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Response

First in Time; First Is Right: Comments on Levitin's *Poison Pill*

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Adam Levitin has made a career of being a first mover. He was, for example, among the first to raise concerns about crypto bankruptcies[1] and fintech "rent-a-charters;"[2] and early to consider deeply the tension inherent in the notion that bankruptcy courts, subject to an elaborate statutory scheme, could also be "courts of equity."[3] His new paper in the *Texas Law Review, Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances,* continues this pattern, being among the first to articulate systematically the pathologies that underlie the *In re Purdue Pharma L.P.*[4] Chapter 11 reorganization, perhaps the most normatively difficult Chapter 11 case ever filed.

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1. *See generally* Adam Levitin, *Not Your Keys, Not Your Coins: Unpriced Credit Risk in Cryptocurrency*, 101 TEXAS L. REV. (forthcoming Mar. 2023).

2. *See* Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and the Evasion of Usury Laws*, 71 DUKE L.J. 329, 345 (2021) (providing the first detailed profile of a fintech lender in the scholarly literature).

3. Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 9–10 (2006). He was not the first to raise the issue, of course. *See, e.g.*, Marcia Krieger, "*The Bankruptcy Court is a Court of Equity": What Does that Mean?*, 50 S.C. L. REV. 275, 297 (1999).

4. 633 B.R. 53 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

Being an early mover has both benefits and costs.[5] In the case of *Poison Pill*, the benefits are that Levitin helps to articulate and frame difficult and important problems in ways that will advance discussion. His diagnosis is the first, and it is largely right. The cost is simply that he could not know what would come next. This Response provides additional context about the *Purdue Pharma* case and subsequent developments in it, to sharpen and advance his arguments about the legal and social costs of the case. I close with some thoughts about what, concretely, could have happened to legitimate the *Purdue Pharma* Chapter 11 reorganization and to ameliorate the worst of its potential implications.

I. The Argument

The core of Levitin's argument is that Congress built into Chapter 11 a set of "checks and balances" designed to protect the interests of both debtors and creditors, but the system has become "unbalanced in recent years because of three independent developments": (1) corporate debtors "weaponiz[e]" bankruptcy; (2) there is little effective appellate review; and (3) "the problem of forum shopping, . . . not just among districts, as has long been the case, but for individual judges."[6] He argues that the interaction of these trends "is far more problematic than any single trend in isolation,"[7] that they "are corrosive of the fundamental legitimacy of the Chapter 11 bankruptcy system,"[8] and may thus threaten "[b]asic due process," which "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."[9]

Although Levitin offers some solutions, the main contribution of the paper is to show the connections between these three problems and how they can produce a case like *Purdue Pharma*. I am sympathetic to Professor Levitin's analysis of the problem but also think the problem may be even more dire than he suggests. His may be among the first words on *Purdue Pharma*, but they will not be the last.[10]

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5. First movers can create and sometimes control markets, but later entrants may be able to capitalize on developments in technologies, tastes, and so on. For general discussions about first movers, see Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41 (1988); Roger A. Kerin, P. Rajan Varadarajan & Robert A. Peterson, *First-Mover Advantage: A Synthesis, Conceptual Framework, and Research Propositions*, J. MKTG., Oct. 1992, at 33 (1992).

6. Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEXAS L. REV. 1079, 1083–84 (2022).

7. *Id.* at 1088.

8. *Id.* at 1083.

9. *Id*.

10. Obviously, others have made valuable contributions about the case. *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1188–91 (2022), Ralph Brubaker, *Mandatory*

II. Purdue Pharma and the Problem of Social Debt

In my view, *Purdue Pharma* is an extreme example of a "social debt" bankruptcy. In other work, I characterize social debt as financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and accountability.[11] In addition to other opioid makers (e.g., Endo[12]), examples include organizational liability for large-scale sexual assault (e.g., over thirty Catholic organizations,[13] The Boy Scouts of America[14]), and alleged contributions to the crisis of gun violence (e.g., InfoWars[15]).

A. *The Problems of Social Debt Bankruptcies—Transparency and Accountability*

The most important questions in social debt bankruptcies will involve transparency and accountability: how did the misconduct occur, and do we have some confidence that those responsible have, in fact, been held accountable in a legally and socially acceptable way? Often, these questions will be answered by collateral litigation, such as individual prosecutions or mass tort litigations.

Purdue Pharma is notorious because there are credible concerns that the Sacklers and their agents triggered and profited—massively—from an opioid

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Aggregation of Mass Tort Litigation in Bankruptcy, 131 YALE L.J.F. 960, 961–62 (2022); Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 411–12 (2021); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness,* 96 AM. BANKR. L.J. 247, 255, 310 (2022); Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 63 (2022). *Poison Pill* advances this work by connecting the dots in order to show a larger and deeper pattern.

11. *See* Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers,* 97 AM. BANKR. L.J. (forthcoming 2023) [hereinafter Lipson, *Rule of the Deal*].

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

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

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

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

crisis that has taken over half a million lives.[16] As is well known, the Sacklers owned and controlled Purdue Pharma, the company whose drug, OxyContin, is considered the "taproot" of the opioid crisis.[17] The company pled guilty to federal drug marketing crimes in 2007, after which the Sacklers took over $10 billion out of the company, offshoring more than half of it.[18] The company, still under the Sacklers' ownership and control, allegedly persisted in its criminal ways, seeking to "turbocharge" the opioid market with the help of consulting firm McKinsey as late as 2013.[19]

A key part of Purdue's bankruptcy was the company's second agreement to plead guilty to federal drug crimes, crimes which would also have been committed while Purdue was owned and controlled by the Sacklers.[20] As discussed further below, that deal contains the "poison pill" in the title of Levitin's paper.

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16. The larger story of the Sacklers, Purdue, and the opioid crisis has been the subject of several books and two television shows. *See, e.g.*, BETH MACY, DOPESICK: DEALERS, DOCTORS AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018); GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA (2020); PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021); *The Crime of the Century* (HBO 2022), https://www.hbo.com/documentaries/the-crime-of-the-century [https://perma.cc/4E72-FY2S]; *Dopesick* (Hulu 2021), https://press.hulu.com/shows/dopesick [https://perma.cc/NP8Z-68E3].

17. Purdue Pharma was a "key player" in the opioid crisis because OxyContin was the "taproot" of that crisis. *See* Patrice Taddonio, *Revisit Purdue Pharma's Role in the Opioid Crisis*, PBS: FRONTLINE (Sept. 12, 2019), https://to.pbs.org/2SUGYyn [https://perma.cc/YH6N-92PG]; Soo Youn, *New York Adds Owners of Company that Makes OxyContin to Lawsuit Against Opioid Makers, Distributors*, ABC NEWS (Mar. 28, 2019, 7:14 PM), https://abcnews.go.com/US/york-adds-owners-company-makes-oxycontin-lawsuit-opioid/story?id=62012633 [https://perma.cc/3CNP-H9NB] (quoting from New York Attorney General Letitia James's lawsuit). The social effects of the opioid crisis, and Purdue Pharma's role in it, are well-documented. *See, e.g.*, Carolina Arteaga & Victoria Barone, A Manufactured Tragedy: The Origins and Deep Ripples of the Opioid Epidemic (Oct. 6, 2022) (unpublished manuscript) (on file with author).

18. As District Judge Colleen McMahon explained when she vacated the bankruptcy court's controversial order confirming Purdue's reorganization plan:

> The Sacklers upstream[ed] some $10.4 billion out of the company between 2008 and 2017, which, according to their own expert, substantially reduced Purdue's "solvency cushion." Over half of that money was either invested in offshore companies owned by the Sacklers or deposited into spendthrift trusts that could not be reached in bankruptcy and off-shore entities located in places like the Bailiwick of Jersey.

