rather than whether particular individuals should (or should not) be subjected to judicial process to determine liability.

Professors David Skeel and George Triantis, otherwise supporters of free contract, have called bankruptcy policy toward contracting "incoherent" because the governing standards are vague.[99] Professor Stephen Lubben has argued that the "panic" over holdouts—and thus the need to coerce them with bankruptcy bargains—is exaggerated.[100]

Nevertheless, bankruptcy bargains drove the reorganization of *Purdue Pharma*. The Sackler Releases are arguably the most notorious example of that, but in order to understand them, it is necessary to understand the deals that foreclosed all other possibilities. Those other possibilities included litigation against the Sacklers to determine direct liability, or investigations and reports that estate fiduciaries could and should have produced. Those forms of scrutiny might have produced greater transparency, increased recoveries for creditors, and instilled confidence in the process. The rule of the deal, however, undercut those efforts.

2. THE SACKLERS' SOCIAL DEBT AND BANKRUPTCY BARGAINS

Maximizing wealth may be the overarching goal of bankruptcy, but for many survivors of serious misconduct, social debt is hard to cash out. It is not difficult to see that Purdue Pharma created social debt, unmanageable social costs with profound public spillovers. The overdose crisis is a

[96] Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1716 (2020).

[97] *Id.* at 1737.

[98] *Id.*

[99] David A. Skeel, Jr. & George Triantis, *Bankruptcy's Uneasy Shift to A Contract Paradigm*, 166 U. PA. L. REV. 1777, 1783 (2018).

[100] Stephen J. Lubben, *Holdout Panic*, 96 AM. BANKR. L.J. 1, 5 (2022).

"national public health care emergency,"[101] an "epidemic" in the words of the U.S. Department of Health and Human Services.[102]

The allegations against Purdue Pharma and the Sacklers have been told often and vividly, and warrant only a summary here to frame the deals that would resolve them in bankruptcy. I do not claim that the allegations are true—rather, that Purdue Pharma's bankruptcy bargains would ensure that we could not know in a legally actionable way whether they were true before the Bankruptcy Court would give the Sacklers the releases they sought.

2.1 THE SACKLERS, PURDUE PHARMA, AND THE OPIOID CRISIS

Purdue Pharma is a closely-held company, at all relevant times owned and controlled by the Sackler family, among the wealthiest in the nation.[103] Purdue Pharma introduced OxyContin in 1995.[104] Following an aggressive and successful marketing campaign, annual sales of OxyContin reached $1 billion in 2001; it became "'the most prescribed brand-name narcotic medication' in the U.S.,"[105] contributing significantly to an overdose crisis that to date has claimed over 500,000 lives.[106]

In 2007, Purdue Pharma and certain executives—but not the Sacklers—pleaded guilty to federal charges of misbranding OxyContin with the intent

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[101] *See, e.g.*, Overdose Death Rates, NATIONAL INST. ON DRUG ABUSE, OPIOID OVERDOSE CRISIS (Jan. 20, 2022), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis ("[T]he misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl—is a serious national crisis that affects public health as well as social and economic welfare."). The U.S. Department of Health and Human Services has declared the opioid crisis a "public health emergency." News Release, Dept. Heath & Hum. Servs, HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017), https://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html.

[102] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., WHAT IS THE U.S. OPIOID EPIDEMIC?, https://www.hhs.gov/opioids/about-the-epidemic/index.html.

[103] The last member of the Sackler family resigned from the board in early 2019. Former Mississippi Attorney General Mike Moore has said "'I don't call it Purdue. I call it the Sackler Company.'" Patrick Radden Keefe, *The Family That Built an Empire of Pain*, NEW YORKER (Oct. 30, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain.

[104] *See* Determination that the OXYCONTIN (Oxycodone Hydrochloride) Drug Products Covered by New Drug Application 20-553 Were Withdrawn from Sale for Reasons of Safety or Effectiveness, 78 Fed. Reg. 23,273-01 (Apr. 18, 2013).

[105] *In re* Purdue Pharma, L.P., 635 B.R. 26, 43 (S.D.N.Y. 2021) (internal citation omitted), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[106] "Purdue Pharma was a 'key player' in the opioid crisis (Patrice Taddonio, *Revisit Purdue Pharma's Role in the Opioid Crisis*, FRONTLINE (Sept. 12, 2019), https://to.pbs.org/2SUGYyn), because OxyContin was the "taproot" of that crisis." Soo Youn, *New York Adds Owners of Company that Makes OxyContin to Lawsuit Against Opioid Makers, Distributers*, ABC NEWS (March 28, 2019), https://abcnews.go.com/US/york-adds-owners-company-makes-oxycontin-lawsuit-opioid/story?id=62012633 (quoting from New York Attorney General Letitia James' lawsuit).

to defraud or mislead.[107] Purdue Pharma had, according to the DOJ, falsely "marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[108]

Despite a "corporate compliance agreement," Purdue Pharma continued to engage in this misconduct, and was subject to a "veritable tsunami" of tort litigation.[109] In 2017, sixty-four cases brought by governmental plaintiffs were consolidated in a multidistrict litigation in the Northern District of Ohio (MDL).[110] Discovery in the MDL revealed evidence of the involvement of members of the Sackler family in Purdue Pharma's misconduct. Those family members were added as defendants in hundreds of the 3000+ cases pending against Purdue Pharma.[111] By the middle of 2019, forty-nine states' attorneys general had filed new or amended lawsuits naming specific members of the Sackler family and/or Sackler-related entities.[112]

These "direct" claims asserted liability "under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions."[113] Because Purdue Pharma was a closely-held company, the Sacklers—who dominated its board of directors—may also have had independent liability on "alter ego" or similar theories.[114]

Absent bankruptcy, the only way the Sacklers could achieve the "global peace" they sought—that is, to eliminate their direct and personal liability—

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[107] United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 570 (W.D. Va. 2007).

[108] *Id.* at 571.

[109] *In re* Purdue Pharma, 635 at 35.

[110] *Id.* at 49 (citing *In re* Nat'l Prescription Opiate Litig., MDL-2804, ECF 1, at Schedule A). The cases in the MDL asserted a variety of claims against Purdue Pharma and others for their role in the opioid crisis, under various theories of liability including: (1) public nuisance, (2) false representations, (3) unjust enrichment, (4) common law parens patriae, (5) negligence, (6) gross negligence, and (7) consumer protection act claims.

[111] *Id.* at 50–51.

[112] *Id.* at 51.

[113] *Id.* at 70.

[114] In a 2019 expert report in one of hundreds of litigations against Purdue Pharma and the Sacklers, Professor John Coffee opined that "[f]rom a corporate governance perspective, I find it easy to conclude that the Sackler family, with its 100% ownership of Purdue Pharma, its control of Purdue Pharma's board, and the aggressive leadership of, in particular, Richard Sackler, had the power to impose its will on Purdue." Expert Report of Professor John C. Coffee, Jr., Matter Of: Purdue Pharma L.P., et al. DCP Case No. 107102 July 12, 2019, at 24 available at https://freepdfhosting.com/ee9c5591e2.pdf) ("Coffee Report"). The Coffee Report was filed under seal in connection with an action by the Utah Division of Consumer Protection against Purdue Pharma and the Sacklers. The author of the report, John Coffee, is a law professor at Columbia Law School, and was retained in the Utah matter by the law firm of Motley Rice. *Id.* at 2.

was to litigate every allegation to a preclusive final judgment or to settle. While either would be expensive, the Sacklers had the money.[115] But allegations leaked in the bankruptcy (and the Sacklers' prebankruptcy efforts to suppress bad facts) suggest that another concern was transparency: The Sacklers wanted to shield as much information as possible.[116] Merits litigation would risk economic losses and divulge even more incriminating information.

Thus, they understandably wanted to settle. But regular courts could not give them the peace they wanted. In the late 1990s, the Supreme Court made it very difficult to certify mandatory "limited fund" class action settlements, which would bind all current and potential plaintiffs without individualized assent or adjudication.[117] Nor, presumably, did they wish to commence bankruptcy in their own names in order to discharge debt.[118]

But nondebtor releases in a bankruptcy of Purdue Pharma might work. In March of 2018, certain members of the Sackler family negotiated a framework for a "global settlement" with certain parties to the MDL (the

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[115] *In re* Purdue Pharma, L.P., 635 B.R. 21, 40 (S.D.N.Y 2021) ("[T]he Sackler family have long been ranked on Forbes' list of America's Richest Families, becoming one of the top twenty wealthiest families in America in 2015, with a reported net worth of $14 billion dollars.") (citation omitted).

[116] For discussions of their efforts to conceal damaging information see, for example, David Armstrong, *Purdue's Sackler Embraced Plan to Conceal OxyContin's Strength from Doctors, Sealed Deposition Shows*, STAT (Feb. 21, 2019), available at https://perma.cc/77M8-FSCE. They often sought to keep the terms of their settlements confidential. *See* David Armstrong, *STAT Goes to Court to Unseal Records of OxyContin Maker*, STAT (Mar. 15, 2016), https://www.statnews.com/2016/03/15/stat-seeks-oxycontin-records/ (ruled in STAT's favor: Order, Boston Globe Life Sciences Media LLC, d/b/a STAT v. Purdue Pharma LP et al., Action No. 07-CI-01303, Commonwealth of Kentucky, Pike Circuit Court, May 11, 2016); Andrew Joseph, *Intensely Private, Deeply Invested: Richard Sackler's Role in Promoting OxyContin Emerges in Court Documents*, STAT (Feb. 22, 2019), https://www.statnews.com/2019/02/22/a-secretive-billionaires-role-in-promoting-oxycontin-emerges-in-new-documents/. Judge Drain's later observation that "no one has tried to hide the Sacklers' settlement history" seems implausible. *See In re* Purdue Pharma, L.P., 633 B.R. 53, 111 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2022), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[117] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815, 852–53 (1999).

[118] Doing so might not have helped. The Bankruptcy Code excepts individuals from the discharge of debts for various types of misconduct, including debts for "willful and malicious injury," or unpaid fines or criminal penalties. 11 U.S.C. § 523(a)(6), (7). It also denies the discharge entirely to individuals who engage in a fraudulent transfer, which the Sacklers arguably did, as discussed below. 11 U.S.C. § 727(a)(2). That provision, however, applies only to transfers that occurred within one year of bankruptcy. *See* Organek, *supra* note 15 (discussing potential bankruptcies by individual Sackler family members).

"Sackler Settlement Framework").[119] The Sackler Settlement Framework had three basic elements, reflected in an unsigned term sheet filed at the beginning of the bankruptcy: (i) the Sacklers would "give" Purdue Pharma to creditors; (ii) they would pay $3 billion (later increased to $5.5 billion) into creditor trusts over an extended period; and (iii) in exchange, they would receive "comprehensive releases."[120] The Sacklers thus "made it clear well before [Purdue Pharma] filed for chapter 11 bankruptcy that they would contribute toward Purdue's bankruptcy estate only if they received blanket releases that would put 'all of the litigation behind them.'"[121] Purdue Pharma commenced its bankruptcy in September 2019 in order to obtain these releases.

2.2 BANKRUPTCY BARGAINS IMPLEMENTING THE SACKLER SETTLEMENT FRAMEWORK

The Sackler Releases were the apex "deal" in the *Purdue Pharma* case. Although they have received the most attention, they would not have been possible without three predicate deals, bargained for before and during bankruptcy: (i) prebankruptcy governance changes that assured the Sacklers of corporate agents, professionals, and a bankruptcy judge likely to support their settlement goals; (ii) a preliminary injunction that shielded the Sacklers from tort lawsuits asserting direct liability during the case; and (iii) a controversial settlement with the DOJ which made the releases virtually inevitable.

2.2.1 Governance Changes—Shopping for Corporate Agents, Professionals and a Judge

To implement the Sackler Settlement Framework, the Sacklers needed two things: (i) credible corporate agents and professionals to manage the chapter 11 process; and (ii) a bankruptcy judge likely to support their desire to settle rather than to litigate. Governance changes made by the Sacklers

[119] In her opinion reversing the bankruptcy court, District Judge McMahon said that the negotiations to create the settlement framework occurred "[i]n the months before Purdue filed for bankruptcy," when "the Sackler family [was] no longer represented on Purdue's Board." *In re* Purdue Pharma, L.P., 635 B.R. 21, at 58 (S.D.N.Y. 2021). It appears, however, that the settlement framework was initially agreed-to by David Sackler and personal injury attorney Michael Moore in March of 2018, when Purdue Pharma was still controlled by the Sacklers. *See* RADDEN KEEFE, *supra* note 12, at 403 (noting that personal injury attorney Michael Moore "acknowledged, in a subsequent interview, that working with another plaintiffs' lawyer, Drake Martin, he had 'put this deal together' for Purdue").

[120] *See* Notice of Filing of Term Sheet with Ad Hoc Comm. (Oct. 8, 2019), [Bankr. ECF 257], at ¶ 5; *see also id.* ¶ 6 (providing that Sackler Family's contributions will be "[i]n exchange for comprehensive releases in the form and manner to be agreed upon by the parties.").

[121] *Purdue Pharma*, 635 B.R. at 59.

—that is, "deals" between Purdue Pharma and its owners—apparently led to both.

The Sacklers caused Purdue Pharma to hire the law firm of Davis Polk & Wardwell as "restructuring counsel" in March of 2018, around the time they struck the initial settlement deal with certain plaintiffs.[122] Turnaround expert Steve Miller joined the company's board in July 2018 as members of the Sackler family left it.[123] Both Davis Polk and Miller are longtime repeat players in the chapter 11 system.[124] It appears that both supported the Sackler Settlement Framework from the outset. Before bankruptcy, they coordinated closely with the Sacklers about messaging in support of it.[125] As the Sacklers resigned from Purdue Pharma's board in 2018–19, Miller brought on two other "bankruptcy directors" to form a "special committee" to negotiate the Sackler Settlement Framework.[126]

The Sacklers (presumably with the help of Davis Polk) found the second critical piece in United States Bankruptcy Judge Robert Drain. Judge Drain may have been attractive because he was known to be a sophisticated judge with a strong preference for negotiated resolutions. He had self-published a

[122] Application of Debtors for Authority to Retain and Employ Davis Polk & Wardwell LLP as Attorneys for the Debtors Nunc Pro Tunc to The Petition Date (Nov. 5, 2019) [Bankr. ECF 419], at 5 ("Davis Polk has provided extensive advice to the Debtors since March 2018 on a broad array of matters and has performed services necessary to enable the Debtors to file for protection under chapter 11."); *see also* Disclosure Statement for Fifth Am. Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, at 3, (June 3, 2021) [Bankr. ECF 2983] [hereinafter "Disclosure Statement"] (describing timing of Sackler negotiations before bankruptcy).

[123] Disclosure Statement, *supra* note 122, at 143.

[124] I have observed elsewhere that "[i]n large chapter 11 cases, the most important participants—for example, distress investors, lawyers, and judge[s]—often form a tightly knit community of repeat players because they are largely located in or around one of two courts (New York or Delaware) and tend to appear in many of the same cases." Lipson, *supra* note 95, at 245.

