NOTE

AFTER *PURDUE PHARMA*: THE FUTURE OF NONCONSENSUAL THIRD-PARTY RELEASES IN CHAPTER 15 PROCEEDINGS

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With bankruptcy proceedings becoming an increasingly popular mechanism through which overburdened debtors and mass tortfeasors consolidate and manage liabilities, the Supreme Court's ruling in Harrington v. Purdue Pharma deals a blow to individuals who may have once relied on nonconsensual, third-party releases to relieve themselves of their personal liabilities. While the Purdue Pharma decision rolls back thirty decades of the use of nonconsensual, third-party releases, the Supreme Court expressly limited its scope to domestic, Chapter 11 proceedings. In an era of global, multi-jurisdictional entities and rampant forum-shopping, this thrusts the practice of pursuing nonconsensual, third-party releases in cross-border insolvency proceedings into flux. This Note therefore aims to examine the impact that the Purdue Pharma decision could have on the future of nonconsensual third-party releases in cross-border, Chapter 15 bankruptcy proceedings as well as how the decision may shape debtors' use of this mechanism under the American bankruptcy regime.

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I. INTRODUCTION

On June 27, 2024, the Supreme Court ruled on *Harrington v. Purdue Pharma L.P.* ("*Purdue Pharma*"), concluding that the Bankruptcy Code did not authorize nonconsensual third-party releases in Chapter 11 proceedings.[1] Prior to this decision, circuits had been fragmented on whether courts, in the adjudication of domestic bankruptcy cases, had the authority to approve releases that would extinguish direct claims held against non-debtor third parties without the claimants' consent. The decades-long, hard-fought settlement agreement—offering payments from a base amount of up to $6 billion to individual victims—was shelved.[2] The settlement agreement was touted as a final resolution for the thousands of litigation filed by governments, individuals, and others against Purdue Pharma and the Sackler family members who owned the company.[3] Amongst other claims, these lawsuits

[1] Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2074 (2024).

[2] Devan Cole & Ariane de Vogue, *Supreme Court Blocks $6 Billion Opioid Settlement That Would Have Given the Sackler Family Immunity*, CNN (Aug. 10, 2023), https://www.cnn.com/2023/08/10/politics/supreme-court-purdue-pharma-opioid-settlement/index.html [https://perma.cc/64J9-TEXF].

[3] *Landmark Second Circuit Decision Affirms Purdue Plan, Legality of Nonconsensual Third-Party Releases*, DAVIS POLK (June 5, 2023) https://www.davispolk.com/insights/client-update/landmark-second-circuit-decision-affirms-purdue-plan-legality-nonconsensual [https://perma.cc/G2TM-9RLA].

allege that Purdue Pharma's fraudulent marketing of OxyContin as a rarely addictive substance contributed to the opioid epidemic.[4] Personal lawsuits against the individual members of the Sackler family posit that the Sacklers engaged in acts of deception and misconduct in directing sales representatives to push higher, addiction-forming doses of OxyContin despite prior knowledge of its potential dangers.[5]

Families of those lost in the opioid crisis decried the ruling, while Justice Neil Gorsuch and the U.S. Trustees expressed hope that "there may be a better deal on the horizon."[6] On January 23, 2025, Purdue Pharma and members of the Sackler family that own the company entered an agreement that would pay $7.4 billion in settlement of lawsuits.[7] As of now, this agreement has not received court approval.

The *Purdue Pharma* decision had come at the heels of increased public scrutiny and media coverage of the role that bankruptcy courts have played in recent high-profile mass torts cases. Many audiences have been enthralled by the investigative journalism and reporting of cases such as Boy Scouts of America,[8] USA Gymnastics (to protect the Olympic Committee from potential liability stemming from Larry

[4] Meryl Kornfield, *Opioid Victims Confront Purdue Pharma's Sackler Family: "It Will Never End for Me"*, WASH. POST (Mar. 10, 2022), https://www.washingtonpost.com/business/2022/03/10/opioid-purdue-pharma-bankruptcy-sackler/.

[5] Katie Zezima & Lenny Bernstein, *Sackler Family Fights Back Against Allegations Purdue Pharma Fueled Against the Opioid Epidemic*, WASH. POST (Apr. 2, 2019), https://www.washingtonpost.com/national/sackler-family-fights-back-against-allegations-purdue-pharma-fueled-the-opioid-epidemic/2019/04/02/4d3b68a6-5578-11e9-9136-f8e636f1f6df_story.html.

[6] *Purdue Pharma*, 144 S. Ct. at 2087.

[7] *Purdue Pharma and Owners to Pay $7.4 Billion in Settlement of Lawsuits Over OxyContin*, NPR (Jan. 24, 2025), https://www.npr.org/2025/01/24/g-s1-44524/purdue-pharma-and-owners-to-pay-7-4-billion-in-settlement-of-lawsuits-over-oxycontin [https://perma.cc/48VQ-G8H4].

[8] *Boy Scouts' $2.4 Billion Bankruptcy Plan Upheld by Judge*, CBS NEWS TEX. (Mar. 28, 2023), https://www.cbsnews.com/texas/news/boy-scouts-2-4-billion-bankruptcy-plan-upheld-by-judge/ [https://perma.cc/EU67-WZE7].

Nassar's abuse),[9] the Weinstein Companies (relating to Harvey Weinstein's abuse and harassment of almost one hundred women),[10] Johnson & Johnson (to settle tens of thousands of cases alleging that talc in its iconic Baby Powder and other products caused cancer),[11] Alex Jones' Infowars (relating to Jones and Infowars' defamatory claims that the 2012 Sandy Hook Elementary School shooting was a "giant hoax"),[12] and the myriad of clergy abuse cases from the Catholic Church.[13] Yet few are aware that some of the key entities and individuals singled out for their roles as facilitators of the reported crimes have been or will be silently discharged from their liabilities via a bankruptcy vehicle known as a nonconsensual, third-party release. In exchange for a financial settlement or any additional form of compensation stipulated in the bankruptcy agreement, these parties would be shielded from any related lawsuits before

[9] Nancy Armour, *USA Gymnastics, Survivors Reach Agreement on Proposed $425 Million Settlement*, USA TODAY (Aug. 31, 2021), https://www.usatoday.com/story/sports/2021/08/31/usa-gymnastics-abuse-survivors-reach-425-million-settlement-agreement/5673248001/ [https://perma.cc/M8WM-FQSJ].

[10] Jonathan Randles, *Bankruptcy Judge Approves $17 Million Fund for Harvey Weinstein Victims*, WALL ST. J. (Jan. 25, 2021), https://www.wsj.com/articles/bankruptcy-judge-approves-17-million-fund-for-harvey-weinstein-victims-11611625431?st=w3le6293borx1i5 [https://perma.cc/S6AN-TZN2].

[11] *Johnson & Johnson Moves Forward with $6.475 Billion Settlement of Talc Cancer Lawsuits*, CNN BUS. (May 1, 2024), https://www.cnn.com/2024/05/01/business/j-and-j-talc-cancer-lawsuits-settlement/index.html [https://perma.cc/FZ2Z-NLEH].

[12] Derrick Bryson Taylor, *Alex Jones's Infowars Files for Bankruptcy*, N.Y. TIMES (Apr. 18, 2022), https://www.nytimes.com/2022/04/18/us/alex-jones-infowars-bankruptcy.html [https://perma.cc/QA4T-P56R]; *see also* Rachna Dhanrajani, Akriti Sharma & Kanishka Singh, *Alex Jones' InfoWars Files for Bankruptcy in U.S. Court*, REUTERS (Apr. 18, 2022), https://www.reuters.com/business/media-telecom/alex-jones-infowars-files-bankruptcy-us-court-2022-04-18/ [https://perma.cc/N997-4943].

[13] Brief of U.S. Conf. of Cath. Bishops as Amicus Curiae Supporting Debtor Respondents at 3–5, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) (No. 23-124).

they even reach the court—and dissenting victims would not be given the opportunity to opt-out of this binding agreement.

While granting third-party releases is a decades-old practice, the Supreme Court's consideration of Purdue Pharma's plan of reorganization reignited debates on dignity, fairness, and public policy in the administration of domestic bankruptcy cases.[14] These concerns are particularly acute in mass torts cases, where victims are forced to reckon with whether they must sacrifice their right to "their day in court" against the shielded parties for what they have been told is the best and only deal available to compensate their losses. Calls for urgent reform have even reached congressional ears. While a 2021 effort to prohibit nonconsensual releases died on the congressional floor before a vote was reached,[15] a new bill was reintroduced to the floor following the *Purdue Pharma* decision and is awaiting consideration.[16]

Although Justice Gorsuch confined the Supreme Court's ruling to the fate of nonconsensual third-party releases in Chapter 11 proceedings, the Supreme Court's ruling may affect the future of third-party releases in the Chapter 15 context as well. From 2018 to 2022, over 700 hundred Chapter 15 cases were filed with the United States' bankruptcy courts, up 44.6% from the previous five-year period.[17] Under Chapter

[14] Jonathan Randles & Soma Biswas, *Bankruptcy Courts Face Congressional Backlash Over Legal Releases*, WALL ST. J. (Aug. 10, 2021), https://www.wsj.com/articles/bankruptcy-courts-face-congressional-backlash-over-legal-releases-11628593201 [https://perma.cc/8DHJ-KG2Z] ("The practices for obtaining releases in bankruptcy 'have at least flirted with the line of being abusive,' said Jeff Cohen, head of the bankruptcy practice at Lowenstein Sandler LLP. . . . 'The more people it touches, it finally has the impact of identifying it as a problem'").

[15] *See* Nondebtor Release Prohibition Act, H.R. 4777, 117th Cong (2021).

[16] Nondebtor Release Prohibition Act 2024, H.R. 9223, 118th Cong (2024).

[17] *Chapter 15 Quarterly Filings (2005-Present)*, AM. BANKR. INST., https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Chapter15Filings_2005-PRESENT.pdf [https://perma.cc/A2CD-T9ZQ] (last visited Jan. 24, 2025).

15 of the Bankruptcy Code, foreign representatives of bankruptcy proceedings that have been confirmed by a foreign court can seek recognition and assistance from U.S. bankruptcy courts in enforcing against a debtor's U.S.-based assets, thus gaining access to robust, debtor-friendly remedies including third-party releases. As any third-party releases to be enforced in the U.S. must first have been approved by the foreign court in which the bankruptcy originated, only proceedings that arise from jurisdictions with similar remedies can seek the enforcement of third-party releases in Chapter 15 cases. While the availability of nonconsensual third-party releases in Chapter 15 proceedings is not conditioned on their availability in the Chapter 11 context, the rollback of this remedy in domestic proceedings may create widespread changes in the Chapter 15 context. U.S.-based parties may seek to restructure and shift their corporate nexus to jurisdictions that grant nonconsensual third-party releases, while international parties may forgo previous practices of establishing a U.S. nexus to qualify for Chapter 11 proceedings and seek Chapter 15 recognition instead. Moreover, the Supreme Court's shrunken appetite for nonconsensual third-party releases in domestic proceedings may cause judges to be more wary of granting them in cross-border proceedings as well.

This Note aims to apply the current discourse on nonconsensual third-party releases into the Chapter 15 context and examine the potential impact of the *Purdue Pharma* case on the future of such releases as a relief granted to foreign proceedings under the Bankruptcy Code. While the Supreme Court's ruling on *Purdue Pharma* will neither directly interfere with nor immediately bind bankruptcy courts from granting third-party releases given that their authority to do so in Chapter 11 and Chapter 15 proceedings arise from separate and distinct parts of the Bankruptcy Code, courts may still look to their circuit's Chapter 11 stance or other policy arguments to inform their decisions in Chapter 15 cases. Part II provides a brief background of Chapter 15 and the recognition and enforcement of foreign proceedings under the Bankruptcy Code. Part III then turns to the current

status of nonconsensual third-party releases in Chapter 11 and Chapter 15 proceedings. Finally, Part IV considers the future of nonconsensual third-party releases in Chapter 15 proceedings. It starts by evaluating whether the public policy issues raised in *Purdue Pharma* and recent Chapter 11 cases may preclude enforcement of nonconsensual third-party releases in foreign schemes of arrangement. Having concluded that these public policy issues are unlikely to jeopardize the availability of nonconsensual third-party releases in granting recognition and enforcement under Chapter 15, it then explores how *Purdue Pharma* will shape debtors' pursuit of third-party releases in Chapter 15 proceedings.