In re Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

19. Press Release, House Comm. on Oversight and Reform, Maloney and DeSaulnier Release Documents Following DOJ Settlement with Purdue and Sackler Family (Oct. 27, 2020), https://oversight.house.gov/news/press-releases/maloney-and-desaulnier-release-documents-following-doj-settlement-with-purdue [https://perma.cc/HTX5-EFP6].

20. Letter from Rachael A. Honig, Att'y for the U.S., U.S. Dep't Just., to Patrick Fitzgerald, Esq. et al., Couns. For Purdue Pharma L.P., Skadden, Arps, Slate, Meagher & Flom LLP, Plea Agreement with Purdue Pharma L.P. 8 (Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1329576/download [https://perma.cc/L3X9-WPDN]; Settlement Agreement Between the United States and Purdue Pharma L.P., U.S. Dep't Just. 4 (Oct. 21, 2020), https://www.justice.gov/opa/press-release/file/1329571/download [https://perma.cc/F3WM-3F98].

Unlike other social debt bankruptcies, however, it appears that the Sacklers were able to stave off collateral proceedings that might have provided transparency and accountability through scorched-earth litigation, secret settlements, or both.[21] Thus, many opioid survivors and activists feared that the Sacklers were using the bankruptcy of their company, Purdue Pharma, to "get away with it."[22] Here, the "it" is not necessarily crimes, because we don't know who actually did the bad deeds. But that is the point. To me, the "it" is the use of Chapter 11 to obtain practical exoneration through so-called nondebtor releases (NDRs) without the transparency and accountability mechanisms of adversary civil or criminal proceedings.

B. *The Sackler "Releases" in Form and Substance*

As is well known, the bankruptcy court in *Purdue* granted to the Sacklers—and hundreds of other individuals and entities—broad "releases" of all civil liability associated with Purdue's marketing, labeling and sale of opioids.[23] A nondebtor release "operate[s] as a bankruptcy discharge arranged without a filing and without the safeguards of the [Bankruptcy] Code."[24] The district court vacated the bankruptcy court's order confirming Purdue's plan of reorganization because nondebtor releases are not statutorily

21. The Sacklers often sought to keep the terms of their settlements confidential. *See* David Armstrong, *STAT Goes to Court to Unseal Records of OxyContin Maker*, STAT (Mar. 15, 2016), https://www.statnews.com/2016/03/15/stat-seeks-oxycontin-records/ [https://perma.cc/QXA8-8W4N]; *see also* Purdue Pharma L.P. v. Boston Globe Life Sciences Media, LLC, No. 2016-CA-000710-MR, 2018 WL 6580507, at *28 (Ky. Ct. App. Dec. 14, 2018) (ruling in STAT's favor); *see also* Andrew Joseph, *Intensely Private, Deeply Invested: Richard Sackler's Role in Promoting OxyContin Emerges in Court Documents*, STAT (Feb. 22, 2019), https://www.statnews.com/2019/02/22/a-secretive-billionaires-role-in-promoting-oxycontin-emerges-in-new-documents/ [https://perma.cc/89D5-HHN7]. Bankruptcy Judge Drain's later claim that "no one has tried to hide the Sacklers' settlement history" was implausible. *See In re* Purdue Pharma L.P., 633 B.R. 53, 111 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

22. Sway, *How the Sacklers Got Away With It*, N.Y. TIMES (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/opinion/sway-kara-swisher-patrick-radden-keefe.html?showTranscript=1 [https://perma.cc/GCJ6-6WAU]; Gerald Posner & Ralph Brubaker, *The Sacklers Could Get Away With It,* N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/opinion/sacklers-opioid-epidemic.html [https://perma.cc/Z63B-T48H].

23. *In re* Purdue Pharma L.P., 633 B.R. 53, 97–98 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

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

authorized.[25] An appeal is now pending before the Second Circuit (and may have been published by the time you read this).[26]

The bankruptcy court in *Purdue Pharma* insisted that the release of the Sacklers was not an adjudication on the merits.[27] This is true only in the formal sense that none of the important judicial mechanisms of transparency and accountability embedded in our system—such as motion practice and a trial on the merits—led to it. It is false as a substantive matter because the outcome is the same as a judgment for the Sacklers: the releases in *Purdue Pharma* would permanently enjoin all civil efforts to hold them accountable for their role in the opioid crisis. It has the force of a judgment on the merits, without any of the process required by law to reach a judgment on such an important question.[28]

One response may be that prosecutors could, in theory, still pursue criminal charges against members of the Sackler family. This, too, is formally true because the *Purdue Pharma* plan has no direct effect on any potential criminal prosecutions.[29] The DOJ's settlement in *Purdue* included a release of the Sacklers for civil liability, but not criminal liability. Thus, the argument would go, the release of the Sacklers does not really evade mechanisms of transparency and accountability. The most serious such mechanism—criminal prosecution—remains.

That, however, ignores political reality. State attorneys general were among the most active and aggressive creditors in the *Purdue Pharma* case. Some, like Massachusetts Attorney General Maura Healey, vowed to hold

25. *In re* Purdue Pharma, L.P., 635 B.R. 26, 37 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

26. Daniel Gill, *Purdue Pharma Bankruptcy Plan Appeal Goes to Second Circuit*, BLOOMBERG (Jan. 28, 2022, 9:32 AM) https://news.bloomberglaw.com/bankruptcy-law/purdue-pharma-bankruptcy-plan-appeal-goes-to-second-circuit [https://perma.cc/NL28-J4F7]. In the interest of transparency, I note that Professor Levitin and I each filed amicus briefs in support of the district court's ruling (and thus against the bankruptcy court's approval of the Sackler releases). *See Brief of Professor Adam J. Levitin as Amicus Curiae in Support of Appellees and Affirmance. In re* Purdue Pharma L.P. et al. (2d Cir. Mar. 18, 2022) Doc. No. 594; *Brief of Amici Curiae Law Professors [Lipson and Foohey] in Support of Appellees Regarding the "Abuse" Standard, In re* Purdue Pharma L.P. et al. (2d Cir. Mar. 18, 2022) Doc. No. 639.

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

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

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

the Sacklers personally accountable for the allegations against them, a credible threat given that Massachusetts's direct lawsuit against them arguably spurred the bankruptcy filing. "It's critical," she said when Purdue first went into bankruptcy, "that all the facts come out about what this company and its executives and directors did, that they apologize for the harm they caused, and that no one profits from breaking the law."[30] As explained further below, the facts did not come out in time for creditors to vote on the plan. The Sacklers did not really apologize, and they will keep about $6 billion in profits from conduct which Purdue itself has agreed was criminal. Yet Healey, like all other state attorneys general, ultimately capitulated to various deals proposed by the Sacklers. Having agreed to take Sackler money under Purdue's plan, states may find it politically difficult to prosecute the Sacklers. Why would they bite the hand that has promised to feed them?

That leaves only the United States as a potential prosecutor. But the U.S. government has been equivocal, to put it diplomatically. The Trump administration appeared to support the Purdue–Sackler deal and thus entered into the DOJ settlements. Those settlements were a critical step toward the releases. But the Biden administration, through the United States Trustee program, leads the charge against them. One administration played a key role in making the releases happen; the other seeks to undo them.

The implications of this intramural tension have yet to be developed, but the point for now is clear: Only the United States has the capacity to credibly prosecute those members of the Sackler family who aided and abetted the corporate crimes to which Purdue has agreed to plead guilty. And it has so far chosen to do nothing about it. This is, unfortunately, understandable. To do so—to prosecute the Sacklers—would risk angering many state attorneys general, all of whom have apparently accepted some sort of deal with the Sacklers.