[125] In May of 2019, Mr. Miller developed an op-ed in coordination with members of the Sackler family which firmly rejected the prospect of litigation. Steve Miller, *Litigation Won't Solve the Opioid* Crisis, WALL ST. J. (May 27, 2019), https://www.wsj.com/articles/litigation-wont-solve-the-opioid-crisis-11558989157. On September 20, 2019, shortly after the bankruptcy began, Marshall Huebner, counsel to the Debtors, recorded the following time entry: "Calls with Sackler family counsel regarding mischaracterization of deal and media issues (0.3); emails regarding Special Committee meeting and agenda items." *See* First Monthly Fee Statement of Davis Polk & Wardwell LLP for Comp. for Servs. and Reimbursement of Expenses Incurred as Counsel to the Debtors and Debtors in Possession for the Period from Sep. 16, 2019 through Sep. 30, 2019, at 53 (Nov. 27, 2019), [Bankr. ECF 551]. On February 13, 2020, Mr. Huebner recorded the following time entry: "Emails with shareholders and PJT Partners regarding Wednesday meeting (0.3)." *See* Sixth Monthly Fee Statement of Davis Polk & Wardwell for Comp. for Servs. and Reimbursement of Expenses Incurred as Counsel to the Debtors and Debtors in Possession for the Period from Feb. 1, 2020 through Feb. 29, 2020, at 83 (Mar. 26, 2020), [Bankr. ECF 986].

[126] *See* Disclosure Statement, *supra* note 122, at 61–63. As discussed below, "bankruptcy directors" are individuals with bankruptcy expertise who temporarily serve on a corporate debtor's board to foster a reorganization.

novel in which opiates played a role,[127] and had previously approved the sort of NDRs the Sacklers would seek.[128]

Purdue Pharma and the Sacklers could only draw Judge Drain if "venue" were proper. Fortunately for the Sacklers, bankruptcy has liberal venue rules. Section 1408 of the Judicial Code permits a corporate debtor to "bootstrap" into the bankruptcy courts of any district where at least one affiliate has "domicile."[129] Domicile, in turn, exists in any state in which an entity debtor is formed.[130]

Purdue Pharma was a Delaware limited partnership, with a New York general partner.[131] Thus, venue would have been proper in the Southern District of New York (SDNY). But there was a catch: There are nine bankruptcy judges in the SDNY, with varying views about nondebtor releases, the key to the global peace they sought.[132] The SDNY is, however,

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[127] ROBERT DRAIN, THE GREAT WORK IN THE UNITED STATES OF AMERICA (BookBaby, 2020). One passage reveals Judge Drain's awareness of the personal suffering caused by substance use disorder of the sort caused by OxyContin:

> I stood still. "It'll be bad when she comes off the opium. She might not last three weeks," I said. "I do not care," he said. "I can hold her a hell of a lot longer if I want to. What's the harm in a little pain? Imagine a woman letting herself go like that."

Id. at 389–90.

[128] *See In re* MPM Silicones, LLC, 2014 WL 4436335, at *32–34 (Bankr. S.D.N.Y. Sept. 9, 2014) (Drain, Bankr. J.) (allowing NDRs).

[129] Section 1409 provides in pertinent part as follows: a case under title 11 may be commenced in the district court for the district

> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2) in which there is pending a [bankruptcy] case … concerning such person's affiliate.

28 U.S.C. § 1409.

[130] *In re* Crosby Nat'l Golf Club, LLC, 534 B.R. 888, 890 (Bankr. N.D. Tex. 2015) ("In the case of a business entity, the state where it was organized is generally its domicile or residence.").

[131] Disclosure Statement, *supra* note 122, at 58.

[132] Two had expressed reservations about nondebtor releases. *See In re* Aegean Marine Petroleum Network Inc., 599 B.R. 717, 723–26 (Bankr. S.D.N.Y. 2019) (Wiles, Bankr. J.) (declining to enter nonconsensual third-party release and noting that such releases do not comport with requirements of subject matter and personal jurisdiction or with the Due Process and Takings Clause of the Constitution because creditors are deprived of their rights without a formal hearing and just compensation); Memorandum Decision and Order Regarding Third-Party Releases Under Debtors' Joint Plan, *In re* Sunedison, Inc., No. 16-10992 (SMB) (Bankr. S.D.N.Y. Nov. 8, 2017) (Bernstein, Bankr. J.), at 16–17 [ECF 4253] (disapproving of opt-out third-party release).

divided into two divisions, Manhattan and White Plains,[133] and Judge Drain happened to be the only judge in the White Plains Division at the time. If the Sacklers commenced their case in White Plains, rather than Manhattan, Judge Drain was certain to be their judge.

To achieve this involved a simple governance change. On March 1, 2019, about a year after first striking the settlement framework, and six months before declaring bankruptcy, it appears that the Sacklers, acting as shareholders of Purdue Pharma's New York general partner, authorized the company to change its registered corporate agent to White Plains, New York (and naming restructuring counsel Davis Polk as such).[134] This gave Purdue Pharma a connection to White Plains, enabling it to commence its case in the White Plain's bankruptcy court. As Professor Adam Levitin has observed, Purdue Pharma sought Judge Drain not "because he is a great judge"—although he may be—but instead because "they think he will be a great judge *for them*."[135]

Forum shopping has long been a concern in chapter 11 cases. Indeed, before nondebtor releases, it may have been the hottest topic in bankruptcy. Professors Lynn LoPucki and Bill Whitford first spotted the issue in their groundbreaking 1991 study, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, where they "unexpectedly discovered extensive forum shopping."[136] The power to choose the forum for a large bankruptcy reorganization "determines where hundreds or thousands of parties will go to court," they said, "and may be

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[133] Under SDNY local rule 1073-1(a), a case would be assigned to the White Plains division where "the principal place of business … set forth on the petition is in Westchester County." Local Rules, United States Bankruptcy Court, Southern District of New York, Assignment of Cases and Proceedings, 1073-1(a), available at https://www.nysb.uscourts.gov/rule-1073-1. The SDNY subsequently changed its case assignment rules for "mega" cases (debtors having assets or liabilities in excess of $100 million), requiring "random selection irrespective of the courthouse in which the case is filed." *Id.* at 1073-1(f) (modified Dec. 2, 2021). Functionally, this appears to mean that a "mega" case would be assigned to any judge in the SDNY, and not exclusively to the judge (or judges) based in White Plains (if the debtor's petition listed a qualifying address). Because, on this definition, *Purdue Pharma* would have been a "mega" case, it would not necessarily have been assigned to Judge Drain had the current rule been in effect when it declared bankruptcy in 2019.

[134] *See* Certificate of Change, Purdue Pharma, Inc. May 14, 2019, at ¶ FIFTH (unpaginated original; on file with author).

[135] Levitin, *supra* note 21, at 1143. Of course, Judge Drain is a well-respected jurist. Press Release, U.S. Bankr. Ct. S.D.N.Y, Distinguished Bankr. Judge To Retire From S. Dist. Bench (Sept. 28, 2021), https://www.nysb.uscourts.gov/sites/default/files/pdf/PressReleaseJudgeDrain.pdf.

[136] Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies,* 1991 WIS. L. REV. 11, 12 (1991) ("While conducting an empirical study of the bankruptcy reorganizations of the forty-three largest, publicly held companies to file and complete their cases from 1979 to 1988, we unexpectedly discovered extensive forum shopping.").

determinative of the outcomes of cases."[137] LoPucki has gone on to decry the persistence of what he now calls "court competition," which he says has resulted in a "corrupt"[138] and "lawless"[139] chapter 11 system.

As with other debates in bankruptcy, concerns about forum shopping have met a contractualist response. Professors David Skeel and Ken Ayotte, for example, counter that because creditors rarely seek to change venue, they accept the dominant venue choices.[140] The choice of forum is, as scholars such as Professor Robert Rasmussen or Professor Alan Schwartz might argue, simply an option on the menu of reorganization choices available to parties trying to resolve the corporate debtor's distress.[141] Here, of course, the Sacklers were arguably trying to choose not merely a forum, but a particular *judge*. And, they sought to resolve not merely Purdue Pharma's financial distress, but theirs, too.

The choice of corporate agents, professionals, and judge had two critical implications for all that would follow. First, as in all chapter 11 cases, Purdue Pharma—and not creditors—would control all practical decisions about whether to sue or settle claims that the estate may have had.[142] But this meant that many causes of action were almost certain to be settled without litigation. Because management of the debtors were appointed by the Sacklers, and Miller had publicly supported the deal, it was difficult to imagine Purdue Pharma would do anything other than settle according to the Sackler Settlement Framework.

This is not entirely surprising. Professor Jared Ellias and his colleagues have shown that bankruptcy directors like Miller and his colleagues appear to favor the interests of shareholders, even though the law of priority would

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[137] *Id.* at 13.

[138] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 138–39 (2005).

[139] *Id.* at 300.

[140] Kenneth Ayotte & David A. Skeel, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 456–57 (2006) (reviewing LYNN M. LOPUCKI, COURTING FAILURE (Michigan, 2005)).

[141] *See, e.g.*, Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1408 (2000); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Reorganization*, 71 TEX. L. REV. 51 (1992); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998).

[142] Such avoidance actions are generally property of the estate (*In re* Cybergenics Corp., 226 F.3d 237, 245 (3d Cir. 2000)) and may present concerns that the debtor in possession "acts under the influence of conflicts of interest." Off. Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (quoting Canadian Pa. Forest Prod. Ltd. v. J.D. Irving, Ltd. (*In re* Gibson Group, Inc.), 66 F.3d 1436, 1441 (6th Cir.1995)).

seem to require them to consider the interests of creditors.[143] Indeed, although Purdue Pharma's solvency was never tested in litigation, it is reasonably well-established that directors of companies in the "zone of insolvency" owe some sort of fiduciary duties to or for the benefit of creditors.[144] While a small group of plaintiff representatives had initially agreed to the Sackler Settlement Framework, the vast majority had not. The sequence of bankruptcy bargains that followed would give others little choice.

Purdue Pharma's counsel also muddied the picture. Once Purdue Pharma commenced its bankruptcy (in September 2019), lead counsel, Davis Polk's Marshal Huebner, offered shifting visions of his role. At certain times, he spoke as if he were a neutral, a "fiduciary for all,"[145] which would necessarily include the Sacklers. At other times, however, he spoke as if he were a crusader avenging the Sacklers' misdeeds.[146] Sometimes he claimed that Purdue Pharma was the "plaintiff" against the Sacklers as "defendants," although the only salient complaint filed (as explained below) was the one

[143] In a sample of cases, Ellias and his colleagues found that these directors investigated claims against insiders, negotiated a quick settlement, and asked the court to approve it. Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1086 (2022) (describing privatized directors as "loud voices in the boardroom shaping the company's bankruptcy strategy."). They find evidence of "pro-shareholder bias," which in ordinary cases renders them a new "weapon in the private-equity playbook," *id.* at 1088, but which here would reflect bias for the Sacklers, Purdue's shareholders. This is consistent with a more general concern that privatized fiduciaries have different incentives than those appointed pursuant (and subject) to statutory standards, such as formal bankruptcy trustees. *See, e.g.*, A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 919 (2009) (noting that turnaround experts "are predisposed to favor only one entity involved in the debtor's Chapter 11 reorganization: the creditor who was responsible for getting them hired").

[144] *See generally* Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1202 (2003) ("Courts and commentators routinely assume that once a firm is distressed, directors owe fiduciary duties to corporate creditors."). The view is not without controversary. *Compare :* North American Catholic Educational Programming Foundation, Inc. v. Gheewalla, 930 A.2d 92 (Del.2007) (describing and limiting duties) *with In re* Gen. Growth Properties, Inc., 409 B.R. 43, 64 (Bankr. S.D.N.Y. 2009) (questioning application of *Gheewalla*).

[145] *See, e.g.*, Hr'g Tr., Sept. 17, 2019, at 31 (HUEBNER: "The company and its advisors well understand that they are fiduciaries for all.").

[146] Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay $4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html.

> He characterized the governments' terms as punitive toward the Sacklers and their company. "We will rip [Purdue] out of your hands," he said. "We will stomp it out of existence. We will transfer its assets to a trust for the benefit of the American people. It will have a monitor. We will pick the board. You will be barred. And you will have to sell all your overseas companies and give us over $4 billion.

against victims to enjoin direct litigation against the Sacklers.[147] After Judge McMahon struck the Sackler Releases, Huebner stated that he was a "vessel" for the victims.[148] It is not clear how one law firm, much less one lawyer, can be a "fiduciary for all," who sues the victims for whom he is nevertheless a "vessel."

This may reflect the complex position of counsel to any debtor in possession. In any mass tort case, the debtor may be managed by at least some individuals implicated in the underlying harm, but is by law required to be a fiduciary for creditors.[149] A social debt bankruptcy, however, heightens concerns about who is acting for whom.

Second, the Sackler Settlement Framework would function in certain respects like a restructuring support agreement, shaping all that would follow. It was the first step in the sequence of bargains that led to the Sackler Releases.[150] To be sure, the initial Sackler Settlement Framework was with a small group of plaintiffs, not a single creditor. But they largely acted in unison in the case, and were quick to support the Sackler Settlement Framework whenever it was challenged.[151]

Purdue Pharma proceeded as a series of negotiations or mediations that had the effect of inducing or forcing all other creditors to capitulate to Purdue Pharma's plan implementing the Sackler Settlement Framework. They could negotiate improvements to it, but they could not realistically change the fact that that was the only option. Creditors who wanted a "day in court" against the Sacklers, or some public account of their alleged misconduct before they voted on the plan, would get neither.

2.2.2 The Preliminary Injunction and the Case Stipulation

Still, the Sacklers had at least one other problem: because they were not debtors in bankruptcy, the "automatic stay" of civil litigation would not shield them (it would only protect Purdue Pharma).[152] Thus, they would need a preliminary injunction to halt pending litigations against them during

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[147] Hr'g Tr., Oct. 11, 2019, at 138 (HUEBNER: "what I hope people are starting to understand as we have these proceedings is that the Debtor is actually the plaintiff against the Sacklers. We're not here to defend the Sacklers.").

[148] *See* Marshall Huebner, Davis Polk Partner, Moderated Conversation at Columbia Law School, Purdue Pharma: A View from Way Inside (Apr. 11, 2022), https://www8.gsb.columbia.edu/richman/node/362#overlay-context=node/341.

[149] 11 U.S.C. § 1107(a).

[150] Baird, *supra* note 32, at 594.

[151] As discussed below, these were the so-called "consenting parties," and part of their deal was that Purdue Pharma agreed to pay their legal fees, although no provision of the Bankruptcy Code contemplates such payments.

[152] 11 U.S.C. § 362(a).

the bankruptcy, in anticipation of making it permanent with the Sackler Releases.

Although no provision of the Bankruptcy Code permits such injunctions, courts authorize them under section 105 of the Bankruptcy Code[153] in order to shield management of a debtor, who might otherwise be distracted from efforts to restructure if they have to defend litigation personally.[154] At the outset of the bankruptcy, Purdue Pharma sought such a preliminary injunction to shield the Sacklers and scores of entities that they owned or controlled from the hundreds of suits against them.[155]

The Sackler Settlement Framework—the first bargain in the sequence—was the rationale. Counsel to Purdue Pharma argued that the preliminary injunction was needed to negotiate a deal with the Sacklers, and that only a deal with the Sacklers would avoid the "tragedy of the commons"[156] of direct litigation, replacing it with "billions of dollars of cash and critical resources … to address the opioid crisis."[157]

Creditors, the most active of which were governments, split on whether to support the preliminary injunction. The so-called "consenting" parties had agreed to the Sackler Settlement Framework at the outset, and so supported the injunction.[158] They had already provisionally made peace with the Sacklers. The so-called "nonconsenting" States, which included aggressive

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[153] Section 105 permits a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105. Sometimes, courts extend section 362's automatic stay to cover nondebtors. *See, e.g.,* A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986) (citing *In re* Johns-Manville Corp., 26 B.R. 405, 410 (Bankr. S.D.N.Y. 1983)).