II. BRIEF OVERVIEW OF CHAPTER 15

A. Historical Background

In October 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act,[18] which added Chapter 15 to the U.S. Bankruptcy Code. Chapter 15 represents the United States's incorporation of the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency ("Model Law") to address transnational insolvencies. Over 62 jurisdictions have adopted or incorporated the Model Law.[19] Chapter 15, in parallel with the Model Law, embraces a universalist approach that tries to "respect[] the differences among national procedural laws" that may conflict in cross-border insolvency proceedings, providing a legal framework that encourages cooperation and coordination among the

[18] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[19] *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNITED NATIONS COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status [https://perma.cc/V4EP-JHDF] (last visited Feb. 17, 2025).

jurisdictions involved in an insolvency.[20] Proponents posit that the procedural elements recommended by universalist frameworks such as Chapter 15 and the Model Law encourage courts to collectively maximize the value of the debtor's assets and promote efficient distribution of available funds, whilst simultaneously protecting creditors from potential discrimination under unfamiliar, foreign insolvency regimes and minimizing duplicative administrative procedures.[21] They also serve as a guidepost to developing nations seeking transnational bankruptcy law reform amidst a fragmented landscape of conflicting insolvency regimes.[22]

Prior to the adoption of Chapter 15, bankruptcy courts relied on 11 U.S.C. § 304 (repealed in 2005) to administer ancillary proceedings commenced in the United States by accredited representatives of foreign insolvency proceedings. Unlike Chapter 15, section 304 did not provide a procedural process for the recognition of a foreign insolvency proceeding.[23] These representatives typically sought the bankruptcy courts' injunctive protection or assistance in repatriating the debtor's U.S.-based assets in foreign collection efforts. As Chapter 15 had not yet been codified, representatives would file a petition to commence a Chapter 7 or 11 proceeding with the court.[24] In administering these proceedings, bankruptcy courts were to consider how to "best assure an economical and expeditious administration" of the foreign debtor's estate.[25] Unlike Chapter 15's aspirations to promote cooperation between U.S. courts, foreign courts, and

[20] United Nations Secretariat, Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency, Note by the Secretariat, ¶ 5, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/436 (Apr. 16, 1997), https://documents.un.org/doc/undoc/gen/v97/224/48/pdf/v9722448.pdf [https://perma.cc/GPQ2-R94J] (last visited Feb. 17, 2025).

[21] Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 LAW & BUS. REV. AM. 281, 285, 299 (2008).

[22] *Id* at 299.

[23] *Id.* at 302.

[24] *See* 11 U.S.C. § 303(b)(4).

[25] *See id.* § 304(c) (repealed 2005).

parties of interest in cross-border proceedings, section 304's purpose was to maximize efficient returns to domestic creditors and prevent "piecemeal distribution."[26] This is reflected in the mandatory language instructing recognition under Chapter 15 as compared to the looser, discretionary standard under section 304.[27]

B. General Procedure for Recognition and Enforcement under Chapter 15

1. Recognition of Foreign Proceedings under Chapter 15

To gain recognition of a foreign proceeding under Chapter 15, a foreign representative must file an application and satisfy the requirements outlined in section 1515.[28] Failure to do so will preclude U.S. bankruptcy courts from considering a foreign representative's request, forestalling any action.[29] Upon the filing of the petition, the court may grant limited provisional relief upon the foreign representative's request—

[26] Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 33 (2005).

[27] *See* John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT'L L. 253, 260 (2007) (noting that the language in 11 U.S.C. § 304(a) stands in contrast to the language of Chapter 15 which states that "an order recognizing a foreign proceeding shall be entered" and a "foreign proceeding shall be recognized" if certain conditions are met).

[28] In filing the application for recognition, the foreign representative provides the U.S. district court with a certification of the commencement of the foreign proceeding and appointment of the foreign representative. The foreign representative must then identify all known foreign proceedings involving the debtor. *See* 11 U.S.C. § 1515.

[29] *See* United States v. J.A. Jones Constr. Grp., LLC., 333 B.R. 637, 639 (E.D.N.Y. 2005) (holding that the Eastern District Court of New York could not consider a foreign representative's request for a stay "[i]n the absence of recognition under chapter 15").

these include a stay of execution against the debtor's assets pursuant to section 1519(a)(1); entrustment of the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court pursuant to section 1519(a)(2)); suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor pursuant to section 1521(a)(3)); and providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities pursuant to section 1521(a)(4).

The U.S. bankruptcy court will then review the petition and determine whether it should recognize the foreign proceeding in question as a "foreign main" or "foreign nonmain" proceeding, if at all. Under Chapter 15 (and similar universalist frameworks), the original insolvency proceeding filed where the debtor maintains its center of main interests (COMI) is considered the "foreign main proceeding," whereas any proceedings filed in other jurisdictions should be considered ancillary and assistive to the administration of the main proceeding.[30] In most instances, a debtor's COMI is assumed to be its place of incorporation. However, courts will also consider the location of the debtor's principal place of business (or nerve center), the location of its primary assets, the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case, and other factors in a fact-intensive inquiry.[31] If the insolvency proceeding seeking recognition had been filed in a jurisdiction where the debtor has an "establishment" (as

[30] DANIEL M. GLOSBAND ET AL., THE AMERICAN BANKRUPTCY INSTITUTE GUIDE TO CROSS-BORDER INSOLVENCY IN THE UNITED STATES 6 (2008).

[31] *See In re* Fairfield Sentry Ltd., 714 F.3d 127, 137 (2d Cir. 2013) (quoting *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)); *see also In re* Ascot Fund Ltd., 603 B.R. 271 (Bankr. S.D.N.Y. 2019) (defining COMI as a place "where the debtor conducts its regular business, so that the place is ascertainable by third parties.").

opposed to its COMI), it is defined as a "foreign nonmain proceeding."[32]

The foreign representative bears the burden to prove that (1) the proceeding is either a foreign main or nonmain proceeding as defined by section 1502, (2) the foreign representative is a person or body, and (3) the petition follows the requirements under section 1515.[33] These are mandatory requirements outlined in section 1517 for recognition. Should a court find that there is insufficient evidence that the foreign proceeding was commenced in a jurisdiction where the debtor has neither its COMI nor an establishment, it will not recognize the proceeding as it fails to satisfy section 1517(a)(1).[34]

The court's determination of whether the foreign proceeding is a main or nonmain proceeding will impact the relief and available remedies granted to the foreign representative in enforcing foreign proceedings. Some courts have noted that the distinction is immaterial given the court's discretion to grant any relief regardless of whether the proceedings are main or nonmain.[35] However, an order granting recognition of a foreign main proceeding triggers powerful provisions including the automatic stay against litigation execution and transfer of assets and the conferral of

[32] *See* 11 U.S.C. § 1502 (defining "foreign nonmain proceeding" as a "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.").

[33] *Id.* § 1517.

[34] *In re* Creative Fin. Ltd., 543 B.R. 498, 514 (Bankr. S.D.N.Y. 2016) (finding that a foreign representative failed to show sufficient activity or an establishment in the British Virgin Islands to grant foreign main or nonmain recognition).

[35] *See In re* Serviços de Petróleo de Constellation S.A., 600 B.R. 237, 272 (Bankr. S.D.N.Y. 2019) ("However, once the decision to grant recognition is made, principles of comity and the provisions of chapter 15 can provide substantially similar relief to a debtor—whether a proceeding is recognized as main or nonmain. This Court repeatedly emphasized…that there may be no statutory and practical effects of distinguishing recognition as a foreign main proceeding, as opposed recognition as a foreign nonmain proceeding.").

the rights and powers of a U.S. Trustee over the debtor's property interests and business.[36] The foreign representative can also request the court to intervene in, dismiss, or suspend existing cases in the U.S. bankruptcy courts as it would in Chapter 11 cases.[37] In effect, the foreign representative of a main proceeding is granted the far-reaching powers of the U.S. Trustee over the debtor's assets and existing proceedings within the territorial jurisdiction of the United States for the purpose of maintaining the primacy of the foreign proceeding.

2. Enforcement of Foreign Proceedings under Chapter 15

Regardless of the protections automatically triggered by the recognition of a foreign proceeding as a main proceeding, courts are expected to accord relief on a case-by-case basis "where necessary to effectuate the purpose of [Chapter 15]."[38] In deciding the relief, courts are required to consider the following factors under section 1507: (1) whether all stakeholders are treated fairly, (2) whether creditors are not prejudiced in recognizing and enforcing the foreign proceeding, (3) whether the debtor's assets are disposed preferentially or fraudulently, (4) whether the debtor's proceeds are distributed accordingly, and (5) whether the debtor has the opportunity for a fresh start if circumstances permit.[39] Courts have emphasized the second factor in particular, noting that the language in section 1521(b) "provide[s] that the court is satisfied that the interests of creditors in the United States are sufficiently protected."[40] Therefore, while courts are required to consider all of the factors outlined above, failure to satisfy the second factor would likely prevent a court from granting any assistance under Chapter 15.

[36] *See* 11 U.S.C. § 1520.
[37] *See id.* § 1524.
[38] *See id.* § 1521(a).
[39] *See id.* § 1507(b).
[40] *See id.* § 1521(b).

In considering post-recognition relief in the enforcement of foreign proceedings, courts are also instructed to adhere to principles of international comity and cooperation with foreign courts.[41] The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[42]

Section 1509 expressly provides that "[the] court shall grant comity or cooperation to the foreign representative," reflecting Congress's intent to codify international comity as a policy within the Bankruptcy Code since the adoption of the now repealed section 304.[43] However, comity plays a slightly different role in Chapter 15 as compared to section 304. Comity or cooperation is only granted to foreign proceedings *after* recognition has been granted under Chapter 15. Under section 304, comity and cooperation inform the court's decision on whether any of the forms of relief outlined in § 304(b) can be accessed. While comity plays an operationally similar role as a factor in the bankruptcy court's consideration of relief to be granted, the lack of a framework or process for recognition under section 304 means that proceedings do not have to meet the rigorous requirements for recognition to access discretionary relief. By establishing a framework for recognition, Chapter 15 preserves judicial economy and protects interested parties from an overwhelming number of frivolous or predatory applications to U.S. bankruptcy courts for relief.[44]

However, courts remain split on whether the principle of comity necessarily means automatic deference to the foreign court's determinations in the original foreign proceeding. In *In re Elpida Memory, Inc.*, the Delaware bankruptcy court

[41] *See In re* Metcalfe & Mansfield Alt. Inv., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("[Chapter 15] . . . turns on subjective factors that embody principles of comity.").

[42] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

[43] *See* 11 U.S.C. §1509(b)(3); *id.* § 304 (repealed 2005).

[44] Beckering, *supra* note 21, at 302.

cautioned against equating comity to automatic deference.[45] Ruling that the independent review of a transaction under the American "business judgment" standard was appropriate despite the Japanese court's prior approval of that same transaction, the court wrote that automatic deference would "gut § 1520."[46] Given that section 1520 is mandatory, requiring automatic deference because of comity would be manifestly contrary to Chapter 15 itself. However, while the Second Circuit has expressed that "the principle of comity has never meant categorical deference to foreign proceedings"—specifically where the "the violation of the laws, public policies, or rights of the citizens of the United States" could be at risk[47]—it explicitly "disagree[d] with the *Elpida* court's downplay of the role of comity and in turn emphasized its role in Chapter 15 when ultimately deciding that an independent review of a similar sale transaction approved by a foreign court would not be appropriate.[48] It warned that *Elpida*'s approach would result in confusing and potentially conflicting processes of administration and distribution, as they would be concurrently handled by "different tribunals in different countries according to different laws."[49] While the Second Circuit is unlikely to grant automatic deference to foreign proceedings, it is less likely to question a foreign court's rulings provided that they "do[] not prejudice the rights of United States citizens or violate domestic public policy."[50]

3. § 1506: Public Policy Limitation on Chapter 15 Proceedings

[45] *In re* Elpida Memory, Inc., No. 12–10947(CSS), 2012 WL 6090194, at *8 (Bankr. D. Del. Nov. 16, 2012).

[46] *Id.*

[47] *In re* Treco, 240 F.3d 148, 157 (2d Cir. 2001).

[48] *In re* Fairfield Sentry Ltd., 484 B.R. 615, 626 (Bankr. S.D.N.Y. 2013).

[49] *Id.* at 628.

[50] *In re* Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009) (quoting Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987)).

