Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances

Adam J. Levitin*

Purdue Pharma, the bankrupt drug manufacturer at the center of the opioid crisis, settled its civil and criminal liability for opioid harms with the Department of Justice in a deal that contained a "poison pill" that prevented creditors from objecting to any subsequent plan of reorganization for Purdue: if creditors exercised their rights and pushed for Purdue's liquidation, they would forfeit all of Purdue's value to the Department of Justice.

This Article argues that Purdue illustrates how the procedural checks and balances that make Chapter 11 bankruptcy a fair and credible system have broken down. Purdue represents the confluence of three trends in bankruptcy: (1) increasingly aggressive and coercive restructuring techniques like the poison pill that lock in the determination of subsequent decisions in the bankruptcy; (2) the lack of appellate review for many key bankruptcy issues; and (3) the rise of "judge-shopping," facilitated by bankruptcy courts' local rules that enable debtors to handpick their judge.

While each of these trends is problematic in its own right, standing alone they do not undermine the fundamental fairness of the bankruptcy system. Their convergence, however, results in a broken legal system in which a single non-Article III judge of the debtor's choosing is the only real check on what the debtor can do in Chapter 11. This situation enables debtors to push through overreaching restructuring transactions that benefit favored creditors and allies at the expense of disfavored creditors, like the opioid victims in Purdue.

* Anne Fleming Research Professor & Professor of Law, Georgetown University Law Center. This Article has benefitted from a presentation at the Corporate Restructuring & Insolvency Seminar. Thank you to Ralph Brubaker, Vincent Buccola, Daniel Bussel, Jared Ellias, Whitman Holt, Melissa Jacoby, Edward Janger, Robert Lawless, Jonathan Lipson, Lynn LoPucki, Stephen Lubben, Elena X. Wang, and various attorneys who asked to remain anonymous for generous comments.

Introduction

Purdue Pharma's bankruptcy is perhaps the most socially important bankruptcy case in history. Purdue, the manufacturer of OxyContin, was at the heart of the opioid crisis[1] that was, prior to the COVID-19 pandemic, America's deadliest public health crisis.

The key question in the Purdue bankruptcy was whether Purdue's owners—the immensely wealthy Sackler family, whose names grace major museums—would be held responsible for Purdue's actions. Purdue was a closely held company, and the Sacklers were, according to a top Purdue Pharma executive, Purdue's "de facto CEO."[2] The Sacklers also received as much as $13 billion in dividends and other payments from Purdue over the years, including after Purdue's contribution to the opioid crisis became clear.[3]

The question of the Sackler's responsibility was both a financial issue and a matter of dignitary justice. Any financial recovery from the Sacklers—potentially billions—could have been used to compensate opioid victims and their families and fund opioid abatement efforts.

From a dignitary justice perspective, the Sacklers are the face of the pharmaceutical industry for the opioid crisis; they are the only readily identifiable set of people to have been blamed for the crisis. Their fate is a metonym for justice for opioid victims. While numerous other individuals were involved in creating the opioid crisis, the other individuals are largely nameless and faceless corporate employees, not the billionaire owners of a major opioid manufacturer. The nameless masses' profits from the misery of opioids were smaller and less direct than the Sacklers. Moreover, whereas most other major opioid manufacturers, such as Endo, Johnson & Johnson, Mallinckrodt, and Teva, were diversified pharmaceutical companies that make a range of products, Purdue's revenue—and the Sacklers' wealth—derives almost entirely from opioids.

In the regular federal civil litigation context, the issue of the Sacklers' liability for the harms of the opioid crisis would come before a federal district court judge selected at random from the panel of judges for that district court. The judge, together with a jury selected from a broad jury pool, would make her ruling based on the merits of the liability question, without regard for its

1. *See* David Armstrong & Jeff Ernsthausen, *Purdue Pharma Touts Data That Downplay Its Role in the Opioid Epidemic, New Analysis Shows*, STAT (Sept. 9, 2019), https://www.statnews.com/2019/09/09/purdue-pharma-data-downplay-its-role-in-opioid-epidemic/ [https://perma.cc/6XLX-TP2G] (stating that Purdue was the "third-largest seller of opioids from 2006 to 2012").

2. Brian Mann, *Critics Want Sacklers to Face Criminal Charges for Role in Opioid Crisis*, NPR.ORG (Nov. 25, 2020), https://www.npr.org/2020/11/25/938801514/critics-want-sacklers-to-face-criminal-charges-for-role-in-opioid-crisis [https://perma.cc/C86C-672G].

3. Jared S. Hopkins & Andrew Scurria, *Sacklers Received as Much as $13 Billion in Profits from Purdue Pharma*, WALL ST. J. (Oct. 4, 2019), https://www.wsj.com/articles/sacklers-received-12-billion-to-13-billion-in-profits-from-oxycontin-maker-purdue-pharma-11570221797 [https://perma.cc/UPW8-NWEQ] (stating that there is an allegation that more than $4 billion of the payments were made from April 2008 to 2016).

collateral consequences on other matters. And the judge's ruling would be subject to an appeal as a matter of right.

In Purdue's bankruptcy, however, an entirely different process unfolded. There was never a trial regarding the Sacklers' liabilities. Instead, Purdue proposed a restructuring plan that included a release of the Sacklers, not just from Purdue's claims against them but also from the claims of all of Purdue's creditors.[4] In exchange, the Sacklers agreed to chip in $4.275 billion to pay Purdue's creditors. The bankruptcy court's approval of this plan[5] bound all of Purdue's creditors, whether or not they consented to it.[6]

The decision to approve the plan was made by a single federal bankruptcy judge who was handpicked by Purdue to serve as the judge for the case, possibly because of his past rulings on nonconsensual third-party releases. The judge did not make his ruling based on the legal merits of the Sacklers' liability—that issue was never before him. Instead, he decided the issue based solely on its collateral consequences, namely whether it was essential to furthering Purdue's reorganization and was in the interests of creditors. In this regard, the judge's hands were all but tied because of a previous settlement he approved between Purdue and the Department of Justice. The settlement contains a "poison pill"—a provision that would have triggered a complete forfeiture for all of Purdue's creditors unless Purdue's restructuring plan, including the release of the Sacklers, was approved by the bankruptcy court.

In most large bankruptcy cases, the bankruptcy court's plan confirmation order never undergoes an appellate review on its merits because the appeal is deemed "equitably moot" by the time it could be heard. Purdue's case turned out differently, but only because of a sharp-eyed district judge who was aware of the significance of the case and risk that appellate review could be frustrated through the doctrine of equitable mootness.[7] Purdue

4. Second Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 90–92, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. May 7, 2021).

5. Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan at 158–59, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021).

6. *See* 11 U.S.C. § 1141(a) (stating that the "provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan").

7. *See* Temporary Restraining Order Pending Argument on the United States Trustee's Motion for a Stay, *In re* Purdue Pharma L.P., No. 21-cv-7969-CM (S.D.N.Y. Oct. 10, 2021) (ECF No. 32) ("I have no intention of allowing the critically important issues on appeal to be 'equitably mooted' . . . ."); Memorandum and Order Denying Without Prejudice the United States Trustee's Emergency Motion for a Stay Pending Appeal at 12, *In re* Purdue Pharma L.P., No. 21-cv-7969-CM (S.D.N.Y. Oct. 13, 2021) (ECF No. 48) ("I am on the record as stating that I will not allow this appeal to be equitably mooted."); Stipulation, *In re* Purdue Pharma L.P. Bankruptcy Appeals, No. 21-cv-7969-CM (S.D.N.Y. Oct. 15, 2021) (ECF No. 52) (stipulation among all parties not to argue that the appeal had been rendered equitably moot by virtue of a bankruptcy court order allowing certain plan features to go into effect).

turned out to be the exception that proves the rule. Because equitable mootness is the standard outcome of appeals of bankruptcy plans, the District Court's intervention was not anticipated when the poison pill settlement was approved.[8]

The single most important question in the most socially important Chapter 11 case in history could readily have been determined through a process that does not comport with basic notions of due process, and but for the unusual intervention of the District Court, perhaps due to the intense media attention given the case, it would not have. Basic due process requires a case to be heard by a neutral arbiter who decides the issue solely on its merits and is subject to appellate review for error.

The problem, unfortunately, is not unique to Purdue. While Purdue stands out in terms of the case's social importance, its procedural infirmity is not an outlier, and in most cases the situation is worse because there is no appellate review. Purdue is only the most extreme example to date of a broader breakdown of Chapter 11 bankruptcy's checks and balances.

Procedural checks and balances are especially critical for bankruptcy because bankruptcy is first and foremost a procedural device. Bankruptcy law's value is that it enables coordinated restructurings and liquidations against the backdrop of certain statutory entitlements for creditors. Restructurings and liquidations outside of bankruptcy can be value destructive or may simply be frustrated because of informational problems, collective action problems, property rights, and transaction costs. Bankruptcy is a process designed to fix these problems by bringing all claims against the debtor into a single forum where they can be addressed in an orderly fashion with adequate information and the preemption of certain nonbankruptcy property rights.

As a procedural system, bankruptcy is a carefully calibrated set of checks and balances designed to protect the rights of both debtors and creditors. Bankruptcy's checks and balances have become unbalanced in recent years because of three independent developments. Each of these developments is problematic in its own right, but in combination, they are corrosive of the fundamental legitimacy of the Chapter 11 bankruptcy system, which depends in the first instance upon compliance with the statutorily required process.

First, there is a problem of debtors weaponizing bankruptcy through the use of increasingly aggressive and coercive restructuring techniques. Not only do these techniques deprive the court of meaningful ability to push back

8. Appeals are pending as of the writing of this Article. Purdue's plan confirmation order was reversed by the District Court. *In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021). Purdue and the Sacklers, as well as other parties, have appealed from the District Court's reversal. *See* Order Granting the Petition for Leave to Appeal and Motion to Expedite, Purdue Pharma, L.P. v. State of Washington, No. 22-110 (2d Cir. Jan. 27, 2022) (ECF No. 103).

against overreach, but they also have the effect of tying the court's hands on future issues in the bankruptcy case. Purdue's use of a poison pill in a settlement to further its restructuring is an example of this sort of coercive tactic, but it has come in a range of forms, from debtor-in-possession (DIP) financing agreements to asset sales and bidding procedures to restructuring support agreements to hurry-up prepackaged plan confirmations.

Second, there is the lack of effective appellate review of many critical bankruptcy issues. The lack of appellate review is a function of the statutory provisions of the Bankruptcy Code limiting appellate remedies, appellate courts' reluctance to second-guess factual valuation determinations, a prudential doctrine called "equitable mootness," and the high cost of delay in bankruptcy. Combined, these factors mean that there is often no appellate review of key issues in bankruptcy cases.

And third, there is the problem of forum shopping in large bankruptcy cases (megacases), not just among districts, as has long been the case, but for individual judges. Bankruptcy venue rules, combined with districts' local rules for case assignment, enable debtors to hand select the judges for their cases. Skilled debtor's counsel will, of course, select not just judges whose past rulings indicate that they will favor the debtor on key issues, but judges whom they believe want to attract large cases to their courtrooms. While most judges are not looking to attract a larger caseload, a handful of judges appear to actively compete to preside over megacases. The belief that a judge wants to attract such cases is the filer's assurance that the judge will not transfer the case based on improper venue or rule against the filer on any key issue.

Put together, these three trends mean that the debtor is picking a judge whom it believes will be more permissive of its aggressive restructuring maneuvers, and that there will never be any meaningful appellate review of the judge, who is therefore effectively free to disregard even binding precedent or clear statutory limitations. In the new world of large Chapter 11 bankruptcies, a single judge of the debtor's choosing is effectively the only check on what the debtor can do. That is a broken legal system.

The legal literature has previously picked up on each of these trends to some degree. While bankruptcy is by its nature coercive, enabling a majority or even minority of creditors to bind other creditors to a restructuring plan, recent scholarship has noted the increased use of a range of coercive tactics, many of which lock in the outcome of future issues in the bankruptcy.[9] In

9. *See, e.g.*, Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 750–51 (2020) (opportunistic behavior by debtors utilizing the restructuring process); Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REG. 651, 653 (2020) (coercive DIP financing agreements); William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1600 (2018) (coercive exchange offers); Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for*

particular, Professor Jared Ellias and attorney Robert Stark have identified a new environment of "bankruptcy hardball," in which distressed firms routinely engage in aggressive tactics that benefit some stakeholders at the expense of creditors.[10] Most of the scholarship on coercive restructuring tactics has not viewed these tactics as a general phenomenon, however. Instead, it has always focused on individual tactics or transactional contexts.

Bankruptcy appeals have never received much scholarly attention. Three decades ago, Professor Charles Tabb noted how a Bankruptcy Code provision limiting appeals had been weaponized,[11] and Professor Daniel Bussel noted problems of how precedent operates within the unique bankruptcy appellate system.[12] More recently, the problems created by the doctrine of equitable mootness have been decried in scholarship.[13] Other factors limiting appellate review have largely been ignored, however.

In contrast, a sizeable literature exists on forum shopping and even judge-shopping in numerous contexts.[14] The literature is particularly rich in

Policing Restructuring Support Agreements, 13 BROOK. J. CORP. FIN. & COM. L. 169, 174–75 (2018) (coercive restructuring support agreements); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 874–83 (2014) (coercive quickie asset sales); Kenneth Ayotte & Jared Ellias, *Bankruptcy Process for Sale*, 39 YALE J. ON REGUL. (forthcoming 2021) (manuscript at 4–5), https://ssrn.com/abstract=3611350 [https://perma.cc/ATC2-L3ZR] (coercive DIP financing agreements); B. Espen Eckbo, Kai Li & Wei Wang, *Do Lenders Extract Rents When Financing Bankrupt Firms?* 5 (ECGI Working Paper Series in Fin., Working Paper No. 794, 2021), https://ssrn.com/abstract=3384389 [https://perma.cc/3SYG-2QXD] (coercive DIP financing agreements).

10. Ellias & Stark, *Bankruptcy Hardball*, *supra* note 9, at 748–49.

11. *See* Charles Jordan Tabb, *Lender Preference Clauses and the Destruction of Appealability and Finality: Resolving a Chapter 11 Dilemma*, 50 OHIO ST. L.J. 109, 116 (1989) (discussing a series of cases that held "the appeal of the entire financing order moot under Bankruptcy Code section 364(e)").

12. Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1075–76 (1994); *see also* Daniel J. Bussel, *Bankruptcy Appellate Reform: Issues and Options*, ANN. SURV. BANKR. L. 257, 258 (William L. Norton ed., 1995) ("Bankruptcy appeals take an unusually tortuous route, making it difficult to obtain precedent-setting appellate decisions to resolve unsettled issues.").

13. *See, e.g.*, Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377, 397–98 (2019) (describing the pernicious effects of the current application of equitable mootness); Robert Miller, *Equitable Mootness: Ignorance Is Bliss and Unconstitutional*, 107 KY. L.J. 269, 291–92 (2018) (stating that equitable mootness is unfair because it encourages "any party to invoke it no matter that chance of success"); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather Than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC. 1, 45–46 (2010) ("The current construction of equitable mootness is not without its faults.").

14. *See, e.g.*, Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 J. LEGAL ANALYSIS 341, 341 (2021) (examining how parties strategically manipulate case assignments based on the different ways district courts assign cases to judges); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 579 (2016) (discussing the historical concerns and identifying the unappreciated virtues regarding global forum shopping); William H.J. Hubbard, *An Empirical Study of the Effect of* Shady Grove v. Allstate *on Forum Shopping in the*

the patent[15] and bankruptcy contexts.[16] In particular, Professor Lynn LoPucki has detailed the intense nature of court competition for big bankruptcy cases

New York Courts, 10 J.L. ECON. & POL'Y 151, 153 (2013) (examining the effect of the Supreme Court's decision in *Shady Grove v. Allstate* on filing patterns of cases in New York federal courts); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 483–84 (2011) (arguing that the forum shopping system no longer encourages plaintiffs to file transnational suits in U.S. courts and thus the anti-forum shopping measure may no longer be necessary); James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WISC. L. REV. 421, 425–26, 429 (2009) (discussing how different pleading standards among circuits may impact forum shopping in securities class actions); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEG. STUD. 365, 395–96 (2006) (examining the effects of forum shopping on asbestos trials); Richard Maloy, *Forum Shopping? What's Wrong with That?* 24 QUINNIPIAC L. REV. 25, 25–26 (2005) (defining forum shopping and attempting to resolve the conflict between representing a client and the warnings against forum shopping); Paul H. Rubin, Christopher Curran & John F. Curran, *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295, 297–98 (2001) (examining how interest groups decide to use either common law or lobbying to achieve a goal); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 289–90 (1999) (discussing forum shopping with respect to litigation in the international human rights petition system); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 269 (1996) (exploring the differences in how law-shopping and jury-shopping are treated differently from judge-shopping); Kimberly Jade Norwood, *Double Forum Shopping and the Extension of* Ferens *to Federal Claims That Borrow State Limitation Periods*, 44 EMORY L.J. 501, 501–02, 507 (1995) (discussing the implications of the Supreme Court's decision in *Ferens v. John Deere Co.* on double forum shopping); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("Thus, by revealing that transfer has the benefit of countering forum shopping, and does so without undue burden, this study argues that preserving the transfer-of-venue scheme is a good policy choice."); Neel U. Sukhatme, *A Theoretical and Empirical Study of Forum Shopping in Diversity Cases* 20–21 (Princeton Univ., Working Paper, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989250 [https://perma.cc/6N4K-LSR8] (explaining how diversity jurisdiction may create forum shopping and demonstrating a general model of forum shopping).

15. *E.g.*, Ofer Eldar & Neel U. Sukhatme, *Will Delaware Be Different? An Empirical Study of* TC Heartland *and the Shift to Defendant Choice of Venue*, 104 CORNELL L. REV. 101 (2018); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539 (2016); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015); Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 87–88 (2015).

16. *E.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) [hereinafter LOPUCKI, COURTING FAILURE]; Terrence L. Michael, Nancy V. Alquist, Daniel P. Collins, Dennis R. Dow, Joan N. Feeney, Frank J. Santoro & Mary F. Walrath, *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741 (2019); Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119 (2018); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381 (2015); Oscar Couwenberg & Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 BUS. LAW. 719 (2015); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013); G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511 (2010); John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785 (2007); Lynn M. LoPucki, *Where Do You Get Off? A Reply to* Courting Failure*'s Critics*, 54 BUFF. L. REV. 511

and decried the "corruption" this competition has had on the bankruptcy system.[17] Professor LoPucki has argued that competition for big cases has affected courts' willingness to push out debtors' management by appointing a trustee and to approve professionals' fees, executive compensation, payments to supposedly "critical" vendors, sweetheart asset sales, and "prepackaged" cases.[18]

Professor LoPucki has also argued that this competition has resulted in insufficient oversight of large cases, resulting in restructurings that fail to adequately address firms' financial problems, as evidenced by an increase in repeat Chapter 11 filings by the same debtor.[19] Notably, however, bankruptcy forum shopping literature is heavily focused on district-level forum shopping.[20] The literature has not previously addressed the more recent

(2006) [hereinafter LoPucki, *Where Do You Get Off?*]; A. Mechele Dickerson, *Words That Wound: Defining, Discussing, and Defeating Bankruptcy "Corruption*,*"* 54 BUFF. L. REV. 365 (2006); Marcus Cole, *"Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998); 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 (1991).

17. LOPUCKI, COURTING FAILURE, *supra* note 16, at 137; LoPucki, *Where Do You Get Off?*, *supra* note 16, at 512–18; *see also* Eisenberg, *supra* note 16, at 1001–03 (identifying judge-shopping as a growing and problematic practice as early as 1990); LoPucki & Whitford, *supra* note 16, at 12–13 (identifying forum shopping and case competition between bankruptcy districts based on a study undertaken between 1979 and 1988).

18. LOPUCKI, COURTING FAILURE, *supra* note 16, at 139. A prepackaged case involves a pre-bankruptcy solicitation of votes on a plan that is presented to the bankruptcy court upon the filing of the case. *Id.* at 157.

19. *See id.*, at 113 ("Delaware reorganizations did not merely result in more refilings, they also resulted in more reorganization failure."); Lynn M. LoPucki & Joseph Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1945 (2002) (finding refiling rate for large public company Chapter 11s filed in Delaware was three times that in other courts, and concluding "Delaware-reorganized firms were significantly more likely to refile . . . and significantly less likely to perform successfully under their plans of reorganization"); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Evidence of a "Race to the Bottom*," 54 VAND. L. REV. 231, 234, 248 (2001) (noting the increased likelihood of large public companies filing for Chapter 11 in Delaware to refile relative to companies that file for Chapter 11 in other courts). Professor Stephen Lubben has taken issue with LoPucki's claim that venue is affecting repeat filings. Stephen J. Lubben, *Delaware's Irrelevance*, 16 AM. BANKR. INST. L.J. 267–68 (2008).

20. *See, e.g.*, LOPUCKI, COURTING FAILURE, *supra* note 16, at 12–13 (discussing forum shopping by Enron between the Southern District of Texas and the Southern District of New York); Eisenberg, *supra* note 16, at 970 (comparing the District of Delaware to other district bankruptcy courts); LoPucki & Doherty, *supra* note 19, at 1938 (introducing data comparing the District of Delaware, the Southern District of New York and all other bankruptcy courts). Historically, there was only a single judge in the District of Delaware, so district shopping to Delaware was judge-shopping. LOPUCKI, COURTING FAILURE, *supra* note 16, at 16.

phenomenon of local divisional assignment and complex case administration rules facilitating shopping for particular judges within a single district.

This Article builds on all three of these separate lines of Chapter 11 bankruptcy literature, but broadens the lens of each line of scholarship. This Article shows how coercive tactics have become the norm in Chapter 11 cases, although they appear in a variety of forms. It also shows that the problems with bankruptcy appeals go far beyond equitable mootness. And it shows how the ability to handpick a particular judge has supercharged forum shopping and rendered it even more toxic than the older literature identified.

This Article also shows that the trends observed by these lines of bankruptcy scholarship interact in a way not previously noted in the scholarly literature. While bankruptcy hardball certainly encourages judge-picking and attempts to limit appeals, judge-picking and limited appellate review in turn enable coercive hardball tactics. The convergence of these trends is far more problematic than any single trend in isolation. This Article represents the first work to connect these seemingly separate developments in bankruptcy law.

This Article proceeds as follows. Part I considers the trend toward ever more coercive restructurings. It presents Purdue's bankruptcy as an example of an unusually coercive restructuring. But Purdue is not an outlier directionally; it is just the tip of the iceberg. Part II turns to the problem of appellate review in bankruptcy. It shows that both statutory and prudential doctrines, plus the costs of delay and the reluctance of appellate courts to second-guess valuation decisions, make appellate review a weak check on coercive restructurings, leaving only the bankruptcy judge as a check. Here, Purdue has been the exceptional case, receiving prompt appellate review because of a district judge who understood the significance of the case and was determined not to allow the appeal to become equitably moot.

Part III shows how debtors have begun to engage in judge-specific forum shopping, as local rules in several districts have enabled debtors—including Purdue—to pick their judge. The ability of debtors to shop for their bankruptcy judge, who will often be the only meaningful check on their restructuring, ensures that debtors can steer their cases to judges they know will be likely to bless their maneuvers. Part IV concludes with a consideration of possible reforms, including mandatory random case assignment rules and the creation of a specialized federal court of bankruptcy appeals to restore the checks and balances in the bankruptcy system.

I. Coercive Restructuring Transactions

A. Coercion in Bankruptcy

Bankruptcy law is, by its very nature, coercive. Bankruptcy law famously enjoins creditors' normal remedies during the duration of a case.[21] A bankruptcy plan may fundamentally change debtor-creditor relationships by amending the terms of debt obligations—reducing principal, changing interest rates and maturity dates, deleting or amending covenants, or even forcing a swap of the debt for equity or other consideration. A bankruptcy plan, if confirmed, binds all creditors, irrespective of their consent,[22] and plan confirmation can require the support of as little as a single creditor.[23]

This coercion of non-consenting creditors is an express function of statute.[24] The Bankruptcy Code's coercive plan confirmation provision is deliberately designed to stymie disruptive or opportunistic behavior by creditors, but the coercion is mitigated by a set of procedural safeguards regarding the plan confirmation process and all take place under the watchful eye of a neutral judge.[25]

Coercion, however, can go farther in bankruptcy and is readily abused by debtors and their favored creditor allies. For example, debtors frequently engage in a range of transactions prior to the confirmation of a plan: they obtain new financing, sell assets, settle litigation, and enter into pacts with key creditor constituencies to support a contemplated plan. Creditors can, of course, object to these transactions, all of which require court approval.[26]

These pre-plan transactions can be coercive on three levels. First, the actual approval of these transactions by the court and other parties can be coerced. This Article refers to this type of transaction as coercive per se.

Second, once approved, the terms of these transactions can tie the hands of the debtor, creditors, and the court in regard to future transactions,

21. 11 U.S.C. § 362(a).