[154] Howard C. Buschman III, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 BUS. LAW. 913, 946 (1992) ("Bankruptcy courts often are presented with applications for section 105 injunctions to bar state court actions against a debtor's officers and directors on the grounds that their defense to such actions will divert them from the task of reorganizing the debtor or that to permit such actions to proceed will increase claims against the estate due to the insiders' indemnification rights pursuant to the debtor's corporate bylaws.").

[155] The preliminary injunction in Purdue Pharma was extended at least thirty-two times, over three years. S*ee* Thirty-Second Amended Order Pursuant to 11 U.S.C. § 105(a) Granting, in Part, Motion for a Preliminary Injunction, Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289, Feb. 7, 2023 [ECF 410] (enjoining individual and governmental defendants from "the commencement or continuation of their active judicial, *administrative, or other actions or proceedings* against the Debtors and/or Related Parties [defined as the Sacklers and non-debtor affiliates they owned or controlled] that were or could have been commenced before the commencement of the case under this title against the Debtors and/or the Related Parties arising from or in any way relating to the Debtors' prescription opioid business") (emphasis added).

[156] Attorney Huebner claimed that to permit even a bellwether trial—a test case—would be "a true tragedy of the commons since the impact of allowing that to proceed is unthinkable value destruction for all." *See* Hr'g Tr., Oct. 10, 2019, at 23 [Bankr. ECF 325].

[157] *See* Mem. of Law in Support of Mot. for Prelim. Inj., at 3. Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289 [ECF 3].

[158] *See* Notice of Filing of Term Sheet with Ad Hoc Comm. (Oct. 8, 2019), [Bankr. ECF 257].

plaintiffs such as New York and Massachusetts, had not. They objected to the preliminary injunction on grounds that it interfered with their police powers to prevent Purdue Pharma from continuing its illicit activities and to continue their direct suits against the Sacklers.[159] This dynamic—creditor division over whether to settle or sue—would be a subsidiary theme in the case, which Purdue Pharma and the Sacklers would be able to exploit.

Judge Drain supported the injunction for two reasons, both rooted in the Sackler Settlement Framework. First, litigating against the Sacklers would be costly, "potentially murderous" litigation.[160] The "prospect" of a plan that implemented the Sackler Settlement Framework, by contrast, warranted the injunction in order to give the parties a "clear shot" to negotiate, free from the distraction of litigation on the merits.[161] It would be an opportunity for "due diligence," the judge said, as in any other deal.[162] Whether the Sacklers would contribute, and if so how much, would be

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[159] Their objection crystallized the factual allegations that would become the central question in the case:

> The Attorneys General of many States have filed suits alleging that eight people in a single family made the choices that caused much of [the prescription opioid] crisis. Members of the Sackler family used their power as owners and directors of their privately-held drug company—Purdue Pharma—to lead a decades long campaign of deceptive marketing for addictive drugs. The Sacklers used the profits from their illegal scheme to become one of the richest families in the world—far wealthier than the company they ran. Now, the Sacklers seek to leverage Purdue Pharma's corporate bankruptcy to avoid their own individual accountability… . Enjoining law enforcement actions against the Sacklers would make a successful reorganization less likely by delaying state court decisions that will inform a resolution. The States' actions do not threaten irreparable harm to Purdue, because it can continue its reorganization effort while suits against the non-debtor Sacklers proceed. The public has a compelling interest in the law enforcement actions going forward to advance interests established in the Bankruptcy Code itself; to enforce the States' laws against dangerous fraud; and to pursue accountability for thousands of injuries and deaths. Accordingly, the States' actions to prove our allegations against the Sacklers, enforce our laws, and secure relief for our citizens should continue.

See The States' Coordinated Opposition to the Debtors' Motion for Preliminary Injunction of States' Law Enforcement Actions Against the Sacklers, Oct. 4, 2019, at 1–2. Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289 (Oct. 4, 2019) [ECF 41].

[160] Hr'g Tr., Oct. 11, 2019, at 261, Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289 [ECF 108].

[161] *Id.*

[162] Judge Drain said that "the purpose of this injunction [was] to enable all of the states and all of the other claimants … to perform due diligence to decide whether a plan [of reorganization] … should consider a contribution by third parties." *In re* Purdue Pharms, L.P., 619 B.R. 38, 46 (S.D.N.Y. 2020) (quoting hearing transcript).

"based on all the facts, including all the claims that your clients and every other plaintiff has asserted against them," the judge stated.[163]

Second, the injunction would be woven into other bankruptcy bargains that would lead to the releases. One of the most important was an ex ante bargain in the form of a case stipulation under which the Sacklers would produce information that would enable creditors to negotiate the settlement.[164] Case stipulations like Purdue Pharma's are not inherently problematic. Here, however, the stipulation included a protective order which would prevent parties from publicly reporting what they learned through due diligence.[165]

Although confidentiality orders appear to have become common in chapter 11 cases, "there is a long-standing presumption of public access to judicial records."[166] Bankruptcy Code § 107 enhances this presumption by providing that, subject to certain exceptions, "a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."[167] Transparency has historically been an important value in corporate reorganization.[168]

In *Purdue Pharma,* media organizations later challenged the sealing and redaction of information produced in discovery pursuant to the protective order. Although Judge Drain ultimately agreed with the movants about the need to release some information (the names of investment advisors to the Sacklers), he waited until shortly before confirming the plan of reorganization to do so.[169] Any information revealed by then would have come after creditors had to vote on Purdue Pharma's plan of reorganization.

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[163] *See, e.g.*, Hr'g Tr., Oct. 11, 2019, at 170, Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289 [ECF 108].

[164] *See, e.g.*, Case Stipulation Among the Debtors, the Off. Comm. of Unsecured Creditors and Certain Related Parties (Oct. 11, 2019), Ex. A [Bankr. ECF 291] [hereinafter "Case Stipulation"].

[165] *See* Third Am. Protective Order (Nov. 12, 2020), [Bankr. ECF 1935].

[166] *See In re* Purdue Pharma, L.P., 632 B.R. 34, 38 (Bankr. S.D.N.Y. 2021) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978)). Although Judge Drain indicated that he was quoting the *Nixon* opinion, the quote does not appear there. It instead appears in *In re* Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005), which cited (but did not quote) *Nixon*.

[167] 11 U.S.C. § 107(a).

[168] *See, e.g.,* Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1618 (2009) ("Transparency has long been a vital feature of reorganization under Chapter 11, which has often been characterized as a "fishbowl.") (citations omitted); Knapp v. Seligson (*In re* Ira Haupt & Co.), 361 F.2d 164, 168 (2d Cir. 1966) ("The conduct of bankruptcy proceedings not only should be right but must seem right.").

[169] *Purdue Pharma*, 632 B.R. at 44 (opinion signed August 9, 2021; plan of reorganization confirmed September 1, 2019).

Moreover, creditors who joined the stipulation ceded important powers that would have given them leverage in negotiations with the Sacklers. Among other things, the Official Committee of Unsecured Creditors (UCC)—the only statutory fiduciary for creditors in the case—agreed not to terminate Purdue Pharma's exclusive right to file a plan for the first eight months of the case.[170] This meant that Purdue Pharma, run by bankruptcy directors appointed by the Sacklers, controlled the decision whether to propose a plan that would release the Sacklers largely free of concern that creditors might propose a plan that did anything else.

The UCC also ceded the powers to seek the appointment of an examiner or trustee in the case, or to convert or dismiss the bankruptcy.[171] As noted above, these powers can be credible threats to lever information, or to fundamentally alter the course of the case. The UCC would later complain that the Sacklers failed to produce adequate information despite the stipulation.[172]

The details of the Sackler Settlement Framework would be negotiated through four court-ordered mediations, each producing interlocking ex post bankruptcy bargains.[173] These mediations modestly improved payouts; the Sacklers raised their offer from $3 billion to about $5.5 billion, which sounds significant, but they also doubled the payout period.[174] They even promised certain noneconomic remedies, such as a "document repository" that would reveal some information about the Sacklers' role at Purdue Pharma.[175] But these were predicated on first giving the Sacklers the releases they sought. Because creditors would have little information about the claims being released—and could not litigate against the Sacklers anywhere—they would have to grant the releases without knowing what they were giving up.

Certain government creditors appealed the preliminary injunction to the United States District Court. Twenty-four of the objecting States had sued the Sacklers before bankruptcy, and wanted to continue to do so. They opposed the Sackler Settlement Framework because, they said, they wanted

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[170] Case Stipulation, *supra* note 164, at ¶ 4.

[171] *See id.*, at ¶ 6. The Sacklers also agreed to certain "anti-secretion" provisions that would prevent them from further transferring assets. *Id.* at ¶ 13.

[172] *See* Off. Comm. of Unsecured Creditors' Notice of Filing of First Set of Unredacted or Partially Redacted Exs. to the Decl. of Mitchell Hurley Dated Sep. 29, 2020 (Dec. 18, 2020), [Bankr. ECF 1754].

[173] *In re* Purdue Pharma, L.P., 633 B.R. 53, 83 (Bankr. S.D.N.Y.), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) ("[T]he plan contains several other settlements interrelated to those settlements that would not be achievable if either of the settlements with the Sacklers fell away.").

[174] As discussed in Part 3.2, because the value of Purdue Pharma itself declined during the case, the present value for creditors improved only slightly.

[175] *See* Disclosure Statement, *supra* note 122, at 134–36.

transparency. "It's critical," Massachusetts Attorney General Healey said, "that all the facts come out about what this company and its executives and directors did, that they apologize for the harm they caused, and that no one profits from breaking the law."[176]

On appeal, District Judge McMahon rejected these concerns. Like Bankruptcy Judge Drain, she believed that the Sackler Settlement Framework required interim peace to produce the global peace the Sacklers sought (ironically, she would be the same judge who later struck the releases).[177] Evincing faith in the bargaining process, she noted that "[i]t cannot [] be presumed that [the objecting States] will object to a final form of settlement."[178] Judge McMahon viewed the mere possibility of a Purdue Pharma plan based on the Sackler Settlement Framework as grounds for sustaining the injunction.

While preliminary injunctions in bankruptcy require a showing of a likelihood of success on the merits, here the success would be confirmation of plan—not the merits of the allegations against the Sacklers. But serious allegations against the Sacklers had only recently come to light in the multidistrict litigation. These, in turn, led to the direct lawsuits against the Sacklers stayed by the preliminary injunction. There had been no judicial determination on the merits of those claims, but plaintiffs were gaining on the Sacklers before bankruptcy.[179] Shutting down all efforts to hold the Sacklers accountable in some public and transparent way fueled concerns that the Sacklers were using Purdue Pharma's bankruptcy to "get away with it."[180]

There were at least two ways to address these concerns early in the case without dismissing it entirely. The first and perhaps most obvious would have been to permit a bellwether litigation to determine whether the Sacklers, themselves, should bear responsibility for Purdue Pharma's misconduct. In a bellwether trial, the claims of some members of a large group of claimants are tried in order to "provide a basis for … settlement or

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[176] *See* Sandhya Raman, CQ Rollcall, *Attorneys General Split on Potential Purdue Pharma Settlement*, 2019 CQINSB 0975, 2019 WL 4316546. New York Attorney General Letitia James was quoted as saying: "'A deal that doesn't account for the depth of pain and destruction caused by Purdue and the Sacklers is an insult, plain and simple. As attorney general, I will continue to seek justice for victims and fight to hold bad actors accountable, no matter how powerful they may be.'" *Id.*

[177] *In re* Purdue Pharma, L.P., 619 B.R. 53, 58 (S.D.N.Y. 2020) (describing proposed settlement as "a framework for negotiation, not a final settlement").

[178] *Id.*

[179] The Sacklers had recently lost "at least three" motions to dismiss lawsuits asserting direct liability. *In re* Purdue Pharma, 635 B.R. 26, 51 (S.D.N.Y 2021) (citations omitted).

[180] *See* Posner & Brubaker, *supra* note 23.

for resolving common issues."[181] Test cases are one way that courts can resolve mass claims "within a reasonable time frame, with a reasonable degree of consistency, without bringing the system to a screeching halt, or removing the hope of justice and compensation within their lifetimes from the expectations of our citizens."[182]

Several states argued that this could have happened within the initial 180-day injunction period.[183] If they won, the trial would only determine liability—not give the plaintiff better payment rights. But it would provide insight into the strength of claims that the Sacklers played a central role at Purdue Pharma and in the company's contribution to the opioid crisis. This, in turn, would enhance parties' ability to price the releases that the Sacklers sought.[184]

Judge Drain rejected this because, he said, even a test case would produce a litigation explosion. "Why would I just do this one?" he asked rhetorically at the first preliminary injunction hearing.[185] Drawing an analogy to Dr. Strangelove, he said he feared that "people will want to advance so they can say I'm going to be next. . . . They want the next doomsday machine."[186]

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[181] *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray . . . ." *Id.*

[182] *See generally* Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499, 502 (2012) (discussing "procedural mechanisms of class actions, multidistrict litigation, coordinated procedures, consolidation, test case and bellwether trials, and even bankruptcy, as the means to process mass claims").

[183] *See* Hr'g Tr., Oct. 11, 2019, at 180, Purdue Pharma, L.P. et al. v. Commonwealth of Mass., et al. (*In re* Purdue Pharma, L.P.), Adv. Pro. No. 19-08289 [ECF 108]. Counsel to the State of Washington argued that—

> if we're talking about a 180-day [injunction], we're talking about a period where the Washington trial could be complete by the end of that period of time if permitted to go forward. And we submit that the information that would be gained to all parties in the system from allowing this trial to go forward and to see what its result would be very beneficial to the process. We understand, no one is disputing that any judgement that Washington obtains is stayed. That's not what this is about from Washington's perspective. The Debtor seems to think we're stupid and don't understand that. But this is not about jumping the line. We know that we all get back in the same place in line."

Id.

[184] *See, e.g.,* Myriam Gilles & Gary Friedman, *MDL Drano: Rule 23-Based Solutions to Mass Tort Buildup*, 84 LAW & CONTEMP. PROBS., 121, 122 (2021) (discussing view that "bellwether trial regime increases settlement values").

[185] Hr'g Tr., Oct. 10, 2019, at 185 [Bankr. ECF 325].

[186] *Id.* at 185–86.

Second, Judge Drain could have appointed an independent examiner to investigate and report on those allegations, so that creditors and the public in general would have an independent report on the mounting allegations against the Sacklers. An examiner was proposed early in *Purdue Pharma*.[187] Many personal injury victims apparently wanted one.[188] But Judge Drain forcefully rejected these suggestions.[189] It was "idiotic" to call for an independent examination and public report, he said, because of "the commitment as part of the injunction to have a full account, and the examinations that are going on."[190]

But there was no "account" of the direct claims against the Sacklers and the results of investigations that were conducted remained concealed by the

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[187] In the interest of full disclosure, I authored a letter, signed by twenty law professors, seeking the appointment of an examiner early in the *Purdue Pharma* case. *See* Letter of Bankruptcy Law Professors to United States Trustee Requesting an Examiner in the Purdue Pharma Chapter 11 Reorganization (Nov. 5, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532642.

