NON-CONSENSUAL THIRD-PARTY RELEASES: THE PROBLEM OR THE SOLUTION

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As an Article I Court, a bankruptcy court must act within its constitutional power when administering a bankruptcy case and restructuring the creditor-debtor relationship.[1] Complex questions arise from the bankruptcy court's need to exercise control over the bankruptcy estate while at the same time abstaining from overstepping its jurisdictional power in violation of the Constitution.[2] Specifically, non-consensual third-party releases have produced a variety of opinions about if and when the bankruptcy court may authorize and approve the non-consensual release of third-party obligations and/or liabilities in a bankruptcy plan of reorganization. The recent Purdue Pharma bankruptcy has once again provided an opportunity to analyze non-consensual third-party releases and the constitutional boundaries of the bankruptcy court's jurisdiction and authority.[3] First, this Comment seeks to analyze existing Supreme Court authority on the bankruptcy court's jurisdiction and authority through the lens of the *Purdue Pharma* reorganization. Second, this Comment will also propose an equitable solution to create an expedited process to quickly and fairly resolve mass tort liability in a court equipped to handle those types of claims.

I. INTRODUCTION TO PURDUE PHARMA L.P. AND THE OPIOID CRISIS

Beginning in the 1990s, several pharmaceutical companies conducted large marketing campaigns to convince the public and the medical

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1 *See, e.g.*, N. Pipeline Constr. Co., v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982); *see also* Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995); Stern v. Marshall, 564 U.S. 462, 470 (2011).

2 *See Stern*, 564 U.S. at 470.

3 *In re* Perdue Pharma, L.P., 635 B.R. 26, 40 (S.D.N.Y. 2021), *appeal docketed*, No. 19-23649 (S.D.N.Y. 2021).

community that opioid painkillers did not have addictive qualities.[4] The pharmaceutical companies succeeded.[5] The following spike in the prescription of opioid painkillers lead to widespread abuse of prescription opioids and eventually non-prescription drugs such as heroin.[6] In 2017, the U.S. Health and Human Services Department declared a public health emergency and announced a plan to combat the opioid pandemic.[7]

Much earlier, from the late 1990s to 2007, individuals and local government began discovering the grisly details behind one of America's largest opioid manufacturers and sellers, Purdue Pharma L.P. The Sackler family purchased Purdue Pharma in 1952 and remained in control of the Company for well over half a century by appointing family members to the board of directors.[8] At least six or seven members of the family have always served on the board of directors for the Company.[9]

Beginning in the early 1980s, the Sackler family, by and through Purdue Pharma L.P., invented, developed, manufactured, and sold the addictive pain killer OxyContin.[10] By 2001, OxyContin became the most prescribed brand-name narcotic in America resulting in more than thirty-four billion dollars in total revenue for Purdue Pharma between 1996 and 2019.[11] The success of the Sackler family pharmaceutical business placed the family among America's top twenty wealthiest families with a net worth of fourteen billion dollars.[12]

The Sackler family's wealth did not come without a price. In the early 2000s, the American public discovered decades of deceptive marketing practices by the family resulting in state and federal investigations into the Company's marketing practices.[13] In 2007, the Company paid $19.5 million to settle state and federal claims relating to the Company's marketing practices.[14] Further, the Company plead guilty to one felony count of

[4] *Opioid Facts and Statistics*, U.S. DEP'T. OF HEALTH & HUM. SERVS., hhs.gov/opioids/about-the-epidemic/index.html (last visited Aug. 16, 2022).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Purdue Pharma*, 635 B.R. at 40.

[9] *Id.*

[10] *Id.* at 41–42.

[11] *Id.* at 43.

[12] *Id.* at 40.

[13] *Id.* at 44.

[14] *Id.* at 46.

misbranding OxyContin with the intent to defraud or mislead and paid $600 million in fines to federal and state governments.[15]

The 2007 settlement agreements further required the Company to create precautions to help stifle the flood of opioids into communities impacted by the worsening opioid epidemic.[16] Unfortunately, as the District Court for the Southern District of New York noted, the purported acceptance of responsibility and promise of change was a "charade" concocted to buy time for the Sackler family's nefarious plans.[17] Redoubling efforts to pinch every penny out of the Company's cash cow OxyContin, the family realized it would face mounting personal liability for their actions.[18] To judgment-proof the family from any potential liability, the family filtered over $10 billion from the Company into offshore spendthrift trusts after the 2007 settlement agreements.[19]

In 2014, individuals began filing a second round of lawsuits, this time against members of the family personally as well as the Company.[20] With the family wealth safely in the Bailiwick of Jersey, the family resigned from the board of directors and enacted their plan to use the Company as a scapegoat for their own personal liability.[21] The strategy involved using the Chapter 11 process to force personal injury claimants to settle for far less than the value of the personal injury claims asserted against the family.[22]

Through the Chapter 11 reorganization process, the debtor, and related entities can secure releases to settle prepetition claims and enjoin future claims arising out of conduct that occurred before the bankruptcy filing (i.e., prepetition claims).[23] The family seeks to leverage the money they pulled out

[15] *Id.* at 48. The family itself emerged relatively unscathed from the first round of lawsuits. It was not until after 2007 that claimants began to trace claims back to the family as the source of the misconduct. *Id.* at 50.

[16] *Id.* at 49.

[17] *Id.* Judge McMahon observed that "this purported acceptance of responsibility was a charade, and the oversight mechanisms built into the settlements were a conspicuous failure. . . . the opioid crisis not only continued, it worsened." *Id.*

[18] *Id.* at 56. Emails between the Sackler family revealed increasing worry at the financial state of the family stating, "We're rich? For how long? Until suits get through to the family?" *Id.*

[19] *Id.* at 57. The family currently owns large offshore investments through spendthrift trusts located in places like the Bailiwick of Jersey. Under current law, it is nearly impossible to repatriate funds and investments contained in these trusts. *Id.* at 71.

[20] *Id.* at 49.

[21] *Id.* at 35, 58.

[22] *Id.* at 58–59.

[23] *Id.* at 59.

of the Company to secure a non-consensual third-party release in the final confirmed plan of reorganization.[24] Explained in more detail below, the non-consensual third-party releases set forth in the final confirmed plan of reorganization would allow the family to escape all liability for their actions in exchange for a monetary contribution to the Company's bankruptcy estate.[25] While third-party releases frequently happen consensually in a bankruptcy case (or even outside of bankruptcy), when non-debtor parties like the Sackler family attempts to hijack the bankruptcy process into forcing claimants to settle claims for less than half of what they are worth, the non-consensual third-party releases raise serious issues regarding the bankruptcy court's constitutional authority.[26]

In September 2021, after years of negotiation and mediation including a $4.325 billion contribution from the family, the bankruptcy court approved Purdue Pharma L.P.'s plan of reorganization including broad, non-consensual third-party releases of claims against the family and their affiliates.[27] Several states and other parties, including the U.S. Trustee, the U.S. Attorney's Office, and numerous non-consenting personal injury claimants, appealed the bankruptcy court's approval of the plan of reorganization on the grounds that non-consensual third-party releases exceed both the bankruptcy court's statutory authority and constitutional power.[28] On appeal, Judge McMahon of the Southern District of New York concluded in a 142-page opinion that the Bankruptcy Code did not statutorily authorize non-consensual third-party releases, but declined to express an opinion on the constitutionality of the releases.[29] This Comment will analyze the bankruptcy court's constitutional authority for approving non-consensual third-party releases, and will provide an equitable alternative to prevent the bankruptcy court from exceeding its constitutional power.