A crucial limitation to the court's ability to grant recognition to and enforcement of foreign insolvency proceedings is "if the action would be *manifestly contrary* to the public policy of the United States."[51] While a foreign representative is not required to make a showing that public policy will not be violated, this is an issue that can be raised by an interested party or by the court *sua sponte*. Unlike section 1507's ex post applicability to recognized foreign proceedings, Section 1506 may come into play even before a foreign proceeding has been granted recognition and designated a main or nonmain proceeding. Under section 1506, U.S. bankruptcy courts may decline to consider the recognition of a foreign proceeding if it concludes that recognition would be manifestly contrary to the public policy of the United States. In contrast, section 1507's limitations on foreign proceedings' eligibility for enforcement and additional assistance by the U.S. bankruptcy courts are only considered for cases that have already been granted recognition under section 1515.

Moreover, while courts must consider whether the additional assistance granted in the enforcement of foreign proceedings would be "consistent with the principles of comity," comity does not play a role in the public policy analysis of section 1506. Scholars have noted that this is likely because a jurisdiction-by-jurisdiction approach to public policy would yield inconsistent results when balancing the relative interests of U.S. public policy.[52] In contrast, since section 1507's limitations are focused on the Bankruptcy Code's concerns with due process in light of potentially conflicting judicial standards between the U.S. and foreign insolvency regimes, comity acts as an overarching principle to promote a more universal approach (as opposed to a strictly U.S.-based approach) to evaluating due process concerns.

Section 1506 has adopted the Model Law's narrow interpretation of public policy[53], emphasizing that a court's

[51] 11 U.S.C. § 1506 (emphasis added).

[52] Beckering, *supra* note 21, at 284.

[53] While there is no language in the Chapter 15 provisions that instruct a narrow interpretation, "it appears well settled that the

determination that a proceeding would be "manifestly contrary" should be restricted to exceptional circumstances concerning the most fundamental policies of the United States.[54] Proponents of the narrow interpretation of the public policy exception argue that this is necessary, as a broad application of section 1506 would frustrate the basic purpose of universalism."[55] In the context of third-party releases, the Fifth Circuit and the Southern District of New York have applied the public policy exception where foreign representatives failed to "provide any justification for the release" or "demonstrate[ ] circumstances comparable to those that would make possible such a release in the United States" under section 1507.[56]

When determining whether to apply section 1506, courts have focused on two factors: (1) whether the foreign proceeding was procedurally unfair; and (2) whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would "severely impinge the value and import" of a statutory or constitutional right of the United States, such that granting comity would "severely hinder United States bankruptcy courts' abilities to carry out . . . the most fundamental policies and purposes of these

exception is to be construed narrowly." *See In re* British Am. Isle of Venice, Ltd., 441 B.R. 713, 717 (Bankr. S.D. Fla. 2010).

[54] *See In re* Ran, 607 F.3d 1017, 1021 (5th Cir. 2010) (citing *In re* Iida, 377 B.R. 243 (B.A.P. 9th Cir. 2007)) ("[The public policy exception should only be] invoked only under exceptional circumstances concerning matters of fundamental importance for the United States."); *see also In re* Fairfield Sentry, 714 F.3d 127, 139 (2d Cir. 2013) (finding that the legislative history urges a narrow interpretation as the "word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States").

[55] See Chung, *supra* note 27, at 261.

[56] *See In re* PT Bakrie Telecom TBK, 628 B.R. 859, 887 (Bankr. S.D.N.Y. 2021) (inviting foreign representatives to further develop the record supporting enforcement of third-party releases in the Second Circuit); *In re* Vitro, S.A.B. de CV, 701 F.3d 1031, 1060 (5th Cir. 2012) (finding a nonconsensual release unenforceable in the Fifth Circuit but acknowledging that the discharge "could be available in other circuits").

rights."[57] A difference in foreign law and U.S. law does not necessarily mean that recognition would be manifestly contrary to U.S. public policy,[58] nor would a difference necessarily entail the absence of certain procedural or constitutional rights.[59]

III. NONCONSENSUAL THIRD-PARTY RELEASES UNDER THE AMERICAN BANKRUPTCY REGIME

Third-party releases, also known as non-debtor releases, extend the discharge of liability available to the debtor upon confirmation of a Chapter 11 plan to non-debtor affiliates. This practice is regularly applied to the release of a debtor's principals, directors, officers, or insurers from liability arising out of the third party's affiliation with the debtor.[60] Proponents of third-party releases see this relief as critical in ensuring the debtor's fresh start "where it would otherwise be faced with post-confirmation indemnification claims by officers and directors, lenders, insurance carriers and others."[61] They also argue that third-party releases provide incentives for non-debtors to contribute to and facilitate the

[57] *In re* Qimonda AG Bankruptcy Litigation, 433 B.R. 547, 568–69 (Bankr. E.D. Va. 2010).

[58] *In re* Black Gold S.A.R.L., 635 B.R. 517, 528 (B.A.P. 9th Cir. 2022) ("[D]ifferences in insolvency schemes do not, without more, justify a finding that enforcing one State's laws would violate the public policy of another State."); *In re* Manley Toys Ltd., 580 B.R. 632, 650 (Bankr. D. N.J. 2018) (citing *In re* Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011)).

[59] *In re* Vitro, 701 F.3d at 1069 ("[F]ederal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign." (citing *In re* Ephedra Products Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006)).

[60] Brett M. Amron & Ethan Katz, *Third-Party Releases—Where Do We Stand?*, NORTON BANKR. L. ADVISER (Thomson Reuters, St. Paul, Minn.), Apr. 2022, at 1.

[61] Menachem O. Zelmanovitz, *Nondebtor Releases in Reorganization Plans: Are They Still Viable or a Thing of the Past in the Second Circuit?*, 25 AM. BANKR. INST. J. 4, 50 (2006).

restructuring process, thus yielding greater recovery and reducing the time and costs for creditors.[62]

Third-party releases can either be consensual or nonconsensual. In consensual third-party releases, parties affirmatively opt into or receive the option to opt-out of the release. There is relatively little dispute over the courts' authority to grant consensual third-party releases, only where that authority originates from. While some trace the courts' authority to originate in section 1123(b)(6) of the Bankruptcy Code, others ground it in the force of the agreement between the consenting creditors and the relevant third parties to discharge those third parties from their liabilities.[63] Nonconsensual releases, in turn, are more contentious due to their binding nature on non-consenting creditors and interference with both property rights and claims outside the immediate creditor-debtor relationship.[64] In a nonconsensual release, parties would be precluded from asserting their own claims against the third parties following plan confirmation. Prior to the *Purdue Pharma* decision, these release provisions were used in injunctions, reorganization plans, and settlement agreements.

A. Circuits' Prior Approaches to Nonconsensual Third-Party Releases in Chapter 11 Proceedings

1. Circuits Prohibiting Nonconsensual Third-Party Releases

[62] Amron, *supra* note 60, at 1.

[63] Transcript of Oral Argument at 7, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) (No. 23-124) [hereinafter "Oral Argument Transcript"] (statement of Curtis E. Gannon, arguing on behalf of the petitioner) (arguing that the consensual releases do not require "the forcible authority of the Bankruptcy Code or the bankruptcy court to extinguish the property right [of creditors against third-parties]. It's been extinguished by virtue of the agreement of the parties.").

[64] *Id.* at 5.

Prior to the *Purdue Pharma* decision, the Fifth, Ninth, and Tenth Circuits had already categorically prohibited all nonconsensual third-party releases except in asbestos cases under section 524(g) and for appointed equity or creditor committee members for their work performed pursuant to section 1103(c) of the Bankruptcy Code.[65] The Fifth Circuit held that the Code "only releases the debtor" and cited prior cases that "seem broadly to foreclose nonconsensual non-debtor releases."[66] The Ninth Circuit has rejected the notion that "the general equitable powers bestowed upon the bankruptcy court by 11 U.S.C. § 105(a) permit the bankruptcy court to discharge the liabilities of non-debtors," hence ruling out the release of third-parties.[67] Meanwhile, the Tenth Circuit concluded that "Congress did not intend to extend such benefits to third-party bystanders."[68] As a result, in light of the flexible venue rules applicable to bankruptcy cases, large debtors with the intention of confirming a plan involving a third-party release could forum shop to bypass these prohibitive circuits.[69]

2. Circuits Approving Nonconsensual Third-Party Releases

The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits have historically ruled that nonconsensual third-party releases are permissible in limited and appropriate circumstances under section 105(a), which authorizes courts

[65] *In re* TCI 2 Holdings, LLC, 428 B.R. 117, 138 n. 24 (Bankr. D. N.J. 2010) ("The Fifth, Ninth and Tenth Circuits hold that, with the exception of sections 524(g) and 1103(c) [dealing with the powers of Committees, thereby 'impl[ying] committee members have qualified immunity for actions within the scope of their duties'], § 524(c) prohibits all non-debtor third-party releases and permanent injunctions." (citing *In re* Pac. Lumber Co., 584 F.3d 229, 252 (5th Cir. 2009)).

[66] *Pac. Lumber*, 584 F.3d at 252.

[67] *In re* Lowenschuss, 67 F.3d 1394, 1401–02 (9th Cir. 1995).

[68] *In re* W. Real Est. Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1990) (per curiam).

[69] *See* 28 U.S.C. § 1408.

to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[70] However, these courts do not follow a singular standard when determining what constitutes an "appropriate" circumstance. For example, the Second Circuit will only grant releases if the circumstances "may be characterized as unique," such as when the estate received substantial financial consideration in exchange for the release of claims or when the plan would otherwise provide for the full payment of the enjoined claims.[71] The Third Circuit looks to "hallmarks" of permissibility, including whether the releases are "fair[], necess[ary] to the reorganization[,]" and "necessary to provide adequate consideration to a claimholder being forced to release claims against non-debtors."[72] The Fourth and Sixth Circuits add more stringent conditional factors for granting nonconsensual, third-party releases, such as a requisite vote for acceptance of the plan by the overwhelming majority of impacted classes, the provision for payment of the impacted classes' claims, and the payment in full to creditors who opt not to settle.[73]

While this Note will not delve into the granularity of each circuit's standard on granting nonconsensual third-party releases, this Section serves to demonstrate that such relief was granted neither often nor lightly in Chapter 11 proceedings prior to *Purdue Pharma* and was subject to "a case-by-case analysis that [was] fact intensive and depend[ent] on the nature of the reorganization."[74]

[70] 11 U.S.C. § 105(a).

[71] *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 142–43 (2d Cir. 2005).

[72] *In re* Cont'l Airlines, 203 F.3d 203, 213–14 (3d Cir. 2000).

[73] *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002).

[74] Third-Party Releases in Bankruptcy Plans, THOMSON REUTERS: WESTLAW PRECISION, https://1.next.westlaw.com/ (last visited Mar. 22, 2025) (type the name of this practice note in the search bar; then press enter; then click on the relevant practice note).

B. The Supreme Court's Rejection of Nonconsensual Third-party Releases in Chapter 11 Proceedings

1. The Majority

On June 27, 2024, Justice Gorsuch, writing for the majority in *Purdue Pharma*, disclaimed the notion that the Bankruptcy Code authorized the nonconsensual discharge of claims against non-debtors.[75] This overturned a thirty-year practice of bankruptcy courts approving such releases to indemnify individual officers or directors from personal liability.[76] While the majority recognized the role of bankruptcy law in solving collective-action problems, they emphasized that bankruptcy courts' power and discretion under present law is constrained.[77]

Within the Chapter 11 context, circuits that had accepted third-party releases relied on the "necessary and appropriate power" in section 105(a) of the Bankruptcy Code, finding that "the power to authorize non-debtor releases is rooted in a bankruptcy court's equitable authority."[78] Reading section 105(a) in conjunction with section 1123(b)(6)'s catch-all grant of power to "include any other appropriate provision not inconsistent with the applicable provisions of this title," the circuits found that the grant of third-party releases within the bankruptcy court's "residual authority" included the power to

[75] Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2083 (2024).

[76] *See* Oral Argument Transcript, *supra* note 63, at 19 (statement of Justice Kavanaugh) ("I'm trying to figure out with [30 years of] practice under the judiciary's belt, why we would say it's categorically inappropriate when the statutory term 'appropriate' is one that takes account usually of all the facts and circumstances.").

[77] *Purdue Pharma*, 144 S. Ct. at 2084 ("So yes, bankruptcy law may serve to address some collective-action problems, but no one (save perhaps the dissent) thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way.").

