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CLAIM PRECLUSION ISSUES IN RECENT CASES

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I. Introduction.

Claims decided or which could have been decided in bankruptcy cases can preclude relitigating the claims in non-bankruptcy cases. This article will discuss two recent decisions applying the doctrine of *res judicata* to claims in non-bankruptcy proceedings.

Res Judicata bars relitigating the same claim or cause of action. Here are the requirements for application as set forth in *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002).

a. There must be a final decision on the merits by a court of competent jurisdiction.
b. The claim in the subsequent action was actually litigated or which could have been litigated in the prior action.
c. The subsequent action must be between the same parties or their privies
d. There is an identity of the causes of action.

1. Findings in a Chapter 11 plan Confirmation Order Precluded a Cause of Action By a Creditor Against a Non-Debtor Third Party

In re: Congoleum Corporation et al., 23-1295 (3d Cir. Aug. 22, 2025):

In this case the Third Circuit Court of Appeals held that the Chapter 11 Plan Confirmation Order which included a finding that a third party (BIW) was not liable for certain environmental claims related to the Debtor's operation of a manufacturing facility barred one of the Debtor's creditors (Occidental) from asserting the claim against the third party based upon the Doctrine of *res judicata*.

The Court concluded that all requirements for r*es judicata* were met which included: "a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit is based on the same cause of action." The Court concluded that both parties were parties to the plan confirmation process Occidental argued that it was not a party to the proceeding because it did not litigate any issues relating to confirmation of Congoleum's plan or the Confirmation Order. The Court rejected this argument since Occidental's lack of participation was irrelevant and the Confirmation Order was *res judicata* as to all issues decided **or which could have been decided** at the Hearing on

Confirmation. The Court went on to state that BIW's potential liability for environmental claims was actually determined by the Confirmation Order. Occidental's claims against BIW raised the same issue addressed by the Confirmation Order finding which was whether BIW may have inherited the liabilities of the Debtor. Thus, *res judicata* barred Occidental from pursuing its claim against BIW.

The finding in the Confirmation Order was the result of a settlement reached by the Debtor with one of its insurers. Under that settlement the insurer bought back the insurance policies from the Debtor in exchange for an injunction barring any future claims under those policies.

One of the Debtor's corporate predecessors had briefly owned BIW several years before the bankruptcy case. The Debtor's predecessors had sold its interest in BIW. As part of the proceedings to approve the settlement Congoleum submitted a Declaration from its Chief Financial Officer stating that BIW was not responsible for the liabilities of the Debtor. The finding that BIW had no responsibility for any liabilities of the Debtor was included as part of the settlement incorporated in the Debtor's plan and Confirmation Order.

This decision cautions creditors to monitor the Chapter 11 Plan Confirmation process. Creditors with potential claims against third parties need to monitor the Plan and Confirmation Order to be sure they do not result in a loss of those claims against third parties.

I would note that the C*ongoleum* Court stated that the finding in the Confirmation Order that BIW had no responsibility for the liabilities of the Debtor was not a third party release but rather a determination that BIW was never responsible for the Debtor's liabilities. Thus, any issues that may be prompted by *Harrington v. Purdue Pharma L.P.*, 144 S. Ct 2071, 219 L.Ed. 2d 721 (2024) were not considered.

2. Allowance of a Claim in a Bankruptcy Case Did Not Bar a Debtor from Contesting the Claim in a Subsequent Action.

Thermal Surgical LLC v. Brown, et al., 24-127 (2d Cir. Aug. 8, 2025):

In this case the Second Circuit Court of Appeals held that allowance of a Creditor's Proof of Claim in full during a Bankruptcy Case did not bar the Debtor from contesting the

amount of the claim in subsequent litigation. The Court raised serious doubts as to whether claim preclusion can be used offensively to secure a money judgment based on the Bankruptcy Court's allowance of a Creditor's claim. The Court considered whether claim preclusion prevented parties from raising issues that could have been raised and decided in a prior action even if they were not actually litigated. The Court considered whether the requirements of claim preclusion which include an earlier decision (1) which was a final judgment on the merits, (2) by a Court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action.

The Court held that the allowance of the Creditor's claim in the Bankruptcy case did not preclude the Debtor from contesting the Creditor's Post-Bankruptcy lawsuit even though the Creditor's claim was allowed in the Bankruptcy Case. The Court's decision focused on the fairness of using offensive claim preclusion based on the allowance of the claim. The Court indicated that an allowed claim in a Bankruptcy Case is not an enforceable money judgment that can be attached to the Debtor's future assets. It also reasoned that since the claims against the Debtor cumulatively exceeded the Debtor's assets, the Debtor has little incentive to contest individual claims. The Creditor's allowed claim in the amount of $315,000 resulted in a distribution of only $12,620.47 to the Creditor. Thus, the Debtor was allowed to contest the Creditor's claim and the amount in a subsequent lawsuit.

Conclusion

These cases are just two examples of the need to consider the impact orders entered and findings made in bankruptcy cases may have in subsequent actions. Practitioners need to monitor the language in orders which may be used in subsequent actions impacting the ability to pursue claims in those actions.

