

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No(s) . 22-113(CON) , 22-115(CON) , 22-116(CON) , 22-  
117(CON) , 22-119(CON) , 22-121(CON) , 22-299(CON) ,  
22-203(XAP)  
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IN RE: PURDUE PHARMA L.P. ,  
PURDUE PHARMA INC. ,  
PURDUE TRANSDERMAL TECHNOLOGIES L.P. , PURDUE  
PHARMA MANUFACTURING L.P. , PURDUE PHARMACEUTICALS  
L.P. , IMBRIUM THERAPEUTICS L.P. , ADLON  
THERAPEUTICS L.P. , GREENFIELD BIOVENTURES L.P. ,  
SEVEN SEAS HILL CORP. , OPHIR GREEN CORP. , PURDUE  
PHARMA OF PUERTO RICO , AVRIO HEALTH L.P. , PURDUE  
PHARMACEUTICAL PRODUCTS L.P. , PURDUE NEUROSCIENCE  
COMPANY , NAYATT COVE LIFESCIENCE INC. , BUTTON  
LAND L.P. , RHODES ASSOCIATES L.P. , PAUL LAND  
INC. , QUIDNICK LAND L.P. , RHODES  
PHARMACEUTICALS L.P. , RHODES TECHNOLOGIES , UDF  
LP , SVC PHARMA LP , SVC  
PHARMA INC. ,  
Debtors .  
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1 PURDUE PHARMA L.P., PURDUE PHARMA INC., PURDUE  
2 TRANSDERMAL TECHNOLOGIES L.P., PURDUE PHARMA  
3 MANUFACTURING L.P., PURDUE PHARMACEUTICALS L.P.,  
4 IMBRIUM THERAPEUTICS L.P., ADLON THERAPEUTICS  
5 L.P., GREENFIELD BIOVENTURES L.P., SEVEN SEAS  
6 HILL CORP., OPHIR GREEN CORP., PURDUE PHARMA OF  
7 PUERTO RICO, AVIRO HEALTH L.P., PURDUE  
8 PHARMACEUTICAL PRODUCTS L.P. PURDUE NEUROSCIENCE  
9 COMPANY, NAYATT COVE LIFESCIENCE INC., BUTTON  
10 LAND L.P., RHODES ASSOCIATES L.P., PAUL  
11 LAND INC., QUIDNICK LAND L.P., RHODES  
12 PHARMACEUTICALS L.P., RHODES TECHNOLOGIES, UDF  
13 LP, SVC PHARMA LP, SVC PHARMA INC.,  
14 Debtors-Appellants-Cross-Appellees,  
15  
16 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF  
17 PURDUE PHARMA L.P., ET AL., AD HOC COMMITTEE OF  
18 GOVERNMENTAL AND OTHER CONTINGENT LITIGATION  
19 CLAIMANTS, THE RAYMOND SACKLER FAMILY, AD HOC  
20 GROUP OF INDIVIDUAL VICTIMS OF PURDUE PHARMA,  
21 L.P., MULTI-STATE GOVERNMENTAL ENTITIES GROUP,  
22 MORTIMER-SIDE INITIAL COVERED SACKLER PERSONS,  
23 Appellants-Cross-Appellees,  
24

25 - v. -

1 THE CITY OF GRANDE PRAIRIE, AS REPRESENTATIVE  
2 PLAINTIFF FOR A CLASS CONSISTING OF ALL CANADIAN  
3 MUNICIPALITIES, THE CITIES OF BRANTFORD,  
4 GRAND PRAIRIE, LETHBRIDGE, AND WETASKIWIN., THE  
5 PETER BALLANTYNE CREE NATION, ON BEHALF OF ALL  
6 CANADIAN FIRST NATIONS AND METIS PEOPLE, THE  
7 PETER BALLANTYNE CREE NATION ON BEHALF OF ITSELF,  
8 AND THE LAC LA RONGE INDIAN BAND,  
9 Appellees-Cross-Appellants,

10  
11 THE STATE OF WASHINGTON, STATE OF MARYLAND,  
12 DISTRICT OF COLUMBIA, U.S. TRUSTEE WILLIAM K.  
13 HARRINGTON, STATE OF CONNECTICUT, RONALD  
14 BASS, STATE OF CALIFORNIA, PEOPLE OF THE STATE OF  
15 CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL ROB  
16 BONTA, STATE OF OREGON, STATE OF DELAWARE, BY AND  
17 THROUGH ATTORNEY GENERAL JENNINGS, STATE OF  
18 RHODE ISLAND, STATE OF VERMONT, ELLEN ISAACS, ON  
19 BEHALF OF PATRICK RYAN WROBLEWSKI, MARIA ECKE,  
20 ANDREW ECKE, RICHARD ECKE,  
21 Appellees.

22 -----  
23 April 29, 2022

24 Oral Argument  
25

1 B E F O R E :

2 HON. JON NEWMAN

3 HON. RICHARD WESLEY

4 HON. EUNICE LEE

5

6

7 A P P E A R A N C E S:

8

9 MARSHALL HUEBNER, for the Debtor

10 MITCHELL HURLEY, for the Unsecured Creditors

11 Committee

12 ROY ENGLERT, for the Ad Hoc Committee

13 GREGORY JOSEPH, for the Raymond Sackler Family

14 J. CHRISTOPHER SHORE, for Ad Hoc Group

15 JEFFREY A. LIESEMER, for MSGE

16 MICHAEL SHIH, for the United States Trustee

17 MAURA MONAGHAN, for the Mortimer Sackler fam

18 CARL CECERE, for the Canadian Creditors

19

20

21

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1 P R O C E E D I N G S

2 HON. EUNICE LEE: The next case which  
3 will be 22-110, In re: Purdue Pharma, and just  
4 before you get started, to let -- remind counsel  
5 that you are permitted to remove your mask at the  
6 podium if you choose.

7 And we will start with the first party,  
8 which will be on behalf of the Debtors and --

9 HON. RICHARD WESLEY: Cast of  
10 thousands. Okay.

11 HON. EUNICE LEE: Okay. And so Mr.  
12 Hueber?

13 MR. HUEBNER: Huebner.

14 HON. EUNICE LEE: Huebner, yes.

15 MR. HUEBNER: May it please the Court,  
16 Marshall Huebner for the fiduciary Debtors. With  
17 your permission, I will address three main points  
18 in my 18 opening minutes and reserve the balance  
19 for rebuttal.

20 First, this Court's 34 years of  
21 unbroken precedent compels reversal. The  
22 District Court is the only Court anywhere ever to  
23 deem the legality of appropriate third-party  
24 releases unsettled in the circuit. The  
25 fiduciaries, mediators, and victims relied on

1     this Court's precedent for over three years in  
2     crafting a value-maximizing life saving plan.

3             Second, even if this Court could or did  
4     reconsider the legal issue anew, its precedent is  
5     firmly rooted in the code.

6             Third, this case, illustrates exactly  
7     why third-party releases are necessary in rare  
8     and unusual cases, to protect the bankruptcy race  
9     and enable reorganization. Judge Drain's  
10    undisputed findings are that continued litigation  
11    of the claims at issue would, one, likely result  
12    in the liquidation of these operating Debtors;  
13    two, gravely impair the estates' other critical  
14    assets.

15            HON. RICHARD WESLEY: So it's the  
16    significance of the settlement that drives the  
17    scope of the bankruptcy judge's authority?

18            MR. HUEBNER: Your Honor, it's -- I  
19    apologize.

20            HON. RICHARD WESLEY: No, no, that --  
21    no.

22            MR. HUEBNER: It is the impact of the  
23    third-party actions on the race of the  
24    bankruptcy.

25            HON. RICHARD WESLEY: So the greater

1 the impact of the non-Debtor, the greater the  
2 ability of the Court to interfere with the rights  
3 of non-parties, parties who have no claims  
4 against the bankrupt themselves perhaps?

5 MR. HUEBNER: Your Honor --

6 HON. RICHARD WESLEY: Who'd interfere  
7 with claims against the non-Debtor --

8 MR. HUEBNER: Your Honor --

9 HON. RICHARD WESLEY: -- that's given a  
10 release?

11 MR. HUEBNER: In this case, you have to  
12 have claims against Debtors.

13 HON. RICHARD WESLEY: That's not my  
14 question. My question is, what's the limiting  
15 principle?

16 MR. HUEBNER: Your Honor, there are at  
17 least three limiting principles. Number one is  
18 the jurisdictional question which is set forth  
19 obviously in many of this Court's decisions,  
20 including SPV Osus, Quigley, and others.

21 The second is the test you set forth in  
22 Metromedia, affirmed on Page 88 of Madoff, and  
23 again on page 99 of Tronox that there is  
24 jurisdiction and authority when the race of the  
25 bankruptcy estate is affected. The decisions in

1     Manville I rest on exactly that principle. And  
2     then of course, Metromedia sets forth while the  
3     Court's exact words are, "It is not a matter of  
4     factors and prongs," it said that "truly unusual  
5     circumstances are necessary," and then lists  
6     several fact patterns: the impact on the estate,  
7     which in that case was a large settlement and the  
8     potential insurance policies; secondly, is the  
9     issue of the substantial consideration being paid  
10    into the estate. You can't bootstrap merely by  
11    paying money. There has to be an impact on the  
12    estate.

13                   And Your Honor, in this case, Judge  
14    Drain tailored the releases verbatim lifting  
15    words from Second Circuit case law to ensure that  
16    your concern, could there be releases about truly  
17    unrelated matters that are brought in and take  
18    away creditors' rights, could never happen. No  
19    direct claims --

20                   HON. EUNICE LEE: Is it your case --

21                   MR. HUEBNER: -- of a third party is  
22    released -

23                   HON. EUNICE LEE: Is it -- can I just -  
24    I'm sorry.

25                   MR. HUEBNER: Yes.



1           HON. EUNICE LEE: So with regard to the  
2 effect on the race, the claims, some of the  
3 claims that are being released, I mean, this is a  
4 very broad release. How is it that they actually  
5 -- I mean, it covers their broader -- it's a  
6 broader release than prior cases have really  
7 addressed and how is it that these claims, in  
8 fact, all have an impact, a direct impact on the  
9 race?

10           MR. HUEBNER: Your Honor, respectfully,  
11 the releases are actually much narrower than  
12 releases in prior cases. Very often, the  
13 releases as they were in Drexel and Metromedia  
14 simply say any matter related to the Debtors, and  
15 in fact, the Court approved releases that have  
16 that language. These releases are actually  
17 nothing like that.

18           HON. EUNICE LEE: I've looked --

19           MR. HUEBNER: The reason they're two  
20 pages long --

21           HON. EUNICE LEE: But I --

22           MR. HUEBNER: -- if I can explain?

23           HON. EUNICE LEE: I'll let you explain,  
24 but just -- but in those prior cases, weren't  
25 those circumstances often where the claims were

1     deemed to be derivative?

2                 MR. HUEBNER:  No, not at all, Your  
3     Honor.  In fact, let's take the example of  
4     Drexel.  Drexel was securities fraud cases  
5     against officers and directors for which they  
6     paid in substantial sums to get releases for all  
7     claims, including fraud in connection with the  
8     Debtor's estate.  Again, in our case Your Honor,  
9     if you'll give me a minute, because it's so  
10    important --

11                HON. RICHARD WESLEY:  Drexel is a class  
12    action where Judge Pollock pulled the class  
13    action out of -- pulled it into District Court.  
14    It's still within the context of bankruptcy so  
15    you can't just say it's just a class action; I  
16    get that.  But what happened in Drexel was that  
17    there were folks who had -- both key litigants  
18    who had claims against -- with regard to breach  
19    of fiduciary duties or other, perhaps securities  
20    fraud, misrepresentations, that may not have had  
21    claims necessarily against Drexel.  But they were  
22    -- but their claims, 850 of them there were in  
23    that, in that Class B it was, in that --

24                MR. HUEBNER:  That's right.

25                HON. RICHARD WESLEY:  There was a fund

1     that was created for them within the context of  
2     that class action. So, it's -- Drexel is kind of  
3     a unique situation in that you had claims that  
4     may not necessarily have been against the estate  
5     and had some, you know, connection to activity by  
6     some of the junk bond purveyors, but ultimately,  
7     that they were paid. By the way, my good friend,  
8     Judge Jacobs is wrong in Metromedia to say that  
9     those claimants in Drexel weren't paid. They  
10    indeed were paid from the fund -- the settlement  
11    fund B. So there's -- with all due respect to  
12    Metromedia that's not correct in that regard, but  
13    that's to the side.

14               MR. HUEBNER: So let me --

15               HON. RICHARD WESLEY: So -- and you  
16    stand on Metromedia. It's kind of a flimsy ship,  
17    isn't it? Judge Jacobs didn't express full  
18    throated endorsement, did he? He said, well  
19    we've done this before. He cites Drexel. Then  
20    he says, well, Drexel and the case that it relies  
21    on which is the Fourth Circuit, relies upon  
22    Section 105, but jeez, you take 105, all it says  
23    is just kind of general powers of the Court and  
24    then others rely on 22 -- 524(e) except that  
25    there's 524(g) which gives specific recognition

1 to the uniqueness of the asbestos matter.

2 MR. HUEBNER: So, Your Honor, weave  
3 together if I may, answers to all of those  
4 questions and do the best I can because they  
5 actually all relate, and this case I think  
6 threads all those issues in our view and in the  
7 view of the overwhelming number of victims, quite  
8 appropriately under Second Circuit precedent.

9 First of all, Drexel has three  
10 sections. The second one was the class action,  
11 Rule 23. III was entirely separate which was  
12 authority under the bankruptcy code, and exactly  
13 as here, your point is exactly one I was going to  
14 make, as you'll hear from the PI victims in  
15 particular, there is a fund. It's billions of  
16 dollars big and there are TDPs and that's exactly  
17 where the claims are channeled, which is the  
18 exact architecture of the plan.

19 Your Honor, to get to your question  
20 before I return to Metromedia, the releases are  
21 not brought. The reason they're two pages long  
22 is because they're narrower. First, you have to  
23 be a creditor against Purdue in order to have  
24 your third-party claim released at all. That's  
25 never been done in a case before, and it's

1 designed to ensure that as in Manville I, III,  
2 and IV, it has to actually be connected to the  
3 estate. And most importantly, among the other  
4 provisions is number four. Judge Drain imported  
5 sua sponte the language from Quigley that says  
6 that the Debtor's conduct has to be the legal  
7 cause or a legally relevant factor, or else the  
8 claims are not released if they're owned by third  
9 parties.