[188] Over 3000 individuals signed a change.org petition calling for the appointment of an examiner. P.A.I.N/Nan Goldin*, We Demand Accountability and Transparency From Purdue Pharma and the Sacklers!*, CHANGE.ORG, https://www.change.org/p/judge-drain (accessed Mar. 5, 2021); *see also* Letter from Peter W. Jackson to Judge Robert Drain at 1, *In re* Purdue Pharma, L.P. (July 30, 2020), [Bankr. ECF 1538].

[189] In a matter having nothing to do with a request for an examiner, Judge Drain warned victims against seeking one. Addressing counsel to the Official Committee of Unsecured Creditors, he said:

> The press, who in a number of totally irresponsible articles led people who have truly suffered, because of the opioid crisis, to believe that there is no investigation going on, that this case's purpose is somehow to let the Sacklers get away with it and that without the appointment of an examiner there won't be an investigation, is just completely and utterly misguided.
>
> So, for anyone to believe that they should be driven by such trash is just a big mistake. We cannot muzzle the press, but certainly, people should understand that what is being put out as if it was news is completely false and should lead them to decide that they do not want to buy or click on that publication in the future because they cannot trust it to do the basic due diligence that any reporter should do.
>
> So, I don't want to hear some idiot reporter or some bloggist quoted to me again in this case. And you and your client should not be guided by anything of that sort or some misguided law professor who does not take the basic due diligence that you would think he or she would want a first-year law student to do to actually look at the actual transcript and the record in the case before spouting off about the need for an examiner, including completely ignoring the appointment of a corporate monitor, the commitment as part of the injunction to have a full account, and the examinations that are going on.

Hr'g Tr., July 23, 2020, at 56–57, [Bankr. ECF 1549]. I later formally sought an examiner on behalf of Peter Jackson for the more limited purpose of determining whether Purdue Pharma's board of directors made the decision to settle rather than sue independently and in good faith. My work on behalf of Mr. Jackson, and Judge Drain's reactions, are discussed in BETH MACY, RAISING LAZARUS: HOPE, JUSTICE, AND THE FUTURE OF AMERICA'S OVERDOSE CRISIS, 264-65 (2022).

[190] Hr'g Tr., July 23, 2020, at 56–57, [Bankr. ECF 1549].

case stipulation and protective order (and claims of attorney-client privilege). The bankruptcy bargains supporting, and supported by, the preliminary injunction foreclosed opportunities for transparency and accountability, leading instead to the releases that would permanently shield the Sacklers.[191]

2.2.3 The DOJ Settlement

The third deal, which "sealed" all others, was a controversial settlement between Purdue Pharma and the DOJ which had a so-called "poison pill" that practically assured the Sacklers would get a plan with the "global peace" they sought. This was a coercive ex post bankruptcy bargain with significant distributive consequences.

Purdue Pharma under the Sacklers was not chastened by the 2007 criminal plea, and continued to violate drug marketing laws. Before bankruptcy, the DOJ opened another investigation into allegations that Purdue Pharma had continued to engage in substantially the same conduct,[192] notwithstanding a corporate compliance program intended to prevent it.[193]

In November 2020, during the bankruptcy, Purdue Pharma agreed to plead guilty to a criminal information filed by the DOJ in the United States District Court for the District of New Jersey. In its plea agreement, the

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[191] Six months into the case, the Official Committee of Unsecured Creditors sought to "formalize" some of the discovery it was taking of the Sacklers, by making a nonadversarial request for information under Federal Rule of Bankruptcy Procedure 2004, which empowers any party in interest to seek a court order for the examination of "any entity" on matters related to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate." Fed. R. Bankr. P. 2004. *See Ex Parte* Mot. of the Off. Comm. of Unsecured Creditors of Purdue Pharma, et al., for an Order Authorizing Examinations Pursuant to Federal Rules of Bankruptcy Procedure 2004 and 9006, (Mar. 25, 2020), [Bankr. ECF 981]. As with other investigations in the case, these produced little public information about the merits of the allegations against the Sacklers.

[192] The timing of the United States' investigation is not known but based on a Memorandum of Understanding Regarding Joint Defense and Common Interest Agreement dated as of May 15, 2018 between counsel for Purdue Pharma and certain members of the Sackler family, it would appear that the company and the family began negotiations in earnest with the DOJ in 2018. *See* Letter dated Feb. 8, 2021 from Michael S. Quinn, Esq. to William K. Harrington, Ex. A at 10 [Bankr. ECF 2370] [hereinafter "Joint Defense Agreement"].

[193] *In re* Purdue Pharma, L.P., 635 B.R. 26, 48–49 (S.D.N.Y. 2021) *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) (noting if statements in 2020 Plea Agreement were true, the debtors' earlier "purported acceptance of responsibility was a charade, and the oversight mechanisms built into the settlements were a conspicuous failure").

company (though, again, not the Sacklers) "admitted to substantial deliberate wrongful conduct" including "aggressive efforts to boost opioid sales."[194]

The Purdue Pharma-DOJ settlements established that the federal government had $18 billion dollars in claims, while a separate civil settlement with the Sacklers required them to pay only $225 million.[195] Purdue Pharma and the DOJ also agreed that the DOJ would have a $2 billion criminal forfeiture judgment with "the status of an allowed superpriority administrative expense claim … with priority over any and all claims and administrative expenses of any kind."[196] This made the United States the most powerful creditor in the case because the criminal forfeiture judgment would be paid ahead of Purdue Pharma's other creditors, in particular, personal injury and governmental creditors.[197] It was, for all practical purposes, the only true priority creditor (although, as discussed below, legal fees exceeding half-a-billion dollars would also have priority, but junior to the "super priority" claims of the United States[198]).

In the settlement, the DOJ agreed to give over $1 billion of those payment rights to state and local governments.[199] This may have induced

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[194] *Id.* at 50 (citing USA v. Purdue Pharma L.P., No. 20-01028 (D.N.J 2020)). As the District Court explained—

> [T]he corporation admitted that Purdue had engaged in aggressive efforts to boost opioid sales, including: offering payments to induce health care providers to write more prescriptions of Purdue opioid products, offering "prescription savings cards" for health care providers to give patients to encourage them to fill prescriptions for opioids, and failing to maintain effective controls against diversion, which included failing to inform the United States Drug Enforcement Administration that health care providers flagged for abuse filled over 1.4 million OxyContin prescriptions.

Id.; *see also* Mot. of Debtors Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States, Ex. C, Addendum A, at 4, ¶ 14 (Oct. 21, 2021), [Bankr. ECF 1828]; Mot. to Confirm That Payment by the Sackler Families Under Settlement with the United States Dep't of Just. is Not Prohibited by this Court, Ex. A, Addendum A, at 4, ¶ 12 (Oct. 22, 2021), [Bankr. ECF 1833]. The Addenda attached to the foregoing pleadings are referred to hereinafter as the "Purdue Addendum" and the "Sackler Addendum," respectively.

[195] Purdue Pharma L.P. Plea Agreement, U.S. DEP'T JUST. 8 (Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1329576/download [https://perma.cc/L3X9-WPDN] ("Purdue Plea Agreement"); Settlement Agreement between the United States and Purdue Pharma L.P., U.S. Dep't Just., Settlement Agreement 4 (Oct. 21, 2020), https://www.justice.gov/opa/press-release/file/1329571/download [https://perma.cc/F3WM3F98] ("Purdue Civil Settlement").

[196] Purdue Plea Agreement, *supra* note 195, at 8.

[197] Secured claims would have priority over the forfeiture judgment, but Purdue Pharma, unusually, had no secured creditors. Statement of Financial Affairs for Purdue Pharma L.P., at 8 (Oct. 29, 2019), [Bankr. ECF 411].

[198] Professional fees are generally paid in chapter 11 cases as a first-priority expense of administration. 11 U.S.C. §§ 503, 507.

[199] Purdue Plea Agreement, *supra* note 195, at 9–10.

many states, who were often active creditors in the case, to support the DOJ settlement.[200]

If that "gift" was a carrot, the DOJ settlement also had a "stick": a so-called "poison pill." The term "poison pill" derives from corporate governance practice, and is shorthand for various measures that a corporate board could take to deter a hostile acquisition of a corporation.[201] Poison pills can be coercive because they can constrain value-maximizing choices.[202]

Here, the DOJ settlement had several conditions that would lead to a plan that implemented the Sackler Settlement Framework: any deviation from those conditions would cause the DOJ's claim to balloon back up to its full amount, essentially eliminating recoveries for any creditors other than the United States. In particular, it required Purdue Pharma to reorganize as a "public benefit company," or similar entity,[203] which meant that Purdue Pharma had to confirm a plan of a particular sort—its case could not be dismissed, and it could not liquidate under chapter 7.

The same "nonconsenting" States that opposed the preliminary injunction also objected to the DOJ settlement on grounds that it was a "plan sub rosa"—a plan of reorganization in fact, but without the procedural protections of disclosure and an informed, supermajority vote, as required by the Bankruptcy Code.[204]

Judge Drain rejected the sub rosa plan concerns because, he said, "[i]t's just simply not the case that a major resolution in the case which limits people's options going forward … constitutes a sub rosa plan."[205] This may be true in theory, but glossed over the fact that the DOJ settlement would make any alternative to a plan proposed by Purdue Pharma economically irrational. Those alternatives would have included dismissal or conversion of the case to a chapter 7 liquidation or the appointment of a chapter 11 trustee. In any of these cases, the Sacklers' bankruptcy directors would no

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[200] Disclosure Statement, *supra* note 122, at 24.

[201] *See, e.g.,* Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 937 (1993). A pill might, for example, trigger issuance of new shares if there were an unsolicited tender offer, thereby disabling a hostile acquisition.

[202] It is, of course, obviously tragic that OxyContin has itself been characterized as a form of "poison." *See* Amy Bohnert, *The Dose Makes the Poison: Opioid Overdose Study Supports Call for Caution in Prescription Levels*, UNIV. OF MICH. INST. FOR HEALTHCARE POL'Y & INNOVATION, https://ihpi.umich.edu/news/dose-makes-poison-opioid-overdose-study-supports-call-caution-prescription-levels (last visited Jan. 8, 2023).

[203] Purdue Plea Agreement, *supra* note 195, at 8–9; Purdue Civil Settlement, *supra* note 195, at 9.

[204] Objection of the Ad Hoc Group of Non-Consenting States to the Motion of Debtors Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. 9019 Authorizing and Approving Settlements Between the Debtors and the United States at 4 (Nov. 10, 2020), [Bankr. ECF 1914].

[205] Hr'g Tr., Nov 17, 2020, at 242, [Bankr. ECF 2073].

longer control Purdue Pharma, potentially threatening the Sackler Releases—and the Sacklers.

The DOJ settlement had three key effects. First, Purdue Pharma—and indirectly its creditors—would bear almost all liability for the alleged misconduct. While there is little doubt that Purdue Pharma should have borne this liability, it also meant that, other than the $225 million the Sacklers were paying as part of their civil settlement, they would likely have no further liability at all, except to the extent they so agreed under Purdue Pharma's plan.

Second, the poison pill, and the priority of the United States' claim rendered it something like a "dominant secured creditor," but with a twist. In a 2004 article, Professor Jay Westbrook identified the procedural power that a dominant secured creditor—one with a lien on all of a debtor's assets—can wield over the bankruptcy process.[206] The concern, Westbrook correctly noted, was that while bankruptcy is intended to respect the property entitlements of secured creditors, the process was to be governed by estate fiduciaries.[207]

The poison pill, and the United States' priority rights in Purdue Pharma's assets (through its forfeiture power), gave the DOJ powers as great as those of a dominant secured creditor, but with the complication that the standards by which it could disrupt the process and take control were contingent on an outcome—an alternative to a Purdue Pharma plan—that this very settlement made highly unlikely. The DOJ thereafter would wield great but uncertain power over the case, accelerating momentum to confirm a plan that would release the Sacklers.

Third, it strongly suggested that the Sacklers would not be prosecuted individually. Of course, Purdue Pharma's bankruptcy could not achieve that result formally,[208] although the DOJ press release all but said so.[209] But, more fundamentally, the deal towards which the parties were negotiating contemplated Sackler payments over many years. To charge the Sacklers

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[206] Westbrook, *supra* note 83, at 801, 805.

[207] *Id.* at 831 ("Even under present law, a dominant secured party will often be able to veto a bankruptcy. There is little more that any contractualist could ask of a legal regime.").

[208] *In re* Purdue Pharma, L.P., 633 B.R. 53, 77 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) ("The plan does not contain a release of criminal conduct. That is crystal clear in the plan and always has been in these cases.").

[209] "'This resolution closes a particularly sad chapter in the ongoing battle against opioid addiction,' said Drug Enforcement Administration (DEA) Assistant Administrator Tim McDermott." *See* Press Release, Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid.

after the plan was confirmed would threaten to disrupt those payments: why would the Sacklers continue to pay if they were being charged anyway? To prosecute, in other words, would be to invite significant political blowback from the States, who would not want to lose the billion-dollar carrot they were getting under the DOJ settlement.

This invites a question: why did the DOJ want to settle? The subsequent administration took a different approach, and through the United States Trustee challenged the Sackler Releases.[210] Did the right hand not know what the left hand was doing? It is not entirely clear, but it appears that Purdue Pharma and the Sacklers worked together to persuade the DOJ in 2020 to undertake no individual prosecutions.[211] The subsequent administration may simply have had a different view about the propriety of nondebtor releases.

The DOJ settlement did not explicitly require a *Purdue Pharma* plan to release the Sacklers. Yet, only the most naïve would fail to see that it was a critical step toward that goal because it made any alternative to a plan proposed by the debtors—which the Sacklers still owned—economically irrational. Indeed, Judge Drain ultimately approved the DOJ settlements because he said that they paved the way for the parties to negotiate the Sackler Releases.[212] Moreover, the effectiveness of Purdue Pharma's plan and Purdue Pharma's sentencing were made contingent upon one another.[213] The DOJ settlement was, as Gerald Posner and I noted in *The New York Times*, likely to be the Sacklers' "last poison pill."[214]

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[210] *See* Statement from Attorney General Merrick B. Garland Regarding Purdue Pharma Bankruptcy, Dec. 16, 2021, https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-regarding-purdue-pharma-bankruptcy (last visited Aug. 2, 2022).

[211] *See, e.g.*, Dep. of David Sackler, Aug. 28, 2020, Ex. 43, [Bankr. ECF 2161-4] ("Q. Okay. Was there coordination between the Sackler Family and Purdue in connection with the investigations? A. Yes. Q. Can you describe the coordination generally? A. Generally I believe it's sharing of documents and work product between lawyers.").

[212] THE COURT: "With those two documents, it would seem to me that as far as potential [liability] issues are concerned, the parties have enough to negotiate the third-party release claims now." Hr'g Tr. at 248, Nov. 17, 2020, [Bankr. ECF 2703].