Which is presumably exactly what the Sacklers want. The *Purdue Pharma* Chapter 11 case was, for all practical purposes, a way for the Sacklers to achieve the "global peace" they long sought, and that would include peace with prosecutors as well as personal injury lawyers.[31] It was

30. *See* Sandhya Raman, *Attorneys General Split on Potential Purdue Pharma Settlement*, CQ ROLL CALL, Sept. 12, 2019, 2019 WL 4316546. New York Attorney General Letitia James was quoted as saying: "A deal that doesn't account for the depth of pain and destruction caused by Purdue and the Sacklers is an insult, plain and simple. As attorney general, I will continue to seek justice for victims and fight to hold bad actors accountable, no matter how powerful they may be." *Id.*

31. Before bankruptcy, it appears that Purdue and Sackler settlements would, in fact, release criminal claims as well. Shortly before Purdue commenced its Chapter 11 case, it settled with the State of Oklahoma. That settlement agreement released both the debtors and the Sacklers (and all other individuals associated with Purdue) from both criminal and civil liability. *See* Consent Judgment as to the Purdue Defendants at 6, Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Dist. Ct. Mar. 26, 2019) (releasing "future civil, criminal, derivative,

thus used to circumvent the ordinary legal processes that should have held the Sacklers and other agents of Purdue Pharma accountable. Those processes are hardly perfect—they rarely produce the "neutral" determinations "solely on [the] merits" that Professor Levitin has in mind.[32] But they don't have to, because the threats of exposure and adjudication—transparency and accountability—out of the control of alleged malefactors (here, the Sacklers) are enough, or at least they are the best we can do.

C. *Chapter 11: Debtor Control and Creditor Acceptance*

Contrast that with Chapter 11. In Chapter 11, the corporate debtor presumptively remains in possession of its assets and functionally controls the course of the case.[33] The debtor's management has the exclusive power to propose a plan of reorganization and to decide whether and who to sue.[34] In *Purdue,* the Sacklers chose these agents before bankruptcy, when they dominated the privately-held company's board of directors (they continue to own its equity as of this writing).[35] So, it is hardly surprising that the Sacklers' designees would give the Sacklers what they wanted in Purdue's bankruptcy.

The extraordinary thing about *Purdue Pharma*—the reason it led to angry demonstrations, outraged episodes of John Oliver's *Last Week Tonight*,[36] and the popularity of shows like *Dopesick*—is the fact that the case had neither individual prosecutions nor a meaningful investigation or report on the underlying allegations. Those allegations involve some of the most lethal misconduct in present memory. It is, to my knowledge, the only social debt bankruptcy in which there were neither individual prosecutions nor an independent report on the merits. Even the bankruptcy of Dalkon Shield

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regulatory, administrative, or any other claims any Releasor may have under any applicable state, regulatory, or administrative law or statute"). Purdue entered into a similar agreement with Kentucky. Settlement Agreement and General Release at 6, Kentucky *ex rel.* Conway v. Purdue Pharma L.P., No. 07-CI-01303 (Pike Cir. Ct. Ky. Dec. 22, 2015). *Cf. In re* Purdue Pharma, L.P., 635 B.R. 26, 36 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) ("[T]he Sacklers offered to contribute toward a settlement, but if—and only if—every member of the family could 'achieve global peace' from all civil (not criminal) litigation . . . .").

32. *See* Levitin, *supra* note 6, at 1083.

33. *See* 11 U.S.C. § 1107.

34. *Id.*; *see also* 11 U.S.C. § 1121.

35. *See* Lipson, *Rule of the Deal*, *supra* note 11. Although an examiner later found that these directors acted "independently" during the bankruptcy, he was prohibited from investigating prebankruptcy conduct, when the Sacklers sought and appointed them. Report of Stephen D. Lerner, Examiner at 3, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. July 19, 2021), Doc. No. 3285; Order Appointing an Examiner Pursuant to 11 U.S.C. § 1104(c) at 2–3, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. June 21, 2021), Doc. No. 3048. Moreover, he had a budget of $200,000 which, in a case where professionals are billing hundreds of millions of dollars, is unlikely to do much. *See infra* note 118.

36. *See, e.g.*, Last Week Tonight with John Oliver (HBO)*, Opioids III: The Sacklers,* YOUTUBE (Aug. 8, 2021), https://www.youtube.com/watch?v=uaCaIhfETsM [https://perma.cc/3HSA-MYJQ].

maker A.H. Robins, said to provide the sordid roadmap for *Purdue*, had an independent examiner.[37] To use Chapter 11 as the Sacklers and Purdue would erodes the integrity of the Chapter 11 system, as Professor Levitin shows, and threatens all other legal mechanisms, at least where the alleged wrongdoers are wealthy and sophisticated.

The hardest question about the case—and one to which I will return—is, Why did creditors accept this? Why did they not push back more? In other words, if the system is out of balance and *Purdue Pharma* is so toxic, why did creditors permit it to get this way?

Proponents of the Purdue–Sackler plan—including, facially, the thousands of creditors who voted for it—would doubtless argue that the system did work, that it is not out of balance, and that no better outcome was plausible. Judge McMahon's decision vacating the plan confirmation order is, to them, an unfortunate misstep in the effort to achieve the "global peace" the Sacklers have long sought,[38] and for which they agreed to pay about $5.5 billion over 18 years.[39] The demands of the ordinary legal system, the need to hold individuals accountable, are too costly compared to the benefits of opioid abatement funds promised under Purdue's plan.

III. The Poison in the Pill

These are serious objections to *Poison Pill*, and in this Part, I will assess Professor Levitin's argument against them, using the three factors he

37. Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 698–700 (4th Cir. 1989). The A.H. Robins Company made an intrauterine contraceptive device that injured or killed thousands of women. *See* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY ix, 1, 5, 67–68 (1991). Its bankruptcy has been savagely criticized. *See, e.g.*, *id.* at ix–xi. But neither it nor its bankruptcy is as offensive as *Purdue*. Unlike *Purdue*, the company was publicly traded, which may have reduced the founding family's control. *See* William Organek, *"A Bitter Result": Purdue Pharma, A Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361, 405 n.239 (2022). Moreover, an examiner was appointed to oversee the company, providing some independent check on the decision to grant the releases. *See In re* A.H. Robins Co., 86 F.3d 364, 367 (4th Cir. 1996) ("While attempting to reorganize under Chapter 11, Robins managed its affairs and operated its businesses as a debtor-in-possession under 11 U.S.C. §§ 1107 and 1108 with oversight by a court-appointed examiner."). While attempting to reorganize its affairs, Purdue was run by agents retained and approved by the Sacklers.

38. *See supra* note 31.

39. *See* Mediator's Fourth Interim Report at 5, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), Doc. No. 4409; *see also* Jan Hoffman, *Sacklers and Purdue Pharma Reach New Deal With States Over Opioids*, N.Y. TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/health/sacklers-purdue-oxycontin-settlement.html [https://perma.cc/9YUL-AAUM].

considers: forum shopping, bankruptcy "hardball," and inadequate appellate review.[40]

A. *Judge Shopping*

Forum shopping is the most studied and least interesting of the problems Levitin identifies. It refers generally to the idea that plaintiffs' counsel will, and perhaps should, seek whatever forum is most favorable to his or her client. No good lawyer advises her client to run a race uphill, unless there are no better options.

Professor Levitin correctly observes that forum shopping has devolved into a kind of judge shopping, that the difference matters, and that *Purdue* is Exhibit A for those who worry about this phenomenon. Concerns about forum shopping in bankruptcy are decades old, going back to the 1991 finding by LoPucki and Whitford that certain districts—initially, the Southern District of New York and then the District of Delaware—dominated large, complex Chapter 11 reorganizations.[41] Those in control of the debtors' filing would choose particular courts both because of the sophistication of the judges and because the judges would give the insiders—the lawyers in particular—what they wanted, with modest pushback at most.

