# TO RELEASE OR NOT TO RELEASE? AN EXAMINATION OF NONDEBTOR RELEASES IN THE CONTEXT OF COMPLEX CHAPTER 11 BANKRUPTCY FILINGS

*Jennifer Kellner*

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# TO RELEASE OR NOT TO RELEASE? AN EXAMINATION OF NONDEBTOR RELEASES IN THE CONTEXT OF COMPLEX CHAPTER 11 BANKRUPTCY FILINGS

*Jennifer Kellner*[*]

## Abstract

*Several complex and high-profile Chapter 11 bankruptcy filings, such as the filing of Purdue Pharmaceuticals and USA Gymnastics, have called into question the validity of nondebtor releases in the context of approval of Chapter 11 reorganization plans in consideration of the tenets, principles, and goals set forth in the Bankruptcy Code. Nondebtor releases provide an additional challenge in the context of complex Chapter 11 Reorganizations as they release claims against "related entities and persons" who have not filed for bankruptcy protection themselves. The recent high-profile bankruptcy filing of Purdue Pharmaceuticals has generated particular and considerable scrutiny into the validity of such releases and when, if ever, nondebtor releases should be provided and approved. The Purdue Pharmaceuticals case presents compound issues surrounding the discretion of bankruptcy judges in balancing the cost of ongoing litigation with the release of nondebtor liability in the context of the opioid epidemic, one of the deadliest drug crises in American History. This note analyzes how the lack of uniformity in the treatment of nondebtor releases is inherently problematic, forcing bankruptcy judges to use their broad, discretionary powers without clear guidelines promulgated by the Bankruptcy Code and without a coherent consensus on whether the standards for nondebtor releases apply differently in complex Chapter 11 Reorganizations, especially those involving salient issues of public policy and health.*

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## INTRODUCTION

Several complex high-profile Chapter 11 bankruptcy filings, such as the filing of Purdue Pharmaceuticals and USA Gymnastics, have called into question the validity of nondebtor releases in the approval of Chapter 11 reorganization plans in the context of the tenets and principles set forth in the Bankruptcy Code. Nondebtor releases provide an additional consideration in the context of complex Chapter 11 reorganizations as they release claims against "related entities and persons" who have not filed for bankruptcy protection themselves.[1] Most recently, the Purdue Pharmaceuticals Chapter 11 bankruptcy filing has drawn particular scrutiny and spotlighted the validity of such releases and when, if ever, nondebtor releases should be provided and approved.[2] In response to this, several members of Congress have proposed the enactment of the Nondebtor Release Prohibition Act (the "NRPA"), which aims to limit the scope of nondebtor releases in the context of Chapter 11 reorganizations under the Bankruptcy Code, or ban them altogether.[3] The Purdue Pharmaceuticals case presents challenging issues surrounding the discretion of bankruptcy judges in balancing the cost of ongoing litigation with the release of nondebtor liability within the context of the opioid epidemic, one of the deadliest drug crises in American History.[4] This Note analyzes how the lack of uniformity in the treatment of nondebtor releases is inherently complex, creating uncertainty whilst forcing bankruptcy judges to use their broad, discretionary powers without clear guidelines promulgated by the Bankruptcy Code and without a coherent consensus on whether the standards for nondebtor releases apply differently in complex Chapter 11 reorganizations, especially those involving issues of public policy and health. Part I of this Note provides an introduction to the basic principles, tenets, and goals of the Bankruptcy Code and Chapter 11 reorganizations. Part II of this Note introduces the role of court-appointed examiners in Chapter 11 cases, particularly in the Purdue Pharmaceuticals case. Part III of this Note examines the history of third-party/nondebtor releases in the context of the USA Gymnastics and Purdue Pharmaceuticals cases. Part IV of this Note addresses Purdue Pharmaceutical's

[1] Kurt Mayr et al., *What the Nondebtor Release Bill Means for Chapter 11 Filings*, LAW360 (Aug. 31, 2021), https://www.law360.com/articles /1417159/what-the-nondebtor-release-bill-means-for-chapter-11-filings/.

[2] *Id.*

[3] *Id.*

[4] Maya Salam, *The Opioid Epidemic: A Crisis Years in the Making*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/us/opioid-crisis-public-health-emergency.html/.

alleged role and contribution in the development opioid crisis. Part V of this Note addresses the issues and considerations surrounding balancing the cost of ongoing litigation with the grant of nondebtor releases. Finally, Part VI of this Note addresses the shortcomings of the NRPA and a proposed solution to the treatment of nondebtor releases in the context of complex Chapter 11 reorganizations involving issues of public health and policy.

## I. INTRODUCTION TO THE BANKRUPTCY CODE

Article I, Section 8 of the United States Constitution authorizes Congress to enact "uniform laws" regarding bankruptcy protections and procedures.[5] Pursuant to this grant of authority, Congress enacted what came to be known as "The Bankruptcy Code" in 1978, which is codified as Title 11 of the United States Code.[6] The Bankruptcy Code governs all bankruptcy cases and is further supplemented by the Federal Rules of Bankruptcy Procedure and local rules of each bankruptcy court.[7] One of the fundamental aims of the federal bankruptcy laws "is to give debtors a financial 'fresh start' from burdensome debts."[8] The Supreme Court articulated this point in *Local Loan Co v. Hunt* stating, "it gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[9] There are six flavors of bankruptcy protection that are provided for under the Bankruptcy Code, one of which is reorganization under Chapter 11.[10] Chapter 11 is customarily used by commercial enterprises that desire to continue operating the business and reorganization.[11] The process of reorganization under Chapter 11 is typically achieved by the filing of a disclosure statement coupled with a plan of reorganization, which can further be approved or rejected by the bankruptcy court at the discretion of the judge assigned to the case as well as creditors.[12]

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[5] *Process – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics/ (last visited May 23, 2022).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* (citing Local Loan Co. v. Hunt*,* 292 U.S. 234, 244 (1934)).

[10] *Id.*

[11] *Id.*

[12] *Process – Bankruptcy Basics*, *supra* note 5.