[213] According to Purdue Pharma's Disclosure Statement, on November 24, 2020, Purdue Pharma pleaded guilty in the United States District Court for New Jersey to an information charging it with three felony offenses. Disclosure Statement, *supra* note 122, at 133. However, Purdue Pharma cannot be sentenced prior to 75 days *after* plan confirmation. *Id.* at 132. Yet, it is a condition precedent to the effective date of the plan that the DOJ settlement "shall have been consummated or will be consummated substantially simultaneously with consummation of the Plan." *Id.* at 262. In confirming the plan, the Bankruptcy Court nevertheless insisted that the plan had no effect on the Sacklers' potential criminal liability. *Purdue Pharma*, 633 B.R. at 77–78 ("At best, suggestions that the plan would relieve the Sacklers of potential criminal liability reflect a lack of understanding about these cases; at worst, such suggestions are irresponsible and, frankly, cruel to those whom they mislead.").

[214] Jonathan C. Lipson & Gerald Posner, *The Sacklers' Last Poison Pill*, N.Y. TIMES (Dec. 5, 2020), https://www.nytimes.com/2020/12/05/opinion/sackler-purdue-pharma-doj.html.

2.3 WHY DID CREDITOR REPRESENTATIVES AGREE?

While it is not hard to understand why the Sacklers and Purdue Pharma would want the three deals described above, they still had to have some creditor support. If the Sackler Releases, and the bankruptcy bargains leading to them, were so problematic, why did creditors agree to them?

Obviously many creditors, in particular the so-called "consenting" parties, believed that they had come to some sort of resolution with the Sacklers. The Sackler Settlement Framework was good enough for them.

But what of the others? In part, the ordinary science of chapter 11 practice worked against them. As explained above, before bankruptcy, the Sacklers chose corporate directors, professionals, and a judge who were highly likely to support the deal they wanted. They rendered resistance to the preliminary injunction and the DOJ settlement futile. But, there were also other constraints on creditor representatives that reduced their incentives or capacity to challenge the deals that led to the releases. Purdue Pharma and the Sacklers did not necessarily create these constraints, but they exploited them to convert the Sackler Settlement Framework into Purdue's plan of reorganization.

2.3.1 The Official Creditors' Committee

To act as a check on the debtor in possession, large chapter 11 cases such as *Purdue Pharma* will have an official committee of unsecured creditors appointed by the United States Trustee, and which "ordinarily consist[s] of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee."[215] In *Purdue Pharma*, there was only one official committee of unsecured creditors (the UCC), and its ability to aggressively represent creditors was limited for three reasons.

First, its membership was internally divided between four personal injury creditors, four commercial creditors (including LTS Lohman, an opioid patch manufacturer, and Blue Cross-Blue Shield), and the Pension Benefit Guaranty Corporation.[216] These did not necessarily represent the same "kind" of creditors because, among other reasons, some commercial creditors were (or may have become) codefendants in other opioid litigations; the personal injury creditors were always plaintiffs.[217] Positions taken, or information revealed, in the *Purdue Pharma* chapter 11 case might

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[215] 11 U.S.C. § 1102(c).

[216] *See* V.S. of the Off. Comm. of Unsecured Creditors of Purdue Pharma, L.P. et al., Pursuant to Bankruptcy Rule 2019 (Oct. 5, 2019), at 5–6. [Bankr. ECF 218].

[217] *See id.* at 2.

hurt commercial creditors in other opioid litigations (such as the multidistrict litigation), which were progressing against many defendants.

Ryan Hampton, a personal injury creditor and opioid activist who chaired the UCC until he resigned in anger after Purdue Pharma's plan was confirmed, wrote that the outcome of the case—in particular, the release of the Sacklers—was "the opposite of what I and many other victims sought: We repeatedly called for transparency into the process, accountability for the Sacklers who had owned the company and reparations for the millions of people affected by the OxyContin-fueled drug epidemic."[218] While Hampton may have called for these things, the UCC appears to have openly pursued few of them.

Second, not only were there potential frictions within the UCC, but it omitted arguably the most important kind of creditor: government entities. The United States Trustee, which appoints the committee, had interpreted the Bankruptcy Code to exclude governmental units from serving on official committees of unsecured creditors.[219] This meant that the United States and hundreds of government creditors—in particular the states—would have no collective, official representation in the case.

This was not surprising, because government actors have generally not been permitted to serve on official creditors' committees.[220] But, as explained below, this left different public actors to operate through various ad hoc committees. As indicated by the objections of the nonconsenting States, those ad hoc committees did not always agree with one another or the UCC. This left creditor groups highly fragmented.

Third, the UCC was the only statutory committee. Bankruptcy courts have the power to appoint other official committees and representatives, and this has been important in mass tort cases, especially those involving long-tail claims, such as those arising from asbestos exposure. Future claimants are presumed to have different views about reorganization than current creditors. Recognizing the need to enable future claimants to participate in reorganization formally, Congress in 1994 explicitly conditioned the availability of nondebtor releases in asbestos cases on the

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[218] *See* Ryan Hampton, *The Sacklers Are Walking off into the Sunset. Reform the System,* N.Y. TIMES (Sept. 11, 2021), https://www.nytimes.com/2021/09/11/opinion/purdue-sacklers-opioids-oxycontin-settlement.html.

[219] *See* 11 U.S.C. §§ 101(41), 1102(b)(1) (defining "person" as excluding government entities in this capacity and providing that a committee should consist of persons, respectively).

[220] The Bankruptcy Reform Act of 1994 amended the Bankruptcy Code definition of "person" to permit the Pension Benefit Guaranty Corporation to serve as a full member of creditors' committees. Prior to the 1994 amendments, PBGC served in an *ex officio* capacity in several major cases, when permitted by committee members and the U.S. Trustee. Harold J. Ashner, *Update on PBGC Legislative and Regulatory Activity*, SL076 ALI-ABA 1757, 1804.

protections of a future claims representative.[221] But, the rules about NDRs involving asbestos liability do not apply to other types of debt. There was no other formal protection for individual creditor interests in *Purdue Pharma*, a gap the Sacklers and the debtor were able to exploit.

2.3.2 Ad Hoc Committees

Rather than statutory committees or official representatives of creditors, *Purdue Pharma* relied on about a dozen "ad hoc" committees to represent many different creditor groups.

Ad hoc committees are "loose affiliation[s]" of creditors, formed to represent self-identified interests.[222] Importantly, ad hoc committees "do not purport to represent the interests of any other parties in interest."[223] Unlike official committees, they are self-selecting, and are not appointed by the United States Trustee. Neither they nor their professionals are statutory fiduciaries; nor are they or their professionals subject to the Bankruptcy Code's special provisions regarding conflicts of interest.[224]

Three ad hoc committees were especially important in *Purdue Pharma:* (1) the committee representing the so-called "consenting" parties; (2) the committee representing so-called "nonconsenting" states; and (3) the committee representing individual personal injury claimants.

The consenting parties group was important because it was initially comprised of eighteen plaintiffs (mostly governments) which had apparently agreed to the Sackler Settlement Framework before bankruptcy.[225] The nonconsenting states, by contrast, were probably the most aggressive and

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[221] 11 U.S.C. § 524(g)(4)(B)(i); Findley v. Falise (*In re* Joint E. & S. Dist. Asbestos Litig.), 878 F. Supp. 473, 571 (E.D.N.Y. & S.D.N.Y. 1995) (citing 11 U.S.C. § 524(g)(4)(B)(i)-(ii) (1994)), *aff'd in part, rev'd in part*, 78 F.3d 764 (2d Cir. 1996) ("[a]n injunction issued pursuant to the statute will only be valid and enforceable as to future claimants if a legal representative was appointed to protect future claimants' rights in the proceedings").

[222] *In re* Wash. Mut., Inc., 419 B.R. 271, 274 (Bankr. D. Del. 2009).

[223] Jennifer Albrecht, *New Bankruptcy Rule 2019: Boon or Bane for Distressed Investors?,* 2011 COLUM. BUS. L. REV. 717, 726 (2011).

[224] *See, e.g.,* 11 U.S.C. § 327(a).

[225] The "consenting" were initially eighteen plaintiffs or their representatives: the States of Florida, Georgia, Louisiana, Michigan, Mississippi, New Mexico, Ohio, Tennessee, Texas, and Utah; Broward County, Florida, the City of Chicago, the City of Philadelphia, Huntington/Cabell County, West Virginia, King County, Washington, Muscogee (Creek) Nation, Santa Clara County, California, and attorneys Paul J. Hanly, Jr., Joseph F. Rice, and Paul T. Farrell, Jr., on behalf of the Court appointed Plaintiffs' Executive Committee in *In re* National Prescription Opiate Litigation, Case No. 17-md-02804, MDL No. 2804. *See* V.S. Pursuant to Bankruptcy Rule 2019, at Ex. A (Oct. 10, 2019), [Bankr. ECF 279]. This committee asserted that "[t]he members of th[is] Ad Hoc Committee negotiated and support a settlement structure with the Debtors and their equity shareholders, on behalf of a larger group of supporting governmental and other contingent litigation claimants. Collectively, this larger group of creditors comprise over half the population of the country, holding substantial claims against the Debtors' estates." *Id.* at 2. This would seem to be a difficult claim to verify.

successful opponents of the Sackler Settlement Framework early in the case. As noted above, they challenged the preliminary injunction and the DOJ settlements, albeit unsuccessfully. In the end, all of these States capitulated to the settlement framework. Even the "nine" holdouts who won the appeal before the District Court capitulated to the Sackler Releases thereafter, during the further appeal to the Second Circuit, in exchange for a modest increase in real consideration.[226]

The ad hoc committee of personal injury claimants was, in retrospect, the most problematic of the ad hoc committees. This committee claimed that it was "comprised of 60,761 personal injury claimants."[227] While its initial disclosures indicated that it had had between 8 and 13 individual members, they were later amended to remove all member names in order to protect allegedly confidential information. It was not clear who constituted this committee or how they were appointed. It was thus not possible to determine whether they or their counsel could adequately represent scores of thousands of personal injury creditors in the case.

The personal injury claimants' ad hoc committee was also problematic because its counsel apparently took the lead in drafting "trust distribution procedures" that would make it difficult for individuals to recover for their claims against Purdue Pharma, and agreed without reservation to release the Sacklers, even though they would retain at least $6 billion which individuals could have tried to pursue outside of bankruptcy absent the preliminary

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[226] Lauren del Valle, *A US Bankruptcy Judge Approved Purdue Pharma and Sacklers' $6 Billion Settlement Agreement with States, Connecticut AG Says*, CNN (Mar. 10, 2022), https://www.cnn.com/2022/03/09/us/us-bankruptcy-judge-approves-purdue-pharma-sacklers-settlement/index.html. As explained below, it appears that the present value of consideration to creditors increased at most only modestly during the case.

[227] Second Am. V.S. of the Ad Hoc Grp. of Individual Victims of Purdue Pharma L.P. et al., Pursuant to Bankruptcy Rule 2019 (Oct. 13, 2021), [Bankr. ECF 3939]. Originally, the individuals' ad hoc committee was purportedly comprised of eight victims who had asserted opioid-related claims against the debtors. All were apparently represented by the personal injury firm ASK LLP, and attorney Edward Neiger. *See* V.S. of the Ad Hoc Grp. of Individual Victims of Purdue Pharma L.P., et al., Purusuant [sic] to Bankruptcy Rule 2019 (Oct 25, 2019), [Bankr. ECF 349]. In March of 2020 (about six months into the case), the individual victims' committee retained the BigLaw firm of White & Case. Its membership expanded to 13. Am. V.S. of the Ad Hoc Grp. of Individual Victims of Purdue Pharma L.P., et al., Pursuant to Bankruptcy Rule 2019 (July 17, 2020), [Bankr. ECF 1480]. Thereafter, this committee further amended its Rule 2019 disclosure to remove the names of all members on grounds that this was personally identifiable information shielded by a protective order in the case. *See* Second Am. V.S. of the Ad Hoc Group of Individual Victims of Purdue Pharma L.P., et al., Pursuant to Bankruptcy Rule 2019, at 2 (Oct. 13, 2021), [Bankr. ECF 3939] ("The names and addresses of the Ad Hoc Group Members constitute "Personally Identifying Information" as that term is defined in the Third Amended Protective Order . . . .").

injunction discussed above.[228] Among other things, counsel to this group advocated for procedures that would have eliminated their putative clients' right to a jury trial against the debtors (later modified), and did eliminate it as to the Sacklers.[229] Those procedures also imposed significant burdens of proof on individuals, including that they have evidence of original prescriptions for OxyContin.[230] Because many victims died without having had a prescription, or cannot find the one they had, this would eliminate the claims of many creditors who might otherwise qualify for the meagre amounts available under the plan (topping out at around $48,000).[231]

The ultimate problem with the ad hoc committees is that they, too, were constrained by their own deals with Purdue Pharma: in many cases, the debtors agreed to pay their lawyers' fees in connection with the decision to support the Sackler Settlement Framework and the plan that embodied it.[232] While estate professionals are paid by the estate, their compensation is different from that of the professionals of ad hoc committees. The fees of the former are subject to various standards under the Bankruptcy Code and the

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[228] There were repeated claims that the Sacklers had rendered those funds unreachable by U.S. creditors, a position Judge Drain accepted at the confirmation hearing. *See In re* Purdue Pharma, L.P., 633 B.R. 53, 89 (Bankr. S.D.N.Y.), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). No litigation ever tested the claim. More important, it is difficult to see why the Sacklers should have received releases for, in effect, returning about half of $10 billion in what appear to be proceeds of Purdue Pharma's confessed crimes.

[229] It appears that counsel to the personal injury ad hoc committee drafted the so-called "trust distribution procedures" under Purdue Pharma's plan, which appear as the *Individual Purdue Pharma L.P. PI Trust Distribution Procedure for Non-NAS PI Channeled Claims* (Sept. 27, 2021), [Bankr. ECF 3787-1] [hereinafter "PI TDPs"]. *See* Hr'g Trans. at 140 (May 26, 2021), [Bankr. ECF 2981] (counsel for the debtors: "These TDPs were drafted largely by the PIs who represent hundreds of thousands of claimants"). The requirement that a personal injury creditor have evidence of a prescription or comparable medical evidence (unless the claimant was a minor) appears in § 5, pp. 6-9 of the PI TDPs. The PI TDPs make clear that if a personal injury creditor wishes to pursue its claim in the "tort system," then it may do so at its expense "against only the PI Trust (and including no other parties as defendants)." *Id.* at Ex. B § 1, p. 1. Whatever jury trial right survives under the PI TDPs could therefore not be asserted against beneficiaries of the Sackler Releases.

[230] Disclosure Statement, *supra* note 122, at 108. *See* Obj. of Peter W. Jackson to Am. Disclosure Statement for First Am. Chapter 11 Plan for Purdue Pharma L.P. and Affiliated Debtors at 12-13, (May 6, 2021), [Bankr. ECF 2819].

[231] Disclosure Statement, *supra* note 122, at 111.