10 Your Honor as to your question, I am  
11 inclined to agree. The Second Circuit cases, and  
12 there are six of them, rest only on 105,  
13 beginning of course, with Manville --

14 HON. RICHARD WESLEY: They all cite to  
15 Judge --

16 MR. HUEBNER: Well, except for Manville  
17 --

18 HON. RICHARD WESLEY: And then  
19 Metromedia. It's repetition of one sentence  
20 endorsements. There's a footnote. There's a  
21 footnote in Madoff --

22 MR. HUEBNER: Well --

23 HON. RICHARD WESLEY: -- which says in  
24 in Metromedia, we approved this. No one, no one  
25 other in MacArthur went through any kind of

1 detailed analysis as to what -- and of course,  
2 that's in the context of -- that's in the context  
3 of --

4 MR. HUEBNER: Your Honor, if I may --

5 HON. RICHARD WESLEY: -- asbestos  
6 litigation.

7 MR. HUEBNER: And the answer is Judge  
8 Drain did. And let me explain. Madoff I of  
9 course predated -- I'm sorry, Madoff. Manville I  
10 of course predated 524(g). It was this circuit  
11 that created the concept of propriety of third-  
12 party releases when necessary to reorganization  
13 and impacting the race. The Supreme Court in  
14 Energy Resources specifically found that  
15 1123(b)(6) which says, and I quote, "A plan may  
16 contain any provision appropriate and not  
17 inconsistent with the provisions of this title."  
18 Two of your sister circuits, the Seventh Circuit  
19 in Aero-Dyne and the Sixth Circuit in Dow  
20 Corning, expressly ruling on third party releases  
21 coupled 1123(b)(6) with 105 and said together  
22 there is no question.

23 Here, Your Honor, we also have two  
24 other helper provisions relied upon by Judge  
25 Drain. 105 is not doing the lift by itself.

1 1123(b)(3) which expressly contemplates the  
2 Debtor settling its own causes of action, the  
3 Debtor's causes of action against the Sacklers  
4 are its most valuable estate -- most valuable  
5 asset. We are the plaintiffs. The Sacklers are  
6 the defendants. We own billions of dollars of  
7 claims. Judge Drain found as a matter of fact  
8 and it is undisputed those claims could not be  
9 settled unless, to use the District Court words,  
10 the "congruent claims" that overlap and  
11 intertwine absolutely and completely and are  
12 inextricable against the Sacklers were settled.

13 We also have 1123(a)(5), Your Honor,  
14 which says that a plan can contain any provision  
15 -- not any provision. Plan can contain  
16 provisions or shall contain, actually, provisions  
17 required for the --

18 HON. RICHARD WESLEY: But that's not  
19 limitless. You don't -- I mean, you don't  
20 seriously say that Congress just says that, do  
21 whatever you want to do, but you can do A through  
22 J but you can do anything else that's necessary  
23 for the plan.

24 MR. HUEBNER: Your Honor, I completely  
25 agree.

1           HON. RICHARD WESLEY: This is a  
2 bankruptcy court. This is a creature statute.  
3 It doesn't -- it has no more jurisdiction than  
4 which Congress gives it.

5           MR. HUEBNER: Your Honor, that's  
6 correct, and --

7           HON. RICHARD WESLEY: Where's the  
8 phrase that says, and anything else the Court  
9 thinks is necessary?

10          MR. HUEBNER: So Your Honor, if I may,  
11 let me separate out jurisdiction, and in fact in  
12 Celotex, the Supreme Court, which this Court  
13 picked up on in multiple decisions, including of  
14 course Madoff III and -- Manville III and IV and  
15 obviously SPV Osus and Quigley which followed,  
16 expressly talk about the new code as being a  
17 fundamental change and far broader bankruptcy  
18 jurisdiction.

19          But to be clear, Your Honor, with  
20 apologies, jurisdiction is actually not really on  
21 appeal. Judge McMahon affirmed Judge Drain and  
22 jurisdiction and found multiple profound --

23          HON. RICHARD WESLEY: Except that we  
24 have to consider jurisdiction ourselves,  
25 regardless of whether you raise it or not.



1           MR. HUEBNER: We do Your Honor, and the  
2 test in this Circuit most recently and Quigley  
3 and SPV Osus verbatim out of Celotex is, is there  
4 a -- if the underlying actions might have a  
5 conceivable effect on the estate. Here, the  
6 effects on the estate are unchallenged and they  
7 are absolutely massive. One, the destruction of  
8 the Debtors themselves who cannot survive if  
9 thousands of lawsuits about their own contact  
10 continues. Two, what was found sufficient in  
11 Manville I and many other cases, the insurance  
12 policies. We share them with the Sacklers and if  
13 these lawsuits all continue --

14           HON. RICHARD WESLEY: Yeah, but that's  
15 curious because, you know, when we had Manville  
16 which went to the Supreme Court, we said that  
17 notwithstanding that, notwithstanding MacArthur,  
18 we said those claims, those direct claims that  
19 came out of state statutory schemes against the  
20 insurance company, Travelers, were direct claims  
21 and based upon Travelers' own concept, right, and  
22 what's curious about it is that when it went to  
23 the Supreme Court, the Supreme Court didn't say  
24 oh, the Second Circuit was wrong because indeed  
25 the supreme -- the bankruptcy court had

1 jurisdiction.

2 It said, well, the notice was  
3 sufficient and so therefore res judicata applies.  
4 We expressed no opinion as to whether the  
5 bankruptcy ---

6 MR. HUEBNER: That's correct, Your  
7 Honor.

8 HON. RICHARD WESLEY: Be much neater --  
9 I mean, if there was no jurisdiction, you would  
10 have thought that the Supreme Court would have  
11 told us that.

12 MR. HUEBNER: Your Honor, your decision  
13 in Manville III was absolutely correct and  
14 supports the conclusion here. Let me explain  
15 why.

16 HON. RICHARD WESLEY: I knew sooner or  
17 later I'd hear this today.

18 MR. HUEBNER: And I'm going to give you  
19 Tronox as its companion. Manville III said  
20 unless there is an effect on the race of the  
21 estate and the Debtor's conduct is at issue,  
22 there is no jurisdiction. Here, we have 100  
23 pages of factual findings, undisputed, and no one  
24 disputes it, about the unbelievably terrible  
25 effect on the estate, nor is there any dispute

1     that the Debtor's conduct must be implicated,  
2     because Your Honor has answered your question,  
3     the very nature of the releases requires it.

4             It's hard-wired in. In Tronox, of  
5     course, what Your Honor did or what this Court  
6     did was you talked about derivative in a  
7     different sense. In other words, the confusion a  
8     little bit or the complexity is that the Manville  
9     cases really talking about derivatives being  
10    derived from the conduct of the Debtor.

11            HON. RICHARD WESLEY: Right.

12            MR. HUEBNER: It's about the underlying  
13    cause of action. The more modern usage is direct  
14    versus derivative, who owns the claims. Tronox  
15    and Madoff are exclusively about finding that  
16    boundary and saying if the --

17            HON. RICHARD WESLEY: You've got a  
18    question from Judge Newman.

19            HON. JON NEWMAN: Can you hear me?

20            HON. RICHARD WESLEY: Yes.

21            MR. HUEBNER: Yes, Your Honor.

22            HON. JON NEWMAN: All right. Before  
23    your time runs out, you seem to be spending an  
24    awful lot of time sparring, if I can put it that  
25    way, with my colleague as to the meaning of

1 certain sentences in certain opinions of our  
2 Court. I take it your position doesn't depend on  
3 those sentences. It depends on the code. Is  
4 that correct?

5 MR. HUEBNER: Your Honor, it is. In  
6 particular, the Supreme Court's decision.

7 HON. JON NEWMAN: All right. Now, you  
8 were invited by Judge Wesley to consider the  
9 question, are you saying anything that's useful  
10 is okay; and I think you started to answer that  
11 question, but I'm not sure you finished it. I  
12 take it your position is no, the code does not  
13 allow anything that's helpful.

14 MR. HUEBNER: Your Honor, that's  
15 exactly correct. 1123(b)(6) contains two  
16 limiters. Even when you leave aside --

17 HON. RICHARD WESLEY: -- 1123(g) -- B.  
18 I'm sorry, (b)(6), it says it may include any  
19 other appropriate provisions not inconsistent  
20 with the applicable provisions of the code. So  
21 if the plan runs into an inconsistency with the  
22 code, the plan is no good, right?

23 MR. HUEBNER: Absolutely, Your Honor.

24 HON. RICHARD WESLEY: Okay. So I just  
25 invite you to focus on the code before you're

1     done rather than get tangled up in who said what  
2     in one sentence of one opinion.

3                 MR. HUEBNER:   Absolutely, Your Honor.  
4     Let me address it directly right now.   All of the  
5     alleged inconsistencies with the code are simply  
6     not there.   And in fact, this Court has ruled  
7     that they are not there in most of the instances.  
8     Alleged inconsistency number one is 524(e), which  
9     merely states a truism.   The Debtor's discharge  
10    does not discharge another party for such debt.  
11    You discharge a Debtor, not a debt.   This Court  
12    rejected the argument that 524(e) has any  
13    relevance to third party releases in Manville I  
14    where it expressly said, "a release is not a  
15    discharge.   It offers none of the umbrella  
16    protections of the discharge."

17                And both in Drexel and Metromedia, the  
18    briefs directly argued to this Court that the  
19    releases it issued violated 524(e) because they  
20    were discharges and this Court said no, there is  
21    no conflict with the statute.   The next provision  
22    is --

23                HON. JON NEWMAN:   Does -- excuse me.  
24    Does the plan discharge any creditor?

25                HON. RICHARD WESLEY:   It's hard to

1 hear.

2 MR. HUEBNER: I apologize, Your Honor.

3 HON. JON NEWMAN: I'm sorry, I'll try  
4 again. Does the plan discharge any creditor?

5 MR. HUEBNER: No, Your Honor. What the  
6 plan does is it releases -- it discharges only  
7 the Debtors and it releases a narrow category of  
8 tailored claims consistent with Second Circuit  
9 precedent of specific third parties, which in  
10 most cases have capacity limitations. It has to  
11 be connected to Purdue in the role with respect  
12 to Purdue or as a transferee, and as I said  
13 before using the language from Quigley literally  
14 verbatim, the Debtor's conduct has to be the  
15 legal cause or a legally relevant factor.

16 There's no other discharge of any kind,  
17 and you need to be a creditor of Purdue, which no  
18 of the -- none of the third-party cases that have  
19 approved much broader releases before have ever  
20 had. You must be a creditor of the Debtor or  
21 your direct claim is not released at all. These  
22 releases were tied to the Debtor, to its conduct,  
23 and to the estate in ways that are much tighter  
24 than in any predecessor case, virtually all of  
25 which just released things related to the estate.

1           With respect to 524(g), Your Honor, to  
2       continue answering your question, the next  
3       alleged inconsistency, there is a reason no Court  
4       in U.S. history has ever accepted that argument.  
5       524(g) is a description of how asbestos releases  
6       work and section 111(b) of the public law enacted  
7       in 1994 expressly states, passed by Congress,  
8       signed by the President, that it is unlawful to  
9       draw an inference from 524(g) and (h) about third  
10      party releases outside of the asbestos context.

11           HON. RICHARD WESLEY: If the -- if an  
12      individual has a claim against the prescriber of  
13      OxyContin, who got one of these value savings  
14      cards that encouraged additional use of OxyContin  
15      from his prescriber and he has a claim against  
16      the prescriber and he also has a claim against  
17      Purdue, he fits within the claimants easily with  
18      that, but he has a claim against the prescriber,  
19      too; is his claim against the prescriber  
20      extinguished?

21           MR. HUEBNER: Absolutely not, Your  
22      Honor.

23           HON. RICHARD WESLEY: Is the  
24      prescriber's claim for contribution from Purdue  
25      extinguished?

1           MR. HUEBNER: No, Your Honor. They're  
2 welcome to try to file a claim against our estate  
3 and they will not prevail. This is all about  
4 maximizing value to creditors by bringing in  
5 money from the Sacklers after years of  
6 negotiation and litigation, and they are the only  
7 released parties. And even there, as I've  
8 described, there are multiple capacity  
9 limitations and limitations on the release. If  
10 you are not on the list of released persons, you  
11 are fair game to be a defendant and God knows  
12 many of them should.

13           If I may finish answering Judge  
14 Newman's question, if that would be helpful. The  
15 only other alleged provision of inconsistency,  
16 again, is one that has never been accepted by any  
17 Court anywhere in this country, never, which is  
18 523. 523 is a provision that says when an  
19 individual natural person goes through  
20 bankruptcy, this is what is and is not  
21 discharged. Important provision, because  
22 millions of people use the bankruptcy code and  
23 Congress wanted to make sure that when you go  
24 into a Chapter 11, you can't wash certain things  
25 through the proceedings.



1           Third-party releases are entirely  
2     different. They come up when critical to a  
3     Debtor's reorganization to help and maximize the  
4     recovery of innocent creditors. We are bringing  
5     in billions and billions of dollars to save  
6     lives. That's why there's --

7           HON. EUNICE LEE: Can I just -- I'm  
8     sorry, can I just jump in? One thing, this -- I  
9     guess one question I have is this this question  
10    of abuse and even in Metromedia, there was this  
11    acknowledgement that, you know, these releases  
12    perhaps can be okay, but there's a heightened  
13    risk of abuse. And in a situation like this  
14    where the parties being released are the ones  
15    determining the contribution and kind of driving  
16    the plan, that suggests concerns about abuse or  
17    even in future cases, the idea that the parties  
18    who are getting the benefit of this release are  
19    determining, you know, how much they give, how  
20    essential it's going to be to the plan.

21           MR. HUEBNER: Absolutely Your Honor.  
22     If I can tackle -- there were two things in  
23     there. If you don't mind, I'd like to address  
24     them both because they're actually so important.

25           Number one is the question of, is there

1 abuse. Now when Metromedia talks about abuse,  
2 and I think Judge Wiles' quite actually sharp  
3 opinion in Aegean Marine is quite helpful on  
4 this. What the Second Circuit was talking about  
5 was the abuse of overuse of third-party releases  
6 and I think the Courts need to be continuously  
7 diligent that the many guardrails and  
8 requirements that this and other circuits have  
9 set forth are continuously monitored for effect  
10 on the estate jurisdiction, race, substantial  
11 contribution, et cetera.

12 That really is what the Court meant by  
13 abuse which is are they being overused, and we  
14 actually went back and looked at the 80 cases  
15 that we cited in our brief, all of them because  
16 the government said that shows this has  
17 metastasized. What they didn't look at was how  
18 many of those cases have turned down third-party  
19 releases, which is more than half, about 55  
20 percent which means the Courts are doing their  
21 job. In this case, Your Honor --

22 HON. EUNICE LEE: I think -- Judge  
23 Newman, did you --

24 HON. JON NEWMAN: -- on the role of  
25 this. Are you familiar with the mediation

1 process that the judge and Attorney Feinberg went  
2 through?

3 MR. HUEBNER: I am Your Honor. I  
4 worked more than 12 hours a day on it for about a  
5 year.

6 HON. JON NEWMAN: In that mediation,  
7 was the 4 billion -- what is it, 4 billion point  
8 something.

9 MR. HUEBNER: 4.325, Your Honor.

10 HON. JON NEWMAN: Was that the  
11 Sacklers' opening suggestion?

12 MR. HUEBNER: So Your Honor, I'm  
13 actually glad you asked --

14 HON. JON NEWMAN: -- was, try to stay  
15 with the question. Was that their opening  
16 suggestion for their contribution?