22. 11 U.S.C. § 1141(a).

23. In a "cramdown" confirmation, at least one impaired class must support a plan, excluding insiders. 11 U.S.C. § 1129(a)(10), (b)(1). A class can contain a single creditor. Thus, a cramdown plan can be confirmed with the support of but a single non-insider creditor or equityholder. If no class is impaired under a plan, then no class's consent is required. 11 U.S.C. § 1129(a)(8), (a)(10).

24. Plan distribution provisions can themselves be coercive, as in the case of "death trap" plans. David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 370–71 (2020).

25. In contrast, the Trust Indenture Act of 1939, a law meant to go hand-in-glove with the Chandler Act of 1938 (the predecessor of modern Chapter 11 bankruptcy) facilitates hold-out behavior outside of bankruptcy, where the New Deal policy concern was about debtors forcing unfair restructurings on nonconsenting bondholders. *See* 15 U.S.C. § 77ppp(b) (prohibiting amendment of payment terms or the right to sue for nonpayment without bondholder consent). By impeding contractual, private, out-of-court restructurings, the Truth Indenture Act aims to channel restructuring into a court-supervised, regulated public process.

26. 11 U.S.C. §§ 363(b), 364; FED. R. BANKR. P. 9019.

including the terms of a plan. In other words, these pre-plan transactions can lock in the terms of a plan or preclude alternative restructurings. Frequently, these coercive transactions are not used to benefit the debtor so much as to benefit certain favored creditors or allies of the debtor, such as those providing the financing for the bankruptcy or purchasing key assets from the debtor, whose cooperation is essential to the continuation of the case. This Article refers to this type of coercion as collateral coercion.

And third, debtors adopt hurry-up tactics that coerce outcomes by precluding creditors from either organizing or obtaining the information needed to object to a plan. This Article refers to this type of coercion as procedural coercion.

The remainder of this Part examines how Chapter 11 coercion operates with five common situations: (1) pre-plan financing agreements; (2) pre-plan asset sales; (3) approval of bidding procedures for pre-plan asset sales; (4) restructuring support agreements; and (5) prepackaged bankruptcies.

1. DIP Financing Agreements.—Cash is the lifeblood of business, and debtors need cash to operate in bankruptcy. Debtors, however, frequently avoid filing for bankruptcy until they face an acute liquidity crisis. Until that moment of reckoning, they keep hoping for resurrection, thinking like Dickens's Mr. Micawber that "something will turn up." This means that the pressing task for most businesses that file for bankruptcy is obtaining new financing. But who would be so foolish as to throw good money after bad by lending to a bankrupt firm?

The Bankruptcy Code presents a solution to the "good money after bad" problem. It authorizes debtors to obtain new financing—called "debtor in possession financing" or "DIP financing"—with court approval by offering prospective lenders: prioritization of repayment ahead of all statutory priority claims and expenses; liens on unencumbered assets; or junior liens on encumbered assets.[27] By the time a business files for bankruptcy, however, it has often borrowed against all of its assets in a bid for time, hoping to stave off bankruptcy. That means there are no unencumbered assets and that junior liens on the assets are worthless. Similarly, it means that a payment priority is of little value because there are no unencumbered assets from which that payment can be made.

Again, the Bankruptcy Code offers a solution: namely, the authorization of new financing secured by a lien of greater or equity priority to existing

27. 11 U.S.C. § 364(c). Only larger businesses obtain DIP financing. Small businesses rely almost exclusively on unencumbered cash flow, trade credit, and the use of "cash collateral" for financing their operations in Chapter 11. *See id.* § 363(a) (defining cash collateral). *But see id.* § 363(c)(2) (requiring the consent of either the court or the interested party in the collateral for the sale of cash collateral).

liens.[28] Such a "priming" lien, however, requires either the consent of existing lienholders or a showing that those existing lienholders are "adequately protected," meaning that their repayment prospects will not be diminished as a result of the new lien.[29]

Often, the debtor cannot show that existing lienholders are adequately protected. Even if it could, however, it does not have the time to do so. The burden of proving adequate protection is on the debtor,[30] and proving adequate protection would require a lengthy hearing regarding the value of the collateral. The debtor, however, needs to get access to the new financing on the first day of the bankruptcy, if only to make payroll and keep the lights on. It is impossible to resolve a contested adequate protection motion on the first day of the bankruptcy: the debtor and objecting lienholders would need to engage valuation experts, who would need time to prepare reports, be deposed, and then testify at a hearing. Even if the hearing could proceed fast enough, the debtor cannot afford the risk of losing at the hearing; if the debtor loses on the adequate protection issue, the debtor will be without the financing needed to operate.

The result is that unless the existing secured debt can be refinanced, debtors generally finance themselves through consensual "priming" liens. But who would consent to being "primed" and letting a new lender jump in line ahead of them? The answer is that the new lender is the same as the existing lienholder. The existing lienholder makes a new loan that primes its existing lien or "rolls up" the existing lien in a refinancing for an amount larger than the existing debt.[31] Fights over priming are thus entirely avoided.

Because debtors frequently need to rely on financing from existing lienholders, there is not a fully competitive market for DIP financing. If the debtor does not have substantial unencumbered assets or free cash flow, the existing lienholder has a functional monopoly on lending to the debtor. No one else will lend the debtor new money because that new money would be at the back of the line for repayment from a debtor that does not have the assets to repay all of its creditors. That means that any new money will have to buy out the existing lienholder, who may well be undersecured. If the existing lienholder does not wish to be bought out, they can credibly threaten a priming fight, which the debtor will desperately want to avoid. Only the existing lienholder can avoid this situation by consenting to prime itself.

28. *Id.* § 364(d)(1).

29. *Id.* § 364(d)(1)(B); *see also id.* § 361 (providing a list of types of "adequate protections" for the interest of entities in property of the estate).

30. *Id.* § 364(d)(2).

31. *See, e.g.*, David Griffiths, *Roll-up, Roll-up, Read All About It!*, WEIL RESTRUCTURING (Oct. 6, 2010), https://restructuring.weil.com/dip-financing/roll-up-roll-up-read-all-about-it [https://perma.cc/D3ED-ZE8K] (explaining the circumstances that led to the trend of lien "roll-ups" and predicting that bankruptcy courts will continue to permit roll-ups).

The DIP lender's situational monopoly means that DIP loans are coercive per se; that is, transactions are presented to the court as being so vital that they must be approved, no matter the terms. The debtor—and the court—really have no choice but to take the deal that the DIP lender offers. Without the deal, the debtor will not have the financing necessary to continue operating and attempt a reorganization. As a former bankruptcy judge observed:

> The problem for the judge is he has to play chicken with the secured lenders, to protect the needs and concerns of junior classes, because he might not have another source of funding. . . . The last thing he wants is for the case to die on his watch.[32]

This situation enables DIP lenders to demand—and receive—terms that cannot be found on arm's length loans outside of bankruptcy.[33] DIP loans are incredibly safe—they are fully secured with court-ordered liens and come with a battery of protective covenants. There is little chance that the DIP lender will not be repaid in full.[34]

In an efficient market, risk and reward are commensurate, such that low risk loans would have low interest rates. Not so on DIP loans. Despite their incredible safety, DIP loans have interest rates and fees of the type one would expect on a non-investment grade loan.[35] In other words, DIP loans are a financial chimera of low risk and high reward.

The terms of DIP loans frequently spill over into the second type of coercion, in that the DIP loan's terms may determine the outcomes of other issues in the bankruptcy. For example, it is common for DIP loans to include detailed timelines (milestones) for a bankruptcy case, requiring the sale of certain assets by specific dates, approval of sale procedures by the DIP

32. Jeremy Hill, *Hedge Funds Elbow Aside Creditors in Fast-Tracked Bankruptcies*, BLOOMBERG (Dec. 17, 2020, 6:30 AM), https://www.bloomberg.com/news/articles/2020-12-17/fast-tracked-bankruptcies-leave-some-creditors-in-the-dark [https://perma.cc/NPR6-WTQZ]. The exception that proves this point is the unusual denial of the debtor's motion to authorize a DIP financing agreement in LATAM Airlines' bankruptcy. *In re* LATAM Airlines Grp., S.A., 620 B.R. 722, 820 (Bankr. S.D.N.Y. 2020).

33. *See* Eckbo, *supra* note 9, at 1, 7 (explaining how the strong bargaining position of DIP lenders can result in supra-competitive loan terms).

34. *See id.* at 29 ("DIP loans have near-zero payment default risk."); William Fahy, *Comment on Debtor-in-Possession Lending* 4, MOODY'S (Oct. 2008), https://www.moodys.com/sites/products/defaultresearch/2007300000539803.pdf [https://perma.cc/CS6Q-4EVS] (claiming a single known case in which a DIP lender was not repaid in full). There are a number of cases in which the DIP lender was equitized, however. *See, e.g.*, Andrew Scurria & Alexander Gladstone, *Sanchez Energy Bankruptcy Lenders Strike Deal to Take Over Company*, WALL ST. J. (Mar. 30, 2020, 6:41 PM), https://www.wsj.com/articles/oil-collapse-leaves-sanchez-energy-lenders-poised-to-take-over-company-11585590625 [https://perma.cc/8732-9TXT] (reporting that top creditors of an energy corporation agreed to take the majority stake in a bankrupt oil-and-gas company in exchange for their loans).

35. Eckbo, *supra* note 9, at 37 fig.4.

lender, or the submission or approval of a bankruptcy plan meeting the DIP lender's approval by a specified date.[36] The effect of these loan terms is that one way or another the DIP lender will often succeed in acquiring all of the value of the debtor, either by the terms of a plan or through an asset sale, leaving little or nothing for other creditors.

It is also common for DIP loans to restrict the use of the funds, including a prohibition on their use for investigating or litigating against the DIP lender.[37] DIP financing agreements will sometimes provide that the debtor must pay certain parties' legal expenses before paying other creditors.[38] And DIP loans will frequently even dictate the appointment of particular officers for the debtor, determining its governance in bankruptcy.[39] Some DIP financing agreements even go so far as to allocate some of the equity of the to-be-reorganized debtor.[40]

If the debtor later decides that it does not want to sell the specified assets by the specified date, or wants to propose a plan on a different timeline, or intends to investigate or sue the DIP lender or to appoint a different individual as an officer, it risks its actions constituting a default on the DIP loan. Such a default might trigger penalty interest provisions and, worse, could result in the DIP lender calling the loan, leaving the debtor without the financing it needs to operate.

A DIP financing agreement is thus often collaterally coercive because it locks in the outcome of the bankruptcy. In other words, a DIP financing agreement can operate as a *sub rosa* plan, which locks in essential plan terms—disposal of the debtor's assets, distribution of value, and governance of the debtor, among other things—without complying with the creditor

36. Tung, *supra* note 9, at 654 (approval of reorganization plan), & n.9 (sale of debtor assets).

37. *See* ADAM J. LEVITIN, BUSINESS BANKRUPTCY: FINANCIAL RESTRUCTURING AND MODERN COMMERCIAL MARKETS 407 (2d ed. 2018) (explaining how "carve-out" provisions can cap investigations of DIP lenders' pre-petition dealings with the debtor).

38. *See, e.g.*, *In re* Indianapolis Downs, 486 B.R. 286, 301 (Bankr. D. Del. 2013) (approving payment of professional fees of restructuring support agreement signatories because the court had previously authorized such fees under the order authorizing the DIP financing).

39. *See* Tung, *supra* note 9, at 670 n.81 ("Senior lenders also commonly 'advise' debtors regarding the appointment of a chief restructuring officer.").

40. *See, e.g.*, Motion of Debtors for Entry of Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection to Prepetition Secured Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief, Exhibit B at 270, *In re* Chinos Holdings, Inc., No. 20-32181 (Bankr. E.D. Va. May 4, 2020) (providing for the parties backstopping the DIP Facility to receive a $40 million fee "paid in New Common Shares issued at the transaction enterprise value of [$1.75 billion] on the effective date" of the plan). The Unsecured Creditors Committee claimed an enterprise valuation of $2.941 billion, suggesting that the real value of the backstop fee might be substantially higher. Notice of Filing of (I) Unredacted Province Expert Group; (II) Redacted Expert Report of the Michel-Shaked Group and Executive Summary Thereof; and (III) Revised Proposed Order, Exhibit A at 5, *In re* Chinos Holdings, Inc., No. 20-32181 (Bankr. E.D. Va. Aug. 13, 2020).

protections embedded in the statutory plan confirmation process. Because the debtor typically has no ability to pay off the DIP loan prior to obtaining new financing upon plan confirmation, the debtor has no choice but to abide by the terms of the DIP loan. The threat of the DIP lender withdrawing financing and leaving the debtor without the funding necessary to operate in bankruptcy coerces the debtor into complying with the terms of the DIP loan.

2. Asset Sales.—A similar story of coercion can be seen with pre-plan asset sales. Debtors regularly sell assets prior to plan confirmation. Asset sales are themselves sometimes both coercive per se and procedurally coercive because of the "hurry-up" nature of the process: the debtor will represent to the court that it needs to sell the assets rapidly (and perhaps without a fully-marketed auction process) because they are the equivalent of "melting ice cubes."[41] Such representation coerces the court and potential objecting creditors into assenting to the transaction because it implies that the bankruptcy estate will lose value if the transaction is not approved.

Asset sales can also be collaterally coercive of future outcomes in the bankruptcy. First, an asset sale can preclude a reorganization. If the debtor sells all or substantially all of its assets, there is nothing left to reorganize under a plan. All a plan can do is divvy up the sale proceeds. Indeed, even if a debtor does not sell off substantially all of its assets, the sale of certain major assets or lines of business can preclude certain reorganization plans.[42]

Second, a pre-plan asset sale can function as a *sub rosa* plan because it might not involve merely the sale of assets, but also the assumption of liabilities by the buyer. The assumed liabilities will presumably be paid in full by the solvent buyer. That means that those assumed liabilities might be treated better than similar or even senior liabilities that remain with the debtor and are not assumed.[43] In other words, an asset sale can effectuate a distribution to creditors that does not comply with the minimum entitlements of the Bankruptcy Code and without being subject to the Code's procedural protections on distributions.

3. Stalking Horse Bidder Protections.—While asset sales are a common feature of Chapter 11 bankruptcies, the Bankruptcy Code does not prescribe a particular process for selling assets. Instead, the process is crafted

41. *See* Jacoby & Janger, *supra* note 9, at 865 (noting that "[f]inancially distressed companies can melt like ice cubes" and that the Second Circuit, citing this "melting ice cube" theory, has agreed that "exigent circumstances" can justify the procedural shortcuts taken to accomplish a sale).

42. *In re* Lionel Corp., 722 F.2d 1063, 1069 (2d Cir. 1983).

43. *See, e.g.*, Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief at 1, *In re* Chrysler LLC., No. 09-50002, 2009 WL 5131534 (Bankr. S.D.N.Y. June 1, 2009).

individually for each sale through a court order. The court order is in response to a motion by the debtor; the court plays only a passive role in approving or disapproving the motion.

Generally, debtors file two motions in connection with a sale transaction: a sales procedures motion and a sale motion. The sales procedures motion proposes a process for the sale, including the bid terms, approval of a stalking horse bidder, and an auction date. The court order granting the sale procedures motion is what creates the terms for the sales process. The later-filed sale motion then seeks the court's approval of the transaction itself, which, if the sale was through an auction, means acceptance of the winning bid.

While bankruptcy law permits private, non-competitive sales, the more common process is an auction. The usual structure is that the debtor identifies a potential buyer and negotiates an asset sale with it, subject to higher and better offers at an auction at which the proposed buyer will serve as the "stalking horse" bidder, meaning that it will commit to making a minimum bid at the auction.

The court has to approve the would-be buyer's status as the stalking horse bidder, and buyers generally insist on certain protections before agreeing to serve as stalking horses. The stalking horse spends the time and resources negotiating the basic terms of the deal, and other bidders are able to free-ride off of its work if they win the auction. Accordingly, potential stalking horse bidders—in conjunction with the debtor—will seek various procedural protections that give them a leg up in the auction, by precluding competing bids, limiting competitors' access to information, or making competitors have to outbid them substantially to win. Quite often they are successful.[44]

First, stalking horse bidders will seek limitations on the marketing of the assets to limit potential competing bidders. While bankruptcy courts will not approve absolute "no shop" clauses that prohibit the debtor from soliciting or even responding to offers from potential bidders, they will sometimes approve "window shop" clauses that allow the debtor to respond to unsolicited inquiries, upon notice to the stalking horse.[45] Stalking horse bidders will also seek fast sale timelines,[46] which limit the ability of potential

44. Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 35–36 (2007) (finding that the stalking horse bidder won the auction 85% of the time in large public bankruptcies).

45. Richard G. Mason & Saish R. Setty, *Bidding Procedures—Stalking-Horse Protections and Collusion*, *in* 39TH ANN. LAWRENCE P. KING & CHARLES SELIGSON WORKSHOP ON BANKR. & BUS. REORGANIZATION 299, 308–09 (Am. Bankr. Inst. ed., 2013), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23085.13.pdf [https://perma.cc/Y4US-LHF3].

46. *Id.* at 309; *see also* LoPucki & Doherty, *supra* note 44, at 36 (noting that an "investment bank [] had the ability and incentive to maximize the advantage conferred by rushing the sale").

competitors to undertake their necessary diligence and calculate their bids. Moreover, if the stalking horse bidder is itself a creditor, it might be able to credit bid. A fast sale timeline can disadvantage a competing cash bidder that needs to line up financing for its bid.

Stalking horses also seek to limit who can bid. They will insist on bidding procedures with minimum bidder qualification rules, including financial screening, confidentiality agreements for bidders for due diligence on the assets, and payment of a deposit for a percentage of any initial bid.[47]

Second, stalking horses will try to gain an informational advantage over competing bidders who do materialize. They will request that competing bids be submitted prior to the auction and shared with the stalking horse bidder. This gives the stalking horse time to strategically prepare for a higher bid if necessary.

Finally, stalking horses will also seek to control the structure of the auction. This starts with a definition of what is considered a "qualified bid" that may even be considered by the debtor. A qualified bid will usually have to conform to the stalking horse's asset purchase agreement and may not be contingent or conditional.[48] Another key part of controlling the auction structure is to specify minimum bidding increments (overbids).[49] As the stalking horse is the initial bid, it is necessary for a competitor to pay the stalking horse's bid plus the overbid to win the auction. If the overbid interval is sufficiently large, it might preclude a competing bid. To wit, suppose that the stalking horse bids 95 and a competitor values the asset at 99, but the overbid is 5. The competitor would have to pay 100 to win the auction, so it will not bid, and the stalking horse wins at a bargain price.

Stalking horses also seek protections in case they do not win the auction. A very common stalking horse protection is to require payment of a "breakup fee"—a percentage of the winning bid—and/or expense reimbursement for the stalking horse if it fails to win the auction or the transaction is otherwise not consummated.[50] The stalking horse might also seek a "topping fee," a percentage of the winning overbid over the stalking horse.[51]

Additionally, the stalking horse might seek for bids to be evaluated in net cash terms, such that the bidders must exceed the stalking horse's bid by at least the amount of any breakup fee or topping fee as well as the overbid.[52] This effectively increases the overbid increment, such that the stalking horse

47. Mason & Setty, *supra* note 45, at 309.

48. *Id.*

49. *Id.*

50. *Id.* at 302; Brad B. Erens, *Bankruptcy Sales: The Stalking Horse*, JONES DAY INSIGHTS (Mar. 2015), https://www.jonesday.com/en/insights/2015/03/bankruptcy-sales-the-stalking-horse [https://perma.cc/CE3S-X4BT].

51. Mason & Setty, *supra* note 45, at 308.

52. *Id.* at 310.

should win unless the other bidder values the asset substantially more than the stalking horse.

To use the previous example, assume a 3% breakup fee. If the stalking horse bids 95, and the overbid is 5, the competitor will have to bid at least 103 (103% of the sum of the 95 stalking horse bid + 5 overbid) for its bid to be equal on a net cash basis. Even if the competitor values the asset at 102—substantially more than the stalking horse—the stalking horse will still win the auction. Thus, one empirical study found that to beat a stalking horse, an outside bidder had to bid on average 3.7% higher than the stalking horse.[53]

Stalking horses have every incentive to seek additional protections that help ensure that they will win the auction, ideally without any competitive bids ever being placed. Of course, stalking horses do not always get all of the protections they seek,[54] but that does not prevent them from seeking those protections, and debtors are able to use the "hurry-up sale" concern to push courts to approve the bidding procedures with the stalking horse's asks.

As with DIP financing agreements and asset sales in general, stalking horse bidder protections operate with two levels of coercion. First, there is coercion per se—the court is pressured to approve the bid protections because of the implication that if it does not, the stalking horse bidder will walk away and the debtor will lose the sale.

Second, there is collateral coercion. Once the bid protections are approved, they frequently determine the outcome of the auction. The bidder qualification rules, confidentiality agreements, and window shop clauses limit competition against the stalking horse, and unless a bidder has an idiosyncratically higher valuation of the assets being sold, it will be impossible to economically outbid the stalking horse due to the breakup fee, the topping fee, the overbid increment, and the net cash term calculation of the bid. The bidding procedures often lock in the auction result, making the auction little more than a pantomime of a market process.

4. Restructuring Support Agreements.—An increasingly common feature of large Chapter 11 cases is the use of restructuring support agreements (RSAs).[55] RSAs may be entered into before or after the bankruptcy, and may be among certain creditors, or more commonly, among certain creditors and the debtor.[56] RSAs commit the signatories to supporting any plan that

53. LoPucki & Doherty, *supra* note 44, at 35–36.

54. *See, e.g.*, *In re* Phila. Newspapers, LLC, No. 09-11204, 2009 Bankr. LEXIS 3167, at *34 (Bankr. E.D. Pa. Oct. 8, 2009) (refusing to authorize breakup fee for insider stalking horse bidder), *rev'd* in part on other grounds, No. 09-mc-178; No. 09-11204, 2009 U.S. Dist. LEXIS 104706 (E.D. Pa. Nov. 10, 2009).

55. Skeel, *supra* note 24, at 384; Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593, 593 (2017).

56. Janger & Levitin, *supra* note 9, at 175.

comports with an agreed-upon term sheet.[57] RSA signatories also agree that the RSA will be binding upon their assignees.[58] The use of pre-plan RSAs and similar devices has risen substantially in the past decade from under 30% of non-prepackaged bankruptcies of large, public companies to over 60% of such cases in 2020.[59]

RSAs operate as a coordination device among creditor constituencies to build consensus around a bankruptcy plan.[60] But they can be coercive in multiple ways.[61] RSAs can be coercive per se: the debtor will often offer a special deal to creditors who sign on to the RSA, such as payment of their legal costs or the right to participate in a rights offering.[62] This sort of vote buying is coercion with a carrot, rather than a stick. Every prenegotiated plan through an RSA is a type of "hardball" against parties not included in its negotiation.

RSAs can also be procedurally coercive. The special deal is often offered on a limited-time basis, a hurry-up technique to pressure creditors to sign the RSA and to preclude creditor organization around alternative restructurings.[63] At the same time, the RSA might limit signatories' ability to renege the deal, even in the face of new information or fiduciary obligations.[64] In other words, RSAs can operate like a Hotel California for signatories.

57. *Id.* at 173.

58. Skeel, *supra* note 24, at 385.

59. Lynn M. LoPucki & UCLA Sch. of Law, *UCLA-LoPucki Bankruptcy Research Database*, UCLA SCH. L., https://lopucki.law.ucla.edu/ [https://perma.cc/8F83-UDR2] [hereinafter *UCLA-LoPucki Bankruptcy Research Database*] (last updated Oct. 31, 2021) (6 of 21 cases in 2010 and 25 of 41 cases in 2020). The UCLA-LoPucki Bankruptcy Research Database tracks large public bankruptcy filings. *Id.* It treats companies as "public" if the company filed an Annual Report with the SEC for a year ending not less than three years prior to the bankruptcy filing. It treats companies as "large" if the Annual Report states assets worth at least $100 million in 1980 dollars (roughly $310 million in current dollars). *Id.*

60. Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion—A Response to Skeel*, 130 YALE L.J.F. 335, 351 (2020).

61. *See* Skeel, *supra* note 24, at 384–88 (identifying elements that lead to a coercive RSA process including pressure from creditors for a speedy bankruptcy process; inducement fees offered by debtors to encourage agreement to an RSA, including "exploding" benefits that are only available for a short time; "deathtraps" that threaten the ability of creditors to recover if they do not consent to the RSA; and the outsized influence of distressed-debt traders); Oscar Couwenberg & Stephen J. Lubben, *Private Benefits Without Control? Modern Chapter 11 and the Market for Corporate Control*, 13 BROOK. J. CORP. FIN. & COM. L. 145, 166 (2018) (explaining that even when creditors may not support a plan they are "compelled to do so in order to obtain a 'full' recovery").