[232] *See* Debtors' Mot. to Approve Payment or Reimbursement of Certain Fees and Expenses of the Non-Consenting States Grp., the Ad Hoc Comm. and the MSGE Grp. Pursuant to Sections 363(b) and 105(a) of the Bankruptcy Code and Bankruptcy Rule 6004 (Oct. 21, 2021), [Bankr. ECF 3986]; Order Granting Debtors' Mot. to Approve Payment or Reimbursement of Certain Fees and Expenses of the Non-Consenting States Grp., the Ad Hoc Comm., and the MSGE Group (Nov. 30, 2021), [Bankr. ECF 4185].

fee application process, which requires estate professionals to submit fairly detailed statements about their work and how it benefitted the estate.[233]

The payment of the fees of professionals retained by ad hoc committees in *Purdue Pharma,* by contrast, was agreed to largely through various deals struck in the case, including the plan of reorganization.[234] It is not clear what legal or evidentiary standard governs such payments. Notably, in some cases, the fees were incurred prior to bankruptcy. Absent those special deals, such fees would presumptively be unsecured claims (if recoverable from the debtors) or payable from creditors pursuant to whatever arrangement particular creditors had with their lawyers (e.g., contingency fee arrangements). Given the modest payments to personal injury creditors and the long duration of payment terms under the plan, creditors' lawyers would otherwise have faced significant collection challenges. Thus, just as the Sacklers were able to buy off the initial consenting parties, whose bankruptcy bargain jumpstarted the case, Purdue Pharma (largely with Sackler funding) induced professionals representing ad hoc committees to capitulate to the Sackler Settlement Framework.

In addition to these soft conflicts, there have long been concerns about the distortions that arise from repeat play in chapter 11. Large cases tend to be dominated by a small number of judges, law firms and distress professionals who appear together frequently in a few select districts that some argue seek big cases.[235] This was part of the concern about Judge Drain: until he announced his retirement, six years before his term ended,[236] he was (and may have continued to be) a repeat player in large chapter 11 cases because he was a respected judge who would try to facilitate deals sought by major parties in a case.[237]

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[233] *See, e.g.,* 11 U.S.C. §§ 328(a) (permitting "reasonable" compensation for estate professionals) & 503(b)(1)(A) (permitting payment as priority expenses of administration).

[234] *In re* Purdue Pharma, L.P., 633 B.R. 53, 66 (Bankr. S.D.N.Y.), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022)(approving fees "as part of a heavily negotiated compromise . . . . reached during the mediation in this case").

[235] *See* Levitin, *supra* note 21, at 1143.

[236] *See* Press Release, United States Bankruptcy Court for the Southern District of New York, Distinguished Bankruptcy Judge to Retire from Southern District Bench (Sept. 28, 2021), https://www.nysb.uscourts.gov/news/distinguished-bankruptcy-judge-retire-southern-district-bench-1.

[237] According to the Bankruptcy Research Database, as of the time of Purdue Pharma's bankruptcy, Akin Gump, counsel to the UCC, represented creditors' committees in large cases before Judge Drain more than any other firm (4 of 24 big cases reported). *See* Florida-UCLA-Lopucki Bankruptcy Research Database, available at https://lopucki.law.ufl.edu/index.php (data as of February 1, 2021). Milbank—counsel to one side of the Sackler family (and one of the law firms at which Judge Drain had worked prior to his service on the bench)—was the second most-frequent (3 of 24 big cases). *See id.*; *see also* Not.

Ordinarily, encouraging deals is not problematic. Indeed, it is what chapter 11 was designed to do. But, social debt calls for more than mediated deals struck in secret. While most disputes settle—including many involving high-stakes social problems—they do so within a framework of adversity which provides greater confidence that responsible individuals are being held accountable according to the rule of law. That is a very different framework from the one created under chapter 11, especially as it is practiced according to the rule of the deal.

3. FALLACIES OF THE RULE OF THE DEAL

Compromise implies contradiction. Litigants decide, for whatever reasons, that peace matters more than principle. This is rarely problematic. Cases involving social debt, however, demand more. This Part argues that the rule of the deal as applied in *Purdue Pharma* rested on, and reflects, a series of fallacies and contradictions which undermined rule-of-law values and creditor recoveries.

3.1 THE CONTRADICTIONS OF THE RULE OF THE DEAL

The contractualist position discussed in Part 1 has long been criticized on grounds of intellectual inconsistency: if private ordering is so great, why recruit a public mechanism—a bankruptcy court—to implement deals that rational actors should accept?[238] Professor Diane Dick has argued that chapter 11 theory rests on an "Efficiency Fallacy," the "assumption that negotiations naturally lead to efficient restructuring outcomes."[239]

The typical response is that the power to impose NDRs reduces the incidence of holding out and information failures. But holding out is always a problem in collective action, and private ordering has developed capacities to manage it.[240] Moreover, the equal and opposite problem—taking the rights

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of Appearance and Request for Service of Papers (Oct. 2, 2019), [Bankr. ECF 192] (Milbank representation of "Raymond Side" of Sackler family).

[238] *See, e.g.*, Lynn M. LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317, 319 (1999) ("Schwartz's proof [of the welfare-enhancing power of contract bankruptcy] is defective. The model employs materially inconsistent assumptions and the proof reaches its goal only through miscalculations from those assumptions."); Carlson, *supra* note 88, at 1354 (reviewing JACKSON, LOGIC AND LIMITS, *supra* note 85) (criticizing creditors' bargain model, asserting, "at his best, Jackson rises to mere tautology").

[239] *See* Dick, *supra* note 93, at 763.

[240] *See, e.g.*, F. Scott Kief & Troy A. Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 48 B.C. L. REV. 111, 131 (2007) ("The combined use of peer and social pressure may help cabin any resulting holdout behavior that arises by appealing to different sensibilities of the holdout IP owner than direct financial payoffs do."); Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 FORDHAM L. REV. 2701, 2711–14 (1996) (discussing the role played by peer and institutional pressure in negotiations).

of others without consent, as the Sackler Releases would do—may be at least as problematic.

Some fallacies in *Purdue Pharma* were obvious. Judge Drain insisted that the Sackler Releases were not an adjudication on the merits.[241] But that was true only in the formal sense that none of the important judicial mechanisms of transparency and accountability embedded in our system—such as motion practice and a trial on the merits—led to it. As noted above, the preliminary injunction that halted direct litigation against the Sacklers was justified not by reference to the merits of those claims, but instead to the probability that a plan of reorganization would be confirmed.

It was false as a substantive matter because the outcome would be the same as a judgment for the Sacklers: the releases in *Purdue Pharma* would permanently enjoin all civil efforts to hold them accountable for their role in the opioid crisis. It has the force of a judgment on the merits, without any of the process required by law to reach a judgment on such an important question.[242]

But there were other, equally problematic contradictions. Here, it appears that creditors holding out did not destroy value, but instead drove the Sacklers to pay more. At the same time, without the ability to obtain releases, the Sacklers had little incentive to agree to participate at all. Determining how to set the right incentives to maximize recoveries has long been a central challenge for all economically-oriented legal spheres, including chapter 11. Whether assent—or resistance—creates value in chapter 11 is a complex and contested question.

Social debt complicates the analysis, because at least some of the problems in these cases are difficult to cash out. Still, if chapter 11 is about bargaining and deals, then actual assent has to matter as to claims against nondebtors. That, of course, is what was lacking in *Purdue Pharma.*

3.1.1 Creditor Support for the Releases

Consider first the problematic claim that creditors supported the Sackler Settlement Framework.

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241 *In re* Purdue Pharma, L.P., 633 B.R. 53, 98 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) ("[T]his Circuit [rejects the argument] that such a release is an adjudication of the claim. It is not. It is part of the settlement of the claim that channels the settlement funds to the estate.").

242 *See* Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, BANKR. L. LETTER, Feb. 2018, at 1, 9–11.

Judge Drain stated at the confirmation hearing that "an unprecedented number" of votes were cast on the plan.[243] But this was not quite true,[244] and in any case, what he really meant was that Purdue Pharma's plan was supported by the vast majority of creditors who *voted*.[245] But fewer than 20% of the 618,194 claimants entitled to vote—and fewer than 50% of the subset of claimants with personal injury claims—cast any ballot on Purdue Pharma's plan.[246] The United States, in its capacity as the largest (and first priority) creditor, joined most creditors and submitted no ballot.[247]

Moreover, there are questions about who actually voted, and how their votes were counted. It appears that the *Purdue Pharma* plan permitted voting by "master ballot" by attorneys representing four or more clients.[248] The plan valued personal injury claims for voting purposes at $1.00/claim, which could not have been accurate if (as allowed) they could be worth up to $48,000 per claim.[249] The Bankruptcy Code presumes that claims are allowed in the amounts stated in the proof of claim.[250] Where claims are contingent or unliquidated, their value may be estimated for plan voting purposes.[251] In *Purdue Pharma,* however, there was no effort to estimate the value of these claims before plan voting. Instead, the *Purdue Pharma* Bankruptcy Court reversed this presumption, and placed the burden of showing an entitlement to vote in an amount greater than $1.00/claim on the individual claimants.

243 *Purdue Pharma*, 633 B.R. at 60.

244 In *In re* Quigley, over 200,000 votes were cast on the plan. *In re* Quigley Co., Inc., 437 B.R. 102, 122 (Bankr. S.D.N.Y. 2010).

245 *Purdue Pharma*, 633 B.R. at 60–61.

246 *See* Final Decl. of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Am. Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and its Affiliated Debtors (Aug. 2, 2021), [Bankr. ECF 3372], at 5; Ex. A (unpaginated) [hereinafter Pullo Declaration].

247 *Id.* This was deemed to be an acceptance of the plan. *Id.* at Ex. A. Although the DOJ had helped craft the settlement discussed above, plan voting occurred after the 2020 election. It appears that the subsequent administration had a different view and, through the United States Trustee Program, challenged the plan.

248 *See* Disclosure Statement, *supra* note 122, at 303. Attorneys submitting such master ballots had to follow "specified procedures associated therewith. An attorney electing to utilize such procedure will be required to collect and record the votes of such clients through customary and accepted practices, or obtain authority to procedurally cast such clients' votes." *Id.*

249 *See* Disclosure Statement, *supra* note 122, at 47. Confirmation of a chapter 11 plan requires the affirmative vote of at least one class of creditors holding "at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors." 11 U.S.C. § 1126(c).

250 11 U.S.C. § 502(a).

251 Estimation and temporary allowance for plan voting are permitted under Bankruptcy Code section 502(c) and Federal Rule of Bankruptcy Procedure 3018. 11 U.S.C. § 502(c)(1) & Fed. R. Bankr. P. 3018(a).

Other courts have had to grapple with these issues, and sometimes come out the other way. In *In re Quigley*, for example, the Bankruptcy Court refused to confirm a plan where there were concerns that a vote, cast mostly on a master ballot, was "manipulated" and "tainted" by side deals cut by the corporate parent of a debtor, which sought the benefit of nondebtor releases.[252] These deals "led the court to conclude … that the vote was "tainted," the plan was not proposed in "good faith" under section 1129(a)(3), and that the favorable votes induced by the parent's side deals should be designated and not counted under section 1126(e).[253]

Purdue Pharma's creditors also lacked meaningful information about the direct claims against the Sacklers that would be released under the NDRs. To solicit votes on a plan, the bankruptcy court must first approve a "disclosure statement" which contains "adequate information" to enable creditors to make an informed decision whether to vote for or against it.[254] In *Purdue Pharma*, the disclosure statement devoted about forty pages to discussions of the *estate's* claims against the Sacklers (e.g., for fraudulent transfers), investigations of those claims undertaken by both debtor's counsel and UCC counsel, and why the Sacklers were difficult collection targets (having offshored about half of the funds they'd stripped out of the company before bankruptcy). But it gave creditors' only two pages on third-party direct claims, and focused almost entirely on why such claims would be futile. Notably, it appears that the disclosure statement does not contemplate the sort of consumer fraud types of claims that were asserted in the direct actions, but instead more conventional tort analysis.[255]

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[252] "Pfizer wrongfully manipulated the voting process to assure confirmation of the Quigley plan," Judge Bernstein wrote. *In re* Quigley Co., Inc., 437 B.R. 102, 126 (Bankr. S.D.N.Y. 2010). He concluded that "the accepting votes cast on behalf of the Settling Claimants were procured in bad faith and will be designated. Without these votes, the Fourth Plan cannot be confirmed under any circumstances." *Id.* at 132. There were also issues with the vote. Apparently 261,790 ballots were cast by personal injury creditors for the plan—of which 254,215 were cast by a "master ballot" by a single law firm. If one counted only the number of votes cast—as was done in *Purdue Pharma*—it would appear that about 97% of creditors supported the *Quigley* plan. *Id.* at 122–23.

[253] Section 1129(a)(3) requires a plan proponent to show that "[t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1126(e) provides that "[o]n request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." 11 U.S.C. § 1126(e).

[254] 11 U.S.C. § 1125(a).

[255] Disclosure Statement, *supra* note 122, at 173 ("[S]ignificant legal hurdles in proving the elements of their claims and collecting on any judgments. Notably, third-party creditors would need to specifically prove that individual members of the Sackler Families and Sackler Entities engaged in conduct that would give rise to personal liability and that such conduct caused the harms allegedly sustained by such third parties.").

Confusingly, Purdue Pharma claimed in the disclosure statement that the value of the direct claims against the Sacklers (and other nondebtors) was "unknowable" and then booked them for plan purposes at $0.[256] Judge Drain overruled objections to the disclosure statement on these grounds, and approved it notwithstanding this omission.[257]

But the direct claims asserted in hundreds of prebankruptcy lawsuits against the Sacklers *were* "knowable." As previously discussed, the parties could have taken certain steps to attribute some value to these claims, whether through bellwether lawsuits or otherwise, but the procedural path of Purdue Pharma's chapter 11 case foreclosed those opportunities. The disclosure statement told creditors none of this.

Moreover, the creditor representatives noted above (many of whom had capitulated to the Sackler Settlement Framework early on) exhorted creditors to vote for the plan. The UCC, for example, sent a "plan support letter" urging this.[258] Plan support letters, like many of the mechanisms used in *Purdue Pharma,* are not in themselves unusual or necessarily problematic. Sometimes, courts will seek to present a balanced picture to creditors and permit the parties to include letters for and against the plan (if there is opposition).[259]

Here, the problem was that the only statutory fiduciary for creditors appears to have acceded to the Sackler Settlement Framework out of resignation, not principle. Its plan support letter argued, in essence, that litigation would be difficult and time-consuming; the Sacklers may be judgment proof; therefore, the available deal was better than any alternatives.[260] But this simply restated the debtors' own assertions. There

[256] *See id.* at App. B at 5, 8 ("The Liquidation Analysis assumes that all opioid-related claims asserted against the Debtors are asserted solely against Debtor PPLP.").

[257] *See* Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto,), at 1—3 (June 3, 2021), [Bankr. ECF 2988]. *See also* Objection of Peter W. Jackson to Amended Disclosure Statement for First Amended Chapter 11 Plan for Purdue Pharma L.P. and its Affiliated Debtors (May 6, 2021), [Bankr. ECF 2819]; Supplemental Objection of Peter W. Jackson to Disclosure Statement for Second Amended Chapter 11 Plan for Purdue Pharma L.P. and its Affiliated Debtors (Fourth Plan Supplement) (May 18, 2021), [Bankr. ECF 2881].

[258] *See* Obj. of the Off. Comm. Of Unsecured Creditors to Mot. To Appoint Exam'r Pursuant to 11 U.S.C. § 1104(c), Ex. 1 (June 13, 2021), [Bankr. ECF 3023], Ex. 1 [hereinafter "Plan Support Letter"].