[78] National Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 350 (4th Cir. 2014); *see also In re* Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078 (11th Cir. 2015).

grant third-party releases since the Bankruptcy Code does not prohibit the approval of either consensual or nonconsensual third-party releases.[79]

However, the majority rejected such a broad construction of section 1123(b).[80] Applying the *ejusdem generis* canon, they interpreted Congress' authorization of "appropriate" plan provisions as limited to those which concern the debtor. Given the focus of sections 1123(b)(1)–(5) on the debtor's rights, responsibilities, and relationships with creditors, any broader interpretation that allowed discharging the debts of a *non-debtor* without the consent of affected claimants would be "radically different."[81] Moreover, given that Congress explicitly carved out an exception to permit nonconsensual third-party releases for asbestos-related bankruptcies in section 524(e), they found it unlikely that section 1123(b)(6) should be broadly read to afford courts the same authority in any context.[82] For the majority, should Congress find it necessary, it may choose to add a similar exception or set of rules for opioid-related bankruptcies.[83]

In accordance with the majority opinion, an interpretation that authorizes nonconsensual third-party releases also contradicts the Bankruptcy Code in multiple ways. First, the Code expressly reserves the benefit of the discharge and enjoinment of all future claims—absent consent from all affected creditors—to the debtor.[84] Historical practice prior to the ratification of the Bankruptcy Code also reserved this benefit to debtors who offered a "fair and full surrender of [its]

[79] *In re* Purdue Pharma L.P., 633 B.R. 53, 103 (Bankr. S.D.N.Y. 2021).

[80] *Purdue Pharma*, 144 S.Ct at 2083 ("Viewed with that much in mind, we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose." (citing Epic Systems Corp. v. Lewis, 584 U.S. 497, 512 (2018))).

[81] *Id.* at 2083.

[82] *Id.*

[83] *Id.* at 2087.

[84] *Id.* at 2085.

property." [85] Second, a discharge of present and future claims against the debtor would not include claims based on "fraud," "willful and malicious injury," or "personal injury or wrongful death tort claim[s]"—the exact types of claims that many opioid victims have leveled against the Sacklers.[86] As such, the Bankruptcy Code in its current form does not empower courts to grant nonconsensual third-party releases outside of asbestos-related bankruptcies.

2. The Dissent

In his dissent, Justice Kavanaugh—joined by Chief Justice Roberts and Justices Sotomayor and Kagan—"respectfully but emphatically" disagreed with the majority's interpretation of section 1123(b)(6) and subsequent conclusion that nonconsensual third-party releases had no statutory basis under the Bankruptcy Code.[87] The bankruptcy system was created to "prevent a race to the courthouse by individual creditors" and preserve the estate for the benefit of creditors; the categorical prohibition of nonconsensual third-party releases would go against that purpose.[88] Because mass tort cases suffer from the same collective-action problem that the bankruptcy system seeks to resolve, bankruptcy law has "stepped in as a coordinating tribunal . . . . reduc[ing] administrative costs and allow[ing] all of the affected parties to come together, pause litigation elsewhere, invoke procedural safeguards, including discovery, and reach a collective resolution that considers both current and future victims."[89] Since the enactment of the Bankruptcy Code in 1978, courts have thus approved nonconsensual third-party releases in both bankruptcy and mass torts cases where such

[85] *Id.* at 2086 (quoting Sturges v. Crowninshield, 4 Wheat. 122, 176 (1819)).

[86] *See* 11 U.S.C. §§ 523(a)(2)–(6); 28 U.S.C. § 1411(a).

[87] *Purdue Pharma*, 144 S. Ct. at 2090.

[88] *Id.* at 2088.

[89] *Id.* at 2092 (citation omitted).

releases would "preserve and increase the debtor's estate and thereby ensure fair and equitable recovery for creditors."[90]

Given the long-standing practice of authorizing bankruptcy courts' discretion to grant equitable relief, Justice Kavanaugh rejected the majority's limited interpretation of the catch-all provision in section 1123(b)(6). Even if one were to adopt the majority's interpretation that section 1123(b)(6) granted bankruptcy courts discretionary authority solely in matters relating to the debtor, the releases in this instance concerned the debtor since the third-party claims were based on the debtor's misconduct and were claims by the debtor's victims and creditors. As such, these releases would affect the debtor's reorganization.[91] The derivative claims fully overlap with the direct claims, and the claims against the Sacklers could deplete the debtor's estate. Moreover, he pointed to the incongruence in the Court's willingness to allow consensual third-party releases, full-satisfaction releases, and exculpation clauses to remain in effect despite being rooted in the catch-all provision of section 1123(b)(6) and not anywhere else in the Bankruptcy Code.[92] Finally, section 524(g) expressly precludes the notion that section 524(e)'s carveout for asbestos-related bankruptcy restricts the grant of nonconsensual third-party releases to those contexts only. Section 524(g) states that there is nothing in the statute that "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."[93] Therefore, section 1123(b)(6) can and should be read to permit bankruptcy courts to grant nonconsensual third-party releases in the appropriate circumstances.

Nevertheless, the dissenting justices agreed with the majority that "only Congress can fix the chaos that will now ensue", thus closing the chapter on the inclusion of

[90] *Id.* at 2095–96.

[91] *Id.* at 2106.

[92] *Id.* at 2108–10.

[93] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (note following 11 U.S.C. § 524).

nonconsensual third-party releases in Chapter 11 proceedings, whether in bankruptcy or mass torts cases.

C. Nonconsensual Third-Party Releases in Chapter 15 Proceedings

Within the Chapter 15 context, third-party releases come into play when foreign representatives are seeking the recognition and enforcement of a foreign restructuring scheme that includes third-party releases. For a U.S. bankruptcy court to consider the enforcement of the third-party releases in a foreign restructuring scheme, the scheme itself must first satisfy the Chapter 15 requirements for recognition and enforcement. Nonconsensual third-party releases only arise in the Chapter 15 proceedings if they were approved in the original, foreign proceeding. For example, a foreign representative would apply for Chapter 15 recognition and enforcement of a foreign restructuring scheme that did not provide dissenting holders with an opportunity to opt-out of the releases granted to third parties as part of the scheme.

When determining whether to approve nonconsensual third-party releases in Chapter 15 cases, the Second Circuit has held that the relevant inquiry is not whether the foreign order could be enforced in an equivalent Chapter 11 case under U.S. law, but whether recognizing the foreign order aligns with principles governing the enforcement of foreign judgments, international comity, and the public policy under Chapter 15.[94] Since third-party releases are not expressly authorized by sections 1521(a)(1)–(7), bankruptcy courts' power to grant third-party releases in Chapter 15 proceedings falls under the court's discretion to provide "appropriate relief" under section 1521 or "additional assistance" that may not otherwise be available under the Bankruptcy Code or U.S. law as permitted by section 1507(b).[95] The court's statutory

[94] *See In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010).

[95] *In re* Agrokor d.d., 591 B.R. 163, 187–89 (Bankr. S.D.N.Y. 2018).

authority to grant nonconsensual third-party releases in Chapter 15 proceedings derives from a completely separate section of the Bankruptcy Code applied to Chapter 11 cases. Even the Fifth Circuit, which has categorically prohibited third-party releases in Chapter 11 proceedings outside the asbestos context, has acknowledged that the prohibitive stances of certain circuits do not preclude the grant of nonconsensual third-party releases in Chapter 15 proceedings.[96]

The enforcement of third-party releases is predicated on the authorization of a similar remedy in the original foreign proceeding and the demonstration of the justification for third-party releases in the record.[97] Because comity is extended where "the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy," bankruptcy courts are empowered to grant third-party releases in Chapter 15 proceedings if the conditions of section 1507(b) are satisfied and there are no violations of public policy pursuant to section 1506.[98] This includes showing that such relief will reasonably assure just treatment of all holders of claims against or interests in the debtor's property, protection of U.S. creditors against prejudice, and inconvenience in asserting their claims in a foreign proceeding.[99]

The courts have not expressly addressed whether the circuits' stances on third-party releases in Chapter 11 proceedings would play a definitive role in determining the propriety of authorizing third-party releases in Chapter 15 cases. In *In re Vitro*, the Northern District of Texas adopted

[96] *In re* Vitro, S.A.B. de CV, 701 F.3d 1031, 1062 (5th Cir. 2012).

[97] *See In re* PT Bakrie Telecom TBK, 601 B.R. 707 (Bankr. S.D.N.Y. 2019) (noting that releases in a foreign proceeding do not have to be identical to those that a U.S. court would approve in a Chapter 11 case).

[98] *In re* Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009) (quoting Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir.1987)).

[99] *In re PT Bakrie*, 601 B.R. at 876.

the Fifth Circuit's stance that "the protection of third-party claims in a bankruptcy case is a fundamental policy of the United States [under section 524]," and since the plan in question "[did] not recognize and protect such rights, [it] is manifestly contrary to such policy of the United States and cannot be enforced here."[100] However, the public policy consideration was one of three reasons for which the court denied enforcement—the court also raised concerns of insufficient protection of the interests of creditors in the United States and an imbalance between the interests of the creditors and the debtor (as well as its non-debtor subsidiaries) that precluded the plan from enforcement under sections 1507, 1521, and 1522.[101] While one could argue that the Fifth Circuit's stance on third-party releases was but one factor in the lower court's decision, it is notable that the court begins its conclusion by denying comity and noting that the plan would "manifestly contravene[] the public policy of the United States" due to its "extinguishment of the non-debtor guarantees."[102]

However, on appeal, the Fifth Circuit stated in dictum that the prohibition of third-party releases under Fifth Circuit precedent does not preclude another U.S. bankruptcy court from enforcement under section 1507 as a permissible form of "additional assistance" not otherwise available under the Bankruptcy Code or U.S. law.[103] Some have interpreted this to suggest that the Northern District of Texas's application of the section 1506 public policy exception was too broad.[104] While the Fifth Circuit did not reach the question of "whether

[100] *In re* Vitro, S.A.B de C.V., 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012).

[101] *Id.*

[102] *Id.* at 133.

[103] *In re* Vitro, S.A.B. de CV, 701 F.3d 1031, 1069 (5th Cir. 2012).

[104] Kathryn Esaw, Catherine Beideman Heitzenrater & Adam Margeson, *Chapter 15, 2005 to 2021: A Reflection on Chapter 15 Decisions and Practical Considerations for Canadians Approaching a Cross-Border Filing*, ANN. REV. INSOLVENCY L., 2021, https://www.iiiglobal.org/file.cfm/46/docs/panel%203.%20esaw-heitzenrater-margeson%20chapter%2015.05-21.pdf [https://perma.cc/2U95-UCPB].

the [Mexican reorganization] plan would be manifestly contrary to a fundamental public policy of the United States" under section 1506, this signals the potential influence of circuit precedent on a bankruptcy court's application of the public policy exception when considering the propriety of granting third-party releases in Chapter 15 cases.[105] It remains uncertain whether the existence of third-party releases in a foreign proceeding would automatically trigger the section 1506 public policy exception in circuits that categorically prohibit them under Chapter 11 circumstances.

Circuits that approve the issuance of third-party releases in Chapter 11 proceedings are on the other side of the same coin. Prior to *Purdue Pharma*, circuit precedent precluded arguments that nonconsensual third-party releases are manifestly contrary to public policy within the meaning of section 1506.[106] A circuit's stance, whether in favor or prohibitive of third-party releases, plays a role in a bankruptcy court's ultimate determination in granting this relief in Chapter 15 proceedings. As such, bankruptcy courts are likely to take into consideration the Supreme Court's new categorical prohibition of nonconsensual third-party releases going forward—the question now is whether it would be a persuasive or controlling factor in its availability to foreign debtors seeking recognition and assistance under the U.S. regime.

D. Varying Approaches to Nonconsensual Third-party Releases in Chapter 15 Proceedings

The recognition and enforcement of nonconsensual third-party releases in Chapter 15 proceedings has been relatively rare outside of the Second Circuit. This is likely the result of the concentration of Chapter 15 filings in the Second Circuit

[105] *In re* Vitro, 701 F.3d at 1070.

[106] *In re* Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (noting that in the Second Circuit, "where [] third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy").

as foreign representatives strategically seek enforcement in a tried and tested circuit. There is a high concentration of Chapter 15 filings in the Second Circuit; for instance, approximately 45% of all Chapter 15 filings from 2018 to 2022 took place in the Second Circuit.[107] To date, only the Second and Fifth Circuits are on record to have considered the issue. Although these two circuits have opposing stances on nonconsensual third-party releases in Chapter 11 proceedings, they are more aligned in the Chapter 15 context. They have both expressed that third-party releases are an available remedy under section 1507 provided that the restructuring plan would be carried out in a manner that was procedurally fair and ensured fair and efficient distribution to creditors. However, it remains unclear whether the Fifth Circuit would be precluded from granting such relief by its stance on nonconsensual third-party releases in Chapter 11 proceedings.