62. Skeel, *supra* note 24, at 381, 386.

63. *Id.* at 386; *see also* Bratton & Levitin, *supra* note 9, at 1601, 1639 (noting the use of coercive hurry-up techniques in out-of-court workouts to preclude the organization of opposition).

64. *See* Janger & Levitin, *supra* note 9, at 180–81 (noting the potential inadequacy of "fiduciary out" provisions); Janger & Levitin, *supra* note 60, at 352 (noting the possibility of RSA signatories being locked in despite new information).

The RSA can be coercive per se to the judge. An RSA presents a judge with a contemplated deal supported by key constituencies. The RSA is presented to the judge as representing the market bargain reached by a set of sophisticated players even though it might be a backroom deal reached by a ring of collusive parties at the expense of those left out of the deal.[65] It is hard for judges to observe the collusive nature of RSAs, which means they are unlikely to second-guess the wisdom of the deal outlined in the RSA or consider other possible deals.

As with DIP financing agreements and asset sales, the coercion with RSAs is not limited to entering into the transaction itself. RSAs also have a coercive effect on other subsequent transactions. RSAs, like DIP financing agreements, often contain "milestones" requiring the debtor to achieve certain things in the restructuring by specified deadlines.[66] Failure to meet these deadlines may excuse the signatories from supporting a plan or may require the debtor to undertake another course of action. In this regard, RSAs are collaterally coercive as they lock in a particular course of action and may preclude pursuit of alternatives, such that by the time of plan confirmation there is only one possible restructuring path. RSAs can thus operate as *sub rosa* plans that present creditors with a *fait accompli*.[67]

5. 24-Hour Drive-Thru Bankruptcies and Hurry-Up Tactics.—An increasingly common phenomenon in Chapter 11 is the use of very fast "prepacked" bankruptcies that circumvent creditors' procedural rights and ability to organize opposition to unfavorable restructuring terms.[68]

65. *See, e.g.*, Alan Zimmerman, *Amid Valuation, Avoidance Disputes, Chesapeake Energy Plan Hearing Gets Underway*, S&P GLOB. MKT. INTEL. (Dec. 16, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/amid-valuation-avoidance-disputes-chesapeake-energy-plan-hearing-gets-underway-61780346 [https://perma.cc/Q2VV-X8UU] (noting claims that RSA was based on a low valuation of the company that would have resulted in billions of dollars of additional value going to the RSA signatories).

66. Janger & Levitin, *supra* note 9, at 184.

67. *See id.* As Professor Janger and I explain in other work,

> In RSAs, if the milestones are missed, then either the signatories are excused from supporting the plan, or the debtor commits to an alternative course of action. As a result, milestones can assure that the proposed business plan progresses toward consummation. But milestones can also lock in a *fait accompli*, assuring that by the time of confirmation there is no meaningful alternative.

Id.

68. *See* Matthew B. Harvey & Paige N. Topper, *One-Day Restructuring: The New Trend of "Super Speed" Prepacks*, MORRIS NICHOLS ARSHT & TUNNELL (Apr. 15, 2021), https://www.morrisnichols.com/insights-one-day-restructuring-the-new-trend-of [https://perma.cc/N53E-HAG9] (noting objections to "prepack" bankruptcies because the accelerated process "leaves little time for notice and due process for creditors and other parties in interest").

"Prepacks" are cases where creditors' votes are solicited prior to the filing of the bankruptcy petition.[69]

The primary attraction of using a prepackaged plan is that it enables a much faster Chapter 11 process. Yet this is precisely what is potentially troubling about prepacks. Faster confirmation timelines in prepackaged plans deprive creditors of the ability to organize opposition to an unfavorable restructuring. The use of a prepack enables a debtor to ram through a plan before anyone can carefully kick the tires of the proposal or organize an opposition block.

The *Federal Rules of Bankruptcy Procedure* require, as a default, at least twenty-eight days' notice after the filing of a bankruptcy petition of either the time fixed for filing objections or of a hearing on a disclosure statement and plan confirmation.[70] Rule 2002(b) provides that:

> [T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement . . . (2) for filing objections and the hearing to consider confirmation of a chapter 9, or chapter 11 plan . . . .[71]

This rule requires that the notice be given by the clerk or a person designated by the court. That means that required notice cannot be provided by the debtor itself before the filing of the bankruptcy petition because the debtor is not the clerk, and there cannot be a court order authorizing another party to give notice until the bankruptcy has actually been filed.

Similarly, Bankruptcy Rule 3017(a) requires at least twenty-eight days' notice after the filing of a disclosure statement before a hearing on the disclosure statement:

69. Outside of bankruptcy, a debtor cannot force a change in the payment terms of a bond or loan on an individual bondholder or loan syndicate member without that bondholder or syndicate member's consent because of the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77ppp(b), and contractual provisions replicating the Trust Indenture Act's restrictions. *See* Bratton & Levitin, *supra* note 9, at 1658 (asserting that "[t]rust indentures customarily include a term that repeats the language of [15 U.S.C. § 77ppp(b)]."). Bankruptcy, however, trumps both the Trust Indenture Act and contractual provisions, enabling non-consensual amendment of payment terms of bonds and loans. This enables debtors to use bankruptcy to squeeze hold-out creditors that will not agree to a deal outside of bankruptcy. This is one of the major appeals of prepackaged bankruptcies, which are often used to deal solely with financial debt, leaving trade, tort, and tax obligations unimpaired. Prepackaged bankruptcies also enable debtors to take advantage of bankruptcy's hypercharged sale power, in which a federal court's order supersedes state law sale restrictions, including the ability to sell assets free-and-clear of interests, including liens. *See* 11 U.S.C. § 363(f) (noting that "[t]he trustee may sell property . . . free and clear of any interests in such property of an entity other than the estate" and further stating that this applies where "such interest is a lien").

70. FED. R. BANKR. P. 2002(b), 3017(a). 11 U.S.C. § 102(1) does not create an exception to the later drafted *Federal Rules of Bankruptcy Procedure*.

71. FED. R. BANKR. P. 2002(b).

> [A]fter a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto.[72]

Rule 3017(a)'s twenty-eight-day clock starts running only after the filing of a disclosure statement, and a disclosure statement cannot be filed with the court until a bankruptcy petition is filed. These rules should mean that a prepackaged plan cannot generally be confirmed in less than twenty-eight days after the filing of the bankruptcy petition,[73] although the *Federal Rules of Bankruptcy Procedure* do give courts discretion to order a reduction of timelines for cause.[74]

The twenty-eight days' notice requirement is important for two reasons: First, it enables creditors and other parties in interest to gather and digest information about the debtor necessary to determine whether they should raise objections. Among other things, it enables the filing of the debtor's required schedules of assets and liabilities, income and expenses, and executory contracts and unexpired leases if they are not filed with the petition,[75] as well as the filing of disclosures by ad hoc committees.[76]

Second, it enables creditors and other parties in interest to organize. In particular, the delay is necessary to give the United States Trustee an opportunity to appoint an official committee of unsecured creditors, and for that official committee to adopt bylaws and retain counsel and financial advisors.[77] Official committees' professionals' fees are funded by the estate[78] and serve as a solution to the collective action problems faced by unsecured creditors. Unsecured creditors may have small claims that are not worth litigating individually. Moreover, unsecured creditors face a free rider

72. FED. R. BANKR. P. 3017(a).

73. No reported opinion holds otherwise, but Judge Robert D. Drain has ruled in oral opinions that the twenty-eight days' notice may run prepetition. *See* Transcript of Jan. 6, 2017 Omnibus Hearing at 36–37, *In re* Roust Corp., No. 16-23786 (Bankr. S.D.N.Y. Feb. 21, 2017) (acknowledging that Rule 2002 provides for twenty-eight days' notice but asserting that "[i]t doesn't say twenty-eight days after the petition date," and further stating that Rule 2002 is "tied to the period of notice, which can be pre-petition"); Transcript of Dec. 21, 2017 Omnibus Hearing at 34–39, *In re* Glob. A&T Elecs., Ltd., No. 17-23931 (Bankr. S.D.N.Y. Dec. 27, 2017) (noting how "Congress contemplated obtaining acceptances or rejections before the petition date").

74. FED. R. BANKR. P. 9006(c)(1).

75. *See* FED. R. BANKR. P. 1007(b)–(c) (requiring schedules to be filed with petition or within fourteen days in a voluntary Chapter 11 case).

76. FED. R BANKR. P. 2019.

77. Between 1978 and 2020, no creditor's committee was ever appointed in 82% of large, public company prepackaged bankruptcies. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59.

78. *See* 11 U.S.C. §§ 330(a)(1), 503(b)(2)–(3), 507(a)(2), 726(a), 1103, 1129(a)(9) (providing for compensation of official committees' professionals as administrative expenses of the bankruptcy estate).

problem because bankruptcy law provides for prorated recoveries by dollar amount of claims among classes of unsecured debt.[79] Therefore, any improvement in recoveries due to one creditor's actions is shared on a pro rata basis among other creditors in the class. This forced sharing reduces the incentive for any individual creditor to act itself. Because the costs of an official committee are borne by the estate, they are effectively borne on a pro rata basis by all unsecured creditors if the unsecured claims are in the money.

The combination of information and organization enables official creditors' committees not just to advocate effectively for the interests of unsecured creditors but also to seek to prosecute claims derivatively for the debtor. Such derivative standing is particularly important when there are claims for which the debtor might be conflicted, such as claims against insiders of the debtor, including both management and owners. In a prepack where there is no official creditors committee, there is no organized and funded constituency of creditors that might probe and prosecute the debtor's pre-bankruptcy transactions.

While the *Federal Rules of Bankruptcy Procedure* contemplate at least twenty-eight days' notice for a disclosure statement, prepacks sometimes move on faster timelines without clear legal authority to do so.[80] Since 2017, there have been only nineteen Chapter 11 cases confirmed in less than twenty-eight days.[81] Only two of these nineteen cases complied with the requisite procedures to reduce timelines.[82] Five of these high-speed bankruptcy cases (none of which complied with the procedural requirements)

79. *See* 11 U.S.C §§ 726(a)(4) (noting that "property of the estate shall be distributed . . . in payment of any allowed claim, whether secured or unsecured"), 726(b) (designating that "[p]ayment on claims . . . shall be made pro rata"), 1123(a)(4) (stating that a plan should "provide the same treatment for each claim or interest of a particular class, unless the holder . . . agrees to a less favorable treatment"), 1129(a)(7) (stating that a court may confirm a plan only if each holder of an impaired claim or interest that has not accepted the plan will receive or retain at least as much as if the debtor were liquidated under chapter 7 of title 11).

80. *See* Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2022 ILL. L. REV. (forthcoming), https://ssrn.com/abstract=3900758 [https://perma.cc/7U5Z-5QEM] (discussing legal authority for prepacks done in under twenty-eight days without Rule 9006 motions for shortening time). Outright disregard of bankruptcy rules by courts would not be unprecedented, however. Professors Lynn LoPucki and Joseph Doherty have shown that bankruptcy courts routinely disregard the rules governing attorneys' fees in large public company bankruptcies. Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423, 425 (2009); Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality Redux*, 85 AM. BANKR. L.J. 35, 37–38 (2011).

81. Levitin, *supra* note 80, at tbl. 1.

82. *Id*.

were approved by Judge Robert D. Drain,[83] a number surpassed by only one other judge.

Judge Drain was the judge who presided over Purdue Pharma's bankruptcy. His selection by Purdue to hear its case was far from coincidental. As discussed in Part III, debtors undertake extreme maneuvers to steer their cases to these judges because they are confident that they will receive favorable treatment from them even on aggressive and—in the case of prepackaged plans that take less than twenty-four hours without the court approving a motion to shorten timelines—patently illegal proposals, and debtors' counsel see the approval of such illegally fast bankruptcies as an indication that a judge is likely to approve their overreaching requests in future cases.

B. Purdue's Poison Pill Plan

1. Purdue's Bankruptcy.—Purdue Pharma was a major manufacturer of opioids, a powerful—and highly addictive—class of pain management medicine. While Purdue was not the largest opioid manufacturer, it produced some of the most powerful opioids,[84] most notably an extended-release version of oxycodone called OxyContin.

Unlike other major opioid manufacturers, Purdue was a closely held company, owned (indirectly) by various members of the Sackler family, who played an active role in Purdue's management as directors and officers, such that the Department of Justice referred to the Sacklers as Purdue's "de facto

83. Findings of Fact, Conclusions of Law and Order (I) Approving (A) the Disclosure Statement Pursuant to Sections 1125 and 1126(c) of the Bankruptcy Code, (B) the Prepetition Solicitation Procedures, and (C) Forms of Ballots, and (II) Confirming the Amended and Restated Joint Prepackaged Chapter 11 Plan of Roust Corporation, et al. at 51, *In re* Roust Corp., No. 16-23786 (Bankr. S.D.N.Y. Jan. 10, 2017) (petition filed Dec. 30, 2016, plan confirmed Jan. 10, 2017); Findings of Fact, Conclusions of Law and Order (I) Approving the Disclosure Statement for the Debtors' Joint Chapter 11 Plan of Reorganization and (II) Confirming the Debtors' Joint Chapter 11 Plan of Reorganization at 2, 31, *In re* Glob. A&T Elecs., Ltd., No. 17-23931 (Bankr. S.D.N.Y. Dec. 22, 2017) (petition filed on Dec. 17, 2017, plan confirmed on Dec. 22, 2017); Order (I) Approving the Disclosure Statement and Confirming the First Amended Joint Prepackaged Chapter 11 Plan of Reorganization of FULLBEAUTY Brands Holding Corp. and Its Debtor Affiliates and (II) Granting Related Relief at 2, 13–14, *In re* FULLBEAUTY Brands Holdings Corp., No. 19-22185 (Bankr. S.D.N.Y. Feb. 5, 2019) (petition filed on Feb. 3, 2019, plan confirmed on Feb. 5, 2019); Amended Order (I) Approving the Disclosure Statement and Confirming the Joint Prepackaged Plan of Reorganization of Sungard Availability Services Capital, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief at 2, 24–25, *In re* Sungard Availability Servs. Cap., Inc., No. 19-22915 (Bankr. S.D.N.Y. May 3, 2019) (petition filed on May 1, 2019, plan confirmed on May 3, 2019); Order (I) Approving the Disclosure Statement for and Confirming the Joint Prepackaged Plan of Reorganization of Deluxe Entertainment Services Group Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and (II) Granting Related Relief at 2, 34, *In re* Deluxe Ent. Servs. Grp., Inc., No. 19-23774 (Bankr. S.D.N.Y. Oct. 25, 2019) (filed Oct. 3, 2019, confirmed Oct. 25, 2019).

84. Armstrong, *supra* note 1.

CEO."[85] Over the years, the Sacklers were greatly enriched through their ownership of Purdue such that they are one of America's wealthiest families[86] with a substantial philanthropic presence in the U.S. and abroad.[87]

A rise in opioid prescriptions starting in the 1990s generated tremendous profits for the Sacklers but also set off an opioid epidemic of addiction and overdoses that destroyed lives and communities. From 1999–2018 over 450,000 Americans died from opioid overdoses.[88]

The mounting toll of the opioid crisis brought with it a tsunami of litigation, alleging, among other things, that opioid manufacturers had downplayed the dangers of addiction and pushed doctors to overprescribe the medications. By 2019, Purdue Pharma was the defendant in over 2,600 civil actions brought by state and local governments and private parties.[89] Although no judgments had been entered against Purdue, it faced the prospect of being drowned in the costs of defending the litigation.[90] In addition, numerous lawsuits also sought to recover from the Sacklers, who reportedly received $13 billion in dividends and other payments from Purdue, including payments made after Purdue's potential liability for the opioid crisis became clear.[91]

As Purdue had no material financial debt, the various opioid plaintiffs were its only substantial creditors. Purdue negotiated the outline of a global settlement with certain plaintiff constituencies, most notably a set of twenty-four attorneys general and the plaintiffs' executive committee in pending federal multidistrict litigation.[92] The term sheet for this settlement—effectively a pre-petition RSA—contemplated a release of the Sacklers "from

85. Mann, *supra* note 2.

86. Katie Warren & Taylor Nicole Rogers, *The Family Behind OxyContin Pocketed $10.7 Billion from Purdue Pharma. Meet the Sacklers, Who Built Their $13 Billion Fortune Off the Controversial Opioid*, BUS. INSIDER (Mar. 23, 2020), https://www.businessinsider.com/who-are-the-sacklers-wealth-philanthropy-oxycontin-photos-2019-1 [https://perma.cc/5E3S-3F6Q].

87. Peggy McGlone, *As More Museums Say No to Sackler Donations, Family Trust Halts Its Giving*, WASH. POST (Mar. 26, 2019), https://www.washingtonpost.com/entertainment/museums/as-more-museums-say-no-to-sackler-donations-family-trust-halts-its-giving/2019/03/25/83ac5ab4-4f22-11e9-88a1-ed346f0ec94f_story.html [https://perma.cc/P3QV-GAC7].

88. *Understanding the Epidemic*, CNTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 17, 2020), https://www.cdc.gov/opioids/basics/epidemic.html [https://perma.cc/CA49-867E].

89. Debtor's Informational Brief at 1, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019), ECF No. 17.

90. *Id.* at 1–2.

91. *See* Hopkins & Scurria, *supra* note 3 (revealing payments made from Purdue to the Sacklers after details of the opioid crisis emerged).

92. Debtor's Informational Brief, *supra* note 89, at 3–4.

all claims and causes of action of any nature" [93] in exchange for a contribution of $3 billion from the Sacklers.[94]

Outside of bankruptcy, however, Purdue had no mechanism for binding all of the plaintiffs in the various litigations to the settlement.[95] The prospects of holdouts and free riders impeded the implementation of the global settlement outside of bankruptcy. Thus, Purdue filed bankruptcy seeking to implement its global settlement through a bankruptcy plan: upon confirmation, a bankruptcy plan binds all of a debtors' creditors, irrespective of their consent, including those with contingent, disputed, or unliquidated claims, like the various opioid plaintiffs.[96] Bankruptcy offers a tool that goes beyond that of regular class action settlements.

Purdue had three major issues it needed to resolve in its bankruptcy. First, there was the question of allocation of value among the claims of thousands of governmental and private entities. Purdue was able to reach an agreement among its creditors on this issue following mediation, with all of the non-federal governmental claimants committing to use all recoveries for opioid abatement.[97] As part of the mediation, the major private plaintiffs—hospitals, insurers, and personal injury claimants—but not the non-federal governmental claimants, agreed to support a restructuring plan that would include a release of the Sacklers.[98]

Second, Purdue had the problem of its liability to the federal government related to Medicare and Medicaid payments and violations of the Food and Drug Act.[99] The federal government has extensive criminal and civil asset forfeiture powers, which, if used, could potentially have left Purdue without any remaining assets.[100]

Third, was the issue about the Sacklers' liability, both to Purdue itself and directly to creditors. The various transfers to the Sacklers were potentially avoidable as "fraudulent transfers"—that is, transfers taken to hinder, delay, or defraud creditors or transfers undertaken while Purdue was

93. Notice of Filing of Term Sheet with Ad Hoc Committee at 5, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 8, 2019); *see also id.* (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").

94. *Id.* at 9.

95. *See id.* at 7–9 (requiring the approval of the Ad Hoc Committee at virtually every stage of the settlement).

96. 11 U.S.C. § 1141(a).

97. Mediators' Report at 3–4, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 23, 2020).

98. *Id.* at 5.

99. *Purdue Pharma L.P. Plea Agreement*, U.S. DEP'T. JUST. 8 (Oct. 20, 2020) [hereinafter *Purdue Plea Agreement*], https://www.justice.gov/opa/press-release/file/1329576/download [https://perma.cc/L3X9-WPDN] .

100. Transcript of Nov. 17, 2020 Omnibus Hearing at 94, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Dec. 7, 2020) [hereinafter Purdue November 2020 Hearing].

insolvent and for which Purdue did not receive reasonably equivalent value.[101] Fraudulent transfers can be avoided, resulting in a return of the assets to the transferor, here Purdue, meaning that the returned assets would then be available for Purdue's creditors. Additionally, the Sacklers faced the possibility of direct liability on various theories of control over Purdue. As the judge noted without irony at one hearing, despite the Sacklers not themselves being the debtors, "The hardest part of this case, and it always has been, is dealing with the claims against and potential contribution by and release of, for w[a]nt of a better term, the Sacklers."[102]

2. The Question of Nondebtor Releases for the Sacklers.—The Sacklers sought to resolve their own direct liabilities not just to Purdue, but to various opioid claimants through Purdue's bankruptcy without going through the bankruptcy crucible themselves. In other words, the Sacklers sought what are known as "third-party" or "nondebtor" releases in Purdue's bankruptcy.

Third-party releases are among the most controversial issues in Chapter 11 bankruptcy.[103] The Bankruptcy Code does not expressly provide for a discharge of liabilities of any party other than the debtor. Instead, aside from a special provision for asbestos bankruptcies,[104] the discharge provisions of the Code relate only to the debtor.[105] As a result, some circuits forbid third-party releases entirely, at least when the releases are deemed nonconsensual.[106]

Other circuits, however, recognizing the practical importance of nondebtor releases, permit them in "unique" or "unusual" or "rare"

101. 11 U.S.C. § 548(a)(1)(A); UNIF. FRAUDULENT TRANSFER ACT §§ 4–5 (UNIF. L. COMM'N 1984).

102. Transcript of July 23, 2020 Omnibus Hearing at 68, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 27, 2020) [hereinafter Purdue July 2020 Hearing].

103. *See, e.g.*, Lindsey Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022) (discussing abuse of nonconsensual nondebtor releases).

104. 11 U.S.C. § 524(g).

105. *Id.* §§ 524(e), 1141(d).

106. *See* Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (*In re* W. Real Est. Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1991) (holding the discharge of liability of a nondebtor proceeding to be improper); Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 760 (5th Cir. 1995) ("[W]e must overturn a § 105 injunction if it effectively discharges a debtor."); Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009) ("In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties."). Matters are more complex in the 9th Circuit. The court has three times refused to approve nondebtor releases. Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 626 (9th Cir. 1989); Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401 (9th Cir. 1995). Yet it has more recently permitted narrow exculpation of postpetition acts by parties related to the plan approval process without repudiating those earlier precedents. Blixseth v. Credit Suisse, 961 F.3d 1074, 1081–82 (9th Cir. 2020).

circumstances[107] or have suggested so in dicta.[108] Examples of when nondebtor releases have been authorized include:

- mass tort cases where the enjoined claims against nondebtors were "channeled" to a settlement trust fund rather than extinguished;[109]

107. *See* MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89, 93–94 (2d Cir. 1988) (affirming the district court's decision to affirm the Bankruptcy court's order enjoining claims against the debtor's insurers because "the insurance settlement/injunction arrangement was essential . . . to a workable reorganization"); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701–02 (4th Cir. 1989) (affirming the district court's decision to enjoin claims against third-party nondebtors because allowing these suits would "defeat" the reorganization plan); Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 212–13, 217 (3d Cir. 2000) (recognizing that the Second and Fourth Circuits have upheld nondebtor releases in "extraordinary cases" and holding that "the [b]ankruptcy [c]ourt and [d]istrict [c]ourt [in this case] lacked a sufficient evidentiary and legal basis to authorize the release and permanent injunction of Plaintiffs' claims under any of the standards adopted by courts that have evaluated non-debtor releases and permanent injunctions"); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002) (following "those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances'"); *In re* Combustion Eng'g, Inc., 391 F.3d 190, 236–38, 237 n.50 (3d Cir. 2004), *as amended* (Feb. 23, 2005) (distinguishing cases involving asbestos-related claims and 11 U.S.C. § 524(g) from *In re Dow Corning Corp.*, *In re Drexel Burnham Lambert Grp., Inc.*, and *In re A.H. Robins Co.* and vacating the order enjoining claimants of the non-debtors); Airadigm Commc'ns, Inc. v. Fed. Commc'ns Comm'n (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008) (holding that bankruptcy courts are permitted "to release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the bankruptcy code"); *In re* Ingersoll, Inc., 562 F.3d 856, 865 (7th Cir. 2009) (upholding a nondebtor release because the release was an "essential component" of the bankruptcy plan under the "unique circumstances of this case"); Behrmann v. Nat'l Heritage Found., Inc., 663 F.3d 704, 711 (4th Cir. 2011) (concluding that bankruptcy courts can authorize nondebtor releases "where circumstances warrant"); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 351–52 (4th Cir. 2014) (holding that a debtor must "demonstrate that it faces exceptional circumstances justifying the enforcement of" a nondebtor release and that to "obtain approval of a non-debtor release . . . a debtor must provide adequate factual support to show that the circumstances warrant such exceptional relief"); SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying), 780 F.3d 1070, 1078–79 (11th Cir. 2015) (holding that a nondebtor release or bar order "should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances"); *In re* Millennium Lab Holdings II, LLC., 945 F.3d 126, 137–40 (3d Cir. 2019) (finding no constitutional issue with a bankruptcy judge's jurisdiction to issue third-party releases when the releases are "integral" to the debtor's restructuring); Blixseth, 961 F.3d at 1082 (permitting narrow exculpation of postpetition acts by parties related to the plan approval process); Jackson v. Le Ctr. on Fourth, LLC (*In re* Le Ctr. on Fourth, LLC), 17 F.4th 1326, 1334 (11th Cir. 2021) (finding notice for nondebtor release sufficed for due process purposes).

108. Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005) (holding an appeal to be equitably moot, but noting 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").

109. *E.g.*, *In re Johns-Manville Corp.*, 837 F.2d at 91; *A.H. Robins Co.*, 880 at 700; *In re Dow Corning Corp.*, 280 F.3d at 655, 662–63.

- cases where the enjoined claims were against an insurer or guarantor, such that the enjoined claims would otherwise indirectly impact the debtor's reorganization because of the third party's right to indemnity or contribution from the debtor;[110]
- cases involving releases for acts or omissions in connection with the bankruptcy itself.[111]

Courts that allow nondebtor releases justify the releases as not expressly forbidden and permitted by both the general powers of the bankruptcy court and the statutory authorization for bankruptcy plans to include "any . . . appropriate provision not inconsistent with the" Bankruptcy Code.[112] These courts impose a range of tests regarding the permissibility of the releases.[113]

Notably, however, the courts permitting such releases have often denied the actual releases before them, while holding open the possibility of allowing releases in other circumstances.[114] Even in circuits where third-party releases have been approved by the circuit court, lower courts remain divided about how broadly to allow them, and the trend since 2001 has been "toward limiting broad third-party releases, except under unique circumstances or precluding them altogether, especially in favor of a corporate debtor's directors and officers."[115] The concern, as the Second Circuit noted, third-party releases are "a device that lends itself to abuse."[116]

While the Second Circuit has never definitively ruled on the permissibility of nonconsensual nondebtor releases, there is a split within the current bankruptcy bench of the Southern District of New York (SDNY), where Purdue's case was filed, about whether bankruptcy courts have

110. *E.g.*, *In re A.H. Robins Co.*, 880 F.2d at 701–02; *see also In re Johns-Manville Corp.*, 837 F.2d at 90–91, 93 (noting that it was disputed whether Manville's insurance coverage for products liability had been exhausted and concluding that the bankruptcy court's orders enjoining claims against Manville's insurers "were necessary to . . . make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund and could not be asserted directly against the insurers").

111. *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 647; *Blixseth*, 961 F.3d at 1078.

112. 11 U.S.C. §§ 105(a), 1123(b)(6).

113. *Compare In re Dow Corning Corp.*, 280 F.3d at 658 (articulating a seven-factor test), *with In re Metromedia Fiber Network, Inc.*, 416 F.3d at 142 ("[T]his is not a matter of factors and prongs. No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.").

114. Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203, 211–14 (3d Cir. 2000); *In re* Dow Corning Corp., 280 F.3d at 653; Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 143 (2d Cir. 2005); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 351–52 (4th Cir. 2014); *In re* Combustion Eng'g, Inc., 391 F.3d 190, 236–37 (3d Cir. 2004).

115. Michael Etkin & Nicole M. Brown, *Third-Party Releases?—Not So Fast! Changing Trends and Heightened Scrutiny*, 29 AIRA J. 22, 29 (2015).

116. *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 142.

jurisdiction to enter nonconsensual releases of creditors' nonderivative claims against third parties.[117]

Notably, the Honorable Robert D. Drain, the judge in Purdue's case, is one of the three current bankruptcy judges in SDNY who has in a published opinion expressed a willingness to enter a third-party release.[118] This particularly matters as we will see in Part III because Purdue was able to handpick Judge Drain to hear its case.

3. The Injunction Against Suits Against the Sacklers.—The filing of a bankruptcy triggers the "automatic stay," a federal stay of most collection actions against the debtor. But the automatic stay does not extend to nondebtor parties, such as equityholders like the Sacklers. At the beginning of its case, Purdue moved for the court to separately enjoin litigation against its officers, directors, and the Sacklers.[119] Purdue argued that the injunction was necessary because such litigation would impose litigation costs and burdens on Purdue, even as a non-defendant, and more importantly because it would threaten to undercut the settlement term sheet it had agreed to with certain creditors and the Sacklers.[120] Despite the fact that a possible monetary judgment against the Sacklers was nowhere on the horizon given the early state of litigation against them, Purdue claimed that if the Sacklers faced other litigation, they would be more reluctant to settle with Purdue.[121]

What is notable about this argument is how it put the cart before the horse in the sense that suits against the Sacklers should be enjoined because

117. *Compare 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), *and* Memorandum Decision and Order Regarding Third-Party Releases Under Debtors' Joint Plan at 2, *In re* SunEdison, Inc., No. 16-10992 (Bankr. S.D.N.Y. Nov. 8, 2017) [hereinafter SunEdison Memorandum and Order] (Bernstein, Bankr. J.) (holding that debtors had not established subject matter jurisdiction for third-party releases), *with In re* Genco Shipping & Trading Ltd., 513 B.R. 233, 271 (Bankr. S.D.N.Y. 2014) (Lane, Bankr. J.) (allowing third-party release), *In re* MPM Silicones, L.L.C., 2014 Bankr. LEXIS 3926, at *99–105 (Bankr. S.D.N.Y. Sept. 9, 2014) (Drain, Bankr. J.) (allowing third-party release), *and In re* Avanti Commc'ns Grp. PLC, 582 B.R. 603 (Bankr. S.D.N.Y 2018) (Glenn, Bankr. J.) (allowing third-party release).

118. *In re* MPM Silicones, L.L.C., 2014 Bankr. LEXIS 3926, at *99–105 (Drain, Bankr. J.) (allowing third-party release); *see also* Transcript of May 2, 2019 Omnibus Hearing at 67–68, *In re* Sungard Availability Servs. Cap., Inc., No. 19-22915 (Bankr. S.D.N.Y. May 7, 2019) [hereinafter Sungard Hearing]; *In re Genco Shipping & Trading Ltd.*, 513 B.R. at 271 (Lane, Bankr. J.) (allowing third-party release); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 603 (Glenn, Bankr. J.) (allowing third-party release).

119. Motion for a Preliminary Injunction at 25, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. Sept. 18, 2019).

120. Memorandum of Law in Support of Motion for a Preliminary Injunction at 31, 39–43, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. Sept. 18, 2019).

121. *Id.*

they might affect Purdue's ability to confirm a particular plan. The argument assumed that Purdue was entitled to confirm a plan that conformed to its RSA-like term sheet.

Judge Drain granted the injunction,[122] in effect privileging the RSA-like term sheet as the map for Purdue's restructuring, despite its lack of formal legal significance. He continued to extend the stay no less than eighteen times, allowing the Sacklers nearly two years of respite from litigation prior to plan confirmation.[123] The approval of the injunction against litigation against the Sacklers was the camel's nose under the tent, laying the groundwork for further developments that ensured that the Sacklers would get a release on bargain terms.

4. Purdue's Settlements with DOJ.—Creditors file claims in bankruptcies that the debtor may then contest. The Department of Justice (DOJ) filed two proofs of claim in Purdue's bankruptcy. One was for $9.7 billion in liability for alleged criminal offenses related to Purdue's "marketing, sale, manufacturing, and distribution of opioid and other pharmaceutical products."[124] The other was for $8.3 billion in alleged civil False Claims Act liability.[125] Both claims were indicated as being disputed.[126]

Menacingly, DOJ noted that it was only filing the proofs of claim prophylactically.[127] Instead, DOJ asserted that it could pursue an action for criminal or civil forfeiture, and that title to any assets subject to criminal or civil forfeiture would "vest in the United States upon commission of the act

122. Order Pursuant to 11 U.S.C. § 105(a) Granting, in Part, Motion for a Preliminary Injunction at 4, Purdue Pharma L.P. v. Massachusetts (*In re* Purdue Pharma L.P.), No. 19-08289 (Bankr. S.D.N.Y. Oct. 11, 2019). A further extension of the injunction was upheld by Decision and Order Affirming the Bankruptcy Court's Preliminar[]y Injunctions at 39, *Dunaway v. Purdue Pharms. L.P.* (*In re Purdue Pharms. L.P.*), No. 7:19-cv-10941-CM (S.D.N.Y. Aug. 11, 2020).

123. Eighteenth Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 8, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. May 20, 2021) (total of 645 days of injunction); Nineteenth Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 9, *In re* Purdue Pharma L.P., No. 19-008289 (Bankr. S.D.N.Y. June 17, 2021) (total of 704 days of injunction).

124. U.S. Department of Justice Modified Form 410 Non-Opioid Claimant Proof of Claim No. 137798, at *7–8, ¶¶ 1–3, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 30, 2020) [hereinafter DOJ Criminal Proof of Claim].

125. U.S. Department of Justice Modified Form 410 Non-Opioid Claimant Proof of Claim No. 137848 at *19, ¶ 58, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 30, 2020) [hereinafter DOJ Civil Proof of Claim] (claiming $2.8 billion in single liability but noting that the False Claims Act allows for treble damages, which would total $8.3 billion).

126. DOJ Criminal Proof of Claim, *supra* note 124, at *7–8, ¶¶ 1–3; DOJ Civil Proof of Claim, *supra* note 125, at *9–10, ¶¶ 5–6.

127. DOJ Civil Proof of Claim, *supra* note 125, at *19, ¶ 62.

giving rise to forfeiture under this section."[128] In other words, while DOJ filed proofs of claim in the bankruptcy case to protect its rights, it also signaled that it did not believe it was subject to the bankruptcy law's stay of collection actions[129] and that if it obtained a criminal or civil forfeiture judgment, the forfeited assets would not be property of the Purdue bankruptcy estate, so they could not be distributed to Purdue's creditors.

Facing this threat, Purdue Pharma entered into a pair of settlements with DOJ that addressed both the government's civil and criminal claims.[130] The settlements were also tied to a separate civil settlement between DOJ and members of the Sackler family under the False Claims Act for $225 million.[131]

Under the criminal settlement, Purdue agreed to plead guilty to three felony counts relating to conspiracy to defraud the United States and to violate the Federal Anti-Kickback Statute.[132] As part of its plea bargain, Purdue agreed to pay a criminal fine of $3.544 billion and to surrender an additional $2 billion in a criminal forfeiture.[133] Under the paired civil settlement, Purdue settled its liability under the False Claims Act and under fraudulent transfer law for $2.8 million.[134]

While the face amount of the Purdue settlements were substantial, the settlements also compromised those amounts: DOJ agreed that both the criminal fine and the civil settlement would be treated as allowed, unsecured claims in the bankruptcy, giving the federal government both a $3.544 billion allowed, unsecured claim for the criminal fine and a $2.8 billion allowed, unsecured claim for the civil liability.[135] This agreed-upon bankruptcy treatment was significant because allowed, unsecured claims get paid only a

128. *Id.* at *19, ¶¶ 63–64 (citing 18 U.S.C. § 981(f) and 21 U.S.C § 881(h)); DOJ Criminal Proof of Claim, *supra* note 124, at *8, ¶¶ 5–6 (citing 18 U.S.C. § 982(b), 21 U.S.C. § 853(c), and 28 U.S.C. § 2461(c)).

129. *See* 11 U.S.C. § 362(a) (requiring an automatic stay of actions against the debtor that commenced or could have commenced before the bankruptcy filing).

130. Press Release, U.S. Dep't 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 [https://perma.cc/84XQ-ZMQ7].

131. Settlement Agreement Between the United States and Dr. Richard Sackler, David Sackler, Mortimer D.A. Sackler, Kathe Sackler, and the Estate of Jonathan Sackler, U.S. Dep't Just., Settlement Agreement (Oct. 21, 2020), https://www.justice.gov/opa/press-release/file/1329736/ [https://perma.cc/49LY-8E5M].

132. *Purdue Plea Agreement*, *supra* note 99, at 1–2.

133. *Id.* at 3.

134. Settlement Agreement Between the United States and Purdue Pharma L.P., U.S. Dep't Just., Settlement Agreement 4 (Oct. 21, 2020) [hereinafter Purdue Civil Settlement], https://www.justice.gov/opa/press-release/file/1329571/download [https://perma.cc/F3WM-3F98].

135. *Purdue Plea Agreement*, *supra* note 99, at 8; Purdue Civil Settlement, *supra* note 134, at 4.

prorated share of whatever value is left over once secured and priority claims have been paid.

While the precise payout is uncertain, it is likely pennies on the dollar at best. For example, personal injury victims are being offered an "Easy Payment" of $3,500, while the survivors of those who died from an OxyContin overdose are expected to receive between $32,000 and $48,000.[136] Thus, Purdue was able to settle in real terms for far less than the substantial face amount of the settlements, which freed up funds for other creditors.[137]

In contrast to the treatment of the criminal fine and the civil liability, Purdue and DOJ agreed that the $2 billion criminal forfeiture judgment would have "the status of an allowed superpriority administrative expense claim . . . with priority over any and all claims and administrative expenses of any kind."[138] In other words, the criminal forfeiture judgment would get paid ahead of all of Purdue's creditors.[139] DOJ, however, consented, based on its anti-piling policy, to credit distributions in Purdue's bankruptcy to state and local governments up to $1.775 billion against the criminal forfeiture liability.[140] As a result, Purdue's criminal forfeiture liability to DOJ was reduced to only $225 million.

Finally, the settlements required that DOJ's $2.8 billion civil liability claim would be separately classified from all other claims under any bankruptcy plan proposed by Purdue.[141] Mandating separate classification was significant because it would ensure that Purdue could confirm a

136. *See* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 9, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 3, 2021) [hereinafter Disclosure Statement] (outlining estimated distribution amounts for "Easy Payment" options).

137. It is unclear why the criminal fine was not subordinated. The Bankruptcy Code provides for subordination of fines that are not compensation for actual pecuniary loss, 11 U.S.C. § 726(a)(4), and the settlement did not specify that the criminal fine was for actual pecuniary loss.

138. *Purdue Plea Agreement*, *supra* note 99, at 8–9. Bankruptcy law does not provide for "superpriority administrative expense claims"—an administrative expense is a distinct category from a claim, such that there cannot be a "administrative expense claim"—nor does it expressly authorize superpriority payments in settlements. Nevertheless, the idea is clear—DOJ would be paid at the head of the line.

139. Secured claims would have priority over the forfeiture judgment, but Purdue, unusually, has no secured creditors. Statement of Financial Affairs for Purdue Pharma L.P., *In re* Purdue Pharma L.P. at 8, No. 19-23649 (Bankr. S.D.N.Y. Oct. 29, 2019); Schedules of Assets and Liabilities for Purdue Pharma L.P. at 164, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 29, 2019).

140. *Purdue Plea Agreement*, *supra* note 99, at 9–10.

141. Purdue Civil Settlement, *supra* note 134, at 5. A revised version of the settlement order did not require separate classification, but instead allowed the Department of Justice to exit the settlement if its claim was not separately classified. Revised Proposed Order Pursuant to 11 U.S.C. § 105 and FED. R. BANKR. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 16, 2020).

bankruptcy plan. A plan can be confirmed through the "cramdown" process with the support (disregarding insiders' votes) of just a single class of impaired claims.[142] Separate classification of DOJ's civil liability claim ensured that there would be a consenting class of impaired, outsider claims in the event a cramdown confirmation were necessary. In other words, if the settlement were approved, Purdue would have the tools in hand to confirm a plan of reorganization over the objection of all creditors other than DOJ.[143]

Table 1, below, summarizes these settlements and their agreed-upon bankruptcy law treatment.

Table 1. DOJ Settlements with Purdue and the Sacklers

	Bankruptcy Claim Amount	Settlement Amount	Bankruptcy Treatment
Purdue Criminal Forfeiture	$2 billion	$2 billion, but reduced to $225 million, conditioned on Purdue emerging as a public benefit company	Allowed superpriority administrative expense claim
Purdue Criminal Fine	$3.544 billion	$3.544 billion	Allowed unsecured claim
Purdue Civil Settlement	$8.4 billion	$2.8 billion	Allowed unsecured claim
Sacklers Civil Settlement	n/a	$225 million	n/a

5. Purdue's Poison Pill.—Of particular significance in Purdue's DOJ settlements was a snapback provision: the credit against the distribution to state and local governments would be granted only if Purdue restructured itself into a "public benefit company" or similar entity permitted to consider goals other than profit maximization in its governance.[144] If Purdue were to restructure in some other way or were to liquidate, then Purdue agreed that it

142. 11 U.S.C. § 1129(a)(10), (b).

143. As it happened, all voting classes voted in favor of the plan. Modified Bench Ruling on Request for Confirmation of Eleventh Amended Joint Chapter 11 Plan at 9, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 17, 2021). Nevertheless, the ultimate plan vote was not a certainty nearly a year prior when Purdue entered into the settlements with DOJ.

144. *Purdue Plea Agreement*, *supra* note 99, at 8–9; Purdue Civil Settlement, *supra* note 134, at 9.

would still be liable for the full $2 billion criminal forfeiture, rather than the reduced payment of $225 million.[145] Moreover, the $2 billion criminal forfeiture would still be treated as "an allowed superpriority administrative expense claim."[146] Given the value of Purdue's assets, a $2 billion superpriority claim for the federal government would likely leave nothing for Purdue's other creditors.[147]

Purdue's criminal plea required a court hearing before a District Court, while Purdue's civil settlement required approval by the Bankruptcy Court.[148] The civil settlement was strongly opposed by a number of Purdue's creditors for a number of reasons, including that the snapback provision functioned as a "poison pill" that, if approved, would lock in the outcome of the bankruptcy.[149]

A "poison pill" is a contract clause that effectuates some sort of negative consequence upon a trigger. Poison pills typically function as a corporate takeover defense—an action that indicates a corporate takeover will trigger the issuance of rights to existing shareholders to acquire new shares of common stock at below-market prices or the like, making the takeover substantially more expensive or unattractive.[150] Purdue, however, applied the concept to trigger a negative consequence if it did not get the restructuring outcome it sought. While a handful of bankruptcy cases have included "death trap" plans that change the compensation for a class or creditor depending on its vote,[151] a poison pill has never previously been used in a bankruptcy transaction of any sort.

145. *Purdue Plea Agreement*, *supra* note 99, at 10. The Agreement states that

> In the event that the Bankruptcy Court does not confirm a plan of reorganization in the Purdue Bankruptcy that provides for the emergence from the Purdue Bankruptcy of a public benefit company (or entity with a similar mission), then (i) Purdue shall not be entitled to the Forfeiture Judgment Credit, and (ii) the United States shall retain the full amount of the Forfeiture Judgment as an allowed superpriority administrative expense claim.

Id.

146. *Id.*

147. Motion 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 at 7, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 21, 2020) [hereinafter Settlement Motion] (noting that the "criminal forfeiture judgment alone could leave the Debtors with no viable alternative to liquidation, and satisfaction of such a judgment would leave little to no recovery for other creditors").

148. 11 U.S.C. § 363(b); FED. R. BANKR. P. 9019.

149. Settlement Motion, *supra* note 147, at Exhibit A 3–4 (providing that if the plea agreement were approved, DOJ would have a $2 billion superpriority administrative expense claim, satisfiable by a $225 million payment).

150. K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 78 n.52 (2016).

151. Skeel, *supra* note 24, at 370–71.

Specifically, if the settlement were approved, the snapback provision would mean that creditors would have to either assent to Purdue restructuring as a public benefit company—just as contemplated by Purdue's RSA-like term sheet—or risk the DOJ's criminal forfeiture claim gobbling up all of Purdue's assets, leaving nothing for them. The prospect was particularly unwelcome for a bipartisan coalition of twenty-five state attorneys general who wanted Purdue to sell its assets and liquidate; these attorneys general did not want their states to become owners or beneficiaries of an opioid manufacturer that they saw as a "public burden company."[152] Judge Drain, however, approved the settlement over their objections.[153]

The settlement was coercive per se because it was approved based on a threat: if Purdue did not take the deal, DOJ would pursue its criminal case and potentially obtain a criminal forfeiture of $9.7 billion and a civil forfeiture of $8.3 billion.[154] A forfeiture judgment of either sort would deem the forfeit assets to have been property of the U.S. government at the time of the wrongdoing,[155] so they would not even be property of Purdue and therefore would not be available for distribution to Purdue's creditors.

In other words, unless Purdue settled with DOJ, it risked being left without any assets and facing liquidation while being unable to make any distribution to opioid victims.[156] That made it imperative for Purdue to settle with DOJ and for the court to approve the settlement. The desire to avoid a liquidation also explains why Purdue would have wanted the snapback provision that tied the reduction in the forfeiture to Purdue's emergence from bankruptcy as a public benefit company.

In contrast, from DOJ's perspective, any distribution to state and local governments, including from a sale and liquidation, should have sufficed under its anti-piling policy. It is hard to see why DOJ would care if Purdue reorganized as a public benefit company or not. Accordingly, there is a strong inference that the poison pill was included in the settlement at Purdue's

152. *Oversight of the Bankruptcy Code, Part 1: Confronting Abuses of the Chapter 11 System: Hearing Before the H. Judiciary Subcomm. on Antitrust, Com., & Admin. L.*, 117th Cong. 17 (2021) (written testimony of Adam J. Levitin, Professor, Georgetown University Law Center).

153. Order Pursuant to 11 U.S.C. § 105 and FED. R. BANKR. P. 9019 Authorizing and Approving Settlements Between the Debtors and the United States at 2, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 18, 2020). Disclosure: I was the co-author of a law professors' amicus brief in opposition to the Purdue-DOJ settlement. Brief of Bankruptcy Professors as *Amici Curiae* in Opposition to the Proposed Settlement Between the United States and the Debtors, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 10, 2020).

154. *See* DOJ Criminal Proof of Claim, *supra* note 124, at *8, ¶¶ 2–3 (estimating a potential fine of approximately $6.2 billion and a forfeiture of $3.5 billion); DOJ Civil Proof of Claim, *supra* note 125, *9–10, ¶ 5 (estimating "single damages in the amount of $2.8 billion or in excess thereof, plus treble damages and penalties").

155. 18 U.S.C. §§ 981(a)(1)(c), 982(b); 21 U.S.C. §§ 853(c), 881(h); 28 U.S.C. § 2461(c).

156. Settlement Motion, *supra* note 147, at 7.

behest, meaning that Purdue created the very exigency that it argued necessitated the settlement.

6. Side Effect #1: Preventing Purdue's Liquidation.—The inclusion of the snapback provision also made the settlement collaterally coercive of future transactions—namely the shape of Purdue's bankruptcy outcome. Because the snapback provision operated as a poison pill, it all but guaranteed that Purdue would emerge from bankruptcy as a public benefit company, thereby heading off the state attorneys general who hoped to force the sale of Purdue's assets to a private buyer, followed by a liquidation. While the poison pill did not formally deprive creditors of a vote on a plan of reorganization or of the right to object to a plan or of the right to propose an alternative plan (once the debtor's plan exclusivity period lapsed), it rendered any such action so unattractive to creditors as to preclude it.

7. Side Effect #2: Ensuring the Sacklers' Release.—The coercive effect of Purdue's poison pill extended beyond ensuring that Purdue would emerge from bankruptcy as a public benefit company. It also had the effect of ensuring that the Sacklers would get a release. While the Sacklers settled their civil liability with DOJ, nothing in Purdue's settlement with DOJ claimed to address the Sacklers' liability to Purdue (on fraudulent transfer and similar theories) or to creditors other than the United States government. A release would only be possible as part of the to-be-proposed plan. Yet, approval of the settlement with the poison pill provision ensured that the Sacklers would be able to get a release in a future plan in exchange for a contribution of some amount to the funds distributed as part of the Purdue bankruptcy.

Purdue always sought a restructuring in which the Sacklers would receive a broad release in exchange for a financial contribution. The RSA-like term sheet that Purdue, along with the Sacklers and a set of creditors, filed at the beginning of the case contemplated a release of the Sacklers "from all claims and causes of action of any nature,"[157] not just by Purdue but also by all of Purdue's creditors, in exchange for a contribution of $3 billion face amount over seven years.[158]

Indeed, when Purdue did finally propose (and confirm) a restructuring plan, it featured a release of the Sacklers by both Purdue and Purdue's creditors in exchange for a $4.5 billion contribution by the Sacklers over ten years ($225 million of which would be counted against the DOJ

157. Notice of Filing of Term Sheet with Ad Hoc Committee at 5, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 8, 2019); *see also id.* (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.").

158. *Id.* at 9.

settlement).[159] Yet the plan contained no analysis of how the Sacklers' contribution compared to the Sacklers' liability to Purdue's creditors. It merely asserted that Purdue believed that creditor recoveries from Purdue in the event that Purdue liquidated "would likely be lower" than under its plan,[160] but this, of course, omitted any consideration of creditors' possible direct recoveries from the Sacklers.