[24] *Id.* at 58.

[25] *Id.* at 59.

[26] Wellness Int'l Network, Ltd., v. Sharif, 575 U.S. 655, 671 (2015).

[27] *Purdue Pharma*, 635 B.R. at 35.

[28] *Id.* at 68.

[29] *Id.* at 37–38. Bankruptcy courts are Article I courts, meaning bankruptcy judges do not enjoy salary protection or life tenure. The lack of protection gives rise to skepticism regarding the types of claims Article I judges may resolve because "the people" are guaranteed an impartial judiciary in Article III of the Constitution. *Id.* at 81–82.

II. THE CONSTITUTIONAL POWER OF THE BANKRUPTCY COURT

To understand the problems and solutions associated with non-consensual third-party releases, it is imperative to understand the historical limits the Supreme Court has placed on the bankruptcy court's jurisdiction. Congress established the bankruptcy courts under an entirely different article of the Constitution than other federal courts.[30] As a result, bankruptcy judges do not enjoy a lifetime tenure or protection from Congress's power of the purse.[31] This means that bankruptcy judges do not have the traditional protection from undue influence by the Legislative Branch and therefore do not have as much power to protect the public against interference from that inferior branch of government. Accordingly, there are certain claims that bankruptcy judges cannot finally determine.[32]

The following Section will briefly analyze the bankruptcy court's limits, discuss the case law outlining these limits, and provide the necessary background regarding the bankruptcy court's constitutional authority.

A. Congress limps to the finish line in the Bankruptcy Code "Marathon."

After 170 years of arguments, revisions, mistakes, and troubleshooting, Congress finally produced the modern Bankruptcy Code in the Bankruptcy Reform Act of 1978.[33] However, the Act did not last long because the Supreme Court struck the Act down as an unconstitutional grant of authority in 1982.[34]

In *Marathon*, the Supreme Court expressed its first opinion on the scope of the bankruptcy court's constitutional power.[35] The new Bankruptcy Code

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30 Bankruptcy courts are established under Congress's power to "establish uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Conversely, other federal courts are established under Congress's power to "ordain and establish" courts inferior to the Supreme Court. *Id.* art. III, § 1, cl. 1.

31 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." *Id.* art. III, § 1, cl. 1.

32 *See Purdue Pharma*, 635 B.R. at 83–84 (explaining that it is essential to the system of checks and balances that the constitutional protection of life tenure and salary aid courts in determining state and common law causes of action, and that without such protection, the court should not be able to finally determine those claims).

33 N. Pipeline Constr. Co., v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982).

34 *Id.* at 87.

35 *Id.* at 52.

provided bankruptcy courts with power over "*all* 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11.'"[36] As a result of the new Code, bankruptcy courts could now decide claims based in state law as well as those arising out of the Federal Bankruptcy Code itself.[37] Under the new Bankruptcy Code the only limit on a bankruptcy judge's power was that she could not enjoin another court or punish criminal contempt not committed in her presence.[38]

Applying the new law, the United States Bankruptcy Court for the District of Minnesota attempted to decide a state law breach of contract claim after the debtor added the claim as part of its reorganization.[39] The claim arose after the debtor filed a lawsuit within the bankruptcy court alleging a breach of contract and warranty as well as for misrepresentation, coercion, and duress.[40] The defendant, Marathon Pipe Line Company, moved to dismiss the case which the bankruptcy court denied.[41] Marathon appealed and the issue made it all the way to the Supreme Court.[42]

On appeal, the Supreme Court began with its usual monologue about the separation of powers and its protections against tyranny:

> "[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.[43]

As previously mentioned, the federal judiciary is meant to protect citizens against the power of the legislative and executive branches of government.[44] Federal judges must be free from undue influence by the legislative or

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[36] *Id.* at 54 (alteration in original) (first emphasis added).

[37] *Id.*

[38] *Id.* at 55.

[39] *Id.* at 56.

[40] *Id.*

[41] *Id.* at 57.

[42] *Id.*

[43] *Id.* (quoting THE FEDERALIST NO. 47, at. 300 (James Madison) (H. Lodge ed., 1888)).

[44] *Id.* at 58.

executive branches when making decisions that affect the American public.[45] To that end, Article III of the Constitution requires federal judges to have certain protections: life tenure, salary protection, and a cool hammer.[46]

However, bankruptcy judges do not enjoy lifetime tenure or salary protection.[47] This meant that bankruptcy judges were not Article III judges and that the Supreme Court now had to decide whether the new Bankruptcy Code violated the Constitution by improperly extending the power to hear and decide cases past the limits set forth in Article III.[48]

The debtor, wanting to settle the case in the more favorable bankruptcy court, proposed two sources of power for Congress to write the new Bankruptcy Code.[49] First, the debtor argued that Congress could, under its enumerated powers in Article I of the Constitution, establish "legislative courts" to which the Article III power of the judiciary would extend for a select kind of cases.[50] Second, the debtor argued that the new bankruptcy law structure satisfied Article III by providing the right to appeal the bankruptcy court's rulings to the local district court and analogizing the bankruptcy court to a special master under an adjunct system.[51]

Beginning with the debtor's legislative courts argument, the Supreme Court clarified that there are only three narrowly defined occasions where "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[52] The three narrowly defined circumstances are:

> 1. Congress's power to establish territorial courts over American lands which were not governed by a sovereign State and in the District of Columbia;
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> 2. Congress's power to create court-martial over the military and navy;

[45] *Id.*
[46] *Id.* at 58–59.
[47] *Id.* at 60–61.
[48] *Id.* at 62.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 62–63.
[52] *Id.* at 64.

3. Congress's power to create legislative courts as adjuncts to administrative agencies.[53]

Bankruptcy law plainly does not fit into category one or category two.[54]

As to the third category, the Supreme Court took care to discuss existing case law to distinguish Bankruptcy Law from an administrative system.[55] Under the administrative law system existing at the time of *Marathon*, Congress could establish legislative courts to decide cases involving "public rights."[56] The creation of these courts flows from the principles of sovereign immunity which allow the government to attach conditions when it consents to being sued.[57]

However, Congress's ability to establish executive tribunals ends where judicial cognizance begins.[58] *Only* controversies between the government and individuals which lend themselves to resolution in an executively created forum may be decided in a non-Article III Court.[59]

Pursuant to this limitation, the Supreme Court created the core versus non-core distinction.[60] It is true that restructuring the creditor-debtor relationship, the core of the bankruptcy court's power, functions much like a "public right" in that it is provided by Congress and does involve the government represented by the U.S. Trustee.[61] However, that does not mean Congress could legislatively allow the bankruptcy court to adjudicate all claims of a debtor in bankruptcy.[62]

[53] *Id.* at 64–68.