17 MR. HUEBNER: So Your Honor with  
18 apologies, mediation privilege actually governs  
19 certain aspects of the mediation, but I think  
20 it's fair to assume that it was not their opening  
21 bid at all. There was a \$3 billion publicly  
22 announced settlement on the day we filed Chapter  
23 11 that also included 90 percent of the upside of  
24 all their foreign companies, all of which had to  
25 be sold.

1 HON. JON NEWMAN: -- fair to assume  
2 that it was mediation and Counselor Feinberg who  
3 got the Sacklers up from their opening bid to  
4 four billion point two.

5 MR. HUEBNER: Your Honor, there --

6 HON. JON NEWMAN: (indiscernible).

7 MR. HUEBNER: Your Honor, there were  
8 two mediators, Judge Layn Phillips and Ken  
9 Feinberg --

10 HON. JON NEWMAN: Yes.

11 MR. HUEBNER: -- who spent 11 months  
12 full time, all day every day --

13 HON. JON NEWMAN: I'm just asking, is  
14 it fair to infer that it was the pushing of the  
15 mediators that got the Sacklers up from whatever  
16 their opening bit was to the eventual 4.2  
17 billion.

18 MR. HUEBNER: So Your Honor, the  
19 mediators were one aspect of helping ensure that  
20 a proper and fair deal was reached in this case.  
21 No question about it. But as the record makes  
22 clear, this was the creditors plan and the  
23 Creditors Committee and 11 ad hoc groups of  
24 victims -- this courtroom is full of them,  
25 litigated opposite the Sacklers. There were

1 hundreds of millions of pages of discovery  
2 produced.

3 HON. JON NEWMAN: I get all that and I  
4 just don't know why -- I mean, I'm giving you  
5 what I think is a softball question, which you're  
6 standing there and letting go right over the  
7 plate. Judge Lee was concerned that the  
8 Sacklers, I think her word was determined the  
9 contribution. And what I'm suggesting to you and  
10 asking you, is it a fair inference that their  
11 opening bid was pushed up by the mediator.

12 MR. HUEBNER: Your Honor, let me  
13 apologize for missing a pitch. What I was trying  
14 to convey, and I apologize, I obviously did it  
15 badly, is there were multiple rounds of mediation  
16 between both active judges and retired judges.

17 HON. JON NEWMAN: Again, is it a fair  
18 inference that the mediators pushed the Sacklers  
19 up from their opening bid to 4.2? Now, either  
20 that's a fair inference or it's not.

21 MR. HUEBNER: Your Honor, it is a fact  
22 that is set forth and described in the disclosure  
23 statement, which has an entire section of the  
24 history of negotiations. They then went up again  
25 after mediation before sitting Judge Chapman.

1                   HON. JON NEWMAN: So to the question  
2 isn't a fair inference, the answer is, yes; is  
3 that right?

4                   MR. HUEBNER: It is, Your Honor.

5                   HON. JON NEWMAN: Thank you.

6                   MR. HUEBNER: And Judge Lee, just to  
7 finish answering your question, because the  
8 question of abuse and control is a desperately  
9 important one, and I want to give you comfort.  
10 Judge Newman's point, which I clearly missed, for  
11 which I apologize, is that we had multiple rounds  
12 of mediation before sitting and former federal  
13 judges who oversaw more than a year of fulltime  
14 mediation to ensure the fairness and integrity of  
15 the process.

16                   But the reason I was struggling for a  
17 minute is, that's only one of the things that  
18 ensure the fairness and the integrity of the  
19 process because we had all -- virtually all 50  
20 state attorneys general, an Official Committee of  
21 Unsecured Creditors, and eight ad hoc victims  
22 groups engaged all day every day in this case,  
23 over 300,000 hours of professional time poised  
24 opposite the Sacklers, which is why this plan has  
25 universal support.

1           The only appellees the U.S. government  
2       which is carved out of the releases, cut its  
3       deals, and got paid by the Sacklers already --

4           HON. JON NEWMAN: Careful. When you  
5       say the U.S. government, are you referring to the  
6       U.S. Trustee?

7           MR. HUEBNER: Your Honor, the U.S.  
8       Trustee is not an economic party in interest.  
9       The Department of Justice --

10          HON. JON NEWMAN: You just referred to  
11       the U.S. government. Is it your view the United  
12       States is against confirmation?

13          MR. HUEBNER: Your Honor, the  
14       Department of Justice submitted a statement of  
15       interest before the District Court that in  
16       essence took the same position as the U.S.  
17       Trustee which frankly many of us found, to say  
18       the least, shocking or confusing given that their  
19       deal pro abatement and giving up almost all their  
20       recovery to state and local governments to save  
21       lives is actually the cornerstone of the plan.

22          HON. JON NEWMAN: They're pulling in  
23       1.75 billion, aren't they?

24          MR. HUEBNER: They are allowing 1.75  
25       billion that is coming from the Sacklers in these

1 various settlements that otherwise would come to  
2 them as a plan distribution to go out to  
3 communities in desperate need of funds to save  
4 lives via our historic abatement structure.

5 HON. JON NEWMAN: United States hadn't  
6 given up its 1.75 super priority claim, the plan  
7 would not be the (indiscernible), would it?

8 MR. HUEBNER: Well, Your Honor, we  
9 agreed to the \$2 billion claim which was done  
10 consensually in a settlement in conjunction with  
11 a provision that they would give most of it back  
12 for abatement. That actually was the business  
13 deal and we actually had to litigate to get that  
14 deal through because parties opposed it.

15 It was a holistic deal where they were  
16 given a very large agreed claim, but then also  
17 agreed to give almost all of it back to save  
18 American lives and ameliorate the opioid crisis  
19 because the Debtors announced on the first day of  
20 the case -- and this is also just desperately  
21 important to me -- we will not do a plan where  
22 the money does not go to save American lives.  
23 And every creditor group in this case --

24 HON. JON NEWMAN: But without the give  
25 back, it wouldn't (indiscernible). That right?



1           MR. HUEBNER: Well, I'm not sure, Your  
2 Honor, what deal we would have cut with the DOJ  
3 had the give back not been part of it. It was a  
4 holistic negotiation where the agreement to the  
5 allowed claims and the 1.75 give back were both  
6 aspects of a Court approved settlement agreement.

7           HON. JON NEWMAN: Well, is it fair to  
8 say it's an integral part of the plan?

9           MR. HUEBNER: Yes, Your Honor, it is.

10          HON. JON NEWMAN: Okay.

11          HON. RICHARD WESLEY: Let me ask a  
12 question. An individual has a personal injury  
13 claim against the corporation for addiction and  
14 they live in a state that allows a direct action,  
15 which imposes personal liability on a director or  
16 officer. They make a claim with regard to the  
17 addiction to the trust, to the appropriate fund,  
18 one of the seven funds that you've created. All  
19 right. And what happens with regard to the  
20 direct action claim in those states where those  
21 claims are allowed?

22          MR. HUEBNER: So Your Honor, those  
23 direct action claims are exactly what is  
24 channeled under the plan. That is in fact the  
25 core of what the third-party release is for. The

1 Sacklers are paying in \$5.5 to \$6 billion which  
2 is actually the money that is funding --

3 HON. RICHARD WESLEY: The answer is,  
4 they're released, right?

5 MR. HUEBNER: They're channeled Your  
6 Honor, and as the TDPs made clear, both your  
7 claims against the Sacklers and your claims  
8 against Purdue are what constitute the basis for  
9 your recovery against the trust. It's just,  
10 there's only one injury, so you measure the  
11 injury once.

12 HON. RICHARD WESLEY: So the release  
13 runs to the Sacklers, releasing them individually  
14 with regard to direct claims that state law  
15 authorizes with regard to various activity of  
16 corporate officers and imposes a direct personal  
17 liability on the director, not -- for which  
18 reimbursement can't be sought from the  
19 corporation but which the officer or director is  
20 a member.

21 MR. HUEBNER: So Your Honor, I think  
22 the laws may be complicated as to whether  
23 reimbursement could be sought from the  
24 corporation and whether they could --

25 HON. RICHARD WESLEY: That's why I said

1     that it couldn't.

2                 MR. HUEBNER: I think that actually  
3     varies by state law.

4                 HON. RICHARD WESLEY: I understand  
5     that, but that's why I asked you only about the  
6     ones that could.

7                 MR. HUEBNER: Right. And so Your  
8     Honor, I guess I would answer it like this.  
9     Getting back to our discussion about ten minutes  
10    ago --

11                HON. RICHARD WESLEY: You don't know  
12    the answer to that?

13                MR. HUEBNER: I do know the answer.

14                HON. RICHARD WESLEY: Okay, good.

15                MR. HUEBNER: The answer is that is  
16    exactly what's channeled. If the claims were  
17    owned by the company, we wouldn't need third-  
18    party releases.

19                HON. RICHARD WESLEY: Well, any channel  
20    claim is then -- the Sacklers are released from  
21    personal liability, right?

22                MR. HUEBNER: Yes, Your Honor. That's  
23    the nature, that's the cornerstone of the  
24    settlement that all the victim groups supported  
25    as well as all the state attorneys general, which

1 is the Sacklers pay in to the estate and the  
2 claims against both the Sacklers and the company  
3 are channeled to the TDPs, the trust distribution  
4 procedures. It's actually a lot like the  
5 insurance company in Manville, interpleaders were  
6 paying in the entire proceeds to the estate and  
7 then claims that could be either against the  
8 company or against the insurance policy go  
9 through the channeling structures. And Your  
10 Honor, it's the, actually --

11 HON. RICHARD WESLEY: Well, there,  
12 there was one policy. There was a huge fight  
13 about a number of policies and layers of coverage  
14 et cetera, et cetera, and Travelers and a number  
15 of the other carriers finally reached a global  
16 settlement and created this fund. And the  
17 situation there was, in Judge Newman's case  
18 MacArthur, you had a distributor, but the  
19 distributor's claims were going to be made  
20 against that fund. But that was the asset that  
21 was going to be divvied up one way or the other.

22 MR. HUEBNER: Right, and --

23 HON. RICHARD WESLEY: But this is a  
24 little different. This is a state statute that  
25 imposes direct personal liability upon the

1     Sacklers and yet the Sacklers' claims are  
2     discharged --

3             MR. HUEBNER:    So Your Honor --

4             HON. RICHARD WESLEY:   -- because of the  
5     fact that they paid into the Debtor and so state  
6     claims are being extinguished by a bankruptcy  
7     order, right?

8             MR. HUEBNER:    So Your Honor, this is  
9     exactly like every third-party release case ever.  
10    In other words, parties have direct claims  
11    against third parties and a settlement is reached  
12    because the bankruptcy estate is so deeply  
13    affected. And again, in most of those cases,  
14    it's only about a payment into the estate or it's  
15    about an insurance policy. Here, we actually  
16    have everything. The Debtors have billions of  
17    dollars of insurance that the Sacklers are now  
18    walking away from and only --

19            HON. RICHARD WESLEY:   -- bankruptcy  
20    court order trumps the state cause of action  
21    because of the supremacy of the bankruptcy court?

22            MR. HUEBNER:    I mean, Your Honor, I  
23    believe in any case, when a third-party claim is  
24    released, that claim otherwise could be  
25    prosecuted under either state or federal law.

1 And so whether it's MacArthur's claim in Manville  
2 I, whether it's the securities law claims in  
3 Drexel, whether it's the hypothetical third party  
4 claims in Metromedia, whether it's the breast  
5 implant claims in Dow Corning, and this is  
6 another really important point --

7 HON. RICHARD WESLEY: And they continue  
8 to grow these types of cases.

9 MR. HUEBNER: Well, interestingly  
10 enough, Your Honor, if you think back from a  
11 policy perspective, almost every mass tort that  
12 has ever hit the bankruptcy system in every  
13 circuit in this land was only resolvable through  
14 third party releases.

15 HON. RICHARD WESLEY: No doubt. No  
16 doubt. The question is, how much can the  
17 bankruptcy court give to the Sacklers as it  
18 impacts individuals who have a separate  
19 independent claim against them for which somehow  
20 the Sacklers become absolved because they play a  
21 vital role in settling this case?

22 MR. HUEBNER: So Your Honor, what I  
23 would say in -- may I answer?

24 HON. EUNICE LEE: Oh, absolutely. I  
25 certainly want -- respond, and start to wrap up.

1 We've let you go quite a bit over.

2 MR. HUEBNER: Sure. I apologize.

3 HON. EUNICE LEE: Absolutely.

4 MR. HUEBNER: I thought I was only  
5 answering questions. I don't mean to tarry.

6 HON. EUNICE LEE: No.

7 MR. HUEBNER: Your Honor, on in Madoff,  
8 this Court's exact words were, bankruptcy courts  
9 have authority "to approve releases of a non-  
10 director's independent claims." That was what  
11 you repeated and cited to Page 99 of Tronox and  
12 you're right, that is out of Metromedia. Now,  
13 Your Honor, if this Court's view is, all of our  
14 cases to date rested only on 105 and a bunch of  
15 the other cases from the Supreme Court have cited  
16 1123(b)(6) also, because that's actually for a  
17 plan of reorganization. In fact, more closely,  
18 arguably even on point because it says a plan may  
19 contain any provision appropriate and not  
20 inconsistent.

21 And bankruptcy judges all over the code  
22 are given leeway, does not discriminate unfairly,  
23 is necessary, necessary for reorganization.  
24 There are adjectives there in about 40 places in  
25 the code where this type of discretion is the

1 warp and woof of what the broad jurisdiction  
2 under Celotex and SPV Osus and Quigley and your  
3 decisions, Tronox, Manville III, Manville IV, are  
4 all about, and never before has a case like this  
5 happened where the entire case for two-and-a-half  
6 years was only about the third-party claims and  
7 after it was mediated, litigated, and negotiated  
8 and every group in the case needs this money to  
9 go out to save lives.

10 HON. RICHARD WESLEY: Okay.

11 HON. EUNICE LEE: We'll hear from you  
12 again on the rebuttal. And so for the next party  
13 we're hearing from the Committee of Unsecured  
14 Creditors; is that correct?

15 MR. HURLEY: It is. Good morning. May  
16 --

17 HON. RICHARD WESLEY: Speak right up.  
18 Please speak right up. It's hard to hear  
19 sometimes.

20 MR. HURLEY: I will.

21 HON. EUNICE LEE: And you're Mr.  
22 Hurley?

23 MR. HURLEY: Yeah, I am Mr. Hurley.  
24 May it please the court, my name is Mitch Hurley  
25 on behalf of the Unsecured Creditors Committee.



1 The UCC was selected by the U.S. Trustee himself  
2 to act as the statutory fiduciary for all of  
3 Purdue's unsecured creditors in these cases, and  
4 the UCC has faithfully discharged that role in  
5 the more than two-and-a-half years since we were  
6 appointed.

7 We can therefore say with confidence  
8 that the plan, far from being dictated by the  
9 Sacklers, is a creditors' plan. It reflects  
10 creditor compromises and advances creditor  
11 interests. The U.S. Trustee is correct that the  
12 transfer related claims are strong against the  
13 Sacklers. We know it was Purdue's creditors who  
14 uncovered and developed virtually all of the  
15 evidence that the U.S. Trustee cites. But  
16 litigation against the Sacklers would take years  
17 and tens of millions of dollars at least and  
18 success, no matter how likely, is not guaranteed.