A deal in which the Sacklers got a release from Purdue and its creditors in exchange for a contribution to Purdue (for the benefit of Purdue's creditors) was always a likely outcome if Purdue restructured, but not if Purdue liquidated. By ensuring that Purdue would restructure, rather than liquidate, the poison pill also ensured that the Sacklers would be able to get a release if they could come to an agreement on the price with Purdue.

The poison pill's effects were farther reaching, however, as they also went to the process by which the price of the Sacklers' release would be determined. The poison pill almost assuredly lowered the price of the release for the Sacklers.[161] The poison pill ensured that the Sacklers merely had to reach a deal with Purdue, not with all of Purdue's creditors. The poison pill left no room for creditors to vote down the plan or otherwise prevent it through objections based on the inadequacy of the Sacklers' contribution because, if a Purdue restructuring plan fell through, the possibility would loom of DOJ gobbling up all of Purdue's assets using its criminal and civil forfeiture power. The poison pill thus had the effect of depriving Purdue's creditors of their ability to vote down or object to a settlement that contained a release of the Sacklers for too low a contribution. As a result, only Purdue's consent to the price of the Sackler release mattered. The poison pill deprived creditors of their ability to freely vote on the plan including the release.

Purdue, as debtor in possession, was a fiduciary not just for the Sacklers, in their capacity as Purdue's shareholders, but also for Purdue's creditors. Purdue, however, had no incentive to push for the top-dollar recovery from the Sacklers. Every extra dollar from the Sacklers would go to creditors, not to Purdue, where it could potentially be available for the benefit of Purdue's managers. Moreover, Purdue was conflicted because its corporate interest is to get out of bankruptcy as quickly as possible because of the operational frictions and reputational problems bankruptcy creates, as well as its incredibly high "burn rate"—the rate at which it was incurring bankruptcy-

159. Disclosure Statement, *supra* note 136, at 11; Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors at 82–83, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Mar. 15, 2021).

160. Disclosure Statement, *supra* note 136, at 354–55.

161. Additionally, the fact that Purdue filed a plan on the very last day when it had the exclusive right to do so suggests that it ran out of negotiating leverage with the Sacklers and felt it had to reach a deal because it valued plan exclusivity—and control over the case, including preventing a liquidation—over the marginal size of the Sacklers' contribution.

related costs.[162] Purdue's interest was to settle with the Sacklers for the lowest possible credible amount that the court would still feel comfortable signing off on the settlement.

As if the poison pill were not coercive enough on its own, the "poisoning" was also by stealth. Purdue got court approval of the DOJ settlement through motion practice.[163] While this is the standard way settlements are approved in bankruptcy, it meant that notice of the proposed DOJ settlement did not go out to all of Purdue's creditors, only to those who chose to place themselves on the Master Service List (and therefore subjected themselves to being bombarded with all of the filings made in the case). That meant that by the time many creditors would have learned about the DOJ settlement, it would have been too late to object to the settlement. Instead, because of the poison pill these creditors—including individual opioid victims—would be stuck with the *fait accompli* of a restructuring as a public benefit company and a release for the Sacklers for whatever number Purdue in its sole discretion decided was adequate.[164]

As it happened, Purdue's plan received the support of over 95% of creditor votes cast.[165] The poison pill, however, undercuts the meaningfulness of this vote because the threat of a forfeiture gave creditors no option other than supporting the plan. Normally, if creditors do not like a plan, they can vote it down and, when the debtor's plan exclusivity period has expired (as Purdue's did the day after it proposed its plan), they can propose their own alternative plans. The poison pill, however, precluded this possibility. The choice creditors faced was not between Purdue's plan versus and possible plan that might have paid them more. It was a choice between Purdue's plan and a forfeiture of all value to DOJ. That was no choice at all. The effect of the poison pill was to render the creditor vote—normally the heart of the Chapter 11 process—little more than a formality.

8. "Hacking" the Bankruptcy Process.—The fundamental legal problem with Purdue's DOJ settlement was that it was a forbidden *sub rosa* plan,

162. Purdue July 2020 Hearing, *supra* note 102, at 33 ("[T]he costs and burdens associated with an extended stay in Chapter 11 are very material."); Purdue November 2020 Hearing, *supra* note 100, at 218 (stating that the fee burn while in Chapter 11 is approaching $1 million a day).

163. *See* Settlement Motion, *supra* note 147, at 5–6 (showing that Purdue filed a motion seeking entry of an order approving their DOJ settlement).

164. One might reasonably wonder why the Department of Justice would go along with a deal that enables the Sacklers to get a release relatively cheaply. We can only speculate, but once the Department of Justice settled its own claims with the Sacklers, it had no reason to care about the terms of a release from liability to other parties and would only have been concerned with not upsetting its criminal plea deal with Purdue as sentencing is delayed until after plan confirmation and Purdue has a walkaway clause in the plea agreement.

165. *In re Purdue Pharma, L.P.*, 633 B.R. 53, 61 (Bankr. S.D.N.Y. 2021), *rev'd In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021). Most creditors (personal injury victims) did not cast ballots, however. *See id.*

meaning a transaction that effectuates outcomes reserved for a Chapter 11 plan without being subject to the procedural requirements for plan confirmation. The term "*sub rosa* plan" does not appear in the Bankruptcy Code; the concept exists only by negative implication. Historically, however, courts have identified transactions as constituting a *sub rosa* plan if they "dispose of all of the debtor's assets, restrict creditors' rights to vote as they deem fit on a plan of reorganization, or dictate the terms of a plan of reorganization."[166] As the Third Circuit has explained:

> When a transaction or settlement in bankruptcy has the effect of "dictating some of the terms of any future reorganization plan," a court deems the transaction impermissible because it "short circuits the requirements of Chapter 11 . . . by establishing the terms of the plan *sub rosa* in connection with a sale of assets."[167]

Given that incredibly broad authorization for what a plan may do,[168] it is more helpful to consider what a plan must do. The Bankruptcy Code also does not define the term "plan," but it does prescribe several mandatory plan terms. A plan must classify claims, specify the treatment of claims, provide adequate means for the plan's implementation, including "amendment of the debtor's charter" or "issuance of securities of the debtor," and provide for certain corporate governance structures.[169] The mandatory provisions of a plan provide a benchmark for determining if a transaction is a *sub rosa* plan. If a transaction undertakes the steps required of a plan, but without conforming to the procedures required of a plan, it should be seen as a *sub rosa* plan and prohibited as such.

Notably, under existing *sub rosa*-plan jurisprudence, a transaction does not need to constitute a complete or formal plan to offend the *sub rosa* rule. Instead, it merely needs to predetermine key features that would normally be part of a plan without complying with the procedural protections required for proposing and confirming a plan.[170]

By this measure, Purdue's civil settlement constituted a *sub rosa* plan. The settlement did not merely settle a dispute about the allowance of DOJ's claim. It also required particular classification and treatment of DOJ's claim

166. Off. Comm. of Unsecured Creditors of Tower Auto. v. Debtors & Debtors in Possession (*In re* Tower Auto. Inc.), 241 F.R.D. 162, 169 (S.D.N.Y. 2006).

167. Energy Future Holdings Corp. v. Del. Tr. Co. (*In re* Energy Future Holdings Corp.), 648 Fed. Appx. 277, 284–85 (3d Cir. 2016) (alteration in original).

168. *See* 11 U.S.C. § 1123(b) (providing what plans may do, including "any other appropriate provision not inconsistent with the applicable provisions of this title").

169. *Id.* §§ 1123(a)(1), (3), (5)(I)–(J), (6), (7).

170. *See, e.g.*, *In re* Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983) (finding that the transaction "had the practical effect of dictating *some* of the terms of any future reorganization plan") (emphasis added); *In re* Lionel Corp., 722 F.2d 1063, 1072 (2d Cir. 1983) (reversing a bankruptcy court's approval of the sale of an asset that represented 34% of the debtors' consolidated assets).

under a plan and effectively required the emergence of Purdue as a public benefit corporation, which would require amendment of Purdue's charter or issuance of new securities.[171] In effect the settlement provided for means of a plan's implementation. And it did so without complying with either the notice and disclosure or voting requirements for plan confirmation, but instead included the poison pill unduly coercing creditors' votes on the eventual plan.

Purdue is not the first debtor to have proposed what is arguably a *sub rosa* plan through a settlement,[172] but it is the first to do so since the Supreme Court's ruling in *Czyzewski v. Jevic Holding Corp.*,[173] a case in which the Supreme Court announced a broad stricture against all transactions that "circumvent the [Bankruptcy] Code's procedural safeguards."[174] In *Jevic*, the Supreme Court held that a type of settlement called a "structured dismissal" that effectuated a priority-skipping distribution that did not accord with the Bankruptcy Code was impermissible.[175] *Jevic* was not keyed to whether a transaction is a *sub rosa* plan; a transaction does not need to rise to the level of a plan to trigger *Jevic*.

Nor is there any reason to think that *Jevic* is tethered solely to priority-skipping transactions. The logic animating *Jevic* is that parties cannot "hack" the bankruptcy process to achieve their desired result. The deal is subordinate to the Code. That the desired result in *Jevic* happened to be a priority-skipping distribution was not what drove the decision. Instead, *Jevic* teaches that there is no end-running the Bankruptcy Code. But that is precisely what *Purdue* did. Judge Drain, however, insisted that despite its sweeping language, *Jevic* is limited to its facts and covers only priority-skipping transactions, not end-runs on the Bankruptcy Code's procedural protections generally.[176]

171. Settlement Motion, *supra* note 147, at 7–8.

172. *See, e.g.*, Motorola, Inc. v. Off. Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007).

173. 137 S. Ct. 973 (2017).

174. *Id.* at 986.

175. *Id.* at 973, 983–84.

176. *See* Purdue November 2020 Hearing, *supra* note 100, at 176–77 (stating that *Jevic* is distinguishable from the present case in because it involved a specific payment). Judge Drain did not even address *Jevic* in his formal opinion read from the bench at the end of the hearing. *Id.* at 223–50.

C. *Taking Stock of Coercion in Bankruptcy*

Bankruptcy law has a tendency to normalize the extraordinary.[177] Transactions approved under unusual circumstances rapidly become precedents for approving the transactions in less compelling circumstances. In an opinion on nondebtor releases, Judge Whitman Holt has termed this the "Lake Wobegon effect."[178] This means that where *Purdue* went, Chapter 11 practice in other cases will surely follow. *Purdue*'s poison pill will undoubtedly be copied creatively by other debtors, rendering bankruptcy an even more coercive process.

The idea of debtors attempting coercive restructuring plans to advance the interests of certain favored creditors or allies—DIP lenders, asset purchasers, RSA signatories, or equityholders—is nothing new, and standing on its own is not a problem. As long as there is a meaningful judicial check on debtor (and creditor) overreach, the fact that some parties play hardball is not itself a systemic problem. Chapter 11 is not a tea party.

This is where the other two developments in bankruptcy law—the increasingly illusory nature of appellate review, and the ability of debtors to handpick the judge for their case—come in. Debtor coercion and overreach exists in a world where the checks and balances that should police such behavior have failed. That lets debtors like Purdue push through inappropriate provisions like the poison pill if they can get a single non-Article III judge of their choice to sign off, and debtors have become adept at handpicking bankruptcy judges they feel confident will approve their deals, irrespective of statute or precedent. That this is happening in as high-profile and important a case as *Purdue* should be an alarm bell that things have gone off the rails in Chapter 11 practice.

II. Illusory Appellate Review

The U.S. legal system is based on the assumption of the general availability of appellate review. Judges are fallible, and appellate review is critical both as a check on judicial mistake and bias and as a mechanism for ensuring consistency among lower courts. Appellate review does not generically benefit any party to litigation, but if there is an advantage or bias for one party in lower courts, then the absence of meaningful appellate review locks in that advantage.

Appellate rights, however, are often illusory in bankruptcy. As Professor Melissa Jacoby has noted, the limited nature of appellate review in

177. *See* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. (forthcoming 2022) (manuscript at 35) (noting that litigants press bankruptcy judges to find "creative remedies originally countenanced only with reluctance as solutions to rare and difficult cases . . . in progressively more routine litigation").

178. *In re* Astria Health, 623 B.R. 793, 801 n.25 (Bankr. E.D. Wash. 2021).

bankruptcy "reduces public oversight in Chapter 11 and intensifies the authority of bankruptcy courts."[179] This Part examines the reasons that appellate review is often absent in bankruptcy: statutory limits on appellate remedies; appellate courts' resistance to second-guessing the technical, fact-based nature of valuation opinions; the costliness of delay while appeals are pending; the requirement of the entry of a final order before an appeal may be taken; and the doctrine of equitable mootness.

A. Limited Appellate Remedies

The Bankruptcy Code itself limits remedies in the event of a successful appeal of a sale or financing order. Orders approving asset sales and DIP financings are among the most important that a bankruptcy court can issue. An asset sale can effectuate a restructuring by changing the composition of the debtor's balance sheet, thereby precluding other possible restructurings.[180] A DIP financing changes the debtor's capital structure by inserting new money with priority over existing obligations,[181] and DIP financing orders frequently authorize other provisions that are determinative of a restructuring, such as a requirement that certain assets be sold within a specified time period.[182]

Even if a sale or financing order is overturned on appeal, the improper sale or the financing itself cannot be reversed.[183] This protects the reliance of buyers or financiers, as well as debtors, but it also renders the ability to appeal largely meaningless, as there is little a court can offer a successful appellant in terms of a remedy.

B. Difficulty of Appellate Review for Valuation Decisions

Another critical issue in bankruptcy is valuation. Valuation of a creditor's collateral determines the amount of a creditor's secured claim, including the ability to accrue postpetition interest,[184] and therefore the treatment the creditor is entitled to in bankruptcy.[185] It also determines whether the creditor is entitled to lift the automatic stay[186] or get adequate protection against depreciation in collateral.[187] Likewise, valuation of the debtor as a whole is essential for determining whether any particular creditor

179. Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1733 (2018).

180. *See supra* section I(A)(2).

181. 11 U.S.C. § 364(c)–(d).

182. *See supra* section I(A)(1).

183. 11 U.S.C. §§ 363(m), 364(e).

184. *Id.* § 506.

185. *Id.* § 1129(b)(2)(A).

186. *Id.* § 362(d)(2).

187. *Id.* § 361.

is receiving its "best interests,"[188] or a distribution equal to at least its share of liquidation value; whether a plan comports with the absolute priority rule;[189] or whether a transfer was a fraudulent transfer or a voidable preference.[190]

Valuation opinions are largely determinations of fact, and as such they are reviewed only for "clear error."[191] Appellate courts are extremely unlikely to overturn a bankruptcy court's valuation determination because the appellate court was not itself able to evaluate the demeanor of the valuation experts and is unlikely to have experience evaluating discounted cash flow analyses that are common in valuations. At most, an appellate court might intervene to specify a certain formulaic *methodology* for determining a discount rate[192] but almost never about the actual determination.

C. Unusual Length and Cost of Bankruptcy Appeals

Appeals always involve some delay and costs but bankruptcy is fundamentally different than other areas of law in both respects. As of the third quarter of 2020, federal courts of appeals took a median time of over nine months to dispose of cases from the time of filing.[193]

Resolution of bankruptcy appeals is potentially slower because bankruptcy often involves an additional level of appellate review. Whereas appeals from the district court go to the court of appeals in a regular case, appeals from the bankruptcy court generally go to either to the district court or to a special bankruptcy appellate panel, and then to the circuit, depending on the circuit.[194] The additional level of appellate review can further delay resolution of an appeal.

188. *Id.* § 1129(a)(7).

189. *Id.* § 1129(b)(2)(B)–(C).

190. *Id.* §§ 547–548.

191. *See, e.g.*, Bate Land Co. LP v. Bate Land & Timber LLC (*In re* Bate Land & Timber LLC), 877 F.3d 188, 198 (4th Cir. 2017) (holding that valuation decisions are determinations of fact reviewed for clear error).

192. *See, e.g.*, Till v. SCS Credit Corp., 541 U.S. 465, 469, 471, 479–80 (2004) (Stevens, J., plurality) (evaluating four approaches to calculating interest rates on installment payments and concluding that a "prime-plus" or "formula" rate best fits the purposes of the Bankruptcy Code); Bank of Montreal v. Off. Comm. of Unsecured Creditors (*In re* Am. HomePatient, Inc.), 420 F.3d 559, 568–69 (6th Cir. 2005) (holding that the cram-down rate in a Chapter 11 case should be the market rate if there is an efficient market and the formula rate if there is no efficient market and affirming the rate set by the bankruptcy court); Momentive Performance Materials Inc. v. Bokf, NA (*In re* MPM Silicones, L.L.C.), 874 F.3d 787, 800–01 (2d Cir. 2017) (adopting the Sixth Circuit's approach from *In re Am. HomePatient, Inc.* and remanding to the bankruptcy court with instructions to apply that approach).

193. ADMIN. OFF. OF THE U.S. CTS., U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2020.pdf [https://perma.cc/GQA8-TEEB].

194. 28 U.S.C. § 158(a)–(d). In some instances, an appeal may be taken directly to the court of appeals. *Id.* § 158(d)(2); FED. R. BANKR. P. 8004(e).

Costs of appeals are also different in bankruptcy. Appeals often require the posting of a supersedeas bond,[195] which can be an onerous undertaking for the appellant even in normal conditions. In a bankruptcy, however, if an appeal of the plan confirmation order is taken, the bond might have to be not merely for the appellant's own stake in the case, but for the entire value to be distributed to all parties under the plan—an impossible requirement in many cases.

Likewise, when an appeal can be taken, the delay before it is decided can create liquidity pressure on the parties. This is especially true in bankruptcy, where an appeal affects not just the liquidity of the parties to the appeal, but of all the parties in the bankruptcy. That delay, however, may affect parties in different ways economically. For example, the appeal of any matter prior to plan confirmation is more likely to put liquidity strains on creditors than on the debtor because with the exception of adequate protection payments and critical vendor payments, debtors do not pay creditors during the course of a bankruptcy, and the automatic stay will remain in place, preventing collection efforts against the debtor. An appeal extends the time during which a creditor is not paid anything. Even if the creditor might prevail on the appeal, the lost liquidity in the interim can be preclusive.

The delay from an appeal imposes time-value costs on parties. Outside of bankruptcy this is sometimes addressed through post-judgment interest that will continue to accrue during the appellate process. But such post-judgment interest is inapplicable to many bankruptcy appeals because they do not involve the question of whether one party is liable to another, but rather whether an order of the bankruptcy court authorizing some action by the debtor was proper. There is no special compensation for time-value in most bankruptcy appeals. Instead, the only time-value compensation that applies are the regular bankruptcy rules regarding accrual of postpetition interest, and in bankruptcy unsecured claims do not accrue postpetition interest.[196] That makes any delay of payment, including delay caused by an appeal, painful for the holders of unsecured claims; these creditors will never receive any compensation for delay.

Consider a $100 million unsecured bond issuance at a time when investors could reinvest their funds and get a 3% risk-free return. If an appeal takes a year to resolve, it will cost those bondholders $3 million to take the appeal, even if they are successful. Additionally, the American Rule on fees means that they will pay their own costs, irrespective of outcome. This means that the bondholders will not rationally pursue the appeal that they believe

195. FED. R. BANKR. P. 8007(c).

196. *See* 11 U.S.C. § 502 (detailing specific rules and requirements for interest claims in bankruptcy proceedings).

will take a year to resolve if their expected gain is less than $3 million plus legal costs. The lack of compensation for time-value serves as a substantial disincentive for litigation in bankruptcy.

Secured claims do accrue postpetition interest, but only until their equity cushion in their collateral is exhausted.[197] Delay can result in the erosion of an equity cushion such that the creditor will cease to be compensated for delay. All of this pressures appellants to either settle or to sell their claim, rather than vindicate their rights.

D. Doctrinal Obstacles to Appellate Review

Cost and delay render bankruptcy appeals unattractive, and review and remedies can be limited. In many instances, though, there is not even a right to take an appeal. A pair of bankruptcy doctrines operate to prevent many appeals.

1. Requirement of a "Final Order."—First, appeals generally cannot be taken unless they are of "final judgments, orders, [or] decrees."[198] Appeals, however, must be taken within 14 days of the entry of a final order.[199] There is a lack of clarity, however, regarding exactly what constitutes a final order, and the consequences of misidentification are serious. As the Supreme Court has observed, "An erroneous identification of an interlocutory order as a final decision may yield an appeal over which the appellate forum lacks jurisdiction. Conversely, an erroneous identification of a final order as interlocutory may cause a party to miss the appellate deadline."[200]

The Supreme Court has explained that the analysis of what constitutes a final order looks to whether the ruling was on a "discrete procedural unit within the embracive bankruptcy case."[201] The issue has come before the Supreme Court twice. In the first case, the Supreme Court held that denial of plan confirmation was not an appealable final order,[202] while in the second it held that any decision on a motion to lift the automatic stay motion is a final order.[203]

197. *Id.* § 506(b).

198. 28 U.S.C. § 158(a). Parties may also seek to obtain appellate review of interlocutory orders at the discretion of the district court. *Id.* § 158(a)(3).

199. *Id.* 158(c)(2); FED. R. BANKR. P. 8002(a).

200. Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586–57 (2020) (resolution of a lift stay motion is a final order).

201. *Id.* at 586.

202. Bullard v. Blue Hills Bank, 575 U.S. 496, 498–99, 502–03 (2015) (holding that court order denying confirmation of a proposed Chapter 13 plan is not a final order because it did not conclusively resolve the proceeding because an amended or new plan could still be proposed).

203. *Ritzen Grp.*, 140 S. Ct. at 586.

The distinction of what is a final order has nothing to do with the relative importance of the bankruptcy court's ruling; the denial of plan confirmation can be every bit as momentous as a plan confirmation or denial of a lift stay motion. Consider: if a plan is denied confirmation it forces the debtor (or another party) to propose another plan with different terms that might be less favorable for some parties. If the first plan was wrongly denied confirmation, there is no redress for a party that now has less favorable treatment under the new plan. It is stuck with the consequences of the bankruptcy judge's bad decision.

It is unclear how this Supreme Court's "final order" jurisprudence applies to things like denial of a motion to dismiss a case for bad faith filing (because the case can always be subsequently dismissed), denial of a venue transfer motion (because venue can still be subsequently transferred), denial of or confirmation of a DIP financing order (because other financings are not precluded), or the determination of the adequacy of a disclosure statement (because other disclosure statements are not precluded). In any case, the requirement of a final order for a party to be able to take an appeal means that certain extremely important rulings in bankruptcy cases cannot be appealed in any timely fashion.

2. Equitable Mootness.—The final obstacle to bankruptcy appeals is judge-made. By the time there is a final order that can be appealed and the appellate court actually hears the appeal, the appeal might be "equitably moot." As the Second Circuit has explained, "Equitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented."[204] An appeal being equitably moot does not necessarily mean that it is moot in the constitutional sense; a live dispute between the parties might still remain.[205] Instead, as the Third Circuit has clarified, "[T]he term 'prudential forbearance' more accurately reflects the decision to decline hearing the merits of an appeal because of its feared consequences should a bankruptcy court's decision approving plan confirmation be reversed."[206]

The equitable mootness doctrine expresses a "Humpty Dumpty" concern: once money starts flowing under a plan, courts are reluctant to reverse anything central to the plan because it's impossible to put Humpty-Dumpty back together again.[207]

204. Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005).

205. *In re* Tribune Media Co., 799 F.3d 272, 277 n.3 (3d Cir. 2015).

206. *Id.*

207. *See, e.g.*, Castaic Partners II, LLC v. Daca-Castaic, LLC (*In re* Castaic Partners II, LLC), 823 F.3d 966, 968 (9th Cir. 2016) ("Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to 'unscramble the eggs.'").

The equitable mootness doctrine was originally intended to protect parties that relied on a plan having become effective—buyers, financiers, and recipients of distributions under the plan. Finality lets creditors get on with their lives, enabling them to spend distributions they receive without fear of those funds being clawed back because of an appeal.[208] It also facilitates reorganizations by encouraging post-confirmation investment in the debtor by ensuring that investors can have confidence in the effect of the confirmation order.[209]

Every circuit has embraced the equitable mootness doctrine in some form, although its application varies.[210] Equitable mootness presents an extreme obstacle to appeals, because bankruptcy plans tend to close quickly. It is generally imperative that large financial transactions close quickly. Large transactions, including bankruptcy plans, often involve financing. That financing must be committed in advance, but having it sitting on hold is expensive and risks market condition changes that give the financiers the right to exit the deal.

While there is usually a business case for a rapid closing and quick effective date of a plan, debtors have also weaponized the doctrine, taking care that plans go effective—and money starts changing hands—as soon as possible after confirmation.[211] This puts pressure on any party that seeks to appeal plan confirmation (or any other order that becomes final upon plan confirmation) to post an enormous supersedeas bond, possibly covering not just its own economic interest in the appeal, but the entire amount of value distributed under the plan, to stay the effectiveness of the plan pending appeal. The bonding requirement will frequently be economically impossible or impracticable for the would-be appellant.