[54] *Id.* at 64–66. While the Bankruptcy Code certainly pioneered a new area of the law, the first exception refers to a geographical region as opposed to a legal or ideological structure. Further, the Supreme Court discussed provisions in the Fifth Amendment that waive the requirement for presentment and indictment by a grand jury for land or naval forces, clearly indicating the Framers' intent that the legislative and executive branches should establish special courts for the military. *Id.* at 71.

[55] *Id.* at 67 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 70.

[59] *Id.*

[60] *Id.* at 71.

[61] *Id.*

[62] *See id.*

The result is that the bankruptcy court is free to do what it is equipped to do, reorganize the creditor-debtor relationship.[63] However, that does not mean Congress may withdraw any Article III controversy to the bankruptcy court—there must be some type of limiting principle.[64] The limiting principle is that in non-core matters, those which do not originate in the Bankruptcy Code, the bankruptcy court cannot constitutionally resolve the claim.[65] Instead, the claim must be heard in an Article III forum.[66]

The Supreme Court then turned to the debtor's claim that bankruptcy courts function as "adjuncts" to the district court and therefore comply with the constitutional judicial scheme.[67] The primary limitation on an adjunct is that its function must be limited to preserve "the essential attributes" of judicial power retained by the Article III court.[68] Again, this limitation preserves the independence of the federal judiciary and restricts undue influence from the other branches of government.[69] Continuing on the theme of core versus non-core matters the Supreme Court established that rights created by Congress are subject to Congress's discretion in their enforcement and resolution.[70] However, when the right stems another source, then Congress cannot change the Article III structure meant to enforce and resolve that right.[71] Thus the Bankruptcy Code provided the bankruptcy court with power that impermissibly intruded on the power of the Article III judiciary and the Supreme Court struck down the Bankruptcy Code until Congress could rewrite it and try again.[72]

B. *Congress codifies the Court's conclusion.*

Of course, the Supreme Court did not amend or rewrite the statute but rather left the necessary revision of the Bankruptcy Code to Congress.[73] In response, Congress enacted the Bankruptcy Amendments and Federal

[63] *See id.* at 72–73
[64] *Id.*
[65] *Id.* at 73–74.
[66] *Id.* at 76.
[67] *Id.* at 76–77.
[68] *Id.* at 81.
[69] *Id.* at 82.
[70] *Id.* at 83–84.
[71] *Id.* at 84.
[72] *Id.* at 87.
[73] *Id.* at 87 n.40.

Judgeship Act of 1984. This legislation codified the distinction the Supreme Court drew in *Marathon* and provided the modern guidelines for bankruptcy court jurisdiction.[74]

Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress allowed district courts to refer bankruptcy cases and proceedings to the bankruptcy court.[75] However, as previously mentioned, there are certain proceedings that only an Article III Court may resolve, meaning the district court cannot refer it to the bankruptcy court for final determination.[76] Taking this limited authority into consideration, Congress defined the cases and proceedings that the district court may refer to the bankruptcy court.[77]

The statute provides that the bankruptcy court may finally resolve only "core" bankruptcy proceedings.[78] Core proceedings are those which are "arising under" or "arising in" a case under Title 11.[79] Core proceedings include proceedings such as the administration of the bankruptcy estate, allowance of claims, preferential transfer proceedings, and fraudulent conveyance proceedings.[80]

On the other hand, the bankruptcy court may not finally resolve "non-core" matters.[81] Instead, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for de novo review.[82] The Bankruptcy Code defines non-core matters are those which are only "related to" a case under Title 11.[83] The only time a bankruptcy court

[74] H.R. 5174, 98th Cong. § 1334 (1984) (providing that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or *arising in or related to* cases under title 11" (emphasis added)); H.R. 5116, 103d Cong. § 157 (1994) (providing the procedure for referring "any or all proceedings arising under title 11 or *arising in or related to* a case under title 11 shall be referred to the bankruptcy judges for the district" (emphasis added)).

[75] 28 U.S.C. § 157(a).

[76] *Id.* § 157(b)(5). "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." *Id.*

[77] *Id.* § 157(b)(1).

[78] *Id.*

[79] *Id.*

[80] *Id.* § 157(b)(2).

[81] *Id.* § 157(c)(1).

[82] *Id.*

[83] *Id.* § 157(a).

may finally determine non-core matters is if all parties consent to the bankruptcy court's authority on the issue.[84]

Lastly, the Bankruptcy Code requires that personal injury or wrongful death claims must be resolved in the district court in which the bankruptcy case is pending or in the district court in the district in which the claim arose.[85] This provision ensures that the bankruptcy court will not exceed its constitutional authority by determining liability on personal injury or wrongful death claims.[86]

C. The Supreme Court expands "related to" authority when issuing injunctions.

A decade after Congress enacted the new jurisdictional provisions, the Supreme Court had the opportunity to determine whether a bankruptcy court could enjoin a district court from allowing a third-party claimant to execute on a supersedeas bond held by a third-party bondsman.[87] The debtor argued that 28 U.S.C. § 157(a) and 11 U.S.C. § 105 provided the bankruptcy court with "related to" jurisdiction over the bond and therefore the ability to enjoin the claimant's execution on the supersedeas bond during the pendency of the bankruptcy case.[88] A majority of the Supreme Court agreed that the execution of the bond was at least "related to" the bankruptcy case, even though it did not directly involve the debtor, because it could impact the debtor's ability to successfully reorganize.[89]

The Supreme Court justified its decision by hypothesizing that if the claimant could reach the bond, then the sureties would attempt to reach the debtor's collateral which would be property of the bankruptcy estate.[90] Thus, the Supreme Court decided that the bankruptcy court could enjoin all proceedings "related to" the bankruptcy case which of course had the practical effect of expanding the bankruptcy court's ability to affect entirely ancillary litigation.[91]

[84] *Id.* § 157(c)(2); *see also* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 655, 671 (2015).

[85] 28 U.S.C. § 157(b)(5).

[86] *Id.*

[87] Celotex Corp. v. Edwards, 514 U.S. 300, 301–02 (1995).

[88] *Id.* at 307–08.

[89] *Id.* at 309.

[90] *Id.* at 310.

[91] *Id.* at 313.

The dissent disagreed with the majority's conclusion instead relying on 28 U.S.C § 157(c)(1) to conclude that if the bankruptcy court could not finally determine a claim, then it should not have the ability to enjoin that claim and prevent an Article III court from exercising its concededly valid jurisdiction.[92] The dissent compared the injunction to injunctions in other bankruptcy cases.[93] Notably, the dissent distinguished the injunction against the third-party bond from injunctions issued in the Johns-Manville Corporation bankruptcy which will be discussed in more detail below.[94] While some contend that the Johns-Manville bankruptcy proves that the bankruptcy court can issue broad injunctions affecting third-party claims, the dissent recognizes that is not the proposition that flows from the Johns-Manville case because that bankruptcy involved "core" claims that were the property of the debtor.[95] Unfortunately, Justice Stevens's logic did not make it into the majority opinion. As a result, the Supreme Court expanded the bankruptcy court's ability to enjoin a virtually limitless array of claims, both temporarily and permanently.