19 In contrast, the settlement  
20 incorporated in the plan does guarantee that  
21 Purdue's claimants will receive billions in  
22 desperately needed relief in the near term and  
23 promote abatement and public health goals that  
24 could not be achieved outside of a consensual  
25 resolution. The settlement also is critical to

1 the reorganization. Purdue's many creditors  
2 negotiated the 20-plus interlocking agreements  
3 that allocate value among creditors.

4 Absent the Sackler settlement and  
5 release, as Judge Drain found, all of those  
6 credit allocation agreements will unravel by  
7 their terms and lead to costly inter-creditor  
8 litigation that itself could take years and cost  
9 tens of millions of dollars. As Judge Drain also  
10 specifically found, the estates cannot withstand  
11 the chaos, that kind of chaos and a liquidation  
12 with literally no recovery by unsecured creditors  
13 would be likely.

14 This is all the more so because in that  
15 event the DOJ could assert the full amount of its  
16 allegedly \$2 billion super priority claim which  
17 is more than some estimates of Purdue's entire  
18 enterprise value. Creditors in trial court for  
19 these reasons recognized that the releases at  
20 issue are not only important to the plan, they  
21 are absolutely essential. Even the U.S. Trustee  
22 acknowledges that the plan would fail without the  
23 release and no party ever identified at the  
24 confirmation hearing or before the District Court  
25 any alternative to the plan that could result in

1 a successful reorganization.

2 That's because there isn't one.

3 Finally, it is estimated that an average of 200  
4 people die every day as a result of the opioid  
5 crisis. Our plan ensures that billions in Purdue  
6 and Sackler assets will be used now to stem that  
7 tide and save and improve countless lives. No  
8 other outcome can achieve this result. It is  
9 that simple. We urge the Court to reaffirm its  
10 holding in Metromedia, uphold the confirmation  
11 order, and let the creditors plan proceed  
12 forthwith.

13 HON. EUNICE LEE: Thank you, Mr.  
14 Hurley.

15 Okay so next, we'll hear from the Ad  
16 Hoc Committee of Governmental --

17 MR. ENGLERT: May it please the court.  
18 My name is Roy Englert. I represent the Ad Hoc  
19 Committee of Governmental and Other Contingent  
20 Litigation Claimants which represents the  
21 interests of many states, municipalities, and  
22 tribes. After protracted negotiation and  
23 mediation, this plan received overwhelming  
24 creditor support. It will make billions of  
25 dollars available for opioid abatement. All of

1 the voting states and territories have now  
2 consented to the plan and its third-party  
3 releases. Forty-two voted -- states voted to  
4 confirm it and another nine have now withdrawn  
5 their objections.

6 Allocation negotiations among the  
7 states began in 2018 and continued for more than  
8 two years, resulting in a consensual split of  
9 abatement funds. The states and local  
10 governments then reached agreement on abatement  
11 metrics and mechanisms, an achievement Judge  
12 Drain called incredible. As the bankruptcy court  
13 also found as fact, the entire race of the  
14 bankruptcy estate will likely be lost if this  
15 plan does not proceed, costing victims billions  
16 of dollars.

17 I would like to turn to the text of the  
18 statute. Section 1123(b)(6) provides that a plan  
19 may include any other appropriate provision not  
20 inconsistent with the applicable provisions of  
21 this title. Seems to me there are three  
22 operative words: any, applicable, and not  
23 inconsistent.

24 Any means any. Not inconsistent, has  
25 been covered by Mr. Huebner and I would

1 particularly commend to this court's attention  
2 Section 111(b) of the 1994 statute, which is  
3 codified. It's sometimes referred to as  
4 uncodified, but it's codified as a note to 11  
5 U.S.C. Section 524. The word that does all the  
6 work is appropriate. And yes, this is a very  
7 broad permission to bankruptcy courts. Now, why  
8 shouldn't that worry the Court? Let me say two  
9 things. One, there is an article by the great  
10 Judge Henry Friendly called "Indiscretion About  
11 Discretion," which has been quoted by the Supreme  
12 Court of the United States. And Judge Friendly  
13 points out that Congress often gives Courts very  
14 broad authority, but then it gets worked out by  
15 the common law method over time so that it is not  
16 abuse.

17 HON. RICHARD WESLEY: Why'd they bother  
18 with 524(g), then?

19 MR. ENGLERT: 524(g) was meant to  
20 ratify this Court's Manville decision.

21 HON. RICHARD WESLEY: But it's  
22 unnecessary. Under your theory, it's completely  
23 unnecessary. Or did -- so it just enacted it so  
24 everybody knew that they agreed with that one?

25 MR. ENGLERT: Well, there was

1        tremendous controversy over Manville, as Your  
2        Honor is well aware, and Congress did want not  
3        only to ratify Manville, but to put some very,  
4        very, very detailed procedures in place. And  
5        that's Congress' prerogative is to legislate in  
6        detail, but it's also Congress' prerogative,  
7        Judge Wesley, to legislate broadly, which is what  
8        it did in 1123(b)(6), but with the very important  
9        qualification that the provision must be  
10       appropriate. If ever there was an appropriate  
11       case, this unique mass tort case, this case in  
12       which --

13                HON. RICHARD WESLEY: Appropriate as  
14       defined by the circumstance or appropriate as  
15       defined by the underlying premises and  
16       limitations of the bankruptcy code itself? I  
17       mean, I'm not interested in the hype of whether  
18       the Sacklers dictated this or not. It doesn't  
19       interest me at all. What I'm interested in is  
20       whether the Court has the authority to do this or  
21       not. And so, is it the substantial contribution  
22       that the third-party non-Debtors make?

23                MR. ENGLERT: That's part of it, but  
24       again, I'm standing here representing the States.

25                HON. JON NEWMAN: No, wait. Don't get

1 drawn into that. For heaven's sakes. You're --

2 HON. RICHARD WESLEY: Why don't you let  
3 him answer my question?

4 HON. JON NEWMAN: Well, he'll answer it  
5 after I finish.

6 HON. RICHARD WESLEY: Okay.

7 HON. JON NEWMAN: Please don't shoot  
8 yourself in the foot by saying it's the  
9 contribution of the Sacklers that make this plan  
10 lawful. Don't do that.

11 MR. ENGLERT: But what I --

12 HON. JON NEWMAN: 1123(b)(6) which said  
13 they can do anything appropriate, not  
14 inconsistent with applicable provisions. So the  
15 burden is on the objectors to find an applicable  
16 provision that says the bankruptcy judge can't do  
17 this, and your position as you started is, there  
18 is none.

19 MR. ENGLERT: Yes.

20 HON. JON NEWMAN: And the fact that  
21 Congress blessed the asbestos thing isn't a  
22 contrary provision because Congress said  
23 specifically, draw no inference from our doing  
24 this.

25 MR. ENGLERT: Yes.

1 HON. JON NEWMAN: Draw no negative  
2 inference.

3 MR. ENGLERT: Yes.

4 HON. JON NEWMAN: So there is no  
5 provision on your view that says it can't be  
6 done, and that remains true whether the Sacklers  
7 put in four billion, one billion, or zero.  
8 Right?

9 MR. ENGLERT: There's no provision of  
10 the code that says that can't be done, no matter  
11 what the Sacklers' contribution. But I do want  
12 to emphasize on behalf of the States, the  
13 enormous amount of work that went into creating  
14 mechanisms for opioid abatement and why this  
15 matter is supported by -- why this plan is  
16 supported by essentially the unanimous view of  
17 the States, which is very unusual.

18 Judge Wesley, I thought some of the --

19 HON. RICHARD WESLEY: So absent a  
20 limitation, anything goes, I take it?

21 MR. ENGLERT: No, this is why I brought  
22 up the Friendly article.

23 HON. RICHARD WESLEY: Judge Newman was  
24 asking you, said absent limitation, anything else  
25 is appropriate. Is that it?



1           MR. ENGLERT: Anything else that's not  
2 inconsistent. Again, I started by saying, the  
3 operative word is --

4           HON. RICHARD WESLEY: Then what are --

5           MR. ENGLERT: -- not inconsistent and  
6 appropriate.

7           HON. RICHARD WESLEY: Excuse me. What  
8 are the limits, then?

9           MR. ENGLERT: The limits are worked out  
10 by Courts over time in decisions like Metromedia  
11 and in the decisions from other circuits --

12           HON. JON NEWMAN: The statute --  
13 Counsel, start with the statute. It doesn't --  
14 you started with the word any, but it is followed  
15 by any other appropriate provisions. Right?

16           MR. ENGLERT: Yes.

17           HON. JON NEWMAN: Doesn't the word  
18 appropriate have some meaning?

19           MR. ENGLERT: Yes.

20           HON. JON NEWMAN: Is it limitless?

21           MR. ENGLERT: Not going to ask anymore.

22           HON. RICHARD WESLEY: I'm done. Thank  
23 you. Thank you, Judge Newman.

24           HON. EUNICE LEE: Thank you.

25           MR. ENGLERT: Thank you.

1                   HON. EUNICE LEE: All right. Next, I  
2 believe it's the counsel for the Raymond Sackler  
3 family. Is, Mr. Joseph is next?

4                   MR. JOSEPH: Your Honor, we reserve the  
5 two minutes for rebuttal, because the issue we  
6 address is not the issue that Your Honors have  
7 been considering.

8                   HON. EUNICE LEE: Okay, thank you.  
9 We'll hear from you later. Okay. And the next  
10 party is the Ad Hoc Group of Individual Victims.  
11 Is that --

12                  MR. SHORE: Yes.

13                  HON. EUNICE LEE: Okay. And you're Mr.  
14 Shore?

15                  MR. SHORE: I am. Again, Chris Shore  
16 from White and Case on behalf of the Ad Hoc  
17 Group, which is a group of about 65,000  
18 individuals that participated actively in the  
19 proceedings below, including in drafting the  
20 TDPs, which raised the question, and I'm happy to  
21 answer any question you might have about the  
22 TDPs, but let me answer the question you asked,  
23 Judge Wesley.

24                  The TDPs are premised on one injury,  
25 one claim. That was a set of processes that were

1 put in TDPs that were approved by the bankruptcy  
2 court without objection from anybody. The  
3 alternate rule in which we would try to determine  
4 160-plus thousand personal injury claims by  
5 allocating relative fault between the Sacklers  
6 and Purdue, completely unworkable. So the TDPs,  
7 one injury, one payment out; but to be clear,  
8 they are all being funded with the Sackler  
9 contributions which are being made for both  
10 release of estate claims and direct claims.

11 With the rest of my time though, and  
12 it's going to sound weird for the victim's lawyer  
13 to say this, I want you to look past the  
14 cravenness of what the Sacklers did here as  
15 officers and directors of this company, and the  
16 damages that they brought on everybody. The key  
17 question that not only applies in this case, but  
18 will apply in every future case is, how do you  
19 solve the situation that Your Honor identified  
20 where there are claims against the corporation  
21 and there are claims against the directors and  
22 officers for their participation in those acts?

23 Those are the claims we're talking  
24 about. Those are the claims that were identified  
25 by Judge McMahon. Those are the claims that are

1 raised in everybody's papers, acts by Mortimer,  
2 Jr., acts by Richard Sackler, acts by Kathe  
3 Sackler, all taken while they were directors or  
4 officers of the company. According to the  
5 appellants in this case and in every case in this  
6 circuit, the only way you can ever solve that  
7 problem is taking one of three approaches.

8 One, you have to get the consent of  
9 everybody who has a direct claim. There are  
10 300,000 creditors in Purdue. There is no way to  
11 get them all to vote on a plan, much less agree  
12 to everything. Two, you can have the directors  
13 and officers file for bankruptcy. The U.S.  
14 Trustee points out that's what can happen. You  
15 have your whole board and officer slate file for  
16 bankruptcy in a case in which you're accused of  
17 participating in a securities fraud. Or three --

18 HON. RICHARD WESLEY: That -- it's  
19 particularly acute in a closely held corporation,  
20 obviously.

21 MR. SHORE: Absolutely.

22 HON. RICHARD WESLEY: Go ahead, go  
23 ahead.

24 MR. SHORE: And three, you litigate it  
25 to result. It leads to what I call an un-most-

1 bankruptcy-like result in which the company  
2 continues to pay on D&O policies while that  
3 litigation goes on. The directors and officers  
4 get no comfort, there's no money funded to pay  
5 victims, and everybody loses.

6 HON. RICHARD WESLEY: Is the injury the  
7 same being addiction as opposed to some other  
8 type of injury?

9 MR. SHORE: Every --

10 HON. RICHARD WESLEY: Is that the  
11 nature of the reason for the one claim?

12 MR. SHORE: Yes.

13 HON. RICHARD WESLEY: Multiple theories  
14 --

15 MR. SHORE: Yes.

16 HON. RICHARD WESLEY: -- against  
17 multiple parties, some of the some of them non-  
18 Debtors, many of them non-Debtors, but it's one  
19 injury?

20 MR. SHORE: One injury. In fact, in  
21 both the bankruptcy court and the District Court,  
22 there were pleas to everybody involved. Please  
23 come forward and tell me about the claims you are  
24 concerned about that are being released. And  
25 what came forward were obvious estate claims.

1 The Sacklers looted Purdue, walked away with all  
2 the money. Those are claims that the estate  
3 could settle without third-party releases. And  
4 what -- everything else that bubbled up and what  
5 Judge McMahon addressed specifically and what  
6 Your Honor raised today, are claims against the  
7 D's and O's for actions they took in directing  
8 the company to distribute products into the  
9 stream of commerce and injure people.

10 Those are the claims we're talking  
11 about. They are inextricably intertwined, as Mr.  
12 Huebner said, with the claims against the  
13 company. So third-party releases are what to  
14 date has solved that problem. It allows the D's  
15 and O's to waive their claims and contribution  
16 claims against the company and kick in money. It  
17 channels the claims to insurance or a fund and it  
18 releases the Debtors from the ongoing  
19 identification claims.

20 If Your Honors are going to find that  
21 that is taken away, that that possibility no  
22 longer exists, there are no third party releases,  
23 we would implore the Court as we have in our  
24 papers to get to the question then of direct and  
25 derivative, to exercise your jurisdiction to look

1 at this situation and say, in a world in which  
2 releases don't exist for the for the Sacklers for  
3 this conduct, should it be a case in which  
4 300,000 claimants each have their individual  
5 claims that they can pursue based on state laws.

6 We'll have cases going in 50 states,  
7 all for the same conduct and all trying to get to  
8 the same result, but for which the individuals  
9 will hold the payments for themselves just as the  
10 nine states who did, who settled. They said, I  
11 have a direct claim, I'm going to take \$300  
12 million approximately for myself to put it in my  
13 pocket and not share for anybody. That's not the  
14 result that bankruptcy should promote.