[259] *See, e.g., In re* Vista Proppants & Logistics, LLC, No. 20-42002-ELM-11, 2020 WL 6325526, at *2 (Bankr. N.D. Tex. Oct. 28, 2020)(including in solicitation materials "a letter from the Committee in opposition to the second amended Plan [and] a letter from the Debtors in support of the Plan").

[260] The Plan Support Letter explained as follows:

was almost no analysis of the merits of the direct claims against the Sacklers, or of the evidence on which the UCC was basing its recommendation.

As in electoral democracy, a failure to vote has no effect on the votes cast, so could not prevent confirmation of the plan. The problem in *Purdue Pharma*, however, is that elections do not determine individual rights as to third parties: contracts and courts do.[261] While nearly 20% of creditors may have voted for Purdue Pharma's plan, the great majority of creditors of Purdue Pharma—that is, holders of about 500,000 claims—expressed no view one way or the other. Buried in boilerplate was the proviso that a failure to vote would be deemed a vote for the plan.[262]

It is no answer to say that chapter 11 plans routinely include nondebtor releases, as Judge Wiles has observed.[263] Even if that is true—and it is an empirical question not yet answered—this seems especially problematic in cases involving social debt. The severity of the allegations against the Sacklers required more than chapter 11 deal-making, because the social and political stakes were so high. The outcry surrounding the case shows that the general public had significant misgivings about what Purdue Pharma's bankruptcy sought to accomplish, even if within the confines of the rule of the deal.

Nor does it help to say that it was a settlement. If the plan really *was* a settlement, it should only have released creditors who assented to it. A voluntary settlement "cannot possibly 'settle,' voluntarily or otherwise, the

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> 1. [T]he Sacklers likely are liable to the Debtors (and thus to their creditors) in amounts far in excess of the Settlement Amount, *but* obtaining judgments to establish that liability could take years; and there can be no guarantee of success.
>
> 2. The Sacklers have assets far in excess of the $4.275 billion Settlement Amount, *but* obtaining a judgment against the Sacklers does not guarantee that either the Debtors or their creditors will be able to access those assets, many of which are in overseas trusts.
>
> 3. [T]he UCC believes that the Debtors' creditors may well also hold direct claims against the Sacklers far in excess of their total assets. *Without the Preliminary Injunction and settlement in place to restrain litigation against the Sacklers, however, the Sacklers are likely to exhaust their collectible assets fighting and/or paying ONLY the claims of certain creditors with the best ability to pursue the Sacklers in court.*

See Plan Support Letter, *supra* note 258, at Ex. 1, 20 (emphasis and capitalization in original). If we assume, as is plausible, that the Sacklers had about $6 billion in assets not off-shored, it is difficult to imagine they would spend all of that in litigation. That they may end up preferring some creditors to others is not important; that is the way the legal system works. If the Sacklers or creditors did not like that, they could commence individual bankruptcies.

[261] Lipson, *supra* note 71, at 634 (characterizing plans as a "cross between a consent decree and a contract").

[262] *See* Pullo Declaration, *supra* note 246, at 5 & Ex. A, n.7.

[263] *In re* Aegean Marine Petroleum Network Inc., 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("Almost every proposed Chapter 11 Plan that I receive includes proposed releases.").

conflicting claims of [those] who do not join in the agreement," the Supreme Court has said.[264] "Of course," the Court has admonished, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party … without that party's agreement."[265] That, however, is what Purdue Pharma's plan ultimately does.

Moreover, there are questions about the representation of individual claimants in the mediations that produced the settlements. Judge Drain accepted the results of the mediation because, he reasoned, "[t]he people representing the personal injury claimants in the mediation were some of the most effective personal injury lawyers in the world, which means that they are aggressive, creative, knowledgeable and responsible in the pursuit of their clients' claims."[266] He supported his findings by reference to statements submitted in support of the plan by noted personal injury lawyers, such as Jayne Conroy, who asserted that the payments under the trust distribution procedures reflected a "settlement premium."[267]

That may or may not be true, but a review of the mediator's report cited by Judge Drain shows that the only counsel representing personal injury claimants in the mediation were the lawyers retained by the personal injury ad hoc committee, led by the Wall Street firm White and Case.[268] Ms. Conroy's name is nowhere to be found in the mediator's report on which the Bankruptcy Court relied.[269]

Other judges have rejected *Purdue Pharma*'s approach, stating that consent "by silence" will be ineffective.[270] In *SunEdison,* for example, Judge Bernstein observed that "[a]bsent a duty to speak silence does not constitute consent."[271] Frequently, chapter 11 plans with NDRs require some evidence of assent, consistent with the contractual—not electoral—nature of the instrument, by giving creditors the option to grant releases or not.[272]

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[264] Martin v. Wilks, 490 U.S. 755, 761–62, 768 (1989).

[265] Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

[266] *In re* Purdue Pharma, L.P., 633 B.R. 53, 78 (Bankr. S.D.N.Y. 2021), *vacated* 635 B.R. 26 (S.D.N.Y. 2021), *appeal docketed*, No. 22-229 (2d Cir. argued Apr. 29, 2022) (citing Mediators' Report (Mar. 23, 2021), [Bankr. ECF 2548]).

[267] *Purdue Pharma*, 633 B.R. at 78-79 (observing that Ms. Conroy "obtained a settlement for roughly 1,100 personal injury claimants, albeit many years ago.").

[268] *See* Mediator's Report, at 7 (Mar. 23, 2021), [Bankr. ECF 2548].

[269] *Id.*

[270] *In re* SunEdison, Inc., 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017).

[271] *Id.* at 458 ("'An offeror has no power to transform an offeree's silence into acceptance when the offeree does not intend to accept the offer []'") (alteration in original) (quoting Karlin v. Avis, 457 F.2d 57, 62 (2d Cir. 1972)).

[272] *See, e.g.*, *In re* PG & E Corp., 617 B.R. 671, 684 (Bankr. N.D. Cal. 2020), *appeal dismissed sub nom.* Int'l Church of the Foursquare Gospel v. PG&E Corp., No. 20-CV-04569-HSG, 2020 WL

Creditors who opt out (or do not opt in) can still "have their day in court" against the nondebtors.

Indeed, the term "release" is a misnomer. Except in the world of chapter 11, a release is a contract term, and is enforceable (or not) subject to the usual rules that govern contracts.[273] The confirmation of the *Purdue Pharma* plan had the effect of a verdict in the Sacklers' favor, but the process leading to it neither determined the merits of those claims nor gave creditors insight into what the plan would take from them. It was a deal without any pretense of individualized assent; so the assertion that creditors agreed to release the Sacklers is simply wrong. Many did. But it is hard to infer assent from the far greater number who did not vote, when they had neither meaningful information, nor realistic choice, about the direct claims they would be "releasing."

3.1.2 Sackler Separation from Purdue Pharma

Contradictory views about the relationship between the Sacklers and Purdue Pharma were a second class of fallacy that supported the deals in *Purdue Pharma.*

On one hand, Purdue Pharma and the Sacklers had separate legal identities—that's why Purdue Pharma was in bankruptcy and the Sacklers were not. Thus, the Bankruptcy Court found that the Sacklers' assets were simply out of creditors' reach, a fact Judge Drain said he found "incredibly frustrating."[274] Moreover, they were distinct for purposes of the attorney-client privilege.[275]

6684578 (N.D. Cal. Nov. 12, 2020) (approving as "consensual" opt-in releases contained in chapter 11 plan); *In re* Bainbridge Uinta, LLC, No. 20-42794, 2021 WL 2692265, at *3 (Bankr. N.D. Tex. June 28, 2021) (approving "opt-out" form in plan solicitation materials). Even in the Southern District of New York, courts appear to prefer option-releases. *See* Rick Archer, *Judge Approves 3rd Party Releases in Stoneway Ch. 11 Plan*, LAW360 (May 12, 2022), https://www.law360.com /bankruptcy/articles/1492359/judge-approves-3rd-party-releases-in-stoneway-ch-11-plan?nl_pk= c221b65d-b025-403d-b78d-11fc08ce0955?copied=1.

[273] Difilippo v. Barclays Cap., Inc., 552 F.Supp.2d 417, 426 (S.D.N.Y. 2008) ("A release is a type of contract and is governed by contract law").

[274] *In re* Purdue Pharma, L.P., 633 B.R. 53, 93 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[275] The UCC sought discovery of the Sacklers by way of Rule 2004 requests, which it appears the Sacklers resisted on grounds of attorney-client privilege. Privilege logs were released, and the disputes were resolved consensually—another deal—but there appears to have been little question that the Sacklers' interactions with their own attorneys were distinct and protectable. *In re* Purdue Pharma, L.P., 632 B.R. 34, 37 (Bankr. S.D.N.Y. 2021). Moreover, Judge Drain noted that the Sacklers promised to release privileged documents in the future, to a "public document repository" under the plan. *Purdue Pharma*, 633 B.R. at 114 (noting that the plan "addresses their naming rights and includes the Sacklers and the Debtors' agreement to provide the comprehensive public document depository, including

Yet, while Purdue Pharma and the Sacklers were separate for these purposes, they were indistinguishable for many others. They were, for example, "inextricably intertwined" for purposes of the preliminary injunction;[276] the Sacklers were Purdue Pharma's "de facto CEO" for purposes of the DOJ Settlement;[277] Purdue Pharma was, in the eyes of personal injury lawyer Michael Moore, the "Sackler Company."[278] This was because the evidence indicated that they were "heavily involved in decisions on how to market and sell opioids … and oversaw sales and marketing budgets and corresponding upward trends in OxyContin prescribing."[279]

Moreover, Judge Drain seemed to believe there was an identity between claims against the debtors and claims against beneficiaries of the Sackler Releases—that is, all were essentially "derivative" and not "direct." The Sackler Releases "cover claims that are truly derivative of the Debtors' claims,"[280] he found, because he apparently viewed them as akin to veil-piercing or breach of duty claims.[281]

But Judge Drain could not have known that. As discussed above, the direct claims against the Sacklers were only coming to light as a result of the opioid multidistrict litigation. The preliminary injunction he granted at the outset of the case foreclosed all efforts by courts of competent jurisdiction to determine the merits of those claims. In any case, the consumer protection statutes under which the Sacklers were being sued would apparently impose independent liability, even if the defendant was the director of a corporation with joint liability.[282] Thus, under well-established precedent, direct and

waivers of the attorney-client privilege, for future analysis by the federal government, states, and others"). That would be meaningful only if the privilege had been respected, which assumed the Sacklers and Purdue Pharma were separate.

[276] Claims against the Sacklers were, Judge McMahon reasoned in that earlier opinion, "based on conduct substantially identical to, and inextricably intertwined with, that alleged to have been engaged in by the Debtors." *In re* Purdue Pharma, L.P., 619 B.R. 38, 43 (S.D.N.Y. 2020).

[277] *See* Sackler Addendum, *supra* note 194, at 4, ¶ 12; Purdue Addendum, *supra* note 194 at 4, ¶ 14.

[278] *See* Radden Keefe, *supra* note 103 (quoting Moore).

[279] *See* Sackler Addendum, *supra* note 194, at 4, ¶ 12; Purdue Addendum, *supra* note 194, at 4, ¶ 14. Presumably the Sacklers would dispute these characterizations.

[280] *Purdue Pharma*, 633 B.R., at 95.

[281] *Id.* at 107 (characterizing direct claims as "closely related" to "claims for piercing the corporate veil, alter ego, and breach of fiduciary duty/failure to supervise.").

[282] *In re* Purdue Pharma, L.P., 635 B.R. 26, 70 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) (discussing Judge Drain's failure to consider claims "arising under various unfair trade practices and consumer protection laws that make officers, directors and managers who are responsible for corporate misconduct personally liable for their actions.").

particularized creditor claims are not property of the estate—they are property of the creditor and cannot be asserted or settled by the estate.[283]

Similarly, the Bankruptcy Court seemed to believe that, even if the Sacklers had independent liability for the debtors' misconduct, creditors could not enhance payouts because the Sacklers would then have reimbursement or indemnity claims against the debtors under limited partnership or similar agreements between the Sacklers and the debtors. Any effort to recover from the Sacklers on direct claims, the court said, would have been little more than a "second fork in the pie."[284] Thus, as the court appeared to see it, creditors who retained the right to recover directly from the Sacklers would get an "extra" helping.

This assumed that there was one "pie." But that would be true only if they did not have separate legal identities. If they were separate from Purdue Pharma, then there were as many potential pies as there were defendants to sue. That's what joint and several liability is. Thus, the right to sue the Sacklers would not have been a second fork in the same pie. It would have been the same (or a similar) fork in other pies. Some creditors may therefore have recovered more than others. But that is always true outside bankruptcy, and a credible threat of liability may have led the Sacklers to pay more to get creditors' actual assent to the releases.

Judge Drain is a sophisticated jurist, who surely understood that shareholders and directors (and their assets) are separate and distinct from the corporations they own or manage. How then could he have believed there was only one pie—not many?

Much of his analysis of the direct claims came via a discussion of jurisdiction, and whether litigation against the Sacklers "'might have any conceivable effect on the bankruptcy estate.'"[285] A "conceivable effect" on the estate would, in Judge Drain's view, result from claims that the Sacklers could assert against Purdue Pharma for indemnification or contribution under limited partnership or similar agreements governing the debtors and their roles as shareholders and directors.[286]

But the Bankruptcy Court made no findings on any of these issues. Nor could it, because no terms giving the Sacklers such rights were considered by the court. If they were, surely the Sacklers' claims should have been disallowed under sections 502(d) and (e) of the Bankruptcy Code, which

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[283] *See, e.g.,* Caplin v. Marine Midland Grace Tr. Co. of New York, 406 U.S. 416, 434 (1972).

[284] *Purdue Pharma,* 633 B.R. at 95, 112.

[285] *Id.* at 96 (quoting SPV OSUS, Ltd. v. UBS AG, 882 F.3d 333, 339–40 (2d Cir. 2018) (internal quotations and other citations omitted).

[286] *Purdue Pharma*, 633 B.R. at 96 (reasoning that bankruptcy court has jurisdiction due to "conceivable possible legal effect of an indemnification or contribution").

bar recovery by creditors against whom the estate has causes of action (e.g., for fraudulent transfer, as here) and disallow contingent claims for reimbursement or contribution.[287] Any Sackler claims that survived may also have been subject to equitable subordination.[288] Moreover, it appears that some of the underlying state laws in issue would forbid insurance coverage for, or indemnification and contribution claims by, defendants in the position of the Sacklers.[289]

The fact that a legal matter may have a "conceivable effect" on a bankruptcy estate for jurisdictional purposes says nothing about the underlying merits of the claim. To have jurisdiction over a matter does not provide a rule of decision by which the matter may be resolved.[290] Here, the Bankruptcy Court applied no rule other than that the Sackler Releases were part of a "settlement" embodied in a plan of reorganization. But the direct claims were not the estate's to settle and, in the absence of individualized assent, any claim that they were being "settled" in the bankruptcy rested on a series of problematic contradictions.

The rule of law depends, in part, on consistent application of basic principles, especially within a case.[291] As Radin asserts, the rule of law requires rules which are applied without contradiction.[292] To implement the nonconsensual "release" in *Purdue Pharma*—an oxymoron, itself—the Bankruptcy Court had to accept a number of contradictions or fallacies. While that may be the price of compromise and settlement in ordinary commercial reorganizations, the social character of liability for contributing to the overdose crisis made this difficult to accept. As explained in the next Part, those contradictions may also have undermined creditors' recoveries.