D. Congress receives a "Stern" warning on the constitutional authority of bankruptcy courts.

The next major decision on the bankruptcy court's constitutional authority to decide claims filed in the bankruptcy court came in the seminal decision *Stern v. Marshall*.[96] *Stern* resulted from a dispute over the late J. Howard's fortune.[97] J. Howard's third wife, Anna Nicole Smith, accused Howard's son, Pierce, of fraudulently inducing her beloved husband into excluding her from his will.[98] The litigation bankrupted Anna and she filed for bankruptcy in the Central District of California.[99] Pierce filed a lawsuit in the bankruptcy court alleging that Anna defamed him by telling the press he had defrauded her to control his father's assets.[100] Anna counterclaim with

[92] *Id.* at 323 (Stevens, J., dissenting).

[93] *Id.* at 324 n.12.

[94] *Id.*

[95] *Id.*

[96] 564 U.S. 462 (2011) (resulting in what are now known as *Stern* claims or claims which the bankruptcy court has statutory authorization to hear but not constitutional authorization).

[97] *Id.* at 469.

[98] *Id.* at 470.

[99] *Id.*

[100] *Id.*

the fraud allegation and, after a bench trial, Anna won $425 million in compensatory and punitive damages on her claim.[101]

For obvious reasons, Pierce was not thrilled with this result and appealed the judgment arguing that the bankruptcy court lacked jurisdiction to decide Anna's counterclaim.[102] The Supreme Court now had to answer two important questions. First, whether Anna's counterclaim was a core or non-core proceeding under the Bankruptcy Code, and second, whether the bankruptcy court had jurisdiction over the claim such that the Court could constitutionally decide it.[103]

Beginning with the statutory authorization, the Supreme Court concluded the Bankruptcy Code permitted the bankruptcy court to enter final judgment on Anna's counterclaim for fraud.[104] Under the Bankruptcy Code, counterclaims by the estate against persons filing claims against the estate are core proceedings.[105] As a core proceeding, it would follow that the claim necessarily arises in or arises under the Bankruptcy Code and therefore the bankruptcy court had statutory authorization to take the claim to final adjudication.[106] Thus, the Supreme Court concluded that the bankruptcy court had statutory authorization to decide the claim.[107]

However, statutory authorization means little if the statute cannot constitutionally grant the power it purports to give. Again, the Supreme Court emphasized the importance of an independent judiciary to the American system of checks and balances.[108] Further, the Supreme Court re-emphasized *Marathon* and the fact that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law."[109] Analogizing the fraud claim to *Marathon* the Supreme Court concluded that the bankruptcy court had exercised the "Power of the United States" and as a result exceeded its constitutional authority even though it acted within the boundaries of the Bankruptcy Code.[110] Thus, the

[101] *Id.* at 470–71.

[102] *Id.* at 471.

[103] *Id.* at 469.

[104] *Id.* at 475.

[105] *Id.*

[106] *Id.* at 476.

[107] *Id.* at 482.

[108] *Id.* at 487–88.

[109] *Id.* at 484 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)).

[110] *Id.* at 487.

Supreme Court clarified that just because the Bankruptcy Code may technically authorize the adjudication of a claim, it is improper for the bankruptcy court to exercise final authority over state law claims.[111]

With the bankruptcy court's constitutional boundaries and underlying jurisdictional statutes in mind, it is now time to turn to non-consensual third-party releases. The next Part will define the releases, examine their relevant history, and compare that history to the Purdue Pharma bankruptcy.

III. THE DEVELOPMENT AND EXISTENCE OF NON-CONSENSUAL THIRD-PARTY RELEASES

To understand the *Purdue Pharma* bankruptcy, it is equally as important to understand exactly what type of claims are at issue and why those claims differ from previous injunctions and orders issued by past bankruptcy courts. This Part defines the claims at issue in *Purdue Pharma* and analyzes the underlying precedent on releasing third-party claims in bankruptcy.

A. The ABCs of non-consensual third-party releases.

There are generally three classifications of claims in a bankruptcy case. This Comment categorizes these claims as "Class A," "Class B," and "Class C" claims. The classification depends both on the substantive nature of the claim as well as the parties asserting and/or disputing the claim.

"Class A" claims are the types of claims that someone would expect to be part of the bankruptcy process. In reference to the "core" versus "non-core" distinction discussed previously, "Class A" claims are most "arising in" and "arising under" claims.[112] Examples of these types of claims would be non-debtors filing claims for collection against the debtor, or the bankruptcy trustee initiating a fraudulent conveyance action against a non-debtor. These claims are easily identifiable, present little to no constitutional issues for the bankruptcy court exercising jurisdiction, and are not the subject of this Comment.

"Class B" claims, also not the focus of this Comment, are claims which, while technically asserted by a non-debtor against another non-debtor, have a direct impact on the size and value of the bankruptcy estate. For example,

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[111] *Id.*

[112] N. Pipeline Constr. Co., v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982); *see also* 28 U.S.C. § 157 *et seq.*

a "derivative" claim where a non-debtor seeks to recover from the bankruptcy estate indirectly as opposed to from another non-debtor person or entity.[113] This issue came up in the *Manville* bankruptcy where a non-debtor party attempted to sue the debtor's insurer because the debtor had sold the claimant asbestos products and as part of the deal extended the debtor's insurance coverage to the claimant.[114] This claim, while technically between two non-debtors, was "related to" the bankruptcy case because if the claimant collected from the insurer vis-à-vis the policy, then it would shrink the policy limit that could flow into and be available to the bankruptcy estate.[115] Thus, the bankruptcy court could properly enjoin that litigation and release the claim in a settlement between the debtor and the insurer.[116]

Finally, there are "Class C" claims which the District Court for the Southern District of New York described as "direct/particularized claims asserted by third parties against non-debtors" that are based on the non-debtors' independent conduct and are directly traceable to them.[117] These claims are not "arising in" or "arising under" because they exist independent of the bankruptcy process. Further, these claims are not "related to" because the only impact they have on the estate is due to the liable non-debtor party's offers of money in exchange for the release.[118] If Congress cannot withdraw claims from an Article III tribunal, then a non-debtor third-party should not have the ability to unilaterally manufacture bankruptcy court jurisdiction by offering cash into the bankruptcy estate.

"Class C" claims create serious issues for owners, directors, officers, and insurers of a debtor company (or related entities) because the owners, directors, officers, and insurers themselves do not want to go into bankruptcy but still want to secure a release of any claims that might be asserted directly against them through the debtor's plan of reorganization. Frequently, the solution is to offer money to the bankruptcy estate in exchange for a release set forth in the debtor's plan of reorganization. If the claimants are willing to

[113] *See In re* Johns-Manville Corp., 517 F.3d 52, 62 (2d Cir. 2008), *rev'd sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 156 (2009) (quoting MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988)).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *In re* Purdue Pharma, 635 B.R. 26, 90 (S.D.N.Y. 2021).