NONDEBTOR PLAN RELEASES AFTER THE *PURDUE PHARMA* DECISION

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The United States Supreme Court issued its opinion last year in *Harrington v. Purdue Pharma L.P.*,[i] holding that the Bankruptcy Code does not permit nonconsensual releases of creditors' claims against nondebtors. This article discusses a few select cases to illustrate how bankruptcy courts have approached nondebtor plan releases after *Purdue Pharma*.

Purdue Pharma

Purdue marketed OxyContin as a less addictive opioid because of its novel time release formula. Purdue realized billions of dollars in profits from this drug. As the effects of OxyContin became apparent, however, thousands of lawsuits were filed. The owners of Purdue, the Sackler family, realized that this would affect them, and began transferring money from Purdue to themselves. Ultimately, they transferred approximately $11 billion from Purdue, much of it into overseas trusts and family-owned companies. When Purdue filed for bankruptcy protection, the Sacklers offered to return over $4 billion to the estate in exchange for personal releases from liability for themselves and related parties. Purdue accepted these terms and incorporated them into its plan. Most creditors who returned ballots voted to accept this plan. Numerous creditors objected, however, along with the United States Trustee, eight states, the District of Columbia, various U.S. and Canadian municipalities, and various Native American tribes.

The Bankruptcy Court approved the plan over these objections and confirmed it. The District Court vacated this decision, finding that the nonconsensual releases provided were not authorized under the Bankruptcy Code without the consent of each affected opioid victim claimant. While the matter was on appeal to the Second Circuit, the Sacklers increased their offer by over $1 billion, settling with the eight states and the District of Columbia. But others, including the United States Trustee, persisted in their objections. Ultimately, the Second Circuit reversed the District Court, siding with the Bankruptcy Court.

The Supreme Court reversed. It found that the Bankruptcy Code authorizes a discharge for a debtor who files for bankruptcy protection and places all of its "assets on the table for distribution to

creditors."[ii] The Sacklers sought such protection without filing their own bankruptcy cases and making all of their assets available. Moreover, the releases under the plan would have released debts that a debtor in bankruptcy might not be able to discharge, such as liability for fraud.[iii] Based on the language of the Bankruptcy Code, the scope of the releases sought, and the history of bankruptcy law in the United States, the Supreme Court found these nondebtor releases impermissible.

Notably, the Supreme Court limited its holding to the narrow issue of whether nonconsensual releases to nondebtors are permissible in bankruptcy. The Supreme Court stated:

> As important as the question we decide today are the ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor.[iv]

Opt-In or Opt-Out?

The Supreme Court expressly left open the question of what would qualify as a consensual nondebtor release in a bankruptcy setting. Must a third party affirmatively opt-in to a release for it to qualify as a consensual release?[v]

Robertshaw (Opt-Out Allowed)

The Bankruptcy Court for the Southern District of Texas addressed this question in *In re Robertshaw US Holding Corp.*,[vi] finding that a release could be deemed consensual if the plan implemented an opt-out feature for the release.

The court in *Robertshaw* first noted that even before *Purdue Pharma,* Fifth Circuit case law prohibited nonconsensual third-party releases, concluding that *Purdue Pharma* did not change existing law in that circuit.[vii] The court then stated that the plan at issue contained consensual releases unlike the nonconsensual releases in *Purdue Pharma*.[viii]

Moreover, the releases afforded affected parties constitutional due process and a meaningful opportunity to opt out.[ix] The court found that parties in interest "were provided detailed notice about the

Plan, the deadline to object to plan confirmation, the voting deadline, and the opportunity to opt out of the third-party releases."[x] The disclosure statement also included a detailed description about the third-party releases and the opt-out. Each ballot had the following statement in boldface:

> **If you submit your Ballot without this box checked, or if you do not submit your Ballot by the Voting Deadline, you will be deemed to consent to the releases contained in Article X.C of the Plan to the fullest extent permitted by applicable law.**[xi]

The court concluded that the third-party release language was specific enough to put releasing parties on notice of the types of claims released, the opt-out procedure worked in practice, and there was no evidence of coercion or confusion.[xii] Finally, the court emphasized that the releases were narrowly tailored to be limited to claims and causes of action closely related to the bankruptcy case and related restructuring activities, and contained "carve outs" of some claims, including claims based on actual fraud and gross negligence.[xiii] The plan's releases were thus deemed reasonable as well as consensual, and were approved by the court.

Spirit Airlines (Opt-Out Allowed)

The Bankruptcy Court for the Southern District of New York in *In re Spirit Airlines, Inc.*[xiv] also approved a plan containing an opt-out procedure for a nondebtor release.