1. Second Circuit

The Second Circuit has historically granted third-party releases under Chapter 15, noting that "principles of enforcement of foreign judgments and comity in [C]hapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions . . . *even if those provisions could not be entered in a plenary [C]hapter 11 case*."[108] Provided that the foreign representative has demonstrated that doing so would be consistent with the principles of comity and that the additional assistance afforded under section 1507(b) meets the conditions of just treatment, protection of creditors based in the United States, and the provision of an opportunity for

[107] *See September 2023 Quarterly Bankruptcy Filings* tbl.F, U.S. CTS. (Sept. 30, 2023), https://www.uscourts.gov/sites/default/files/data_tables/bf_f_0930.2023.pdf [https://perma.cc/A8E3-CJUZ].

[108] *In re* Sino-Forest, 421 B.R. at 662 (emphasis added) (citing *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010).

a fresh start for the debtor, third-party releases are granted in the Second Circuit.[109] When considering the propriety of granting third-party releases in Chapter 15 proceedings, the Second Circuit has held that a bankruptcy court is not required to make an independent determination about the propriety of the foreign court's grant of third-party releases in the foreign proceeding.[110] Moreover, because the relief granted in a foreign proceeding does not need to be identical to that available in the United States, the bankruptcy court is not required to find that the structure or form of a third-party release in a foreign order is identical to third-party releases under the Bankruptcy Code.[111] Instead, "[t]he key determination . . . is whether the procedures used in [the foreign court] meet our fundamental standards of fairness."[112]

In 2018, the U.S. Bankruptcy Court for the Southern District of New York, in *In re Avanti Communications Group PLC* granted Chapter 15 recognition and enforcement for the first time to a foreign restructuring plan that included nonconsensual third-party releases.[113] In *In re Avanti*, the court found that the nonconsensual third-party releases in the English scheme of arrangement could be enforced under the discretionary relief of section 1507(b) as the scheme sufficiently protects and treats the interests of creditors and other interested entities justly.[114] The releases were nonconsensual as they prevented dissenting holders of one of two sets of the senior secured notes in question from pursuing claims against third-party guarantors.[115] Here, Judge Glenn concluded that (i) creditors had a full and fair opportunity to

[109] *Id.*

[110] *In re Metcalfe*, 421 B.R. at 697.

[111] *See In re* PT Bakrie Telecom TBK, 628 B.R. 859, 886 (Bankr. S.D.N.Y. 2021) ("Indeed, the releases in a foreign proceeding subject to Chapter 15 need not be identical to those that a U.S. court would endorse in a Chapter 11 case.").

[112] *In re Metcalfe*, 421 B.R. at 697.

[113] *In re* Avanti Commc'ns Grp. PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

[114] *Id.* at 615.

[115] *Id.* at 609.

vote on and be heard in a manner consistent with U.S. due process standards; (ii) the class of creditors who would have been prevented from pursuing claims against the third-party guarantors "voted overwhelmingly to approve the scheme;" and (iii) the failure "to enforce the [releases] could result in the prejudicial treatment of creditors" and "prevent the fair and efficient administration of the [r]estructuring."[116]

Later that year, the Southern District of New York recognized and enforced a Croatian settlement agreement in *In Re Agrokor d.d.*[117] Although two insider creditors—guarantors affiliated with the debtor outside the Chapter 15 case—voted on the Croatian agreement, the court found that their votes did not taint the agreement as over two-thirds of non-insider creditors had voted in favor of the agreement.[118] Relying on the reasoning established in *In re Avanti*, the court found it appropriate to enforce the Croatian agreement (with the third-party releases intact) because (i) the foreign proceeding was compliant with the Second Circuit's test for procedural fairness, (ii) the creditors received due process, and (iii) the enforcement of the Croatian agreement would yield the efficient restructuring of the debtor without jeopardizing creditors' rights.[119]

Thus, the Second Circuit's enforcement of nonconsensual third-party releases in Chapter 15 cases hinges on the court's finding of procedural fairness in the foreign proceeding, the just treatment and protection of creditors, and the overall fairness and efficiency in the administration of the restructuring.

These factors similarly dictate when the Second Circuit believes it should reject foreign representatives' applications for the enforcement of nonconsensual third-party releases. When considering whether to grant comity to enforce the third-party releases permitted by an Indonesian foreign judgment, the court in *In re PT Bakrie Telecom TBK* looked at

[116] *Id.* at 618–19.

[117] *In re* Agrokor d.d., 591 B.R. 163, 187 (Bankr. S.D.N.Y. 2018).

[118] *Id.* at 191.

[119] *Id.*

"whether the foreign proceeding abided by fundamental standards of procedural fairness as demonstrated by a clear and formal record" and "assure[d] the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections" consistent with the requirements for extending assistance under sections 1521 and 1507.[120] Here, the court denied enforcement because there was no evidence that the Indonesian court considered the impact of the third-party release on creditors' rights and there was nothing in the record that justified the third-party release.[121] In the absence of "a rudimentary record in the foreign proceeding as to the basis for such [third-party] releases and procedural fairness of the underlying [foreign] process," the court found that the foreign representative did not meet its burden for the enforcement of the third-party releases.[122]

As of now, no cases in the Second Circuit have successfully met the high standard of section 1506 to be used as a justification to deny the grant of nonconsensual third-party releases. The Second Circuit does not consider the circuit division over the propriety of third-party releases or its stance on third-party releases in Chapter 11 proceedings as preclusive of granting post-recognition relief or comity.[123] It has stated that it would not find the issuance of third-party

[120] *In re* PT Bakrie Telecom TBK, 628 B.R. 859, 884 (Bankr. S.D.N.Y. 2021).

[121] *Id.* at 883–87.

[122] *Id.* at 887.

[123] As the Southern District of New York puts it,

> While Second Circuit case law places narrow constraints on bankruptcy court approval of third-party non-debtor release and injunction provisions, the use of such provisions is not entirely precluded. . . . The Canadian statute, on the other hand, was interpreted in Metcalfe to grant jurisdiction to its courts to approve such relief in appropriate circumstances. . . . [T]he Court concludes that § 1506 does not preclude giving comity to the Canadian Orders in this case.

In re Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697–98 (Bankr. S.D.N.Y. 2010).

releases manifestly contrary to public policy given that it does not categorically prohibit third-party releases.[124] According to the Circuit, "[e]ven the absence of certain procedural or constitutional rights will not itself be a bar [to grant third-party releases] under § 1506."[125] To successfully argue against the enforcement of nonconsensual third-party releases in Chapter 15 proceedings in the Second Circuit, applicants may be better served demonstrating a failure to satisfy the procedural fairness and just treatment requirements under sections 1521 and 1507 than reaching for a public policy argument.

2. Fifth Circuit

Of the circuits that categorically prohibit third-party releases in Chapter 11 proceedings (unless in the asbestos context), only the Fifth Circuit has been tested on its application in Chapter 15 proceedings. This occurred in *In re Vitro*, discussed earlier in this Section.[126] Following the Fifth Circuit's judgment on appeal, it remains uncertain whether the Fifth Circuit's stance on third-party releases in the Chapter 11 context would definitively rule out the possibility of granting third-party releases in Chapter 15 proceedings.

The Fifth Circuit grounds its authority to grant third-party releases in Chapter 15 proceedings rooted in Section 1507 of the Bankruptcy Code. It has developed a three-step hierarchical process to determine whether the enforcement of a foreign court's order would be appropriate. First, it considers whether the relief requested is enumerated in sections 1521(a)(1)–(7).[127] If not, it determines whether the relief would qualify as "appropriate relief" under the general terms of section 1521(a). Finally, if the requested relief falls outside

[124] *In re* Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013).

[125] *See In re* OAS S.A., 533 B.R. 83, 104 (Bankr. S.D.N.Y. 2015) ("Even the absence of certain procedural or constitutional rights will not itself be a bar under [Section] 1506.").

[126] *See supra* Section III.C.

[127] *In re* Vitro S.A.B. de CV, 701 F.3d 1031, 1056 (5th Cir. 2012).

the overall scope of section 1521, the court can consider whether it would be appropriate to provide "additional relief" under section 1507.[128] The court would also take into consideration whether the relief sufficiently protects the creditors and whether it risks being manifestly contrary to public policy under section 1506.

Here, the Fifth Circuit reaffirmed the lower court's denial of enforcement due to the plan's failure to meet the conditions prescribed under section 1507(b). Contrary to the requirements in section 1507(b)(4), the plan created a single class of unsecured creditors, failing to "provide for the distribution of proceeds of the debtor's property substantially in accordance . . . . with Title 11."[129] In addition, approval of the plan was only achieved after insider votes were counted, which is against the Bankruptcy Code.[130] However, the court clarified that third-party releases are theoretically available under section 1507 and that its stance on nonconsensual third-party releases in Chapter 11 cases does not preclude other circuits from granting such relief in Chapter 15 cases.[131]

If we were to cabin *In re Vitro* to its facts, third-party releases would be prohibited in the Fifth Circuit under section 1507 *only* if they fail to meet the conditions outlined in subsection (b). There are grounds for such an interpretation, as the court stated that "[Section] 1507 theoretically provides for the relief Vitro seeks . . . . But the *devil is in the details*, and in this case, the bankruptcy court correctly determined that relief was precluded by § 1507(b)(4)."[132] The Fifth Circuit also distinguished *In re Vitro* from other cases where the third-party releases have near unanimous support and would

[128] *Id.* at 1054–57 (5th Cir. 2012).

[129] *Id.* at 1039.

[130] *Id.* at 1066 n.39, 1067.

[131] *Id.* at 1062 ("We conclude that, although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law.").

[132] *Id.* at 1060 (emphasis added).

not rely on insiders for approval.[133] If this narrow interpretation is embraced, foreign representatives may still succeed in asking for third-party releases under section 1507 provided that the conditions in section 1507(b) are satisfied. Nevertheless, the Fifth Circuit has yet to order the recognition or enforcement of a foreign order that includes nonconsensual third-party releases.

The Fifth Circuit ultimately did not reach the question of whether the enforcement of the requested nonconsensual third-party releases would have been manifestly contrary to a fundamental public policy of the United States under section 1506. While it observed that the approach to section 1506 "does not sit well with the bankruptcy court's broad description of the fundamental policy at stake as the protection of third-party claims in a bankruptcy case," the circuit court did not explicitly overturn nor reaffirm the lower court's ruling that the third-party releases were prohibited under section 1506.[134] Thus, although the Fifth Circuit has found that it could have the authority to grant nonconsensual third-party releases in Chapter 15 proceedings under section 1507, a clearer pronouncement is still needed to determine whether it would find persuasive arguments that such enforcements are manifestly contrary to public policy.[135]

[133] *Id.* at 1068.

[134] *Id.* at 1069.

[135] *Vitro's Mexican Plan of Reorganization Denied Comity in the U.S.*, DAVIS POLK (June 25, 2012), https://www.davispolk.com/sites/default/files/files/Publication/afa36cdc-0204-462f-bee0-2427f44d7644/Preview/PublicationAttachment/7ce0f287-1a8e-4ae5-8c93-25e0abe118b6/06.25.12_Vitro_s_Mexican_Plan.pdf [https://perma.cc/L4JA-BNRG] ("[I]t is not at all clear whether other courts would find that third-party releases contained in a Chapter 11 plan of reorganization violate a fundamental policy of the United States.").

IV. THE FUTURE OF NONCONSENSUAL THIRD-PARTY RELEASES IN CHAPTER 15 PROCEEDINGS

Although the Supreme Court was careful in limiting the scope of its ruling to nonconsensual, third-party releases in Chapter 11 proceedings, the *Purdue Pharma* decision may influence foreign debtors' ability and appetite to seek such relief in the United States.

A. Availability of Nonconsensual Third-Party Releases in Chapter 15 Proceedings

Given that the authority to grant nonconsensual third-party releases in Chapter 11 and 15 proceedings are separate and distinct within the Bankruptcy Code, the Supreme Court's decision to categorically prohibit the releases does not directly interfere with the availability of such releases in Chapter 15 proceedings under sections 1521 and 1507. The Fifth[136] and Second Circuits[137] have both expressed that bankruptcy courts could offer "additional assistance" otherwise not available under the Bankruptcy Code or U.S. law — the enforcement of such releases would fall squarely within the category. Regardless of whether a court adopts the Third Circuit's position that an independent review is necessary before granting deference[138] or the Second Circuit's position of automatic deference but for any prejudicial effect

[136] *In re* Metcalfe Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court.").

[137] *In re* Vitro, S.A.B. de CV, 701 F.3d 1031, 1062 (5th Cir. 2012) (concluding that third-party releases can be permitted through recognition of a foreign plan even where such relief was otherwise unavailable in a domestic U.S. bankruptcy case in the Fifth Circuit).