Chapter 11 of the Bankruptcy Code is notorious for its use in large, commercial, complex bankruptcy proceedings as it is frequently and colloquially referred to as a "reorganization" bankruptcy. [13] Chapter 11 of the Bankruptcy Code provides an opportunity for a debtor to reorganize its business, especially its financial affairs, in order to provide the debtor with a "fresh start."It is fashioned primarily for business debtors, although individuals who are not engaged in business can also qualify for bankruptcy protection under Chapter 11.[14] A Chapter 11 case commences with the filing of a petition with the bankruptcy court, which can be voluntary or involuntary, though in the case of complex Chapter 11 cases it is normally a voluntary decision of the debtor to reorganize. Often in Chapter 11 cases the debtor assumes the position of a "debtor in possession" and will continue to operate the business and perform functions that would be performed by a trustee under other chapters of the Bankruptcy Code.[15] Generally, a disclosure statement and plan of reorganization must be filed with the court throughout the process of reorganization.[16] The disclosure statement provides information concerning the assets, liabilities, and business affairs of the debtor. Such information is often used by creditors to make an informed judgment regarding the adequacy and sufficiency of the debtor's plan of reorganization.[17] The contents of the Chapter 11 plan include a classification of claims, which specifies how each class of claims will be treated under the plan pursuant to 11 U.S.C. §1123.[18] More than one plan can be submitted to creditors for approval by the debtor.[19] In the event of competing plans of reorganization, the court considers both the preferences of the creditors as well as equity security holders in determining which plan should be confirmed.[20] In the process of approving the plan, any party of interest may file an objection to confirmation of a plan.[21] If no objections to the plan are filed, the court is allowed to use its discretion to determine whether the plan has been proposed in good faith

[13] *Chapter 11– Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics/ (last visited May 23, 2022).

[14] 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2022).

[15] *Chapter 11 – Bankruptcy Basics*, *supra* note 13.

[16] 11 U.S.C. §§ 1121, 1125 (2005).

[17] *Chapter 11 – Bankruptcy Basics*, *supra* note 13.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

and according to Fed. R. Bankr. P. 3020(b)(2).[22] In order for a Chapter 11 plan of reorganization to be confirmed the court must find that: "(1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and proponents of the plan are in compliance with the Bankruptcy Code."[23]

Chapter 11 of the Bankruptcy Code embodies the policy and principle that it is "generally preferable to enable a debtor to continue to operate the business as a going concern rather than simply to liquidate a troubled business."[24] Further, the Bankruptcy Code presumes that the debtor's business will continue to operate.[25] Frequently, the debtor will remain in possession of the business, operating as a debtor in possession ("DIP") unless cause suggests otherwise.[26] This presumption allows the debtor to retain control over daily operations and management as well as enables the debtor to participate and negotiate in the plan process.[27] The negotiation process will ideally lead to a consensual plan of reorganization, under which the debtor and creditors agree on "business and financial plans that offer some realistic chance of success."[28] The bankruptcy judge is one of the key players associated with the approval of a Chapter 11 plan, which governs how a business will effectively reorganize to emerge from bankruptcy.[29] The approval of a bankruptcy plan requires a judicial order to be enforceable,[30] which must include "a finding related to the feasibility of the plan."[31]

## II. COURT-APPOINTED EXAMINERS

In addition to plan requirements, Chapter 11 provides for the intervention of independent third parties, including an examiner or a trustee, depending on the facts and circumstances of the case.[32] While trustees are a requirement in Chapter

[22] *Chapter 11 – Bankruptcy Basics*, *supra* note 13.

[23] *Id.*

[24] 7 COLLIER ON BANKRUPTCY, *supra* note 14, ¶ 1100.01.

[25] *See id.*

[26] *See id.*

[27] *Id.*

[28] *Id.*

[29] *Process – Bankruptcy Basics*, *supra* note 5.

[30] Melissa A. Jacoby, *What Should Judges do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 582 (2015) (citing 11 U.S.C. §§ 1129, 1225(b)(2)(c), 1325 (2012)) (discussing enforceability of Chapter 11 plans).

[31] *Id.*

[32] Krista Fuller, *Chapter 11 Examiner When Why What and How Part I*, AM. BANKR. INST., Mar. 2005, https://www.abi.org/abi-journal/chapter-11-examiner-when-why-what-and-how-part-i/.

7 bankruptcy cases, they are less frequently appointed in Chapter 11 cases.[33] In comparison with a trustee, whose role is primarily to take control of the business, the role of a court-appointed examiner in a Chapter 11 case is akin to an investigator.[34] The examiner performs "the investigative duties of a trustee…but stands on a different legal footing than a trustee."[35] Additionally, the court "can mold the examiner's duties to fit a particular case," which allows the examiner to more effectively assist in the reorganization.[36] The grounds for the appointment of an examiner stem from 11. U.S.C. §1104(c), which provides: "if the court does not order the appointment of a trustee…then at any time before the confirmation of a plan, on request of a party of interest or the United States trustee…the 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…"[37] If a request for an examiner is made by the U.S. trustee or a party of interest,[38] an examiner can be appointed on two grounds.[39] First, an examiner may be appointed if it "is in the interest of the creditors, any equity security-holders and other interests of the estate."[40] The interest is determined through a cost-benefit analysis which weighs whether creditors would be best served by the appointment against the costs of appointment.[41] Second, an examiner shall be appointed if "the debtor's fixed liquidated unsecured debts…exceed $5 million."[42] The examiner is to "investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such a business and any other matter relevant to the case or to the formulation of a plan."[43] In addition to specific duties, an examiner has three

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* (citing *In re* Baldwin United Corp.*,* 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985)).

[37] Fuller, *supra* note 32 (citing 11 U.S.C. §1104(c)).

[38] The Bankruptcy Code provides that "a party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. §1109(b) (2021).

[39] Fuller, *supra* note 32.

[40] *Id.* (citing 11 U.S.C. §1104(c)).

[41] *Id.* (citation omitted).

[42] *Id.* (citing 11 U.S.C. §1104(c)(2)).

[43] *Id.* (citing 6 BANKR. SERV. L. ED. §52:321(2004)).

general duties that arise from the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and common law[44] explained in *In re Big Rivers* as (1) the duty to be neutral and disinterested, (2) the duty to disclose, and (3) the duty of loyalty.[45] "Everything that an examiner does must be done with loyalty to the creditors, the shareholders and to the judicial process."[46]

While examiners were created at the discretion of Congress with the aim of providing "special protection for the large cases having great public interest…to determine fraud or wrongdoing on the part of present management," there has been controversy regarding their roles in recent complex bankruptcy cases where examiner investigations have resulted in major lawsuits or settlements.[47] Additionally, judges have hesitated to appoint an examiner if there is "no apparent benefit to the estate or if a party requests one for strategic reasons."[48] Bankruptcy Judge Robert E. Gerber stated in *Lyondell Chemical* that "mandatory appointment [of examiners] is terrible bankruptcy policy, and the Code should be amended…to delete §1104(c)(2) and to give bankruptcy judges…the discretion to determine when an examiner is necessary and appropriate, and whether a request for an examiner is merely a litigation or negotiating ploy."[49] Generally, the appointment of an examiner in a Chapter 11 cases is rare.[50] A review of dockets from 576 of the largest Chapter 11 cases commenced between 1991 and 2007 indicates that examiners were only sought in about 15% of the sample.[51] However, there has been little empirical study on the pattern of the appointment of examiners in Chapter 11 cases.[52] Further, the motions to appoint examiners were granted in only 6.7% of all cases in the sample, representing an even smaller percentage of cases using court-appointed examiners.[53]

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[44] Fuller, *supra* note 32 (citing United States v. Schilling (*In re* Big Rivers Elec. Corp.), 355 F.3d 415, 422 (6th Cir. 2004)).