15 The question that should be addressed,  
16 and I think based upon what we put forward our  
17 papers, is the Court can rule in a world in which  
18 third party releases don't exist, claims like  
19 this, there may be direct claims, but the Debtor  
20 should have standing to pursue them. It leads to  
21 what Your Honor said in Tronox, which is, it  
22 leads to an equitable result. Everybody wins.  
23 People will have their opportunity to  
24 participate. People can question whether the  
25 Debtor settlement is appropriate, but you can't

1     leave a world in which nobody gets anything until  
2     the 300,000th person gives up their litigation  
3     because that's the factual situation we're in.  
4     The Sacklers aren't funding until they get  
5     comfort on those claims. It's done, pursuant to  
6     a third-party release. If the third-party  
7     release isn't available, it should be done  
8     pursuant to this Court's existing direct  
9     derivative jurisprudence that's been laid out and  
10    summarized most recently in Tronox.

11               So unless you have any further  
12    questions, that's what we have.

13               HON. RICHARD WESLEY: Thank you.

14               MR. SHORE: We thank you for your time.

15               HON. EUNICE LEE: Thank you.

16               MR. LIESEMER: Good morning, May it  
17    please, the Court. I'm Jeffrey Liesemer of  
18    Caplin and Drysdale for the Multi-State  
19    Governmental Entities Group which represents the  
20    interests of over 1,000 local governments and  
21    tens of millions of their constituents.

22               Local governmental entities are at the  
23    forefront of both opioid litigation and abatement  
24    efforts and will be critically affected by  
25    resolution of the issues before this Court today.



1 First, 95 percent of the creditors casting  
2 ballots voted in favor of the plan containing the  
3 shareholder releases; whereas, Section 524(g) by  
4 comparison only requires 75 percent. This  
5 overwhelming support shows that creditors believe  
6 that the plan containing the releases best serves  
7 their interests.

8 Second, it's hard to imagine third  
9 party releases more important and essential to a  
10 reorganization than these. Two of the more  
11 important achievements of the MSGE Group and  
12 other public creditors are, one, an agreed  
13 allocation of recoveries among incredibly  
14 disparate and complex creditor groups; and two,  
15 agreement to use the billions recovered from  
16 Purdue and Sacklers exclusively to abate the  
17 opioid crisis, bringing billions of life-saving  
18 dollars to help those most vulnerable and in  
19 need.

20 Those achievements likely would be  
21 destroyed if creditors could continue to sue the  
22 Sacklers for Purdue-related claims. This is  
23 because the available assets are dwarfed by the  
24 claims asserted against them. The public  
25 creditors' claims alone are in the trillions of

1     dollars. Even if one significant creditor were  
2     not bound to the releases and got a judgment  
3     anywhere near its asserted claim, the Sacklers  
4     would not be able to make their agreed settlement  
5     contributions, drastically reducing or  
6     eliminating payments to all other public and  
7     private creditors.

8                    Thus, the releases are essential to  
9     protect the victims and creditors. Indeed, the  
10    trial court found that at SPA 296 that the  
11    Debtors would likely liquidate absent these  
12    releases, leaving victims with little or nothing.  
13    We ask that the confirmation order be affirmed.  
14    Thank you.

15                   HON. EUNICE LEE: Thank you. And is  
16    the next party for the Mortimer side, initial  
17    coverage Sackler family? Is that --

18                   MS. MONAGHAN: Your Honor, I reserved  
19    my time for rebuttal as well.

20                   HON. EUNICE LEE: Okay.

21                   MS. MONAGHAN: Thank you.

22                   HON. EUNICE LEE: Thank you. We'll  
23    hear from you. Okay. I'll let you introduce  
24    yourself.

25                   MR. CECERE: Carl Cecere for the

1 Canadian creditors. I'm going to be focusing my  
2 time on the issues that are unique to the  
3 Canadian creditors, but obviously they cross cut  
4 on a lot of different things, including the  
5 Court's power to --

6 HON. RICHARD WESLEY: -- up?

7 MR. CECERE: Yeah, the Court's power to  
8 impose the releases. The appellants in this case  
9 have largely attempted to minimize the  
10 significance of the Canadian creditors, but the  
11 Court shouldn't be taken in by that effort. The  
12 Canadian creditors represent much more than a few  
13 isolated communities. They're the named  
14 representatives of classes that are likely to be  
15 certified in the near future that will represent  
16 all 3,000 municipalities in Canada, all 600 First  
17 Nations in Canada.

18 HON. EUNICE LEE: Can you -- I actually  
19 have one question. Your argument about,  
20 regarding sovereign immunity. How did the  
21 releases implicate that? There's -- this is not  
22 a foreign sovereign being brought into Court or  
23 held liable. I just -- I'm confused by that  
24 argument.

25 MR. CECERE: Well, it is an instance in

1    which our property is being adjudicated, our  
2    rights and our property. That is our rights and  
3    causes of action that we have against the  
4    Sacklers and other shareholder release parties  
5    are being adjudicated --

6                   HON. EUNICE LEE: But you're not being  
7    forced --

8                   MR. CECERE: -- for the --

9                   HON. EUNICE LEE: You're not being --  
10   I'm sorry. You're not being forced to, dragged  
11   into a U.S. Court. You're not being held liable  
12   for something. What's --

13                  MR. CECERE: No, but we're being -- I  
14   mean, it's the same as if we were defending the  
15   declaratory judgment. We are having our rights  
16   adjudicated as a defendant. Whether or not we  
17   are being held liable for damages doesn't matter  
18   in terms of sovereign immunity. It's a question  
19   of whether the Court is exerting jurisdiction  
20   over us.

21                  HON. EUNICE LEE: But you're coming  
22   into this voluntarily. The Court is not forcing  
23   you into this proceeding. You voluntarily have  
24   been a part of this.

25                  MR. CECERE: Well, we filed a proof of

1 claim in this case and that's true of the  
2 individual representative claimants that are here  
3 before you today, not the class, but when you  
4 file a proof in bankruptcy, that does not waive  
5 claims of sovereign immunity. When it comes to  
6 immunity provided under FISA, the only way to  
7 waive immunity under FISA is under FISA; 1604  
8 says that, you know, you go through 1604 and 1605  
9 through 1607, but the only ways, the exclusive  
10 ways that FISA immunity can be waived when it  
11 comes to the common law immunity enjoyed by  
12 tribes when they appear and provide and they  
13 enter an appearance in bankruptcy by filing a  
14 proof of claim.

15 All they have done is consented to  
16 personal jurisdiction to adjudicate their claim  
17 and any claims or counterclaims that might offset  
18 that claim. There is no consent or there is no  
19 waiver of sovereign immunity as to subject matter  
20 jurisdiction and sovereign immunity is a matter  
21 of subject matter jurisdiction and there is no  
22 waiver of other claims.

23 You can't bring us into Court in  
24 bankruptcy and then then have other people  
25 adjudicate their rights against us, and that's

1 exactly what happened here.

2 HON. EUNICE LEE: I guess, maybe I'm  
3 disputing the idea that you were brought into  
4 this Court in bankruptcy. You weren't brought  
5 in. You inserted yourself into this.

6 MR. CECERE: Well, we were brought into  
7 this -- we came to this bankruptcy to adjudicate  
8 our rights against the Debtor. We never raised  
9 any issues against any of these shareholder  
10 release parties. We've never sued. We never  
11 sued them. We never voluntarily consented to be  
12 sued and countersued by them. And one of the  
13 decisions that the appellants rely upon SG  
14 Phillips says you're only waiving when you appear  
15 in bankruptcy issues related to setoffs. You're  
16 not waiving any other issues regarding subject  
17 matter jurisdiction or sovereign immunity or  
18 anything else.

19 And so, your rights against third  
20 parties are not an issue and you haven't  
21 introduced or allowed yourself to be sued by  
22 them, if that makes any sense.

23 I want to return back to the issue of  
24 jurisdiction, the Court's power to enter the  
25 releases because I think Judge Wesley, your

1     instinct is exactly correct. It's extremely  
2     problematic for these releases to be so broad  
3     because there's no contouring about jurisdiction.  
4     There certainly was probably jurisdiction to  
5     release some of these claims, but when you  
6     release all claims of all states without regard  
7     to whether or not there would be rights of  
8     contribution or indemnity by statute or anything  
9     else like that, you create a really big problem.

10           And that's an especially bad problem  
11     for us because there's literally no connection to  
12     the estate at all from our claims. There will be  
13     no rights to contribution indemnity or insurance  
14     because they haven't established that there's any  
15     insurance policy that covers us. They haven't  
16     established that, you know, the rights of  
17     contribution indemnity with regards to our claims  
18     against Purdue Canada, they're going to run to  
19     Purdue Canada.

20           They're the joint tortfeasor in that  
21     situation and our contribution act claims, well,  
22     contribution -- I mean, our Competition Act  
23     claims for those contribution and indemnity and  
24     insurance are all affirmatively barred by  
25     Canadian law. There will be no recovery for

1     those claims. There's no connection to the  
2     estate there.

3             And as the Court -- as you suggested,  
4     Judge Wesley, it's also extremely problematic for  
5     them to say that well, because they've got a  
6     right to withdraw, the Sacklers have a right to  
7     withdraw the money if they're sued or, you know,  
8     there would be a cascade of events that would  
9     happen if there were to be a bunch of suits.  
10    That is an extremely problematic way of  
11    establishing jurisdiction because that  
12    establishes that there were effects on a  
13    particular plan.

14            But then you have to leap from the plan  
15    to the estate and you're not -- and that is an  
16    indirect effect. That is a second order if this  
17    happens and then in another event happens and  
18    that other people do other things, and that's  
19    exactly the kind of attenuated indirect  
20    connection that can establish jurisdiction under  
21    this Court's precedent.

22            HON. RICHARD WESLEY: Canadian  
23    plaintiffs possess direct claims against the  
24    Sacklers individually?

25            MR. CECERE: So we have not filed any



1     claims against the Sacklers directly yet. We  
2     were prohibited from doing so by the impositions  
3     --

4             HON. RICHARD WESLEY: Right.

5             MR. CECERE: -- of stays here --

6             HON. RICHARD WESLEY: Under Canadian  
7     law.

8             MR. CECERE: Under Canadian law, we can  
9     sue -- we can and plan to do, yes, exactly that.  
10    We plan to sue them both in their capacities,  
11    directors as -- of Purdue Canada. We also plan  
12    to sue them under the Competition Act, which is a  
13    direct action against them individually, not in  
14    their capacities as officers and directors, but  
15    individually for their conduct in promoting  
16    opioid drugs in the United States --

17            HON. RICHARD WESLEY: You say those  
18    types --

19            MR. CECERE: In the United States.

20            HON. RICHARD WESLEY: And under  
21    Canadian law, you say the -- with regard to those  
22    claims, they can't seek contribution or  
23    indemnification?

24            MR. CECERE: with regard to the  
25    contribution -- excuse me. With regard to the

1 Competition Act claims, that's not just unlikely  
2 to happen, it's affirmatively barred under  
3 Canadian law on all three. There will be no  
4 contribution, there'll be no indemnity, there can  
5 be no insurance coverage.

6 HON. RICHARD WESLEY: Okay.

7 MR. CECERE: Thank you.

8 HON. EUNICE LEE: Okay, thank you.

9 MR. CECERE: Okay, and --

10 HON. EUNICE LEE: I think we --

11 HON. RICHARD WESLEY: We have.

12 HON. EUNICE LEE: We have your  
13 argument.

14 MR. CECERE: Okay. Thank you.

15 HON. EUNICE LEE: Thank you. Okay, and  
16 we'll hear now from the Trustee.

17 MR. SHIH: Thank you very much, Your  
18 Honor. Mike Shih for the U.S. Trustee. I want  
19 to zoom out to focus on the appropriate framework  
20 for assessing the statutory question, and that  
21 stems from the long line of Supreme Court cases  
22 making clear that Congress needs to enact  
23 exceedingly clear language if it wants to  
24 significantly alter the power of the federal  
25 government over private property, as it

1 articulated most recently in Cowpasture.

2           So, under the plan proponents' view,  
3 the code authorizes bankruptcy courts to  
4 permanently extinguish causes of action, which  
5 are a species of property right as the Court made  
6 clear in Zimmerman Brush, but no provision of the  
7 bankruptcy code expressly authorizes bankruptcy  
8 courts to adopt releases of this sort, as the  
9 court indeed remarked in Metromedia. So  
10 constitutional avoidance requires that the code  
11 be construed to prohibit the result that the plan  
12 proponents are asking for, and that's a very easy  
13 way of assessing the statutory claims here.

14           Now, the only response to this that I  
15 think the other side has come up with is not that  
16 avoidance doesn't apply or it's not that  
17 constitutional issues aren't at least deeply  
18 implicated. It's that the bankruptcy code speaks  
19 clearly, and I think Judge Newman was getting at  
20 this in his colloquy about 1123(b)(6), but the  
21 problem is the other side's interpretation of  
22 that statute just can't be reconciled with the  
23 way the Supreme Court has addressed these general  
24 provisions, codifying bankruptcy courts' residual  
25 equitable authority as the Energy Resources case

1 on which the other side so heavily relies  
2 actually underscores.

3 Energy Resources makes clear that all  
4 of these statutes, whether it's 105, 1123, or  
5 whatever all of these residual equitable powers  
6 derive from the traditional understanding that  
7 bankruptcy courts, as Courts of equity, have  
8 broad authority to "modify creditor-Debtor  
9 relationships." And in assessing statutes of  
10 this type, the Supreme Court has repeatedly  
11 rejected the idea that the code's general  
12 authority provisions are able to accomplish a  
13 result that is antithetical not only to the text  
14 of the code, but to its structure, purposes, and  
15 history.

16 HON. EUNICE LEE: Well, I think -- I  
17 mean, I think the other side's argument is that  
18 in fact, this type of release would not be  
19 inconsistent with the code and that it's not, in  
20 fact, inconsistent with any express provision of  
21 the code, so maybe you could you could speak to  
22 that specifically.

23 MR. SHIH: I will, Your Honor. There's  
24 two parts to your question and I want to get at  
25 them in reverse. So the first question is how

1 express does the inconsistency have to be? And  
2 the other side would have you believe that it  
3 needs to be expressly forbidden by the bankruptcy  
4 code for there to be an inconsistency and that  
5 just can't be right under cases like Jevic, Law,  
6 and RadLAX.

7           So take Jevic, for example. That was  
8 about the priority ordering that the bankruptcy  
9 code sets forth. Now, those priority orders  
10 don't apply to this type of order, called a  
11 structured dismissal. So nothing in the  
12 bankruptcy code expressly prohibits a bankruptcy  
13 court from adopting a structured dismissal that  
14 violates the priority provisions. Nevertheless,  
15 the Supreme Court said in Jevic that the priority  
16 provisions are so fundamental to bankruptcy, that  
17 the general provisions granting equitable power  
18 to the bankruptcy court can't support the  
19 exercise of authority. And so analogizing --

20           HON. EUNICE LEE: Can I just jump in  
21 for a second?

22           MR. SHIH: Yeah.

23           HON. EUNICE LEE: Because to me, the  
24 Jevic case is distinct from what's going on here.  
25 In that situation, you actually have something in

1 the bankruptcy code that specifically says this  
2 is the priority order and it applies to certain  
3 circumstances. And yes, in that case, they're  
4 applying -- their basically, the bankruptcy court  
5 is saying, well, we know these are the standard  
6 priority orders, but because the code doesn't say  
7 we have to apply it to a structured dismissal, we  
8 won't.