[138] *In re* Elpida Memory, Inc., No. 12–10947(CSS), 2012 WL 6090194, at *8 (Bankr. D. Del. Nov. 20, 2012).

on the rights of U.S. citizens or violation of domestic public policy,[139] deference to the original foreign court under the principles of comity would make nonconsensual third-party releases theoretically available in Chapter 15 proceedings even if prohibited in Chapter 11 proceedings.

Yet parties in Chapter 15 proceedings have begun contesting whether bankruptcy courts should interpret sections 1521 and 1507's "additional assistance" to include nonconsensual third-party releases following the Purdue Pharma decision. The first case to directly address this issue is *In re Crédito Real S.A.B. de C.V., SOFOM, E.N.R.*, which the Delaware Bankruptcy Court recently issued a written opinion on April 1, 2025.[140] The debtor, one of Mexico's largest non-bank financial lending institutions, had sought recognition and enforcement of a prepackaged bankruptcy proceeding that had received Mexican court approval.[141] The proposed plan ("Concurso Plan") had received the consent of the majority of recognized creditors and received support representing 56.55% of the aggregate outstanding unsecured claims.[142] The Concurso Plan contains releases that shield certain parties who played roles in the negotiation and implementation of the Chapter 15 process, including the Ad Hoc Group, the Mexican Liquidator, the Chapter 15 Debtor's former directors and officers, the Indenture Trustee, and certain related parties.[143]

The United States International Development Finance Corporation (the "DFC") opposed the grant of nonconsensual third-party releases, contending that the term "any appropriate relief" in section 1521(a) only refers to relief available under the Bankruptcy Code.[144] The DFC asserted that catchall provisions of 1521(a)(7) and 1507 should be read

[139] *In re* Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009).

[140] *In re* Crédito Real S.A.B. de C.V., SOFOM, E.N.R., No. 25–10208(TMH), 2012 WL 977967, at *1 (Bankr. D. Del. Apr. 1, 2025).

[141] *Id.* at *2.

[142] *Id.* at *3.

[143] *Id.* at *4.

[144] *Id.* at *5.

in the same limited manner that the Supreme Court read the catchall provision of section 1123(b)(6)—i.e., not conferring authority for enforcement of the nonconsensual third-party releases.[145] Judge Horan's *In re Crédito Real* opinion rejected this interpretation. While he acknowledged that both sections 1521(a)(7) and 1123(b)(6) operate as catchall provisions with similar "any . . . including" language, section 1521(a)(7) is distinct as it "does not direct courts to look to the 'other' provisions when providing relief under its catchall. Instead, section 1521(a) allows courts to grant 'any additional relief that may be available to a trustee'."[146] Since the grant of third-party nonconsensual releases is within the scope of the trustee's authority and section 1521(a) does not direct courts to limit available relief to that which is afforded in other provisions, such relief is permissible under section 1521(a)(7).[147] As for section 1507's "additional assistance" language, Judge Horan recognized that assistance is not an unlimited grant of authority.[148] Section 1507 is "[s]ubject to the specific limitations stated elsewhere in this chapter."[149] But since that authority is circumscribed by the remainder of chapter 15 and not the Bankruptcy Code as a whole, section 1507 is not limited by the prohibition of nonconsensual third-party releases in Chapter 11.[150] Moreover, Chapter 15 has a much different purpose and context than the Bankruptcy Code at large—its emphasis on the promotion of comity and international cooperation entitles it to different limitations than those constraining other parts of the Code.[151] As such, Judge Horan found that both the plain language and purpose of sections 1521(a)(7) and 1507(a) permit a U.S. court to

[145] *In re* Crédito Real S.A.B. de C.V., SOFOM, E.N.R., No. 25–10208(TMH), 2012 WL 977967, at *8 (Bankr. D. Del. Apr. 1, 2025).

[146] *Id.* at *6.

[147] *Id.* at *10.

[148] *Id.* at *11.

[149] 11 U.S.C. § 1507(a).

[150] *In re* Crédito Real S.A.B. de C.V., SOFOM, E.N.R., No. 25–10208(TMH), 2012 WL 977967, at *8 (Bankr. D. Del. Apr. 1, 2025).

[151] *Id.* at *11.

enforce a foreign order for nonconsensual third-party releases.[152]

The DFC has since appealed this decision, so Judge Horan's initial decision may not be the last word on whether bankruptcy courts should interpret sections 1521 and 1507 to authorize the grant of nonconsensual third-party releases in Chapter 15 proceedings. Aside from *In re Crédito Real*, which was filed in the District of Delaware, the permissibility of enforcing a scheme or plan containing nonconsensual third-party releases in a Chapter 15 proceeding is currently pending before the Southern District of New York in two separate cases as well.[153]

B. Viability of Section 1506 Challenges to Nonconsensual Third-Party Releases in Chapter 15 Proceedings

Even if bankruptcy courts hold that nonconsensual third-party releases are available under sections 1507 and 1521 as a form of "additional assistance," *Purdue Pharma* may complicate matters with section 1506's "manifestly contrary to public policy" exception. In the past, bankruptcy courts have rejected the idea that the enforcement of third-party releases would be contrary to public policy since "third-party releases are not categorically prohibited."[154] This is no longer the case. As outlined above, there are two primary circumstances in which a bankruptcy court would invoke section 1506: (i) the foreign proceeding was procedurally unfair or (ii) the application of foreign law or recognition of the foreign proceeding would impede a fundamental statutory or constitutional right and hinder the bankruptcy courts' ability to uphold them.[155] The Northern District of Texas has already

[152] *Id.* at *12–13.

[153] *See* Yuzhou Grp. Holdings Co., No. 24-11441 (LGB) (Bankr. S.D.N.Y. Feb. 21, 2025); Odebrecht Engenharia e Construcao S.A. - Em Recuperação Jud., No. 25—10482 (MG) (Bankr. S.D.N.Y. Apr. 21, 2025).

[154] *In re* Sino-Forest Corp., 501 B.R. 655, 655 (Bankr. S.D.N.Y. 2013).

[155] *See supra* Section II.B.3.

raised the Fifth Circuit's categorical prohibition of nonconsensual third-party releases in domestic bankruptcy cases as symbolic of how the protection of third-party claims is a fundamental policy of the United States. Moreover, the U.S. Trustee and several amici have submitted additional constitutional concerns raised by nonconsensual third-party releases, primarily under the Fifth and Seventh Amendments. While the majority declined to address the policy debates and constitutional arguments underpinning nonconsensual third-party releases to Congress,[156] bankruptcy courts could find such arguments more compelling in light of the Supreme Court's prohibitive stance on nonconsensual releases.

This Section will explore the current public policy arguments raised in the Chapter 11 arena and conclude that it is unlikely that any of them could be seen as so "repugnant to the American laws and policies" that nonconsensual third-party releases in Chapter 15 proceedings should be precluded by the second prong of section 1506's inquiry.[157]

1. The Protection of Third-Party Claims

In the *Purdue Pharma* decision, the majority emphasized that section 1123(b)(6) of the Bankruptcy Code should not reach non-debtor third-party claims, categorically holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to *discharge claims against a non-debtor without the consent of affected claimants*."[158] While the Supreme Court's interpretation of section 1123(b)(6) would not directly interfere with foreign representatives' request for nonconsensual third-party releases in Chapter 15,

[156] Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2087 (2024) ("Both sides of this policy debate may have their points. But in the end, we are the wrong audience for them.").

[157] Bd. of Dirs. of Telecom Arg. S.A., No. 05–17811, 2006 WL 686867, at *25 (Bankr. S.D.N.Y. Feb. 24, 2006) ("[T]he foreign law . . . must not be repugnant to the American laws and policies").

[158] *Purdue* Pharma, 144 S. Ct. at 2088 (emphasis added).

practitioners may point to the Court's protection of third-party claims and argue that the recognition and enforcement of their foreign schemes by the U.S. bankruptcy regime would be contrary to public policy.

Invoking the section 1506 public policy exception, opposing noteholders may follow the example of the Fifth Circuit's decision in *In re Vitro S.A.B de C.V* and point to the Supreme Court's ruling as evidence that the protection of third-party claims is a fundamental U.S. policy that should be protected from foreign interference and that the enforcement of nonconsensual third-party releases in a foreign scheme would be inconsistent with the U.S. bankruptcy courts' efforts to uphold this right. Since this would be an example in which a "foreign tribunal's procedures and safeguards do not comport with United States public policy," practitioners may say that the court should conclude that the foreign scheme cannot be recognized.[159] However, a court would likely weigh this inconsistency in public policy against the deference granted to foreign courts under the principles of comity. Foreign judgments "are generally granted comity as long as the proceedings in the foreign court 'are according to the course of a civilized jurisprudence, i.e. fair and impartial.'"[160] Thus, even if contrary to U.S. policy, bankruptcy courts are unlikely to refuse granting nonconsensual, third-party releases in foreign schemes provided that the foreign representative has demonstrated a basis and necessity for the releases in the foreign scheme and that the foreign proceeding was conducted in a procedurally fair manner. Judge Horan's *In re Crédito Real* decision proceeded on similar grounds: given that the DFC neither objected to the procedural fairness of the proceedings nor identified any violations of constitutional or statutory rights, the Plan could not be found as "manifestly

[159] *In re* Manley Toys Ltd., 580 B.R. 632, 648 (Bankr. D. N.J. 2018).

[160] *In re* Toft, 453 B.R. 186, 194 (Bankr. S.D.N.Y. 2011) (citing *In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006); Hilton v. Guyot, 159 U.S. 113 (1895)).

contrary to public policy."[161] Unilaterally opposing all foreign schemes that have nonconsensual third-party releases as part of the approved relief would be inconsistent with the spirit of cooperation between jurisdictions that underscores Chapter 15.[162] Since post-recognition relief is "largely discretionary and turns on subjective factors that embody principles of comity," courts are unlikely to take such a drastic step.[163]

Moreover, bankruptcy courts have previously ruled that a difference in foreign law and U.S. law does not mean that recognition would be manifestly contrary to U.S. public policy.[164] In *Black Gold S.A.R.L.*, the Ninth Circuit did not view that the differences between Monegasque and U.S. bankruptcy laws—including the lack of a concept equivalent to abandonment, how the automatic stay does not terminate once the insolvency case is closed, and the absence of the legal theory of alter ego—did not bar recognition under the public policy exception of section 1506. While one could argue that the issue of protecting third-party claims is more serious and warrants a bar to recognition, past rulings have not indicated that it is a "matter of fundamental importance for the United States" that would compel invoking section 1506. In the words of Judge Horan, "[t]he simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not make them manifestly contrary to U.S. public policy"—had the Supreme Court intended to prohibit their usage in Chapter 15 proceedings, they would have.[165] Even the Fifth Circuit—

[161] *In re* Crédito Real S.A.B. de C.V., SOFOM, E.N.R., No. 25–10208(TMH), 2012 WL 977967, at *14–15 (Bankr. D. Del. Apr. 1, 2025).

[162] Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3–4 (1991) (noting that comity's definitions include "politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations").

[163] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

[164] *In re* Black Gold S.A.R.L., 635 B.R. 517, 528 (B.A.P. 9th Cir. 2022).

[165] In re Crédito Real S.A.B. de C.V., SOFOM, E.N.R., No. 25–10208(TMH), 2012 WL 977967, at *16 (Bankr. D. Del. Apr. 1, 2025).

which had already categorically prohibited nonconsensual third-party releases in Chapter 11 proceedings—expressed reluctance over the idea that third-party claims are a fundamental policy that invokes the section 1506 public policy exception. As such, courts are more likely to continue taking a case-by-case approach when assessing the enforcement of foreign schemes that involve nonconsensual third-party releases.[166]

2. Constitutional Concerns

Since the Supreme Court did not express a stance on the constitutional arguments raised against the use of nonconsensual third-party releases in reaching its conclusion, it remains unclear whether bankruptcy courts would consider these arguments persuasive. On the other hand, it does not preclude noteholders from invoking them in opposition to the Chapter 15 recognition and enforcement of a foreign scheme involving nonconsensual third-party releases.

a. Due Process and Creditors' "Day in Court"

Critics of nonconsensual third-party releases have argued that such releases offend the Fifth Amendment's guarantee of due process of law as they deprive creditors of the adjudication of their claims against non-debtors and of their property without offering an opportunity to opt out of the compulsory indemnification.[167] The enforcement of nonconsensual, third-party releases denies victims of this "deep-rooted historic tradition."[168] Unlike class actions where disagreeing members have the opportunity to leave the class under Federal Rule of

[166] *In re* Vitro, S.A.B. de C.V., 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012).