Appeals of the confirmation order of Purdue Pharma's bankruptcy plan are still pending as of the writing of this Article. The possibility remains that the appeals will ultimately be found to be equitably moot. If the Purdue appeal avoids equitable mootness, however, it would be the exceptional case; numerous other cases never get appellate review on their merits because of the doctrine.

208. *See* JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1173–75 (9th Cir. 2015) (Smith, J. dissenting) (reasoning that the majority's decision to allow equitable remedies on appeal discourages investors and others from relying on finality of bankruptcy court confirmation orders to invest in properties until all litigation is concluded, causing a years-long delay).

209. *See id.* at 1173 (explaining that investors' ability to rely on the finality of bankruptcy court confirmation orders aligns with the Bankruptcy Code's goal to facilitate successful reorganization).

210. Murphy, *supra* note 13, at 33, 39.

211. Nordhoff Invs. v. Zenith Elecs., 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) (noting that "equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges").

E. Taking Stock of Limited Appellate Review in Bankruptcy

Bankruptcy suffers from a lack of effective appellate review because no part of the system is designed to be conducive of appellate review. Instead, both the Bankruptcy Code and prudential doctrines go out of their way to protect reliance interests at the expense of meaningful appellate review and remedies.

The lack of effective appellate review in many key bankruptcy situations is problematic in its own right, but lack of appellate review by itself does not inherently favor any party in the bankruptcy system. But when debtors can pick their own judge, as discussed in the following Part, lack of appellate review becomes a decidedly pro-debtor feature upsetting bankruptcy law's careful calibration of debtor and creditor rights.

III. Judge-Shopping in Chapter 11

A. Bankruptcy Venue Rules and "Forum Shopping"

For the past two decades, venue has been among the most controversial topics in business bankruptcy because of allegations that forum shopping in large, complex Chapter 11 cases has "corrupted" the bankruptcy system.[212] Venue is not jurisdictional in federal courts, but having local concerns addressed by a local court plays an important role in the legitimacy of the legal system. Moreover, venue can affect the outcome of a case because it can affect what law applies, the identity of the judge who applies the law, and even the ability of parties to participate in the case.

Bankruptcy filings must be done separately for every corporate entity in a firm. The bankruptcy venue statute permits a business entity debtor to file: (1) in the district in which it has been headquartered for the previous 180 days; (2) in the district in which its principal assets have been located for the previous 180 days; (3) in any district in the state in which it or its general partner has been incorporated for the previous 180 days;[213] or (4) in any district in which one of its affiliates or its general partner or its partnership has filed.[214]

212. *See generally* LOPUCKI, COURTING FAILURE, *supra* note 16 (explaining, for example, that the relaxation of forum shopping rules has led to state courts competing to favor debtor "case placers," eroding protections for creditors and increasing the failure rates of reorganized firms).

213. The statute refers to the "residence" or "domicile" of the debtor. 28 U.S.C. § 1408(1). Corporations are treated as "domiciled" in their state of incorporation. 1 COLLIER ON BANKRUPTCY ¶ 4.02(2)(b) (16th ed. 2020). For a discussion about the history of this interpretation, see LOPUCKI, COURTING FAILURE, *supra* note 16, at 56–57.

214. 28 U.S.C. § 1408. Creditors are not "defendants" in a bankruptcy case, but the minimum contacts doctrine for personal jurisdiction does not apply to their claims anyway because bankruptcy law provides for nationwide service of process. FED. R. BANKR. P. 7004(d).

This system gives debtors tremendous leeway in choosing where to file their bankruptcies. In particular, the ability to "bootstrap" into the venue of an affiliate that has already filed for bankruptcy in a district means that, as long as a single entity within the debtor's corporate structure has a venue connection with a district, every entity in the corporate structure can file in that district. As long as the affiliate's bankruptcy venue is appropriate, the venue for the rest of the entities in the debtor firm's corporate family is appropriate, even if those entities have neither assets nor operations nor incorporation and perhaps not even creditors in the district. The result has been the proliferation of Chapter 11 megacase filings in venues with only a nominal connection to the debtor. In particular, because so many firms are incorporated in Delaware, most large businesses will have the possibility of filing for bankruptcy in Delaware. For example, the Los Angeles Dodgers filed for bankruptcy in Delaware, where the team has an incorporated affiliate, but no assets or operations or even substantial creditors.[215] By one measure, nearly 80% of large, public company Chapter 11 filings in 2020 were forum shopped, in that they were filed in a district other than that of the debtor's headquarters.[216]

B. From "Forum Shopping" to "Judge-Picking"

Historically, forum shopping became about shopping for a favorable judicial district and was primarily a Delaware and SDNY game.[217] The debtor would select Delaware or SDNY and end up with a randomly assigned judge from those districts' rota.

In the past few years, however, a new phenomenon has emerged: district-level forum shopping has changed into outright judge-picking. The key mechanism underlying this change is bankruptcy courts' local rules for case assignment. While the precise workings of local rules vary by court, there are two basic methods for judge-picking.

First, some bankruptcy courts have separate geographical divisions, and local rules assign cases among those geographical divisions on the basis of the address on the debtor's petition. Some of these divisions have but a single judge, so any case assigned to the division is guaranteed to have that judge. These local rules have allowed debtors to pick their judge by listing a mailing address in a particular court division. In some instances, debtors have used

215. *In re* L.A. Dodgers LLC, 457 B.R. 308, 310 (Bankr. D. Del. 2011).

216. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59 (45 of 57 cases in 2020).

217. Originally, bankruptcy forum shopping was as much about shopping for a judge as for a judicial district because there were fewer bankruptcy judges, and some districts, such as Delaware, were one-judge districts. Picking a district was picking a judge in such a situation. By the 2000s, however, the bankruptcy bench had expanded, such that forum shopping was a district-level phenomenon.

short-term office space or even virtual office space to take advantage of these divisional assignment rules.[218]

While, in some districts, debtors have abused divisional assignment rules to engage in judge-picking, in other districts the court itself virtually invites the judge-picking. This second method of judge-picking plays off the "complex case" panels that a few judicial districts have implemented. In a complex case panel system, two or three judges will be designated for hearing all large Chapter 11 cases. In these districts, the debtor is guaranteed to get one of two or three judges. With careful play of the districts' divisional case assignment system or deliberately conflicting out judges by retaining as local counsel law firms that employ family members of a judge, debtors can pick an individual judge.[219]

C. Judicial Competition for Megacases

Good debtor's counsel will, of course, select not just judges whose past rulings indicate that they will favor the debtor on key issues, but judges who have shown that they want to attract megacases to their courtrooms.[220] Most judges do not want to attract additional cases; their dockets are already overflowing. But a handful of bankruptcy judges are perceived as seeking to attract megacases to their courtrooms.[221]

The perception that a judge wants to attract megacases gives the debtor assurance that the judge will go along with the restructuring contemplated by the debtor and not transfer the case based on improper venue or rule against the debtor on significant issues. Among other things, this means that the judge will sign off on major transactions proposed by the debtor, that the judge will extend the debtor's plan exclusivity as long as permitted, and that the judge will refuse to appoint an examiner or a trustee, even if one is allowed as a matter of right by statute.

Thus, the increase in forum shopping predicts the increased bankruptcy hardball. In particular, it predicts the increased use of RSAs (or similar

218. *See, e.g.*, Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J. (Aug. 13, 2020), https://www.wsj.com/articles/companies-lease-offices-in-new-york-suburb-to-pick-bankruptcy-judge-11597311001?mod=flipboard [https://perma.cc/8PL3-HU8C]. For further details, see Levitin, *supra* note 80, at 8, which notes that local rules have encouraged "incredible tactics . . . such as debtors renting short-term or even virtual office space to provide an in-venue address to produce the desired case assignment."

219. *See* Levitin, *supra* note 80, at 26 n.71 ("The easiest way to [pick a judge] is if a judge has a spouse or child who is an attorney. If the debtor engages the judge's family member's firm as local counsel, the judge will be conflicted off the case.").

220. Indeed, as part of the ethical duty of zealous representation, counsel arguably have a duty to judge-shop. *See* Am. Bar. Ass'n, Model R. Prof. Conduct 1.3[1].

221. *See* LOPUCKI, COURTING FAILURE, *supra* note 16, at 20–21 (suggesting possible motivations for judges seeking to attract megacases).

devices such as the term sheet in *Purdue*).[222] Debtors and other case placers know that judges who want megacases will go along with the deal outlined in an RSA, both encouraging them to put ever more aggressive terms in their RSAs and rendering the bankruptcy process little more than an expensive theater of process.

This does not mean that the judge will always rule for the debtor. The judge will sometimes rule against the debtor on noncritical matters or push back on some of the debtor's asks on key matters. Big bankruptcy cases involve dozens of judicial decisions to which the debtor is a party. A judge can rule against the debtor on all sorts of smaller issues—small claims objections, for example—without materially affecting the case. Indeed, a judge can even rule against a debtor on a high profile motion—when the relief sought is not urgent and the debtor is not precluded from revisiting the issue.

Still, if a judge wants to be able to continue attracting cases, the judge must accommodate the debtor on all key issues.[223] The knowledge that some judges want to land big cases provides an implicit guaranty to bankruptcy case placers—primarily debtor's counsel—that the judge will rule their way on all the key issues in the case, and if a judge ever disappoints, the judge will be branded as "unpredictable" and will not get future big case business.

D. *Purdue's Suspicious Case Assignment*

1. How Purdue Got Its Case Assigned to Judge Drain.—The ability to handpick the judge for a bankruptcy has led to apparent abuses of local case assignment rules. The Bankruptcy Court for the Southern District of New York (SDNY) has long had a local rule that assigns all cases where the debtor's address on the bankruptcy petition is in Rockland or Westchester Counties to the one-judge White Plains Division in the New York City suburbs.[224]

222. *See supra* section I(A)(4).

223. *See* LOPUCKI, COURTING FAILURE, *supra* note 16, at 159, 249–50 (noting that a judge who does not rule in favor of debtors on key issues is tagged "unpredictable" and thus a "toxic judge").

224. General Order M-297, *In re* Adoption of Amendments to Local Bankruptcy Rules (Bankr. S.D.N.Y. July 7, 2004) (amending local rule 1073-1(a) and basing case assignment on "the street address of the debtor set forth on the petition"); *In re* Adoption of Local Bankruptcy Rules (Bankr. S.D.N.Y. Mar. 26, 1996) (adopting local rule 1073-1(a) and basing case assignment on the "mailing address of the debtor set forth on the petition"); General Order M-70, *In re* Local Bankruptcy Rules (Bankr. S.D.N.Y. Mar. 19, 1986) (adopting local rule 5(a) and basing case assignment on the "mailing address on the petition"). The current version of the rule, dating from May 22, 2020, bases case assignment on "the principal place of business in the District of the debtor set forth on the petition." Bankr. S.D.N.Y. R. 1073-1(a). A general order of the court now provides that an unspecified percentage of the Chapter 11 cases assigned to White Plains shall go to another specific judge. General Order M-547, *In re* Modification of Assignment of Cases and Proceedings to the Honorable Sean H. Lane (Bankr. S.D.N.Y. Apr. 29, 2020) [hereinafter Modification of Assignments to Judge Lane].

Purdue appears to have abused the local case assignment rule to get its case assigned to Judge Drain. Purdue is headquartered in Connecticut and has a major manufacturing facility in Rhode Island.[225] Purdue's holding company, Purdue Pharma L.P., is a Delaware limited partnership with a set of subsidiaries, all of which are Delaware or British Virgin Island entities.[226] The general partner in the Purdue Pharma limited partnership (and in many of the subsidiaries that are also structured as limited partnerships) is Purdue Pharma Inc., a New York corporation.[227]

Purdue Pharma Inc. is an unusual general partner, as it has no equity interest in Purdue Pharma L.P. or any of the subsidiaries.[228] Instead, it receives a service fee for serving as general partner. This is an arrangement permitted by Delaware law despite being the very antithesis of a partnership interest.[229] While legally a general partner under Delaware law, Purdue Pharma Inc. is nothing more than a contractor for Purdue Pharma L.P.

Based on the New York incorporation of Purdue Pharma Inc., however, Purdue Pharma L.P. and its various affiliates filed their bankruptcy cases in SDNY. Despite this thin connection to New York—a contractor deemed to be a general partner by Delaware law—Purdue's venue complied with the letter of the venue statute.[230]

The local case assignment rule in force when Purdue filed provided for assignment of cases based on "the street address of the debtor set forth on the petition," but only provided assignments for addresses in counties in New York.[231] The SDNY local bankruptcy rule was silent regarding non-New York addresses, but an out-of-jurisdiction debtor could effectively pick the division that its case will be assigned to using the court's Case Management/Electronic Case Files (CM/ECF) system.

When a debtor files for bankruptcy, the only public record is the debtor's petition. But the petition is not the entirety of the information provided with

225. Debtor's Informational Brief, *supra* note 89, at 8; *7 Things RIers Need to Know About Purdue Pharma Filing for Bankruptcy*, GOLOCALPROV NEWS (Sept. 16, 2019), https://www.golocalprov.com/news/7-things-riers-need-to-know-about-purdue-pharma-filing-for-bankruptcy [https://perma.cc/46UG-AXJK].

226. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 17, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 15, 2019) [hereinafter Purdue Voluntary Petition].

227. *Id.*

228. *Id.*

229. DEL. CODE ANN. tit. 6, § 17-401(a) (2018).

230. 28 U.S.C. § 1408(2). Because of the lack of an equity interest, Purdue Pharma Inc. is not an affiliate of Purdue Pharma L.P. under bankruptcy law. 11 U.S.C. § 101(2), but the venue statute treats general partners separately than affiliates. 28 U.S.C. § 1408(2).

231. Bankr. S.D.N.Y. R. 1073-1(a) (2017). The Bankruptcy Court for the Southern District of New York has subsequently amended its case assignment rule so that all Chapter 11 cases involving over $100 million of assets or liabilities are randomly assigned. Gen. Order M-581, *In re Amendment to Local Bankruptcy Rule 10731-1 Relating to Assignment of Mega Chapter 11 Cases* (Bankr. S.D.N.Y. Nov. 30, 2021).

the filing. Additional information is provided in the CM/ECF system.[232] When an attorney files a bankruptcy petition using the CM/ECF website for the SDNY bankruptcy court, the attorney will encounter a prompt to select the appropriate division for the case to be assigned. Case assignment is based in the first instance on the debtor's selection in the CM/ECF system rather than on the information filled out on the petition (which is a .pdf file that the CM/ECF cannot read). Code becomes literally law. Only the petition, however, is visible to other parties or the public. The debtor's entries in the CM/ECF system when filing the case are not visible through the regular PACER docket interface.

The petition for Purdue Pharma Inc.—the venue hook for SDNY—listed the debtor's principal place of business as being in Stamford, Connecticut, and gave no other address. Yet if Purdue indicated on CM/ECF that it was based in Westchester County, New York, it would have its case assigned to the court's White Plains division. That is apparently what Purdue did.[233]

So how did Purdue even claim to be located in Westchester County? On March 1, 2019, Purdue Pharma Inc., changed its official corporate address for service of process from New York City, New York County, New York, where it had been since the company's incorporation in 1990, to White Plains, Westchester County, New York.[234] Purdue has never conducted business at the White Plains address. Purdue could easily have engaged a registered agent for service of process with an address anywhere it wanted in New York state, yet Purdue chose White Plains of all locations.

It is hard to conclude anything other than that Purdue's address change was made in contemplation of bankruptcy.[235] Indeed, on September 15, 2019,

232. Each court operates its own CM/ECF website, so there are variations in information provided among courts.

233. STATE OF N.Y. DEP'T. OF STATE DIV. OF CORPS., STATE RECS., & UNIF. COM. CODE, CERTIFICATE OF CHANGE OF PURDUE PHARMA INC. 1 (Mar. 1, 2019) (declaring that the address of Purdue's registered agent is in White Plains, NY). Despite the requirement under 11 U.S.C. § 107 that "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," the Clerk of the Bankruptcy Court for the Southern District of New York refused my telephonic request on July 21, 2021, for a record of Purdue's CM/ECF filing. The Clerk did confirm, however, that for Purdue's case to be assigned to the White Plains Division, Purdue would have had to select the White Plains Division for its filing in the CM/ECF system.

234. STATE OF N.Y. DEP'T. OF STATE, CERTIFICATE OF INCORPORATION OF PURDUE PHARMA INC. 3 (Oct. 2, 1990); CERTIFICATE OF CHANGE OF PURDUE PHARMA INC., *supra* note 233, at 1; *see generally* Letter from Sen. Tammy Baldwin, Sen. Wis., to the Board of Directors of Purdue Pharma Inc. (Sept. 29, 2020), https://on.wsj.com/3nuW1dC [https://perma.cc/KQ8G-WPG6] ("I ask that Purdue provide information documenting the decision—approved by the board—to change its address to White Plains immediately before filing for bankruptcy.").

235. *See* Adam Levitin, *Purdue Continues to Peddle Malarkey About Why It's in White Plains*, CREDIT SLIPS (July 29, 2021, 9:45 AM), https://www.creditslips.org/creditslips/2021/07/purdue-continues-to-peddle-malarkey-about-why-its-in-white-plains.html [https://perma.cc/JST8-HKJH]

198 days after the change in address—just slightly beyond the 180 days minimum time required in the venue statute for venue to be appropriate—Purdue filed for bankruptcy. Purdue's case was assigned to Judge Drain, the sole bankruptcy judge sitting in White Plains.

Purdue knew it was getting Judge Drain even before it filed. In fact, Purdue was so sure that it was getting Judge Drain that it pre-filled his initials on the captions of motions filed immediately after its petition, before PACER, the court's electronic docket system, had indicated a judicial assignment. Specifically, Purdue Pharma Inc., filed its bankruptcy petition at 11:16 p.m. on September 15, 2019.[236] The petition is a standard form that does not have a place for the debtor to indicate a judicial assignment. PACER automatically generated a case number for the case, but not a judicial assignment. This is evident because the petition does not have a judge's initials indicated on the electronic case number stamp PACER puts on top of the document when filing is accepted.[237]

Purdue Pharma Inc., then filed a motion at 12:28 a.m. on September 16, 2019 for joint administration of all of its affiliates' cases.[238] Unlike the petition, this motion was filed using a form prepared by the debtor. This sort of motion would have been prepared well in advance of the bankruptcy filing; standard bankruptcy practice would be to have all of the "first day" motions prepared substantially in advance of their filing, particularly a ministerial motion like this. The text on the first page of the joint administration motion has a place to indicate a case caption, as is required on all motions filed with the court.[239] The caption has a bracketed blank for the case number because the Davis Polk attorneys could not have known the case number when they prepared the motion, prior to filing the petition. The blank for the case number, however, is followed by the initials indicating the judge:

(suggesting that Purdue changed its address to White Plains to ensure its bankruptcy proceedings would be adjudicated by Judge Drain). In addition, on May 14, 2019, Purdue Pharma, Inc. restated its certificate of incorporation. STATE OF N.Y. DEP'T. OF STATE, RESTATED CERTIFICATE OF INCORPORATION OF PURDUE PHARMA INC. (May 14, 2019). The restated certificate of incorporation specified that a copy of any process served should be sent to the law firm of Davis Polk & Wardell LLP, attention Marshall S. Huebner. *Id.* at ¶ FIFTH. Mr. Huebner, a partner at Davis Polk, is Purdue's lead bankruptcy attorney. Marshall S. Huebner, DAVIS POLK, https://www.davispolk.com/lawyers/marshall-huebner [https://perma.cc/75R4-WGYK].

236. Purdue Voluntary Petition, *supra* note 226.

237. *Id.*

238. Motion of Debtors for Entry of an Order Directing Joint Administration of Chapter 11 Cases, *In re* Purdue Pharma Inc., No. 19-23648 (Bankr. S.D.N.Y. Sept. 15, 2019) [hereinafter Motion of the Debtors].

239. Bankr. S.D.N.Y. R. 9004-2(a).

Case No. 19-[ ](RDD)[240]

"RDD"—Robert D. Drain.

The judge is assigned to a case only *after* the case number is assigned, which requires the filing of a bankruptcy petition. Purdue did not yet know a case number when it drafted the joint administration motion because it had not yet filed the petition. Yet it was so sure it was getting Judge Drain that it even filled in his initials in advance.

2. Why Did Purdue Want Judge Drain?—It appears that Purdue maneuvered its case into White Plains because it wanted Judge Drain to preside over the case. Why specifically, though, did Purdue want Judge Drain?

Purdue claimed that it did not want Judge Drain, so much as it wanted a venue close to its Stamford, Connecticut, headquarters.[241] It is hard to credit this claim. The aggregate convenience of White Plains was ambiguous relative to some of Purdue's other filing options.

Debtors routinely file for bankruptcy in Delaware, for example, despite it being a physically inconvenient venue for them and their attorneys and necessitating the added expense of retaining local counsel. Indeed, debtors' management rarely appear in court. Accordingly, the role of convenience for the debtor's management in filing decisions seems marginal.

A Connecticut venue would have been just as convenient, and also would have guaranteed Purdue a particular judge and the same circuit-level law. Stamford is equidistant in terms of vehicular travel time between White Plains and Bridgeport, Connecticut, where a judge for the Bankruptcy Court for the District of Connecticut sits. The Connecticut bankruptcy court's local rules in effect at the time of Purdue's filing provided that any filing of a debtor based in Stamford went to the Bridgeport judge.[242] Purdue could readily have filed for bankruptcy in Connecticut and had proper venue, but chose not to do so.

Even within SDNY, it is not clear that White Plains is the most convenient venue. Stamford is a commuter suburb of New York City, with

240. Motion of the Debtors, *supra* note 238.

241. *See* Jonathan Randles, *Senator Questions Drugmaker Purdue's Bankruptcy Venue Choice*, WALL ST. J. (Sept. 29, 2020, 8:43 PM), https://www.wsj.com./articles/senator-questions-drugmaker-purdues-bankruptcy-venue-choice-11601426636 [https://perma.cc/BU9E-ADZW] (quoting a Purdue spokeswoman who said, "White Plains is about 15 miles from our corporate headquarters, and is the closest federal bankruptcy courthouse").

242. Bankr. D. Conn. R. 1073-1(a)(1) (revised March 2021 after Purdue's bankruptcy proceedings began but using the same language as 2018 rule) (designating that "those cases in which the Debtor resides or has its principal place of business in Fairfield or Litchfield Counties shall be assigned to the Bridgeport Division").

the main Bowling Green courthouse in Manhattan being readily accessible via a short commuter rail and subway ride from Stamford. More importantly, White Plains is not as convenient as the Bowling Green courthouse for Purdue's counsel at Davis Polk & Wardwell LLP—or any of the other Manhattan-based attorneys involved in the case. The White Plains venue only added cost to the case.[243]

The more plausible reason that Purdue picked Judge Drain is that it was confident that he would not rule against it on any key issue. Purdue could have that confidence because Judge Drain had already signaled his interest in having megacases in his courtroom by virtue of his willingness to accept megacases with dubious venue connections.

Under Judge Drain, White Plains transformed from a sleepy backwater venue into a go-to location for Chapter 11 filings, as debtors realized that they could weaponize the local case assignment rule to steer their cases to Judge Drain if they could claim a Westchester County connection.

Judge Drain is among the most prominent bankruptcy judges in the nation. Prior to going on the bench in 2002, Judge Drain had been a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, a leading national law firm, where he worked on Chapter 11 megacases.[244]

Judge Drain initially sat at the Bowling Green courthouse in Manhattan. As Table 2, below, shows, while sitting at Bowling Green, Judge Drain was assigned 18% of public or large private cases filed in SDNY, more than double his pro rata share among the eight SDNY bankruptcy judges.[245] The discrepancy, however, may be explained, at least in part, by the mere 4%

243. *See* Jeremy Hill & Dawn McCarty, *With $2,300 Phone Calls, Purdue Runs Up Huge Bankruptcy Tab*, BLOOMBERG (May 11, 2021, 7:13 AM), https://www.bloomberg.com/news/articles/2021-05-11/purdue-runs-up-nearly-400-million-in-bankruptcy-adviser-bills [https://perma.cc/3WEJ-YDAH] (describing how Davis Polk billed Purdue $64,000 for taxis, meals, and hotel rooms at Westchester County's Ritz-Carlton, the closest hotel within walking distance of the bankruptcy court in White Plains). Purdue's lead bankruptcy counsel, Marshall Huebner, of Davis Polk & Wardwell, LLP, *see* DAVIS POLK, *supra* note 235, has argued that a Bridgeport, Connecticut venue would have added substantially to the costs of the case because of the need for lawyers to travel from Manhattan, but his argument holds equally true for White Plains. Marshall Huebner, Purdue Pharma: A View from Way Inside (Apr. 11, 2022) (video on file with author) ("Could we have filed in Bridgeport, Connecticut? Sure, that was also available to us . . . it would have made the case unthinkably more expensive because it would have meant all these lawyers and bankers were going up to Bridgeport, Connecticut, every single time we had a hearing . . . .").