Forum shopping in Chapter 11 has been a bug (or feature) of the system ever since. LoPucki has gone on to argue, controversially, that court competition of the sort he first documented is evidence of "corruption" and "lawlessness."[42]

The problem is that, while forum shopping may look and be bad, the reality is complicated by the fact that creditors have a variety of tools that can protect them in the event that a corporate debtor is railroading them into a

40. I will consider these out of the order Professor Levitin chose, in part to better map to the analytic and temporal orientation of bankruptcy (debtors shop for judges before they weaponize the process and avoid the risk of appeal).

41. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 12 (1991) ("While conducting an empirical study of the bankruptcy reorganizations of the forty-three largest, publicly held companies to file and complete their cases from 1979 to 1988, we unexpectedly discovered extensive forum shopping.") (footnotes omitted). Douglas Baird sounded the alarm about a different kind of forum shopping—between bankruptcy and nonbankruptcy outcomes—in 1987. Baird observed that "[l]egal rights should turn as little as possible on the forum in which one person or another seeks to vindicate them." Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 822 (1987). Since he now appears to support the sorts of nondebtor releases granted by the *Purdue* bankruptcy court—a form of relief clearly not possible in any other court—he has presumably reconsidered his earlier position. *See Oversight of the Bankruptcy Code Part 1: Confronting Abuses of the Chapter 11 System: Hearing Before the Subcomm. on Antitrust, Com. and Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Douglas G. Baird, Chair, Nat'l Bankr. Conf.).

42. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 138–39 (2005); Lopucki, *supra* note 10, at 250.

hostile bankruptcy court. These include a motion to change venue,[43] as happened recently in *In re LTL Management LLC*,[44] or to dismiss the case entirely, as happened recently in *In re National Rifle Association of America*.[45] Admittedly, such motions are unlikely to succeed since they are often decided by the "shopped" judge.[46] Still, scholars like David Skeel and Ken Ayotte insist that because creditors rarely assert these remedies, they must be willing to accept the dominant venue choices.[47]

There is no easy answer to this debate, but in an important sense, *Purdue Pharma* is outside of it because, as a social debt bankruptcy, it is so extreme. As Professor Levitin points out, Purdue did not merely choose a forum—one of 94 federal judicial districts—but a particular judge, Robert Drain, because he was the only judge sitting in the White Plains (New York) division at the time.[48] "Purdue appears to have abused the local case assignment rule to get its case assigned to Judge Drain," Levitin argues, provocatively.[49]

He recognizes that "Purdue's venue complied with the letter of the venue statute,"[50] but nevertheless argues that seeking Judge Drain in particular was abusive because 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."[51] Purdue wanted Judge Drain, Professor Levitin hypothesizes, because "it was confident that he would not rule against it on any key issue."[52] The key issue, of course, was shielding the Sacklers from litigation.

Professor Levitin's assessment is doubtless correct, but there is more to consider. Every competent lawyer wants the most favorable tribunal, and there have certainly been moments when particular venues had a single judge (e.g., Delaware in the 1990s), producing the same effect.[53]

Purdue's judge shopping was abusive for two reasons in addition to those identified by Professor Levitin. First, it was not Purdue that did the shopping—it was the Sacklers. We know this because, as Professor Levitin

43. *See* 28 U.S.C. § 1412 ("A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.").

44. No. 21-30589, 2021 WL 5343945, at *1 (Bankr. W.D.N.C. Nov. 16, 2021).

45. 628 B.R. 262, 264 (Bankr. N.D. Tex. 2021).

46. *See* LoPucki & Whitford, *supra* note 41, at 24–25, 39–40.

47. Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 456–57 (2006) (reviewing LOPUCKI, COURTING FAILURE, *supra* note 42).

48. Levitin, *supra* note 6, at 1133–34.

49. *Id.* at 1132.

50. *Id.*

51. *Id.* at 1134.

52. *Id.* at 1136.

53. *Id.* at 1087 n.20.

points out, the only publicly available evidence of any connection to White Plains was a change of address approved by the board of directors of the debtors' general partner.[54] But the document that did that was not merely a simple change of address. It was an amended and restated charter for the entity, which could only have been approved by the shareholders—the Sacklers.[55] While the Sacklers did not dominate Purdue's board at the moment that the charter amendment was filed, they controlled the board until the fall of 2018, when they chose both bankruptcy counsel (the law firm of Davis Polk & Wardwell LLP) and so-called bankruptcy directors who approved the change of address.[56] In short, if the end game was exoneration for the Sacklers, the opening move was finding agents and a judge who would give the Sacklers what they wanted.

Second, Judge Drain was not merely on record supporting the releases that the Sacklers wanted. He was also a highly managerial judge, who would guide the process toward an outcome he seemed to view as inevitable from the outset: the release of the Sacklers in exchange for some of their ill-gotten gains.[57] In a 1982 article, Judith Resnik argued that judges were increasingly "managerial," inserting themselves directly into the pretrial management of large and complex cases.[58] As "managers," she argued, they "frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review."[59] This presciently foresaw how Judge Drain sought to manage *Purdue Pharma*.

The fact that bankruptcy judges are managerial is not, of itself, news. I made this point over a decade ago,[60] and Melissa Jacoby has elaborated on it.[61] Judge Drain, however, went to extraordinary lengths to assure that the Sacklers' deal would not be killed.

In part, this was reflected in his hostility to those who would challenge deals intended to resolve large and complex cases before him. Earlier, in the

54. *Id.* at 1132–33, 1133 n.234.

55. STATE OF N.Y. DEP'T OF STATE, RESTATED CERTIFICATE OF INCORPORATION OF PURDUE PHARMA INC. (May 14, 2019).

56. *See* Lipson, *Rule of the Deal*, *supra* note 11.

57. "[I]t appears to me to have always been the case and will continue to be the case," Judge Drain observed at a September 2020 hearing, that "a plan in which [the Sacklers] do make a material contribution that satisfies the [S]econd [C]ircuit's test in *In re Metromedia, Inc.* is not only possible but the most likely outcome in this case." Transcript of Sept. 30, 2020, Hearing at 79, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 2, 2020), Doc. No. 2054 (citation omitted).

58. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

59. *Id.*

60. Jonathan C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 657–59 (2008).

61. Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571, 579 (2015).

Sears[62] bankruptcy—which languishes in bankruptcy court to this day—Judge Drain attacked lawyers for vendors who objected to the debtors' plan, accusing them of incompetence.[63] In *Purdue,* counsel for the debtor, Davis Polk, had to be aware that if Judge Drain supported a Sackler-driven deal, there could be no realistic opposition. Judge Drain would not be a neutral adjudicator; he would be a manager, acting more the part of a senior law firm partner.

Thus, Judge Drain was committed to settlement, and not adversarial adjudication, from the outset. He openly mocked calls for transparency and accountability in *Purdue Pharma*. The case was, he said, "about who should pay money."[64] He would "lambaste[]," "cut off," and "yell[]" at those who had the temerity to challenge the deal or how it was constructed.[65]

This may partially answer the question asked by the Skeels and the Ayottes of the world: creditors may not want the debtors' venue choice, but the costs of challenging it, measured in legal fees and the threat of judicial abuse, exceed the benefits of any effort to change it because the request to change it must be made to the judge who wants the case in the first place.[66]

Professor Levitin recognizes the underlying relational dynamic here: Judge Drain and the BigLaw insiders would expect to see one another again in other big cases, so outsiders who might disrupt the deal had to be neutralized. Ironically, Judge Drain would not be able to maintain that

62. *In re* Sears Holdings Corp., No. 18-23538 (Bankr. S.D.N.Y. filed Oct. 15, 2018).

63. WYCO Researcher, *Sears Holdings Might Remain in Ch.11 Bankruptcy For Years*, SEEKING ALPHA (Oct. 28, 2019, 9:03 AM), https://seekingalpha.com/article/4299541-sears-holdings-might-remain-in-ch-11-bankruptcy-for-years [https://perma.cc/8KDH-Y32X].