[167] Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 439–40 (2022).

[168] Brief of "Texas Two-Step" Victims as Amici Curiae Supporting Petitioner at 12, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) (No. 23-124) [hereinafter "Amicus Brief"].

Civil Procedure Rule 23(b)(3),[169] creditors are crammed down and forced to accept an outcome to which they did not consent and watch the extinguishment of their property rights (i.e., their causes of action).[170]

In the Chapter 15 context, nonconsensual third-party releases would prevent creditors who had hoped to pursue claims against non-debtor third parties outside of the foreign restructuring proceeding from doing so in the United States. The recognition and enforcement of the foreign scheme under Chapter 15 would impose a stay of relevant, ongoing litigation and any third parties would be able to seek the bankruptcy court's intervention in future claims.

Although some courts have held that even the absence of certain procedural or constitutional rights will not itself be a bar under section 1506,[171] it is unlikely that this would persuade a court to refuse enforcement of nonconsensual third-party releases in Chapter 15 proceedings. Provided that the enforcement of the foreign proceeding is fair and impartial, concerns about creditors not having their "day in court" with regard to third-party claims are unlikely to be fatal.[172] Even *In re Vitro*, where opposing noteholders successfully invoked the public policy exception, was dismissed not simply because of the section 1506 issue but also due to procedural concerns that included the role of insider votes in securing approval of the plan and the lack of distinction between secured and unsecured creditors in the distribution of the debtor's property.[173] As such, if the Supreme Court were to rule that nonconsensual third-party

[169] FED. R. CIV. P. 23(b)(3).

[170] Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); Mullane v. Centr. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (recognizing a cause of action in an extinguished property interest).

[171] *See In re* Vitro, 701 F.3d at 1069.

[172] *In re* Ephedra Prods. Liab. Litig., 349 B.R. 333, 355–56 (S.D.N.Y. 2006) ("In any event, the Procedure here in issue, as amended, plainly affords claimants a fair and impartial proceeding. Nothing more is required by § 1506 or any other law.").

[173] *In re* Vitro, S.A.B de C.V., 473 B.R. 117 (Bankr. N.D. Tex. 2012).

releases were unconstitutional due to a lack of due process or a breach of the Fifth Amendment, a bankruptcy court would likely extend deference to the foreign court's approval of the foreign scheme provided that the foreign representative demonstrated a basis for the nonconsensual, third-party releases and the foreign proceeding was conducted in a manner that was fair and impartial. If the plan was approved by a majority of creditors without relying on the use of insider votes, the court would likely believe that the creditors had been entitled to a fair and impartial proceeding in the foreign court, hence ruling out the section 1506 public policy exception. In the alternative, should the Supreme Court rule that nonconsensual third-party releases are constitutional in light of these due process concerns, section 1506 is unlikely to act as a categorical bar against similar due process concerns arising from foreign insolvency proceedings.

Finally, as noted above, a difference between the foreign jurisdiction's stance on constitutional issues central to U.S. law would not induce bankruptcy courts to interfere with the foreign court's decision. Absent concerns of discriminatory or unfair treatment of creditors under unfamiliar insolvency laws, courts will abide by the centuries long practice of granting assistance to foreign courts under the principles of comity even in the face of divergent schemes of legislation.[174]

b. Creditors' Right to a Jury

A related concern is the deprivation of creditors' Seventh Amendment right to "trial by jury." This does not refer to a bankruptcy court conducting a jury trial, but rather any legal

[174] As the New York Court of Appeals stated,

> Our own scheme of legislation may be different. . . . That is not enough to show that public policy forbids us to enforce the foreign right. . . . If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.

See Loucks v. Standard Oil Co., 224 N.Y. 99, 110–11 (1918).

(and not equitable) claims against third parties outside of the bankruptcy proceeding that might require a jury trial.[175] For example, creditors may seek to bring personal injury or wrongful death claims against a third party before a jury but find themselves precluded from doing so due to the extinguishment of the third party's liability under a nonconsensual third-party release. The Chapter 15 enforcement of a nonconsensual third-party release in a foreign scheme of arrangement would amount to foreign interference with the Seventh Amendment right to trial, a right which is "justly dear to the American people."[176]

However, bankruptcy courts are unlikely to be persuaded by such an argument given that they have specifically granted recognition and enforcement to a foreign proceeding that did not provide for the jury trial of personal injury claims. In *In re Ephedra*, the court rejected the objectors' argument that the deprivation of creditors' right to trial by jury is manifestly contrary to the public policy of the United States.[177] While the court acknowledged that the constitutional right to a jury trial was "an important component of [the American legal system]," U.S. courts have regularly both enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign and dismissed U.S. cases in favor of foreign forums despite the objection that the foreign forum provides no trial by jury.[178] Thus, coupled with the bankruptcy courts' stance that the absence of certain constitutional rights will not itself be a bar under section 1506, an appeal to the Seventh Amendment is unlikely to rise to the level of severity required for the enforcement of a nonconsensual, third-party release in a Chapter 15 proceeding to be deemed manifestly contrary to U.S. public policy.

[175] *See* Amicus Brief, *supra* note 168, at 15.

[176] Parsons v. Bedford, 28 U.S. 433, 446 (1830).

[177] *In re Ephedra*, 349 B.R. at 335–36.

[178] *Id.* at 337.

C. Future Trends: The Avoidance or Rise of Pursuing Nonconsensual Third-Party Releases in Chapter 15 Proceedings?

Since it is unlikely that the Supreme Court's categorical bar on nonconsensual third-party releases would prevent foreign debtors from receiving assistance by U.S. bankruptcy courts in enforcing foreign court-approved plans that involve such releases, it seems that debtors interested in pursuing this remedy have a backdoor channel to bypass *Purdue Pharma*. American debtor companies with an existing cross-border presence may be able to avail themselves of this remedy, while those without an existing cross-border presence may seek to restructure themselves in order to provide an additional avenue for the indemnification of its corporate officers, shareholders, or affiliates. However, given the recency of the *Purdue Pharma* decision and its untested influence on Chapter 15 proceedings, foreign representatives may still be reluctant to risk further litigation and delays to creditor repayment should U.S. bankruptcy courts' refuse to recognize and grant assistance to insolvency plans involving nonconsensual third-party releases. This Section therefore explores some potential future trends in how the *Purdue Pharma* decision will impact third-party releases in Chapter 15 proceedings.

1. Sidestepping Nonconsensual Releases: The Rise of More Coercive, Consensual Third-Party Releases

In the aftermath of Supreme Court's categorical bar on nonconsensual third-party releases, bankruptcy practitioners have predicted that debtors—now forced to seek unanimous or near unanimous consent—will take "hard measures to coerce holdouts."[179] In *Purdue Pharma*, the majority chose not

[179] Anthony Casey et al., *[Purdue Pharma Bankruptcy Series] What Happens After the Supreme Court's Debacle in Purdue Pharma*, HARV. L. SCH. BANKR. ROUNDTABLE (July 18, 2024) https://bankruptcyroundtable.law.harvard.edu/2024/07/18/what-

to "express a view on what qualifies as a consensual release," teeing up the question of what constitutes valid consent and whether the threat of unequal treatment of creditors would be considered coercive and hence nonconsensual.[180] While it cites to *In re Specialty Equipment Companies*, in which the Seventh Circuit suggests that "courts have found releases that are *consensual and non-coercive* to be in accord with the strictures of the Bankruptcy Code,"[181] this decision does not discuss what "consensual" or "non-coercive" mean. As such, debtors could either drive a hard bargain by giving creditors the choice to opt in to the releases for a better payout or opt out at the risk of receiving relatively discounted cash payments over a much longer period of time. Alternatively, they can negotiate to reduce the settlement amount as a result of the litigation costs and exposure to the opt outs, a common practice in securities fraud and class actions.[182]

Foreign debtors who intend on initiating Chapter 15 proceedings may therefore pursue consensual releases on more coercive and potentially unequal terms in the original foreign bankruptcy proceedings. This approach allows them to avoid the risk of a U.S. bankruptcy court refusing to recognize and enforce a plan involving nonconsensual third-party releases under section 1506. While an overly coercive plan that severely discriminates between creditors who opt in or opt out risks failing under the procedural fairness and just treatment requirements outlined by sections 1521 and 1507, U.S. bankruptcy courts have shown deference to the foreign court's judgment if there is a "clear and formal record" demonstrating that the foreign court has considered the

happens-after-the-supreme-courts-debacle-in-purdue-pharma/ [https://perma.cc/5FHM-LNP8].

[180] Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2076 (2024).

[181] *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) (emphasis added).

[182] Phil Anker, *Contributors Speak Up on Purdue Pharma*, CREDITOR RTS. COAL. (July 6, 2024), https://creditorcoalition.org/contributors-speak-up-on-purdue-pharma/ [https://perma.cc/VL3Z-GS3D].

impact of the contemplated third-party release on creditors' rights when granting the release.[183] This holds true even after the *Purdue Pharma* decision.

For instance, on July 22, 2024, less than a month after the Supreme Court's ruling, the United States Bankruptcy Court for the Southern District of New York granted recognition and assistance to a Brazilian bankruptcy plan that entitled creditors who agreed to the third-party releases significantly higher recoveries than creditors who opted out or refused to grant their releases. In *In re Americanas S.A.*, the confirmed Brazilian plan included a consensual release of claims—including claims relating to the accounting regularities that gave rise to the Brazilian bankruptcy proceedings—against certain current and former directors, officers, and affiliates of the debtors, and shareholders who agreed to provide additional funding as part of the plan.[184] Under the plan sanctioned by the Brazilian court, creditors who opted into the releases and who elected payment in via a combination of equity in the reorganized company and new debentures, would promptly receive recoveries equal to approximately 80% of their claims.[185] In contrast, creditors who elected to receive payment in cash would not be required to grant releases but would only be entitled to recovery equal to *approximately 30% of their claims after 15 years*.[186] Worse still, creditors who fail to make any election (i.e., those deemed to not have granted releases) would only receive cash payments equivalent to 20% of their claims after 20 years.[187] Although the court questioned the reasons for "large disparities" between the creditors who granted releases versus those who did not, it seemed satisfied that the

[183] *See In re* PT Bakrie Telecom TBK, 601 B.R. 707, 724 (Bankr. S.D.N.Y. 2019) (denying enforcement of the third-party release as there was no "clear and formal record" that indicated the Indonesian court's consideration of the release on creditors' rights).

[184] *In re* Americanas S.A., No. 23-10092(MEW), 2024 WL 3506637, at *1 (Bankr. S.D.N.Y. July 22, 2024).

[185] *Id.*

[186] *Id.* at *1.

[187] *Id.*

Brazilian Court confirmed the plan and overruled creditors' complaints that the proposed releases were coercive.[188] Notably, the court did highlight that no creditors objected to the enforcement of the plan or the disparate recoveries in the Chapter 15 proceedings, perhaps signaling that it would interrogate the issue of just treatment of creditors more intensively should there be such challenges in similar cases in the future.[189] Nevertheless, for foreign debtors who do not wish to risk the rejection of nonconsensual third-party releases in Chapter 15 proceedings in light of *Purdue Pharma*, *In re Americanas S.A.* provides some guidance as to the levels of discriminatory creditor treatment U.S. bankruptcy courts would be willing to tolerate when approving consensual third-party releases.

D. Using Chapter 15 to Access Nonconsensual Third-Party Releases — International Forum Shopping

Forum shopping is nothing new to U.S. debtors. While opportunistic debtors welcome the flexibility, critics balk at the rampant gamesmanship it enables. The Bankruptcy Code gives debtors broad leniency to choose their preferred venue for reorganization.[190] The modernization and development of other foreign jurisdictions' insolvency regimes allows debtors to take their forum shopping worldwide and choose to reorganize in a foreign jurisdiction and gain relief otherwise not available in the U.S..[191] Similarly, foreign debtors attracted to remedies such as the automatic stay only

[188] *Id.* at *2, *4–5.

[189] *In re* Americanas S.A., No. 23-10092(MEW), 2024 WL 3506637, at *2 (Bankr. S.D.N.Y. July 22, 2024).

[190] Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars,* 37 EMORY BANKR. DEV. J. 101, 102–3 (2021).