244. Robert D. Drain Appointed United States Bankruptcy Judge for the Southern District of New York, DAILY BANKR. NEWS (May 28, 2002), http://bkinformation.com/News/BKIStories/drain.htm [https://perma.cc/XS32-8MKX].

245. *See infra* Table 2. Cases from 2003 are omitted because Judge Drain's megacases assigned in 2003 were originally assigned to other judges. A directionally similar pattern emerges using a broader data set from BankruptcyData.com that covers companies with public securities of any size as well as private companies with over $50 million in assets or liabilities, but excludes single-asset real estate cases and companies whose liability is mainly based on disputed litigation claims. *Bankruptcy Data*, BANKR. DATA, https://www.bankruptcydata.com/ [https://perma.cc/8ASC-B6KV].

share going to Judge Adlai Hardin, Jr., who was the judge sitting in White Plains during those years,[246] and the 0% share going to Judge Cecelia Morris, who was the judge sitting in the Poughkeepsie, New York, courthouse.[247] Other factors that might have boosted the percentage of megacases going to Judge Drain include other judges being conflicted out of some cases and reassignment of cases because of the overload of megacases for certain judges following a dramatic spike in filings in 2001–2003. Accordingly, Table 2 reports case filings only starting in 2004.

Judge Drain moved to White Plains in 2009 when that position became open.[248] Cases only started to indicate a White Plains courthouse address for Judge Drain around November 2009.[249] For the next several years he attracted only 10% of megacase filings in the district—roughly his expected random share.[250] Then, something changed around 2018, and megacases started flocking to Judge Drain's White Plains courtroom.

Thus, between 2018 and 2020, Judge Drain received 62% of megacases filed in SDNY.[251] He would have received a higher percentage had not an order issued by the Chief Judge of the SDNY Bankruptcy Court in 2019 started to divert some White Plains cases to Judge Sean Lane at Bowling Green.[252]

246. *See infra* Table 2.

247. *See infra* Table 2. In other words, the appropriate benchmark for random megacase assignment is more like one-sixth of megacases (17%) than one-eighth of megacases (12%).

248. Bill Heltzel, *Foreign Firms Flock to White Plains to File for Bankruptcy*, WESTCHESTER & FAIRFIELD CNTY. BUS. JS. (Mar. 30, 2017), https://westfaironline.com/87170/foreign-firms-flock-to-white-plains-to-file-for-bankruptcy [https://perma.cc/LV5U-B9TW].

249. *See, e.g.*, Notice of Change of Courthouse for November 12, 2009 Hearing at 1, *In re* APF Grp., Inc., No. 09-23696 (Bankr. S.D.N.Y. Nov. 2, 2009) (informing parties of change of courthouse address to White Plains in November 2009). I have not been able to pinpoint the exact date of Judge Drain's move, but it is immaterial, as no megacases were assigned to him between August of 2009 and October of 2010. *Bankruptcy Data*, *supra* note 245.

250. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59.

251. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59.

252. Modification of Assignments to Judge Lane, *supra* note 224, at 1 (assigning an unspecified percentage of White Plains Division Chapter 11 and Chapter 15 to Judge Sean H. Lane).

Table 2. Assignment of Large, Public Company Bankruptcy Cases in the Southern District of New York[253]

Judge Division / Years	Percentage of Bankr. SDNY Large, Public Company Bankruptcies Assigned to Judge
Hardin White Plains 2004–2008	4%
Morris Poughkeepsie 2004–2009	0%
Drain Bowling Green 2004–2009	18%
Drain White Plains 2010–2017	10%
Drain White Plains 2018–2020	62%

It is not clear exactly what changed to result in a shift of case filings from the Bowling Green rota to Judge Drain in White Plains. Leading megacase Chapter 11 attorneys—who would not speak on the record given their anticipation of future appearances before Judge Drain—suggested a trio of factors, however.

First, in 2014, Judge Drain issued an opinion in *Momentive*[254] that a debtor could satisfy the Bankruptcy Code's cramdown requirements by paying secured creditors the value of their collateral at a below-market interest rate and without payment of any make-whole premium.[255] This decision lowered the cost to debtors of dealing with secured debt and cemented Drain's reputation as a reliably pro-debtor judge.

Second, two of the judges sitting at Bowling Green issued opinions limiting or expressing reluctance to enter third-party releases.[256] These

253. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59.

254. *In re* MPM Silicones, L.L.C., 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), *rev'd* Momentive Performance Materials Inc. v. Bokf, NA (*In re* MPM Silicones, L.L.C.), 874 F.3d 787, 801 (2d Cir. 2017), *subsequent proceeding at* Order on Remand for Determination of Cramdown Interest Rate, *In re* MPM Silicones, L.L.C., No. 14-22503 (Bankr. S.D.N.Y. Apr. 19, 2019).

255. *Id.* at *29–30.

256. *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

decisions made Bowling Green less attractive to case placers because of the risk that they could end up with their cases before these judges.

Third, three new judges starting sitting at Bowling Green in 2015.[257] Their views were still relatively unknown, resulting in less certainty about what would happen if a debtor's case would end up with them.

It is clear, however, that, at least as early as 2013, some debtors were maneuvering to get their cases before Judge Drain, using a range of dubious tactics, including creation of new Westchester County- and Fairfield County-based affiliates,[258] and use of Westchester County mailing addresses for 100

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); SunEdison Memorandum and Order, *supra* note 117, at 16–17 (Bernstein, Bankr. J.) (disapproving of opt-out third-party release).

257. *See* Press Release at 1, Karen Greve Milton, Circuit Executive, Second Judicial Circuit of the United States, U.S. Court of Appeals Appoints New SDNY Bankruptcy Judge (Feb. 11, 2015), https://www.nysb.uscourts.gov/sites/default/files/pdf/021015-SDNY-Bankruptcy-Garrity-PressRelease-FINAL.pdf [https://perma.cc/2G5B-6SWV] (appointing James L. Garrity, Jr. to SDNY Bankruptcy bench at Bowling Green); Press Release at 1, Karen Greve Milton, Circuit Executive, Second Judicial Circuit of the United States, U.S. Court of Appeals Appoints New S.D.N.Y. Bankruptcy Judge (Apr. 6, 2016), https://www.nysb.uscourts.gov/sites/default/files/pdf/040616-SDNY-Bankruptcy-Vyskocil-PressRelease-FINAL.pdf [https://perma.cc/SAJ4-G57Z] (appointing Kay Vyskocil to S.D.N.Y. Bankruptcy bench at Bowling Green); Press Release at 1, Karen Greve Milton, Circuit Executive, Second Judicial Circuit of the United States, U.S. Court of Appeals Appoints New SDNY Bankruptcy Judge (Feb. 27, 2015), https://www.nysb.uscourts.gov/sites/default/files/pdf/022715-SDNY-Bankruptcy-Wiles-PressRelease-FINAL.pdf [https://perma.cc/J4PX-PSFV] (appointing Michael E. Wiles to SDNY Bankruptcy bench at Bowling Green).

258. *E.g.*, Entity Information: Excel Maritime Carriers LLC, N.Y. DEP'T. OF STATE, DIV. OF CORPS., https://apps.dos.ny.gov/publicInquiry/#search (search "Excel Maritime" under "EntityName"; then click "Corporations" and "LimitedLiabilityCompany"; then click "Search the Database"; then click on "Excel Maritime Carriers LLC" and follow hyperlink to page) (debtor organized in New York, Dec. 14, 2012); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 6, 8, *In re* Excel Mar. Carriers LLC, No. 13-23059 (Bankr. S.D.N.Y. July 1, 2013) [hereinafter Excel Maritime Voluntary Petition] (affiliates based in Liberia); Entity Information: New Cotai Ventures, LLC, N.Y. DEP'T. OF STATE, DIV. OF CORPS., https://apps.dos.ny.gov/publicInquiry/#search (search "New Cotai Ventures" under "EntityName"; then click "Corporations" and "LimitedLiabilityCompany"; then click "Search the Database"; then click on "New Cotai Ventures, LLC" and follow hyperlink to page) (debtor formed Sept. 27, 2018); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* New Cotai Ventures, LLC, No. 19-22910 (Bankr. S.D.N.Y. May 1, 2019) (debtor filed bankruptcy petition in New York); Entity Information: Maxcom USA Telecom, Inc, N.Y. DEP'T. OF STATE, DIV. OF CORPS., https://apps.dos.ny.gov/publicInquiry/#search (search "Maxcom USA" under "EntityName"; then click "Corporations" and "LimitedLiabilityCompany"; then click "Search the Database"; then click on "MaxCom USA Telecom, Inc." and follow hyperlink to page) (debtor incorporated in New York, June 12, 2019); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 14, *In re* Maxcom USA Telecom, Inc., No. 19-23489 (Bankr. S.D.N.Y. Aug. 19, 2019) (parent is Mexican entity); Entity Information: Internap Technology Solutions, Inc., N.Y. DEP'T OF STATE, DIV. OF CORPS., https://apps.dos.ny.gov/publicInquiry/#search (search "Internap Tech" under "EntityName"; then click "Corporations" and "LimitedLiabilityCompany"; then click "Search the Database"; then click on "Internap Technology Solutions, Inc." and follow hyperlink to page)

square foot short-term office space or even virtual offices.[259] In fact, some of the same addresses have appeared on multiple debtors' petitions.[260] The resort to these sorts of sham transactions reflects debtors' desire to have their cases heard by Judge Drain.

In all, between 2008 and 2021, Judge Drain has heard twenty-nine cases involving non-single-asset real estate debtors with at least $50 million in liabilities. Few judges in the country have heard more large cases during this time.[261] Yet only three of twenty-nine cases involved firms with their headquarters in Westchester or Rockland Counties.[262] The other twenty-six of those cases were shopped into his courtroom.[263] Thus, 90% of the

(debtor incorporated in New York, Feb. 24, 2020); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 18–19, *In re* Internap Tech. Sols., Inc., No. 20-22393 (Bankr. S.D.N.Y. Mar. 16, 2020) [hereinafter Internap Voluntary Petition] (affiliates all based in Virginia).

259. *See* Randles, *supra* note 218 (detailing Senator Tammy Baldwin's request for Purdue to turn over information discussing the company's decision to change its New York address to White Plains); Excel Maritime Voluntary Petition, *supra* note 258, at 1 (777 Westchester Ave., Suite 101, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Ultrapetrol (Bah.) Ltd., No. 17-22168 (Bankr. S.D.N.Y. Feb. 6, 2017) (mailing address of 445 Hamilton Ave., White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Roust Corp., No. 16-23786 (Bankr. S.D.N.Y. Dec. 30, 2016) (777 Westchester Ave., Suite 101, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Ezra Holdings Ltd., No. 17-22405 (Bankr. S.D.N.Y. Mar. 18, 2017) (mailing address of 75 South Broadway, Office 489, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Com. Envelope Mfg. Co., Inc., No. 18-22177 (Bankr. S.D.N.Y. Feb. 2, 2018) (Cenveo) (777 Westchester Ave., Suite 111, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Glob. A&T Elecs., Ltd., No. 17-23931 (Bankr. S.D.N.Y. Dec. 17, 2017) (listing principal place of business as 11 Martine Ave., 12th floor, White Plains, NY, the address of a law firm); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* FULLBEAUTY Brands Holdings Corp., No. 19-22185 (Bankr. S.D.N.Y. Feb. 3, 2019) (mailing address of 50 Main Street, Suite 1000, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Sungard Availability Servs. Cap., Inc., No. 19-22915 (Bankr. S.D.N.Y. May 1, 2019) (mailing address of 50 Main Street, Suite 1014, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Empire Gen HoldCo, LLC, No. 19-23006 (Bankr. S.D.N.Y. May 19, 2019) (50 Main Street, Suite 1063, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Deluxe (Del.) Can. Holdings Corp., No. 19-23773 (Bankr. S.D.N.Y. Oct. 3, 2019) (50 Main Street, Suite 1014, White Plains, NY); Internap Voluntary Petition, *supra* note 258, at 1 (50 Main Street, Suite 1000, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Phone Trends, Inc., No. 20-22475 (Bankr. S.D.N.Y. Apr. 14, 2020) (50 Main Street, Suite 1000, White Plains, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Jason Indus., Inc., No. 20-22766 (Bankr. S.D.N.Y. June 24, 2020) (mailing address of 777 Westchester Ave., Suite 101, White Plains, NY).

260. *See supra* note 259. These addresses are 777 Westchester Avenue, White Plains, New York (four petitions) and 50 Main Street, White Plains, New York (six petitions). *Supra* note 259.

261. Since 1979, only ten other bankruptcy judges in the whole country have presided over more large, public bankruptcy cases than Judge Drain. *UCLA-LoPucki Bankruptcy Research Database*, *supra* note 59.

262. *See infra* Figure 1.

263. *See infra* Figure 1.

megacases that Judge Drain has heard had no business being in his courtroom.

The shopping into Judge Drain's courtroom involved a range of methods, some plainly legal and others using more questionable methods:

- Four cases were shopped using traditional and plainly legal bootstrapping of venue based on long-existing affiliates.[264]
- Two cases were shopped into Judge Drain's court based on claims of property in Westchester County.[265] Notably, a claim of property in a location is not sufficient for venue; the property must be the debtor's "principal assets,"[266] but no such representation was given in either case. Indeed, in one case, the representation was given on a consolidated basis,[267] but venue and case assignment are not determined on a consolidated basis, but on a debtor-by-debtor basis, so it is unclear if the debtor in the first-filed case, which established venue, had any property in Westchester County.
- Four cases involved bootstrapping of venue based on newly created affiliates. These affiliates were created between twenty-two and 217 days before the bankruptcy filing.[268]
- Fourteen cases were assigned to Judge Drain based on addresses in short-term office space, virtual offices,[269] or registered agent addresses.[270] Two of those cases also involved newly created affiliates.[271]

264. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 2, 4–6, *In re* TBS Shipping Servs., Inc., No. 12-22224 (Bankr. S.D.N.Y. Feb. 6, 2012); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 2, 4, *In re* Stir Crazy Café W. Nyack, LLC, No. 13-22093 (Bankr. S.D.N.Y. Jan. 25, 2013); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 2, 5–6, *In re* N.Y. Radiation Therapy Mgmt. Servs., LLC, No. 17-22769 (Bankr. S.D.N.Y. May 25, 2017); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 2, 5–6, *In re* Windstream Bus. Holdings, LLC, No. 19-22310 (Bankr. S.D.N.Y. Feb. 25, 2019).

265. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 4–5, *In re* IBC Sales Corp., No. 12-22051 (Bankr. S.D.N.Y. Jan. 11, 2012); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 4–5, *In re* Juniper Bond Holdings I LLC, No. 14-22504 (Bankr. S.D.N.Y. Apr. 13, 2014) [hereinafter Juniper Voluntary Petition].

266. 28 U.S.C. § 1408(1).

267. Juniper Voluntary Petition, *supra* note 265, at 1, 4–5.

268. *See supra* note 258.

269. *See supra* note 259.

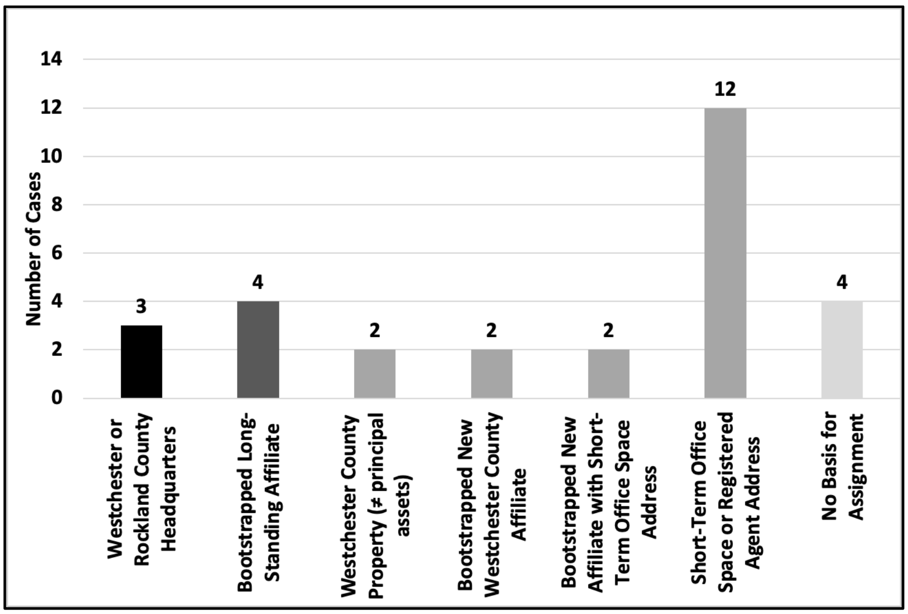
270. *See supra* notes 233–35 and accompanying text.

271. Excel Maritime Voluntary Petition, *supra* note 258, at 10; Internap Voluntary Petition, *supra* note 258, at 7, 9–10.

- In four cases there was no obvious basis for a White Plains assignment,[272] and in two of those, there was no basis for a Southern District of New York venue.[273] It is unclear how these cases would have been assigned to Judge Drain unless the debtors indicated that the White Plains division was the appropriate venue on the CM/ECF system.

The chart below summarizes the case-assignment basis for the twenty-nine megacases that Judge Drain has heard in White Plains.

Figure 1. Basis for Venue of Non-Single Asset Real Estate Cases with at Least $50 Million in Debt Before Judge Drain, 2011–2021[274]



272. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 6, *In re* dELiA*s, Inc., No. 14-23678 (Bankr. S.D.N.Y. Dec. 7, 2014) (debtor's address is in New York City, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Tops Mkts., LLC, No. 18-22277 (Bankr. S.D.N.Y. Feb. 21, 2018) (debtor's address is in Erie County, NY, in the Western District of New York). *See also infra* note 273.

273. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, 15, *In re* 2008 Broadway, Inc., No. 15-23006 (Bankr. S.D.N.Y. Dec. 12, 2010) (Great Atlantic & Pacific Tea Co.; debtor's address is in New Jersey and debtor's name refers to a property in New York City, NY); Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1, *In re* Sears, Roebuck & Co., No. 18-23537 (Bankr. S.D.N.Y. Oct. 15, 2018) (debtor's address is in Hoffman Estates, Illinois).

274. *Bankruptcy Data*, *supra* note 245; *see supra* notes 258–59, 264–65.

While Judge Drain is a smart and hardworking jurist, debtors have not been flocking to his courtroom because he is a great judge.[275] Debtors have sought out Judge Drain because they think he will be a great judge *for them*. The best evidence of this is that the debtors in four of the shopped cases sought—and received—confirmation in a matter of days, arguably in contravention of the *Federal Rules of Bankruptcy Procedure*.[276] There is no opportunity for a judge to do anything but get out of the way and rubber stamp a case that proceeds that quickly.

By the time Purdue filed its case in White Plains in 2019, it was clear from the megacase filing pattern that the Chapter 11 megacase bar believed that Judge Drain was happy to attract megacases and would grant rulings favoring debtors.[277] Once the case placers, such as debtors' counsel, believe that a judge has signaled interest in attracting megacases,[278] they believe they have a general assurance that the judge will not rule against them on any significant issue; if the judge did, the judge would not be able to attract megacases in the future because the judge would be tarred as "unpredictable."

---

275. Judge Drain has come under substantial criticism (including in this Article) for his conduct in the Purdue Pharma bankruptcy. On September 28, 2021, shortly after confirming Purdue's bankruptcy plan, Judge Drain announced his retirement from the bench, effective as of end of June 2022. Press Release, 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.

276. *See supra* note 83. Only a handful of judges have been willing to confirm cases so quickly. *See* Levitin, *supra* note 80, at 43–44 (finding that eleven of fourteen non-compliant high-speed bankruptcies went through three judges, including Judge Drain). Judge Drain is the only judge to claim that the *Federal Rules of Bankruptcy Procedure* allow for notice periods to run prior to the filing of the bankruptcy. *Id.*

277. *See* Peg Brickley, *Storied Chicago Retailer Sears Picks a Court, and a Judge, in New York*, WALL ST. J. (Oct. 29, 2018), https://www.wsj.com/articles/storied-chicago-retailer-sears-picks-a-court-and-a-judge-in-new-york-1540834808 [https://perma.cc/M7QW-JKTT] (explaining that Judge Drain endorsed favorably the concept of "critical vendor payments" for retailers aiming to maintain links to large suppliers).

278. There is no single telltale "signal" that a judge is interested in attracting megacases, but there are several signs. First is the background of the judge. Judges who were previously big shot Chapter 11 lawyers do not go on the bench because they are eager to handle the bankruptcy of the lawn care company, the dry cleaner, or the dentist. They want to deal with big cases in a position of respect vis-à-vis their former peers in the megacase bankruptcy bar.

Second, judges send signals about their willingness to be accommodating of the megacase bar. These signals include formal courtroom procedures and standing orders that indicate that the judge sees himself as being in a service profession. For example, is the judge willing to schedule hearings around the debtor attorneys' convenience? Will the judge run hearings late, rather than adjourn for a later date? Will the judge give out his cellphone number? Additionally, judges develop a reputation about whether they will give debtors' counsel a hard time about approving first day orders or professional fees.

Third are the judge's past rulings on controversial issues in general. Is this the sort of judge who will approve transactions that push the envelope? Will the judge even entertain motions for the appointment of a trustee or an examiner in a megacase? A judge who will readily approve examiners or who will push back at aggressive transactions will rapidly develop a reputation as problematic.

Whether the Chapter 11 megacase bar was in fact correct about Judge Drain is beside the point, although his actions in Purdue are consistent with the bar's evaluation. What mattered was that Judge Drain was perceived as eager to have megacases in his courtroom and willing to accommodate debtors to attract them.

The general belief that Judge Drain wanted to attract megacases might have been sufficient reason alone for Purdue to file in White Plains, but it might have had more specific reasons as well. In particular, Judge Drain had also previously indicated a position on two key issues for Purdue.

First, Judge Drain had previously exhibited hostility to appointing an independent examiner. A bankruptcy examiner is an independent third party appointed by the court to investigate "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."[279] Appointment of an examiner may be made upon motion of any party in interest if such appointment is in the best interests of creditors, equityholders, and the estate, or if the debtor has fixed, unliquidated, unsecured debt owing to an outsider that are not for goods, services, or taxes.[280]

An examiner would have been very problematic for the Sacklers and thus for Purdue's ability to cut a deal with them because an examiner would have produced an extensive report on the Sacklers' dealings with Purdue. An examiner's report would start to shed some light on the Sacklers' culpability, which would have helped fix creditor expectations regarding the Sacklers' financial liability. Such a report would have constrained Purdue's negotiating space, and it would have been difficult for Purdue to cut a deal until the examiner's report was finished. Purdue, however, had good reason to believe that Judge Drain would not be receptive to a motion to appoint an examiner.

In the *Loral Space*[281] bankruptcy, Judge Drain refused to appoint an examiner, even when appointment was not discretionary under the Bankruptcy Code, preferring to be reversed on appeal.[282] A willingness to appoint an examiner would make Judge Drain a much less attractive judge for debtors worried about an independent party poking around their financial affairs.

Judge Drain's comments at a hearing in *Purdue* underscore that his *Loral* ruling was not a fluke, but his comments indicated that he believed that other mechanisms create equivalent transparency to that produced by an

279. 11 U.S.C. § 1104(c); *see also* Daniel J. Bussel, *A Third Way: Examiners as Inquisitors*, 90 AM. BANKR. L.J. 59, 63 n.9 (2016) (citing and explaining 11 U.S.C. § 1104(c)).

280. 11 U.S.C. § 1104(c).

281. *In re* Loral Space & Commc'ns Ltd., 313 B.R. 577 (Bankr. S.D.N.Y. 2004), *rev'd and remanded sub nom. In re* Loral Space & Commc'ns, Ltd., No. 04-civ-8645, 2004 WL 2979785 (S.D.N.Y. Dec. 23, 2004).

282. *Id.* at 587.

examiner.[283] As it happened, Judge Drain did ultimately appoint an examiner at the very end of the case, but he did so reluctantly and only because he was concerned about negative press. After explaining why he thought an examiner was inappropriate, Judge Drain nevertheless appointed one because: "I am concerned that if I do not appoint[] an examiner, the next press release will be, 'Court refuses to appoint examiner to determine whether process was fair,' and not add, 'because there was no evidence submitted to show that it wasn't.'"[284]

Yet, even while appointing an examiner, Judge Drain restricted the scope of the examination to the question of the independence of the Special Committee from the Sacklers, imposed a very abbreviated timeline on the examination, and limited the examiner to being a single attorney with a budget of just $200,000, which made it all but impossible for the examiner to litigate even a single inappropriate privilege claim.[285]

Second, Judge Drain was one of three sitting bankruptcy judges in SDNY who has written a published opinion approving of a nondebtor release,[286] and two of the judges sitting at Bowling Green had issued opinions

283. Purdue July 2020 Hearing, *supra* note 102, at 56–57. Judge Drain stated in *Purdue* that:

> 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.