[118] *Id.*

negotiate, then often this process happens consensually and the owners, directors, officers, and insurers secure the release consensually.[119]

However, if the claimants do not agree to release the claims, it becomes a bitter game of leverage. The owners, directors, officers, and insurers will try to entice other creditors who do not have direct claims to vote for a plan containing non-consensual third-party releases because it will net those creditors a larger distribution in the reorganization. Often the owners, directors, officers, and insurers succeed in securing the necessary votes to approve the non-consensual third-party releases, and the claimants object to the releases as a violation of the bankruptcy court's statutory and constitutional authority. This scenario is exactly what happened in *Purdue Pharma*, and it highlights why this practice cannot continue. The claimants, often victims of a mass tort, lose their right to the adjudication of their claims in front of an Article III tribunal. Further, the claimants must then take a distribution often amounting to a fraction of what the claim is worth, engage in more extensive litigation against a litigation trust, and/or try to find a liable party that is not a beneficiary of the non-consensual third-party release set forth in the plan of reorganization.

The above classification system highlights the issues inherent with non-consensual third-party releases. While the classification system itself is relatively simple, the rise of the non-consensual third-party release was not. The next Section analyzes the development of the non-consensual third-party release and explains how the lines of bankruptcy court jurisdiction and constitutional power have blurred to allow non-consensual third-party releases to slip through the cracks of bankruptcy jurisprudence.

B. The misunderstood origins of the non-consensual third-party release.

Judge McMahon in the Southern District of New York correctly observed that Purdue Pharma L.P., by and through its counsel, intended to file a "*Manville*-style" bankruptcy case.[120] It is true that Purdue Pharma L.P. and the Johns-Manville Corporation both filed for bankruptcy to avoid nationwide litigation resulting from virtually unlimited personal injury liability.[121] However, the similarities end there. As this Section will explain

119 Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 671 (2015).

120 *Purdue Pharma*, 635 B.R. at 35 (stating that the litigation "would resolve both existing and future claims against the company arising from the prescription of OxyContin").

121 *Id.*; *In re* Johns-Manville Corp., 97 B.R. 174, 176. (Bankr. S.D.N.Y. 1989).

in greater detail, the *Manville* bankruptcy intended to settle a large swath of "Class A" claims that the Johns-Manville Corporation asserted against its insurers, a fact which the United States Supreme Court acknowledged in 2009.[122] Conversely, the *Purdue Pharma* bankruptcy really seeks to preclude litigation directly against the Sackler family by offering monetary consideration in exchange for broad non-debtor releases.[123] The Company, not the family, filed for bankruptcy, and the claims sought to be release are the direct claims of third-parties against the family.[124] These are "Class C" claims because they do not arise in, arise under, and are unrelated to the *Purdue Pharma* bankruptcy case. The only reason the family's liability has any conceivable effect on the reorganization is because the family has offered money wrongfully taken from the Company as a short-circuit way to expand the bankruptcy estate and secure broad releases for their own independent wrongdoing.[125] As discussed, the Supreme Court has expressly foreclosed one party from unilaterally imposing a state law claim on the bankruptcy court via a procedural farce.[126]

Even though the *Manville* and *Purdue Pharma* bankruptcy cases were filed to handle totally different classes of claims, the proponents of Purdue Pharma L.P.'s plan of reorganization claim it is analogous to *Manville* due to its necessity, public benefit, and limitation on and mitigation of extensive litigation.[127] The next Section will point out the origin of this misunderstanding and how *Purdue Pharma*-style bankruptcy cases should be handled going forward.

1. Building a doctrine, the *Manville* asbestos reorganization.

The Johns-Manville Corporation filed for Chapter 11 reorganization mere weeks after the Supreme Court declared the Bankruptcy Code's jurisdictional provisions unconstitutional in *Marathon*.[128] As stated, the *Manville* plan of reorganization attempted to consolidate and resolve virtually unlimited

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[122] Travelers Indem. Co. v. Bailey, 557 U.S. 137, 140–41 (2009).

[123] 635 B.R. at 35.

[124] *Id.*

[125] *Id.* at 36. As previously mentioned, after the 2007 settlement, the family began a process of taking all the liquid cash out of Purdue Pharma L.P. and filtering it into spendthrift trusts in places like the Bailiwick of Jersey before resigning from the board of directors. *Id.* at 71.

[126] Stern v. Marshall, 564 U.S. 462, 469 (2011).

[127] 635 B.R. at 37.

[128] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90 (2d Cir. 1988) ("August 26, 1982 Johns-Manville Corporation filed a petition for reorganization under Chapter 11.").

liability against the debtor corporation, and claims the debtor had against its insurers, arising out of asbestos products. The Bankruptcy Court for the Southern District of New York crafted valiant solutions and unique remedies for the unprecedented bankruptcy case. The *Manville* case represents a shining moment for equity and creative solutions but does not serve as precedent for the proposed plan in *Purdue Pharma* because the actions and ancillary cases in *Manville* show that the *Manville* bankruptcy only intended to resolve claims asserted against the debtor and claims the debtor asserted against other parties, all "Class A" claims.

The first series of appeals antecedent to the *Manville* bankruptcy arose from the Johns-Manville Corporation's co-defendants who wanted to stay state court litigation to prevent large judgments from bankrupting smaller companies using asbestos.[129] After *Manville* filed for bankruptcy, plaintiffs dismissed the debtor from the personal injury actions to pursue entities that had not filed bankruptcy.[130] The Corporation's co-defendants sought to expand the automatic stay to cover all asbestos defendants so they could remain solvent during the pendency of the *Manville* bankruptcy.[131] The motions provided the Sixth Circuit with the opportunity to analyze the breadth of the bankruptcy court's authority to enjoin litigation in Article III courts under the umbrellas of the Section 362's automatic stay.[132]

The Sixth Circuit started with the rule that the automatic stay does not protect sureties, guarantors, co-obligors, or "others with a similar legal or factual nexus to the Chapter 11 debtor."[133] Nothing in the Bankruptcy Code indicates that Congress intended to expand the stay beyond the debtor.[134] Thus, the Sixth Circuit properly concluded that the Bankruptcy Code did not allow a bankruptcy court to enjoin Article III litigation against the past co-defendants of the debtor.[135] Lastly, the Sixth Circuit went a step further to properly announce that there is "no basis in law or equity" for staying proceedings of solvent co-defendants of the debtor in state court litigation

129 Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1196 (6th Cir. 1983).

130 *Id.*

131 *Id.* Only the solvent defendants moved for protection from the automatic stay. *See id.*

132 *Id.* ("[S]aid provision facially stays proceedings 'against the debtor' and fails to intimate, even tangentially, that the stay could be interpreted as including any defendant other than the debtor . . . .").

133 *Id.*

134 *Id.* at 1197.