9 That's a clear inconsistency where the  
10 code is addressing a particular area in a very  
11 specific way about priority and the Court is  
12 actually -- the bankruptcy court is saying, well  
13 we know this is a priority, but we're going to  
14 divert from this because we think there's a good  
15 reason, something general like that. Here,  
16 there's not some specific provisions about third-  
17 party releases in the code where you can look at  
18 that, oh, this is some specific standard and  
19 we're going to go away from that.

20 That's -- it seems like a different  
21 situation in Jevic because it's highly specific.  
22 And so yes, what they were doing wasn't forbidden  
23 by the code, but it was addressed in a very  
24 explicit way.

25 MR. SHIH: So, point taken Your Honor.

1 We disagree with that reading of Jevic because,  
2 you know, as the other side would have it, there  
3 does need to be some express prohibition. But  
4 Your Honor's, I think, point is, I guess slightly  
5 different which is, you know, that the sort of  
6 inconsistency was more specific because there  
7 we're only talking about, you know, the specific  
8 priorities framework and here the inconsistency  
9 is much broader, but that makes the problem  
10 worse, Your Honor, not better.

11 So virtually every provision of the  
12 bankruptcy code is there to restructure the  
13 creditor-debtor relationship. That's all the  
14 bankruptcy code really talks about. And this  
15 Court has held and the Supreme Court has held and  
16 other circuits have held that the whole point of  
17 bankruptcy is tailored to that relationship. And  
18 so it makes sense that the code is replete with  
19 statutory provisions directed to that  
20 relationship.

21 It's not just the priority scheme that  
22 we're talking about now. We're now talking  
23 about, you know, as the other side said, the warp  
24 and weft of the entire bankruptcy code. And none  
25 of those provisions, except one has anything to

1 say about the release of a non-Debtor's direct  
2 claim against another non-Debtor. The one  
3 provision is arising only in the asbestos  
4 context, and it doesn't apply to direct claims.  
5 It only applies to derivative claims, as this  
6 Court explained in Manville IV.

7 So the inconsistency is, yes, you're  
8 right, Your Honor, it's a more general  
9 inconsistency, but that just underscores why the  
10 power asserted by the bankruptcy court was so  
11 remarkable and why --

12 HON. EUNICE LEE: I guess another way  
13 to look at it is, if it's so general, how are you  
14 determining that there is in fact an  
15 inconsistency?

16 MR. SHIH: So it's not -- it's a  
17 structural analysis, Your Honor, in the same way  
18 that the Supreme Court has relied on the similar  
19 structural intuition in Jevic, RadLAX, and Law.  
20 So, you know, again, the Supreme Court says,  
21 where we have a whole bunch of provisions that  
22 address a particular type of thing and no  
23 provision addresses the sort of thing that the  
24 bankruptcy court wants to do but there's  
25 obviously a relationship between them, then, you



1 know, that is antithetical to the structure of  
2 the bankruptcy code.

3 And so that intuition applies with full  
4 force here, but it's not just a specific problem.

5 HON. JON NEWMAN: So your reading of  
6 1123(b)(6) when it says, any -- not inconsistent  
7 with any active provision, you think that means  
8 inconsistent with another provision that deals  
9 with a specific topic and inconsistent with any  
10 provision that doesn't deal with a specific  
11 topic. Is that right?

12 MR. SHIH: No, Your Honor. We agree  
13 that appropriate has meaning. What we're saying  
14 is that the specific topic relevant to the  
15 question of a non-Debtor release is indeed the  
16 topic of whether a discharge in bankruptcy can  
17 provide relief not only to the Debtor but also to  
18 the non-Debtor and not only for derivative  
19 claims, but also for direct claims. And so we  
20 disagree with the premise of the question that  
21 there is somehow some divergence between, you  
22 know, that fundament of the bankruptcy code and  
23 somehow that's irrelevant to the power that the  
24 bankruptcy court has asserted.

25 But it's not just these general

1 provisions, Your Honor, that the release offends.  
2 The release also grants the equivalent of a  
3 discharge to the Sacklers without ensuring that  
4 the Sacklers submit to the code's procedures for  
5 protecting creditors. So there's no reasonable  
6 dispute, for example, that if the Sacklers had  
7 declared bankruptcy themselves -- they haven't,  
8 but if they had, the result would have been much  
9 different and the deal would have looked quite  
10 different.

11 So the Sacklers would have --

12 HON. JON NEWMAN: Excuse me. Didn't we  
13 say in Manville I that a release was not a  
14 discharge?

15 MR. SHIH: That was certainly part of  
16 Manville I, but Manville I doesn't sweep that far  
17 for two reasons. The first is, Manville I only  
18 addressed derivative claims as the later cases in  
19 the Manville line make clear. And the second is  
20 that in Metromedia, this Court explained that  
21 indeed, a third-party release could be the  
22 equivalent of a discharge. But you know, just to  
23 go back to the inconsistency, if the Sacklers had  
24 declared bankruptcy themselves, they would have  
25 needed to account for all of their assets. They

1 would have needed to put them in the bankruptcy  
2 estate subject to certain exemptions.

3 They wouldn't have been able to obtain  
4 relief for claims for fraud and certain other  
5 forms of intentional misconduct. And --

6 HON. JON NEWMAN: The other doesn't  
7 doubt anything you just said.

8 MR. SHIH: No, they don't. They don't.  
9 They don't --

10 HON. JON NEWMAN: If go into  
11 bankruptcy, the bankruptcy laws apply to them has  
12 a discharged creditor. They don't dispute that.  
13 Their argument is, this is not a discharge. And  
14 you say in effect, it's a discharge, right?

15 MR. SHIH: Yes, Your Honor. But that  
16 makes the problem worse.

17 HON. JON NEWMAN: It it's not a  
18 discharge, is it?

19 MR. SHIH: It is the same relief that a  
20 discharge grants. All a discharge -- discharge  
21 is not a magical term in bankruptcy. All a  
22 discharge means is that there is a permanent  
23 injunction on bringing a particular claim.  
24 That's exactly what this release does. This  
25 release operates as a permanent injunction on

1 bringing a particular type of claim.

2 HON. RICHARD WESLEY: It extinguishes  
3 the claim.

4 MR. SHIH: It permanently extinguishes  
5 --

6 HON. RICHARD WESLEY: -- that it's a  
7 permanent defense against?

8 MR. SHIH: Exactly. And that's exactly  
9 what a discharge in bankruptcy does. And so they  
10 say it's, well, not technically a discharge in  
11 bankruptcy. That's true, Your Honors, but that  
12 just underscores why this is so weird to try to  
13 say, is consistent with the bankruptcy code. If  
14 the relief they're given by the bankruptcy court  
15 is identical to a discharge, but the bankruptcy  
16 discharge provisions emphatically do not cover  
17 the sort of relief that they got, that is a  
18 tremendous assertion of power on behalf of the  
19 bankruptcy court that you would think Congress  
20 would have specified more clearly if it had  
21 intended the bankruptcy court to wield such  
22 authority.

23 And of course, notwithstanding the  
24 asbestos exception, which applies only to  
25 derivative claims we are not aware of and the

1 other side hasn't cited a single example of  
2 Congress saying that in something like the 222  
3 years in which Congress has been legislating in  
4 the bankruptcy space. But, you know, to return  
5 to the point about the relief that the Sacklers  
6 could have gotten in individual bankruptcy just  
7 illustrates why this case is on all fours with  
8 Jevic and RadLAX and Law.

9 By not declaring bankruptcy, the  
10 Sacklers didn't have to give up all of their  
11 assets, got broader relief, release for claims  
12 for fraud than they would have gotten under  
13 bankruptcy, all under the umbra of bankruptcy.  
14 And that's the sort of assertion of authority by  
15 the bankruptcy court that evades specific  
16 restrictions on what a discharge could do that  
17 the Supreme Court found so problematic.

18 HON. RICHARD WESLEY: Where in the  
19 language of the release, you find they're  
20 released from fraud?

21 MR. SHIH: Sorry?

22 HON. RICHARD WESLEY: Where in the  
23 language of the release do you find they're  
24 released from fraud, fraudulent claims?

25 MR. SHIH: So it's found in the

1 definition of cause of action, Your Honor. And  
2 if you bear with me --

3 HON. RICHARD WESLEY: I just want to  
4 make a note.

5 MR. SHIH: Yeah, if you'll bear with  
6 me, let me find it in our brief. Yeah, so we  
7 begin discussing this on Page 19 of our brief --

8 HON. RICHARD WESLEY: Page 19. Yeah.  
9 Okay.

10 MR. SHIH: And it continues on -- when  
11 we discuss the changes to the release on Pages  
12 222 -- 21 through 23.

13 HON. RICHARD WESLEY: Okay.

14 MR. SHIH: And so the operative  
15 definition of cause of action is any claim within  
16 the meaning of the bankruptcy code, as well as  
17 any claim of any kind, character, or nature  
18 whatsoever. And that to me seems broad enough to  
19 encompass a claim for fraud against the Sacklers.

20 HON. RICHARD WESLEY: All right.

21 MR. SHIH: So the other inconsistency  
22 to point out is with respect to 524(g) itself.  
23 When Congress enacted 524(g), it specified that  
24 that was being enacted notwithstanding Section  
25 524(e), which of course states that a discharge

1 in bankruptcy is for the benefit of the Debtor.

2 The other side has no explanation for  
3 why Congress would have wanted to include the  
4 notwithstanding language. As far as they're  
5 concerned, Congress didn't need to enact that  
6 language at all, and indeed Congress, wouldn't  
7 have needed to enact 524(g) at all, because in  
8 their view, bankruptcy courts have traditionally  
9 wielded such power, but --

10 HON. EUNICE LEE: What do we -- I mean  
11 with regard to 524(g), when it explicitly states,  
12 don't read into, don't assume or read anything  
13 into -- from this rather, about the bankruptcy  
14 court's authority, it seems like it's a wash.  
15 Like, how can you say, well, even though the  
16 statute has an explicit provision telling --  
17 saying, you can't rely on this or read into this,  
18 we should still read into it.

19 MR. SHIH: So it's not -- because that  
20 over reads the rule of construction, Your Honor.  
21 All the rule of construction says is, if Courts  
22 believe that bankruptcy courts have always had  
23 this authority, then the enactment of 524(g)  
24 shouldn't restrict that. That, I think, is the  
25 best reading of the rule of construction, but

1 Congress didn't take a view as to -- in the rule  
2 of construction as to whether bankruptcy courts  
3 have traditionally wielded that authority.

4 And although the other side relies on  
5 cases such as Katz that talk about the bankruptcy  
6 court's traditional authority at the time of the  
7 framing, they have notably failed to identify any  
8 framing era example of a bankruptcy court  
9 reaching out to terminate a non-Debtor's direct  
10 claim against another non-Debtor and we're not  
11 aware of any example of such historical power  
12 being exercised under equity, which is another  
13 reason why if a bankruptcy court is to exercise  
14 that power, one would expect Congress to have  
15 spoken quite clearly. And of course, as  
16 Metromedia itself recognized, there is no express  
17 provision of the bankruptcy code authorizing the  
18 release in question. I --

19 HON. JON NEWMAN: So is it fair to say  
20 that with respect to non-asbestos claims,  
21 Congress didn't speak one way or the other with  
22 respect to releases?

23 MR. SHIH: That's fair, Your Honor.

24 HON. JON NEWMAN: Okay.

25 MR. SHIH: It's difficult to parse



1 because again, Congress in 524(g) said that  
2 524(e) is a bar. And so, you know, we should  
3 credit what Congress said insofar as Congress  
4 relied on the notwithstanding language. If  
5 Congress hadn't thought of 524(e) as a bar, it's  
6 hard to understand why Congress would have put in  
7 the notwithstanding term. But, you know, even if  
8 Your Honor is right, that the bankruptcy code has  
9 nothing to say, the District Court correctly held  
10 that the tie goes against the bankruptcy court's  
11 exercise of authority here, and that's true for  
12 two reasons.

13 The first is of course the rule of  
14 construction that the Supreme Court articulated  
15 in cases like *Cowpasture*, that requires an  
16 exceptionally clear statement of congressional  
17 intent. And second, the fact that in *Jevic*, the  
18 Supreme Court said to the extent that the  
19 bankruptcy court wants to assert a power that is  
20 inconsistent with the structure, purposes, or  
21 text of the bankruptcy code, there needs to be  
22 much more than congressional silence. So the  
23 fact that --

24 HON. EUNICE LEE: Isn't that -- that's  
25 the whole issue though, whether or not in fact

1     this is inconsistent with the bankruptcy code and  
2     we know that there's no explicit provisions  
3     addressing that. That's the whole sort of issue  
4     here.

5             MR. SHIH: So Your Honor, if you don't  
6     think that there's any inconsistency with the  
7     bankruptcy code, then of course, this difficulty  
8     is -- that's going to be hard for us to overcome.

9             HON. EUNICE LEE: Right, but I mean, I  
10    guess what I'm saying is, point me to the thing  
11    that shows there's an inconsistency.

12            MR. SHIH: If you haven't agreed that  
13    the inconsistencies that we've identified here  
14    are not inconsistencies, right, then Your Honor  
15    has a very specific understanding of  
16    inconsistency that just can't be squared with how  
17    that is used in normal parlance because  
18    inconsistency doesn't mean inconsistent with just  
19    the express terms of a statute.

20            Imagine a plain language example,  
21    library says members can only borrow books for  
22    two weeks, and that's all. And then so a  
23    nonmember marches in and says, well I'm not a  
24    member so I can borrow books for as long as I  
25    want. I think everybody would go, that's a

1 little bit weird, notwithstanding the fact that  
2 the rule for the library doesn't have anything to  
3 do with what nonmembers can or can't do. And so  
4 that's analogous to the sort of inconsistency  
5 that's present here where a non-Debtor says, I  
6 can get the benefit of a discharge and the  
7 bankruptcy gets to grant me the equivalent of a  
8 discharge, a permanent injunction, as Judge  
9 Wesley has pointed out, but I don't need to  
10 comply with any of the rules of the bankruptcy  
11 code and I don't need to contribute all of my  
12 assets, and by the way, the permanent injunction  
13 that I'm getting is broader than the permanent  
14 injunction, I would have been entitled to had I  
15 declared bankruptcy myself.

16 That's the fundamental inconsistency  
17 here and the fact that it's not just with limited  
18 provisions such as the priority scheme makes the  
19 problem worse and not better, Your Honor. And  
20 so, you know, to the extent --

21 HON. JON NEWMAN: Is it your position  
22 that there cannot be a lawful release of the sort  
23 in this case unless Congress explicitly  
24 authorizes such a release?