64. Transcript of June 16, 2021, Hearing at 141, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. June 17, 2021), Doc. No. 3094.

65. I was a principal focus of Judge Drain's ire, having sought the appointment of an examiner on behalf of Peter Jackson, whose daughter, Emily, died after ingesting a single OxyContin. *See, e.g.*, Maria Chutchian, *Purdue Pharma Bankruptcy Judge OKs Examiner but Condemns Sackler-Related Attacks*, REUTERS (June 16, 2021, 5:52 PM), https://www.reuters.com/legal/transactional/purdue-pharma-bankruptcy-judge-oks-examiner-condemns-sackler-related-attacks-2021-06-16/ [https://perma.cc/QJB5-Q44V].

66. Like almost all matters in bankruptcy, motions to change venue are subject to standing orders of referral from the applicable district court to the bankruptcy court. *See, e.g.*, M-431 Amended Standing Order of Reference (Bankr. S.D.N.Y. Jan. 31, 2012). In the spring of 2020, after the abusive nature of Purdue's forum shopping became public, the Bankruptcy Court for the Southern District of New York entered a general order providing that an unspecified percentage of Chapter 11 cases assigned to White Plains would 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). The court subsequently amended its case assignment rule so that all Chapter 11 cases involving over $100 million of assets or liabilities are randomly assigned within the district. Gen. Order M-581, In re Amendment to Local Bankruptcy Rule 1073-1 Relating to Assignment of Mega Chapter 11 Cases (Bankr. S.D.N.Y. Nov. 30, 2021) (providing for the "random assignment of mega [C]hapter 11 cases [filed in the Southern District of New York] to the Judges irrespective of the courthouse in which the case is filed.").

dynamic. For reasons not explained, he announced in September 2021 that he was retiring from the bench—six years before the end of his term.[67]

B. *Weaponizing Bankruptcy*

Consider next Levitin's argument that bankruptcy has been weaponized.[68] Bankruptcy law is, he argues, "by its very nature, coercive" because a plan of reorganization "binds all creditors, irrespective of their consent, and plan confirmation can require the support of as little as a single creditor."[69] Professor Levitin then discusses five ways in which the Chapter 11 process has been weaponized: "(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."[70]

These are all important developments in practice that can have the coercive effect Professor Levitin describes. But, in fact, *Purdue Pharma* had none of them. Instead, there was a prebankruptcy proposed deal among the Sacklers, Purdue, and a small group of creditors negotiated in March 2018 (the "Sackler Settlement Framework"), while the Sacklers both owned and (through a majority of the board) controlled the company.[71] The Sackler Settlement Framework had three basic elements, reflected in an unsigned term sheet filed at the beginning of the bankruptcy: (i) the Sacklers would "give" Purdue to creditors;[72] (ii) they would pay $3 billion (later increased to $5.5 billion) into creditor trusts over an extended period;[73] and (iii) in exchange, they would receive "comprehensive releases."[74]

Purdue's bankruptcy was a process in pursuit of this deal. Professor Levitin correctly argues that a settlement agreement with the DOJ, with a

67. *See* Press Release, Bankr. Ct. S.D.N.Y., Distinguished Bankruptcy Judge to Retire from Southern District Bench (Sept. 28, 2021), https://www.nysb.uscourts.gov/sites/default/files/pdf/PressReleaseJudgeDrain.pdf [https://perma.cc/QYU3-6M3B]. The case was subsequently assigned to Judge Sean H. Lane. *See* Notice of Case Reassignment from Judge Robert D. Drain to Judge Sean H. Lane, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. July 1, 2022), Doc. No. 4937.

68. Levitin, *supra* note 6, at 1083.

69. *Id.* at 1089 (footnotes omitted).

70. *Id.* at 1090.

71. *See* Lipson, *Rule of the Deal*, *supra* note 11.

72. *See* Notice of Filing of Term Sheet with Ad Hoc Committee at 4, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 8, 2019), Doc. No. 257.

73. *See id.* at 9.

74. *See id.* at 5 (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"). The agreement to give the company to creditors was, in some respects, like a prebankruptcy sale, except that the transfer would occur through a plan rather than a so-called 363 sale. A sale under section 363 of the Bankruptcy Code can involve a sale of all or most of a debtor's assets outside of a plan of reorganization. The concern is that such sales may determine the outcome of the case even though creditors have no vote on such a sale, as they would on a plan of reorganization.

"poison pill," was critical to implementing the Sackler Settlement Framework through a plan.[75] That settlement made it all but impossible to propose a plan that would do anything other than release the Sacklers because that would give the DOJ the power to take all of Purdue's assets, leaving nothing for creditors—a power which was, Gerald Posner and I observed in *The New York Times,* the Sacklers' last "poison pill."[76]

Unlike venue choice, where there was no apparent effort to resist, some creditors did challenge the DOJ settlement, chiefly on grounds that it was a plan of reorganization "sub rosa"—a plan in function, if not in form.[77] Their objections were overruled by Judge Drain, who said, "It's just simply not the case that a major resolution in the case which limits people's options going forward . . . constitutes a sub rosa plan."[78]

In the abstract that may be true. But here it was deeply problematic because other "weapons" in the case combined with the DOJ settlement to create conditions in which a plan releasing the Sacklers would be inevitable and the vote on it largely uninformed.

First, at the outset of the case, Purdue sought and received a sprawling injunction shielding the Sacklers and scores of other nondebtor individuals and entities from ongoing litigation.[79] When Purdue declared bankruptcy in September 2019, the Sacklers were named as defendants in several hundred lawsuits asserting direct liability for personal injury as well as deceptive acts and practices deriving from their role in Purdue's fraudulent opioid marketing while under control of the Sacklers.[80] Purdue commenced its bankruptcy in September 2019, shortly after the Sacklers lost "at least three" motions to dismiss lawsuits asserting direct liability.[81]

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75. Levitin, *supra* note 6, at 1082.

76. Jonathan C. Lipson & Gerald Posner, *The Sacklers' Last Poison Pill*, N.Y. TIMES (Dec. 5, 2020), https://www.nytimes.com/2020/12/05/opinion/sackler-purdue-pharma-doj.html [https://perma.cc/6W4M-NEBR].

77. *See, e.g.*, Objection of the Ad Hoc Group of Non-Consenting States to the Motion of Debtors Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. 9019 Authorizing and Approving Settlements Between the Debtors and the United States at 12, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Nov. 10, 2020), Doc. No. 1914. Disclosure: I was co-author, with Professor Levitin, of a law professors' amicus brief in opposition to the Purdue–DOJ settlement. *See* 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-bk-23649 (Bankr. S.D.N.Y. Nov. 10, 2020), Doc. No. 1913-1.

78. Transcript of Nov. 17, 2020 Hearing at 242, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Nov. 9, 2020), Doc. No. 2073. This was, unfortunately, no reason at all.

79. *See* Order Pursuant to 11 U.S.C. § 105(a) Granting, In Part, Motion for a Preliminary Injunction at 1–2, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. October 11, 2019), Doc. No. 82). The preliminary injunction was affirmed on appeal to the District Court. *See* Dunaway v. Purdue Pharms. L.P. (*In re* Purdue Pharms. L.P.), 619 B.R. 38, 62 (Bankr. S.D.N.Y. 2020).

80. *In re* Purdue Pharma, L.P., 635 B.R. 26, 34–35, 40 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

81. *Id*. at 51 (citations omitted).