135 *Id.*

because the bankruptcy court does not have the power to enjoin Article III litigation that does not involve the debtor.[136]

Things went a little differently in the Fifth Circuit.[137] When the Johns-Manville Corporation filed in the Southern District of New York, a Louisiana district court decided to stay all proceedings pending in that district in which the Corporation was a defendant.[138] This was also the right decision, and in conformity with the Sixth Circuit's actions, because an Article III court undoubtedly has the discretion to stay Article III litigation in its own venue.[139]

What is interesting is that the Fifth Circuit also analyzed the bankruptcy court's injunction protecting the Corporation's insurers.[140] The plaintiffs argued that *Marathon* prevented a bankruptcy court from enjoining litigation against a non-debtor.[141] The plaintiffs asserted that the claims against the insurers bore no "reasonable nexus" to the *Manville* bankruptcy.[142] The Fifth Circuit disagreed.[143] The Fifth Circuit reasoned that the automatic stay correctly applied to the insurers because the insurance policies, and therefore the claims against the Corporation's insurers, were property of the *Manville* bankruptcy estate.[144] Thus, the Fifth Circuit refused to disturb the stayed litigation because the stay applies to property of the bankruptcy estate and because an Article III court undoubtedly has the ability to stay litigation in its own venue.[145]

These two cases illustrate the exact bounds of the bankruptcy court's ability to enjoin present and future litigation. The bankruptcy court does not have authority to enjoin a "Class C" claim which bears no relation to the bankruptcy proceeding or bankruptcy estate. However, the bankruptcy court may enjoin litigation in the "Class A" and "Class B" categories because those claims would likely impact the administration of the bankruptcy estate. These cases also illustrate that courts after *Marathon* courts, including the Second Circuit, had the correct understanding of the bankruptcy court's jurisdictional

[136] *Id.*
[137] *In re* Davis, 730 F.2d 176, 177 (5th Cir. 1984) (per curiam).
[138] *Id.*
[139] *Id.* at 178.
[140] *Id.* at 181.
[141] *Id.*
[142] *Id.* at 183.
[143] *Id.*
[144] *Id.* at 184.
[145] *Id.* at 185.

boundaries because they correctly concluded the bankruptcy court could not enjoin purely third-party litigation and claims that had no impact on the bankruptcy case. Unfortunately, as the next Sections will demonstrate, the creation of the channeling injunction, coupled with a reinterpretation of *Manville* in the early 2000s, has elevated judicial expediency above constitutional propriety, resulting in the extinction of third-party claims and the rise of the non-consensual third-party release.

2. The Second Circuit creates the channeling injunction.

Where the Fifth Circuit's opinion in *Davis* analyzed the scope of the automatic stay, the first appeal in the actual *Manville* bankruptcy case asked the Second Circuit to determine whether the bankruptcy court had the authority to issue a channeling injunction that prevented all future lawsuits related to the Johns-Manville Corporation's insurance agreements.[146] Similar to the Fifth Circuit's decision in *Davis*, the Second Circuit in *Manville* concluded that the bankruptcy court could issue a channeling injunction because the insurance claims were property of the bankruptcy estate, impacted the bankruptcy case, and, therefore, were at least "related to" the bankruptcy case.[147]

On appeal, the party challenging the channeling injunction (MacArthur) argued that the channeling injunction constituted a de facto discharge in bankruptcy of non-debtor parties that was impermissible because Chapter 11 does not provide for such a discharge of the debtor, much less a discharge of the liability of third parties.[148] MacArthur argued that its vendor endorsements that allowed it to collect against the insurers were independent contractual rights.[149] In essence, MacArthur argued that it had a "Class C" claim that was outside of the Bankruptcy Code's jurisdiction against Manville's insurers.

The Second Circuit disagreed with MacArthur, observing that the "injunctive orders do not offer the umbrella protection of a discharge in

[146] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90–91 (2d Cir. 1988). The channeling injunction was later codified in 11 U.S.C. § 524(g). The injunction "channels" litigation away from the settling entity and into a trust created from the funds the settling entity contributed as consideration for the release of liability.

[147] *Id.* at 91.

[148] *Id.*

[149] *Id.*

bankruptcy."[150] The Court added that MacArthur's "claims against the insurers based on Manville's policies are not extinguished; they are simply channeled away from the insurers and redirected at the proceeds of the settlement."[151] Based on the foregoing, the Second Circuit concluded that MacArthur could still assert its claims it would just have to assert them against the settlement trust.[152] Thus, the Second Circuit concluded that the bankruptcy court properly issued a channeling injunction as part of the final plan for reorganization.[153]

The Second Circuit Court of Appeal's conclusion did not fully resolve the appeal because it also needed to ensure that the bankruptcy court had the requisite constitutional authority to issue the channeling injunction. Fully aware of this constitutional issue, the Second Circuit went on to explain how the bankruptcy court could issue the injunction without violating the limits of the Constitution. The Second Circuit observed that the bankruptcy court has power over a broadly defined bankruptcy estate.[154] If a claim is part of the bankruptcy estate, then it is part of the estate and necessarily falls within the "core" of the bankruptcy court's jurisdiction, meaning it is a "Class A" claim.[155] Thus, MacArthur's right to recovery under the insurance policy was a "Class A" claim over which the bankruptcy court had authority to oversee the settlement process and release.[156]

However, the Second Circuit still had a problem because MacArthur argued that its contractual right vis-à-vis the policy was independent of Manville's contractual right vis-à-vis the policy and, therefore, MacArthur's claim could not be enjoined because it was not property of the bankruptcy estate.[157] The Second Circuit quickly dispatched this argument with the observation that the "vendor endorsements cover only those liabilities resulting from the vendor's status as a distributor of Manville's products."[158] Further, the "endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of

[150] *Id.*
[151] *Id.*
[152] *Id.* at 94.
[153] *Id.* at 93.
[154] *Id.* at 91–92.
[155] *See id.* at 92.
[156] *Id.*
[157] *Id.*
[158] *Id.*

the underlying policies."[159] Thus, MacArthur's rights were "completely derivative" of the Johns-Manville Corporation's insurance rights and still fell within the definition of the property of the bankruptcy estate.[160]

The Second Circuit's opinion in *Manville* first illustrates that the bankruptcy court has the authority to settle claims asserted by the debtor, as well as claims against the debtor, so long as they do not run afoul of the more modern *Stern* decision. Further, the Second Circuit's opinions establish that the original understanding of the *Manville* bankruptcy was that only derivative contractual rights against insurers would be enjoined from proceeding in the Article III court. The decision makes clear that claimants could still bring direct causes of action against the insurer—the Second Circuit expressly rejected the argument that the channeling injunction enjoined independent claims as well as rejected that MacArthur held any sort of independent contractual right to the insurance policies that did not flow through the debtor.[161] The Second Circuit did not decide what would become of any independent claims against the debtor's insurers and indeed could not because such a claim was not before the Second Circuit for decision.[162] Despite this precedent, future courts eventually misconstrued the *Manville* bankruptcy to enjoin direct claims, which are "Class C" claims, thus creating the foundation for expanding the bankruptcy court's authority beyond its constitutional bounds.