Id.

284. Transcript of June 16, 2021 Omnibus Hearing at 170–71, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 17, 2021).

285. *Id.* at 171.

286. *In re* MPM Silicones, L.L.C., 2014 Bankr. LEXIS 3926, *99–105 (Bankr. S.D.N.Y. Sept. 9, 2014) (Drain, Bankr. J.) (allowing third-party release); Sungard Hearing, *supra* note 118, at 58–68; *see also supra* note 117. Judge Drain had also allowed third-party releases in other cases. *See, e.g.*, Lynch v. Lapidem Ltd. (*In re* Kirwan Offices S.À.R.L.), 592 B.R. 489, 503–12 (S.D.N.Y. 2018) (McMahon, J.) (upholding nonconsensual nondebtor release in plan confirmed by Judge Drain).

refusing or limiting third-party releases.[287] The nondebtor release of the Sacklers in exchange for a financial contribution to Purdue's estate was, of course, the lynchpin of the RSA-like term sheet that mapped out the proposed deal at the start of the case and that ultimately served as the template for the confirmed plan. Given the centrality of the release of the Sacklers to its plan, Purdue needed confidence that its case would be heard by a judge who would grant the release.[288]

Ultimately, Purdue's actual motivations for picking Judge Drain are irrelevant. Purdue's selection of its own judge lends an appearance of impropriety, and its selection of a judge who had previously indicated his favorable positions on what would obviously be key issues in its bankruptcy only furthers the appearance of impropriety. No matter how Judge Drain in fact behaved, Purdue's judge-picking created an appearance of impropriety that indelibly tainted the entire case.

The appearance of possible impropriety is concern enough. The standard for the judicial system should be a neutrality above reproach.[289] As Judge Drain himself noted, "This is not a normal case. It's a very public case. . . . Public perception here is more important than in most cases."[290]

As it happens, Judge Drain gave Purdue all the major rulings it sought, namely the injunction of suits against the nondebtor Sacklers, approval of DOJ settlement despite the inclusion of the poison pill, and ultimately confirmation of a plan with a release of the Sacklers, and denial of certification of an appeal of the confirmation order directly to the Second Circuit.[291] He also shielded Purdue by making it clear that he would not appoint an examiner, and, when finally backed into a corner on the issue because of intense negative press coverage, Judge Drain authorized an examiner subject to unprecedentedly stringent limitations.

287. *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); SunEdison Memorandum and Order, *supra* note 117, at 16–17 (Bernstein, Bankr. J.) (disapproving of opt-out third-party release).

288. *See* Brickley, *supra* note 277 ("No one wants a $300 million roll of the dice, according to lawyers inside and outside of Sears's bankruptcy case who were asked to explain the attraction of White Plains, and its one-judge court.").

289. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2020) ("A judge shall . . . avoid impropriety and the appearance of impropriety.").

290. Renae Merle & Lenny Bernstein, *Purdue's Choice of NY Bankruptcy Court Part of Common Forum Shopping Strategy, Experts Say*, WASH. POST (Oct. 10, 2019), https://www.washingtonpost.com/business/2019/10/10/purdues-choice-ny-bankruptcy-court-part-common-forum shopping-strategy-experts-say/ [https://perma.cc/XWS4-LPCG].

291. Order Denying Motions for Certification of a Direct Appeal to the United States Court of Appeals for the Second Circuit Pursuant to 28 U.S.C. § 158(d), *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 15, 2021).

Purdue ended up receiving meaningful appellate review,[292] but this was an unexpected occurrence that Judge Drain could not have anticipated and in fact attempted to stymie. Meaningful appellate review could hardly have been expected: the district judge to whom the appeal was expected to be assigned[293] had both previously held an appeal from one of Judge Drain's decisions to be equitably moot[294] and had upheld Judge Drain's previous nonconsensual release of a creditor's claims against a nondebtor.[295] An observer of the case prior to the fall of 2021 would have predicted that any appeal of a plan confirmation order would likely be ruled equitably moot.

Judge Drain, however, hardly acted to encourage meaningful appellate review. He refused to stay the effectiveness of the plan.[296] Judge Drain also denied the motions of the United States Trustee and various creditors to certify the case for a direct appeal to the Second Circuit. The bankruptcy appellate statute authorizes certification of direct appeals if there is no controlling circuit or Supreme Court law *or* a case "involves a matter of public importance."[297] Not only was there no Second Circuit opinion addressing the constitutionality of nondebtor releases—only dicta in an opinion about when such releases might be allowed[298]—but also it is hard to imagine a case involving a matter of greater public importance than the nondebtor releases in Purdue, which go to the heart of an enormous nationwide public health crisis. Nevertheless, Judge Drain held that the case did not involve "a matter of public importance" because there was, in his view, already controlling circuit law on nondebtor releases.[299] By denying

292. As of the writing of this Article, the District Court has reversed the plan confirmation order, *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021), and the appeal of the District Court's ruling to the Second Circuit is pending. *See* Order Granting the Petition for Leave to Appeal and Motion to Expedite, Purdue Pharma, L.P. v. State of Washington, No. 22-110 (2d Cir. Jan. 27, 2022) (ECF No. 103).

293. *See* Letter from Judge Colleen McMahon to Marshall S. Huebner of Davis, Polk & Wardwell LLP, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. June 29, 2021) (ECF No. 3093) (disabusing Purdue's counsel of the idea that Purdue matters would automatically be assigned to Judge McMahon).

294. Tsuei Yih Hwa v. Frontier Communs. Corp. (*In re* Frontier Communs. Corp.), 2021 U.S. Dist. LEXIS 107413, *21–25 (S.D.N.Y. June 8, 2021) (holding appeal to be equitably moot).

295. Lynch v. Lapidem Ltd. (*In re* Kirwan Offices S.A.R.L.), 592 B.R. 489, 503–12 (S.D.N.Y. 2018) (McMahon, J.) (upholding nonconsensual nondebtor release).

296. Order Denying Motions for Stays Pending Appeal, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Nov. 29, 2021) (ECF No. 4177).

297. 28 U.S.C. § 158(d)(2)(A).

298. Metromedia Fiber Network, 416 F.3d at 141 (holding an appeal to be equitably moot, but noting that "While 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.").

299. Order Denying Motions for Certification of a Direct Appeal to the United States Court of Appeals for the Second Circuit Pursuant to 28 U.S.C. § 158(d), *In re Purdue Pharma L.P.*, No. 19-23649-rdd (Bankr. S.D.N.Y. Oct. 15, 2021) (ECF No. 3956); Transcript of October 14, 2021 omnibus hearing, at 195–96, *In re Purdue Pharma L.P.*, No. 19-23649-rdd (Bankr. S.D.N.Y.).

certification of the appeal directly to the circuit, Judge Drain ensured that the appeal would be heard by a district judge who had previously signed off on nondebtor releases. And later, after several objecting states settled out of the appeal, Judge Drain took the unusual step of calling the United States Trustee's continuation of its appeal of his plan confirmation order "reprehensible."[300]

To be sure, Judge Drain's rulings can be defended as the good faith efforts of a judge doing his level best to apply the law correctly to the facts before him. Nonetheless, by maneuvering to ensure that Judge Drain would hear its case, Purdue cast an unavoidable aspersion on the judge. Judge-picking was the original sin in Purdue's bankruptcy, and it tainted the entire case with an appearance of impropriety.[301]

When debtors can pick their judges in a system that usually precludes meaningful appellate review, the entire system—including good and well-meaning judges—becomes suspect.

It is this undermining of confidence in the fairness of the Chapter 11 system that makes judge-picking so invidious. That this can happen in perhaps the most socially important bankruptcy case should be a call for a reform of the bankruptcy venue and appellate system.

E. The Lack of Consequences for Manufacturing Venue

The irony of Purdue's picking of Judge Drain is that neither Judge Drain nor Purdue's law firm, Davis Polk & Wardwell LLP, were strangers to forum shopping being problematic. In 2005, Jacksonville, Florida, grocery store chain Winn-Dixie filed for bankruptcy in the Southern District of New York. Winn-Dixie had claimed New York venue by incorporating a New York

300. Transcript of Mar. 9, 2022 omnibus hearing, at 105, *In re Purdue Pharma L.P.*, No. 19-23649-rdd (Bankr. S.D.N.Y.) ("At some point, the U.S. Trustee actually has to look out for the interest of people that are actually getting money under this plan and not just throwing ways to kill it. This is just—I just find this reprehensible.").

301. Judge Drain has understandably bridled at this suggestion, lambasting the United States Trustee for stating "the result [regarding nondebtor releases] may well be different depending on what district you go to, what state you go to, and which particular courtroom you go to." Transcript of October 14, 2021 omnibus hearing, at 67, *In re Purdue Pharma L.P.*, No. 19-23649-rdd (Bankr. S.D.N.Y.). Judge Drain responded by calling the statement an "innuendo," suggesting the the United States Trustee was "casting aspersions on the integrity of any judge, any bankruptcy judge in the circuit," and demanding that the United States Trustee retract the statement. *Id.* 67–79.

Judge Drain's umbrage, however, is belied by charts produced by law firms that track differences among Southern District of New York and Delaware bankruptcy judges on nondebtor releases. *See, e.g.*, Skadden, *New Trends Emerge for "Consensual" Third-Party Releases in the Southern District of New York and District of Delaware* (2020), at https://www.skadden.com/-/media/files/publications/2020/01/2020-insights/newtrendsemergeforconsensualthirdpartyreleasesinth.pdf [https://perma.cc/2K4S-9TPV].

affiliate shortly before filing.[302] The case was assigned to Judge Drain. After creditors moved to transfer the case, Judge Drain transferred the venue of grocery store chain Winn-Dixie from his courtroom to the Middle District of Florida.[303]

For years, *Winn-Dixie* stood as the only example of a major case getting transferred due to manufactured venue. While Judge Drain did transfer the case, it is notable that despite the undisputed fabrication of venue, he refused to find that the case had been filed in bad faith, and all of his pre-transfer orders stood, allowing Winn-Dixie to keep part of the benefits of its maneuver.

Prior to 2021—well after Purdue's bankruptcy filing—the only other major case to have its venue transferred because of manufactured venue was *Patriot Coal*.[304] Patriot, represented by Marshall Huebner of Davis Polk, subsequently Purdue's lead bankruptcy attorney,[305] was headquartered in St. Louis and had subsidiaries in a number of coal states, but none in New York.[306] The month before filing its bankruptcy petition in Manhattan, however, Patriot incorporated two new New York subsidiaries, which it used to claim New York venue.[307] Neither subsidiary had an office in New York.[308] One had a bank account there, and the other an ownership certificate in another subsidiary with the physical certificate held in New York by counsel of a lender as collateral.[309] Judge Shelley Chapman transferred Patriot's case to St. Louis "with considerable regret," as "it would have been a great privilege to preside over these cases,"[310] but like Judge Drain, she declined to find that the case had been filed in bad faith,[311] despite the once again undisputed fabrication of venue.

302. Transcript of Apr. 12, 2005 Omnibus Hearing at 166–67, *In re* Winn-Dixie Stores, Inc., No. 05-11063 (Bankr. S.D.N.Y. Apr. 25, 2005).

303. Order Transferring Venue of the Debtors' Bankruptcy Cases to the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division, *In re* Winn-Dixie Stores, Inc., No. 05-11063 (Bankr. S.D.N.Y. Apr. 13, 2005).

304. *In re* Patriot Coal Corp., 482 B.R. 718 (Bankr. S.D.N.Y. 2012). In 2021, Judge Craig Whitley of the Bankruptcy Court for the Western District of North Carolina transferred the venue of LTL Management, LLC, a freshly created company to which its parent, Johnson & Johnson, had allegedly transferred its talc liabilities, to the District of New Jersey. Order Transferring Case to the District of New Jersey, *In re* LTL Management, LLC, No. 21-30589 (Bankr. W.D.N.C. Nov. 16, 2021) (transferring venue based on convenience of the parties and the interests of justice, including the debtor's manufactured connection with the forum).

305. *See* DAVIS POLK, *supra* note 235.

306. *In re* Patriot Coal Corp., 482 B.R. 718, 729–30 (Bankr. S.D.N.Y. 2012).

307. *Id.* at 726–27.

308. *Id.*

309. *Id.*

310. *Id.* at 755.

311. *Id.* at 744.

Judges' unwillingness to find that wholly manufactured venue is a sign of a bad faith filing and expressions of regret for having to transfer cases with improper venue has emboldened the Chapter 11 bar to engage in all manner of judge-picking behavior by limiting the consequences for doing so.

F. Taking Stock of Judge-Shopping in Bankruptcy

While forum shopping has been with bankruptcy for decades, its newest incarnation, judge-shopping, is far more pernicious. Judge-shopping, facilitated by local court rules, allows debtors not only to pick a district with favorable precedents but also to pick a judge who the debtor believes will be inclined to side with it on key issues in the case.

Judge-shopping would be a problem on its own, but in conjunction with the lack of effective appellate review and debtors' inclination to pursue ever more coercive and overreaching restructuring maneuvers, it has the effect of undermining the basic procedural integrity of the bankruptcy system. A debtor is able to pick a judge it believes will be favorably inclined to rule its way on key issues, even if those decisions push or overstep the boundaries of what is legally permissible, as in the case of Purdue, and then evade appellate review of that judge's decisions. Such a system upsets Chapter 11's carefully calibrated balance between debtor and creditor rights and gives debtors and their favored creditor allies free rein to use bankruptcy to trample disfavored creditors, such as tort victims.

IV. Restoring Chapter 11's Checks and Balances

Chapter 11 is a system that works incredibly well in many regards, and the bankruptcy bench is generally a set of professionals of the highest quality and integrity. The point of this Article is not to cast shade on these hard-working public servants, but to point out a set of systemic features that lead to an inevitably compromised Chapter 11 system that tilts towards debtors and their allied parties (who might themselves be creditors)—DIP financiers and asset purchasers—and very much to the disadvantage of outsider creditors.

Chapter 11 works well because it is a procedural mechanism that carefully balances debtor and creditor rights. There are certainly judges who get overly invested in steering "their cases" to a particular outcome.[312] But the system is able to handle the occasional over-invested judge as long as

312. *See, e.g.*, *"Interventionist" Judge in Eastern Case: Lifland's Style Borders on the Eccentric, Some Lawyers Say*, L.A. TIMES (May, 22, 1989), https://www.latimes.com/archives/la-xpm-1989-05-22-fi-488-story.html [https://perma.cc/AJS2-7U7G] (describing how a Manhattan bankruptcy judge was accused of being "interventionist" and of having "lost his impartiality" during a major case).

cases are more or less randomly assigned and there is effective appellate review.

Random case assignment and appellate review are essential checks and balances for the bankruptcy system. The whole balance of the system is upset when forum shopping and lack of effective appellate review enable debtors to pick judges and evade review of overreaching maneuvers.

The current situation is a sort of "reverse trilemma" in that fixing any one of the three problems—coercive restructuring transactions, limited appellate review, or judge-shopping—will go a substantial way to ameliorating the negative effects of the other two. In this regard, it is not necessary to fix all three problems to restore Chapter 11 to a more appropriate balance.

A. Venue and Case Assignment Rules

Correcting district level forum shopping problems requires amendment of the bankruptcy venue statute. While bipartisan legislation addressing the district-shopping problem has recently been introduced in Congress,[313] attempts to reform the venue system have repeatedly failed over the past couple of decades.[314] The opposition of the Delaware (and sometimes New York) Congressional delegations as well as a President from Delaware likely dooms current attempts.

While wholesale venue reform is unlikely, local case assignment rules can be amended without legislation. Bankruptcy courts can themselves address this problem by adopting random intra-district judge assignment rules for all Chapter 11 cases excluding those under subchapter V (small business reorganizations). This means jettisoning complex case assignment rules and jettisoning intra-district division case assignment rules for Chapter 11s that do not involve small businesses. Indeed, subsequent to this Article circulating in pre-publication form, the Bankruptcy Courts for both the Southern District of New York and the Eastern District of Virginia—two of the most popular filing destinations for large bankruptcy cases—adopted local rules that require random case assignment for all "megacases"—cases involving over $100 million in assets or liabilities.[315]

Whatever benefits might exist from a system that assigns all complex cases to a particular judge or set of judges, the system will collapse from its own success. If too many debtors file in the district to take advantage of the

313. Bankruptcy Venue Reform Act of 2020, S. 5032, 116th Cong. (2020); Bankruptcy Venue Reform Act of 2019, H.R. 4421, 116th Cong. (2019).

314. *See, e.g.*, LOPUCKI, COURTING FAILURE, *supra* note 16, at 123 (discussing a failed attempt at bankruptcy forum reform in the 1990s).

315. Gen. Order M-581, *supra* note 231; Standing Order 21-21, *In re* Judge Assignment Protocol for Mega Chapter 11 Cases (Bankr. E.D.Va. Nov. 30, 2021).

ability to pick the judge, the judge or judges assigned the complex cases will end up overworked.[316]

Likewise, the best argument for assigning cases within a district to particular divisions is that it reduces burdens on and costs for the debtor firm and its attorneys of having to travel to an inconvenient location within the district. But the employees of the debtor firm itself rarely need to make court appearances, and even in the largest districts the travel is not so burdensome. All complex cases should be randomly assigned, rather than directed to particular judges.

B. *A Federal Court of Bankruptcy Appeals*

More important than venue reform, however, is the need to reform the bankruptcy appellate process so that appeals can be taken more easily and quickly. Bankruptcy cases are different from all other types of cases because they involve a court order approving a major financial transaction—a plan or possibly an asset sale or financing agreement. Closing speed is critical for large financial transactions; if they are stayed pending a long appeal, the transactions will often collapse. Likewise, unwinding them is not a practical option, as the Bankruptcy Code's limitation of remedies for sales and DIP financings and the equitable mootness doctrine recognize. Regular federal courts of appeals are unlikely to hear bankruptcy appeals with the sort of expedition required.

A similar problem exists for corporate merger and acquisition transactions. Those transactions do not need court approval, unlike major bankruptcy transactions, but they still present the same difficulty for judicial review, whether by an initial court or an appellate court. The solution devised by the Delaware Chancery Court is straightforward: it will enjoin a challenged M&A transaction, quickly hear the case, and render an opinion a few days later.[317] This process is possible in part because the Chancery Court is comprised of jurists who are deeply versed in Delaware corporate law and can therefore grasp the issues before them more quickly and with briefing that does not need to explain basic concepts.

Bankruptcy needs an equivalent specialized court that can hear appeals rapidly. Specifically, this Article calls for the creation of a Federal Court for

316. Lynn LoPucki and Joseph Doherty have identified judicial experience as an important factor in reorganization success. Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 990–92 (2015). The importance of experience suggests that random assignment may not be optimal. It is impossible, however, to always assign large cases to experienced judges, as there will be no opportunity for rookies to gain experience. Appointment to the bankruptcy bench—a non-partisan process undertaken by each Circuit Court of Appeals, 28 U.S.C. § 152(a)(1)—should serve as the screen to ensure judicial quality.

317. *See* Del. Ch. R. 65(b) (providing an expeditious method for the issuance of a temporary restraining order or preliminary injunction to prevent an imminent irreparable injury).

Business Bankruptcy Appeals, that would operate much like the Court of Appeals for the Federal Circuit does for patent claims. Such a specialized court could operate with more abbreviated procedural deadlines, enabling rapid appellate review for Chapter 11 cases.[318] Moreover, an expert court would be more likely to take a holistic view of the operation of the Bankruptcy Code within its practice context, as opposed to the textualist approach of non-expert courts, which often results in greater confusion about the law, rather than clarity.

Furthermore, a single national court of appeals for bankruptcy cases would result in greater uniformity of bankruptcy law.[319] The current appellate system in many circuits has bankruptcy appeals first heard by district courts. As a result of the initial appeal to the district court, fewer cases reach circuit courts of appeals. Unlike a circuit court ruling, those district court appellate decisions, however, do not bind the bankruptcy courts in the other districts in the circuit or even other district court judges in the same district.

Several circuits utilize a bankruptcy appellate panel (BAP) of three bankruptcy judges in lieu of appeals to the district court. This has the advantage of expertise and potentially circuit-wide uniformity,[320] but there is no guarantee of speed from appeals to a BAP.

Both Professor Daniel Bussel and Professor Samir Parikh have previously proposed a special court of bankruptcy appeals, and Professor Parikh has also called for reforming the appellate procedure rules to speed up appeals challenging venue.[321] Professor Parikh's proposal is targeted at enhancing the uniformity of bankruptcy law to reduce the incentive to forum shop among districts. Yet the very existence of such a court could also speed up the appellate process.

One concern about a special court of bankruptcy appeals is that it would amplify, rather than diffuse, the problems endemic to the Chapter 11, as the

318. If the court were an Article III court, it could satisfy the constitutional requirement of Article III review for so-called "Stern" claims with a *de novo* review of the bankruptcy court's findings of fact and law. *See Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 28 (2014) (reaffirming the holding in *Stern* that Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain claims).

319. A federal court of bankruptcy appeals would render the Supreme Court less likely to rule on bankruptcy matters. In the author's view, that is a feature, not a bug of the proposal, because the Supreme Court's textualist approach is poorly suited to the complex ecosystem of bankruptcy law, so its rulings often end up creating more confusion in the law than clarity.

320. Only one circuit has held that BAP decisions are not binding precedent on individual bankruptcy judges. *In re* Expert S. Tulsa, LLC, 842 F.3d 1293, 1296 (10th Cir. 2016). The Sixth Circuit, however, has adopted a local rule that provides that BAP decisions may be precedential. 6th Cir. Bankr. App. Panel R. 8024-1(b); *see also* Bank of Maui v. Estate Analysis, 904 F.2d 470, 472 (9th Cir. 1990) (declining to decide the authoritative effect of a BAP decision). In any event, BAP decisions are treated as significant authority.

321. Bussel, *supra* note 12, at 266 (noting that a national bankruptcy court of appeals would eliminate strategic forum shopping); Parikh, *supra* note 16, at 202, 206.

judges likely to be appointed to the court would come from the very milieu in which those practices have become standard operating procedure. To the extent this is a problem, it could be mitigated by having existing circuit judges serve rotating stints on a special nationwide Chapter 11 bankruptcy appeals panel, rather than constituting a new court of appeals itself, although such a structure would undercut the expertise and speed of a specialized court.

Alternatively, a court of bankruptcy appeals could be structured as a special nationwide BAP, with bankruptcy judges from across the country serving terms on the panel. The use of bankruptcy judges would ensure the expertise of the court, while a draw from the national pool of judges would ensure that the judges would not simply come from the handful of courts where most megacases are filed and who are acculturated to (and might have approved) some of the more questionable restructuring practices.

Irrespective of the precise structure of the appellate system for bankruptcy, there should be, at the very least, expedited appellate review (without requiring the posting of a supersedeas bond, but with sanctions for frivolous appeals) for certain types of orders, such as DIP financing, asset sales, plan confirmation (or denial), injunctions against collection attempts on nondebtors, and releases of nondebtors for prepetition behavior. This would allow some of the most critical—and controversial—issues in bankruptcy cases to undergo appellate review, helping relieve some of the problems caused by judge-shopping.

Conclusion

Chapter 11 has been a successful and widely imitated system for restructuring financially distressed businesses. Its success is due to its careful balancing of debtor and creditor rights. The advent of local rules that facilitate judge-shopping combined with the lack of meaningful appellate review, however, means that there is no longer an effective procedural check on debtors together with favored creditor allies pursuing coercive and overreaching transactions and plans. Debtors will always be incentivized to push for ever more aggressive restructuring terms. The Chapter 11 system will only hold up, however, if courts are able to push back when appropriate.

If debtors can continue to pick their judges, and those judges are not subject to serious appellate review, abuses of Chapter 11 system will get worse. Bankruptcy has the tendency to normalize the extraordinary, as the approval of a transaction in unusual circumstances in one case becomes the basis for approving the transaction in more mundane circumstances in subsequent cases. In this manner, any precedents developed in the current lopsided bankruptcy system—including Purdue's poison pill—will likely become normalized and assimilated into normal bankruptcy practice, resulting in a world in which debtors and favored creditor allies routinely use bankruptcy to take advantage of disfavored creditor constituencies. That sort of arrangement was the hallmark of the pre-New Deal restructuring world.[322] The current Chapter 11 is heir to the New Deal legislation designed to push back against that sort of arrangement.[323] Purdue's poison pill provides a preview of what a return to that world will look like. Unless bankruptcy courts rescind their local rules that enable judge-shopping and Congress acts to strengthen appellate review in bankruptcy, more creditors will have to swallow similarly bitter pills.

322. *See generally*, Securities & Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees* (1937).

323. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 124–25 (2001) ("[I]t is clear that the Chandler Act played a crucial role in the overall New Deal Project."); Bratton & Levitin, *supra* note 9, at 1600–01 ("The [Trust Indenture Act of 1939] was a New Deal reaction to the excesses of a Depression-era out-of-court restructuring market . . . .").