[45] *Id.*

[46] *Id.*

[47] Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 2 (2010) (citing 124 CONG. REC. SS17403-34 (daily ed. Oct. 6, 1978) (statement of Senator DeConcini), *quoted in* Collier on BANKRUPTCY, App. 14.4(f)(iii) (15th ed., rev. 2002)).

[48] *Id.* at 3.

[49] *Id.* at 3-4 (citation omitted).

[50] *Id.* at 4.

[51] *Id.*

[52] *Id.*

[53] Lipson, *supra* note 47, at 4.

Factors that contribute to the appointment of examiners include size of the case (measured by the amount of assets), conflict, venue, fraud, and strategy.[54] The appointed examiner is authorized to perform the functions that a trustee would normally perform and is required to file a statement of any investigation conducted.[55] In an examination of the factors leading to the appointment of examiners, Jonathan C. Lipson, a professor at Temple University Beasley School of Law, whose research focuses on governance, restructuring, and contracting practices[56] suggests that factors including case size, the degree of conflict in a particular Chapter 11 case, venue, fraud, and strategy all contribute to whether the appointment of an examiner will be sought and when the motion for the appointment of an examiner will be granted by the court.[57]

### *A. Appointment of Examiner in Purdue Pharma*

In the recent Purdue Pharmaceuticals Chapter 11 bankruptcy case the appointment of an examiner was thoroughly questioned, especially by claimants whose lives have been affected by opioid overdoses.[58] Purdue Pharmaceuticals filed for Chapter 11 bankruptcy protection in 2019 following their alleged role in significantly contributing to the opioid epidemic due to combative and aggressive marketing practices for its OxyContin brand of painkillers.[59] The filing halted more than 2,000 lawsuits pending against the company due to the enforcement of the

[54] *Id.* at 5-6.

[55] *Chapter 11 – Bankruptcy Basics*, *supra* note 13.

[56] *Professor Jonathan Lipson*, TEMP. UNIV. BEASLEY SCH. OF L. DIRECTORY, https://law.temple.edu/contact/jonathan-lipson/ (last visited May 23, 2022).

[57] Lipson, *supra* note 47, at 5–6.

[58] Maria Chutchian, *Sacklers Did Not Influence Purdue in Deal Talks, Examiner Finds*, REUTERS (July 20, 2021, 12:49 PM MST), https://www.reuters.com/legal /transactional/sacklers-did-not-influence-purdue-deal-talks-examiner-finds-2021-07-20/.

[59] Knowledge at Wharton, *The Purdue Pharma Bankruptcy Case: What's at Stake*, WHARTON SCH. OF U. PA. (Sept. 23, 2019), https://knowledge.wharton.upenn.edu/article /purdue-pharma-bankruptcy/.

automatic stay[60] in Chapter 11 bankruptcy proceedings.[61] Judge Drain, the judge overseeing the Purdue Pharmaceuticals bankruptcy case, appointed an examiner to "probe the independence of a special committee that negotiated a deal with the Sackler family members that own the OxyContin maker."[62]

In the Purdue Pharmaceuticals case, professor Jonathan C. Lipson, representing a creditor, Peter Jackson, filed a motion seeking the appointment of an examiner.[63] Lipson stated he was seeking the appointment of an examiner on behalf of Jackson to investigate the role of the Sackler family in negotiating a settlement framework pursuant to their Chapter 11 plan.[64] However, at the hearing Lipson narrowed the source of the relief sought, stating he sought only an investigation into whether Purdue's board of directors was unduly influenced by the Sacklers when presenting the Chapter 11 plan of reorganization of Purdue, citing Purdue's efforts to constrain the Sacklers from being able to remove board members preceding the company bankruptcy filing in September 2019.[65] Judge Drain criticized Lipson's motion alleging that it was filed with an absence of evidence that the Chapter 11 process lacked integrity.[66] Additionally, Judge Drain noted a lack of evidence suggesting that the "fiduciaries and their own representatives have misguided motives or have misled or have confused or somehow acted without integrity."[67] Further, Judge Drain also expressed his dismay in granting the motion stating that there was a risk the public and opioid

[60] The "automatic stay" is a central tenant and key component of bankruptcy cases. 11 U.S.C. §362(a)(1) provides that "except as provided in subsection (b) of this section, a petition filed…operates as a stay, applicable to all entities of (1) the commencement or continuation, including the issuance or employment of process of a judicial, administrative, or other action or proceeding against the debtor that was our could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. §362 (2021).

[61] Knowledge at Wharton, *supra* note 59.

[62] Maria Chutchian, *Purdue Pharma Bankruptcy Judge OKs Examiner but Condemns Sackler-Related Attacks*, REUTERS (June 16, 2021, 3:52 PM MST), https://www.reuters.com/legal/transactional/purdue-pharma-bankruptcy-judge-oks-examiner-condemns-sackler-related-attacks-2021-06-16/.

[63] Vince Sullivan, *Examiner with Narrow Scope Approved in Purdue Ch. 11*, LAW360 (June16, 2021, 6:44 PM), https://www.creditslips.org/files/examiner-with-narrow-scope-approved-in-purdue-ch.-11---law360.pdf.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

injury claimants would believe that the systems and processes in place were not in their best interest.[68] Attorneys for Purdue stated that the settlement was created during negotiations among the debtor, the Sackler family, and the attorneys general of all 50 states and other governmental entities engaged in the multidistrict litigation with the company over its role in the opioid crisis.[69]

## III. THIRD-PARTY/NONDEBTOR RELEASES

In addition to controversy over the appointment of an examiner, the Purdue Pharmaceuticals Chapter 11 bankruptcy case[70] and USA Gymnastics case[71] also pose the contentious and often complex issue of nondebtor third-party releases in the evaluation and negotiation of Chapter 11 plans. These high-profile cases increase the level of scrutiny associated with the approval of nondebtor releases in Chapter 11 plans and seek to "release nondebtor parties from any liability related to the relevant debtors' business activities."[72] Nondebtor releases essentially extinguish liabilities for nondebtors.[73] Generally, nondebtors are parties to a bankruptcy case who have not filed for bankruptcy protection themselves.[74] In the Purdue Pharmaceuticals case, the Sackler family members can be considered nondebtors because the company itself, Purdue Pharmaceuticals, filed for bankruptcy protection, not the Sackler family nor any of its individual members. A plan that contains nondebtor releases will often bind the debtor's creditors to release their personal claims against third parties involved in the reorganization process.[75] Nondebtor releases are frequently employed in complex Chapter 11 proceedings with the policy goal of furthering the "fresh start" that the reorganizing business strives to achieve.[76]

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[68] Sullivan, *supra* note 63.