25 MR. SHIH: Yes.

1 HON. JON NEWMAN: That's your position?

2 MR. SHIH: Our position is that if  
3 Congress has not expressly authorized the release  
4 of a direct claim of a non-Debtor against another  
5 non-Debtor, then a bankruptcy court lacks  
6 authority to adopt a plan that contains a release  
7 of that sort, an expressed congressional  
8 enactment, such as 524(g) except applicable to  
9 direct claims and not just derivative claims.  
10 That's the sort of thing that would be required  
11 before a bankruptcy court or any court could  
12 exercise authority in bankruptcy to do something  
13 like that. And the due process --

14 HON. JON NEWMAN: Go ahead.

15 MR. SHIH: No, Your Honor, I did not  
16 mean to interrupt.

17 HON. RICHARD WESLEY: He's --

18 HON. JON NEWMAN: Oh, I thought you had  
19 to leave (indiscernible), no? Am I wrong?

20 HON. RICHARD WESLEY: No, no. No.

21 HON. EUNICE LEE: Continue.

22 HON. RICHARD WESLEY: It's very hard to  
23 hear you, Judge Newman.

24 HON. JON NEWMAN: Okay. I'll try to do  
25 better. Now sure if counsel wants me to, but

1 I'll be glad to --

2 HON. EUNICE LEE: You can --

3 HON. JON NEWMAN: -- process. I'm  
4 trying to get the volume up. What in your view  
5 will happen to the existing and potential  
6 plaintiffs if the plan is not confirmed?

7 MR. SHIH: So I'm glad for the  
8 opportunity to address that, Your Honor, and I  
9 want to make something very, very clear. The  
10 U.S. Trustee fully recognizes the pain and  
11 suffering that the opioid crisis has caused and  
12 the U.S. Trustee agrees with the District Court  
13 that the proposed plan with these contours could  
14 provide a lot of things that are very good to a  
15 lot of people. But those don't bear on the core  
16 legal question which is whether the release is  
17 constitutionally sound or statutorily authorized.

18 And moreover, these predictions about  
19 what will happen if the District Court is  
20 affirmed are speculative. So for example, the  
21 bankruptcy court approved the plan based in  
22 significant part on representations that it was  
23 the best plan and based on, it seems, significant  
24 efforts by the mediators to extract the best plan  
25 and that led to a \$4.3 billion contribution by

1 the Sacklers.

2 But once the District Court vacated the  
3 plan, the Sacklers agreed to contribute an  
4 additional, like, one point something billion  
5 more, which was not on the table until the plan  
6 was vacated. So these suggestions that  
7 everything is going to fall apart are a little  
8 hard to credit. But even if the Sacklers decide  
9 to take their proverbial ball and go home, that  
10 doesn't mean that no plan can be confirmed. So  
11 for example, the estate has billions of dollars  
12 in fraudulent conveyance claims against the  
13 Sacklers that presumably the estate could pursue  
14 if it chose.

15 The states and plaintiffs could recover  
16 from the various lawsuits against the Sacklers  
17 that the bankruptcy court put on ice and more  
18 people could file lawsuits such as, presumably,  
19 the Canadian municipalities whose ability to file  
20 lawsuits has been pretermitted by the injunction  
21 that the bankruptcy court put in place and to the  
22 extent that --

23 HON. JON NEWMAN: Where would they sue  
24 the Sacklers?

25 MR. SHIH: I don't know, Your Honor.

1 You'll have to ask the Canadians about that. But  
2 the point is, to the extent that the Sacklers  
3 protest --

4 HON. JON NEWMAN: Claim is, their money  
5 is in the bailiwick of Jersey.

6 MR. SHIH: That's right, Your Honor.  
7 But these representations about the value of the  
8 claims are also a little bit hard to credit. So  
9 at the confirmation hearing, the Debtor  
10 specifically said that the merits of the District  
11 Court's -- of the direct claims against the  
12 Sacklers and the other released parties were  
13 irrelevant. I think one illustrative statement  
14 is on Page 806 of the SPA where they said, we  
15 chose the train that we're riding and train we're  
16 riding is not the merits.

17 At the bankruptcy hearing, they never  
18 analyzed the value of the claims. They never  
19 retained any experts to value the claims. They  
20 didn't invite or receive any presentations from  
21 potential plaintiffs with such claims. So it's  
22 hard now to say, well, you know, the claims are  
23 essentially worthless. And they also emphasize  
24 how successful the Sacklers have been, as Your  
25 Honor has said, at shielding their assets from

1 recovery. But that's also difficult to square  
2 with the Sacklers' own behavior where they agreed  
3 to pay a billion dollars more to get these  
4 releases after the release was vacated, to try to  
5 make this lawsuit go away.

6 So it's difficult to understand how, in  
7 light of the absence of anything in the record  
8 about the value of these direct claims against  
9 the Sacklers and in light of the Sacklers'  
10 willingness to pay an extra billion dollars just  
11 to get the release to try to make the lawsuit go  
12 away, that the fact that some of their assets may  
13 make the Sacklers hard to collect against, makes  
14 the claims that the non-Debtors have against the  
15 Sacklers worthless.

16 HON. EUNICE LEE: But your view is that  
17 that doesn't --

18 HON. EUNICE LEE: I can't year you.

19 HON. EUNICE LEE: I'm sorry. I just  
20 was going to say, but your view is that that  
21 doesn't really -- even if the Sacklers were  
22 putting in 10 billion, your view is still that  
23 these releases are bad and the deal can't go  
24 through?

25 MR. SHIH: That's right, Your Honor,



1 but I understood Judge Newman's question to be  
2 focusing on the equitable components of this and  
3 the sole point --

4 HON. RICHARD WESLEY: The claims --  
5 what claims against the Sacklers could be  
6 released and only the claims held by the estate?

7 MR. SHIH: So the claims that are not -  
8 - the releases that are not at issue here, Your  
9 Honor, are the derivative releases, so releases  
10 of the sort that were approved in Manville I such  
11 as against the proceeds of an insurance policy  
12 that was basically property of the estate. The  
13 Trustee has not contested the propriety of that  
14 sort of release and, you know, we don't  
15 understand any of the objectors to be focused on  
16 that either.

17 So that would certainly still survive  
18 an affirmance of the District Court's holding.  
19 But the sort of thing that can't be released is  
20 exactly the sort of claim --

21 HON. RICHARD WESLEY: Indemnification  
22 claims they might hold against the against the  
23 Debtors, should they themselves as corporate  
24 directors be cast in the liability where they  
25 have the right to indemnification?

1 MR. SHIH: Who is bringing --

2 HON. RICHARD WESLEY: The Sacklers.  
3 Could the -- could they be released from that?

4 MR. SHIH: I'm not sure, Your Honor. I  
5 think the way we would think about it is whether,  
6 you know, that is a claim belonging to the  
7 estate.

8 HON. RICHARD WESLEY: One of the  
9 problems with this is that it seems like a  
10 hypothetical. There's no definition to this.  
11 That's why it was -- when the victims' council  
12 stood up, it was helpful in some ways to put, you  
13 know, some definition to it. And his view was,  
14 there's one injury. I understand that. That's  
15 exactly what -- that's MacArthur. That's exactly  
16 MacArthur because there was exposure to asbestos  
17 by a product that MacArthur sold that Manville  
18 made.

19 So it was all contained within that and  
20 that's why that, recognizing the importance of  
21 the insurance policy or the insurance coverage  
22 and Judge Newman analogized to claims against a  
23 common res -- for which could -- people could  
24 make. That makes perfect sense to me. But it's  
25 hard to see the -- it's hard to conceptualize how

1     this plays out as inappropriate beyond the  
2     bankruptcy court's authority without putting the  
3     actors together because they're so fact specific  
4     in some times, and that's why I've continued to  
5     ask questions about the state direct claims.

6             MR. SHIH:   Yes, Your Honor.

7             HON. RICHARD WESLEY:   And asked your  
8     Canadian colleague there, representing the  
9     Canadian claimants to expound to that.   So, I  
10    mean, these are claims that you premise exist,  
11    but have -- no one's definitely asserted because  
12    of the injunction, right?

13            MR. SHIH:   No, Your Honor.   So there's  
14    two sort of sets of claims that could be fit into  
15    an answer to you.   The first are, all of the  
16    claims that already existed brought by a lot of  
17    the states, for example, that were put on ice,  
18    but had survived motions to --

19            HON. RICHARD WESLEY:   Unfair business  
20    practices, fraud --

21            MR. SHIH:   Right.   State, False Claims  
22    Act cases or something along those -- so those  
23    all survived motions to dismiss, as I understand  
24    it, on the basis that they were actually  
25    derivative claims and not direct claims, and our

1     brief sets out a couple of instances of cases  
2     surviving motions to dismiss on that basis under  
3     state law. So that's one category of claims that  
4     would be erased permanently by the release that  
5     would be able to go forward under the District  
6     Court's order if that's affirmed.

7             Another category, of course is claims  
8     that haven't been brought in virtue of the  
9     injunction that has been in place and to the  
10    extent that they likewise assert direct liability  
11    on behalf of the Sacklers, then those two would  
12    be permanently extinguished, but individuals  
13    would be able to proceed on them to the extent  
14    that the District Court is affirmed.

15            But, you know, to your point that  
16    there's essentially one injury, that's  
17    potentially true as a factual matter in some of  
18    these cases, but the fact is, we just don't know  
19    because as Your Honor has pointed out, that is a  
20    necessarily fact-specific inquiry and the point  
21    of the release is that it pretermits any such  
22    inquiry. Nobody gets to go to Court to try to  
23    test whether their claims are sufficiently  
24    overlapping.

25            And Your Honor, even if the claims were

1 sufficiently overlapping, that wouldn't solve the  
2 constitutional problem because, you know, as Your  
3 Honor is quite aware, it's just a fundamental  
4 principle of tort law that even though you may  
5 suffer one wrong at the hands of multiple actors,  
6 you have an individual claim, an individual cause  
7 of action against all of the actors who have  
8 injured you and it's that cause of action, that  
9 property right under Zimmerman Brush, which is  
10 being permanently terminated by the Sackler  
11 release and that's something that there must be a  
12 clear statement from Congress before a bankruptcy  
13 court can assert that authority.

14 And I want to close by underscoring the  
15 importance of that constitutional question, which  
16 didn't get a lot of air time in the presentation  
17 of the other side.

18 HON. EUNICE LEE: Could I just -- I'm  
19 sorry to jump in.

20 MR. SHIH: Of course. Yeah.

21 HON. EUNICE LEE: It's related to this,  
22 the constitutional question. I guess I'm  
23 wondering how the constitutional problem you see  
24 here in terms of extinguishment of property  
25 rights and claims, how does that not also apply

1 to 524(g)? Is that unconstitutional?

2 MR. SHIH: No, Your Honor, and that's  
3 true for two reasons. The first is. Congress  
4 enacted 524(g) and when --

5 HON. EUNICE LEE: Well, Congress can't  
6 go against the Constitution.

7 MR. SHIH: That's right, Your Honor,  
8 but as the Supreme Court and other cases have  
9 held, Congress' rearrangement of the economic  
10 relationship between actors is subject to  
11 rational basis review, but the reason that's true  
12 is because the Constitution vests authority in  
13 Congress, and Congress alone to make decisions  
14 about how to balance the countervailing policy  
15 interests and the heightened procedures in  
16 524(g), which by the way were not followed here,  
17 only underscore the extent to which Congress took  
18 seriously those constitutional concerns.

19 Here, Congress has not acted and so for  
20 the bankruptcy court to assert the authority to  
21 just copy/paste provisions that might be  
22 constitutional in the limited context of  
23 derivative claims in asbestos bankruptcies and  
24 say, well, we think that these provisions are  
25 good enough in this context for direct claims in

1 non-asbestos bankruptcies, that's a key  
2 separation of powers problem and nobody in this  
3 case has cited any authority for the bankruptcy  
4 court to craft remedies that is, you know, a  
5 power traditionally allocated by the Constitution  
6 to Congress and Congress alone.

7 I see my time has expired.

8 HON. EUNICE LEE: If you --

9 HON. JON NEWMAN: I just want to ask  
10 two short questions, if I may. Is there any  
11 finding of fact made by Judge Drain that you  
12 think is clearly wrong?

13 MR. SHIH: Yes, Your Honor. So if this  
14 Court holds --

15 HON. JON NEWMAN: -- the number. Can  
16 you do it by numbering to save us time?

17 MR. SHIH: I'm sorry, Your Honor, I  
18 couldn't hear the second part of that.

19 HON. JON NEWMAN: Could you identify  
20 them by their numbers, just to save us time.

21 MR. SHIH: I'm -- not off the top of my  
22 head but I can tell you the categories. The  
23 first are --

24 HON. JON NEWMAN: Okay.

25 MR. SHIH: -- Judge Drain's findings

1 with respect to the Metromedia standard. So to  
2 the extent that the Court believes that the  
3 Metromedia standard controls, which it does not,  
4 Judge Drain made certain findings.

5 HON. JON NEWMAN: The way he  
6 interpreted Metromedia?

7 MR. SHIH: Oh, no, no, no. Judge Drain  
8 said Metromedia adopted factors that a judge must  
9 find for a release to be approved. We disagree  
10 with that reading of Metromedia, but to the  
11 extent that this Court agrees with Judge Drain  
12 that Metromedia controls, those findings are  
13 clearly erroneous for the reasons we set forth in  
14 our brief. Moreover, we disagree with Judge  
15 Drain's findings with respect to the  
16 constitutional issues.

17 Judge Drain found, for example, that  
18 notice was sufficient but for the reasons set  
19 forth in our brief, the fact that the notice may  
20 have gone out to a lot of people does not mean  
21 that the quality of notice was sufficient to put  
22 those people on notice of what this plan was  
23 going to do.

24 HON. RICHARD WESLEY: What it said, as  
25 opposed to who saw.



1 MR. SHIH: Absolutely, Your Honor.

2 HON. RICHARD WESLEY: Right.

3 MR. SHIH: And so there are a number of  
4 other factual disputes that we raise in our brief  
5 related to, for example, the necessity of the  
6 release to the plan and so on, so please don't  
7 take the response from the podium as being the  
8 exclusive source of the disputes that we have  
9 with the findings of fact from the District Court  
10 -- from the bankruptcy court, rather. But the  
11 point is, there are several important disputes  
12 that the Trustee has set forth with the reasoning  
13 of the District Court's findings of fact.

14 HON. EUNICE LEE: Okay.

15 HON. JON NEWMAN: Okay.

16 HON. EUNICE LEE: All right. Other  
17 questions. Thank you, Mr. Shih.

18 MR. SHIH: Thank you very much.

19 HON. RICHARD WESLEY: Thank you, Mr.  
20 Shih.

21 HON. JON NEWMAN: And now we're ready  
22 for rebuttal from Mr. Huebner.

23 MR. HUEBNER: Your Honor, one -- Your  
24 Honors, one side of the -- before I begin, just  
25 procedurally. Sorry, I apologize. One side of

1 the Sacklers has ceded their two minutes, so they  
2 don't intend to speak, but I think the other has  
3 not, so I think if it's okay I have six minutes,  
4 if that's okay --

5 HON. EUNICE LEE: Okay that's fine.  
6 Yes. Thank you.

7 MR. HUEBNER: Your Honor, we just heard  
8 a great many things from the U.S. government that  
9 are extremely surprising, to say the least. I  
10 think most importantly, a lot of the argument you  
11 just heard assumes that 34 years of Second  
12 Circuit precedent is either illegal or  
13 unconstitutional and that the majority of  
14 circuits in this country have been violating both  
15 the law and the Constitution for decades, none of  
16 which is true.