[287] 11 U.S.C. §§ 502(d) & (e).

[288] A court may subordinate claims based on the doctrine of equitable subordination pursuant to section 510(c) of the Bankruptcy Code. 11 U.S.C. § 510(c). For equitable subordination to apply, the claimant must have engaged in some inequitable conduct, the misconduct must have resulted in injury to creditors or conferred an unfair advantage on the claimant, and equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code. *See, e.g.*, Benjamin v. Diamond (*In re* Mobile Steel Co.), 563 F.2d 692, 699-700 (5th Cir. 1977).

[289] *In re* Purdue Pharma, L.P., 635 B.R. 26, 70 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[290] *See, e.g.,* Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) ("the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim.").

[291] Charles W. Tyler, *The Adjudicative Model of Precedent,* 87 U. CHI. L. REV. 1551, 1565 (2020) (discussing how inconsistency undermines rule of law in precedent).

[292] Radin cites the eight elements of Lon Fuller's "Parable of King Rex," the fifth of which is: "5. Non-contradictoriness. Those who are expected to obey the rules must not simultaneously be commanded to do both A and not-A." *See* Radin, *supra* note 3, at 785 (citing LON FULLER, THE MORALITY OF LAW 33–38 (rev. ed. 1969)). Other, similar elements of the parable included "conformability," "stability," and "congruence," none of which were evident in Purdue Pharma's treatment of assent or entity identity. *Id.*

3.2 THE ECONOMIC FAILINGS OF PURDUE PHARMA

During a six-hour reading of his plan confirmation order, Judge Drain declared himself "bitter" about the result in *Purdue Pharma,* which he then spelled out for greater emphasis: "B-I-T-T-E-R."[293] He was bitter, he said, because the Sacklers did not contribute as much as he had hoped.

It is a fair point. It is true that, during the case, the Sacklers increased their offer from $3 billion payable over nine years to $5.5 billion over eighteen years. But the dynamics of the case, reflecting the rule of deal, created little incentive for them to pay more.[294]

The problem was one of basic litigation strategy. As J.B. Heaton has observed, the economics of settlement will be the product of background legal or social pressure.[295] Here, those who *rejected* the deal created the pressure. If it was not enough, it was because the debtors, creditor groups allied with the Sacklers, and the judge created or permitted conditions that made it difficult to exact more from the Sacklers. Thus, *Purdue Pharma* was also problematic as measured against the distributive standards that ordinarily govern under the rule of the deal, for three reasons.

First, although the Sacklers increased the face amount of their contribution during the case, its present value actually rose little, if at all, because their payment period was doubled from 9 to 18 years.[296] Media reports estimated that the Sacklers would be able to make the promised payments solely from income on the funds they withdrew from Purdue Pharma.[297] If so, they would keep as principal about $10 billion in proceeds from conduct that many, including Purdue Pharma, consider criminal.

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[293] *In re* Purdue Pharma, L.P., 633 B.R. 53, 93 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 2021 WL 5979108, *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[294] "[I]t appears to me to have always been the case and will continue to be the case," Judge Drain observed at a September 2020 hearing, that "a plan in which [the Sacklers] do make a material contribution that satisfies the [S]econd [C]ircuit's test in *In re Metromedia, Inc.* is not only possible but the most likely outcome in this case." Hr'g Tr., at 79, Sept. 30, 2020, [Bankr. ECF 2054].

[295] J.B. Heaton, *Settlement Pressure*, 25 INT'L REV. L. & ECON. 264 (2005); *see also*, J.B. Heaton, *Big Cos. Shouldn't Cry 'Settlement Pressure' to Justify Appeal*, LAW360 (Apr. 18, 2022, 5:06 PM), https://www.law360.com/articles/1484746/big-cos-shouldn-t-cry-settlement-pressure-to-justify-appeal ("[S]ettlement pressure generally can exist in a meaningful sense only when a defendant is risk averse.").

[296] If we assume a 6% growth rate, the present value of the $3 billion payout over nine years would have been $1,775,695.39. Assuming the same growth rate, $5.5 billion over 18 years has a present value of $1,926,890.85. *See* Present Value Calculator, CALCULATOR.NET, https://www.calculator.net/present-value-calculator.html (last visited Jan. 8, 2023). The Sacklers appear to pay no interest on their contribution but would presumably receive interest and other income on the roughly $10 billion they are said to have taken out of the company.

[297] *See* Patrick Radden Keefe, *How Did the Sacklers Pull This Off?*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/opinion/sackler-family-opioids-settlement.html.

Second, while the Sacklers' real contribution increased modestly, the value of the debtors (as stated in their monthly operating reports) appears to have declined significantly. Recall that the Sackler Settlement Framework requires not only a cash contribution from the Sacklers, but also that creditors are paid from the proceeds of Purdue Pharma's future sales.

At the outset of the case, in October 2019, the debtors (other than the holding company parent entity) showed consolidated equity of almost $2 billion.[298] By December of 2022, however, that had dropped to about $1.4 billion.[299] Thus, while the optics of the Sackler contribution may have improved, economic reality for creditors has deteriorated.

Third, counsel to the debtors frequently made a point of saying that funds would go only to opioid abatement.[300] While some funds may ultimately serve that important purpose, it should be noted that, as of this writing, no dollars have gone to opioid abatement. But, over $740 million—a little over half the reported value of the debtors—has been spent on professional fees, in particular attorneys, through December of 2022, with the meters still running.[301] And this does not include hundreds of millions of additional dollars that will be paid to personal injury lawyers from trusts created by the plan.[302] Early estimates pegged total professional fees at around $1.2 billion—or roughly half the present value of what creditors can expect if the Sackler Releases are reinstated, and the Sacklers keep their promises.[303]

Moreover, problematic insiders have received significant payments during the case. Board member Peter Boer, for example, appears to have received over $2 million in directors' fees.[304] But, he does not appear to have been a member of the board's "special committee" of bankruptcy directors.

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[298] *See* Monthly Operating Report, period ending Oct. 31, 2019, at 10 (Nov. 10, 2019) [Bankr. ECF 520] (indicating "total liabilities and equity" of $1.997 billion).

[299] *See* Monthly Operating Report, period ending Dec. 31, 2022, at 6 (Feb. 8, 2023), [Bankr. ECF 5403] (indicating "total liabilities and equity" of $1.414 billion).

[300] At the first hearing on the preliminary injunction, for example, counsel for Purdue Pharma stated that "[b]illions of dollars will be dedicated to treatment and remediation of the public health crisis caused by the opioid epidemic and this remediation will occur in the near future, not years from now after protracted and costly litigation, one of the significant motivations of entering into a settlement at the outset of the case." Hr'g Tr., Oct. 10, 2019, at 41 [Bankr. ECF 325].

[301] *See* Monthly Operating Report, period ending Dec. 31, 2022, at 23 (Feb. 8, 2023), [Bankr. ECF 5403] (reporting cumulative professional fees of $740,844,600).

[302] *See* Disclosure Statement, *supra* note 122, at 18 (discussing contingent fees paid from trusts).

[303] It is estimated that counsel to ad hoc committees may recover another half billion dollars under the plan, bringing professional fees in the case well in excess of $1 billion. *See* Objection of United States Trustee to Sixth Amended Joint Chapter 11 Plan of Purdue Pharma L.P. and its Affiliated Debtors, at 9 (July 19, 2021), [Bankr. ECF 3256] (citing Plan section 5.8).

[304] *See* Monthly Operating Report, period ending Dec. 31, 2022, at 21 (Feb. 8, 2023), [Bankr. ECF 5403] (reporting directors' fees paid to Boer during bankruptcy of $2.275 million).

discussed above. Instead, he was appointed in 2008, and served on the board while Purdue Pharma was apparently committing its second set of confessed crimes.[305] Equally bad: there is evidence that he advised the Sacklers on how to strip assets out of Purdue Pharma in July 2007, after the company's first criminal plea, in May 2007.[306]

Contrast that with payouts for personal injury creditors. Individual claimants can recover no more than about $48,000.[307] All personal injury claims (that is, as a class) are capped at $750 million.[308] As noted above, the trust distribution procedures would also require adult claimants to show that they had a prescription for OxyContin.[309] This is problematic, because it is likely that many claimants either did not have a prescription or cannot find the one they had.

Similarly, case insiders frequently asserted that they were advancing the "public interest" through Purdue Pharma's bankruptcy. At the first hearing on the preliminary injunction, counsel to the debtors argued that special protection was needed so that Purdue Pharma's assets could go "towards the public good."[310] At the hearing on plan confirmation, another attorney for Purdue Pharma said that the plan was in "the best interest of all creditors and the American public more generally, to help abate the opioid crisis."[311]

It is, however, important to note that these and many other attorneys are billing upwards of $1700/hour.[312] These may be the standard rates for BigLaw in big cases. But, the actual public servants in the case—the scores of lawyers from the offices of State attorneys general and the DOJ, who are actually tasked with acting in the public interest—were making nothing close to that.

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[305] Disclosure Statement, *supra* note 122, at 63.

[306] *See* Off. Comm. of Unsecured Creditors' Reply in Support of its Motion to Compel Production of Purportedly Privileged Documents, or for In Camera Review, Based on Good Cause, Crime Fraud, and at Issue Exceptions to Claims of Privilege, at 3 (Jan. 12, 2021), [Bankr. ECF 2260] ("Peter Boer, a close family advisor and current Purdue director, advised the Sacklers in July 2007 to 'take defensive measures' against Purdue's 'uncapped liabilities,' including by sending assets overseas.").

[307] Disclosure Statement, *supra* note 122, at 8.

[308] *Id.* at 3.

[309] *Id.* at 8 ("[Y]ou will be entitled to receive a recovery only if the opioid used was prescribed to the opioid user and was not, for example, obtained by unlawful means or by a prescription to another person. You will need to submit evidence to show that you satisfy these criteria.").

[310] Hr'g Tr., Oct. 10, 2019, at 12, [Bankr ECF 325].

[311] Hr'g Tr., Aug. 16, 2021, at 51, [Bankr ECF 3599].

[312] *See, e.g.*, Twenty-Seventh Monthly Fee Statement of Davis Polk & Wardwell LLP for Compensation for Services and Reimbursement of Expenses Incurred as Counsel to the Debtors and Debtors in Possession for the Period from November 1, 2021 through November 30, 2021, [Bankr. ECF 4248], at Ex. B-4. Nine of ten partners working on the case billed more than $1,700 per hour in November 2021. Only one, Angela Libby (the only woman, I note) billed less, at $1,635 per hour.

To be fair, the professionals in *Purdue Pharma* faced significant challenges. Their rates were presumably "market." Professional fees have long been a sore point in chapter 11 practice and scholarship.[313] Without wading into that debate, the important point here is simply that cases involving social debt should probably be especially sensitive to concerns that the costs of the bankruptcy process are justified by the benefits creditors can expect to see. Here, many of the conditions that gave rise to worries about the character of the process may also have undermined the purported goal of the rule of the deal, which is to maximize creditor recoveries.

As to the larger question: Why didn't Judge Drain put greater pressure on the Sacklers? He said he believed he had no choice. "It is incredibly frustrating," he stated in his ruling on plan confirmation. He further explained,

> that the law recognizes, albeit with some exceptions, although fairly narrow ones, the enforceability of spendthrift trusts. It is incredibly frustrating that people can send their money offshore in a way that might frustrate U.S. law. It is frustrating, although a long-established principle of U.S. law, that it is so difficult to hold board members and controlling shareholders liable for their corporation's conduct.[314]

He believed he had no power to change that; he could not "impose what I would like on the parties."[315]

This is true in a formal sense. But, from my perspective, the economic outcomes might have been better if he had allowed greater pressure on the Sacklers from the outset. That pressure could have come from decisions as simple as permitting a bellwether litigation to proceed against the Sacklers at the beginning of the case. In addition, or instead, he could have signaled neutrality about the appointment of an examiner, or deferred approval of the DOJ settlement until plan confirmation. The threat of greater forced disclosure, or the risk of case conversion or dismissal (practically eliminated by the DOJ settlement), might have led the Sacklers to pay more to induce greater participation. A disclosure statement that provided greater

[313] *See, e.g.,* Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices,* 83 AM. BANKR. L.J. 423, 423 (2009)("the United States bankruptcy courts routinely authorize and tolerate professional fee practices that violate the Bankruptcy Code and Rules.").

[314] *In re* Purdue Pharma, L.P., 633 B.R. 53, 93 (Bankr. S.D.N.Y.), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted,* No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

[315] *Id.* at 94.

independent insight into the merits of claims against the Sacklers—or a plan that permitted creditors to opt out of the Sackler Release—might have required the Sacklers to contribute more to win necessary support.

Hindsight is easy, and I do not want to suggest that Judge Drain did anything other than what he thought was best under conditions as he saw them. Chapter 11's deal culture was an attractive environment in which the Sacklers could seek to obscure and distract from the allegations against them while contributing to a plan of reorganization that might help ameliorate a crisis in which their company (and allegedly they) played a significant role. Judge Drain is a respected judge because he understands and operates effectively in that environment.

This may have made his court attractive to large companies with complex restructuring problems. In ordinary commercial cases, that culture can facilitate bargaining that produces creative, and perhaps value-maximizing, resolutions superior to those offered by the ordinary legal system, or bargaining outside of it.

But, social debt bankruptcies are different because the normative stakes are much higher. In *Purdue Pharma,* those stakes also required the involvement of political actors at every level of government, who were divided horizontally and vertically. They, in turn, had uneasy relationships with personal injury and commercial creditors, who had their own conflicting incentives. It would have been very difficult for the Sacklers (or their corporate agents and professionals) to ignore those divisions and to fail to exploit them.

To bring a deal together under such conditions was undoubtedly difficult. It took great effort, which Judge Drain (and, later, Judge McMahon) lauded. And, if a deal is your goal, then perhaps the outcome is commendable. But perhaps that is also evidence that a deal—at least, one framed by the Sacklers—was not an appropriate starting and ending point.

CONCLUSION

Neither social debt nor the rule of the deal is new. Both have long been features of the legal system. I have used *Purdue Pharma* as a case study not because I believe it is representative of other cases, but because I hope it is not. The tragedy of *Purdue Pharma* is that even modest efforts to provide transparency and accountability, such as through a bellwether litigation, a litigation risk analysis, more fulsome disclosure, or line-item consent, might have produced a better outcome, allaying the concerns of victims and survivors whose demands for dignitary justice went largely unheeded and paying more, sooner. To be sure, there are other social debt bankruptcies, and whether (or to what extent) they present similar problems of transparency and accountability will require future study.

While I obviously think the Sackler Releases are impermissible, it is possible (indeed, I believe probable) that the Second Circuit or the Supreme Court will think otherwise. Purdue Pharma and the Sacklers made strong arguments to the Second Circuit that the Sackler Releases were "necessary" to provide funding to abate the opioid crisis. No one would doubt the need; whether the rule of the deal was the right path is another matter.

In the meantime, this article has shown that the Sackler Releases were virtually inevitable from the outset, reflecting strategic choices by Purdue Pharma and the Sacklers before and throughout the bankruptcy, choices which Judge Drain largely support, and which creditors could not effectively challenge. Under these conditions, the rule of the deal was a threat to the rule of law. It was also a poor deal in the bargain.

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