3. The misinterpretation of *Manville*.

In August of 2004, the Court of Appeals for the Second Circuit affirmed a "Clarifying Order" entered by the Southern District of New York Bankruptcy Court interpreting the confirmation plan in the original *Manville* bankruptcy case.[163] The bankruptcy court's clarification order effectively

159 *Id.*

160 *Id.* Note that this decision took place long before the Supreme Court decided *Stern*. While the fact scenario is similar, the *Manville* channeling injunction was decided correctly even under *Stern* because *Stern* handled a state court common law claim for fraud while the *Manville* case involved the settlement of insurance contracts. Reorganizing and settlement of disputed contractual rights of the debtor is one of the main focuses of a reorganization, so the *Manville* reorganization did not present a *Stern* issue.

161 *Id.*

162 *Id.*

163 *In re* Johns-Manville Corp., 517 F.3d 52, 59 (2d Cir. 2008).

barred all asbestos claimants from suing insurance companies.[164] The bankruptcy court invoked *MacArthur Co. v. Johns-Manville Corp.* to enjoin direct claims against the insurers calling them "creatively pleaded attempts to collect *indirectly* against the Manville insurance policies."[165] This is not the correct reading of *MacArthur* because that case involved a derivative right vis-à-vis a vendor's right on the insurance policy, whereas the rights at issue in the insurance actions were direct actions against the insurers for their own fraudulent misrepresentations which produced the health problems associated with asbestos.

A year later, the case ended up in front of the United States Supreme Court. [166] The "new" lawsuits resulted from the information Travelers, the Johns-Manville Corporation's principal insurer, allegedly knew about asbestos and Travelers's failure to warn the public. [167] During the *Manville* bankruptcy, Travelers contributed eighty million dollars to the Manville Personal Injury Settlement Trust, which settled the bankruptcy estate's contractual rights against its insurers and created the channeling injunction to create an avenue to recovery for the asbestos claimants.[168] Individual claimants were supposed to submit claims against the trust for review and payment.[169] The contribution to the litigation trust settled the "Class A" claims that the bankruptcy estate asserted against the insurance company.

However, some claimants sought to assert "Class C" claims against Travelers for its own wrongdoing that was not derivative of the Johns-Manville Corporation's misconduct. [170] Now, the Supreme Court had to resolve the apparent conflict between the bankruptcy court's "Clarifying Order" that enjoined claims asserted against Travelers for its independent actions and the claimant's right to assert independent claims.

First, the Supreme Court refused to analyze whether the bankruptcy court exceeded its subject matter jurisdiction in entering the original orders because

[164] *Id.* The insurance company suits arose after the Manville bankruptcy as people learned that the insurance companies not only knew about the dangers of asbestos but they also helped Manville hide those dangers. *Id.*

[165] *Id.*

[166] Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

[167] *Id.* at 140.

[168] *Id.* at 141. The settlement trust reached a total value of $770 million by the time all of the claims settled. *Id.* Since its creation, the settlement trust has paid out over $3.2 billion to over 600,000 claimants. *Id.*

[169] *Id.* at 142–43.

[170] *Id.*

the Supreme Court decided that jurisdictional and constitutional issues were resolved in the first round of appeals after the bankruptcy court confirmed the plan in 1986.[171] The Supreme Court stated that "Direct Actions fall within the scope of the 1986 Orders, as suits of this sort always have."[172] However, as previously explained, no party intended the confirmed plan to resolve independent liability of the insurers; indeed it would be impossible for parties to contemplate that possibility because the cases suggest that at the time of confirmation nobody suspected the insurers of any independent wrongdoing.[173] Regardless, the Supreme Court dismissed the subject matter and constitutional argument without analysis.[174] As a result, Travelers could not challenge the subject matter jurisdiction of the clarifying orders which expanded the intent and scope of the original orders.[175]

Second, in interpreting the plain language of the plan, the Supreme Court discarded the claimant's argument that the original orders did not bar direct "Class C" claims.[176] The Court interpreted the definition of "Policy Claims" to mean that while the direct claims were not expressly included, they were also not expressly excluded, concluding that, by implication, the direct claims should be barred.[177] But this is inconsistent with even the Supreme Court's own words and observations. The Court admits that *MacArthur* only decided whether the derivative claims could be barred but fails to make the necessary connection that the direct claims were not at issue because nobody in that bankruptcy case would have expected the plan to release them.[178] In making this mistake, the Court concluded that parties in privity with the bankruptcy that had a "fair chance" to challenge the plan could not now resist the bankruptcy order.[179] However, in reality, the claimants did not get a fair chance because they would never have expected, nor could they, that eighteen years after the reorganization, the bankruptcy court would interpret their claims to be discharged as well.

[171] *Id.* at 147–48.

[172] *Id.* at 148.

[173] *Id.* at 156 (Stevens, J., dissenting).

[174] *Id.* at 148 (majority opinion).

[175] *Id.*

[176] *Id.* at 149–50.

[177] *Id.* at 150.

[178] *Id.* at 152 n.5.

[179] *Id.* at 153.

4. The dissent gets *Manville* right.

The dissent in *Travelers* crafts a persuasive explanation premised on two key points. First, the Court must respect the constitutional limits of the bankruptcy court's power. Second, Travelers Insurance shelled out $440 million extra in tacit recognition that the original orders were only to settle the Johns-Manville Corporation's insurance policy claims, not the asbestos claimant's direct claims.[180]

The dissent begins by dividing claims into two classes.[181] First, the "insurer actions," which comprised suits by individuals claiming Travelers must pay because of the Corporation's actions.[182] Second, the "independent actions," which are claims asserting liability against Travelers for its own actions.[183] Under the dissent's system, the "insurer actions" would be "Class A" claims and the "independent actions" would be "Class C" claims.

The dissent takes issue with the majority's use of the term "direct actions" because, under the dissent's system, a direct action could either be an "insurer action" or an "independent" action.[184] The majority's overbroad characterization confuses which claims the bankruptcy court could constitutionally enjoin because it allows the majority to justify extinguishing liability running from a non-debtor to another non-debtor.[185] However, as the dissent points out, the claims against Travelers should have been classified as independent actions and allowed to proceed because the bankruptcy court did not and could not have constitutionally enjoined those claims.[186]

Unfortunately, the dissent's wisdom did not win the day, and bankruptcy courts continue to use the *Manville* bankruptcy case as an example of the bankruptcy court's ability to enjoin "Class C" claims which are totally independent of the reorganization process. The foregoing interpretation of the *Manville* case is the foundation of the Sackler family's ability to hold the bankruptcy estate hostage and negotiate a settlement payment to the bankruptcy estate in consideration of a release of their liability in the plan of reorganization.