It would have been easy for Judge Drain to create an exception to the preliminary injunction to permit a "bellwether" (test) litigation to proceed, as certain creditors asked.[82] He rejected that, however, because litigating against the Sacklers would be costly, "murderous" litigation.[83] The "prospect" of a plan that implemented the Sackler Settlement Framework, by contrast, warranted the injunction in order to give the parties a "clear shot" to negotiate, free from the distraction of litigation on the merits.[84] Even a test case would produce a litigation explosion, he said. "Why would I just do this one?" he asked rhetorically at the first preliminary injunction hearing.[85] Drawing an analogy to Dr. Strangelove, he said he feared that "people will want to advance so they can say I'm going to be next."[86] "You know?" he said, "They want the next doomsday machine."[87]

Second, the injunction would be woven into other deals in the case that would lead to the releases. One of the most important was a stipulation under which the Sacklers would produce information that would enable creditors to negotiate the settlement.[88] Case stipulations like Purdue's are not, in themselves, necessarily problematic. Here, however, the stipulation included a protective order which muzzled all parties so that they could not publicly report what they learned through due diligence.[89]

Moreover, creditors who joined the stipulation ceded important powers that would have given them leverage in negotiations with the Sacklers. Among other things, the Official Committee of Unsecured Creditors (UCC)—the only statutory fiduciary for creditors in the case—agreed not to terminate Purdue's exclusive right to file a plan for the first eight months of the case.[90] This meant that Purdue, run by agents appointed by the Sacklers, controlled the decision whether to propose a plan that would release the Sacklers. The UCC also ceded the powers to seek the appointment of an examiner or trustee in the case, and to seek to convert or dismiss the

82. *See, e.g.*, Transcript of Oct. 11, 2019, Hearing at 219–20, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. Nov. 8, 2019), Doc. No. 108.

83. *See id.* at 261.

84. *See id.*

85. *See id.* at 185.

86. *See id.*

87. *Id.* "Not that any attorney general would [act] like George C. Scott," Judge Drain was quick to note. *Id.* at 186.

88. *See, e.g.,* Notice of Filing of Case Stipulation Among the Debtors, the Official Committee of Unsecured Creditors and Certain Related Parties at 9, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 11, 2019), Doc. No. 291 [hereinafter Case Stipulation].

89. *See* Third Amended Protective Order, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Nov. 12, 2020), Doc. No. 1935. In ordinary commercial bankruptcies, protective orders are common features of mediation. *See, e.g., In re* Teligent, Inc., 640 F.3d 53, 56 (2d Cir. 2011). The public interest in the underlying allegations in *Purdue Pharma* made the use of confidential mediation problematic.

90. Case Stipulation, *supra* note 88, at 7–8.

bankruptcy.[91] These powers can be credible threats to lever information or, if the request is granted, to have it produced. The UCC later complained that the Sacklers failed to produce adequate information despite the stipulation.[92]

The third, and perhaps most important, weapon was Judge Drain himself. His managerial commitment to the Sackler Settlement Framework from the outset put him in conflict with creditors who demanded greater transparency and accountability during the case. This ended up being critically important because Purdue's plan of reorganization—which would release the Sacklers—said nothing about the merits of the direct claims against them or how ostensibly independent fiduciaries of Purdue's board could have chosen to forgo litigation against the Sacklers.[93]

Early in the case, Judge Drain issued a spontaneous warning against any who would have had the audacity to seek greater transparency. In a matter having nothing to do with a request for an examiner, Judge Drain angrily warned victims against seeking one. Addressing counsel to the Official Committee of Unsecured Creditors, he said:

> The press, who in a number of totally irresponsible articles led people who have truly suffered, because of the opioid crisis, to believe that there is no investigation going on, that this case's purpose is somehow to let the Sacklers get away with it and that without the appointment of an examiner there won't be an investigation, is just completely and utterly misguided.
>
> So, for anyone to believe that they should be driven by such trash is just a big mistake. We cannot muzzle the press, but certainly, people should understand that what is being put out as if it was news is completely false and should lead them to decide that they do not want

91. *See, e.g.*, *id.* at 8–9. The Sacklers also agreed to certain "anti-secretion" provisions that would prevent them from further transferring assets. *Id.* at 14.

92. *See* Official Committee of Unsecure Creditors' Notice of Filing of First Set of Unredacted or Partially Redacted Exhibits to the Declaration of Mitchell Hurley Dated September 29, 2020, at 2, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Dec. 18, 2020), Doc. No. 2161. The UCC and the Sacklers apparently resolved consensually their various discovery disputes. The court acknowledged that the public (and, realistically, most creditors) would have no direct access to information produced by that discovery but viewed that as a necessary concession to the agreement between the Sacklers and creditor representatives:

> The only argument that [certain plan objectors] can make is that the public hasn't had access to such information. But of course if the discovery and information-sharing process had not been conducted as it was by the public's representatives, including the very states that make this argument, far less information would have been produced, most of which the public would never have had access to in any event, including if the settled claims instead went to trial or an examiner issued an examiner's report.

In re Purdue Pharma L.P., 633 B.R. 53, 86 (Bankr. S.D.N.Y. 2021), *vacated sub nom. In re* Purdue Pharma, L.P., 635 B.R. 26 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022).

93. *See generally* Notice of Filing of Term Sheet with Ad Hoc Committee, *supra* note 72.

> 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.[94]

In the end, there was no account—full or otherwise—and the results of whatever merits examinations occurred remained locked behind protective orders and the case stipulation.[95]

In *Purdue,* the problem was therefore not merely that the DOJ settlement's poison pill deprived creditors of any other choice but also that any vote cast on the plan could not have been informed. To solicit votes on a plan, the bankruptcy court must first approve a "disclosure statement" which contains "adequate information" to enable creditors to make an informed decision whether to vote for or against the plan.[96] In *Purdue*, the disclosure statement contained lengthy discussions of the *estate's* claims against the Sacklers (e.g., for fraudulent transfers), and the difficulty of collecting on a judgment because the Sacklers had offshored assets before bankruptcy.[97] But the disclosure statement offered little meaningful information on the *direct* claims against the Sacklers—which were the ones the Sackler releases would eliminate. Confusingly, Purdue claimed in the disclosure statement that the value of the direct claims against the Sacklers (and other nondebtors) was "unknowable" and then booked them for plan purposes at $0.[98] The

94. Transcript of July 23, 2020 Hearing at 56–57, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. Oct. 2, 2020), Doc. No. 1791. As noted in the author's footnote, I later formally sought an examiner on behalf of Peter Jackson for the more limited purpose of determining whether Purdue's board of directors made the decision to settle rather than sue independently and in good faith. Although the judge granted a very narrow version of the request, the request infuriated him.

95. Purdue's plan of reorganization would create a "public document repository" that would contain material produced in various litigations against Purdue as well as some Sackler documents. *In re* Purdue Pharma, L.P., 635 B.R. 26, 65 (S.D.N.Y. 2021), *certificate of appealability granted*, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022). That information would not become available, however, until long after creditors had to vote on the plan of reorganization.

96. 11 U.S.C. § 1125(a).

97. *See generally* Disclosure Statement for Fifth Amended Joint Chapter 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y June 3, 2021), Doc. No. 2983 [hereinafter Disclosure Statement].

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

bankruptcy judge approved the disclosure statement and plan notwithstanding this omission.[99]

But the direct claims asserted in hundreds of prebankruptcy litigations against the Sacklers *were* "knowable" in important respects: knowing their viability required only a bellwether litigation on the merits. Unfortunately, Judge Drain foreclosed that through the preliminary injunction at the beginning of the case, trashed as idiotic demands for an investigation or report during the case, and approved a disclosure statement that failed to answer the most basic question, which was what creditors would be forced to give up under the plan. The inability to assign a dollar value to the direct claims was created by Purdue and a bankruptcy judge committed to a confidential settlement from the outset. But the disclosure statement told creditors none of this.[100]

The hardball that Levitin describes is, to many, the ordinary science of Chapter 11.[101] It is not new and can be traced back to the realization by private equity that bankruptcy could be a money-making venture, not just a money-

99. Order Approving (I) Disclosure Statement for Fifth Amended Chapter 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto at 1–3, *In re* Purdue Pharma, L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. June 3, 2021), Doc. No. 2988 [hereinafter Order Approving Disclosure Statement].