[69] *Id.*

[70] Vince Sullivan, *US Trustee Challenges Constitutionality of Purdue Releases*, LAW360 (Sept. 22, 2021, 6:56 PM EDT), https://www.law360.com/articles/1424220/us-trustee-challenges-constitutionality-of-purdue-releases.

[71] P. Sabin Willett & Morgan Lewis, *Proposed Legislation May Limit Chapter 11 Plan Releases*, JD SUPRA (Aug. 25, 2021), https://www.jdsupra.com/legalnews/proposed-legislation-may-limit-chapter-8356376/.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Willett & Lewis, *supra* note 71.

### *A. History of Third-Party/Nondebtor Releases in Chapter 11 Plans*

Third-party releases in the context of Chapter 11 bankruptcy plans have generated considerable debate as to whether bankruptcy courts may extinguish liabilities of parties that have not filed for bankruptcy protection.[77] While the Purdue Pharmaceuticals and USA Gymnastics cases are contemporary and extreme examples of third-party releases in the context of Chapter 11 cases in the wake of public health crises and sexual abuse claimants, these cases illuminate the inconsistencies in resolution of third-party releases. These inconsistencies create uncertainties in the treatment and evaluation of third-party releases.[78] This inconsistency presents a judicially unmanageable standard and process for bankruptcy judges to use in the evaluation of such releases.

The Bankruptcy Code gives bankruptcy courts "broad equitable powers to balance the interests of the affected parties, guided by the overarching goal of ensuring the success of the reorganization."[79] Section 105(a) of the Bankruptcy Code articulates that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[80] Additionally, section 1123(b)(6), permits a Chapter 11 plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title."[81] The disagreement over the broad authority conferred by the statutes is particularly salient in the context of nondebtor releases.[82]

Courts arguing the invalidity and impermissibility of nondebtor releases focus primarily on Section 524(e) of the Bankruptcy Code,[83] which provides "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[84] The Ninth Circuit, on appeal in *Underhill v. Royal*, contended that section 524(e) "will not discharge the liabilities of co-debtors or guarantors."[85] The court also concluded that the

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[77] Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEVS. J. 13, 13 (2006) (discussing debate over extinguishing liabilities of non-debtors in chapter 11 cases).

[78] *Id.* at 44.

[79] *Id.* at 15.

[80] *Id.*

[81] *Id.* at 15–16.

[82] Silverstein, *supra* note 77, at 16.

[83] *Id.* at 42.

[84] *Id.*

[85] Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985).

bankruptcy court "has no power to discharge the liabilities of a nondebtor pursuant to consent of creditors as part of a reorganization plan."[86] An alternative view of nondebtor releases is that such releases permit third parties to obtain releases of liability, one of the "key benefits" offered by the filing of a bankruptcy petition, without having to comply with the Code's accompanying duties and requirements.[87] The allowance of nondebtor releases may also jeopardize the careful balance between debtor's rights and creditor's rights that Congress sought to achieve when creating the provisions that govern the bankruptcy process.[88] Ultimately, some courts have ruled that the statute therefore prohibits nondebtor releases.[89] Other courts have relied on alternate grounds to critique the validity of nondebtor releases holding that "third-party releases are simply beyond the equitable powers granted by and contained within section 105(a) of the Bankruptcy Code."[90] Other courts, amenable to the grant of nondebtor releases rely primarily on the holding of *MacArthur Co. v. Johns-Manville Corp*.[91] The Second Circuit, in its holding, observed that section 105(a) "has been construed liberally to enjoin suits that might impede the reorganization process."[92] As a result of the settlement being "essential…to a workable reorganization, it falls well within the bankruptcy court's equitable powers."[93] The Fourth Circuit, in *In re A.H. Robins Co.*, extended the holding from *Johns-Manville* to third-party releases of direct claims against nondebtors.[94]

A majority of pro-release courts have adopted a five-factor test to evaluate the validity of nondebtor releases in *In re Master Mortgage Investment Fund, Inc.*[95] First, there must be "an identity of interest between the debtor and the third party."[96] Second, the third party must contribute "substantial assets" to the reorganization.[97] Third, the release must be "essential to the reorganization" and

[86] *Id.*

[87] Silverstein, *supra* note 77, at 50.

[88] *Id.* at 42.

[89] *Id.* at 50.

[90] *Id.* at 53.

[91] *Id.*

[92] Silverstein, *supra* note 77, at 55 (citing MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89, 93 (2d Cir. 1988)).

[93] *Id.* at 56.

[94] *Id.*

[95] *Id.* at 64.

[96] *Id.* (citing *In re* Master Mortg. Invest. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994)).

[97] Silverstein, *supra* note 77, at 65 (citing *In re* Master Mortg. Invest. Fund, Inc., 168 B.R. 930 (Bankr. W.D. Mo. 1994)).

"without the release, there is little likelihood of success."[98] Fourth, "a substantial majority of the creditors agree to [the release], specifically, the impacted class, or classes has 'overwhelmingly' voted to accept the proposed plan treatment."[99] Fifth, the plan provides for "payment of all, or substantially all, of the claims of the class or classes affected by the nondebtor release."[100]

In the evaluation of third-party releases, courts often distinguish between consensual and non-consensual third-party releases.[101] Consensual third-party releases are generally viewed more favorably, however, the inconsistency and issues in the approval of third-party releases in Chapter 11 plans manifests mainly in the context of non-consensual releases.[102] A third-party release is deemed "consensual" when a creditor affirmatively votes in favor of a plan of reorganization that contains such releases.[103] *Deutsche Bank AG, London Branch v. Metromedia Fiber Network*, is a leading Second Circuit case illuminating various issues surrounding third-party releases and presents a standard for the evaluation of the approval of nonconsensual third-party releases.[104] Appellants challenged the release on the grounds that the "nondebtor releases were unauthorized by the Bankruptcy Code."[105] The court emphasized that "[w]hile none of our cases explains when a nondebtor release is 'important' to a debtor's plan, it is clear that such a release is proper only in rare cases."[106] Additionally, the court alluded to the fact that nondebtor releases present issues related to both statutory authority and the potential for abuse by parties seeking to shield themselves from liability.[107] "The only explicit authorization in the Code for nondebtor releases is 11 U.S.C. §524(g), which authorizes such releases in asbestos cases when specified conditions are satisfied, including the creation of a trust to

[98] *Id.*

[99] *Id.*

[100] *Id.* at 66.