[191] *Id.* at 105 (noting the risk of U.S.-based firms that "are directed to file in less favored districts may instead choose to reorganize in a foreign jurisdiction" as a result of American bankruptcy court's more liberal standard of recognizing foreign insolvency proceedings).

available under the robust American bankruptcy regime could establish a U.S. nexus in order to file under Chapter 11.[192] However, in light of *Purdue Pharma*, bankruptcy practitioners anticipate an increase in Chapter 15 filings as debtors forgo Chapter 11 proceedings and use Chapter 15 as a backdoor to gain U.S. bankruptcy courts' recognition and assistance in enforcing nonconsensual third-party releases.[193] Practitioners are actively suggesting that companies consider pursuing their restructuring under a non-U.S. regime to then seek recognition and enforcement under Chapter 15.[194] Such

[192] Shana A. Elberg & Liz Downing, *International Companies Turn to US Restructurings for COVID-19 Relief*, SKADDEN , ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES (June 2021) https://www.skadden.com/insights/publications/2021/06/quarterly-insights/international-companies-turn-to-us-restructurings [https://perma.cc/4BEZ-ACR6].

[193] Ben Clarke, *Purdue Pharma Ruling Could Lead to More Ch15 Cases, ABI Panellists Say*, GLOB. RESTRUCTURING REV. (Oct. 4, 2023), https://globalrestructuringreview.com/article/purdue-pharma-ruling-could-lead-more-ch15-cases-abi-panellists-say [https://perma.cc/EFU4-24WT].

[194] *See, e.g.*, Madlyn Primoff et al., *Psst, Need a Non-Consensual Third Party Release After the Supreme Court's Purdue Decision?: Consider a Non-U.S. Proceeding Plus Chapter 15 Recognition*, FRESHFIELDS (July 2, 2024) https://blog.freshfields.us/post/102jbq3/psst-need-a-non-consensual-third-party-release-after-the-supreme-courts-purdue [https://perma.cc/SCV5-3MLR]; Brett A. Axelrod & Agostino A. Zammiello, *Navigating the Bankruptcy Terrain After Purdue Pharma*, FOX ROTHSCHILD (Oct. 18, 2024), https://www.foxrothschild.com/publications/navigating-the-bankruptcy-terrain-after-purdue-pharma [https://perma.cc/8B7P-74X5].

foreign jurisdictions include the United Kingdom,[195] the Netherlands,[196] Germany,[197] and Croatia.[198]

One could easily imagine a multinational corporation that was incorporated in a foreign jurisdiction but has its principal place of business in the United States opting to file for bankruptcy in the foreign court to bypass Chapter 11 policy and obtain nonconsensual third-party releases through Chapter 15 recognition and enforcement. The reverse is true too. A multinational corporation incorporated in the United States may choose to shift its principal place of business and principal assets to one of its foreign offices to the same effect. If the operating subsidiaries' economic activity is sufficiently based in the foreign jurisdiction, the insolvency proceeding may qualify for foreign nonmain recognition under Chapter

[195] *See* Re Lecta Paper UK Ltd. [2020] EWHC (Ch) 382 (Eng.) (extending guarantor relief permitted under U.K. schemes of arrangements to "a large number of third parties, including directors, legal advisors, financial advisors, and various other intermediaries").

[196] *See* Wet van 7 oktober 2020 tot wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (Wet homologatie onderhands akkoord) [WHOA] [Act on the Confirmation of Out-of-Court Restructuring Plans], Stb. 2020, 414 (Neth.). WHOA allows restructuring plans to "also amend the rights of creditors against legal entities that form a group with the debtor" provided that such plans will provide for the payment or security of the debtors' obligations or obligations for which the non-debtors are liable. The English translation of the statute is quoted from Bruce A. Markell, *The International Two Step: Recognizing Domestic Chapter 15 Reorganizations*, 98 AM. BANKR. L.J. 1, 13 (2024).

[197] *See* Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen [StaRUG] [Corporate Stabilization and Restructuring Act 2020], Dec. 22, 2020, BGBl I S. at 3256 (Ger.) ("[A] restructuring plan may also modify rights of holders of restructuring claims owed to such holders under any liability assumed by an affiliate . . . as guarantor, joint debtor or otherwise, or held by such holders in assets of that affiliate (intragroup third-party security)."). The English translation of the statute is quoted from Markell, *supra* note 196, at 14.

[198] *See In re* Agrokor d.d., 591 B.R. 163, 179–83 (Bankr. S.D.N.Y. 2018).

15.[199] A domestic corporation with no cross-border presence tactically incorporating a new parent company in a foreign jurisdiction and arranging for its assets or operations to be sold in a manner that would cause the foreign-incorporated company to function as an alter ego solely to gain access to Chapter 15 recognition. As it is unlikely a court would blindly accept a tactical front as the COMI,[200] the debtor would have to provide sufficient evidence that the foreign proceeding was commenced in a jurisdiction where the debtor has its COMI or an establishment to satisfy sections 1502 and 1517(a)(1).[201] While cumbersome and expensive, corporations have successfully executed similar strategies in areas such as tax restructuring.[202]

[199] *See In re* Serviços de Petróleo Constellation S.A., 600 B.R. 237 (Bankr. S.D.N.Y. 2019) (finding that the operations of the Brazilian subsidiaries of a debtor whose COMI was in Luxembourg were sufficient to create an "establishment" in Brazil, thus allowing the Brazilian restructuring proceedings to be recognized as foreign nonmain proceedings under Chapter 15).

[200] *See In re* Silicon Valley Bank (Cayman Islands Branch), 658 B.R. 75 (Bankr. S.D.N.Y. Feb 22, 2024) (the court dismissed Silicon Valley Bank's attempt to seek nonmain recognition under Chapter 15 by opening a branch in the Cayman Islands subject to Cayman Islands regulation). Bruce A. Markell, however, suggested that the real reason for dismissal was that banks are ineligible debtors under Chapter 15:

> While recognizing that [*In re* Silicon Valley Bank] might present an instance of a domestic entity seeking nonmain recognition, the court dismissed the attempt based on the debtor status as a bank a type of debtor not permitted under the Code, including chapter 15. Had the debtor been a permitted entity, such as a service firm such as an accounting or law firm, the outcome might have been different.

Markell, *supra* note 196, at 33.

[201] See Markell, *supra* note 196, at 19–35, for a hypothetical, detailed strategy on how domestic U.S. companies could initiate proceedings that satisfy the requirements of Chapter 15 to achieve recognition and assistance as a foreign proceeding.

[202] Casey & Macey, *supra* note 190, at 102, 129.

U.S. bankruptcy courts have accepted foreign debtors' COMI-shifting strategies in the past, but their appetite for domestic corporations engaging in the same tactics remains untested. In *In re Ocean Rig UDW Inc.*, Chief Bankruptcy Judge Martin L. Glenn of the Southern District of New York granted Chapter 15 recognition as a foreign main proceeding to a group of debtor companies that had been incorporated in the Marshall Islands, were tax residents of Cyprus, and previously maintained a law establishment in Greece. They later migrated their COMI to the Cayman Islands in order to pursue corporate reorganization.[203] The insolvency laws of the Marshall Islands did not give debtors the ability to reorganize, only to be dissolved or wound up.[204] Consequently, the debtors took extensive action to shift their COMI to the Cayman Islands, including moving their head offices, books and records, and principal places of business, conducting board meetings in the Cayman Islands, and providing notification of the changes to media outlets and regulatory boards for almost one year before they simultaneously commenced provisional liquidation proceedings in the Grand Court of the Cayman Islands and sought Chapter 15 recognition in the Southern District of New York.[205] Taking into account all the debtors' actions prior to the commencement of the Cayman Islands insolvency proceedings, Judge Glenn was satisfied that the COMI-shift was "done for proper purposes to facilitate a value-maximizing restructuring of [the debtors'] financial debt," rather than being "manipulated prior to the filing in bad faith."[206] Although the COMI-shifting for the broader purpose of reorganization in *In re Ocean Rig* may be distinguished from instances where a debtor shifts its COMI solely for the purpose of accessing nonconsensual third-party releases, one could argue that both scenarios involve COMI-shifting for the purpose of accessing remedies otherwise unavailable to the debtor. It remains to be seen whether

[203] *In re* Ocean Rig UDW Inc., 570 B.R. 687, 695–96 (Bankr. S.D.N.Y. 2017).

[204] *Id.* at 694.

[205] *Id.* at 696–98.

[206] *Id.* at 703–07.

courts will view domestic corporations who shift their COMIs to foreign jurisdictions for the purpose of filing under Chapter 15 negatively or with more scrutiny, but debtors may be encouraged by bankruptcy courts' prior grants of Chapter 15 recognition to debtors that had engaged in COMI-shifting.

Even if one were to argue that using Chapter 15 as a run-around the Chapter 11 categorical prohibition is a bad faith tactic, bankruptcy courts have noted that a bad faith filing, by itself, will not trigger the mandate of section 1506.[207] Given that the courts tolerate U.S. non-debtors engaging in similar bad faith litigation tactics in Chapter 11 proceedings, there would not be a violation of U.S. public policy. However, bankruptcy courts may exercise their discretion in declining to extend recognition and enforcement to nonconsensual third-party releases if they believe that the foreign representative or the foreign proceeding has not sufficiently demonstrated a justification for the releases.[208] A court may therefore deny recognition and enforcement if it finds that there was no basis for the foreign proceeding or the inclusion of nonconsensual third-party releases in the foreign scheme aside from to unfairly gain access to relief to which it otherwise would not have had access. In *In re Toft,* the Bankruptcy Court for the Southern District of New York refused to recognize a German insolvency proceeding as a foreign main proceeding because the foreign representative initiated the Chapter 15 proceeding for the sole purpose of gaining access to a German debtor's email accounts stored on U.S. servers. The court found that the foreign representative was seeking powers beyond those afforded to bankruptcy trustees under U.S. law because "a trustee in bankruptcy is not entitled to a search warrant under the Federal Rules of

[207] *See In re* Creative Fin. Ltd., 543 B.R. 498, 516 (Bankr. S.D.N.Y. 2016) ("The Court has been faced with bad faith filings in U.S. chapter 11 cases as well, and while it has repeatedly taken action to deal with the abusers, it has not elevated its concerns as to the debtor misconduct to the level of public policy.").

[208] *In re* PT Bakrie Telecom TBK, 628 B.R. 859, 885 (Bankr. S.D.N.Y. 2021).

Criminal Procedure."[209] While foreign representatives may ask for additional relief otherwise not available under the Bankruptcy Code or in U.S. law via section 1507, this illustrates that bankruptcy courts are alert to the risks of bad faith filings and will deny recognition and enforcement where appropriate.

Nevertheless, *In re Toft* can be distinguished from a Chapter 15 proceeding that was filed for the sole purpose of acquiring nonconsensual third-party releases. *In re Toft* relates to relief not directly relevant to the debtor's bankruptcy, whereas a foreign representative would likely argue that the nonconsensual third-party releases are related and essential to the bankruptcy proceedings and would impact the distribution of debtor's assets. As such, the abstract risk of gamesmanship in bad faith Chapter 15 filings is unlikely to trigger section 1506 unless opposing noteholders can point to specific facts in the record that show that the Chapter 15 proceeding was filed for no other reason than for an advantage not directly related to the debtor's bankruptcy.

V. CONCLUSION

Despite the Supreme Court's decision to categorically prohibit nonconsensual third-party releases in domestic Chapter 11 proceedings, *Purdue Pharma* is unlikely to pose a large risk to the availability of the recognition and enforcement of such releases as part of foreign restructuring schemes in the United States. Although the Supreme Court interprets section 1123(b)(6) to suggest that the Bankruptcy Code does not authorize courts to interfere with non-debtor claims without the creditors' consent, this interpretation is confined to Chapter 11 proceedings only. Bankruptcy courts would still have the statutory authority to grant nonconsensual third-party releases as a form of additional relief under section 1507 of the Bankruptcy Code. While the grant of nonconsensual third-party releases may result in a clash between foreign laws and stances on constitutional

[209] *In re* Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011).

issues, it is unlikely that these distinctions would be deemed so manifestly contrary to fundamental policies of the United States where nonconsensual third-party releases would be categorically denied in Chapter 15 proceedings.

Instead, U.S. bankruptcy courts will likely continue its case-by-case scrutiny of the appropriateness of granting such assistance to foreign courts' cross-border restructuring proceedings. As such, we may see a surge in Chapter 15 filings as foreign debtors forgo pursuing Chapter 11 proceedings and multinational corporations utilize their cross-border presences to try and obtain nonconsensual third-party releases through the Chapter 15 backchannel. U.S.-based corporations may similarly be incentivized to restructure and COMI-shift to foreign jurisdictions to avail themselves of this benefit, but whether U.S. bankruptcy courts would respect and recognize that restructuring under Chapter 15 remains to be seen.