The court in *Spirit Airlines* noted that consensual third-party releases have been permitted in the Second Circuit.[xv] The court explained that courts have been presented with two choices for showing consent: an opt-out and an opt-in.[xvi]

> An opt-out provides that a third-party release will be effective as to each party who is sent a ballot or opt-out form that clearly explains that the ballot or opt-out form must be returned and the opt-out box checked if the party elects not to approve the third-party release. An opt-in provides that no party (even a party voting in favor of the proposed plan) would be deemed to have granted a third-party release unless that party elected to submit a form that opted into a release, with that election being separate from that party's vote with respect to the plan.[xvii]

The court rejected the view that an opt-in mechanism was the only permissible way to manifest consent, noting that decisions in the district permitted use of an opt-out mechanism "if the affected parties receive clear and prominent notice and explanation of the releases and are provided an opportunity to decline to grant them."[xviii] In assessing the permissibility of an opt-out, the circumstances of each case are reviewed to determine whether consent exists.[xix]

After reviewing a number of recent opinions issued by Second Circuit bankruptcy courts, the *Spirit Airlines* court found that the third-party releases before it were consensual and the opt-out procedure was permissible.[xx] The releases were clearly worded and prominently presented in all of the plan materials, including the ballots and the opt-out form itself. Moreover, the third-party releases were consistently part of the proposed plan since the beginning of the bankruptcy and there were no changes to the proposed releases that might confuse any party.[xxi] Additionally, this case promised a substantial recovery to the proposed releasing parties. Thus, unlike cases where creditors expect to recover little and thus may be disinclined to follow the case closely, the creditors here had every incentive to follow the case to see if the promised recoveries came to fruition.[xxii] Finally, the court noted that some creditors had signed contracts expressing their willingness to agree to the release[xxiii] and others had voted in favor of the plan without opting out.[xxiv] Parties deemed to reject the plan were not bound by any release.[xxv] For these reasons, the court found the plan acceptable and confirmed it.

Smallhold (Opt-In Favored)

The Bankruptcy Court for the District of Delaware in *In re Smallhold, Inc.* found that after *Purdue Pharma*, consent to a release could no longer be imposed on a non-responsive creditor through an opt-out procedure.[xxvi] The court rejected its prior "default" theory which imposed a nonconsensual release on a creditor who did not act.[xxvii] Previously, the court had considered inclusion of a release in a plan as routine; it was no different from any other plan term to which parties could object if they wished.[xxviii] Allowing parties to object to a release by filing an "opt out" form was thus a form of administrative convenience provided to creditors in lieu of requiring a formal objection.[xxix] The court now believes that it can only allow release provisions in a plan if the court could enter a default judgment against the party to be bound.[xxx] This is a much higher standard, of course.

The court provided several cogent examples. In one, the court asked, if someone hit another person's car and left a note on the windshield saying, "If I don't hear from you in 10 days, I owe you nothing," would any court consider that enforceable?[xxxi] Of course not. Likewise, after *Purdue Pharma*, to require creditors to object or else be subject to (or be deemed to consent to) a third-party release is equally untenable.[xxxii] However, creditors who voted on the plan were deemed to have given a third-party release, after receiving clear instructions that such a vote would operate to grant a release unless they opted out, and being given a simple mechanism to opt out.[xxxiii] The plan vote was an

affirmative step, and coupled with conspicuous notice of the opt-out mechanism, sufficed as consent to the third-party release under general contract principles.[xxxiv]

Conclusion

Bankruptcy courts continue to grapple with the issue of what constitutes a consensual nondebtor release after *Purdue Pharma*. They are examining issues that they consider material, and these issues appear to vary a bit from case to case. And, outcomes differ. All of this suggests that the Supreme Court may have to address this issue in more detail in the future.

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[i] *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 144 S. Ct. 2071 (2024).
[ii] *Id.* at 215, 144 S. Ct. at 2081.
[iii] *Id.* at 222, 144 S. Ct. at 2085.
[iv] *Id.* at 226, 144 S. Ct. at 2087-88 (emphasis in original) (citation omitted).
[v] For a survey of cases about consent and the permissibility of opt-out mechanisms for releases of claims against nondebtors, *see Bankruptcy: Post-Purdue Pharma Third-Party Release Ruling Tracker,* Practical Law Bankruptcy & Restructuring Law (July 24, 2025).
[vi] 662 B.R. 300 (Bankr. S.D Tex. 2024).
[vii] *Id.* at 322.
[viii] *Id.*
[ix] *Id.* at 323.
[x] *Id.*
[xi] *Id.*
[xii] *Id.* at 324.
[xiii] *Id.*
[xiv] 668 B.R. 689 (Bankr. S.D.N.Y. 2025).
[xv] *Id.* at 702.
[xvi] *Id.* at 703.
[xvii] *Id.* (citations omitted).
[xviii] *Id.*
[xix] *Id.*
[xx] *Id.* at 707.
[xxi] *Id.*
[xxii] *Id.* at 708.
[xxiii] *Id.* at 708-09.
[xxiv] *Id.*at 709.
[xxv] *Id.*at 711.
[xxvi] 665 B.R. 704, 708-09 (Bankr. D. Del. 2024).
[xxvii] *Id.* at 708-09, 717-23.
[xxviii] *Id.*
[xxix] *Id.*
[xxx] *Id.*
[xxxi] *Id.* at 709-10.
[xxxii] *Id.* at 719-20.
[xxxiii] *Id.* at 723-25.
[xxxiv] *Id.* at 723.