[101] Thomas R. Califano & Anna Gumport, *Congress Seeks to Restrict Nondebtor Releases in New Bankruptcy Reform Bill*, N.Y.L.J. (Sept. 17, 2021, 2:20 PM), https://www.law.com/newyorklawjournal/2021/09/17/congress-seeks-to-restrict-nondebtor-releases-in-new-bankruptcy-reform-bill/?slreturn=20220424205111/.

[102] *Id.*

[103] Michael S. Etkin & Nicole M. Brown, *Third-Party Releases?—Not so Fast! Changing Trends and Heightened Scrutiny*, 29 AIRA J. 22, 23 (2015).

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

[105] *Id.* at 141.

[106] *Id.*

[107] *Id.*

satisfy future claims."[108] Further, "a nondebtor release is a device that lends itself to abuse."[109] "By it, a nondebtor can shield itself from liability to third parties…it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." [110] "The potential for abuse is heightened when releases afford blanket immunity."[111] The *Metromedia* opinion spotlights the fact that "no case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique."[112] "A central focus of these…reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties."[113] "Substantial financial contributions from nondebtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made their reorganizations feasible."[114] Ultimately, the Second Circuit rejected the bankruptcy court's findings on appeal stating that "a nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan."[115]

### *B. USA Gymnastics—Third-Party/Nondebtor Releases*

On December 5, 2018, USA Gymnastics filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Indiana.[116] The organization sought bankruptcy protection amidst hundreds of lawsuits from gymnasts claiming abuse and negligence at the hands of USA Gymnastics after gymnasts experienced years of sexual abuse at the hands of former team doctor Larry Nassar.[117] On October 25, 2021, U.S. Bankruptcy Judge Robyn M. Moberly permitted USA Gymnastics to begin soliciting votes for a Chapter 11 Plan that would create a settlement fund for

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[108] *Id.* at 142 (citing Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 211, 211 n.6 (3d Cir. 2000)).

[109] *In re* Metromedia Fiber Network, Inc., 416 F.3d at 142.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *In re* Metromedia Fiber Network, Inc., 416 F.3d at 142.

[115] *Id.*

[116] *Timeline for Key Motions and Actions Regarding USA Gymnastics' Bankruptcy* Case, USA GYMNASTICS, https://usagym.org/pages/aboutus/pages/bankruptcy.html/ (last visited Nov. 5, 2021).

[117] Vince Sullivan, *USA Gymnastics OK'd to Solicit Votes for $400M Ch. 11 Plan*, LAW360 (Oct. 25, 2021, 6:43 PM EDT), https://www.law360.com/articles/1434182/usa-gymnastics-ok-d-to-solicit-votes-for-400m-ch-11-plan/.

sexual abuse claimants and "calls for insurers of USA Gymnastics and nondebtor entities that include the U.S. Olympic and Paralympic Committees to contribute $400 million into a sex abuse claims fund that will provide recoveries to those claimants and further provide one percent of the fund for future claimants." [118]

### *C. Purdue Pharmaceutical—Third-Party/Nondebtor Releases*

On September 1, 2021, Bankruptcy Judge Robert Drain of the Southern District of New York conditionally approved a $4.5 billion bankruptcy settlement that shielded the Sackler family from liability in exchange for providing funding in order to combat the ramifications and devastating effects of the opioid crisis.[119] Judge Drain stated he would confirm a plan of reorganization that would "transform Purdue into a public benefit company and settle civil lawsuits filed by governments and opioid victims against the drugmaker and its owners."[120] However, Judge Drain also emphasized that the release from civil lawsuits against the Sackler family does not protect them from any criminal charges.[121] The plan negotiations in the Purdue Pharmaceuticals case ultimately resulted in "releases" from liability for harm caused by OxyContin to the Sacklers and associates.[122] The U.S. Trustee expressed concern over the third-party releases for the Sackler family contained in Purdue's Chapter 11 plan "highlighting an ongoing concern about the 'extraordinarily broad' non-consensual, third-party releases."[123] Further, the U.S. Trustee, William K. Harrington, has challenged the constitutionality of such releases.[124] Harrington emphasized the potential for claimants to be "irreparably harmed by the plan releases going into effect" allowing "possibly thousands of Sackler family members and associated parties…[to] be released without a full accounting of their…liability for the opioid disaster." Additionally, Harrington

[118] *Id.*

[119] Jonathan Randles, *Purdue Pharma Bankruptcy Plan Approved, Freeing Sacklers from Lawsuits*, WALL ST. J. (Sept. 1, 2021, 6:55 PM ET), https://www.wsj.com/articles /purdue-pharma-bankruptcy-plan-approved-freeing-owners-from-lawsuits-11630528636/.

[120] *Id.*

[121] Brian Mann, *The Sacklers, Who Made Billions from OxyContin, Win Immunity from Opioid Lawsuits*, NPR (Sept. 1, 2021, 7:33 PM ET), https://www.npr.org/2021/09/01 /1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic/.

[122] *Id.*

[123] Jeremy Hill & Allison McNeely, *Purdue Pharma Narrows Protection for Sacklers During Trial*, BLOOMBERG (Aug. 23, 2021, 9:14 AM MST), https://www .bloomberg.com/news/articles/2021-08-23/purdue-pharma-narrows-protections-for-sacklers-on-judge-concern/.

[124] Sullivan, *supra* note 70.

argues the releases breach the bankruptcy clause provided for in the Constitution since they do not apply with equal force to all nondebtors and deny due process to the victims of the opioid crisis, depriving them of their rights to pursue claims "'against the myriad Sackler family members and other nondebtors—many of whom are unidentified.'"[125] Additionally, Harrington argued that the Sackler family and their associates used the bankruptcy system to "avoid liability for 'alleged wrongdoing in concocting and perpetuating for profit one of the most severe public health crises ever experienced in the United States.[126] Finally, Harrington raised concerns about a non-Article III court having the constitutional authority to render such a judgment that would "extinguish state-law causes of action between nondebtors."[127] The ruling will likely be appealed by federal and state authorities that opposed Purdue's plan arguing that the settlement structure is unconstitutional and the Sacklers were not contributing a sufficient amount of their wealth to the settlement.[128] In approving the settlement, Judge Drain did not consider Purdue or the Sacklers' culpability in the crisis, but rather focused his approval on whether the contribution of the family represented a "fair resolution to the Chapter 11 case."[129] Several critics intend to challenge Judge Drain's ruling in appellate court. One lawyer opposing the settlement in particular, a lawyer for Washington state, stated that Judge Drain would be making a "historic mistake" in the approval of Purdue's plan.[130]

## IV. PURDUE PHARMA'S ALLEGED ROLE IN THE OPIOID EPIDEMIC

A discussion of the nondebtor releases in the Purdue Pharmaceuticals plan warrants a discussion as to the culpability of the role of the Sackler family in their contributions to the Opioid Epidemic in the United States. On December 17, 2020, the Committee on Oversight and Reform of the House of Representatives met regarding the role of Purdue Pharmaceuticals and the Sackler Family in the opioid epidemic.[131] This was a landmark hearing where, under threat of subpoena, two members of the Sackler family testified in public under oath for one of the first

[125] *Id.*

[126] Mann, *supra* note 121.