100. Disclosure: On behalf of Peter Jackson, I submitted an objection to the Disclosure Statement on these grounds. *See* Objection of Peter W. Jackson to Amended Disclosure Statement for First Amended Chapter 11 Plan for Purdue Pharma, L.P. and Its Affiliated Debtors, *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. May 6, 2021), Doc. No. 2819; Supplemental Objection of Peter W. Jackson to Disclosure Statement for Second Amended Chapter 11 Plan for Purdue Pharma, L.P. and Its Affiliated Debtors (Fourth Plan Supplement), *In re* Purdue Pharma L.P., No. 19-bk-23649 (Bankr. S.D.N.Y. May 18, 2021), Doc. No. 2881. At a hearing on May 12, 2021, the bankruptcy court suggested that the Debtors amend their disclosure statement to so provide:

> There's a consistent drumbeat in the objections, which is to give the objectors the most credit[;] We're not sure what these claims are, but they're being released and I'd like to know more about the merits of them before I agree to vote in favor of a plan or not object to a plan that releases them.
>
> . . . .
>
> . . . I think it should be in the disclosure statement, and I think it should be in the liquidation analysis. And, frankly, I think the Debtors should state their views on the potential risks of direct third-party claim litigation in contrast to the settlement . . . .

Transcript of May 12, 2021, Hearing, at 19, 21, 24, *In re* Purdue Pharma L.P. No. 19-bk-23649 (Bankr. S.D.N.Y. May 12, 2021), Doc. No. 2898. Although the Disclosure Statement discussed the risks of litigation, it said little about the strengths of the underlying allegations against the Sacklers on matters such as fraud, consumer deception and intentional misconduct that formed the basis for the direct claims.

101. *See* Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball,* 108 CALIF. L. REV. 745, 750–51 (2020).

losing one.[102] But there is also less at stake in that hardball. If Hedge Fund A wants to fight Hedge Fund B for the remains of Debtor D, only aficionados really care about who wins or loses. It is inside baseball that matters to those of us who spend time thinking about it. But it does not matter to the many creditors and victims who were left baffled and angered by the *Purdue* case.

Instead, the real problem with hardball in a case like *Purdue* is the nature of the underlying wrong, the fact that it was a social debt bankruptcy. The extraordinary wrongs that created Purdue Pharma's massive debt—and the Sacklers' massive wealth—demanded special consideration of the public interest in both the reality and the appearance that the wrongdoers are in fact being held accountable. "The conduct of bankruptcy proceedings not only should be right but must seem right," the Second Circuit admonished in 1966.[103]

It is easy to be cynical about those ideals and to dismiss the possibility that trials can produce "truth," as Judge Drain did in *Purdue.*[104] That cynicism may be appropriate in ordinary commercial cases, where demands for procedural due process are likely to be little more than tactical ploys to get more money. But social debt bankruptcies call for more, which the Chapter 11 system in practice is weaponized to resist. Public confidence not merely in Chapter 11, but also in the legal system generally, is the collateral damage at issue in social debt bankruptcies after *Purdue Pharma*.

C. *Appellate Review*

Appellate review is, in contrast to forum shopping and hardball, the least studied and perhaps most interesting of the problems in *Purdue*. Professor Levitin summarizes a host of challenges to ordinary appellate review which follow the exigencies of the bankruptcy system. The most difficult and important of these is the judge-made doctrine of "equitable mootness."

As Levitin recites, "[e]quitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented."[105] It appears to be invoked after a plan of reorganization has been confirmed and "substantial[ly] consummat[ed]."[106] Thereafter, even if a bankruptcy judge

102. Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1614 (2009) (discussing "the influence that largely unregulated private investors—such as hedge funds, private equity funds, and investment banks—exert over distressed companies.").

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

104. In colloquy at the initial hearing on the preliminary injunction, Judge Drain cut off counsel to certain objecting creditors—"Let's be real here, all right?"—and asserted that "trial is, at best, a limited way to get to the truth. It doesn't result in the truth, it results in a ruling or a verdict." *See* Transcript of Oct. 11, 2019, Hearing at 113, 115, *In re* Purdue Pharma L.P., No. 19-08289 (Bankr. S.D.N.Y. Nov. 8, 2019), Doc. No. 108.

105. Levitin, *supra* note 6, at 1126 (quoting Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005).

106. 11 U.S.C. § 1101(2) (defining "substantial consummation").

made a serious error in confirming the plan, an appellate court may decline to reverse on grounds that it would be "impractical or inequitable to 'unscramble the eggs.'"[107]

The obvious response to concerns about equitable mootness in *Purdue* is that the debtors there agreed to stay consummation of their plan (mostly) in order to permit an expedited appeal, which is now pending before the Second Circuit.[108] Whatever *Purdue Pharma*'s problems, equitable mootness has not been one of them—yet.

Indeed, commentators have suggested that if the Second Circuit does not align itself in *Purdue* with other circuits that approve such releases, then a trip to the Supreme Court may be the next stop.[109] "The Supreme Court has a very narrow focus on the language of the statute itself," Professor Douglas Baird recently told *Law360*.[110] "I could see a Supreme Court that is quite hostile to third-party releases."[111] Moreover, Justice Alito distinguished himself as an early skeptic of equitable mootness while on the Third Circuit, dissenting in *In re Continental Airlines*[112] on grounds that the doctrine was "bad precedent"—it lacked any foundation in law, and was "unjustified and unjust."[113]

Yet, it is also true that the Court has sidestepped important and controversial bankruptcy issues in the past by declaring them moot. This was notably the outcome in the Chrysler[114] bankruptcy, where the Court dodged a serious priority-based challenge to the government-induced sale of the

107. Castaic Partners II, LLC v. Daca-Castaic, LLC (*In re* Castaic Partners II, LLC), 823 F.3d 966, 968 (9th Cir. 2016) (quoting Baker & Drake, Inc. v. Pub. Serv. Comm'n (*In re* Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994)).

108. Order Granting Petition for Leave to Appeal, *In re* Purdue Pharma L.P., No. 22-00085 (2d Cir. Jan. 27, 2022); *see also In re* Purdue Pharma, L.P., No. 21-cv-7532, 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) (granting certificate of appealability); Vince Sullivan, *Purdue's Appeal on Ch. 11 Releases Fast-Tracked by 2nd Circ.*, LAW360 (Jan. 28, 2022, 6:13 PM), https://www.law360.com/articles/1459847 [https://perma.cc/PT3G-Z7LC].

109. *See, e.g.*, Geoff Mulvihill, *Appeals Court to Consider Paving Way for Purdue Pharma Deal Out of Bankruptcy*, PBS NEWS HOUR (April 29, 2022), https://www.pbs.org/newshour/nation/appeals-court-to-consider-paving-way-for-purdue-pharma-deal-out-of-bankruptcy [https://perma.cc/Q2E2-4ASM] ("No matter how the 2nd Circuit rules on the case, an appeal to the U.S. Supreme Court is possible.").

110. Vince Sullivan, *Boy Scouts Case Far from Over as Ch. 11 Appeals Loom*, LAW360, (Sept. 13, 2022, 8:06 PM), https://www.law360.com/bankruptcy/articles/1530160/boy-scouts-case-far-from-over-as-ch-11-appeals-loom?nl_pk=c221b65d-b025-403d-b78d-11fc08ce0955 [https://perma.cc/VF7J-AVTE].

111. *Id.*

112. 91 F.3d 553 (3d Cir. 1996).

113. *Id.* at 567, 573 (3d Cir. 1996) (Alito, J. dissenting).