17 Judge Wesley, to answer your first  
18 question, why was 524(g) needed? There's a very  
19 precise answer. The managing Trustee of the  
20 Johns-Manville Personal Injury Trust went to  
21 Congress and said, for every dollar the stock  
22 price goes up, the trust gets another \$100  
23 million. Can you please clarify to leave no  
24 doubt that the trusts are rock solid, and in  
25 light of that testimony, Congress agreed to pass

1 a specific statute?

2 Number two, Your Honor, with respect to  
3 inconsistency, which we heard a fair amount of  
4 argument on, let me remind the panel, if I may,  
5 that at Page 64 of the government's brief, they  
6 concede it is their burden to prove inconsistency  
7 under Hardage, not ours. That burden most  
8 assuredly has not been carried. In response to  
9 many questions from this panel, they retreated  
10 again admitting time and time again that they  
11 actually could find no inconsistent provisions  
12 but that it was a gestalt. So let's first talk  
13 about what the cases actually say.

14 What Law v. Siegel which he relied on  
15 actually says, is that 105 which is actually not  
16 the section implicated here, can violate the  
17 "express terms" Page 422 "explicit mandates,"  
18 Page 421, and "specific provisions" at Page 421-  
19 22.

20 HON. RICHARD WESLEY: Well, that's no  
21 doubt true, but it also can't violate the due  
22 process clause in the Constitution of the United  
23 States.

24 MR. HUEBNER: Your Honor, I agree  
25 completely and --

1 HON. RICHARD WESLEY: Okay.

2 MR. HUEBNER: -- with that, let me turn  
3 to Jevic and Energy Resources. What Jevic said  
4 was that the structured dismissal there, which  
5 was a permanent final disposition of the Debtor's  
6 assets in radical violation of the priority  
7 conduct of the code violated the code's "first  
8 principle and most important and famous rule" and  
9 violated the procedures "specified by the code."  
10 Jevic v. Siegal and Law -- sorry, Law v Siegel  
11 and Jevic support our side entirely.

12 Your Honor with respect to sovereign  
13 immunity for the Canadians, we'll largely rest on  
14 our papers except to say four very quick things.  
15 Number one, their class is uncertified. They  
16 represent less than 1 percent of the population  
17 of Canada. Number two, we settled with all of  
18 the Provinces of Canada and did a huge carveout  
19 of all Canadian claims and everyone else in  
20 Canada including provinces representing the  
21 entire population was satisfied. Three, in  
22 response to your questions, Your Honor, there was  
23 no answer. Section 106 for 18 years has been  
24 found by every Court to ever breach the issue to  
25 trump the Foreign Sovereign Immunities Act and,

1 as he admitted upon questioning but not quite,  
2 your -- this Court's own decision in Phillip  
3 Constructors expressly says you file a claim, you  
4 "necessarily submit to the bankruptcy court's  
5 equitable power." That's at page 707.

6 To hear him represent to this panel  
7 that their claims are unrelated to the Debtors is  
8 completely shocking given what his brief actually  
9 says, and I quote at Page 62. The claims are  
10 "based in part on allegations that the Sacklers  
11 acted through the Debtors using them as an  
12 instrumentality to commit Canadian fraud."  
13 Simply stated, they retain all their claims  
14 against Purdue Canada just like everyone in  
15 Canada does. The only thing that is released are  
16 claims that relate to the Debtors.

17 Your Honor, with respect to the  
18 arguments made by the U.S. Trustee, let me tick  
19 them down very quickly. Number one, the  
20 authority to modify debtor-creditor relationships  
21 expressly lauded in Energy Resources, sometimes  
22 in rare cases requires the resolution of third-  
23 party claims that are inextricably intertwined.  
24 That is not intuition. Those are the findings of  
25 fact of a trial court that heard 41 witnesses and

1 it's actually pretty amazing to hear the  
2 appellate expert from the DOJ testifying to this  
3 court about what he believes will happen.

4 I'm not sure where the belief is from,  
5 because we had a trial and here's what the  
6 undisputed findings of fact of the trial court  
7 were. The Debtors would likely liquidate.  
8 Unsecured creditors would likely receive nothing,  
9 instead of more than \$6 billion and insurance and  
10 identity claims would be massive. To hear him  
11 say, here's what we dispute factually is  
12 unbelievable. The District Court said, in the  
13 middle of the appeal, the facts in this case are  
14 totally undisputed. Does anyone disagree? She  
15 actually said it twice and there was no response.

16 Connecticut was up at the podium at the  
17 time, which is why the District Court opined in  
18 her opinion at Page 50 -- 81, Footnote 54, "No  
19 one has challenged any of the findings of fact."  
20 He wasn't there and it's not true. She also said  
21 it on Page 6. The bankruptcy court's facts were  
22 "essentially unchallenged." That's not the trial  
23 court, that's the District Court.

24 Your Honor, on to some of the other  
25 questions that were asked. There is no

1 inconsistency. You asked and asked and asked,  
2 and the Second Circuit, the Third Circuit, the  
3 Fourth Circuit, the Sixth Circuit, the Seventh  
4 Circuit and the Eleventh Circuit have likewise  
5 found no inconsistency. Energy resources creates  
6 incredibly broad authority to modify credit  
7 relationships. Here's a little known interesting  
8 fact. Energy Resources in fact was kind of a  
9 third-party release case. You can't tell it from  
10 the Supreme Court's opinion, but I'll tell you  
11 what actually happened because it's in the  
12 bankruptcy court opinions and the briefs.

13           The officers, directors, the Debtors  
14 wanted to settle with them and they said, pay  
15 money into the estate and facilitate the  
16 reorganization. And the D's and O's said, we'll  
17 only pay if you pay the IRS in the order we like  
18 that lets us off the hook for our responsible  
19 person liability under 6672. And the Court put  
20 it in the plan. And then the IRS said, are you  
21 insane? You're going to order the IRS over its  
22 objection in what order to apply the Debtor's tax  
23 payments to benefit officers and directors who  
24 paid money into a bankruptcy estate?

25           And guess what the Supreme Court said.

1 They said yes. And that's why both Aero-Dyne in  
2 the Seventh Circuit and Dow Corning in the Sixth  
3 Circuit expressly rely on Energy Resources for  
4 third-party releases. This Court created the  
5 whole doctrine before 524(g) was enacted because  
6 the world needed it and virtually everyone has  
7 adopted it because when you get to mass torts  
8 like this, the money for the victims is often up  
9 at the parent company.

10 Your Honor, another factual finding  
11 that clearly counsel was unaware of, is that  
12 Judge Drain found as a matter of fact that more  
13 discovery was provided in this case than any case  
14 he has seen in his, I think he said, 34 years as  
15 a lawyer and judge, and more than the Sacklers  
16 would have provided had they been in Chapter 11.  
17 Another fact that he appears not to know is that  
18 the majority of the Sacklers' wealth is not in  
19 their own name. It's in trusts, many overseas,  
20 that are not bankruptcy eligible.

21 So the fantasy in their brief, which is  
22 nowhere supported by the record and is in  
23 derogation of extensive trial with 41 witnesses,  
24 is that we got more discovery, more money, and  
25 more transparency than any other. Your Honor,



1 Judge Wesley, you asked several times about fraud  
2 and I will be very upfront about it. Are claims  
3 for fraud released? Yes. That's what they're  
4 paying \$5.5 to \$6 billion to the joint creditors  
5 because that was your problem with the PIs. It's  
6 all joint creditors. You have to be a claimant  
7 against Purdue or your claim against the Sacklers  
8 is not released.

9 And that's why the Canadian carveout  
10 worked with the real representatives of  
11 Canadians' population because if they have claims  
12 directly against Purdue Canada --

13 HON. RICHARD WESLEY: Let me ask you a  
14 question. If someone who has a claim against  
15 Purdue also has a claim because one of the  
16 Sacklers unfortunately crossed a centerline,  
17 struck them, so they have -- it's a completely  
18 different, separate tort, but they have a claim  
19 against Purdue also; is that claim, that the  
20 personal injury claim released?

21 MR. HUEBNER: The answer, Your Honor, I  
22 think is no, and that's the point. The original  
23 use of derivative in Manville I -- and this is  
24 why it is a little bit analytically confusing --  
25 is derived from the conduct of the Debtors. Our

1     leases are tied exclusively to opioids and to the  
2     Debtors.

3                 HON. RICHARD WESLEY:   Yeah, that's the  
4     one injury theory that --

5                 MR. HUEBNER:   And the Debtor's conduct  
6     and the fact, the idea -- the fact patterns were  
7     engaged -- again, counsel wasn't -- just wasn't  
8     there at the time.   There were extensive  
9     colloquies before both the bankruptcy court and  
10    the District Court ensuring a fact pattern much  
11    tougher than yours which is --

12                HON. RICHARD WESLEY:   That's why Drain  
13    amended at 10.7 to say legally relevant.

14                MR. HUEBNER:   Exactly, Your Honor.   And  
15    it already only limited opioid claims.   And the  
16    example was exactly that one, which in fact,  
17    strangely enough in Judge McMahon's prior  
18    decisions that came out exactly the other way, if  
19    you read her Kirwan decision it cites about 140  
20    cases and comes out the other way on every single  
21    issue from her decision here.   She went to that  
22    exact fact pattern in Kirwan and Karta and  
23    narrowed the releases as Judge Drain did also, to  
24    be 100 percent sure not only your fact pattern,  
25    Your Honor, but closer one.   What if Susie

1 Sackler -- that was Judge McMahon's phrase --

2 HON. RICHARD WESLEY: I can't -- I'm  
3 sorry I couldn't hear you. What did you say?

4 MR. HUEBNER: What Judge McMahon asked  
5 in the hearing was, what if Susie Sackler sold  
6 oxy to her roommate out of her dorm room. Is the  
7 mere fact that it's OxyContin, so you could say  
8 it's Purdue? Answer, not within the ambit of the  
9 releases because it doesn't involve the Debtors'  
10 conduct and it's not a legally relevant cause.

11 Your Honor, just a couple of finer  
12 points, because the U.S. -- the Trustee said so  
13 many things that are troubling. Judge Lee, in  
14 response to your question about the rule of  
15 construction, I'm not sure where the gloss on the  
16 rule of construction came from but it is totally  
17 clear on its face that it forbids exactly the  
18 524(g) analysis.

19 If you look at the Supreme Court  
20 decision in Verizon, the Supreme Court literally  
21 said, I want to find X. It's clearly the right  
22 answer under the statute, but the rule of  
23 construction there, which was identically worded,  
24 bars me. Here, there's no reason to want to find  
25 anything they're asking for, because it will

1 result in the death and suffering of thousands of  
2 people and the destruction of a plan that every  
3 creditor in this case worked for years to build  
4 to ensure a lifesaving outcome.

5 Your Honor, just one final thing if I  
6 may. We also heard some testimony about the fact  
7 that he doesn't believe or is not sure that the  
8 claims are intertwined. Not one but two judges  
9 already found that to be untrue. Judge McMahon's  
10 prior decision in Dunaway which was about the  
11 earlier -- about the preliminary injunction  
12 expressly addressed this. Judge McMahon's  
13 decision below on appeal expressly found the  
14 claims congruent -- her words -- and totally  
15 intertwined. And Judge Drain surveyed the  
16 complaints and actually found as a matter of fact  
17 that the claims were intertwined and inseparable.

18 And Your Honors, that's the whole  
19 point. It's not only that we would lose billions  
20 of claims against the Sacklers in this fire  
21 tornado of thousands of litigations where we're  
22 competing against our own creditors for years to  
23 recover from the Sacklers. It's not only that  
24 the 24 inter-creditor deals that obviated years  
25 of fighting among creditors about who is entitled

1 to what. It's not only that our insurance, which  
2 now is 100 percent ours to get and give to  
3 innocent victims and save lives would instead be  
4 in a war with the Sacklers who have dozens of  
5 entities that are beneficiaries. It's actually  
6 the estate itself.

7 Even the companies couldn't survive the  
8 firestorm. And so the Debtor's conduct is always  
9 at the core. The Debtor's very reorganization is  
10 at the court. Judge Newman asked counsel, what  
11 is the alternative? The answer was an appellate  
12 lawyer saying, you know, like, maybe we could all  
13 litigate for a long time and it would be a better  
14 outcome. There is a trial about this. They are  
15 not an economic party. They don't die if they  
16 don't get funds for abatement and remediation,  
17 but the clients of everyone else in this  
18 courtroom is at risk of doing exactly that.

19 Four years of my life have been devoted  
20 to doing the best I can for the victims of Purdue  
21 to get them the most money, fair abatement, and  
22 victims to save lives. The notion that we should  
23 gamble that an alternative that two estate  
24 fiduciaries and 11 groups spent years exploring  
25 every pathway because they think it sort of might

1     violate their vision of the gestalt of the code  
2     because they have some generic cases that say  
3     normally bankruptcies, about the Debtor, is an  
4     insult to 34 years of Second Circuit precedent as  
5     well as the victims in this case.

6             HON. EUNICE LEE:    Okay.

7             MR. HUEBNER:    I think I will leave it  
8     at that unless the panel has question.

9             HON. EUNICE LEE:   Thank you, Mr.  
10    Huebner.   I believe there's still one appellant  
11    who has not argued yet.

12            MS. MONAGHAN:   That's a hard act to  
13    follow and I won't take long.   Maura Monaghan on  
14    behalf of the Mortimer side, initial covered  
15    Sackler parties.   I just wanted to address one  
16    discrete point that Judge Lee had raised, which I  
17    think went to the question of what the Sacklers'  
18    role was at Purdue at the time that these  
19    releases and contributions were negotiated,  
20    because it would be troubling if a party got to  
21    be on both sides of that transaction and in fact  
22    determine their own fate.

23            And I wanted to note that that was  
24    absolutely not the case.   The last Sackler left  
25    the board of Purdue long before Purdue filed for

1 Chapter 11. Judge Drain actually appointed an  
2 independent examiner to look at the question of  
3 whether the Sacklers had exerted any influence  
4 over Purdue in the arms-length negotiations and  
5 concluded that they didn't. These negotiations  
6 were overseen by eminent mediators who had a very  
7 strong view.

8 To answer Judge Newman's question, it  
9 certainly was not the Sacklers' opening bid by  
10 any means that ended up being the amount. And  
11 then of course it was all subject to a very  
12 thorough scrutiny by the Court at the  
13 confirmation hearing. So that's all I wanted to  
14 say just to make sure that was clear.

15 HON. EUNICE LEE: Okay, thank you.

16 MS. MONAGHAN: Thank you, Your Honors.

17 HON. EUNICE LEE: And so I think we've  
18 covered all the parties now. Thank you everyone  
19 for your arguments today and thank you to all of  
20 our Court staff for making everything run  
21 smoothly. With that, we'll take that -- we'll  
22 take it under advisement.

23 (Whereupon these proceedings were  
24 concluded)

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: May 3, 2022



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