[127] Sullivan, *supra* note 70.

[128] Randles, *supra* note 119.

[129] *Id.*

[130] *Id.*

[131] *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. (2020).

times in history.[132] "Since 1999, nearly half a million lives have been devastatingly cut short by opioid overdoses in the United States alone."[133] Purdue Pharmaceuticals has generated more than $35 billion in revenue since the introduction of OxyContin, an addictive prescription painkiller, to the market.[134] The introduction of OxyContin in the 1990s is widely seen as one of the spurs of the beginning of the tragic and widespread opioid crisis in the United States that has unfolded over the last two decades.[135] The Sackler family has owned Purdue Pharmaceuticals since 1952 and has profited exponentially from the sales of OxyContin, withdrawing more than $10 billion from the company.[136] Under the control of the Sackler family, Purdue targeted high-volume prescribers to boost sales of OxyContin, ignored safeguards to reduce prescription opioid misuse, and promoted false narratives about their products to steer patients away from safer alternatives.[137] The hearing involved testimony from two members of the Sackler family, David and Kathe Sackler, regarding their role in the opioid crisis.[138] Purdue is one of the latest court cases in a series, in which drugmakers and distributors are seeking to resolve legal liabilities over opioids which caused nearly 500,000 overdose deaths between the years of 1999 and 2019.[139] In July 2021, several other drug companies such as AmerisourceBergen Corp., Cardinal Health Inc., McKesson Corp., and Johnson & Johnson negotiated a $26 billion dollar settlement to resolve lawsuits filed by state and local governments blaming them for their role in fueling the opioid epidemic.[140] Previously, the Sackler family has

[132] Press Release, House Comm. on Oversight & Reform Chairwoman Carolyn B. Maloney, Maloney and DeSaulnier Condemn Legal Releases for Members of the Sackler Family (Sept. 1, 2021), https://oversight.house.gov/news/press-releases/maloney-and-desaulnier-condemn-legal-releases-for-members-of-the-sackler-family/.

[133] *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic*, *supra* note 131.

[134] *Id.*

[135] Mann, *supra* note 121.

[136] *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic*, *supra* note 131.

[137] *Id*.

[138] *Id.* at 6-8.

[139] Randles, *supra* note 119.

[140] Sara Randazzo & Jared S. Hopkins, *Opioid Settlement of $26 Billion Between Drug Companies, States Expected This Week*, WALL ST. J. (July 19, 2021, 11:05 PM ET), https://www.wsj.com/articles/26-billion-opioid-settlement-among-states-and-drug-industry-expected-this-week-11626745448?mod=article_inline/.

pleaded guilty two times to federal crimes related to its marketing of OxyContin.[141]

## V. BALANCING THE COST OF ONGOING LITIGATION WITH NONDEBTOR RELEASES—DOES A FAIR SETTLEMENT MODEL EXIST?

The Purdue Pharmaceuticals case serves as a basis for evaluating salient and critical questions of the appointment of court-appointed examiners in large, complex Chapter 11 bankruptcy cases as well as the difficulties that arise in allowing for third-party nondebtor releases in cases concerning massive public health crises. This case begs the question of whether a fair settlement model actually exists and if so, how to balance the cost of ongoing litigation with nondebtor releases in the context of financial contributions towards settlement funds and the bankruptcy estate.

The issues surrounding the approval of nondebtor releases in Chapter 11 Reorganization plans have recently attracted congressional attention.[142] On July 28, 2021, certain members of Congress introduced the Nondebtor Release Prohibition Act of 2021 ("NRPA"), partially in response to the Purdue Pharmaceuticals Chapter 11 Case as well as the Chapter 11 filing of USA Gymnastics.[143] The NRPA proposes to add Section 113 to the Bankruptcy Code limiting the power and discretion of the bankruptcy courts.[144] The NRPA, in short, proposes to amend the Bankruptcy Code by restricting courts' ability to approve third-party releases of nondebtors and is not limited to the approval of Chapter 11 plans in the mass tort context.[145] "[T]he Act narrows the scope of consensual third-party releases and injunctions, and would generally prohibit nonconsensual third-party releases and injunctions."[146] The restrictions proposed by the implementation of the NRPA would apply to the court approval of "'any provision, in a plan of reorganization or otherwise for the discharge, release, termination or modification of' or any order granting 'the discharge, release, termination or modification of' the liability of a nondebtor or its property for 'any claim or cause of action for an

[141] Mann, *supra* note 121.

[142] Califano & Gumport, *supra* note 101.

[143] Kyle Arendsen & Peter Morrison, *Congress Proposes Significant Bankruptcy Code Changes to Protect Tort Claimants and Creditors*, RESTRUCTURING GLOBALVIEW (Aug. 11, 2021), https://www.restructuring-globalview.com/2021/08/congress-proposes-significant-bankruptcy-code-changes-to-protect-tort-claimants-and-creditors/.

[144] *Id.*

[145] Califano & Gumport, *supra* note 101.

[146] *Id.*

entity other than the debtor or the estate.'"[147] Further, for a third-party release to fall into the consensual category, "that party must 'expressly consent in a signed writing' thus doing away with the ability to obtain 'opt out' releases."[148]

Critics of the NRPA argue that such an amendment may be in opposition to the goals of reorganization as promulgated by the Bankruptcy Code, such as "the ability to rehabilitate enterprises and preserve going concerns."[149] Further, the NRPA, if enacted may disincentivize nondebtors from providing financial contributions and in turn ultimately incentivize nondebtors to engage in prolonged litigation to limit the scope of their liability.[150] This disincentivizing principle could limit the monetary recovery of claimants, which is especially salient in the context of Chapter 11 reorganizations that involve issues of public policy and public health.