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[180] *Id.* at 156 (Stevens, J., dissenting).
[181] *Id.* at 156–57.
[182] *Id.* at 157.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

IV. A SIMPLE EQUITABLE AND CONSTITUTIONAL SOLUTION

Many solutions have been proposed for this issue. Congress even enacted 11 U.S.C § 524(g), providing the bankruptcy court authority to handle a *Manville*-type bankruptcy.[187] However, that statute is limited to channeling a debtor's liability to asbestos claimants into a trust funded by the debtor.[188] The Sackler family is neither the debtor nor an asbestos producer. Some have proposed that the statute should be expanded to include more than just asbestos claimants.[189] However, the legislative silence on the matter for nearly thirty years is not encouraging. In fact, a recent proposal would expressly eliminate the possibility of non-consensual third-party releases.[190] Non-consensual third-party releases have simply fallen out of congressional favor, and they should fall out of judicial favor as well. It is time for bankruptcy courts and district courts to turn to a procedural solution that properly respects the constitutional boundaries placed on these courts.

Indeed, an early Second Circuit case provides insight as to what the solution may look like. *In re Drexel Burnham Lambert Group, Inc.*, provides instruction on what an equitable solution could look like if the procedure in that case were expedited and modified to fit the needs of a reorganization.[191] The Drexel Burnham and Lambert Group engaged in securities fraud resulting in a $350 million settlement with the Securities and Exchange Commission which made the company, as well as the directors and officers, liable to pay into a trust fund to be administered by the SEC.[192] Drexel paid $200 million of the claim but filed for bankruptcy before paying the remaining $150 million.[193] The remaining $150 million, as well as 15,000 other claims against the company, complicated the bankruptcy and necessitated an expedient resolution of the claims to prevent a massive economic fallout.[194]

Recognizing the dire situation, the district judge for the Southern District of New York withdrew the settlement of claims under 28 U.S.C. § 157(d) to

[187] 11 U.S.C. § 524(g).

[188] *Id.*

[189] *See generally* Richard L. Epling, *Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?*, 75 BUS. LAW. 1747 (2020).

[190] H.R. 4777, 117th Cong. (2021–2022).

[191] 960 F.2d 285 (2d Cir. 1992).

[192] *Id.* at 288.

[193] *Id.*

[194] *Id.*

resolve them.[195] Judge Pollack ordered that the formation of two groups to represent claimants pursuing the Drexel.[196] In a little over a year, the parties had worked out a settlement which they presented to the district court for approval.[197] The settlement required the debtor to pay the SEC $150 million in full, then to pay two subclasses of claimants seventy-five percent and twenty-five percent of their claims respectively.[198] Further, the subclasses obtained shares in Drexel's remaining assets and the seventy-five percent class obtained an interest in Drexel's claims against its directors and officers.[199] The district court certified the classes and approved the settlement.[200]

The appeal largely focused on appealability and the class certification; however, the discussion germane to this Comment is the Second Circuit's observations about the settlement agreement.[201] When a proper Article III court approves a settlement, albeit a forced one, the reviewing court will approve it unless there is a "clear showing" that the district court abused its discretion in granting the settlement.[202] This standard provides the district court with great latitude to approve a settlement and create a workable settlement to send to the bankruptcy court to complete the reorganization.[203] When the parties reach a settlement, it has the effect of truly reducing litigation costs, expediting the bankruptcy process in the correct manner, and yielding a larger recovery for the claimants while holding the correct parties liable to the fullest extent provided by law—all things which the current non-consensual third-party release framework fails to achieve.[204]

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195 *Id.* 28 U.S.C. § 157(d) permits the district judge to "withdraw, in whole or in part, any case or proceeding . . . if the [district judge] determines that the resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting commerce."

196 *In re Drexel*, 960 F.2d at 288.

197 *Id.*

198 *Id.* at 288–89.

199 *Id.* at 289.

200 *Id.*

201 *Id.* at 292.

202 *Id.*

203 *See id.* In its review of the settlement, the district court must consider "the complexity of the litigation, comparison of the proposed settlement with the likely result of litigation, experience of class counsel, scope of discovery preceding settlement, and the ability of the defendant to satisfy a greater judgment." *Id.*

204 *Id.* at 293.

Further, the Second Circuit discussed the injunction against the twenty-five percent subclass from suing the third-party directors and officers.[205] The Second Circuit observed that the "[a]greement is unquestionably an essential element of Drexel's ultimate reorganization."[206] Further, the settlement agreement "enables the directors and officers to settle [a more limited number of suits] without fear that future suits will be filed."[207] As a result, the settlement agreement represents the perfect compromise by maximizing the claimant's recovery while allowing others to pursue the directors and officers of the company and force the directors and officers to participate in negotiation on a more manageable range of claims.[208] As a result, the district court did not abuse its discretion in approving the settlement agreement and approving the injunctions and struck the perfect balance between fairness of recovery to the claimants and peace of mind to the defendants.[209]

The *Purdue Pharma* bankruptcy would benefit from a similar procedure. As noted, the settlement in *Drexel* took only a year to negotiate and finalize.[210] Such a procedure would fit right into the timeline of the *Purdue Pharma* bankruptcy, which was filed on September 15, 2019.[211] Further, the procedure from *Drexel* would constitutionally satisfy the three fundamental findings that Bankruptcy Judge Drain concluded necessitated the settlements: that the settlements were "necessary to the Plan; that they were fair and reasonable; and that it was necessary and appropriate for him to approve the non-consensual release."[212] These justifications mirror those enunciated by the Southern District of New York in *Drexel*.[213]

In much the same way as in *Drexel*, settling claims against the Sackler family in the district court would provide all the benefit the bankruptcy court sought to provide to the bankruptcy estate while also keeping the bankruptcy court from overexerting its judicial influence because the non-debtor personal injury claims would be resolved in the proper Article III venue. Further, such a settlement would avoid the obvious side effect of the "*Manville*-style" bankruptcy, protracted litigation. Within this Comment, it

205 *Id.*
206 *Id.*
207 *Id.*
208 *Id.*
209 *Id.*
210 *See id.* at 288.
211 635 B.R. 26, 58 (S.D.N.Y. 2021).
212 *Id.* at 70.
213 *Compare In re Drexel*, 960 F.2d at 293, *with Purdue Pharma*, 635 B.R. at 70.

is plain to see that even three decades past plan confirmation in the Johns-Manville Corporation's bankruptcy parties still engage in heavy litigation with the Corporation's insurers.[214] However, the procedure utilized in *Drexel* provides a much more final procedure for resolving the claims and imputing on the settlements the power of the Article III judiciary to detract individuals from attempting to circumvent the proper road to recovery.

CONCLUSION

In the end, the Bankruptcy Court for the Southern District of New York correctly observed that the Sackler family's cooperation with and contribution to the reorganization of Purdue Pharma was necessary and that such a settlement could produce an equitable result. However, the way in which the bankruptcy court secured that participation is unconstitutional and unfair to parties asserting claims directly against the Sackler family.

While it is frustrating to undo what many see as a major accomplishment for judicial equity, it is necessary to maintain firm boundaries on the constitutional power balance between Article I and Article III courts. The settlement should be renegotiated in the district court, and the district court should pressure the Sackler family to contribute more to the litigation trust to adequately cover a broader range of personal injury claims. Only then can the bankruptcy court confirm the plan after the district court approves the settlement, and the parties may finally reach the necessary and equitable settlement.

[214] *See, e.g.*, Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009); *In re* Johns-Manville Corp., 600 F.3d 135 (2d Cir. 2010).