114. Ind. State Police Pension Tr. v. Chrysler LLC, 558 U.S. 1087, 1087 (2009).

automaker by declaring the issue moot.[115] Justice Alito's dissent in the recent opinion in *Czyzewski v. Jevic Holding Corp.*,[116] on the technical grounds that the parties changed their theory of argument, suggests a willingness to tolerate the sort of deal-making that drove much of what was problematic in *Purdue*.[117]

IV. A Path Forward

Predicting the future in a case like *Purdue Pharma* is difficult. As of this writing, Purdue and the Sacklers' quest to reinstate the Sackler releases is pending before the Second Circuit Court of Appeals. Although Judge McMahon's opinion, which is being challenged on appeal, was well-reasoned and careful, Purdue, the Sacklers, and the creditors with whom they have aligned made strong arguments to the Second Circuit that the nondebtor releases were necessary given the severity of the opioid crisis and the funding that Purdue's plan would make available.

There is thus reason to think that the Second Circuit will reverse Judge McMahon and reinstate the releases. Purdue's plan may then be consummated before any challenge is taken up by the Supreme Court, likely rendering any appeal equitably moot, as explained above.

This would be unfortunate because Purdue's plan could easily have made the releases consensual through a mechanism of informed assent. That would have been achieved by two things: (i) some independent assessment and report on the allegations against the Sacklers, whether through bellwether trial, an examiner's report, or simply comprehensive discussion in the disclosure statement; and (ii) a line-item option to grant the release in the plan.

It is, for all practical purposes, too late to permit a bellwether trial, and Judge Drain's cynical decision to limit the examiner to a budget of $200,000—an amount he chose because it did not exceed his salary—means that the examination that did occur would tell creditors little of relevance.[118]

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115. *Id.*; *see also* Jonathan C. Lipson & Jennifer L. Vandermeuse, Stern, *Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, 2013 WIS. L. REV. 1161, 1167 (2013) (discussing the "Court's indifference to the Chrysler bankruptcy").

116. 137 S. Ct. 973 (2017).

117. *Id.* at 987 (Alito & Thomas, JJ., dissenting). In *Jevic,* the Court struck a so-called structured dismissal on grounds that, among other things, it violated the Bankruptcy Code's priority distribution structure. *Id.* at 983–86. For a discussion of *Jevic,* see Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 633–34 (2018).

118. *See* Transcript of June 16, 2021, Hearing, at 172, *In re* Purdue Pharma L.P. No. 19-bk-23649 (Bankr. S.D.N.Y. June 17, 2021), Doc. No. 3094 (Judge Drain: "I will set the budget for [the examination] by the examiner, i.e., the examiner's own cost, at $200,000, which is essentially my salary . . . ."). Since estate-retained partners routinely bill in excess of $1,700 an hour—and legal fees at this writing are approaching $900 million—it is remarkable that the examiner was able to do

But it is not too late to amend the disclosure statement to provide a more fulsome analysis of the direct claims that would be eliminated, and a line-item on which creditors could agree (or not) to release the Sacklers. In principle, this could happen if the Second Circuit affirms the district court in *Purdue* (although the plan proponents are more likely to ask the Supreme Court to intervene, risky though that might be).

There has been no systematic study of the use of line-item releases, but it appears that the better approach to nondebtor releases is to give creditors this choice. In some cases, this may require creditors to "opt out" of the nondebtor release by noting that they do not agree to it on a separate line on the ballot.[119] In other cases, this may require creditors to "opt in" to granting the release.[120] In *Purdue,* of course, the plan gave creditors no option at all, which is the heart of the problem.

This is hardly a perfect solution. It would require amending the disclosure statement and resoliciting ballots. This may be expensive and may reopen negotiations over other matters. Presumably, some creditors would not grant releases, which would leave the Sacklers exposed to litigation risk. If, however, the Sacklers are correct that they "acted lawfully in all respects"[121]—and they retain a war-chest of about $6 billion, as they would under the *Purdue* plan—it is not clear what they have to fear. The tobacco

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anything. *See* Edward Helmore, *The Woman Who Turned Down Her Share of a $6bn Settlement to Fight the Family Behind the Opioid Crisis*, THE GUARDIAN (Apr. 10, 2022, 2:00 AM), theguardian.com/us-news/2022/apr/10/ellen-isaacs-purdue-pharma-opioid-settlement [https://perma.cc/H2TX-PPUW] ("[L]awyers have billed close to $1bn in legal fees in the Purdue case alone . . . ."). The examiner's report did provide important evidence that the Sacklers did not seek to influence the debtors' board during the case, although that was the least important of the questions the examiner should have answered.

119. *See, e.g.*, *In re* Bainbridge Uinta, LLC, No. 20-42794, 2021 WL 2692265, at *3 (Bankr. N.D. Tex. June 28, 2021) (approving "opt-out" form in plan solicitation materials).

120. At least some courts are skeptical of this practice. *In re* SunEdison, Inc., 576 B.R. 453, 461 (Bankr. S.D.N.Y. 2017) ("[I]mplying a 'consent' to the third party releases based on the creditors' inaction[] is simply not realistic or fair, and would stretch the meaning of 'consent' beyond the breaking point.") (quoting *In re* Chassix Holdings, Inc., 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015)).

121. As a result of one of four court-ordered mediations in the case, the Sacklers made the following statement:

> The Sackler families are pleased to have reached a settlement with additional states that will allow very substantial additional resources to reach people and communities in need. The families have consistently affirmed that settlement is by far the best way to help solve a serious and complex public health crisis. *While the families have acted lawfully in all respects, they sincerely regret that OxyContin, a prescription medicine that continues to help people suffering from chronic pain, unexpectedly became part of an opioid crisis* that has brought grief and loss to far too many families and communities.

Mediator's Fourth Interim Report at 18, *In re* Purdue Pharma L.P. No. 19-bk-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), Doc. No. 4409 (emphasis added)*; see also* Lauren del Valle, *Richard Sackler Says His Family and Purdue Pharma Are Not to Blame for US Opioid Crisis*, CNN (Aug. 20, 2021, 7:19 PM), https://www.cnn.com/2021/08/20/us/purdue-pharma-richard-sackler-testifies-opioid-bankruptcy/index.html [https://perma.cc/X5SD-S3J3].

companies have continued to defend comparatively small litigations long after the tobacco settlement because they never used bankruptcy and could not have gotten the nondebtor releases the Sacklers sought.[122]

Conclusion

Purdue Pharma will likely prove the most normatively consequential bankruptcy of our times. Its effects will be felt not only in Chapter 11 cases but also throughout the legal system because the conduct of the case and the outcome in the bankruptcy court challenge fundamental notions of the rule of law in a democratic society. Professor Levitin's *Poison Pill* is an important contribution to our understanding of how the Chapter 11 system has become imbalanced and the implications of that state of affairs for the legal system. This Response has sought to provide additional context and insight into the case in order to advance his analysis. These are not the first words on *Purdue Pharma* and will surely not be the last.

122. In *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000), *rev'd sub nom. Liggett Grp. Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *decision approved in part, quashed in part,* 945 So. 2d 1246 (Fla. 2006) (per curiam), individual plaintiffs won a verdict of $12.7 million in compensatory damages and class plaintiffs won $144.8 billion in punitive damages. Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1734–1735 n.51 (2008). Although the verdict was vacated by the Florida Supreme Court in *Engle v. Ligette Group, Inc.*, 945 So.2d 1246, 1254 (Fla. 2006) (per curiam), the Florida Supreme Court held that future plaintiffs within the class could proceed individually, and that key findings from the prior trial—that smoking causes certain diseases, that nicotine is addictive, and that the defendants tortiously concealed information about the health effects of smoking—"will have res judicata effect in those [individual] trials." *Id.* at 1257 n.4, 1269. As a consequence, "so-called '*Engle*-progeny' claimants could bring individual suits without relitigating these core issues." *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 302 n.78 (2021).