Judge Drain, a reluctant advocate of the preliminary approval of the settlement, was forced to balance the proposed monetary contributions by the Sackler family to a trust with the cost of ongoing litigation and the possibility of a lesser recovery for claimants. Judge Drain stated "it is clear to me after a lengthy trial that there is no other reasonably conceivable means to achieve this result" and the settlement offers an opportunity to help communities with funding for drug treatment and other opioid abatement programs.[151] Early critics of the plan, such as New York Attorney General Letitia James, emphasized that the money contributed by the Sackler's to the settlement plan will "do real good."[152] In a statement, Ms. James said "[n]o deal is perfect, and no amount of money will ever make up for the hundreds of thousands who lost their lives, the millions who became addicted, or the countless families torn apart by this crisis, but these funds will be used to prevent future death and destruction as a result of the opioid epidemic."[153]

### *A. Public Policy—Settlements in Consideration of Public Health*

The Purdue Pharmaceuticals case also strikes a seemingly eerie resemblance to the Master Settlement Agreement (the "MSA") reached in 1998 with the four

[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] Califano & Gumport, *supra* note 101.
[151] Mann, *supra* note 121.
[152] *Id.*
[153] *Id.*

largest tobacco companies in the U.S.[154] Fifty-two state and territory attorneys signed the MSA to settle dozens of state lawsuits brought to recover billions of dollars in health care costs associated with treating smoking-related illnesses. The MSA ultimately created various new restrictions related to the advertising, marketing, and promotion of cigarettes including the prohibition of tobacco advertising that targets people under 18, the use of cartoons in tobacco advertising, and the use of cigarette brand names on merchandise.[155]

The nondebtor releases involved in the Purdue Pharmaceuticals case carry forth implications involving public policy especially in the context of public health crises. Following the confirmation of Purdue Pharmaceutical's plan, Representative Carolyn B. Maloney and senior Committee Member Representative Mark DeSaulnier issued a statement calling the approval of the plan "a dark day for justice in America" and renounced the ability of "powerful people to evade accountability through legal releases in bankruptcy court."[156] In the face of public health crises- should nondebtor releases in large Chapter 11 cases receive a *further* level of heightened scrutiny? While bankruptcy judges are given broad equitable powers, where do we draw the line?

The answers to these questions involve balancing the cost of ongoing litigation with the potential amount received in settlement in exchange for providing nondebtor releases in complex Chapter 11 proceedings involving issues of public health, safety, and policy. The Sackler family members can be considered "insider" members of Purdue Pharmaceuticals. An insider is "a director, officer, or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer, or person in control of the debtor."[157] In exchange for the contribution of settlement funds, the Sackler family forfeited their ownership of Purdue Pharmaceuticals.[158] One argument for granting releases to insiders focuses on the "contributing nondebtor theory" where "[r]eleases or injunctions are granted in

[154] *The Master Settlement Agreement*, NAAG CTR. FOR TOBACCO & PUB. HEALTH, https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/ (last visited May 24, 2022).

[155] *Master Settlement Agreement*, TRUTH INITIATIVE, https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement/ (last visited May 24, 2022).

[156] *See* Press Release, *supra* note 132.

[157] *Bankruptcy Basics Glossary*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary/ (last visited May 24, 2022).

[158] Mann, *supra* note 121.

exchange for payments to the debtor in order to fund the reorganization."[159] Given the devastating effects of the opioid epidemic, one of the deadliest drug crises in American history,[160] the Purdue Pharmaceuticals case warrants noteworthy attention and consideration. Judge Drain, while begrudgingly accepting the releases provided for in the plan, noted the bitterness of such a result.[161]

The settlement negotiated in the Purdue Pharmaceuticals case involved an evidently difficult balance between electing to not grant releases, potentially resulting in a lesser settlement for victims of the opioid crises and ongoing litigation, and granting releases to increase the monetary value of the settlement fund. Judge Drain noted that the plan had the potential to "fall apart" without the Sackler settlement, leading to a liquidation of Purdue Pharmaceuticals and a best-case recovery of $600 million recovery for creditors.[162]

While $4.5 billion may seem like an exorbitant amount of money to the average person, the reality is that the Sackler family will remain an extremely wealthy family. The Sacklers have withdrawn more than $10 billion from Purdue Pharmaceuticals since bringing the highly-addictive painkiller OxyContin to market.[163] As families grieve the loss of loved ones due to the tragedies of opioid epidemic and targeted marketing practices of Purdue Pharmaceuticals, this bankruptcy settlement will allow the Sackler family to largely preserve their wealth without taking accountability for their actions.[164] Senator Elizabeth Warren commented on this bizarre phenomena stating "bankruptcy is there to help companies in trouble… rich people in giant corporations have figured out how to game the system… billionaires like the Sacklers want to get the benefits of bankruptcy while they keep their assets secret."[165]

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[159] Elizabeth Gamble, note, *Nondebtor Releases in Chapter 11 Reorganizations: A Limited Power*, 38 FORDHAM URB. L.J. 821, 841 (2011).

[160] Salam, *supra* note 4.

[161] Mann, *supra* note 121.

[162] Rick Archer, *Purdue Pharma Ch. 11 Plan Gets OK with Sackler Releases*, LAW360 (Sept. 1, 2021, 4:39 PM EDT), https://www.law360.com/bankruptcy/articles/1417959/purdue-pharma-ch-11-plan-gets-ok-with-sackler-releases/.

[163] *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic*, *supra* note 131.

[164] Jeremy Hill et al., *Sacklers to Exit from Complex Purdue Bankruptcy with Billions*, BLOOMBERG (Sept. 2, 2021, 5:56 AM MST), https://www.bloomberg.com/news/features/2021-09-01/sackler-family-exits-bankruptcy-trial-over-purdue-pharma-s-oxycontin/.

[165] Press Release, House Comm. on Oversight & Reform Chairwoman Carolyn B. Maloney, Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to

Additionally, the scope of payouts as a result of the settlement agreement would ultimately yield very little in the form of monetary relief to individual claimants who have suffered as a result of the opioid epidemic.[166] Around 138,000 individuals have filed claims for a death, expenses tied to their addiction, or the birth of a child exposed to opioids during pregnancy.[167] Lynn Wencus, a claimant from Wretham, Massachusetts, filed a claim for the death of her son Jeff who unfortunately passed away due to an opioid overdose in 2017.[168] To file her claim, Ms. Wencus compiled painful reminders of her loss including receipts for prescriptions, doctors' visits, detox, and rehab stays.[169] The breadth and depth of the collection process Ms. Wencus engaged in to file her claim is not only emotionally taxing, but further something many families whose lives have been impacted may not be able to do, due to either not having retained such records or the pain associated with recounting such tragic events. The evidence collected by Ms. Wencus will then be converted to a certain number of "points," which will determine the monetary value of her claim.[170] The estimated monetary recovery from the settlement is estimated to be between $26,000 and $40,000, a fraction of the more than $125,000 the Wencus family spent on Jeff's care.[171] Additionally, the Wencus family will only recover the remainder after attorney and administrative fees are paid.[172] A majority of the settlement money will be used to help states, local governments, and tribes fight the opioid crisis in the future, rather than compensate individual claimants who have already experienced grief, loss, and pain due to the opioid epidemic.[173]

Eliminate Non-Debtor Releases, Prevent Corporations and Private Entities from Escaping Accountability in Bankruptcy Proceedings (July 28, 2021), https://oversight.house .gov/news/press-releases/rren-nadler-durbin-blumenthal-maloney-announce-legislation-to-eliminate-non/.

[166] Martha Bebinger, *The Purdue Pharma Deal Would Deliver Billions, but Individual Payouts Will Be Small*, NPR (Sept. 28, 2021, 5:00 AM ET), *https*://www.npr.org /2021/09/28/1040447650/payouts-purdue-pharma-settlement-sackler/.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Bebinger, *supra* note 166.

[172] *Id.*

[173] *Id.*

## VI. PROPOSED SOLUTION

The lack of uniformity between circuits in the treatment of nondebtor releases is inherently problematic, and further could perhaps encourage forum shopping based on circuit trends in favorability towards such releases.[174] This problem is exacerbated when interwoven with issues of public policy and health. Additionally, bankruptcy judges are left to make discretionary interpretations of the Bankruptcy Code with no clear consensus on whether the standards apply differently in complex Chapter 11 Reorganizations, especially those involving issues of public policy and health, which are often highly publicized and critiqued.

### *A. The NRPA*

In the context of public health crises, especially in consideration of the scale and devastation of the opioid epidemic, the Bankruptcy Code warrants revision to assist bankruptcy judges in the use of their discretion in approving plans that involve nondebtor releases such as the release negotiated by the Sackler family. One suggested revision in response to the highly-publicized nature of the Purdue Pharmaceuticals case has been a congressional proposal to revise the Bankruptcy Code by adopting the NRPA, further discussed above.[175] The NRPA was proposed in response to a lack of a judicially manageable standard surrounding nondebtor releases in complex Chapter 11 cases and is aimed at limiting the scope of nondebtor releases in Chapter 11 plans, if not prohibiting their use altogether.[176] The bill contends "[t]o amend Title 11, United States Code, to prohibit nonconsensual release of a debtor's liability to an entity other than the debtor, and for other purposes."[177]

### *B. Critique of NRPA Proposed Solution*

The NRPA is an ineffective and far-fetched solution to the problems and complexities posed by nondebtor releases in complex Chapter 11 reorganizations as it conflicts with the basic policy principles supported and affirmed throughout

[174] Mayr et al., *supra* note 1.

[175] Gregg M. Galardi, Ryan Preston Dahl, & Mark Maciuch, *The Way Is Shut: Nondebtor Release Legislation Proposes Mandatory Dismissal on Account of Pre-Bankruptcy Liability Management Transactions*, ROPES & GRAY (Oct. 13, 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/October/The-Way-Is-Shut-Nondebtor-Release-Legislation-Proposes-Mandatory-Dismissal-On-Account/.

[176] *Id.*

[177] Nondebtor Release Prohibition Act of 2021, H.R.4777, 117th Cong. (2021).

the Bankruptcy Code. While the introduction of the NRPA was spurred by the highly public nature of the Purdue Pharmaceuticals and USA Gymnastics cases, the proposed amendments to the Bankruptcy Code contain implications beyond third-party nondebtor releases in the mass tort context, affecting the future of Chapter 11 reorganizations as a whole.[178] One of the governing principles in Chapter 11 cases is the ability to provide the debtor with a "fresh start" through the facilitation of a reorganization plan which allows the debtor to continue as an operating entity, more often than not, generating more value than a liquidation of the debtor would provide. [179] Additionally, the Bankruptcy Code, as currently fashioned, allows judges to craft creative solutions unique to the needs of each individual case. The enaction of the NRPA would effectively revoke the ability of bankruptcy judges to allow for nondebtor releases, and potentially encourage the use of the tort litigation system for adjudicating such claims, which contains its own "attendant costs and delays."[180] Further, the NRPA may also provide perverse incentives for nondebtors. The NRPA potentially disincentivizes such parties from participating in the funding process of Chapter 11 cases and reorganizations.[181] While the Sacklers should be held accountable and liable for their alleged role in the opioid crisis, without the settlement money they contributed, the monetary recovery for affected claimants would have been slashed even further.[182] The NRPA, while a step in the right direction, contains flaws that warrant further amendment to address the balance between discretion, morality, and statutory authority that nondebtor releases require in the context of complex Chapter 11 reorganizations.

Given the public policy and public health crises implicated in the Purdue Pharmaceuticals case and the sheer number of lives affected by the potential settlement due to the widespread devastation of the opioid epidemic, there should be a judicially manageable and standardized process for bankruptcy judges to use in evaluating the validity of nondebtor releases. To resolve this issue, the Bankruptcy Code warrants amendment to contain explicit considerations and guidelines for bankruptcy judges to use when evaluating whether a case presents itself with the requisite "unusual circumstances"[183] in which nondebtor releases are

[178] Califano & Gumport, *supra* note 101.

[179] *Chapter 11 Bankruptcy*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/chapter_11_bankruptcy/ (last visited May 24, 2022).

[180] Califano & Gumport, *supra* note 101.

[181] *Id.*

[182] Archer, *supra* note 162.

[183] Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136. 142 (2d Cir. 2005).

appropriate and how such releases should be construed in accordance with the policies and goals of the Bankruptcy Code. Such guidelines could include factors such as how to compare the liquidation value to the proposed settlement contribution to the estate and an explanation of factors that render a case "unusual" enough to warrant consideration of nondebtor releases, such as when involving issues of public health. Additionally, such guidelines could explicitly incorporate the five-factor test articulated in *In re Master Mortgage Investment Fund, Inc.*, mentioned above, with a further explanation providing clarity on how to balance each factor. The promulgation of such guidelines would streamline the process for the consideration of nondebtor releases and resolve the inherently problematic discretion bankruptcy judges have in approving plans that contain such releases. An alternative to amending the Bankruptcy Code itself would be for the American Bankruptcy Institute to promulgate a set of guidelines and considerations to use when evaluating the validity and appropriateness of nondebtor releases in Chapter 11 Reorganizations. This solution would further protect the basic tenets and principles of the Bankruptcy Code, which has already undergone substantial revision since its enactment, and provide salient and informed guidance for when nondebtor releases should be used and how they should be implemented.